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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001520-MR

KEITH FITZPATRICK — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY THOMAS BURDETTE, JUDGE
ACTION NO. 05-CR-00136

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE AND STUMBO, JUDGES; ROSENBLUM,[1] SENIOR JUDGE.

MOORE, JUDGE: Keith Fitzpatrick appeals from the Pulaski Circuit Court's judgment convicting him of Trafficking in a Controlled Substance, i.e., cocaine, and Possession of Drug Paraphernalia, i.e., rolling papers. Following a jury trial, Fitzpatrick was sentenced to serve seven years' imprisonment for the trafficking conviction and to pay a $500 fine for the drug paraphernalia conviction. After a careful review of the record, we affirm the Pulaski Circuit Court's judgment.

[1] Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

I. FACTUAL AND PROCEDURAL BACKGROUND

Keith Fitzpatrick, who is from Cincinnati, Ohio, was working temporarily in Somerset, Kentucky. While there, he stayed at the Budget Inn. During the course of his stay, an anonymous caller placed a "9-1-1" call, in which the caller alleged that a black male named "Keith" was selling drugs out of Room 263[2] of the Budget Inn.

Lieutenant William Hunt, who works for the Somerset Police Department, testified at the hearing on Fitzpatrick's motion to suppress that he received a report from police dispatch concerning the anonymous tip from the "9-1-1" call. Thereafter, Lt. Hunt went to the Budget Inn with Officer Bill Bolin.[3] Lt. Hunt did not observe any criminal activity occurring at the hotel at that time but proceeded to knock on the door of Room 263. He testified that two more officers, "Officer Stephens"[4] and Officer Roger Estep, later joined them at the hotel, but he was not certain at what time they arrived. Lt. Hunt attested that when he and Officer Bolin knocked on the door, Fitzpatrick answered the door, and they asked if they could enter the room. According to Lt. Hunt, Fitzpatrick let them in, and after entering the room, Lt. Hunt smelled what his training led him to believe was marijuana. Officer Bolin informed Fitzpatrick why they were there, to wit that they had a complaint that drugs were being sold in his room. Lt. Hunt testified that

[2] In his appellate brief, Fitzpatrick states the room number at the Budget Inn as having been Room 236. However, upon review of the tape from the suppression hearing, it is apparent that Lt. Hunt testified that the room number was Room 263.

[3] We note that this officer's name was spelled "Bolin" in Fitzpatrick's appellate brief, and that it was spelled "Bowling" in the Commonwealth's brief. We will refer to him as "Officer Bolin" in this opinion.

[4] No first name was provided for Officer Stephens.

Officer Bolin then asked if Fitzpatrick had a problem with their looking around the room, and Fitzpatrick responded that he did not care if they looked. Once they began searching the room, Lt. Hunt noticed what appeared to be a partially smoked marijuana cigarette commonly known as a "roach" in the ashtray on the nightstand between the beds. Lt. Hunt testified that Fitzpatrick was arrested, and he was read his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966).

Fitzpatrick also testified at the suppression hearing. He stated that he was asleep when the police knocked on his hotel room door, as it occurred in the early morning hours. He further attested that he did not give the police permission to enter his room, that the officers told him to sit down, which he did, and that they then entered his room. Fitzpatrick testified that he was never read his *Miranda* rights, and he did not give the officers consent to search his room. The prosecutor asked Fitzpatrick if it was possible that his memory was impaired because he had been smoking marijuana that night, and he responded that he had not smoked marijuana the night of the search.

The circuit court made the following oral findings of fact at the end of the suppression hearing: A man named "Keith" was reported selling drugs from Room 263 at the Budget Inn; officers went there and knocked on the door, which was answered by a man named "Keith;" the officers were invited in; they smelled marijuana; they asked to search further and were given permission to do so; and during the search, they found a marijuana cigarette known as a "roach." Based on these findings, the circuit court upheld the search and overruled Fitzpatrick's motion to suppress. In its written order overruling

Fitzpatrick's motion to suppress, the circuit court noted that both Lt. Hunt and Fitzpatrick testified at the suppression hearing, that Lt. Hunt testified that consent to search was provided and *Miranda* warnings were given, and that Fitzpatrick denied having consented to the search. The court "note[d] that the evidence found at the scene corroborate[d] the tip." The court then made the following written findings of fact: "1. [Fitzpatrick] gave consent. 2. The Police administered the *Miranda* warnings to the Defendant." (italics added).

