RENDERED: SEPTEMBER 27, 2002; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002747-MR

ERIC LEE STEWART — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
ACTION NO. 00-CR-00829-01

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: COMBS, JOHNSON AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Eric Lee Stewart has appealed from a final judgment and sentence of imprisonment entered by the Fayette Circuit Court on October 31, 2000, which convicted him of possession of marijuana[1] and sentenced him to jail for a period of six months. Having concluded that the trial court's ruling on Stewart's motion to suppress certain evidence was clearly

[1]Kentucky Revised Statutes (KRS) 218A.1422.

erroneous, we reverse the final judgment and remand for further proceedings.

On August 21, 2000, a Fayette County grand jury indicted Stewart for trafficking in a controlled substance within 1,000 yards of a school,[2] one count of possession of drug paraphernalia,[3] and one count of being a persistent felony offender in the second degree (PFO II).[4] On September 7, 2000, Stewart filed a motion to suppress all evidence seized by the police at his residence on the grounds that the search was a warrantless search that was conducted without his consent. At the suppression hearing conducted on September 26, 2000, the trial court accepted Stewart's argument as to lack of consent, but it denied his motion to suppress on the grounds that the seized evidence was admissible because the search was a proper administrative search. On October 6, 2000, Stewart entered a conditional guilty plea[5] to the amended charge of possession of marijuana. The possession of drug paraphernalia charge and the PFO II charge were dismissed. On October 31, 2000, the Fayette Circuit Court entered its final judgment and sentence of six months' imprisonment. This appeal followed.

---

[2]Kentucky Revised Statutes (KRS) 218A.1411.

[3]KRS 218A.500.

[4]KRS 532.080.

[5]Kentucky Rules of Criminal Procedure (RCr) 8.09.

This case arose on June 16, 2000, when state probation and parole officer Kenny Vanover received a tip that Jason Taylor, a probationer under the supervision of Officer Vanover, was selling crack cocaine out of his residence located at 349 Nelson Avenue. Officer Vanover went with police officers to the residence to conduct a search and to speak with Taylor. Taylor's residence was a two-story house which was owned by his mother, Mary Jane Stewart. Ms. Stewart's and Taylor's bedrooms were downstairs. At the time of the search, an upstairs bedroom was occupied by Ms. Stewart's grandson, Eric Stewart, who paid rent to his grandmother. Stewart's room was clearly labeled with a name tag affixed to the door stating "Eric Stewart". The upstairs also contained an additional room that was frequently used when Stewart's and Taylor's friends came over to visit. Ms. Stewart described this room as a storage room.

Taylor was not present at the house when Officer Vanover and the police officers arrived. Ms. Stewart allowed the officers to enter the house and she told them that they could search anywhere they wanted. Officer Vanover testified that he was not the probation officer for Eric Stewart and he had no information concerning Stewart whatsoever. Officer Vanover further testified that Stewart was at the house when he arrived but that Stewart left at some point during the search.

Ultimately the search led the officers upstairs where they found marijuana, razor blades, twisted baggies, and money in the upstairs storage room. In Stewart's bedroom, the officers

found what they believed to be two rocks of crack cocaine and a shoebox of baggies, but no marijuana was found in his bedroom. It was later determined and stipulated by the Commonwealth that the substance believed to be crack cocaine was not crack cocaine.

At the suppression hearing, Stewart argued that the officers did not have the right to search the upstairs of the house because he never consented to the search. The Commonwealth argued that the evidence was admissible under either of two theories. It first argued that the evidence was admissible because Ms. Stewart consented to the search and that she had the authority to consent to a search of the entire house. The Commonwealth ultimately abandoned this theory and stipulated that Ms. Stewart did not have the authority to allow the officers to search Stewart's bedroom. The trial court agreed with the Commonwealth's argument that the search was admissible because Stewart was on probation and probationers must freely consent to searches by a probation officer. The trial court rejected Stewart's argument that Officer Vanover had no authority over him since Officer Vanover was not his probation officer, and in fact did not even know that he was on probation at the time of the search. The trial court ruled that the evidence was admissible pursuant to a valid administrative search.

