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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002035-MR

MYREE MARSHALL — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 02-CR-00300

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND VANMETER, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

VANMETER, JUDGE: Myree Marshall appeals from the McCracken Circuit Court's order denying his motion to suppress evidence on the ground that it resulted from an illegal search and seizure. For the following reasons, we affirm.

After Marshall was indicted for first-degree trafficking in a controlled substance (cocaine) and as a first-degree persistent felony offender (PFO), he moved the circuit court to suppress evidence of thirty-seven rocks of crack cocaine found in a

[1] Senior Judge Daniel T. Guidugli, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

prescription pill bottle on his person. According to this court's previous opinion, during a hearing on Marshall's suppression motion, Kentucky State Trooper Harvey Baxter, the only witness, testified to the following facts:

> In 2002, Trooper Baxter was an officer of the Paducah City Police Department. According to Baxter's videotaped testimony, on August 14, 2002, Baxter and Officer Rundles, also a Paducah police officer, were patrolling together. They saw Charles Huff, the Defendant Myree Marshall and another man known to Officer Baxter only as Sierra, walking together. Officer Rundles believed that a bench warrant had been issued for Huff's arrest. The officers stopped the car and approached the three men. While Officer Rundles talked to Huff, Officer Baxter talked to Sierra and Marshall. Baxter had had previous interactions with Marshall concerning alcohol and Marshall's having been barred from the property where the officers encountered the men. Officer Rundles noticed Huff talking oddly, without opening his mouth, and saw him swallow something. Officer Rundles made Officer Baxter aware that Huff had swallowed something and said something to the effect that Baxter should see if the other two men had anything. Baxter noticed that Marshall appeared nervous and kept putting his hands in his pockets. Baxter asked Marshall if he could search him for drugs, and Marshall replied that he did not have any drugs and did not want to be searched. Baxter then told Marshall that his life had been threatened in that neighborhood, and asked Marshall if he could pat him down for weapons. Marshall denied that he had weapons, but consented to the pat-down. Baxter patted Marshall down from the front, then turned him around to pat him down from the back. When he did so the rear pocket of Marshall's baggy pants gaped open and Baxter could see a prescription pill bottle in Marshall's open pocket. Baxter asked Marshall what was in the pill bottle and Marshall said that the bottle did not belong to him, it belonged to Huff, and told Baxter to take the bottle out and give it to Huff. When Baxter removed the bottle he could see that it contained what appeared to be rocks of crack cocaine. A field test confirmed that the rocks were cocaine. Marshall was then placed under arrest.

Marshall v. Commonwealth, No. 2004-CA-903-MR, slip op. at 2-3 (Ky.App. Nov. 10, 2005). The circuit court denied Marshall's suppression motion, finding that when Baxter performed the pat-down search to which Marshall had consented, the pill bottle came into Baxter's plain view. Marshall entered a conditional guilty plea to first-degree trafficking in a controlled substance and second-degree PFO, and the circuit court sentenced him to fifteen years' imprisonment, plus thirty days.

On appeal, this court noted that pursuant to *Hazel v. Commonwealth*, 833 S.W.2d 831 (Ky. 1992), certain elements must exist for the admission of evidence seized pursuant to the "plain view" exception to the warrant requirement. Among those elements is the requirement that the evidence's incriminating character must be immediately apparent. *Id.* at 833. Noting that the circuit court "did not find that the incriminating character of the pill bottle was immediately apparent to Officer Baxter when he saw it, nor did [this court's] review of the hearing reveal any testimony that would support such a finding[,]" this court vacated the circuit court's order denying Marshall's suppression motion and remanded for further proceedings.[2] *Marshall,* No. 2004-CA-903-MR, slip op. at 6, 8-9.

