

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001590-MR

DAVID WADE CONLEY

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 06-CR-00275

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** *

BEFORE: KELLER, LAMBERT, AND STUMBO, JUDGES.

KELLER, JUDGE: David Wade Conley appeals from a judgment of the Fayette Circuit Court upon a conditional guilty plea convicting him of cultivation of marijuana, a Class D felony, and possession of drug paraphernalia, a Class A misdemeanor. Conley was sentenced to one year in prison for the cultivation of marijuana conviction and a concurrent one year sentence for the paraphernalia conviction with the total sentence

being probated for three years. Conley appeals from the trial court's denial of his motion to suppress evidence seized from his residence. For the reasons stated below, we affirm.

FACTUAL & PROCEDURAL HISTORY

While on routine patrol on January 1, 2006, Officer Thomas Perkins (Officer Perkins) observed fireworks being launched into the air from the backyard of an address he later identified as Conley's residence. Officer Perkins approached the backyard of Conley's residence, announced his presence, and was greeted by Conley. Officer Perkins told Conley that he would be confiscating the illegal fireworks. Conley agreed to meet Officer Perkins at the front door of the residence with the fireworks.

Officer Perkins testified that he was overwhelmed by the strong odor of marijuana when Conley opened the front door of the residence. As Conley was handing over the illegal fireworks, Officer Perkins, still standing on the porch of the residence, noticed what he identified as marijuana inside a Mason jar on a coffee table in the residence. Officer Perkins also observed a glass pipe next to the Mason jar. Officer Perkins also testified that as he was speaking to Conley, Conley appeared nervous, jittery, and evasive, and that he was continually looking back over his shoulder. Officer Perkins noted that Conley had bloodshot watery eyes and that his pupils were not reacting to light. Based on these observations, Officer Perkins asked Conley if he had been smoking marijuana. Initially Conley responded that he had not, but later admitted that he had been.

At some point after Conley handed over the fireworks to Officer Perkins and after Officer Perkins' observations about Conley's use of marijuana, Conley attempted

to shut the door to his residence. Officer Perkins placed his foot in front of the door to block Conley from closing it. Officer Perkins then entered the residence to seize the marijuana he had previously seen. While seizing the marijuana, Officer Perkins observed more paraphernalia on the table including a box containing loose marijuana, glass pipes, rolling papers, roach clips, and more Mason jars.

Officer Perkins' requested backup, Officer Gale, arrived soon after Officer Perkins entered the home. Officer Perkins testified that they conducted a protective sweep of the home based on Conley's earlier nervous behavior. As Officer Gale began to walk through a curtain separating the hallway from the living room, Conley began to cry. Officer Perkins asked if anything else would be found and Conley said yes. Officer Gale then discovered a number of marijuana plants growing in a bedroom of the house. The officers did not find anyone else in the residence.

After consultation with a supervisor and the narcotics unit, Officer Perkins left the residence to obtain a search warrant. The subsequent search of the home produced 164 marijuana plants, two sets of digital scales, various items associated with the growing of marijuana, Ziplock bags, and books on marijuana. Conley was arrested.

On February 27, 2006, a Fayette County grand jury indicted Conley for cultivation of marijuana, five or more plants; possession of drug paraphernalia; and illegal use of fireworks. Conley filed a motion to suppress on March 10, 2006, arguing that the entry and search violated his right to privacy and the warrant requirements of the United States and Kentucky Constitutions. The circuit court denied Conley's motion to suppress

whereupon Conley entered a conditional guilty plea to cultivation of marijuana, five or more plants; and possession of drug paraphernalia. Conley was sentenced to one year's imprisonment for each conviction with the sentences to run concurrently. The jail terms were probated for three years.

APPELLATE ARGUMENTS

Conley first argues that the searches of his residence violated his right to privacy, which protects his possession of marijuana for personal use. In support of this argument, Conley cites to the Kentucky Constitution and argues that Section 2, specifically, has been used to limit attempts by the Legislature to exercise unreasonable power over the citizens of the Commonwealth. These searches, Conley argues, invaded his privacy and were therefore an exercise of unreasonable power. Next, Conley argues that the warrantless entry into his home and subsequent warrantless search of his home were illegal. In this argument, Conley attacks what he sees as an improper application of the protective sweep and plain view doctrines.

