RENDERED: OCTOBER 28, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court of Appeals

NO. 2004-CA-002189-MR

KELVIN LEE WHITE — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NO. 04-CR-00395

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: GUIDUGLI AND TAYLOR, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

TAYLOR, JUDGE: Kelvin Lee White appeals from an October 5, 2004, judgment of the Fayette Circuit Court upon a jury verdict finding him guilty of first-degree trafficking in a controlled substance and possession of drug paraphernalia. We reverse and remand.

On the evening of February 20, 2004, Lexington Police were conducting surveillance at the Coolivan Apartment Complex

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

in Lexington, Kentucky. Shortly after midnight, Officer Franz Wolff observed a "white male" and "white female" loitering on the sidewalk in front of the apartments. After approximately ten minutes, a "black male" approached the two individuals. All three proceeded into the breezeway of the apartments. Thereafter, appellant exited a nearby apartment, briefly conversed with them, and proceeded to the sidewalk. Appellant apparently spotted a police cruiser patrolling the area and turned to inform the others. The three individuals in the breezeway then entered the apartment.

After the cruiser left the area, appellant again proceeded to the sidewalk, approached the rear of a vehicle, opened the trunk, and retrieved a cardboard box. Appellant returned to the apartment with the box. All four remained inside for approximately ten minutes. The white male and female exited the apartment and left the area. The black male exited the apartment and remained in the breezeway. Appellant returned to the vehicle, opened the trunk, placed the box in the trunk, and then drove away.

Suspecting a narcotics transaction had occurred, Officer Wolff radioed Officer Hilton Hastings and gave him a description of the vehicle. Officer Hastings and Officer Joseph Eckhardt were patrolling the area and spotted the vehicle. The two officers observed that the vehicle had a loud muffler and

initiated a traffic stop. Appellant was issued a warning citation for the muffler. According to Officer Hastings, appellant stated that he was a member of the Fayette County Drug Court. Officer Hastings told appellant he was free to leave. Officer Hastings then informed appellant that the vehicle was suspected as being involved in a possible drug transaction at the Collivan Apartments.

There is some dispute as to the events that occurred next. Officer Hastings claims he asked appellant if he could search "the entire vehicle," and appellant responded in the affirmative. Officer Hastings conducted a pat-down of appellant's person; no weapons or contraband were discovered. Officer Hastings then asked appellant when he last opened the trunk. Appellant responded that it had been "awhile." Officer Hastings asked appellant how to open the trunk. Appellant responded that the vehicle was not his and that he did not have a key to the trunk. Officer Hastings then took the key ring retrieved from appellant's pocket during the pat-down and used a key therefrom to open the trunk. Upon opening the trunk, Officer Hastings spotted a box fitting the description given by Officer Wolff. The box contained cocaine.

Appellant contends he did not give Officer Hastings consent to search the entire vehicle. Appellant asserts he only consented to a search of the passenger compartment. Appellant

says the officer questioned him about how to open the trunk and he responded that the vehicle did not belong to him, he would not consent to a search of the trunk, and he did not even have a key to the trunk.

On March 23, 2004, appellant was indicted by the Fayette County Grand Jury for the offense of first-degree trafficking in a controlled substance, possession of drug paraphernalia, and carrying a concealed deadly weapon. Appellant subsequently filed a motion to suppress the evidence obtained from the search. Following a hearing, the circuit court denied appellant's motion to suppress. The court found that appellant did not consent to the search but concluded the search was valid pursuant to Wilson V. Commonwealth, 998 S.W.2d 473 (Ky. 1999).

On September 9, 2004, a jury trial was conducted. The jury found appellant guilty of first-degree trafficking in controlled substance and possession of drug paraphernalia. Appellant was acquitted of the deadly weapon charge. Appellant was sentenced to a total of fifteen years' imprisonment. This appeal follows.

Appellant contends the circuit court erred by denying his motion to suppress evidence obtained as the result of an illegal search. Specifically, appellant contends the circuit court erroneously relied upon Wilson to justify the search.

In Wilson, the defendant had violated a condition of his parole. Two parole officers went to the halfway house where Wilson was residing to arrest him. A pat down search revealed $373.00 in Wilson's pocket. The officer concluded this amount of cash was inconsistent with the income Wilson was earning through his employment. While the parole officers were waiting to transport Wilson to the jail, Wilson asked if he could call someone to move his vehicle. This request combined with the large amount of cash Wilson was carrying raised the officers' suspicion and, thus, led to a search of the vehicle. The search revealed several bags of marijuana and a scale.

We, however, do not interpret Wilson as broadly as the circuit court. In the case sub judice, the police officers conducting the search were not acting on any probationary or drug court procedure as were the parole officers in Wilson. Rather, the police officers were investigating a suspected narcotics transaction. Another distinguishing fact is that there was no evidence the police officers knew appellant had signed a consent to search form[2] or had agreed to any search

[2] Appellant signed a "Drug Court Program Consent to Search Form" in connection with his participation in the Fayette County Drug Court. The form states:

> I, Kelvin White, in consideration for the privilege of entry into the Fayette County Drug Court program, to consent to allow any law enforcement agency to search my person, automobile, or residence when acting on Drug Court procedures.

condition[3]. The officers conducted the search on the basis that appellant had verbally consented to the search.[4] By contrast, the parole officers in Wilson were aware of the search condition and relied upon it to justify the search. For these reasons, we view Wilson as inapposite and do not believe the search can be justified under its precepts. Having so determined, we now address the more troublesome issue of whether the search can be justified under the recent United States Supreme Court decision of U.S. v. Knights, 534 U.S. 112, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001).

