RENDERED: SEPTEMBER 27, 2002; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002614-MR

WILLIAM WRIGHT — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LEWIS G. PAISLEY, JUDGE
ACTION NO. 01-CR-00758

COMMONWEALTH OF KENTUCKY — APPELLEE

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

BEFORE: GUIDUGLI, HUDDLESTON AND KNOPF, JUDGES.

GUIDUGLI, JUDGE. William Lamonte Wright (hereinafter "Wright") has appealed from the Fayette Circuit Court's final judgment and sentence entered on November 19, 2001, and as amended on November 26, 2001. Wright entered a conditional guilty plea pursuant to RCr 8.09 to the charge of Possession of a Controlled Substance, First Degree, and received a one year sentence, which was probated for five years. Wright is appealing the circuit court's denial of his motion to suppress evidence obtained in a warrantless search. Having considered the parties' briefs, the record, and the applicable case law, we affirm.

On July 17, 2001, the grand jury handed down a five-count indictment against Wright, Andrea Fawn Wright (hereinafter "Fawn") and Elizabeth King stemming from a June 21, 2001, incident at Fawn's residence on East Fifth Street in Lexington, Kentucky. Wright was charged with one count of Possession of a Controlled Substance, First Degree, pursuant to KRS 218A.1415, for possessing cocaine. Wright entered a plea of not guilty as did his co-defendants, and he later moved for a suppression hearing on the grounds that the police performed an illegal warrantless search and seizure. His co-defendants joined in the motion. The two issues to be decided by the circuit court were whether the detective had the right to illuminate the side yard with his flashlight during his initial contact and whether the two defendants who were not occupants of the residence had standing to challenge the search and seizure.

The circuit court held a suppression hearing on August 29, 2001, at which time the Commonwealth presented testimony from Detective Jack Dawson (hereinafter "Det. Dawson"), Detective Shane Ensminger (hereinafter "Det. Ensminger"), and Detective Edward Hart, all of whom are narcotics detectives with the Lexington Police Department. As the facts of this case do not appear to be in dispute, we will briefly summarize the testimony as it pertains to Wright.

On the evening of June 21, 2001, Det. Ensminger received information from a confidential informant that Fawn was selling crack cocaine and running a crack house at her residence on East Fifth Street. He along with several other detectives

proceeded to her address to conduct a "knock and talk" investigation. Det. Dawson and another detective were the first to arrive. He stepped onto the front porch with the intention of knocking on the door. At that point, he heard the sound of several people in the fenced side yard and he moved to the side of the porch where there was an opening in the privacy fence permitting access to the side yard. He asked for Fawn, who identified herself. Det. Dawson then illuminated his flashlight and scanned the side yard to account for everyone. He did not identify himself as a police detective or request permission to enter the side yard or to illuminate it with the flashlight. He also noted that he would not have been able to see into the side yard without a flashlight. In a chair toward the back of the year, he saw Wright, Fawn's nephew, look at him, and noted that he had a dollar bill in his left hand folded longways. Wright attempted to hide the dollar bill, and Det. Dawson saw him shaking his hand to get something off of it. He then began grinding the ground with his foot and dropped the dollar bill. After observing these actions, Det. Dawson stepped into the side yard from the porch and approached Wright. After Wright complied with his order to move his foot, another person began grinding his foot at the same location. He ordered this second person to cease as well. When he arrived at their location in the yard, Det. Dawson saw white power on the ground and what appeared to be cocaine residue on the dollar bill. At that point, he arrested Wright and recovered the dollar bill and the substance appearing

to be cocaine. The rest of the events which took place that night are not relevant to this appeal.

