

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001284-MR

DEBORAH MILLER ALLEN

APPELLANT

APPEAL FROM MAGOFFIN CIRCUIT COURT
v. HONORABLE JOSEPH F. BAMBERGER, SPECIAL JUDGE
INDICTMENT NO. 04-CR-00008

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING

** ** * * * * *

BEFORE: GUIDUGLI AND SCHRODER, JUDGES; MILLER,¹ SPECIAL JUDGE.
MILLER, SPECIAL JUDGE: Deborah Miller Allen ("Allen") brings
this appeal from a conditional plea of guilty under Kentucky
Rules of Criminal Procedure (RCr.) 8.09 entered in the Magoffin
Circuit Court on March 17, 2005. For the reasons stated below,
we reverse.

¹ Retired Judge John D. Miller sitting as Special Judge by assignment of the
Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

BACKGROUND

Allen complains that the court erred in denying her motion to suppress evidence. On November 19, 2002, at approximately 12:00 a.m., Kentucky State troopers executed a search warrant at the residence of Danny Joe McFarland ("McFarland") in Magoffin County. The warrant permitted the search of the McFarland residence, and "any and all persons present," together with all vehicles at the residence. When the officers arrived, Allen, McFarland, and his son were present at the residence. The three were directed to wait in the living room and kept under observation. The officers summoned a drug sniffing dog from a neighboring county. The McFarlands and Allen were instructed to empty their pockets. At that time, Allen did not produce any contraband. She asked several times to use the bathroom. She was denied the privilege. The officers stated they wanted to "preserve evidence" and feared she might dispose of same in the bathroom.

Some two hours later, at approximately 2:00 a.m., a handler and dog arrived at the McFarland residence. Prior to this time, Allen had not been physically searched by the officers because no female officer was present and the male officers present preferred not to pat-down females. As the drug dog was about to enter the residence, a trooper advised the McFarlands and Allen that if they had any contraband on their

persons or in their clothing they should, for their own safety, take it out before the dog entered. The implication was that the dog, upon sensing the presence of drugs, might hurt them. At this point, Allen emptied her pockets and produced a plastic container, with several small baggies of cocaine therein.

Allen was forthwith arrested and charged with trafficking in a controlled substance in the first-degree; possession of a controlled substance in the first-degree; possession of a controlled substance in the third-degree; possession of marijuana; and, possession of drug paraphernalia.² On the February 19, 2004, the grand jury of Magoffin County returned an indictment upon the several charges.

Allen moved to suppress the evidence obtained from her person on the basis it violated the Fourth Amendment of the United States Constitution and Section 10 of the Kentucky Constitution. The motion was denied. Ultimately, the Commonwealth dismissed all charges against Allen except possession of a controlled substance in the first-degree. This was done in exchange for a conditional plea of guilty upon that charge. This appeal ensued.

MOTION TO SUPPRESS

At the suppression hearing, the trial court rendered written findings of fact and conclusions of law. On March 17,

² Kentucky Revised Statute (KRS) 218A.1412, 218A.1415, 218A.1417, 218A.1422, and 218A.500(2), respectively.

2005, based on these findings, the trial court entered an order denying the motion. The court concluded that, pursuant to Johantgen v. Commonwealth, 571 S.W.2d 110 (Ky.App. 1978), the warrant's authorization to search "all persons present" did not comply with the particularity requirement of the Fourth Amendment of the United States Constitution and Section 10 of the Kentucky Constitution. Therefore, any search of Allen's person would of necessity be analyzed as a warrantless search. However, the trial court went on to conclude that no search of Allen's person had occurred because she voluntarily produced the contraband from her pockets prior to the entry of the drug dog.

Finally, the trial court concluded that no seizure of Allen occurred (justifying search of her person) because there was no evidence that she was prevented from leaving the residence.

STANDARD OF REVIEW

Our standard of review of the trial court's decision on a motion to suppress requires that we first determine whether the trial court's findings of fact are supported by substantial evidence. Commonwealth v. Neal, 84 S.W.3d 920, 923 (Ky.App. 2002). If they are, then they are conclusive. See RCr. 9.78. Based on those findings, we must then conduct a *de novo* review of the trial court's application of law to those facts to determine whether its decision is correct as a matter of law.

