RENDERED: NOVEMBER 30, 2001; 2:00 p.m.

NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002670-MR

MICHAEL GEORGE WILLIAMS — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NO. 00-CR-00603

COMMONWEALTH OF KENTUCKY — APPELLEE

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

BEFORE: GUIDUGLI, MILLER, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Michael George Williams appeals from his conviction of first-degree trafficking in a controlled substance and possession of marijuana. Having reviewed the record and the applicable law, we affirm.

On April 24, 2000, police used a reliable confidential informant to perform a controlled buy, in which the informant purchased crack cocaine from Michael Williams at Williams's residence at 773 Florida Street in Lexington, Kentucky. On April 26, 2000, police applied for and received a search warrant for the residence based on the April 24 controlled buy. Police did not request a no-knock warrant, and the warrant was not

designated as such.[1] Because of the time elapsed since the first buy, prior to executing the search warrant, police arranged with the same confidential informant to make another controlled buy from Williams, which occurred on April 26 at approximately 11:30 p.m.[2] After this buy, the informant reported that Williams was carrying a 9 mm handgun in his waistband. The informant reported that Williams told him that he carried the gun because he was afraid of being robbed by other drug dealers. Knowing that Williams was armed, the decision was made, for the purpose of officer safety, to execute the warrant in a no-knock fashion. Approximately one hour later, at 12:30 a.m. on April 27, 2000, police executed the search warrant. The officers opened the front door, which was unlocked, announced their presence, and repeatedly announced after crossing the threshold. Williams was found in bed, with the loaded gun next to the bed. Williams attempted to throw approximately 7.7 grams of crack cocaine into a dog carrier. Police also recovered approximately one and a half grams of marijuana. After receiving Miranda warnings, Williams made unsolicited and incriminating statements to police including that the "dope" and gun were his, and that he sells "dope" because he has to make child support payments.

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[1]Detective Douglas Caldwell, a narcotics detective with the Lexington Police Department, testified at the suppression hearing that at the time the search warrant was obtained, police had no information to lead them to request a no-knock warrant. When debriefed following the April 24 controlled buy, the informant made no mention of weapons or dangerous dogs.

[2]Caldwell testified that because of the time lag, he wanted to do another buy to make sure the intelligence was the same as when he made the initial buy.

Williams moved to suppress the evidence seized pursuant to the search warrant on the grounds that police officers did not knock and announce their presence before entering the residence. Detective Caldwell testified to the facts as stated above at a July 6, 2000 suppression hearing. Williams's motion to suppress was denied. The trial court found that the last minute information that police received that Williams had a gun was an exigency justifying a no-knock entry. The court further found that the police decision not to seek a no-knock warrant was reasonable based on Detective Caldwell's testimony that the area was known for mobile drug traffickers, and that a delay caused by seeking a new warrant could have resulted in the drugs or Williams being gone.

A jury trial was held on October 4, 2000. Williams was found guilty of first-degree trafficking in a controlled substance and possession of marijuana. On October 31, 2000, the court entered its final judgment and sentence of probation, sentencing Williams to nine years' imprisonment, probated for five years, and a $500 fine. This appeal followed.

Williams first argues that the trial court erred in denying his motion to suppress. Williams contends that his Fourth Amendment rights were violated when the officers failed to knock and announce their presence and purpose prior to entering his residence.[3] On appellate review, a trial court's findings of fact pursuant to a motion to suppress are conclusive if supported

[3]Appellant does not dispute the validity of the search warrant, only the no-knock entry.

by substantial evidence. RCr 9.78. We conclude the trial court's factual findings are supported by substantial evidence in the present case. When the findings of fact are supported by substantial evidence, the question then becomes, "whether the rule of law as applied to the established facts is or is not violated." Adcock v. Commonwealth, Ky., 967 S.W.2d 6, 8 (1998) quoting Ornelas v. United States, 517 U.S. 690, 697, 116 S. Ct. 1657, 1662, 134 L. Ed. 2d 911 (1996).