In Knights, a detective with the sheriff's department was investigating arson. The detective had reasonable suspicion to believe Knights was involved in the arson. The detective was aware of Knights' probationary status, as well as the search condition contained in Knights' probation order. Based upon the

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> This search will be for the purpose of ensuring my compliance with the agreement of participation I have executed with the Drug Court. However, I acknowledge that any contraband which may be found may be used against me. This search may be without probable cause. I understand that I have a constitutional right to not have my person, automobile, or residence searched by law enforcement without probable cause, but I waive that right only for the period I am participating in the Drug Court program.

[3] As used in this opinion, the term "search condition" refers to a condition contained in a probation order wherein a probationer agrees to submit his "person, property, place of residence, vehicle, personal effects, to search at anytime . . . ." U.S. v. Knights, 534 U.S. 112, 114, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001).

[4] The circuit court found that appellant did not consent to a search of the vehicle's trunk. This ruling is not before this Court on appeal.

search condition, the detective believed a search warrant would not be necessary and searched Knights apartment without a warrant. AS a result of the search, contraband was seized from the apartment.

In analyzing whether the search was valid, the United States Supreme Court recognized that "[t]he touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interest.'" Knights, 534 U.S. at 118-119, (quoting Wyoming v. Houghton, 526 U.S. 295, 300, 119 S. Ct. 1297, 143 L. Ed. 2d 408 (1999)). The Supreme Court further recognized that certain individuals on probation possess a significantly diminished expectation of privacy:

> The judge who sentenced Knights to probation determined that it was necessary to condition the probation on Knights' acceptance of the search provision. . . . The probation order clearly expressed the search condition and Knights was unambiguously informed of it. The probation condition thus significantly diminished Knights' reasonable expectation of privacy.

Knights, 534 U.S. at 119-120.

The Court then weighed the probationer's diminished privacy interest against the legitimate governmental interest in "apprehending violators of the criminal law." Id. at 121. It

was also observed that a probationer is more likely to violate the law than an ordinary citizen. Id.

Upon identifying the probationer's diminished expectation of privacy and the government's interest in pursuing probationers who violate the law, the Court held:

> The degree of individualized suspicion required of a search is a determination of when there is a sufficiently high probability that criminal conduct is occurring to make the intrusion on the individual's privacy interest reasonable. Although the Fourth Amendment ordinarily requires the degree of probability embodied in the term "probable cause," a lesser degree satisfies the Constitution when the balance of governmental and private interests makes such a standard reasonable. Those interests warrant a lesser than probable-cause standard here. When 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.

Id. at 121 (citations omitted). In essence, the Court concluded that a police officer may lawfully search a probationer subject to a search condition if the officer had reasonable suspicion of criminal activity and was aware of the search condition. Thus, the Court declared the search to be lawful.

In the case sub judice, the police officer did not rely upon the consent to search form previously signed by appellant as justification to search the trunk of appellant's

vehicle. Moreover, the record is void of any evidence suggesting the police officer was aware of the consent form prior to the search. From this lack of evidence, it can only be concluded that the officer was unaware of the consent form prior to conducting the search. We view the officer's lack of knowledge of the consent form prior to the search to be pivotal; this lack of knowledge clearly distinguishes this case from Knights.

If an officer is unaware of a consent form or search condition, a search may not be retroactively justified by the subsequent discovery of such form or condition. In so holding, we are persuaded by the reasoning of People v. Sanders, 31 Cal. 4th 318, 73 P.3d 496 (2003):

> [I]f an officer is unaware that a suspect is on probation and subject to a search condition, the search is not justified by the state's interest in supervising probationers or by the concern that probationers are more likely to commit criminal acts.
>
> This is not to say that the validity of the search depends upon the officer's purpose. The validity of a search does not turn on "the actual motivations of individual officers." (Whren v. United States (1996) 517 U.S. 806, 813, 116 S. Ct. 1769, 135 L. Ed. 2d 89.) But whether a search is reasonable must be determined based upon the circumstances known to the officer when the search is conducted. . . .

> The requirement that the reasonableness of a search must be determined from the circumstances known to the officer when the search was conducted is consistent with the primary purpose of the exclusionary rule- - to deter police misconduct. . . . A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.
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> Thus, the admission of evidence obtained during a search . . . that the officer had no reason to believe was lawful merely because it later was discovered that the suspect was subject to a search condition would legitimize unlawful police conduct. . . .

Id. at 506-508 (citations omitted).

In sum, we now hold that a search condition cannot justify an otherwise unlawful search if a law enforcement officer was unaware of the condition at the time the search was conducted. Accordingly, we are of the opinion the search of appellant's trunk was unlawful and the circuit court erred by denying appellant's motion to suppress the evidence seized therefrom.

For the foregoing reasons, the judgment of the Fayette Circuit Court is reversed and this cause is remanded for proceedings not inconsistent with this opinion.

ALL CONCUR.

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