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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000263-MR

DONALD ROZELLE MARTIN — APPELLANT

v.

APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 99-CR-00053

COMMONWEALTH OF KENTUCKY — APPELLEE

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

BEFORE: BUCKINGHAM, COMBS, and DYCHE, Judges.

COMBS, JUDGE: Donald Rozelle Martin appeals an order of the Logan Circuit Court entered on December 26, 2000, denying his motion to vacate his conviction and sentence brought pursuant to Kentucky Rule of Criminal Procedure (RCr)11.42. We affirm.

In 1996, Martin pled guilty to two counts of third-degree rape and was sentenced to nine years in prison. Martin's sentence was probated and he was placed under the active supervision of Bob Birdwhistell, a state probation and parole officer. In February 1999, Birdwhistell received information from a law enforcement officer that Martin may have been selling drugs and that there was an unusual amount of traffic in and out of his residence. Accompanied by the Logan County drug officer, a deputy sheriff, a state trooper, and a police dog, Birdwhistell went to Martin's residence to conduct a search for contraband on

February 16, 1999. Martin was not at home; however, his girlfriend, Donna Logan, answered the door and admitted Birdwhistell and the officers into the house. Although no drugs were discovered in the search, Birdwhistell seized two 22-caliber rifles and one 12-gauge shotgun, all loaded, which were standing against the wall in Martin's bedroom.

Martin was subsequently indicted for the unlawful possession of a firearm by a convicted felon. Kentucky Revised Statute (KRS) 527.040. On the advice of his counsel, Martin entered a plea of guilty to the charge. On October 12, 1999, he was sentenced to serve two years in prison.

In June 2000, Martin, pro se, moved to vacate his sentence, alleging that his guilty plea was involuntary. Specifically, Martin claimed that his probation officer had lacked a "reasonable suspicion" to conduct the warrantless search of his residence and that his counsel's failure to move to suppress the fruits of the search constituted a violation of his Sixth Amendment right to counsel. New counsel was appointed to represent Martin in his post-conviction proceeding, and an evidentiary hearing was conducted on December 1, 2000.

In denying Martin's motion, the trial court found that Birdwhistell was a "person of high credibility"; that Birdwhistell made the decision to search Martin's residence based on information which he obtained from a local law enforcement officer; and that while rightfully in the residence, Birdwhistell discovered the firearms in plain view. The trial court concluded that the probation officer had not engaged in any improper

conduct and that he had a reasonable suspicion to conduct the search. It further concluded that Martin's trial counsel would not have prevailed had he moved to suppress the evidence gathered during the search and that, consequently, he did not render ineffective assistance of counsel. This appeal followed.

Martin continues to argue that his sentence is void and that counsel rendered ineffective assistance by failing to assert a violation of his Fourth Amendment protection from unreasonable searches. To prevail on a claim of ineffective assistance of counsel, Martin must show that his counsel's performance was deficient and that the deficient performance prejudiced him. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984); accord, Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985), cert. denied, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). Where, as in this case, the principal claim is counsel's failure to litigate an alleged unlawful search and seizure, the movant must show that his Fourth Amendment claim is meritorious. Kimmelman v. Morrison, 477 U.S. 365, 374-75 (1986). Additionally, in the context of a plea bargain, Martin must show that, but for counsel's failure to file a pre-trial motion to suppress the evidence, there is a reasonable probability that he would not have pled guilty but would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 726 (1986); Centers v. Commonwealth, Ky.App., 799 S.W.2d 51, 55 (1990).

As the trial court stated, there is no dispute that the Commonwealth may provide for searches of probationers, parolees,

and their property--including their homes--on a basis short of probable cause. Griffin v. Wisconsin, 483 U.S. 868, 873, 97 L.Ed. 2d 709, 107 S.Ct. 3164 (1987); see also, Wilson v. Commonwealth, Ky., 998 S.W.2d 473 (1999), in which the court upheld a warrantless search of a parolee's automobile in reliance on Griffin's discussion of the "special needs" of the state in its supervision of those on probation or parole justifying a "departure from the usual warrant and probable-cause requirements." Id., at 474-475.

The gravamen of Martin's claim is that his probation officer did not comply with the policies promulgated by the Department of Corrections in conducting the warrantless search. See, Corrections Policies and Procedures (CPP) 27-16-01, incorporated by reference in 501 KAR 6:020 (2001). Martin maintains that there is a "popular misconception" that probation and parole officers may search their clients on a whim whereas the Department's policies, consistent with the requirements of the Fourth Amendment, permit a warrantless search only if justified by a "reasonable suspicion" -- a term which the Cabinet defines as requiring the probation officer

> to point to specific and articulable facts that, taken together with rational inferences from those facts, reasonably warrant a belief that a condition of probation or parole has been or is being violated.

CPP 27-16-01(IV)A.

