

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001303-MR

STEVE GAFFNEY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 08-CR-00763

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON AND MOORE, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

CAPERTON, JUDGE: Steven D. Gaffney appeals the Fayette Circuit Court's denial of his motion to suppress the evidence obtained during a search of his motel

¹ Senior Judge David C. Buckingham, sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and the Kentucky Revised Statutes (KRS) 21.580.

room and bathroom. Gaffney conditionally pled guilty to possession of cocaine and being a persistent felony offender in the first degree. Gaffney argues on appeal that his constitutional rights were violated because the search of the motel room and bathroom exceeded the scope of the alleged consent given to the officers. The Commonwealth argues that this issue was not properly preserved for appeal. We agree and accordingly, affirm this appeal.

The trial court held a suppression hearing on the matter on August 7, 2008. Therein, Lexington police officer Jeff Jackson testified that on May 21, 2008, he was signaled over to a car in a motel parking lot. The passenger informed the officer that his wife was in room 224 and that she was afraid because the guy with her in the room was dealing heroin. Officer Jackson went to room 224 and knocked on the door to check on the man's wife. Officer Jackson recognized the woman in the room from prior incidents. Officer Jackson asked to search the room. Officer Jackson testified that Gaffney, who was the individual in the room with the woman, gave permission to search the room. Gaffney then entered the bathroom to put on his pants and to secure his dog.

During the course of his search, Officer Jackson found electronic scales with residue on them. He then asked Gaffney to remove his dog from the bathroom so that he could search it. Gaffney removed his dog and Officer Jackson found 14 grams of crack cocaine wrapped in a white towel. Officer Jackson

testified that Gaffney never revoked his permission to search his room. After Gaffney testified, the trial court denied Gaffney's motion to suppress the evidence obtained in the search. Gaffney now appeals.

On appeal Gaffney presents one argument, which he claims was preserved by his motion to suppress and the hearing. Gaffney argues that the trial court committed reversible error by denying the motion to suppress the evidence obtained from the bathroom of his motel room following an alleged consensual search because the search of the bathroom exceeded the scope of the alleged consent. The Commonwealth argues that this claimed error was not presented to the trial court either in Gaffney's motion to suppress or in his argument at the suppression hearing. Consequently, the Commonwealth argues that this claimed error is unpreserved.² After a review of the record, we agree with the Commonwealth that the claimed error presented by Gaffney was not properly preserved for appellate review.

Gaffney's motion to suppress stated that he was challenging whether his consent for the search was freely and voluntarily given; and that he did not give consent to search as the Commonwealth alleged but, in fact, the woman in the room without authority to give consent gave permission to the officer for the search. As noted, on appeal, Gaffney is making a different argument, namely, that

² The Commonwealth argues that in the alternative, the trial court properly denied Gaffney's motion to suppress. Given that we agree with the Commonwealth that the issue presented by Gaffney was not properly preserved, we decline to address the Commonwealth's remaining argument.

the search of his bathroom in his motel room exceeded the alleged consent given to search.

This argument was not presented to the trial court; therefore, we will not consider it now for the first time on appeal. *See Combs v. Knott County Fiscal Court*, 283 Ky. 456, 141 S.W.2d 859, 860 (Ky.App. 1940) (“It is an unvarying rule that a question not raised or adjudicated in the court below cannot be considered when raised for the first time in this court.”); *Skaggs v. Assad, By and Through Assad*, 712 S.W.2d 947, 950 (Ky. 1986) (“It goes without saying that errors to be considered for appellate review must be precisely preserved and identified in the lower court.”); *Kennedy v. Commonwealth*, 544 S.W.2d 219, (Ky. 1976) (“[A]ppellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court.”). Gaffney’s claimed error was improperly preserved for review.

For the aforementioned reasons, we affirm the appeal.

BUCKINGHAM, SENIOR JUDGE, CONCURS.

MOORE, JUDGE, CONCURS IN RESULT ONLY.

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