

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002087-MR

RODNEY McDANIEL, JR.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 04-CR-01064-002

COMMONWEALTH OF KENTUCKY

APPELLEE

AND:

NO. 2006-CA-002088-MR

ANDREA SHAREE STOKES

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 04-CR-01064-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: THOMPSON AND WINE, JUDGES; HENRY,¹ SENIOR JUDGE.

WINE, JUDGE: Rodney McDaniel, Jr., and Andrea Sharee Stokes appeal from an order of the Fayette Circuit Court again denying their motions to suppress evidence following a prior remand from this Court. McDaniel and Stokes argue that the trial court clearly erred by finding that exigent circumstances justified a warrantless search of their apartment, that the cocaine was in plain view, and that Stokes voluntarily consented to a search of the bedroom. The trial court's findings on remand are sufficient to support its conclusion that the warrantless search was proper. Furthermore, the trial court's other findings that the cocaine was in plain view and that Stokes consented to the search of the bedroom were supported by substantial evidence. Hence, we affirm.

The relevant facts of this action were set forth in this Court's prior opinion as follows:

Officers of the Lexington Police Department were dispatched in the early morning hours to an apartment building where a possible domestic disturbance was underway. Officer Joshua Masterson arrived first. He could hear a man yelling and a woman crying in an upstairs apartment. Because of the possible volatile situation and his lack of experience, Officer Masterson did not approach the apartment, awaiting Officer William Richardson's arrival two to three minutes later.

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

When Officer Richardson arrived, he and Officer Masterson knocked at the apartment door and announced their identity. The sound of argument inside the apartment ceased; and the apartment became quiet, except for the sound of a woman whimpering. Officer Masterson testified that he and Officer Richardson knocked at the door for five to six minutes when they heard what sounded like a firearm being prepared for use. Unsure of the gravity of the situation, Officers Masterson and Richardson retreated from the door of the apartment and interviewed a neighbor to gather more information. The neighbor told the officers that a fight had been going on for a couple of hours and that someone in the apartment had been "bounced around the walls." Approximately five minutes after the officers retreated, Sergeant William Richmond arrived. Sergeant Richmond talked to the neighbor for fifteen to twenty minutes before he and Officer Masterson returned to the door of the apartment.

Sergeant Richmond also heard a woman inside the apartment whimpering. He then knocked on the door for five to ten minutes more before a female, Stokes, finally opened it. Stokes appeared to be shaken and upset but told the officers that she was alone in the apartment and did not know why the police had been called. Sergeant Richmond asked Stokes to step outside the apartment and into the hallway. He said that an officer had heard a weapon being prepared for use inside the apartment. While he was in the hallway with Stokes, Richmond noticed the silhouette of a man in the rear of the dimly lit apartment. Stokes then changed her story and admitted that her boyfriend, McDaniel, was also there. Sergeant Richmond then ordered McDaniel to come out and show his hands. McDaniel hesitated but finally came as far as the living room where Sergeant Richmond ordered him to lie on the floor. Sergeant Richmond and Officer Masterson then entered the apartment, handcuffed McDaniel, and patted him down for weapons. Sergeant Richmond informed the uncooperative and belligerent McDaniel that he was not under arrest but that they were going to keep him handcuffed until they could satisfy themselves that the apartment was safe. When they entered the apartment, the officers smelled marijuana smoke.

After Sergeant Richmond and Officer Masterson entered the apartment, Officer Jerry Curtsinger, who had been stationed at the rear of the apartment building to foil an escape attempt, also entered. As Officer Curtsinger glanced around the living room for any possible weapons, he noticed a small plastic baggie containing a white powder lying in a small trashcan. Based on their experience and training, the officers believed the white powder was cocaine.

At that point, Sergeant Richmond and Officer Curtsinger went out into the hall to speak to Stokes. The officers informed her of her rights and told her that they had smelled marijuana in the apartment. They then asked her if there were any weapons or drugs in the apartment. Stokes admitted to the presence of marijuana, and she led the officers to the bedroom where she showed them some marijuana joints in an ashtray. The officers then asked Stokes for consent to search the remainder of the apartment, but she declined. Stokes was then arrested for possession of marijuana.

As Stokes was being led from the apartment, McDaniel stated that he was responsible for any illegal substances in the apartment but declined to consent to a search of the entire apartment. McDaniel was then arrested and removed from the apartment. Officer Masterson stayed at the apartment to secure it while Sergeant Richmond and Officer Curtsinger went for a search warrant. When they returned with the search warrant, they searched the apartment. That search yielded the baggie with the white powder, as well as a firearm and ammunition in a closet.

