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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000096-MR

ANTONIO JERODE MITCHELL — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 09-CR-00844

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, MOORE, AND VANMETER, JUDGES.

CAPERTON, JUDGE: Antonio Mitchell entered a conditional guilty plea in exchange for a fifteen-year probated sentence on first-degree possession of a controlled substance; trafficking in marijuana, less than eight ounces; and being a persistent felony offender in the second degree. On appeal, Mitchell contests the trial court's denial of his motion to suppress the evidence obtained during a search

of his person. After a thorough review of the parties' arguments, the record, and the applicable law, we find no error and, accordingly, affirm the trial court's denial of Mitchell's motion to suppress.

The following facts were testified to at a suppression hearing. On March 28, 2009, Officer Kornrumph was investigating a tip that he had received from a fellow soldier in his Army Reserve Unit about suspicious drug-related activity at a specific home. Officer Kornrumph observed Mitchell and a driver pull up to the residence in question. Mitchell, the passenger in the vehicle, exited and approached the residence. After a brief period of time inside the residence, Mitchell returned to the vehicle and the pair left without buckling their seatbelts. Officer Kornrumph initiated the stop of the vehicle for failure of the occupants to use their seatbelts. Given the history of narcotics activity at the residence the pair had just visited, Officer Kornrumph asked for a canine unit as he called the stop in to dispatch. Thereafter, Officer Kornrumph approached the car and engaged the driver in conversation.[1] Officer Slark and his canine partner arrived within five minutes of the request and prior to a ticket being written for the failure of the occupants to use their seatbelts.

The driver of the vehicle gave Officer Kornrumph consent to search his person and his vehicle. Accordingly, Officer Kornrumph removed the driver from

[1] Mitchell argues that the line of questioning by the officer amounted to implied coercion. The officer's line of questioning included asking about his choice of grocery store and the convenience of the location. We find little merit in Mitchell's argument that this line of questioning amounts to coercion. Thus, we decline to address Mitchell's argument of implied coercion for reasons discussed *infra.*

the vehicle. Officer Slark[2] approached Mitchell and asked him to vacate the vehicle in order to search the vehicle since it was customary to remove any occupants from a vehicle and frisk them for weapons. Officer Slark also asked Mitchell for consent to search his person and testified that Mitchell gave consent. To the contrary, however, Mitchell testified that he never consented to the search. The search of Mitchell revealed cocaine, cash, marijuana, and digital scales.

Mitchell subsequently filed his motion to suppress, alleging that he was detained for an unreasonable amount of time and that the line of questioning resulted in an unlawful seizure of his person. He further asserted that the consent was tainted by the unlawful seizure, and that the fruits of the search and any subsequent statements by Mitchell should be suppressed. At the hearing, Mitchell additionally argued that he had not given consent to search his person.

After hearing the evidence and the parties' arguments, the trial court found that Mitchell gave voluntary consent to the search of his person[3] and denied the motion to suppress. It is from this denial that Mitchell now appeals.

On appeal, Mitchell makes two arguments. First, Mitchell argues that he did not consent to the search of his person and thus the search was unconstitutional and, therefore, the evidence obtained as a result must be suppressed. Second, while Mitchell denies consenting to a search of his person, he argues that if this

[2] The canine remained in Officer Slark's vehicle the entire time.

[3] The trial court additionally found that Officer Kornrumph stopped the vehicle for failure of the occupants to use their seatbelts, that the canine officer arrived within five minutes of the stop and before a citation had been written, and that the driver gave consent to search his person and his vehicle.

Court accepts the trial court's findings of fact that consent to the search was given, then this Court must also hold that the consent was obtained due to implied coercion from the line of questioning and the presence of the canine unit on the scene. The Commonwealth argues that the trial court's findings concerning consent are conclusive and that there was no implied coercion. With these arguments in mind, we turn to the applicable law.

In review of the trial court's decision on a motion to suppress, this Court must first determine whether the trial court's findings of fact are clearly erroneous. Under this standard, if the findings of fact are supported by substantial evidence, then they are conclusive. Kentucky Rules of Criminal Procedure (RCr) 9.78; *Lynn v. Commonwealth,* 257 S.W.3d 596, 598 (Ky. App. 2008). "Based on those findings of fact, we must then conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law." *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky. App. 2002) (citing *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998); *Commonwealth v. Opell*, 3 S.W.3d 747, 751 (Ky. App. 1999)).

Thus, the factual findings of the trial court in regard to the suppression motion are reviewed under the clearly erroneous standard and "the ultimate legal question of whether there was reasonable suspicion to stop or probable cause to search is reviewed *de novo*." *Commonwealth v. Banks,* 68 S.W.3d 347, 349 (Ky. 2001). Additionally, preliminary questions such as whether consent was voluntarily given are a question of fact to be determined from the totality of all the

circumstances and are subject to review only for clear error, the most deferential standard of review. *Talbott v. Commonwealth*, 968 S.W.2d 76, 82 (Ky. 1998); *Hampton v. Commonwealth*, 231 S.W.3d 740, 749 (Ky. 2007) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S. Ct. 2041, 2047-48, 36 L. Ed. 2d 854 (1973), and *Miller v. Eldridge*, 146 S.W.3d 909, 915 (Ky. 2004)).

At a suppression hearing the trial court acts as the finder of fact. As such, it has the sole responsibility to weigh the evidence before it and judge the credibility of all witnesses. *Dunn v. Commonwealth*, 286 Ky. 695, 151 S.W.2d 763, 764-765 (1941). The trial court has the duty to weigh the probative value of the evidence and has the discretion to choose which testimony it finds most convincing. *Commonwealth, Dept. of Highways v. Dehart,* 465 S.W.2d 720, 722 (Ky. 1971). The trial court is free to believe all of a witness's testimony, part of a witness's testimony or none of it. *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996); *see also Gillispie v. Commonwealth*, 212 Ky. 472, 279 S.W. 671, 672 (1926).

In the case *sub judice* the trial court was presented conflicting accounts of whether Mitchell consented to the search of his person. The trial court, as the trier of fact, exercised its discretion and chose to believe Officer Slark's recounting of events rather than Mitchell's. *See Anderson, supra,* and *Dunn, supra.* The finding that Mitchell voluntarily consented to the search of his person was based upon substantial evidence in the record; thus, the finding is not clearly erroneous and is

conclusive. *See Lynn, supra.* Accordingly, we find no error in the trial court's denial of Mitchell's motion to suppress the evidence based upon lack of consent.

Mitchell also argues that while he denies consenting to a search of his person, that if this Court accepts the trial court's findings of fact that consent to the search was given, then this Court must also hold that the consent was obtained due to implied coercion from the line of questioning and the presence of the canine unit on the scene.

Our review of the suppression hearing reveals that 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."). Moreover, Mitchell does not request a palpable error analysis under RCr 10.26. "Absent extreme circumstances amounting to a substantial miscarriage of justice, an appellate court will not engage in palpable error review pursuant to RCr 10.26 unless such a request is made and briefed by the appellant." *Shepherd v. Commonwealth,* 251 S.W.3d 309, 316 (Ky. 2008) (internal citations omitted).

Accordingly, we decline to review Mitchell's argument that his consent was the product of implied coercion.

In light of the foregoing, we affirm the trial court's denial of Mitchell's motion to suppress the evidence obtained from the search of his person.

ALL CONCUR.

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