

RENDERED: AUGUST 8, 2008; 10:00 A.M.
 NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000618-MR

RUSSELL ALLEN APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE KATHLEEN VOOR MONTANO, JUDGE
ACTION NO. 04-CR-001988

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

*** * * * *

BEFORE: CAPERTON AND STUMBO, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Russell Allen was charged in the Jefferson Circuit Court with several drug offenses as a result of an incident that occurred at a residence. He moved the court to suppress the statements he made to the officers at the scene on the ground that he had not been given a *Miranda* warning. *See*

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The court conducted a suppression hearing and denied the motion. Allen then entered a conditional guilty plea to the offenses as amended by plea agreement, and this appeal followed. We affirm.

The facts set forth below are those found by the trial court in its order denying Allen's suppression motion. On February 26, 2004, Officer Larry Smith and a fellow officer of the Louisville Metro Police Department responded to a call regarding a landlord-tenant dispute. When the officers approached the door of the residence, they smelled marijuana. The main door of the residence was open, but the screen door was closed. The officers knocked and were admitted by a man inside the residence.

Once inside, the officers observed from 8 to 10 people in the house and saw marijuana on the kitchen table. The officers asked the people to identify themselves. Officer Smith testified that he did not remember if Allen produced an identification card or simply gave his name. According to Allen, he refused to give his name to the police, and they only discovered it by searching a bag he was holding that contained a prescription bottle with his name on it.

After learning Allen's name, the officers discovered that there was an out-of-state warrant for his arrest. Allen was handcuffed and seated on the couch while the officers searched the bag he had been holding. Varying amounts of narcotics were found inside the bag. Another person at the residence told Officer

Smith that Allen also had a gun. After a further search, a gun was found under the cushion of the couch where Allen had been sitting. It is undisputed that Allen had not been read his *Miranda* rights at this time.

A conversation then ensued between the officers regarding which of the individuals in the house would be taken to jail. Officer Smith told the female tenant of the residence and an individual named Thomas Henderson that they would be going to jail. He told the female tenant that she was going because there were drugs in the house and she was the tenant. Purportedly in an attempt to protect the woman, Allen told officers that the drugs in the residence were his and that only he should go to jail.

Allen was indicted for trafficking in a controlled substance in the first degree while in possession of a firearm, possession of a firearm by a convicted felon, trafficking in marijuana, carrying a concealed deadly weapon, and for being a persistent felony offender in the second degree. After the court denied his motion to suppress the statements, Allen entered a plea of guilty conditional on the outcome of this appeal of the court's ruling.

Appellate review of a motion to suppress is governed by the standard expressed by the Supreme Court of the United States in *Ornelas v. United States* and adopted by this Court in *Adcock v. Commonwealth*. The approach established by the Supreme Court of the United States is a two-step process that first reviews the factual findings of the trial court under a clearly erroneous standard. The second step reviews *de novo* the applicability of the law to the facts found.

Welch v. Commonwealth, 149 S.W.3d 407, 409 (Ky. 2004).

Allen argues that the incriminating statements he made to police should be suppressed because they were elicited from him without a prior *Miranda* warning. “A *Miranda* warning is not required when a suspect is merely taken into custody, but rather when a suspect in custody is subject to interrogation.” *Watkins v. Commonwealth*, 105 S.W.3d 449, 451 (Ky. 2003). Allen contends that the comments of the police to the female tenant threatening to take her to jail were in effect a form of interrogation because he may have felt pressured to claim the drugs were his in an attempt to assist the tenant who was protesting her innocence.

Interrogation has been defined to include “any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect . . . focus[ing] primarily upon the perceptions of the suspect, rather than the intent of the police.” *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689, 64 L.Ed.2d 297 (1980).

Wells v. Commonwealth, 892 S.W.2d 299, 302 (Ky. 1995).

The pertinent facts of the case are not in dispute. In applying the law to the facts, the trial court found that Allen’s incriminating statements were made voluntarily and not as the result of any interrogation by the police officers. We agree. There is no indication that the officers should have known that their remarks to the female tenant were reasonably likely to elicit such an altruistic response from Allen, nor is there any indication that they should have been perceived as such by Allen.

The order denying Allen’s motion to suppress is therefore affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

J. Brandon Pigg
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General
Michael L. Harned
Assistant Attorney General
Frankfort, Kentucky