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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002099-MR

RICHARD A. SMITH — APPELLANT

v.

APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
INDICTMENT NO. 04-CR-00085

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HENRY, TACKETT, AND VANMETER, JUDGES.

HENRY, JUDGE: Richard A. Smith was sentenced to five years imprisonment by the Muhlenberg Circuit Court in a judgment entered on September 21, 2004 following his conditional guilty plea to a number of pending criminal charges. Smith appeals from the trial court's August 20, 2004 order denying his motion to suppress evidence following an August 2, 2004 suppression hearing. On review, we affirm.

On June 4, 2004, the Muhlenberg County Grand Jury indicted Smith on counts of first and second-degree possession

of a controlled substance, possessing drug paraphernalia, and being a first-degree persistent felony offender.[1] Following his arrest and entry of a "not guilty" plea, Smith filed a motion to suppress the evidence obtained from his residence on the grounds that the search of his home and the seizure of the above-referenced items were unreasonable, illegal, and in violation of the 4th Amendment to the United States Constitution and Section 10 of the Kentucky Constitution.

On August 2, 2004, the trial court conducted a suppression hearing in which the following facts were given: On May 29, 2004, Probation and Parole Officer Cameron Laycock, who had been supervising Smith—a parolee—since July 21, 2003, received a telephone call from Smith's brother, Curtis Smith, advising that he had found drug paraphernalia that he believed belonged to Smith and that he believed Smith was using illegal drugs while he was on parole. Laycock contacted Muhlenberg County Sheriff Jerry Mayhugh and requested that Mayhugh accompany him on a home visit for security reasons, pursuant to department policy.

The two men went to the Central City area of Muhlenberg County to look for Smith, and they eventually went to the residence of Smith's sister, Tracy Neal. There, Neal and

[1] Smith had previously been convicted of one count of first-degree possession of a controlled substance and two counts of trafficking in marijuana. The first-degree PFO count was later amended to a second-degree count.

her husband, Wayne Neal, advised Laycock and Mayhugh that they were fixing up the building behind their home so that it could serve as a place where Smith could reside as a tenant. They also led Laycock to believe that Smith may have stayed there on previous occasions, and they also indicated that they believed that Smith had relapsed and was using drugs because they had observed drug paraphernalia in the building.[2] In fact, Tracy Neal testified that in January 2004, she contacted Laycock to report other possible drug-related parole violations by Smith. Neither Laycock nor Mayhugh recalled anyone telling them that Smith was paying rent to stay in the building when they talked to the Neals. However, Wayne Neal acknowledged that Smith had paid him $200.00 for rent about a week-and-a-half before his arrest.

The Neals gave Laycock and Mayhugh permission to enter the building, which was vacant, and look for evidence of drugs or related items. Neither man had a warrant of any kind. Mayhugh testified that he did not go into the building, and he said that he indicated to the Neals that he would be violating Smith's rights if he did so. However, the Neals both testified that Mayhugh did enter the building, and Tracy Neal stated that

[2] It is unclear whether this concern was expressed to Laycock before or after he entered the building in question.

Mayhugh removed a syringe that she had pointed out to him.[3] Laycock described the interior of the building as resembling that of a one-bedroom apartment. He noticed a couch and a TV along with a number of boxes. A refrigerator was also present, but there was no bed. Laycock then went to a closet, where he found a plastic bag inside of a leather jacket that contained four or five syringes, with one of the syringes appearing to have been used. He showed what he had found to the Neals and placed the syringes back into the jacket. The Neals acknowledged that they had previously seen syringes in the building. Mayhugh then gave them his cell phone number, and the Neals told him that they would call if Smith came to the property later.

That same evening, Mayhugh received a call from Tracy Neal indicating that Smith was in the building. He and Laycock returned to the property, and when they knocked on the door of the building, it was Smith who answered. Mayhugh and Laycock asked if they could come in, and Smith gave them permission to do so. Another individual named Clint Brewer, who was also on parole, was in the building. After Mayhugh and Laycock explained to Smith that they were there because they had been told that he had been using drugs and possibly had some in the

[3] It should be noted that Mayhugh acknowledged that he did enter the building when he and Laycock made their subsequent visit later that evening, and he further testified that he confiscated a syringe from another man who was there at the time.

building, Smith admitted that he had been using drugs and showed them the syringes that were in his jacket pocket and also a bottle containing Dilaudids and Lortabs, both controlled substances. Mayhugh testified that Smith was "very cooperative" but also "very talkative." He also expressed the opinion that Smith was "really out there" as a result of being "strung out on drugs." Mayhugh then read Smith and Brewer their Miranda rights (He had observed Brewer with a syringe) and detained them.

