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Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-002056-MR

MICHAEL PREWITT

APPELLANT

APPEAL FROM SPENCER CIRCUIT COURT
v. HONORABLE CHARLES R. HICKMAN, JUDGE
ACTION NO. 05-CR-00033;

COMMONWEALTH OF KENTUCKY APPELLEE

AND

NO. 2006-CA-002263-MR

SHARON PREWITT APPELLANT

APPEAL FROM SPENCER CIRCUIT COURT
v. HONORABLE CHARLES R. HICKMAN, JUDGE
ACTION NOS. O4-CR-00024; 05-CR-00032
AND 05-CR-00046

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND VACATING AND REMANDING IN PART

** ** ** ** **

BEFORE: CLAYTON, KELLER AND MOORE, JUDGES.

MOORE, JUDGE: Michael Prewitt ("Michael") and his sister, Sharon Prewitt ("Sharon"), appeal from the Spencer Circuit Court's judgments denying their motions to suppress. Michael was convicted of: cultivation of marijuana, five or more plants, first offense; trafficking in marijuana, eight ounces to under five pounds, first offense; and use/possession of drug paraphernalia, first offense. He was sentenced to serve a total of five years of imprisonment, and that sentence was probated. Sharon was convicted of: cultivating marijuana, over five plants; complicity to trafficking in marijuana, eight ounces to under five pounds; and complicity to possess drug paraphernalia. She was sentenced to serve a total of five years of imprisonment, and that sentence was also probated. Both Michael and Sharon allege on appeal that the circuit court should have granted their motions to suppress. After a careful review of the records, we affirm in part, reverse in part, and vacate and remand in part for further consideration consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

On May 1, 2004, Sharon was stopped at a vehicle safety checkpoint by Spencer County Deputy Sheriff Russell Cranmer and

Kentucky State Police Trooper Mitch Harris. According to Deputy Cranmer's testimony, he noticed that the vehicle's tags had expired so he informed Trooper Harris of this. Trooper Harris responded by stating that he smelled marijuana emanating from the vehicle. Deputy Cranmer then testified that Trooper Harris pulled Sharon's vehicle over while Deputy Cranmer continued to check other vehicles.

Trooper Harris attested that on the night in question, he told Sharon that he smelled marijuana and he asked her if she had smoked anything that day. Sharon responded by telling Trooper Harris that she had smoked earlier. After directing Sharon to pull her vehicle to the side of the road and ordering her to exit the vehicle, Trooper Harris conducted three field sobriety tests on Sharon. Trooper Harris testified that after conducting the tests, he believed that Sharon was under the influence of intoxicants.

According to Deputy Cranmer, when Trooper Harris began to walk Sharon back to his cruiser, Deputy Cranmer approached them, inquired whether he could ask Sharon some questions, Mirandized[1] her, and proceeded to ask questions. The reason Deputy Cranmer wanted to question Sharon was because, according to his testimony, he knew her and he had been working with informants who had alleged that there was marijuana growing at the house that she shared with her brother, Michael. Deputy Cranmer testified that after reading Sharon her *Miranda* rights,

[1] *See Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed. 2d 694 (1966).

she gave him permission to ask her some questions. He attested that he informed Sharon that he had been told there was marijuana growing in her house, and she responded that all the plants had died, with the exception of two or three plants. Deputy Cranmer asked if he could look inside her house and she denied his request, explaining that she could not give consent to search because her brother also lived there. Regardless, because Trooper Harris placed Sharon under arrest for driving under the influence, Deputy Cranmer testified that he used the information to obtain a search warrant of the house.

Unfortunately, the encounter between Sharon and the officers was not video-recorded from a police cruiser until Deputy Cranmer began the *Miranda* process with her. Thus, the initial conversation between Sharon and Trooper Harris was not recorded. However, we note that *immediately* after being Mirandized, Sharon asked the officers why they thought she had marijuana growing at her house, and one of the officers responded she had just told them she did. Thus, the conversation to which the officer was referring, *i.e.*, that there were multiple dead marijuana plants at Sharon's house, occurred before the tape recording began and before Sharon was Mirandized. Furthermore, one of the officers reminded Sharon that she had just told them that she had smoked a joint and driven her daughter somewhere, which also occurred before her *Miranda* rights were read to her.

A review of the videotape reveals that at least one of the officers repeatedly told Sharon during the stop that she was not under arrest. Regardless, Trooper Harris testified that at the time he pulled Sharon over and asked her to get out of her vehicle, she was not free to leave because she had admitted to smoking marijuana at that point, and Trooper Harris was preparing to conduct field sobriety tests. After the field sobriety tests were concluded, and when Deputy Cranmer approached Trooper Harris and Sharon to ask her questions, Trooper Harris was preparing to place Sharon under arrest. Thus, she was not free to leave.[2]

Based on the information obtained during Sharon's traffic stop, a warrant to search the house that she shared with her brother, Michael, was obtained. During that search, items were seized that formed the bases for the charges against Sharon and Michael.