McDaniel and Stokes were indicted for trafficking in a controlled substance in the first degree while in possession of a firearm, possession of drug paraphernalia, and possession of marijuana. Each filed a suppression motion, arguing that the officers' initial entry into the apartment was an unconstitutional invasion of their home. The trial court denied suppression following an evidentiary hearing, finding that the warrantless entry was justified under the exigent circumstances exception.

McDaniel later entered a conditional guilty plea to first-degree trafficking in a controlled substance and possession of drug paraphernalia, reserving the right to appeal the trial court's denial of his suppression motion. He was ultimately sentenced to seven years' incarceration, but that sentence was probated for five years. After the denial of her motion to suppress, Stokes entered a conditional guilty plea to first-degree possession of a controlled substance, possession of drug paraphernalia, and possession of marijuana, reserving the right to appeal the trial court's denial of her motion to suppress. Stokes was ultimately sentenced to one year of imprisonment, probated for five years.

McDaniel and Stokes separately appealed the denial of their motions to suppress, and their appeals were consolidated before this Court. In its consolidated review, this Court concluded that the trial court failed to adequately address the effect of the thirty-minute time lapse from the time the officers arrived until the time they conducted the warrantless search of the apartment. The Court held that “[a] determination of this time-lapse issue is critical because it appears to be the essence of exigent circumstances that there was the lack of time to obtain a warrant without thwarting the arrest or making it more dangerous. Where time was adequate, failure to obtain a warrant should not be excused.” *Rodney McDaniel, Jr. v. Commonwealth*, Nos. 2005-CA-001394-MR & 2005-CA-001395-MR (Not-to-be-Published opinion rendered May 26, 2006), Slip Op. at 9 (internal quotations marks omitted). This Court remanded the matter “to allow the trial court to make specific findings on the effect, if any, of the time lapse between the officers’ arrival on the scene and their entry into the apartment on the existence of exigent circumstances.”

On remand, the trial court made additional factual findings in accord with this Court's directions. The court found that "the fact the officers arrived at the scene thirty minutes before they entered the apartment does not negate the existence of the exigency in this case." After noting its previous findings concerning the evidence of a domestic dispute in the apartment and the fact that Officer Masterson heard a weapon being prepared inside the apartment, the trial court concluded that:

[T]he officers fear for their and Stokes' safety occurred when Stokes opened the door and the officers saw the man in the back of the dim apartment in which they had heard a gun being prepared for use twenty minutes before. At the moment McDaniel was slow to cooperate, the officers decided that there was a sufficient chance of danger to necessitate their entry into the apartment. The officers' failure to seek a warrant or enter the apartment earlier does not negate the fact that when the door was opened the officers and Stokes were in a potentially hostile and dangerous situation and the officers acted reasonably under the circumstances, as they existed at the time of entry. These circumstances included the accumulation of evidence obtained over that 30 minute time period as well as the new circumstances presented to them once Stokes opened the door. The officers were then in reasonable fear that they must enter and subdue McDaniel in order to protect Stokes and themselves from possible harm. Therefore, the thirty-minute time lapse had no effect on the exigency of the circumstances and the officers could constitutionally enter the apartment under the exigent circumstances exception to the warrant requirement of the 4th amendment

Stokes and McDaniel again appeal from the denial of their motions to suppress. Since their separate appeals still involve common issues of law and fact, we have again elected to resolve both appeals in one opinion. RCr 9.78 sets out the procedure for conducting suppression hearings and establishes the standard of appellate

review of the determination of the trial court. Our standard of review of a trial court's decision on a suppression motion following a hearing is twofold: First, the factual findings of the court are conclusive if they are supported by substantial evidence; and second, this Court conducts a *de novo* review to determine whether the trial court's decision is correct as a matter of law. *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky. App. 2002).

As noted in this Court's prior opinion, all warrantless searches are deemed unreasonable unless the Commonwealth meets its burden of showing that the search falls within a recognized exception to the warrant requirement. *Gillum v. Commonwealth*, 925 S.W.2d 189, 190 (Ky.App. 1995). But if a trial court finds that exigent circumstances existed at the time of the warrantless entry into a person's dwelling, the entry does not violate the Fourth Amendment's protection from warrantless searches and seizures. *Posey v. Commonwealth*, 185 S.W.3d 170, 173 (Ky. 2006). In this case, the Commonwealth relies on the safety exigency, which permits officers to make a warrantless entry into a residence "when they reasonably believe that a person within is in need of immediate aid," or where there is an immediate need to protect or preserve life or prevent serious injury. *Mincey v. Arizona*, 437 U.S. 385, 392, 98 S. Ct. 2408, 2413, 57 L. Ed. 2d 290 (1978). *See also Causey v. City of Bay City*, 442 F.3d 524, 529 (6th Cir. 2006).