The parties briefed the issues pursuant to the circuit court's direction. In its memorandum, the Commonwealth specifically did not contest the defendants' standing to assert a violation of their Fourth Amendment rights. At a subsequent status hearing on October 5, 2001, the circuit court denied the motion to suppress and made the following findings of fact on the record. The three defendants were at a social gathering when police came to the residence. The first detective to arrive[1] noticed people in the yard to the left behind a privacy fence. However, there was no privacy fence blocking his view from the front porch. He would have been able to see into the side yard but for the darkness. He used his flashlight to illuminate the yard. Relying upon Commonwealth v. Johnson, 777 S.W.2d 876 (1989), the circuit court found that the shining of the flashlight did not constitute an invasion of anyone's privacy. The circuit court found that the officers had a reasonable basis for the steps taken, and that there was no basis to suppress the evidence obtained. This ruling was memorialized by a written order entered October 9, 2001.

On October 19, 2001, the circuit court accepted Wright's conditional guilty plea with a recommended sentence of one year on Count 3 of the indictment. The circuit court entered a final judgment and sentence of probation on November 19, 2001,

[1]The circuit court misidentified Det. Dawson as Det. Ensminger, but this will not affect the validity of its findings.

as amended on November 26, 2001, sentencing him to one year, but probating the sentence for five years with several conditions. This appeal regarding the denial of the motion to suppress followed.

On appeal, Wright argues that the Fourth Amendment of the United States Constitution does not permit a police officer to shine a flashlight into a fenced yard, which he contends was not open to the public or open for public viewing. He attempts to distinguish Commonwealth v. Johnson, supra, from the facts of his case. He also argues that the requirements for a "plain view" seizure were not met as there was nothing immediately apparent in his activity that would lead the detective to believe contraband was in the dollar bill.

In response, the Commonwealth first argues that Wright did not have standing to assert that he had a legitimate expectation of privacy. Because this issue was specifically not contested by the Commonwealth below, the Commonwealth is precluded from raising this issue in its brief. The Commonwealth next argues that the use of the flashlight to illuminate a darkened area did not constitute a search, citing Commonwealth v. Johnson, supra, and the United States Supreme Court's decision in Texas v. Brown, 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983). The Commonwealth then argues that Wright did not preserve his position that the dollar bill he was holding was not immediately apparent as contraband. Having reviewed Wright's memorandum filed in support of the motion to suppress, we believe that the issue was properly preserved. Wright specifically

argued below that a dollar bill does not have an apparent incriminating character and would not support a "plain view" search. Lastly, the Commonwealth provided alternative arguments that the evidentiary value of the dollar bill in plain view was immediately apparent because of the detective's experience and Wright's actions, that exigent circumstances warranted the seizure, and that Wright abandoned the drugs and dollar bill, which were then lawfully recovered.

In reviewing a decision of the trial court on a motion to suppress following a hearing, we must first determine whether the findings of fact are supported by substantial evidence. If so, those findings are conclusive. RCr 9.78; Adcock v. Commonwealth, Ky., 967 S.W.2d 6, 8 (1998). We must then perform a *de novo* review of the factual findings to determine whether the trial court's decision is correct as a matter of law. Ornelas v. United States, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed. 2d 911 (1996); Stewart v. Commonwealth, Ky., 44 S.W.3d 376, 380 (2000).

We have examined the record, including the videotape of the suppression hearing, and have determined that the findings of fact as set forth by the circuit court on the record are clearly supported by the record. We note further that the facts did not appear to be in dispute. As the circuit court's findings of fact are supported by substantial evidence in the record, they shall be conclusive. Therefore, we shall now determine whether the circuit court's decision to deny the motion to suppress was correct through our *de novo* review.

The first issue we shall address is whether the detective's use of a flashlight to illuminate the side yard constituted an illegal search. In Texas v. Brown, 460 U.S. 730, 75 L.Ed.2d 502, 103 S.Ct. 1535 (1983), the United States Supreme Court addressed the issue of illumination, holding that:

> It is likewise beyond dispute that Maples' action in shining his flashlight to illuminate the interior of Brown's car trenched upon no right secured to the latter by the Fourth Amendment. . . . Numerous other courts have agreed that the use of artificial means to illuminate a darkened area simply does not constitute a search, and thus triggers no Fourth Amendment protection.