Sharon and Michael moved to suppress the evidence that was obtained during the search of the house, arguing that the search warrant was based on statements unconstitutionally obtained from Sharon. At the close of Sharon and Michael's joint suppression hearing, the circuit court made the following findings of fact: Sharon was stopped at a routine safety check; the officers saw that she had expired tags; the trooper smelled marijuana, which is why she was pulled over (and the circuit court opined that it believed the smell of marijuana was enough

[2] Apparently, Trooper Harris never read Sharon her *Miranda* rights.

to form a basis for asking Sharon questions); the officers must have asked questions prior to what was shown on the tape, but it does not appear that that was an "interrogation" situation; Deputy Cranmer stated that he had been told there were marijuana plants, and it was clear that there had been a discussion about that before the recording began, but whether to believe the trooper and the deputy's version of events was a credibility decision for the finder of fact to make. Thus, the circuit court stated that it found no reason to suppress the evidence.

Ultimately, both Sharon and Michael entered guilty pleas to the charges against them, conditioned on their right to appeal the circuit court's denial of their motions to suppress. They were both sentenced to serve a total of five years' imprisonment, and those sentences were probated.

They now appeal the circuit court's denial of their motions to suppress. Specifically, Sharon contends that: (1) the circuit court erred in failing to suppress the evidence that was seized based upon her statements made to officers during her un-Mirandized custodial interrogation, in violation of her Fifth and Fourteenth Amendment rights under the United States Constitution, and her Section Eleven rights under the Kentucky Constitution; and (2) the circuit court erred in failing to enter written findings of fact regarding the evidence presented at the suppression hearing, in violation of Ky. R. Crim. P. (RCr) 9.78. Michael argues that: (1) the statements made by his co-defendant, Sharon, were obtained unlawfully; and (2) the

evidence obtained while executing the search warrant should be suppressed, because the warrant was based on wrongfully obtained statements made by Sharon.

II. STANDARD OF REVIEW

> If the trial court's findings of fact are supported by substantial evidence, then they are conclusive. We conduct *de novo* review of the trial court's application of the law to the facts. 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.

Hallum v. Commonwealth, 219 S.W.3d 216, 220 (Ky. App. 2007) (internal quotation marks and citations omitted).

III. ANALYSIS

We first note that neither Sharon nor Michael contends that there was anything unlawful about the safety checkpoint or the initial stop of Sharon's car at the checkpoint, before Trooper Harris asked Sharon any questions about smoking that day. Therefore, any challenge that Sharon and/or Michael may have made to the initial stop at the safety checkpoint is deemed waived. *See Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 815 (Ky. 2004).

A. CLAIM THAT EVIDENCE SEIZED AT HOUSE SHOULD HAVE BEEN SUPPRESSED

Both Sharon and Michael allege, in essence, that Sharon's statements to the officers about having marijuana plants at the house were obtained in violation of her right against self-incrimination. Thus, both assert that the evidence

seized during the search of the house, pursuant to the search warrant that was obtained based on Sharon's wrongfully obtained statements, should have been suppressed as "fruit of the poisonous tree." On the other hand, the Commonwealth contends that Sharon "voluntarily answered the [deputy's] question regarding the marijuana plants," so that the failure to Mirandize her prior to questioning her does not require the exclusion of the evidence seized during execution of the search warrant. Therefore, we will address this claim, which is brought by both Sharon and Michael, first.

In determining whether Sharon's *Miranda* rights were violated, we must first determine whether she "was subject[ed] to a custodial interrogation at the time [s]he claims [s]he was denied any of [her] *Miranda* rights." *Jackson v. Commonwealth*, 187 S.W.3d 300, 305 (Ky. 2006). "The term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 1689-90, 64 L. Ed. 2d 297 (1980). An "incriminating response" is "any response -- whether inculpatory or exculpatory -- that the prosecution may seek to introduce at trial." *Id.* at n.5 (emphasis removed).

In the present case, the Commonwealth has acknowledged that Sharon was in custody at the time she was asked about the

marijuana plants growing at her house, as Trooper Harris testified during the suppression hearing that Sharon was not free to leave from the time that he had her step out of her car. As for the issue of whether Sharon was being interrogated at the time that the officer asked her about the plants, a review of the videotape from the police cruiser reveals that, based on the discussion between Deputy Cranmer and Sharon, it is apparent that Deputy Cranmer asked Sharon questions about the marijuana plants growing at her house before she was Mirandized. Additionally, in its appellate brief, the Commonwealth admits that Deputy Cranmer asked Sharon questions about the marijuana at her house before she was read her *Miranda* rights. Thus, Sharon was subjected to a custodial interrogation, and the circuit court's finding to the contrary was in error.