The Commonwealth argues that the right to possession of marijuana in one's home is not a protected right and that the warrantless search was conducted lawfully. In support of its arguments, the Commonwealth cites a number of Kentucky decisions supporting the warrantless search and denying a privacy right to possess marijuana within one's home.

STANDARD OF REVIEW

Our standard of review of the trial court's decision on a motion to suppress evidence “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). Substantial evidence is “evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men.” *Owens-Corning Fiberglass Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). If the findings of fact are supported by substantial evidence, then they are conclusive. *See* Kentucky Rules of Criminal Procedure (RCr) 9.78. Based upon 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. *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998); *Commonwealth v. Opell*, 3 S.W.3d 747, 751 (Ky.App. 1999).

ANALYSIS

The first issue before this court is whether Conley has a constitutionally guaranteed privacy right protecting his possession of marijuana for personal use within his home and, if so, whether such right was violated by the search of his residence. For the following reasons, we hold that there is no privacy right protecting the possession of marijuana for personal use within one's home.

Conley argues that the relevant case law in Kentucky establishes that an individual's right to privacy is protected against over-extensive governmental intrusion

unless *the government can show* that such intrusion directly protects the public's health, safety, or morals. This position, however, improperly places upon the government the burden of proving the constitutionality of an act when, in fact, “the one who questions the validity of an act bears the burden to sustain such contention.” *Stephens v. State Farm Mut. Auto. Ins. Co.*, 894 S.W.2d 624, 626 (Ky. 1995).

Conley's primary argument is that the legislature may only criminalize conduct when it is reasonably necessary to protect the public's health, safety, or morals. In *Commonwealth v. Harrelson*, 14 S.W.3d 541 (Ky. 2000), the Supreme Court of Kentucky held that the use of marijuana presents a risk to the public's health and safety. Harrelson was cited and arrested for cultivation of marijuana, fewer than five plants, a Class A misdemeanor, after he planted four hemp seeds on a tract of land in Lee County. The charge was later amended to possession of marijuana. He pled not guilty and moved to dismiss the charge, contending that the hemp seeds did not come within a proper statutory definition of marijuana, or, if they did, that the statute was unconstitutionally overbroad and vague. In response to Harrelson's challenge to the validity of the legislature's action, the Court held that “[t]he valid public interest in controlling marijuana is a public issue involving health, safety and criminal activity.” *Id.* at 547.

Conley also cites *Commonwealth v. Campbell*, 133 Ky. 50, 117 S.W. 383 (1909), and *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992), as supportive of his contentions. In *Campbell*, the issue involved the criminalization of possession of intoxicating liquor; and in *Wasson*, the issue involved the validity of Kentucky's criminal

prohibition of consensual sodomy. As does Conley, Harrelson argued that *Campbell* and *Wasson* supported his constitutional challenge. However, the *Harrelson* court held that these cases had no bearing on the statute criminalizing possession of marijuana.

Reliance by Harrelson on his reference to great moral issues of the current times is unpersuasive. The alleged moral concerns expressed in *Commonwealth v. Wasson*, Ky., 842 S.W.2d 487 (1992) and *Commonwealth v. Campbell*, 133 Ky. 50, 117 S.W. 383 (1909), are not evident here in view of the fact that the statute applies to the health, safety and well-being of the citizens of Kentucky without reference to so-called “moral” issues.

Harrelson, 14 S.W.3d at 547.

In light of the Court's ruling in *Harrelson*, we hold that there is no constitutionally protected right of privacy entitling an individual to possess marijuana for personal use within his or her home.

Next, we address Conley's argument that the officers' warrantless entry into his home was illegal. This argument challenges the validity of the application of the plain view doctrine. For the following reasons, we hold that the officers' entry into the home was lawful, pursuant to the plain view doctrine.