Smith was subsequently taken to the Muhlenberg County Jail by Muhlenberg County Deputy Sheriff Jarrod Kirkpatrick, and Smith was read his statement of rights. Smith signed an acknowledgment and a waiver of rights and proceeded to give a statement to Kirkpatrick whereby he admitted to using drugs and being in the possession of Lortabs, Dilaudids, and syringes.

On August 20, 2004, the trial court entered factual findings and an order denying Smith's motion to suppress. Smith subsequently entered into a conditional guilty plea on all charges, while reserving the right to appeal the suppression issue to this court. On September 9 and September 21, 2004, the trial court entered orders consistent with this plea and sentenced Smith to five years imprisonment. This appeal followed.

We initially note that the standard for appellate review of a motion to suppress is that we first review the

factual findings of the trial court under a "clearly erroneous" standard. Welch v. Commonwealth, 149 S.W.3d 407, 409 (Ky. 2004), citing Ornelas v. U.S., 517 U.S. 690, 699, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911 (1996). After reviewing the record and the trial court's order denying Smith's motion to suppress, we are satisfied that the court's factual findings as a whole are not "clearly erroneous." Accordingly, we next turn to the second step of the standard, which requires us to review de novo the trial's court's applicability of the law to its factual findings. Id., citing Ornelas, supra.

Smith raises a number of arguments focused upon the trial court's conclusions of law. However, we focus on the contention that Laycock and Mayhugh violated his 4th Amendment rights by entering and searching his residence without reasonable suspicion or consent when Smith was not there. This argument, of course, refers to Laycock's visit in which he went inside the building in question without Smith being present and found syringes in his jacket pocket.

"While residence searches generally require both probable cause and a warrant, the 'special needs' of supervised release reduce probationers' and parolees' reasonable expectations of privacy." Coleman v. Commonwealth, 100 S.W.3d 745, 752 (Ky. 2003). Our Supreme Court has recognized that "[w]hen an officer has reasonable suspicion that a probationer

subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable." Riley v. Commonwealth, 120 S.W.3d 622, 627 (Ky. 2003), quoting U.S. v. Knights, 534 U.S. 112, 121, 122 S.Ct. 587, 593, 151 L.Ed.2d 497 (2001). "The United States Supreme Court has thus held that a warrantless search of a probationer's residence is reasonable under the Fourth Amendment when the search is supported by reasonable suspicion and authorized by a condition of probation." Coleman, 100 S.W.3d at 752, citing Knights, supra; Griffin v. Wisconsin, 483 U.S. 868, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987). Our Supreme Court has similarly recognized that warrantless searches of parolees may be constitutional when authorized by the terms and conditions of parole. Id. at 752-53, citing Wilson v. Commonwealth, 998 S.W.2d 473 (Ky. 1999); Clay v. Commonwealth, 818 S.W.2d 264 (Ky. 1991).

Pursuant to statutory authority,[4] regulations and policies have been implemented by the Justice Cabinet and the Kentucky Department of Corrections allowing Kentucky parole officers to conduct a warrantless search of the person and property of a parolee upon reasonable suspicion that the parolee

[4] See Kentucky Revised Statutes ("KRS") 196.030, KRS 196.035, KRS 196.075, KRS 439.348, and KRS 439.470.

is violating a condition of supervision—for example, being in possession of contraband. See CPP[5] 27-16-01 (Search; Seizure; Chain of Custody; Disposal of Evidence) (VI)(1)(A)(1), incorporated by reference in 501 KAR[6] 6:020E § 1(c). CPP 27-16-01 defines "reasonable suspicion" as "a less stringent standard than probable cause and shall require that the acting authority be able to point to specific and articulable facts that, taken together with rational inferences from those facts, reasonably warrant a belief that a condition of supervision has been or is being violated." CPP 27-16-01(IV)(6).

The Sixth Circuit Court of Appeals has specifically noted that this definition comports with the federal definition of "reasonable suspicion," U.S. v. Payne, 181 F.3d 781, 786 (6th Cir. 1999), and has reiterated the United States Supreme Court's holding that "reasonable suspicion" is based on the totality of the circumstances and requires "articulable reasons" and "a particularized and objective basis for suspecting the particular person ... of criminal activity." Id. at 788, quoting U.S. v. Cortez, 449 U.S. 411, 417-18, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981).

Here, Smith signed a parole agreement that contained the following acknowledgement: "I agree that I may be subject to

[5] Kentucky Corrections Policies and Procedures.

[6] Kentucky Administrative Regulations.

search and seizure if my officer has reason to believe that I may have illegal drugs, alcohol, volatile substance [sic], or other contraband on my person or property." By signing this release agreement, Smith knowingly agreed to conditions that, as a parolee, reduced his expectation of privacy to the extent that his parole officer could conduct a search upon "reasonable suspicion" that he was in possession of contraband. See Riley, 120 S.W.3d at 627-28. Accordingly, with this diminished expectation of privacy established, we evaluate the merits of Smith's constitutional challenge by determining whether the search in question was accomplished in accordance with the applicable policy—i.e., by determining whether there was "reasonable suspicion" that "the performance of the search may produce evidence to support the alleged violation [of Smith's parole]." CPP 27-16-01(V)(1); see also Coleman, 100 S.W.3d at 754.

After a review of the record and the applicable case law, we conclude that there was adequate "reasonable suspicion" to support the search in this case.[7] Laycock was advised by a known source with whom he was personally familiar—Smith's own brother, Curtis Smith—that he believed his brother was using drugs again, in violation of the terms of his parole. Curtis

[7] In reaching this conclusion, we are operating under the assumption that the building in question can actually be considered Smith's "residence"—even though the evidentiary record is far from conclusive as to this issue. We do so because this issue is not of relevance in our ultimate analysis.

specifically advised Laycock that he had found a syringe in the subject building shortly before making the phone call to Laycock, and that Smith had appeared to be under the influence of drugs in a number of interactions that Curtis had had with him.

Our Supreme Court has distinguished anonymous from non-anonymous tips for purposes of analyzing "reasonable suspicion," and has concluded that non-anonymous tips require a lesser amount of corroboration because the veracity, reputation, and basis of knowledge of a known informant can be readily assessed. See Collins v. Commonwealth, 142 S.W.3d 113, 115 (Ky. 2004), citing Alabama v. White, 496 U.S. 325, 332, 110 S.Ct. 2412, 2417, 110 L.Ed.2d 301, 310 (1990); see also Florida v. J.L., 529 U.S. 266, 270, 120 S.Ct. 1375, 1378, 146 L.Ed.2d 254 (2000). Here, the tip was not anonymous because Laycock was advised by Smith's own relative that he appeared to be using drugs in violation of his parole. Moreover, that relative gave a detailed basis for his knowledge—namely, that he was doing renovation work in a building in which his brother had essentially taken up residence, and that he had found a syringe. Given these facts, and the fact that Smith had a lesser expectation of privacy because of the terms of his parole, we agree with the trial court that "reasonable suspicion" existed for a search of Smith's person or property.

In a related argument, Smith contends that the search in question should be invalidated because he was absent at the time it occurred. While this issue appears to be one of first impression in Kentucky, we note that whether or not a parolee was absent when a parole officer conducted a warrantless search of his residence has not been considered by other jurisdictions to be a significant factor in analyzing the validity of the search under the Fourth Amendment. See Philip E. Hassman, "Validity, Under Fourth Amendment, of Warrantless Search of Parolee or His Property by Parole Officer," 32 A.L.R.Fed. 155, § 12 (2005). While a parolee's failure to give contemporaneous consent to a search almost certainly makes any subsequent search subject to the provisions of the Fourth Amendment, see Coleman, 100 S.W.3d at 752 (Citations omitted), we similarly see no reason why a parolee's absence or presence should be a significant factor in analyzing a warrantless search of a parolee as long as reasonable suspicion is present and as long as the terms of parole or probation allow for residential searches. Accordingly, we must reject Smith's contentions in this respect.

Smith also tenders the arguments that Officer Laycock "was acting as an agent of the police and was merely costumed as a parole officer," and that Laycock did not consult with his District Supervisor before initiating the search of the building

in question, as set forth in CPP 27-16-01. However, after reviewing the record, we do not see where these arguments were ever presented to the trial court, and we have not been asked to consider them under the "palpable error" standard set forth in RCr[8] 10.26. "An appellate court will not consider a theory unless it has been raised before the trial court and that court has been given an opportunity to consider the merits of the theory." Shelton v. Commonwealth, 992 S.W.2d 849, 852 (Ky. App. 1998) (citing Hopewell v. Commonwealth, 641 S.W.2d 744, 745 (Ky. 1982). "Regardless of the merits of this argument, these grounds, being different from those asserted in the court below, are not properly preserved for appellate review." Daugherty v. Commonwealth, 572 S.W.2d 861, 863 (Ky. 1978). Accordingly, we find that these issues are unpreserved for our review.

Given our ruling that the trial court's decision can be upheld on the grounds that "reasonable suspicion" existed for a search of Smith's person or property, and that his terms of parole allowed for such a search, we do not address the remaining arguments and issues raised by the parties. The judgment of the Muhlenberg Circuit Court is affirmed.

ALL CONCUR.

[8] Kentucky Rules of Criminal Procedure.

BRIEF FOR APPELLANT:

Patrick F. Graney
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Robert E. Prather
Assistant Attorney General
Frankfort, Kentucky