The case proceeded to trial, and following *voir dire*, Fitzpatrick moved *in limine*, seeking to prevent the officers from testifying that they received an anonymous tip that drugs were being sold in Room 263 of the Budget Inn. Fitzpatrick's counsel argued that the officers could say they had received a tip and they went to the hotel, but counsel contended that the officers should not be permitted to say that the tip alleged drugs were being sold in that room. Fitzpatrick's counsel based this motion *in limine* on KRE 404(b) and the hearsay rule. The circuit court overruled the motion *in limine*, holding that the evidence was not hearsay and did not qualify as KRE 404(b) evidence.

The jury trial was held, during which Officer Bolin testified that after Fitzpatrick consented to the search of his hotel room, the officers found the following in the room: a bag containing a white substance, over $3,000 in cash, a small bag of marijuana, and rolling papers. Officer Bolin attested that *Miranda* rights were read to Fitzpatrick and that Fitzpatrick's person was then searched. While searching his person, a smaller bag containing a white substance and $135 in cash was found. Officer Bolin

testified that Fitzpatrick was asked about the two bags containing white substances, and Fitzpatrick admitted that the two bags contained cocaine.

Officer Estep testified at trial that Fitzpatrick informed him that he obtained the cocaine from someone in Nashville and that he could buy kilos of cocaine from Nashville "crack houses." Officer Estep further attested that when he asked Fitzpatrick whether he ever sold cocaine, Fitzpatrick responded that he had sold it to his friends and co-workers.

The jury convicted Fitzpatrick of Trafficking in a Controlled Substance, i.e., cocaine, and Possession of Drug Paraphernalia, i.e., rolling papers. Fitzpatrick was then sentenced to serve seven years of imprisonment for the trafficking conviction and to pay a $500 fine for the drug paraphernalia conviction.

Fitzpatrick now appeals, raising the following claims: (1) the circuit court erred when it overruled his motion to suppress the evidence seized from the search of his hotel room because the search was illegal and the police had no right to search the room without corroborating the anonymous tip; and (2) the circuit court erred when it denied his motion *in limine* to prevent the police witnesses from testifying to investigative hearsay.

II. ANALYSIS

A. CLAIM CONCERNING FITZPATRICK'S MOTION TO SUPPRESS

If the trial court's findings of fact are supported by substantial evidence, then they are conclusive. *See Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky. App.

2002). We conduct *de novo* review of the trial court's application of the law to the facts. *Id*. We review findings of fact for clear error, and we "give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Stewart v. Commonwealth*, 44 S.W.3d 376, 380 (Ky. App. 2000) (internal quotation marks and citation omitted). We also "give due weight . . . to the circuit court's findings on the officers' credibility." *Baltimore v. Commonwealth,* 119 S.W.3d 532, 539 (Ky. App. 2003).

We first note that the circuit court's findings of fact, which were based primarily on Lt. Hunt's version of the events on the evening in question, are supported by substantial evidence. *See Neal*, 84 S.W.3d at 923. Thus, those findings are conclusive, and we base our analysis on the facts as determined by the circuit court.

Fitzpatrick alleges that the search of his hotel room was illegal because the officers failed to corroborate the anonymous tip before going to the hotel to question him. However, courts have upheld the police investigatory tool used in this case, known as a "knock and talk."

> A knock and talk investigation involves officers knocking on the door of a house, identifying themselves as officers, asking to talk to the occupant about a criminal complaint, and eventually requesting permission to search the house. . . . If successful, it allows police officers who lack probable cause to gain access to a house and conduct a search.

Hayes v. Indiana, 794 N.E.2d 492, 496 (Ind. Ct. App. 2003) (internal quotation marks and citations omitted). "The prevailing rule is that, absent a clear expression by the

owner to the contrary, police officers, in the course of their official business, are permitted to approach one's dwelling and seek permission to question an occupant." *Id*.