On remand, the circuit court again found that when Baxter performed the weapons pat-down search to which Marshall consented, he observed the pill bottle in plain view. Further, when Baxter asked Marshall what was in the pill bottle, Marshall

[2] This court also noted that the circuit court did not discuss whether, by telling Baxter to remove the pill bottle from his pocket and give it to his companion, Marshall gave Baxter "legal authorization to remove the bottle from his pocket[.]" *Marshall*, No. 2004-CA-903-MR, slip op. at 8.

instructed or gave Baxter permission to remove the pill bottle from his pocket. When Baxter did so, he saw the bottle's contents in plain view "and immediately recognized the incriminating nature of the contents." Accordingly, the circuit court again denied Marshall's suppression motion, concluding that the search and seizure of the pill bottle fell within the plain view exception. This appeal followed.

First, Marshall contends that his consent to the pat-down for weapons was involuntary because just moments earlier, he had denied Baxter's request to search his person for drugs. We disagree.

A warrantless search is considered unreasonable unless it falls under an exception to the rule requiring a valid warrant. *Farmer v. Commonwealth*, 6 S.W.3d 144, 146 (Ky.App. 1999). A voluntary consent provides one exception to the warrant requirement. *See Cook v. Commonwealth*, 826 S.W.2d 329, 331 (Ky. 1992). It is the Commonwealth's burden to prove "by a preponderance of the evidence that the defendant voluntarily consented to the search in question. The issue of whether the consent was indeed voluntary must be determined from the specific circumstances of a case." *Farmer*, 6 S.W.3d at 146 (internal citation omitted).

Here, the fact that Marshall denied Baxter's request to search his person for drugs, just moments before Baxter requested and received Marshall's consent to be searched for weapons, does not compel a finding that Marshall's consent to the search for weapons was involuntary. Of course, when an accused expresses his desire to deal with the police only through counsel, pursuant to his Fifth Amendment right to counsel, he "is

not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Roberson v. Commonwealth*, 185 S.W.3d 634, 638-39 (Ky. 2006) (quoting *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981)). However, we are unaware of any analogous rule when dealing with an accused's consent to be searched under the Fourth Amendment. Given the fact that Baxter only twice asked Marshall's consent to be searched, combined with the lack of any evidence of other coercive circumstances,[3] the trial court did not err by finding that Marshall voluntarily consented to be patted down.

Next, Marshall argues that the trial court erred by denying his suppression motion because he only consented to a pat-down for weapons. Since Baxter knew "that the pill bottle was not a weapon, he had no further right to investigate what was in [Marshall's] pocket or in the bottle." We disagree.

As set forth above, when Baxter properly patted down Marshall pursuant to Marshall's consent, he saw a pill bottle in Marshall's back pocket. It is irrelevant whether at that moment the incriminating nature of the pill bottle was immediately apparent, because Baxter did not seize it at that time. *Minnesota v. Dickerson*, 508 U.S. 366, 375, 113 S.Ct. 2130, 2136-37, 124 L.Ed.2d 334 (1993) (under plain view doctrine, officers may **seize** incriminating object without a warrant). Rather, Baxter appropriately

[3] Examples of coercive police conduct include application of force, intimidating movement, overwhelming show of force, brandishing of weapons, blocking of exits, threats, commands, and use of an authoritative tone of voice. *United States v. Drayton*, 536 U.S. 194, 204, 122 S.Ct. 2105, 2112, 153 L.Ed.2d 242 (2002).

posed another question to Marshall, *i.e.*, an inquiry as to what was in the pill bottle.[4] When Marshall explained that the bottle belonged to his companion rather than to him, and then told Baxter to remove the bottle and give it to his companion, Marshall consented to Baxter's removal of the bottle from his pocket. At that point, the incriminating nature of the pill bottle's contents was immediately apparent, and the seizure of the item was appropriate under the plain view exception to the warrant requirement.

The McCracken Circuit Court's order denying Marshall's suppression motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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[4] Baxter did not have to end his investigation simply because he did not feel any weapons. After all, the purpose of a weapons search is "to allow the officer to pursue the investigation without fear of violence." *Commonwealth v. Whitmore*, 92 S.W.3d 76, 79 (Ky. 2002) (citing *Minnesota v. Dickerson*, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993)).