We review *de novo* the trial court's legal determination that Birdwhistell had reasonable suspicion to conduct the search. However, we review the "historical facts" for clear error, giving

"due weight to inferences from those facts by resident judges and local law enforcement officers." Stewart v. Commonwealth, Ky.App., 44 S.W.3d 376, 380 (2000). Martin argues that Birdwhistell lacked a reasonable suspicion to search his house because the information that he received was "neither corroborated nor predictive, and came from an anonymous source." He relies on United States v. Payne, 181 F.3d 781, 789 (1999), which invalidated a search of a parolee's truck and his former wife's trailer. The Payne court characterized the information received by the parole officer as lacking in "any of the traditional indicia of reliability" and as "stale." Martin also relies on Stewart, supra, which upheld a search based on information supplied by an anonymous caller because there was "sufficient corroboration of significant facts to create a reasonable suspicion." 44 S.W.3d at 382. The court also noted as follows:

> The information included several specific details and predictive information that under the totality of the circumstances, the anonymous tip, as corroborated, exhibited sufficient indicia of reliability to satisfy the lesser reasonable suspicion standard[.]

Id. While we do not disagree with the holdings in Payne and Stewart, we do not believe that either requires a result different from that reached by the trial court in the case before us.

At the time of the hearing on the RCr 11.42 motion, Birdwhistell could not remember whether the tip about Martin's possible drug dealing came from a sheriff's deputy or from a state trooper. However, Birdwhistell testified that he was

certain that the information emanated from someone in law enforcement. Birdwhistell also testified that the officer informed him that there was an unusually large amount of traffic going in and out of Martin's residence, which Birdwhistell knew to be located in a lightly travelled area. In view of this evidence, we find no meaningful distinction between this case and the circumstances considered by the United States Supreme Court in Griffin, supra. In that case, the court upheld a warrantless search by a probation officer of the home of a probationer after receiving an "unauthenticated tip" from an unidentified police officer that "there were or might be" guns in Griffin's house. 483 U.S. at 871, 878. The officer found a weapon, and Griffin was charged with possession of a firearm by a convicted felon. The United States Supreme Court held that such information received by the probation officer was adequate to satisfy the reasonableness requirement of the Fourth Amendment:

> In some cases--especially those involving drugs or illegal weapons--the probation agency must be able to act based upon a lesser degree of certainty that the Fourth Amendment would otherwise require in order to intervene before a probationer does damage to himself or society. The agency, moreover, must be able to proceed on the basis of its entire experience with the probation, and to assess probabilities in the light of its knowledge of his life, character, and circumstances.
>
> To allow adequate play for such factors, we think it reasonable to permit information provided by a police officer, whether or not the basis of firsthand knowledge, to support a probationer search. The same conclusion is suggested by the fact that the police may be unwilling to disclose their confidential sources to probation personnel. For the same reason, and also because it is the very

> assumption of the institution of probation that the probationer is in need of rehabilitation and is more likely than the ordinary citizen to violate the law, we think it enough if the information provided indicates, as it did here, only the likelihood ("had or might have guns") of facts justifying the search.

Id., 483 U.S. at 879-880. (Emphasis added and footnotes omitted.)

The information which Birdwhistell received concerning the traffic at Martin's house provided him with even more detail than that determined as adequate to create a reasonable suspicion in Griffin. Although we agree with Martin that Payne and Stewart present further refinements in the Fourth Amendment area, both cases are distinguishable on their facts. In Payne, the court specifically stated that while the tip may have been "somewhat reliable" at the time of its receipt by the parole officer, it was "stale by the time of the search" and "contained no indication of ongoing activity." Unlike this case, the tip concerned the parolee's car--not his truck or the trailer. The information supplied to Birdwhistell was more detailed than that in Griffin. The Payne court had noted that the search "was even less justifiable than the search in Griffin." Id. In Stewart, the validity of the search at issue did not arise in the probation or parole context; significantly, the tip did not originate from a police officer. Thus, we hold that the trial court did not err in its conclusion that the constitutional requirement of reasonableness was met in the search of Martin's residence.

Martin's second argument is that Birdwhistell was not acting as a probation officer while conducting the search of his residence but rather that he was serving as a "stalking horse"; -- that is, a probation officer who uses his authority "to help the police evade the Fourth Amendment's warrant requirement." United States v. Harper, 928 F.2d 894, 897 (9th Cir.1991). See also, United States v. Grimes, 225 F.3d 254, 259 (2d Cir.2000), United States v. McFarland, 116 F.3d 316, 318 (8th cir.1997), and United States v. Ooley, 116 F.3d 370, 372 (9th Cir.1997). However, the trial court rejected any hint that Birdwhistell was acting improperly (beyond the scope of a probation officer) in searching Martin's residence. Instead, the trial court found Birdwhistell to be a very credible witness.

Birdwhistell testified that he frequently received information from police officers about his clients and that he routinely investigated any such tips. He stated that the decision to search Martin's residence for evidence was his decision--not that of the officer who made him aware of the situation nor that of any other police officer. He was accompanied by law enforcement officers at his own request to insure that the search would be done correctly. This evidence is more than sufficient to support the trial court's findings with respect to Birdwhistell's purpose in conducting the search. The fact that a probation officer and other police entities work together does not necessarily establish or imply that the search is conducted for investigative rather than probationary purposes. McFarland, 116 F.3d at 318. Thus, the trial court was not

clearly erroneous in finding that Birdwhistell was properly in Martin's residence for the purpose of conducting a probationary search when he saw the firearms in plain view.

Martin's Fourth Amendment arguments fail on their merits, and thus we conclude that the court did not err in determining that trial counsel did not render ineffective assistance in failing to seek suppression of the evidence seized during the search.

The order of the Logan Circuit Court is affirmed.

ALL CONCUR.

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