The Commonwealth nevertheless argues that Sharon voluntarily answered Deputy Cranmer's questions before she was Mirandized, thus rendering her answers uncoerced, and the marijuana and other evidence seized at her house should not be excluded. The Kentucky Supreme Court has stated:

> A statement is not "compelled" within the meaning of the Fifth Amendment if an individual voluntarily, knowingly and intelligently waives [her] constitutional privilege. . . . The inquiry whether a waiver is coerced has two distinct dimensions.
>
> First the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have

> been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it.

Mills v. Commonwealth, 996 S.W.2d 473, 481-82 (Ky. 1999) (internal quotation marks and citations omitted). Both dimensions must be met for waiver. Consequently, the trial court had to review the totality of the circumstances surrounding the interrogation pursuant to *Mills*. *Id*.

After obtaining these answers from Sharon, she was read her *Miranda* rights, then she was questioned again about the marijuana plants at her house, and she again answered that she had multiple plants that had died at her house.

In *Missouri v. Seibert*, 542 U.S. 600, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004), the United States Supreme Court, in a plurality opinion, held that *Miranda* warnings given in the middle of an interrogation, after the defendant provided an unwarned confession, were ineffective, so that the defendant's confession, which was repeated after the *Miranda* rights were read, could not be used against defendant during trial. *Seibert*, 542 U.S. at 605, 617. This police tactic is referred to as the "question-first" technique. However, because *Seibert* was a plurality opinion, the Kentucky Supreme Court "has held that we need only be confined to the position taken by those Members who concurred in the judgments on the narrowest grounds." *Jackson*, 187 S.W.3d at 308 (internal quotation marks omitted). In *Jackson*, the Kentucky Supreme Court further noted that, regarding *Seibert*, "[w]e have determined that the

narrowest holding, rendered by Justice Kennedy, precludes use of the ['question-first'] technique only where police deliberately employ the technique to circumvent the suspect's *Miranda* rights. We further held that such a determination cannot be made absent an evidentiary hearing addressing the specific issue." *Id.* at 309 (internal quotation marks and citation omitted).

In the present case, the evidentiary hearing that was held did not address the issue of whether the officers deliberately employed the "question-first" technique to circumvent Sharon's *Miranda* rights. Therefore, under *Jackson*, we are compelled to vacate and remand for an evidentiary hearing on that issue. Furthermore, we vacate and remand regarding whether the factors in *Mills* were met, particularly considering that the circuit court erred in finding that Sharon was not subjected to a custodial interrogation when the officers asked her questions about the plants growing at her house.[3]

B. SHARON'S CLAIM THAT CIRCUIT COURT SHOULD HAVE ENTERED WRITTEN FINDINGS OF FACT

Sharon next argues that the circuit court erred in failing to enter written findings of fact regarding the evidence presented at the suppression hearing, in violation of RCr 9.78. That rule provides as follows:

> If at any time before trial a defendant moves to suppress, or during trial makes

[3] We acknowledge the United States Supreme Court has held that "[a] subsequent administration of *Miranda* warnings to a suspect who has given a *voluntary* but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement." *Oregon v. Elstad*, 470 U.S. 298, 314, 105 S. Ct. 1285, 1296, 84 L. Ed. 2d 222 (1985) (emphasis added). However, before a determination of voluntariness can be made, the trial court must first consider the factors in *Mills* and *Jackson*.

> timely objection to the admission of evidence consisting of (a) a confession or other incriminating statements alleged to have been made by the defendant to police authorities, (b) the fruits of a search, or (c) witness identification, 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 the motion or objection and necessary to support the ruling. If supported by substantial evidence the factual findings of the trial court shall be conclusive.

RCr 9.78.

In the present case, the circuit court entered oral findings of fact at the conclusion of the suppression hearing and prior to denying Sharon's motion to suppress. Contrary to Sharon's assertion, RCr 9.78 does not require the circuit court to enter *written* findings of fact. Rather, the rule merely requires the court to enter its factual findings into the record, which the court did in this case, albeit orally. Therefore, this claim is without merit.

C. MICHAEL'S CLAIM THAT THE EVIDENCE SEIZED FROM HIS HOUSE SHOULD HAVE BEEN SUPPRESSED IN HIS CASE

Finally, Michael claims that the evidence seized should have been suppressed as "fruit of the poisonous tree." However, the resolution of this issue depends greatly on whether Sharon's statements were unconstitutionally obtained under the standards of *Jackson* and *Mills*. Thus, we cannot resolve this issue because the circuit court must first hold another

evidentiary hearing and enter additional findings consistent with this opinion.

D. CONCLUSION

The Spencer Circuit Court's judgment denying Sharon's motion to suppress is affirmed in part, to the extent that the court's findings of fact did not need to be written. Additionally, the Spencer Circuit Court's judgments denying Michael and Sharon's motions to suppress are reversed in part, concerning the court's determination that Sharon was not subjected to a custodial interrogation at the time that she made her statements. Further, the circuit court's judgments in these cases are vacated and remanded in part, for another evidentiary hearing and further findings consistent with this opinion.

ALL CONCUR.

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