"[T]he Fourth Amendment incorporates the common law requirement that police officers entering a dwelling must knock on the door and announce their identity and purpose before attempting forcible entry." Adcock, 967 S.W.2d at 8, citing Wilson v. Arkansas, 514 U.S. 927, 115 S. Ct. 1914, 131 L. Ed. 2d 976 (1995). However, "[t]he Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests." Wilson, 514 U.S. at 934, 115 S. Ct. at 1918. Exigent circumstances can justify a police decision to disregard the knock and announce rule. Richards v. Wisconsin, 520 U.S. 385, 117 S. Ct. 1416, 137 L. Ed. 2d 615 (1997); Adcock, 967 S.W.2d at 9. "In order to justify a no-knock entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." Adcock, 967 S.W.2d at 9, quoting Richards, 520 U.S. at 394, 117 S. Ct. at 1421. Although felony

drug investigations frequently pose risks of violence or destruction of evidence, there is no blanket exception to the knock-and-announce rule in such cases. Richards, 520 U.S. 385, 117 S. Ct. 1416. A reviewing court must evaluate on a case-by-case basis the reasonableness of a police decision not to knock and announce. Richards, 520 U.S. at 394, 117 S. Ct. at 1421.

Under the circumstances of the present case, having received information that Williams had been carrying a gun an hour prior to the execution of the search warrant, we believe that it was reasonable for the police to believe that knocking and announcing would be dangerous. Further, police were not required to seek a new search warrant specifically authorizing a no-knock entry. Police officers may "exercise independent judgment concerning the wisdom of a no-knock entry at the time the warrant is being executed." Richards, 520 U.S. at 396, 117 S. Ct. at 1422. The reasonableness of the police officers' decision must be evaluated as of the time they entered the residence. Richards, 520 U.S. at 395, 117 S. Ct. at 1422. Having received last minute information that Williams was armed, we conclude the police officer's decision was reasonable.[4] Accordingly, the trial court did not err in denying Williams's motion to suppress.

Williams next argues that the "trial court's failure to review the search warrant and affidavit prior to ruling on

[4]Williams further argues that the search was illegal because it was at night, an argument for which he cites no authority. This argument was unpreserved and will not be considered on appeal.

Williams's suppression motion, combined with the Commonwealth's failure to file these documents in the record prior to trial" was error which deprived him of his right to due process. Our review of those portions of the record cited by Williams reveal an objection to the fact that the original warrant was not filed in the record and a statement by the trial court that it could not recall whether it had reviewed the original warrant or a copy at the suppression hearing. "The warrant and the affidavit should be carefully preserved for filing with the appropriate court, although no specific law requires their filing." 8 Leslie Abramson, Kentucky Practice — Criminal Practice and Procedure, §18.88 (3rd ed. 1997). The record contains a copy of the search warrant and the return.[5] KRE 1003 provides that a duplicate is admissible to the same extent as an original unless a genuine question is raised as to the authenticity of the original or in the circumstances it would be unfair to admit the duplicate in lieu of the original. Williams offers no authority to support the objection made at trial that a motion to suppress must be granted if the original search warrant is not filed in the record. The record does not indicate that Williams requested the original through a bill of particulars. Accordingly, we conclude the trial court did not err in overruling the objection.

Williams next contends that the trial court erred in overruling his Batson challenge, thus denying him his right to a jury of his peers. Contrary to the Commonwealth's assertion, our review of the record indicates that this issue was preserved by

[5]TR 65-66.

defense counsel's objection to the fact that all but one of the four African-American venirepersons were struck.

In Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the United States Supreme Court set forth a three-part test for determining whether a prosecutor has exercised peremptory challenges in a racially discriminatory manner, thereby violating the equal protection clause. First, the defendant must establish a prima facie case showing that the prosecutor made peremptory challenges based on race. Batson, 476 U.S. at 96, 106 S. Ct. at 1722. The burden then shifts to the prosecutor to articulate a racially neutral explanation for the challenges. Batson, 476 U.S. at 97, 106 S. Ct. at 1723. The trial court must then determine whether the defendant has established the existence of purposeful discrimination. Id. "A trial court's ruling on a Batson challenge will not be disturbed unless clearly erroneous." Washington v. Commonwealth, Ky., 34 S.W.3d 376, 380 (2000).

With regard to the first prong, it is arguable whether Williams established a prima facie case of racial discrimination, based solely on the fact that three out of four African-American venirepersons were struck. "Batson requires more than merely stating that the prosecutor struck a certain number of blacks from the jury panel." Commonwealth v. Hardy, Ky., 775 S.W.2d 919, 920-921 (1989). However, when, as in the present case, the prosecutor offers race-neutral explanations for the peremptory challenges, and the trial court rules on the issue, the preliminary issue of whether the defendant made a prima-facie

showing becomes moot. Commonwealth v. Snodgrass, Ky., 831 S.W.2d 176, 179 (1992). We therefore turn to the issue of whether the trial court's finding that the Commonwealth's strikes were based on reasons other than race was clearly erroneous. Id.

The Commonwealth stated that it struck Juror #180 because he was illiterate, Juror #127 because she stated that the Commonwealth was prosecuting her brother, and Juror #220 because he wrote "not applicable" on his juror questionnaire for "employment", an answer the prosecutor described as "highly unusual". We opine that the Commonwealth's explanation for striking Juror #220 is questionable - we believe "not applicable" is an ambiguous response which could easily mean one is retired or unemployed. However, in Purkett v. Elem, 514 U.S. 765, 768, 115 S. Ct. 1769, 1771, 131 L. Ed. 2d 834 (1995), the United States Supreme Court held that the second prong of the Batson test "does not demand an explanation that is persuasive, or even plausible." "'At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.'" Purkett, 514 U.S. at 768, 115 S. Ct. at 1771, quoting Hernandez v. New York, 500 U.S. 352, 360, 111 S. Ct. 1859, 1866, 114 L. Ed. 2d 395 (1991). Although we may believe the Commonwealth's explanation with regard to Juror #220 is unconvincing, it is, on its face, race neutral.[6] Id. As the prosecutor offered race-

[6]Had we been the trier of fact, we would have inquired as to why the prosecutor did not question the juror on voir dire

(continued...)

neutral explanations for the three challenges, and as Williams offered no other evidence that the Commonwealth engaged in purposeful racial discrimination, we cannot say the trial court's finding that the Commonwealth exercised strikes based on reasons other than race was clearly erroneous.

Williams's final argument is that his due process rights were violated when the trial court allowed the prosecution to introduce his child support payment record to the jury during sentencing. At the sentencing hearing, Williams testified in mitigation that he sold drugs to help his ill mother and to pay child support. In rebuttal, the Commonwealth introduced records which showed that Williams had not paid child support. The admission of rebuttal evidence is within the sound discretion of the trial court. Ruppee v. Commonwealth, Ky., 821 S.W.2d 484, 487 (1991). We conclude the introduction of the records was proper as rebuttal evidence to Williams's mitigation defense that he had sold drugs to pay child support. Hence, the trial court did not abuse its discretion in admitting the records.

For the aforementioned reasons, the judgment and sentence of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT: Lexington, Kentucky

Matthew W. Boyd

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[6](...continued)
regarding the answer. However, the trial court was not required to do so. "The trial court may accept at face value the explanation given by the prosecutor depending upon the demeanor and credibility of the prosecutor. Stanford v. Commonwealth, Ky., 793 S.W.2d 112 (1990). No additional inquiry or evidentiary hearing is required under Batson." Snodgrass, 831 S.W.2d at 179.

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