"The Fourth Amendment protection against unreasonable searches and seizures is not limited to one's home, but also extends to such places as hotel or motel rooms." *United States v. Cormier*, 220 F.3d 1103, 1108-09 (9th Cir. 2000). In the present case, as in *Cormier*, because Fitzpatrick "had a reasonable expectation of privacy in his [h]otel room, the question is whether he voluntarily opened the door or, alternatively, whether there were coercive circumstances that turned an ordinary consensual encounter into one requiring objective suspicion." *Id*., 222 F.3d at 1109.

In *Cormier*, the Ninth Circuit Court of Appeals reiterated its prior holding stating that

> [a]bsent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person's right of privacy, for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door of any man's "castle" with the honest intent of asking questions of the occupant there[of] whether the questioner be a pollster, a salesman, or an officer of the law.

Id. (internal quotation marks and citation omitted). In the present case, as occurred in *Cormier*, the officers knocked for a short period before Fitzpatrick answered the door. There was no evidence that the officers announced who they were while knocking or that they in any way compelled Fitzpatrick to open the door "under the badge of authority." *Id*. Therefore, contrary to Fitzpatrick's assertion, the officers did not need to corroborate

the anonymous tip before conducting the "knock and talk," because no reasonably articulable suspicion "needed to be shown in order to justify the 'knock and talk.'" *Id*.

Moreover, the Seventh Circuit Court of Appeals has held that, in regard to a "knock and talk" conducted at a person's hotel room, the question "is whether [the occupant] would feel free to decline the officers' request that they come to the door, or would feel free to otherwise terminate the encounter." *United States v. Adeyeye*, 359 F.3d 457, 462 (7th Cir. 2004). The Court continued, explaining that "[t]he test is an objective one and requires consideration of the totality of the circumstances." *Id*.

As previously explained, in the present case, although the officers knocked on Fitzpatrick's hotel room door in the early morning hours, there was no evidence that they knocked more than a short time or that they announced they were police while knocking. Fitzpatrick answered the door, invited the officers in, the officers asked if they could look around the room, and Fitzpatrick gave his consent for them to do so. A reasonable person in Fitzpatrick's position would have felt free to ignore the knocks on the door or to refuse the officers' entry to the room, or to terminate the encounter. *See id*. Therefore, the encounter was consensual, and it is unnecessary for us to determine whether the officers had reasonable suspicion to conduct the knock and talk. *Id*.

As for the part of Fitzpatrick's claim wherein he asserts that the search of his hotel room was illegal, the circuit court found that Fitzpatrick had consented to the search of the room. A search without a warrant is unreasonable unless it is shown that the search qualifies for one of the exceptions to the warrant requirement. *Cook v.*

Commonwealth, 826 S.W.2d 329, 331 (Ky. 1992). Consent is one such exception. *See id*. "The law does not require that [a defendant] be advised of his *Miranda* rights or that he had a right to refuse the search." *Id*. "All that was required to establish consent was that the consent was voluntarily given in view of all the circumstances." *Id*. "Whether a consent to search was voluntarily given is a question of fact to be determined by a preponderance of the evidence from the totality of all the circumstances." *Talbott v. Commonwealth*, 968 S.W.2d 76, 82 (Ky. 1998). If the prosecution establishes "by a preponderance of the evidence that the consent given by [the defendant] was freely and voluntarily obtained without any threat or express or implied coercion," then the consent to search is valid. *Cook*, 826 S.W.2d at 331.