In *Posey v. Commonwealth*, 185 S.W.3d 170 (Ky. 2006), the Supreme Court of Kentucky summarized the plain view doctrine as follows:

Absent exigent circumstances, it is not reasonable for a law enforcement agent or officer to enter a person's home without consent or a warrant. *Payton v. New York*, 445 U.S. 573, 590, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); *Talbott v. Commonwealth*, 968 S.W.2d 76, 81 (Ky. 1998). 'The Commonwealth bears the burden to demonstrate that exigent

circumstances were present justifying the warrantless entry.' *Commonwealth v. McManus*, 107 S.W.3d 175, 177 (Ky. 2003).

'Destruction of evidence is a recognized exigent circumstance creating an exception to the warrant requirement.' *Id.* Where officers have probable cause to believe that a crime has occurred and that evidence from that crime is in imminent danger of being destroyed, it is reasonable for law enforcement officers to secure the place where the evidence is located in order to prevent its imminent destruction. *Id.* (citing *Segura v. United States*, 468 U.S. 796, 810, 104 S.Ct. 3380, 3388, 82 L.Ed.2d 599 (1984) (characterizing the preservation of evidence in danger of imminent destruction as a 'now or never' situation)).

In this case, the marijuana was in plain view. As such, there is no dispute as to whether the officers had probable cause to believe that Appellant was in possession of a controlled substance. Moreover, since the contraband was in plain view, it was also reasonable for them to believe that the drugs were in imminent danger of being destroyed in the absence of immediate action to secure the evidence. *See Ker v. California*, 374 U.S. 23, 28, n. 3, 83 S.Ct. 1623, 1627, n. 3, 10 L.Ed.2d 726 (1963) (referring to the ease and speed with which drugs can be destroyed) and *Illinois v. McArthur*, 531 U.S. 326-327, 121 S.Ct. 946, 948, 148 L.Ed.2d 838 (2001) (police had good reason to fear that, unless restrained, defendant would destroy drugs before they could return with a warrant). Therefore, the circumstances in this case were exigent and as such, the officers acted reasonably when they entered the home without a warrant, restrained and arrested Appellant, and then secured the evidence which was in plain view

Posey, 185 S.W.3d at 173. As in *Posey*, the marijuana and some paraphernalia could be seen by Officer Perkins from Conley's front porch. These items, in conjunction with the odor of marijuana coming from Conley's house and Conley's bloodshot, watery eyes gave

Officer Perkins more than probable cause to believe that Conley was in possession of a controlled substance. Furthermore, Conley's nervous behavior gave Officer Perkins probable cause to believe that the marijuana was imminent danger of being destroyed. Therefore, we hold that the officer's actions were justified under the plain view doctrine.

Lastly, we shall only briefly examine the protective sweep of Conley's home. The ultimate seizure of the illegal items from Conley's home was based on a search warrant supported by probable cause. Probable cause for the search warrant was established by Officer Perkins' lawful plain view discovery of the marijuana and drug paraphernalia in Conley's home. The initial plain view discovery of contraband items is enough to establish probable cause that the search would uncover contraband within the home. The judge issuing the search warrant “need only make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *Lovett v. Commonwealth*, 103 S.W.3d 72, 77 (Ky. 2003).

In *Rawlings v. Commonwealth*, 581 S.W.2d 348, 351 (Ky. 1979), the Supreme Court of Kentucky indicated that the discovery of marijuana seeds coupled with the odor of burnt marijuana would be enough to establish probable cause for a warrant. In this case, Officer Perkins smelled burnt marijuana and saw actual marijuana and paraphernalia, which was more than enough to establish probable cause for the search warrant. Therefore, probable cause existed even if the descriptions of the items

discovered during the protective sweep were to be redacted from the affidavit in support of the search warrant.

CONCLUSION

As this Court has held, there is no constitutional right to possess marijuana for personal use within one's home. Therefore, when Officer Perkins, legally standing on Conley's front porch, saw marijuana on Conley's table, in plain view, he gained the legal right to enter Conley's home to prevent the destruction of that marijuana. Since this plain view discovery establishes the requisite probable cause for a search warrant and was described in the affidavit in support of the search warrant, the order of the Fayette Circuit Court denying Conley's motion to suppress is affirmed.

ALL CONCUR.

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