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Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002384-MR

DAVID SMITH — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 97-CR-00805

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE, HUDDLESTON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from an order denying appellant's motion to suppress pursuant to a search of appellant's truck, after which appellant entered a conditional plea of guilty to trafficking in marijuana over five pounds. Appellant argues that the warrantless search of his car was unconstitutional, as it was conducted without his voluntary consent. After reviewing the record and applicable law, we affirm.

On January 29, 1997, appellant, David Smith, was pulled over for speeding on I-65 in Warren County, Kentucky, by Trooper

Carl Estep, a member of the Drug Interdiction Team of the Kentucky State Police. Estep had clocked appellant driving 74 mph in a 65 mph zone. Estep approached appellant's pickup truck and requested his driver's license. Appellant gave Estep his license, registration, and insurance card.

Estep then went back to the patrol car, conducted a check, and came back to appellant's truck to return his license. Although everything checked out fine, Estep asked appellant to step out of the vehicle and come around to the back of the truck. By that time, another officer, Trooper Cantor, had arrived on the scene. Estep asked appellant what he had in the back of the truck. Appellant then pulled the tailgate down, showed the officer some clothing, tools, and personal effects and closed the tailgate. Estep told appellant to open the tailgate again. Estep then went to get the drug sniffing dog out of his police car. It is disputed whether or not the dog alerted. Estep took the dog back to the car, then returned and lifted a corner of the vinyl cover off the back of the truck. Estep then walked to the cab of the truck, reached in, and pulled out appellant’s tobacco pouch, in which he found two cigarette butts that he believed were roaches. Estep then returned to the back of the truck, pulled the vinyl cover forward and found two buckets containing a total of ten pounds of marijuana.

On December 17, 1998, appellant was indicted by the Warren County Grand Jury for trafficking in marijuana, five pounds or more. A hearing on appellant's motion to suppress the evidence obtained from the search of his truck was held on

February 3, 1998. The court denied the motion on May 29, 1998. On July 6, 1998, appellant entered a conditional guilty plea to trafficking in marijuana, five pounds or more, reserving the right to appeal the court's order denying his motion to suppress evidence. On September 21, 1998, the court entered its final judgment, sentencing appellant to six years' imprisonment. This appeal followed.

Appellant argues on appeal that the trial court erred in denying his motion to suppress, as the warrantless search of his truck was conducted without his voluntary consent. Warrantless searches are unreasonable unless it can be shown that they fall within one of the exceptions to the rule that a search must rest upon a valid warrant. Clark v. Commonwealth, Ky. App., 868 S.W.2d 101 (1993). Consent is one of the exceptions to the requirement for a warrant. Howard v. Commonwealth, Ky. App., 558 S.W.2d 643 (1977). Other exceptions include: (1) the plain view exception; (2) the inventory exception; (3) the automobile exception; and (4) the search incident to arrest exception. Clark, 868 S.W.2d at 105-107.

At the suppression hearing, Trooper Estep admitted that he had no probable cause to search appellant's truck, nor any articulable suspicion that appellant was engaged in any wrongdoing. Therefore, the Commonwealth concedes that the only exception to the warrantless search rule that would apply in this case is consent. The Commonwealth argues that appellant's act of opening the tailgate the first time provided consent to search the vehicle, and such consent, once given, could not be revoked.

Appellant argues that he did not consent to a search of his truck, and if this Court finds that he did, that it was not voluntary. Voluntariness of consent is to be determined from a totality of the circumstances. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). The Commonwealth bears the burden of proving, by a preponderance of the evidence, that the defendant voluntarily consented to the search. Cook v. Commonwealth, Ky., 826 S.W.2d 329 (1992). We first note that appellant did not sign, nor was he offered, a written consent form, although such forms appear to have been available to the troopers. Although consent does not need to be in writing, a written waiver has been held to be a strong indicator that consent was voluntarily given. 8 Leslie W. Abramson, Ky. Criminal Practice and Procedure, § 18.193 (3rd ed., 1997); see also, Kennedy v. Commonwealth, Ky., 544 S.W.2d 219 (1976); Johnson v. Commonwealth, Ky., 509 S.W.2d 274 (1974). Furthermore, appellant's traffic stop and alleged consent were not videotaped by police videocamera.

