

RENDERED: DECEMBER 22, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001866-MR

MARCELLUS BUSH

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 03-CR-00480

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** *

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Marcellus Bush has appealed from a judgment entered on August 24, 2005, by the Christian Circuit Court which, following the denial of his motion to suppress evidence and pursuant to his conditional guilty plea, convicted him of possession of a controlled substance in the first degree, cocaine,¹ and for being a persistent felony offender in the first degree (PFO I).² Having concluded that the trial court failed to

¹ Kentucky Revised Statutes (KRS) 218A.1415.

² KRS 532.080(3).

make sufficient factual findings and conclusions of law in its denial of Bush's motion to suppress evidence, we vacate and remand.

On July 28, 2003, Detective Mark Nichols of the Christian County Sheriff's Department, assisted by Kentucky State Police Trooper Bob Winters, conducted a "trash pull"³ on a trash container located in front of Bush's residence at 208 South Jessup Street, Hopkinsville, Christian County, Kentucky. In the trash receptacle, the officers located plastic bags without corners, marijuana seeds, and tobacco.⁴ Subsequently, based upon the trash pull and a report from another law enforcement agency regarding alleged controlled substance purchases at the residence, Trooper Winters filed an affidavit⁵ and obtained a warrant to search the residence at 208 South Jessup Street.

Upon executing the search warrant at the residence, the officers found suspected cocaine and marijuana, a set of scales, and a police radio. Thereafter, Bush was indicted on September 26, 2003, by a Christian County grand jury for

³ Det. Nichols testified that a "trash pull" consists of officers searching trash that has been left at the curb of a residence for pick-up.

⁴ The officers suspected the tobacco was from hollowed-out cigars.

⁵ The description in Trooper Winters's affidavit of some of the items which were found during the trash pull differed slightly from the testimony of Det. Nichols. The affidavit noted that the officers found "baggies with the corners removed, marijuana seeds, cigar boxes, [and] guts from cigars that had been hollowed out."

trafficking in a controlled substance in the first degree,
cocaine,⁶ possession of marijuana,⁷ possession of drug
paraphernalia,⁸ possession of a police radio,⁹ and being a PFO I.

On October 21, 2004,¹⁰ Bush filed a motion to suppress
the evidence seized as the result of the search of his
residence. Det. Nichols testified at the suppression hearing
that a search warrant in Christian County can only be obtained
based upon evidence found during a trash pull if a piece of mail
that contains the homeowner's name is located within the trash.
Det. Nichols stated that a piece of mail was found in the trash
that contained either Bush's name or the name of his girlfriend.
Bush argued that the trash which had been searched did not
belong to him and, therefore, the search warrant was not based
upon probable cause. The trial court denied the motion on
December 14, 2004, finding only that Bush did not have an
expectation of privacy in the trash located at the curb in front
of his residence.¹¹

⁶ KRS 218A.1412.

⁷ KRS 218A.1422.

⁸ KRS 218A.500(2).

⁹ KRS 432.570.

¹⁰ The motion contained in the record was file stamped by the clerk on
December 14, 2004. However, it was dated October 21, 2004, and noticed to be
heard on November 17, 2004.

¹¹ Bush conceded to this finding at the suppression hearing, and therefore
there is no reason for this Court to address the issue.

Bush was found guilty by the jury at a trial held on February 17, 2005.¹² However, Bush's motion for a new trial was granted because an ineligible juror sat on the jury that convicted him. Before a new trial was held, Bush entered a conditional guilty plea on August 15, 2005, to possession of a controlled substance in the first degree and being a PFO I, reserving his right to appeal the denial of his motion to suppress evidence, and was sentenced to 15 years' imprisonment. This appeal followed.

The only issue on appeal is whether the trial court erred by denying Bush's motion to suppress evidence. Bush's argument is based upon his claim that the trash did not belong to him and that there was no probable cause for the issuance of the search warrant.

The Commonwealth has raised the question of whether Bush has preserved his argument for our review.¹³ We conclude that by arguing that the trash did not belong to him, Bush was rebutting the probable cause for the issuance of the search warrant, and thus properly objected to whether there was sufficient probable cause for the issuance of the search warrant

¹² Bush was acquitted of the charge of possession of a police radio by a directed verdict of acquittal.

¹³ See Kennedy v. Commonwealth, 544 S.W.2d 219 (Ky. 1976) (stating that any issue must be properly raised in the lower court in order to be reviewed on appeal).

and to the subsequent search. Since the source of the trash was an underlying premise for the finding of probable cause for the search warrant, the issue raised by Bush on appeal is properly preserved for our review.

When an appellate court reviews a trial court's ruling on a motion to suppress, it must first determine whether the trial court's factual findings were supported by substantial evidence. If supported by substantial evidence, the factual findings are conclusive.¹⁴ The appellate court must next conduct a de novo review of the trial court's application of the law to the facts to determine whether the trial court's legal conclusions are correct.¹⁵

When the trial court denied Bush's suppression motion, it did not enter into the record any findings of fact concerning the evidence presented at the suppression hearing. RCr 9.78 clearly provides that, upon a motion to suppress, "the trial court shall conduct an evidentiary hearing outside the presence of the jury and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by

¹⁴ Kentucky Rules of Criminal Procedure (RCr) 9.78.

¹⁵ Commonwealth v. Neal, 84 S.W.3d 920, 923 (Ky.App. 2002).

the motion or objection and necessary to support the ruling.”

The provisions of this rule are mandatory.¹⁶

In this case, the trial court record contains only a general oral statement from the trial judge agreeing with the position of the Commonwealth following the testimony and arguments made at the suppression hearing. The record does not contain a formal written order denying the motion to suppress. There is only a hand-written note from the trial court on its docket sheet, which does not include any factual basis for the ruling. This record alone does not meet the mandatory requirements of RCr 9.78. It is impossible for an appellate court to review factual findings which do not exist.¹⁷

Accordingly, the judgment of the Christian Circuit Court is vacated, and this matter is remanded for the trial court to review the record of the suppression hearing previously conducted and to enter into the record specific findings of fact and conclusions of law on Bush’s motion to suppress evidence seized from his residence.

GUIDUGLI, JUDGE, CONCURS.

COMBS, CHIEF JUDGE, CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION.

¹⁶ See Moore v. Commonwealth, 634 S.W.2d 426, 433 (Ky. 1982); and Brown v. Commonwealth, 564 S.W.2d 24, 31 (Ky.App. 1978).

¹⁷ See Lee v. Commonwealth, 547 S.W.2d 792, 794 (Ky.App. 1977).

COMBS, CHIEF JUDGE, CONCURRING IN RESULT: I concur reluctantly. The record supports the fact that the judge properly issued the search warrant in this case pursuant to which the evidence was seized. Accordingly, the court clearly did not err in refusing to suppress the evidence.

So often the issue at a suppression hearing turns on whether there was probable cause to justify a warrantless search. Not so in this case. The police acted cautiously and discreetly in seeking a warrant. The court correctly responded to their due diligence in denying the motion to suppress the evidence seized during the search that followed execution of the warrant.

While the better practice would certainly be a formalized written set of findings pursuant to RCr 9.78, that omission under the particular circumstances of this case (an oral statement from the judge supported by the written note on the docket sheet) is not egregious. The majority opinion is asking for meticulous compliance with the rule. I cannot dissent with that sound principle. However, I must emphasize that the omission in this case surely involves a very close call. Therefore, I concur in result only.

BRIEFS FOR APPELLANT:

J. Brandon Pigg
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky