

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000465-MR

WILLARD GROSS, II

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 06-CR-00860

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: STUMBO AND TAYLOR, JUDGES; HENRY,¹ SENIOR JUDGE.

TAYLOR, JUDGE: Willard Gross, II, brings this appeal from a February 14, 2007, judgment of the Fayette Circuit Court upon a conditional plea of guilty to the offense of first-degree possession of a controlled substance. We affirm.

Gross was indicted by the Fayette Grand Jury upon one count of possession of a controlled substance in the first degree. Thereafter, Gross filed a motion to suppress

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 Kentucky Revised Statutes 21.580.

evidence alleging that the Lexington police violated his constitutional right against unreasonable search and seizure.

At the suppression hearing, Sergeant Chris Schnelle testified for the Commonwealth. Sergeant Schnelle recounted that he was called to the Red Roof Inn in Lexington, Kentucky, to investigate a complaint of drug activity in Room 239. When Sergeant Schnelle arrived, a woman (Jackie Gross)² had been arrested for possession of drug paraphernalia and removed from the hotel room. A subsequent search of Room 239 produced no illegal contraband. Sergeant Schnelle stated that Jackie informed police she had stayed overnight in Room 239 with a white male who had long hair, drove a red automobile, and who would be returning to the room with crack cocaine. Thereafter, Sergeant Schnelle and other police officers surveilled Room 239 for about thirty to forty-five minutes when a red car arrived. Gross then exited from the car. Sergeant Schnelle testified that he approached Gross and asked Gross why he was there. The Sergeant further testified that Gross replied he was staying in Room 239. Sergeant Schnelle stated that he then requested permission to search Gross's pockets; Gross gave consent. The Sergeant testified that upon searching Gross's pockets he discovered a rock of crack cocaine.

Gross testified that he rented the hotel room solely in his name and had only given Jackie permission to stay there. He stated that Jackie had been using illegal drugs and that he took the crack cocaine to prevent Jackie from using it. Gross specifically testified that he never gave police consent to search his person or his room.

Following an evidentiary hearing, the circuit court denied Gross's motion to suppress evidence. Consequently, Gross entered a conditional plea of guilty to first-

² Jackie Gross is not related to Willard Gross, II.

degree possession of a controlled substance. Ky. R. Crim. P. (RCr) 8.09. By judgment entered February 14, 2007, Gross was sentenced to one-year imprisonment probated for a period of three years. This appeal follows.

Gross argues that the circuit court erred by denying his motion to suppress evidence. Upon review of a denial of a motion to suppress evidence, the circuit court's findings of fact are conclusive if supported by substantial evidence of a probative value and issues of law are reviewed *de novo*. RCr 9.78; *Talbott v. Com.*, 968 S.W.2d 76 (Ky. 1998).

Gross specifically contends that the search of his person and of his hotel room violated his constitutional right against unreasonable search and seizure. *See* U.S. Const. amend. IV; Ky. Const. section 10. We shall initially address Gross's argument that his person was illegally seized and searched and then address his argument concerning the hotel room.

In the case at hand, Sergeant Schnelle testified that Jackie informed the police that a white man with long hair would be returning to the room with crack cocaine. The Sergeant particularly stated that Jackie said the man would be driving a red car. The record reveals that Gross later arrived at the hotel room in a red car. Thereupon, Sergeant Schnelle approached Gross and questioned him. Gross admitted to staying in Room 239. At this point, the Sergeant testified that Gross consented to a search of his pockets, and Gross testified that he did not.

Considering the totality of the circumstances, we believe that the police possessed reasonable suspicion of criminal activity necessary to justify the initial investigatory stop of Gross, especially considering Jackie's detailed tip that accurately

predicted Gross's arrival in the red car and that Jackie was previously found in possession of drug paraphernalia while at the hotel room. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *Williams v. Com.*, 147 S.W.3d 1 (Ky. 2004). Thus, we conclude that the initial investigatory stop of Gross was proper.

Gross also challenges the subsequent search of Gross's pockets and seizure of crack cocaine therefrom. The record reveals that Sergeant Schnelle testified that Gross consented to the search. While Gross testified to the contrary, the credibility of a witness's testimony is within the sole province of the fact-finder. *See Cole v. Gilvin*, 59 S.W.3d 468 (Ky.App. 2001). As the fact-finder, the circuit court obviously found Sergeant Schnelle's version of events more trustworthy. Moreover, Sergeant Schnelle's testimony that Gross consented to the search constitutes substantial evidence of a probative value. Consequently, we hold that the circuit court did not err by denying Gross's motion to suppress evidence seized from his person.

Gross also argues that the circuit court erred by denying his motion to suppress related to the search of his hotel room. Under RCr 9.78, a defendant may file a motion seeking to suppress “the fruits of a search.” The record clearly reflects that the police seized no contraband from the hotel room. As there was no evidence seized from the search of the hotel room, we believe the circuit court properly denied Gross's motion to suppress related to the hotel room.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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