Id.; Adcock v. Commonwealth, 967 S.W.2d 6, 8 (Ky. 1998);
Commonwealth v. Opell, 3 S.W.3d 747, 751 (Ky.App. 1999).

Here, the trial court's findings of fact are supported by substantial evidence gathered from several witnesses. We therefore consider the trial court's findings of fact conclusive. We also agree with the trial court's conclusion that the warrant did not comply with either U.S. or Kentucky constitutional requirements and thus it was invalid with regard to Allen. However, with regard to the trial court's conclusion that she voluntarily produced the contraband, we find that the application of the law to those facts was erroneous as a matter of law. We therefore reverse.

ANALYSIS

Although the trial court correctly found the warrant's authorization to search "all persons present" invalid, it nevertheless concluded that "no search of Ms. Allen occurred when she produced the contents of her pockets in response to the trooper's statement that if she had contraband she should take it off her person prior to the entry of the 'drug dog,' as that response was a voluntary act on her part." This was error.

All searches conducted without a warrant are considered unreasonable unless they come within one of the exceptions to the warrant requirement. Farmer v. Commonwealth, 6 S.W.3d 144, 146 (Ky.App. 1999) citing Coolidge v. New

Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

Voluntary consent is one of the recognized exceptions. Id.

With regard to what constitutes "voluntary" consent, the United States Supreme Court has stated:

[T]he Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed."

Schneckloth, 412 U.S. at 227-228. Cf. Middleton v.

Commonwealth, 502 S.W.2d 517, 518 (Ky. 1973) ("Consent to a search must be free, voluntary, and **without coercion of any**

type.") (Emphasis added). The issue of whether the consent was

voluntary must be determined from careful scrutiny of all the specific circumstances of a case. Schneckloth v. Bustamonte,

412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). See also

Anderson v. Commonwealth, 902 S.W.2d 269 (Ky. 1995) and

Commonwealth v. Sebastian, 500 S.W.2d 417 (Ky. 1973). The

Commonwealth has the burden of proving by a preponderance of the

evidence that the defendant voluntarily consented to the search

in question. See Cook v. Commonwealth, 826 S.W.2d 329 (Ky.

1992). This burden cannot be met by showing no more than

acquiescence to a claim of lawful authority. Middleton, 502

S.W.2d at 518 citing Bumper v. North Carolina, 391 U.S. 543, 88

S.Ct. 1788, 20 L.Ed.2d 797 (1968). A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. Id.

A careful examination of all the facts in this case indicates that the prosecution did not establish by a preponderance of the evidence that the consent given by Allen was freely and voluntarily obtained without any threat or express or implied coercion. It was established that Allen was in the presence of several armed and uniformed officers. She was required to remain only in the living room of the residence. Allen also made repeated requests to use the bathroom and was denied. She was observed constantly by an officer during the approximate two hour wait for the drug dog to arrive.

Even more persuasive than Allen's prolonged detention is the trial court's finding that as the drug dog arrived, an officer advised the McFarlands and Allen "that if they had any contraband on their persons or in their clothing they should take it out before the dog entered for their own personal safety." The officer's statement is wrought with implicit coercion. The clear implication of the officer's statement was that the dog would hurt them unless they produced any contraband hidden on their person. If the officer were truly concerned for Allen's safety, he could have easily removed her from the residence or kept the drug dog at bay. The trial court found

that Allen considered the officer's statement to be an order. When Allen produced the contraband from her pockets, she merely acquiesced to the officer's claim of lawful authority under the invalid warrant.

Under the totality of the circumstances of this case, it cannot be said that Allen freely and voluntarily consented to produce the contraband from her pockets. She was detained for an inordinate amount of time by armed officers who claimed to have a valid warrant. She was led to believe the drug dog would hurt her unless she produced the contraband. Moreover, Allen was shown and read a search warrant purporting to authorize a search of her person, which was determined by the trial court to be invalid with regard to her. Under these coercive facts, no reasonable person would believe they had a right to resist the search. "Where there is coercion there cannot be consent." Bumper, 391 U.S. at 550.

Because we reverse on this issue, we need not review the trial court's conclusion that no seizure of Allen's person occurred.

CONCLUSION

We are unable to find that Allen voluntarily consented when she produced the contraband from her pockets. The evidence seized from her should have been suppressed. On the authority

of Johantgen, supra, since her conviction could not have been obtained without it, it is therefore reversed.

ALL CONCUR.

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