Appellant does admit, however, that he voluntarily put the tailgate of his truck down and showed Officer Estep some tools and clothing in response to Estep's initial question as to what was in the truck. Appellant argues that, in doing so, he only consented to a search of the items which he showed the officer, and the officer extended the search beyond the limited items appellant permitted him to see. A suspect can limit the scope of a search to which he consents. Florida v. Jimeno, 500 U.S. 248, 111 S. Ct. 1801, 114 L. Ed. 2d 297 (1991). Kentucky

case law concerning limiting the scope of a consent search is sparse. However, in United States v. Gant, 112 F.3d 239 (6th Cir. 1997), the Sixth Circuit engaged in an analysis of this issue. In Gant, the appellant argued that his consent to an officer's request to have a "look" in his bag limited the scope of the search to a visual inspection, not to opening closed containers within the bag. The Court stated:

> When law enforcement officers rely upon consent as the basis for a warrantless search, the scope of the consent given determines the permissible scope of the search. [Jimeno, 500 U.S. at 251-252, 111 S. Ct. at 1803-1804]. The standard for measuring the scope of the consent given is objective reasonableness--"what would the typical reasonable person have understood by the exchange between the officer and the suspect?" Id. at 251, 111 S. Ct. at 1803-04.

Gant, 112 F.3d at 242. Applying the above "objective reasonableness" test, the court held that a "a reasonable person would understand that a request by a police officer to 'look' in a bag seeks consent to search the bag for evidence of illegal activity," and therefore, the search of the closed containers in the bag did not exceed the scope of the appellant's consent. Id. The court further stated that an officer does not have to specifically use the word "search" when requesting permission to search, but that "any words, when viewed in context, that objectively communicate to a reasonable individual that the officer is requesting permission to [conduct a search] constitute a valid search request" for Fourth Amendment purposes. Id. at 242, quoting United States v. Rich, 992 F.2d 502 (5th Cir. 1993).

A trial court's findings of fact on a motion to suppress are conclusive if supported by substantial evidence. Diehl v. Commonwealth, Ky., 673 S.W.2d 711 (1984); RCr 9.78. We adjudge that Estep's asking appellant what was in the truck would communicate to a reasonable person that the officer is requesting permission to search the bed of the truck. We further believe that appellant's subsequent voluntary act of opening the tailgate of the truck provided the necessary consent for the officer to search. Accordingly, we believe the trial court correctly found that appellant voluntarily consented to the search of his truck.

We next address appellant's argument that his opening the tailgate the second time was in response to Estep's order to "open it back up." We agree that this act would not, in itself, have established voluntary consent to search the truck. The Commonwealth's burden of proof that consent was freely and voluntarily given "is not satisfied by showing a mere submission to a claim of lawful authority." Florida v. Royer, 460 U.S. 491, 497, 103 S. Ct. 1319, 1324, 75 L. Ed. 2d 229 (1983). However, this issue becomes irrelevant because as we have previously determined, appellant had already consented to the search by opening the tailgate the first time, and, the search having commenced, appellant's consent could not subsequently be revoked.

With regard to revocation of consent, appellant argues even if he had given limited consent, that limited consent was revoked when he closed the tailgate. The prevailing view on revocation of consent to search would support appellant's

position. This view was summarized by the Iowa Supreme Court in State v. Myer, 441 N.W.2d 762, 765 (Iowa 1989):

