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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002028-MR

DIRK PARKER — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 08-CR-01130

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, DIXON AND WINE, JUDGES.

DIXON, JUDGE: Dirk Parker appeals a final judgment rendered by the Fayette Circuit Court following a jury trial, alleging that the court erroneously denied his pre-trial suppression motion and impermissibly allowed the Commonwealth to re-open its case during the penalty phase of the trial. Finding no error, we affirm.

In the early morning hours of August 4, 2008, Parker was visiting the home of Ronald Padgett on Elm Tree Lane in Lexington, Kentucky. Parker, Padgett, and

a third man were sitting on the front porch when Lexington Police Officer Jason Rothermund, along with an officer trainee, approached the house to investigate suspected drug activity.[1] Officer Rothermund conducted a search of Parker, which revealed a wrapper containing crack cocaine and three small plastic bags containing marijuana. Officer Rothermund placed Parker under arrest, and a subsequent inquiry revealed that Parker had an active bench warrant on file.

In September 2008, the grand jury indicted Parker on charges of (1) trafficking in a controlled substance first-degree (cocaine); (2) trafficking in a controlled substance (marijuana) within 1000 yards of a school; and (3) persistent felony offender, second-degree (PFO II). Thereafter, Parker filed a motion to suppress the evidence found during the search. The court held an initial suppression hearing on January 16, 2009, and a supplemental hearing on March 10, 2009. The court heard testimony from Officer Rothermund, as well as Padgett and Parker. The testimony indicated that Padgett's property was fenced-in, except for an opening in the fence (where a gate would be) facing the street. The court heard conflicting testimony regarding the search of Parker. Both Parker and Padgett testified that Parker refused consent when Officer Rothermund asked to search Parker's person. Officer Rothermund testified that he believed Parker consented to

[1] Prior to their arrival at the Padgett residence, the officers had encountered a woman, Shannon Cogar, a few blocks up the street. Cogar admitted that she had just obtained crack cocaine from a house on Elm Tree Lane where three men were sitting on the porch. She described the location of the house and gave the officers a description of the man who had the drugs.

the search. According to Officer Rothermund, he asked Parker, "Do you mind if I search your person?" and Parker responded, "Yeah, but what for?"

At a status hearing on April 10, 2009, the court made an oral ruling denying the motion to suppress evidence. The court found that the officers lawfully entered the Padgett property and approached the porch. The court also found that Parker did not consent to the search of his person, but upheld the search based on the "inevitable discovery" exception to the exclusionary rule. The court reasoned that, absent the non-consensual search, Officer Rothermund would have ultimately served the pending bench warrant on Parker and inevitably discovered the contraband during a valid search incident to arrest.

A jury trial convened on August 31, 2009. The jury found Parker guilty of trafficking in a controlled substance and PFO II and recommended an enhanced sentence of twelve years' imprisonment.[2] On October 8, 2009, the trial court rendered a final judgment and sentenced Parker according to the jury's recommendation.

Parker raises two issues on appeal. First, he alleges the court erred by denying his suppression motion because the officers impermissibly entered the property, which tainted the subsequent search of his person. Second, Parker contends the trial court erred by allowing the Commonwealth to re-open its case during the PFO phase of the trial.

[2] The jury could not reach a verdict on count two of the indictment, and Parker subsequently pled guilty to an amended charge of possession of marijuana.

I. Denial of Motion to Suppress Evidence

On appellate review of an order denying a motion to suppress evidence, we first review the trial court's findings of fact under the clearly erroneous standard, and then we review *de novo* the application of the law to those facts. *Welch v. Commonwealth*, 149 S.W.3d 407, 409 (Ky. 2004).

At the outset, we note that the Commonwealth has questioned whether Parker has standing to challenge the constitutionality of the officers' entry onto Padgett's property. Our review indicates that the trial court neither addressed nor ruled upon standing in its decision. "Standing must have been raised before the circuit court, and the Commonwealth should secure a ruling from the court, before this Court will entertain a standing challenge." *Hause v. Commonwealth*, 83 S.W.3d 1, 11 (Ky. App. 2001). As the issue of standing is not preserved for our review, we will now address Parker's substantive allegation of error.