This Court specifically directed the trial court to address the effect of the thirty-minute delay on the existence of exigent circumstances justifying the warrantless

search of the apartment. Based on the testimony of the police officers, the trial court found that exigent circumstances were present after Stokes opened the door to the apartment. In reaching this conclusion, the trial court implicitly found the officers' testimony regarding the situation to be more credible than the testimony of Stokes and McDaniel. The trial court's evaluation of the credibility of the witnesses was supported by substantial evidence and is thus conclusive. *Henson v. Commonwealth*, 20 S.W.3d 466, 469 (Ky. 1999).

Nevertheless, Stokes and McDaniel argue that the officers' testimony was not sufficient to support a finding of exigent circumstances justifying a warrantless entry. In particular, they contend that there was no evidence to support a finding that the officers lacked adequate time to obtain a warrant. We disagree. For the thirty minutes before Stokes opened the door, the officers had heard sounds of an argument and a woman whimpering; had information from a neighbor that the argument had been ongoing for a couple of hours and that it sounded like someone was being thrown about the apartment; and the officers had heard what they believed to be the sound of a weapon being readied for use.

As McDaniel correctly points out, the thirty-minute delay tends to undermine the argument that an immediate exigency existed. But the lapse-of-time issue is significant only because the reasonableness of the officers' actions must be judged at the point they made the warrantless entry. When Stokes opened the door, the officers acquired new information which heightened the urgency of the situation. They noted

Stokes' distressed appearance and her clearly false statement that no one else was in the apartment. They also observed McDaniel standing in the darkened back bedroom. McDaniel refused to come into the light or show his hands.

The officers were entitled to consider these new circumstances along with the information they had acquired over the previous thirty minutes. Based upon the information available to the officers at the time, we agree with the trial court that they reasonably believed that an immediate entry was necessary to protect themselves and others. Consequently, their warrantless entry into the apartment was justified.

Stokes and McDaniel next argue that the officers' seizure of the cocaine was improper. As noted above, Officer Curtsinger saw a small plastic baggie containing a white powder sitting in a small trash can. In its initial opinion, the trial court found that the plastic baggie was in plain view and thus was properly seized. In the prior appeal, this Court declined to consider whether the cocaine was in plain view because there was an issue about the officers' entry into the apartment. Since the trial court found that the officers' entry was lawful, we may now consider the trial court's findings that the items were properly seized.

The plain view doctrine allows law enforcement officers to seize evidence without a warrant when the initial intrusion was lawful, the discovery of the evidence is inadvertent, and the incriminating nature of the evidence is immediately apparent. *Commonwealth v. Hatcher*, 199 S.W.3d 124, 126 (Ky. 2006). In this case, the officers were lawfully in the apartment. Furthermore, the trial court found that the plastic baggie

was sitting in plain view in the trash can. The trash can was sitting on the floor close to where McDaniel was being held, and the baggie was lying on top of the trash in the can. Officer Curtsinger also testified that, based upon his experience, he believed the white powder in the baggie was cocaine. These facts were sufficient to support the trial court's conclusion that the cocaine was in plain view.

Finally, McDaniel and Stokes contend that they were unlawfully detained and, therefore, any statements which they made or consent given should be suppressed. The trial court found otherwise, and we agree. The police clearly had probable cause to detain McDaniel and Stokes. The officers had a reasonable basis to believe that McDaniel had engaged in domestic violence and may be armed. When the officers entered the apartment, they smelled burned marijuana and saw cocaine residue in plain view. Under these circumstances, the officers were justified in detaining both McDaniel and Stokes.

McDaniel and Stokes further argue that the detention rendered any statements or consent which they gave to be involuntary. The question of voluntariness turns on a careful scrutiny of all the surrounding circumstances in a specific case. *Cook v. Commonwealth*, 826 S.W.2d 329, 331 (Ky. 1992). "Consent to a search must be free, voluntary, and without coercion of any type." *Middleton v. Commonwealth*, 502 S.W.2d 517, 518 (Ky. 1973). McDaniel and Stokes were advised of their *Miranda* rights before they made the incriminating statements. Furthermore, Stokes consented to the search of the bedroom where the marijuana was found. In fact, Stokes led Officer Curtsinger to the

marijuana in the bedroom. Given these facts, the trial court did not clearly err in finding that Stokes gave a voluntary and uncoerced consent to the search.

Accordingly, the order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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