The factual findings of the trial court regarding a motion to suppress shall be conclusive if supported by

substantial evidence.[6] Stewart has the burden of showing that the trial court's ruling was clearly erroneous.[7]

On appeal, the Commonwealth has not argued that the evidence was admissible pursuant to a valid administrative search. Instead, in its brief the Commonwealth argues:

> The Commonwealth's position is that the marijuana appellant pled guilty to possessing was not found in appellant's room. The search of appellant's room is irrelevant to appellant's conviction because the evidence found in appellant's room (rocks of cocaine)[8] was irrelevant to procure his conviction for possessing marijuana.

Our rules of procedure require the appellee's brief to contain a statement, with reference to the record, showing whether an issue was preserved for review and in what manner.[9] "It is an elementary rule that trial courts should first be given the opportunity to rule on questions before those issues are subject to appellate review" [citations omitted].[10] This rule

---

[6]RCr 9.78.

[7]Clark v. Commonwealth, Ky.App., 868 S.W.2d 101, 103 (1993)(citing Harper v. Commonwealth, Ky., 694 S.W.2d 665, 668 (1985)).

[8]Although the Commonwealth states on appeal that the search revealed rocks of cocaine in Stewart's bedroom, a review of the suppression hearing reveals that the Commonwealth stipulated that the evidence seized was not cocaine.

[9]Kentucky Rules of Civil Procedure (CR) 76.12(4)(d)(iv).

[10]Swatzell v. Natural Resources & Environmental Protection Cabinet, Ky., 962 S.W.2d 866, 868 (1998).

applies to the appellee as well as to the appellant.[11] "It is only to avert a manifest injustice that this court will entertain an argument not first presented to the trial court."[12]

After reviewing the videotape of the entire suppression hearing, we conclude that the Commonwealth's argument on appeal was not properly presented to the trial court. As stated previously, during the suppression hearing the Commonwealth raised only two arguments under which the seized evidence would be admissible against Stewart. The Commonwealth never argued that the search of Stewart's room was irrelevant because the marijuana was found in a common room. Thus, we hold that this argument was not properly preserved for our consideration.

We also hold that the trial court's ruling that the seized evidence was admissible pursuant to a valid administrative search was clearly erroneous. Officer Vanover went to Ms. Stewart's house with the intention of conducting a search based upon a tip that Jason Taylor, one of his probationers, was selling drugs. At the time of the search, Officer Vanover did not know that Stewart was living in the house. Furthermore, Officer Vanover was not Stewart's probation officer; and in fact, he did not even know that Stewart was on probation. At the suppression hearing, the Commonwealth relied on the fact that all

---

[11]Akers v. Floyd County Fiscal Court, Ky., 556 S.W.2d 146, 152 (1977).

[12]Pittsburg & Midway Coal Mining Co. v. Rushing, Ky., 456 S.W.2d 816, 818 (1969).

probationers must sign an agreement that allows their probation officer to conduct a search if they believe that the probationer possesses illegal drugs or contraband.[13] Regardless of this broad authorization allowing a search, the fact stills remains that Officer Vanover could not have been conducting an administrative search of Stewart because of his status as a probationer if Officer Vanover had no knowledge of Stewart being a probationer. Thus, we hold that the trial court's ruling which denied Stewart's motion to suppress based on an administrative search was clearly erroneous.

For the foregoing reasons, this Court reverses the judgment of the Fayette Circuit Court and remands this case for further proceedings consistent with this Opinion. On remand, Stewart shall be allowed to withdraw his conditional guilty plea and have the possession of marijuana charge tried by a jury with the evidence seized from his room being suppressed.

ALL CONCUR.

BRIEF FOR APPELLANT:

J. Nick Payne
Lexington, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General

Rickie L. Pearson
Assistant Attorney General
Frankfort, Kentucky

[13]Stewart's probation agreement was never introduced into the record. Apparently, these are form documents and Officer Vanover testified concerning the contents of the form probation agreement at the suppression hearing.