Although at the suppression hearing Fitzpatrick stated that he had been sleeping when the officers knocked on his hotel room door, Lt. Hunt testified that after Fitzpatrick answered the door, the officers asked if they could enter the room, and Fitzpatrick let them enter. The officers then explained to Fitzpatrick that they had received a complaint that drugs were being sold out of that hotel room, and they asked if they could look around the room. Fitzpatrick gave his consent for them to do so. Despite Lt. Hunt's testimony that he smelled what he thought was burnt marijuana when he first entered the hotel room, Fitzpatrick testified that he had not smoked marijuana that night. Fitzpatrick does not allege that he was under the influence of drugs or any illegal substances that would have invalidated his consent to enter and search. Fitzpatrick did not allege at the suppression hearing that the officers threatened him or coerced him in

any way to give his consent to the search. Therefore, because there was no coercion, Fitzpatrick was apprised of why the police were there before he gave his consent to search and, according to Fitzpatrick, he was not under the influence of drugs at the time he consented, his consent was freely and voluntarily given, and the search of the hotel room was proper. Consequently, the circuit court did not err when it overruled Fitzpatrick's motion to suppress the evidence seized as a result of the search of his hotel room.

B. CLAIM CONCERNING FITZPATRICK'S MOTION *IN LIMINE*

Fitzpatrick next claims that the circuit court erred when it denied his motion *in limine* to prevent the police witnesses from testifying to investigative hearsay. Specifically, Fitzpatrick contends that the officers' testimony regarding the anonymous tip would constitute evidence of prior bad acts, in violation of KRE 404(b), and that such evidence would be hearsay. We review a trial court's evidentiary rulings for an abuse of discretion. *See Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000).

However, in the present case, even if we were to assume, *arguendo*, that the circuit court erred in denying the motion *in limine* and in admitting this testimonial evidence at trial, the error was harmless. Kentucky Rule of Criminal Procedure 9.24 sets forth the "harmless error" doctrine and provides as follows:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order, or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or for setting aside a verdict or

> for vacating, modifying or otherwise disturbing a judgment or order unless it appears to the court that the denial of such relief would be inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.

"Under the harmless error doctrine, if upon consideration of the whole case it does not appear that there is a substantial possibility that the result would have been any different, the error will be held non-prejudicial." *Gosser v. Commonwealth*, 31 S.W.3d 897, 903 (Ky. 2000).

During trial, Officer Bolin testified that after Fitzpatrick consented to the search of his hotel room, the officers found the following in some shoes in the room: a bag containing a white substance, over $3,000 in cash, a small bag of marijuana, and rolling papers. Officer Bolin attested that *Miranda* rights were read to Fitzpatrick and that Fitzpatrick's person was then searched. While searching his person, one of the officers found a smaller bag containing a white substance and $135 in cash. Officer Bolin testified that Fitzpatrick was asked about the two bags containing white substances, and Fitzpatrick responded by admitting that the two bags contained cocaine.

Officer Estep testified at trial that while he was questioning Fitzpatrick at the hotel room, Fitzpatrick informed him that he obtained the cocaine from someone in Nashville. Fitzpatrick also told Officer Estep that he could buy kilos of cocaine from Nashville "crack houses." Officer Estep further attested that when he asked Fitzpatrick whether he ever sold cocaine, Fitzpatrick responded that he had sold it to his friends and

co-workers.

Based on the aforementioned officers' testimony, any error in admitting into evidence testimony regarding the anonymous tip is harmless because "there is [not] a substantial possibility that the result would have been any different" if the anonymous tip testimony had not been admitted. *Gosser*, 31 S.W.3d at 903.

Moreover, the circuit court admonished the jury concerning the officer's testimony regarding the anonymous tip. Specifically, Officer Bolin testified that he and Lt. Hunt went to the Budget Inn Room 263 on the night in question because they had "received a complaint of drug trafficking from that room." Fitzpatrick's counsel objected to this testimony, and the circuit court admonished the jury "that even though he[] received an anonymous tip, that . . . doesn't necessarily make it true. That's not a fact . . . the fact is [that] he received an anonymous tip. Understand?"

Once a trial court admonishes a jury, the "jury is presumed to follow an admonition to disregard evidence and the admonition thus cures any error." *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003). Thus, in the present case, because the circuit court admonished the jury that the fact that the officers received an anonymous tip doesn't necessarily make the tip true, any error in admitting testimony concerning the anonymous tip was cured. Consequently, the circuit court did not err when it denied Fitzpatrick's motion *in limine* to exclude the officers' testimony concerning the anonymous tip.

Accordingly, the judgment of the Pulaski Circuit Court is affirmed.

ALL CONCUR.

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