Id. at 739-40. Likewise, the 6th Circuit Court of Appeals has held that an examination of the appellant's hands using ultraviolet light did not constitute a search for Fourth Amendment purposes. United States v. Richardson, 388 F.2d 842 (6th Cir. 1968). In Rudolph v. Commonwealth, Ky., 474 S.W.2d 376, 377 (1971), the former Kentucky Court of Appeals held that an arresting officer at the time of the arrest "had a right to shine his flashlight into the appellant's automobile as a precaution for his own safety. This did not constitute a search of the automobile at that time."

The Supreme Court of Kentucky again addressed this issue in Commonwealth v. Johnson, Ky., 777 S.W.2d 876 (1989). Specifically, this case dealt with an officer's use of a flashlight to illuminate the interior of a motel room from a partially opened door and curtain. Relying upon the decisions in Texas v. Brown, supra, and United States v. Richardson, supra, the Court said that:

> [A] determination of whether or not contraband is in plain view should not depend on existing lighting conditions or the time of day. One seeking to maintain his privacy should reasonably expect that person disposed to look inside a motel room will not hesitate to enhance their visibility by use of a widely available devise such as a flashlight.

Johnson, 777 S.W.2d at 879.

In the present appeal, we hold that the detective's use of a flashlight through the open portion of the privacy fence did not constitute a search within the meaning of the Fourth Amendment. Although we agree that a residence naturally provides a higher degree of privacy than an automobile or motel room, in this situation the detective did not violate any constitutional protections. Det. Dawson properly walked on the porch to begin the "knock and talk" procedure. It was not until he heard voices in the side yard that he proceeded to the left side of the porch. He looked through an opening in the fence large enough for a person to walk through and used the flashlight the illuminate the yard, which had been darkened by the nighttime sky. Clearly, any member of the general public could have looked through the opening of the fence from the porch. We hold that the detective's use of the flashlight did not constitute a search and therefore did not violate any of Wright's rights under the Fourth Amendment of the United States Constitution or Section 10 of the Kentucky Constitution.

We shall next address whether the requirements of the "plain view" exception were met in this case. In Clark v. Commonwealth, Ky.App., 868 S.W.2d 101, 106 (1993), we set out the requirements of the "plain view" exception as follows:

> [T]he "plain view" exception validates searches and seizures when evidence is visible to the officer, provided the officer has not violated the constitution in getting to where he can view the evidence; the officer has lawful access to the object itself; and the object's incriminating character is immediately apparent. Hazel v. Commonwealth, Ky., 833 S.W.2d 831, 833 (1992).

Earlier, the Supreme Court of Kentucky had set out the three requirements for a plain view seizure: "prior justification for the officer's presence, inadvertence of discovery, and immediate apparentness that evidence has been found." Johnson, supra. The detectives' presence was clearly justified by the tip from the confidential informant and by prior complaints regarding activities at Fawn's residence.

The requirement at issue in this case is whether it was immediately apparent that evidence of an incriminating nature had been found. Wright argues that a dollar bill, as our nation's legal tender, is not immediately identifiable as contraband, and thus could not justify a "plain view" seizure. We disagree with Wrights's contention based upon Det. Dawson's testimony regarding his experience as a narcotics detective and Wright's reactions to the detective's presence. He testified that a dollar bill folded in the manner in which it was here is indicative of drug use or trafficking, and that Wright quickly hid the bill, shook it with his hand to remove a substance from it, and then proceeded to grind the substance into the ground. We believe that the detective's prior experience and Wright's actions turned a dollar bill into evidence of contraband, justifying its seizure, as well

as that of the recovered cocaine, as a "plain view" exception to the warrant requirement.

For the foregoing reasons, the judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Alicia A. Sneed
Lexington, KY

BRIEF FOR APPELLEE:

A. B. Chandler, III
Attorney General

Courtney J. Hightower
Assistant Attorney General
Frankfort, KY