> In conducting any consent search, the authorities are limited by the terms of the consent. See [Schneckloth, 412 U.S. at 222, 93 S. Ct. at 2045] (the right of the officers to search is only coextensive with the particular search consented to). Consent may be withdrawn or limited at any time prior to the completion of the search. United States v. Milian-Rodriquez, 759 F.2d 1558, 1563 (11th Cir. [1985]), cert. denied, 474 U.S. 845, 106 S. Ct. 135, 88 L. Ed. 2d 112 (1985). However, a revocation of consent does not operate retroactively to render unreasonable that search conducted prior to the time of revocation. See Jones v. Berry, 722 F. 2d 443, 449 n. 9 (9th Cir. 1983), cert. denied, 466 U.S. 971, 104 S. Ct. 2343, 80 L. Ed. 2d 817 (1984); United States v. Black, 675 F.2d 129, 138 (7th Cir. 1982), cert. denied, 460 U.S. 1068, 103 S. Ct. 1520, 75 L. Ed. 2d 945 (1983); . . .

See, People v. Powell, 502 N.W.2d 353 (Mich. App. 1993).

There are numerous cases recognizing the right of a suspect to withdraw his consent once a search is in progress. See, United States v. Tillman, 963 F.2d 137 (6th Cir. 1992) (Suspect consented to search of his bag. As officer and DEA agent began to search his bags, suspect revoked his consent. The officer immediately closed the bags and instructed the agent to do so as well. Court noted that suspect's right to revoke consent to a search is a substantial one.); United States v. Ward, 576 F.2d 243 (9th Cir. 1978) (consent may be withdrawn anytime prior to completion of search); United States v. Seely, 570 F.2d 322 (10th Cir. 1978) (consent may be revoked); Mason v. Pulliam, 557 F.2d 426 (5th Cir. 1977) (when basis for search is consent, government limited by suspect's right to withdraw his

consent and reinvoke Fourth Amendment rights); Powell, 502 N.W.2d at 356 (relying on Jimeno, 500 U.S. 248, 111 S. Ct. 1801 to hold that if a suspect can limit the scope of the consent to search at the beginning, then it follows he should be permitted to limit the scope of the search after the search has begun.); Burton v. United States, 657 A.2d 741 (D.C. 1994) (Consent may be withdrawn any time prior to completion of search. An effective withdrawal of consent requires unequivocal conduct in the form of an act, statement, or combination of the two that is inconsistent with the consent to the search previously given.); Jiminez v. State, 643 So.2d 70 (Fla. Dist. Ct. App. 1994) (Suspect consented to pat-down search. Suspect's grabbing of officer's hand when officer removed cigarette pack from his pocket revoked consent to search, and search of pack which contained cocaine held to be illegal).

Having determined that appellant initially gave consent for Estep to search the bed of the truck, we also believe that appellant's closing of the tailgate was an attempt to revoke that consent. We believe that the prevailing view would consider appellant's closing of the tailgate a revocation of consent, rendering the subsequent search illegal. However, we are bound by the law in Kentucky which does not follow the prevailing view discussed above. Kentucky law states that consent, once given, cannot be revoked once a search has commenced. The controlling case on this issue is Smith v. Commonwealth, 197 Ky. 192, 246 S.W. 449, 451 (1923) in which the Court stated:

> In Bruner v. Commonwealth, 192 Ky. 386, 233 S.W. 795 [1921], we held that one who

> voluntarily agrees that his premises may be searched by a peace officer cannot thereafter complain that the search was made without a warrant. And manifestly, it would be but an amplification of the above principle to declare that, where one voluntarily consents to a search of his premises, vehicle, or other property by a peace officer without a search warrant, he will not, after such search has commenced, and while it is in progress, be permitted to withdraw such consent in order to prevent the discovery by the peace officer of evidence that might conduce to prove him guilty of the offense charged in the search warrant. (Emphasis added.)

We believe that Kentucky's position is in the minority. However, this Court is bound by stare decisis and is unable to grant the appellant the relief he requested. Only our Supreme Court can overrule precedent and grant David Smith the relief he requested.

For the foregoing reasons, the decision of the Warren Circuit Court is affirmed.

GUDGEL, CHIEF JUDGE, CONCURS IN RESULT ONLY.

HUDDLESTON, JUDGE, DISSENTS.

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