Parker argues the officers impermissibly entered the protected curtilage of the Padgett property, which violated his constitutional right to privacy. Accordingly, Parker asserts the unlawful entry onto the property tainted the subsequent discovery of the contraband on Parker's person.

In ruling on this issue, the trial court relied on *Quintana v. Commonwealth*, 276 S.W.3d 753 (Ky. 2008). In *Quintana*, the Kentucky Supreme Court addressed the constitutional concerns that arise when a police officer approaches the front door of a home to conduct a "knock and talk." *Id*. at 755. The Court acknowledged that constitutional privacy rights in one's home extend to the

curtilage, which is "the area immediately surrounding the house." *Id*. at 757. The Court recognized, however, that "certain areas such as driveways, walkways, or the front door and windows of a home frequently do not carry a reasonable expectation of privacy because they are open to plain view and are properly approachable by any member of the public, unless obvious steps are taken to bar the public from the door." *Id*. at 758. Where a police officer enters the curtilage of a private residence, the Court stated that,

> the officer who approaches the main entrance of a house has a right to be there, just as any member of the public might have. When a resident has no reasonable expectation to privacy if someone approaches his front door for a legitimate purpose, police officers may also so approach.

Id.

The reasoning of *Quintana* is sound, and we agree with the trial court that it applies to the facts of this case. Although Parker asserts that the fence surrounding the property indicated intent to exclude the public, the testimony was undisputed that there was no gate blocking the path to the front porch. Further, Parker testified that he watched the officers as they walked down the street toward the house, which indicates that the front porch was in plain view of the street. As the *Quintana* Court succinctly stated, "Essentially, the approach to the main entrance of a residence is properly 'invadable' curtilage . . . because it is an area that is open to the public." *Id*. Under the circumstances presented here, the officers lawfully

entered Padgett's property and approached the front porch. Accordingly, the trial court properly denied Parker's motion to suppress.

II. Re-opening During PFO Phase

At the close of the PFO phase of the trial, Parker moved for a directed verdict on grounds that the Commonwealth had failed to establish Parker's age as required by KRS 532.080(2). The Commonwealth conceded the omission and moved the court to re-open the evidence for the limited purpose of establishing Parker's age. Over Parker's objection, the court re-opened the evidence, and the Commonwealth presented proof regarding Parker's date of birth. Parker opines that he relied to his detriment on the Commonwealth's announcement that its proof was closed, as he expected to receive a directed verdict based on the specified absence of proof. Parker theorizes that, had he known the court would allow the Commonwealth to cure the defect, he might not have brought the evidentiary omission to the Commonwealth's attention (via his motion for directed verdict); rather, he asserts that he simply could have argued the lack of evidence to the jury in closing.

In ruling on the Commonwealth's request to re-open, the trial court relied on *Stokes v. Commonwealth*, 275 S.W.3d 185, 191 (Ky. 2008), which recognized that such a decision is within the discretion of the trial court. In *Stokes*, the Kentucky Supreme Court stated that the test to determine whether a jury should receive additional evidence after the close of proof "is whether an injustice is likely to result if the new evidence is not put before the jury." *Id*. In the case at bar, the

court noted that re-opening was a matter of judicial discretion and concluded that the interests of justice warranted re-opening for the limited purpose of establishing Parker's age.

We have reviewed the record on appeal, and we note that, although the trial in this case lasted one day, it did not conclude until after 11:00 p.m. The PFO phase began after 9:00 p.m., and during the discussion regarding re-opening, the prosecutor's statements implied that it was merely an oversight that Parker's age had not been adduced during the case-in-chief.

In *Hayes v. Commonwealth*, 625 S.W.2d 575, 576 (Ky. 1981), the Kentucky Supreme Court found that the trial court had not erred by allowing the Commonwealth to re-open its case after the close of all evidence during the PFO phase. Furthermore, in *Montgomery v. Commonwealth*, 262 S.W.2d 475, 477-78 (Ky. 1953), Kentucky's highest court found that the trial court had properly exercised its discretion when it allowed the prosecution to re-open its proof after the defendant had moved for a directed verdict. Under the circumstances presented here, we conclude the trial court did not abuse its discretion by re-opening the proof to establish Parker's age.

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

ALL CONCUR.

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