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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001278-MR

MICHAEL EUGENE LOGAN — APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE MARC I. ROSEN, JUDGE
ACTION NO. 06-CR-00223

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND THOMPSON, JUDGES; ROSENBLUM,[1] SPECIAL JUDGE.

ROSENBLUM, SPECIAL JUDGE: Michael Eugene Logan appeals the judgment and sentence on guilty plea entered March 19, 2007, in Boyd Circuit Court. That judgment found Logan guilty of possession of controlled substances, first degree,

[1] Retired Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

subsequent offense and possession of controlled substance, third degree, subsequent offense and sentenced him to two concurrent sentences totaling 5 years in the Kentucky State Penitentiary. We affirm.

Sometime in June of 2006,[2] Officers Rob Danta and Rick Francis visited the home of Logan. The officers were investigating a burglary and had received information that some of the stolen property had been taken to Logan's residence. The officers asked Logan and his roommate Paul Perry if they could search the apartment and consent was given. The parties disagree as to the scope of the consent for the search. Logan contends that his permission was limited to a search for a DVD/VCR combination. The officers state that they had made it clear to Logan that they were also searching for jewelry. During the search, Logan made several comments to the officers that they would not find a DVD/VCR combination in certain objects. Logan would later argue that these comments constituted a request to cease the search. The officers discovered two bottles in the cushions of the couch containing medication. Logan had prescriptions for some of the medication, but not for others.

Logan was subsequently charged with possession of controlled substance, first degree, subsequent offense; possession of controlled substance, third degree, subsequent offense; and second degree persistent felony offender. Logan moved to suppress the evidence discovered in his apartment. On January 24, 2007, a suppression hearing was held and the trial court denied Logan's

[2] In their briefs, the parties disagree as to the exact date.

motion. Logan subsequently entered a conditional guilty plea to the charges of possession of controlled substances, first degree, subsequent offense and possession of controlled substance, third degree, subsequent offense.[3] The trial court entered its findings of fact, conclusions of law and judgment on February 6, 2007. On March 19, 2007, the trial court entered its judgment and sentence on guilty plea, sentencing Logan to 5 years on each charge, to run concurrently. This appeal followed.

On appeal, Logan argues that the trial court erred by failing to suppress the evidence seized from his residence and by failing to enter written findings of fact following the suppression hearing. The Commonwealth argues that Logan's claims are unpreserved due to his failure to comply with RCr 8.09.[4] We believe that the Commonwealth's argument regarding preservation is without merit. RCr 8.09 states:

> With the approval of the court a defendant may enter a conditional plea of guilty, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified trial or pretrial motion. A defendant shall be allowed to withdraw such plea upon prevailing on appeal.

The Commonwealth's offer on a plea of guilty indicates "[Logan] reserves the right to appeal suppression issues." Furthermore, Logan's motion to enter guilty plea grants specifically "[t]he right to appeal my case to a higher court" and the

[3] Logan's guilty plea was contingent upon his ability to appeal the suppression issue.

[4] Although the Commonwealth cited to RCr 8.10 in its brief, we are under the impression that this was a typographical error and should have in fact been RCr 8.09.

judgment and sentence on guilty plea adjudges "[Logan] has reserved the right to appeal on the suppression issue."

When reviewing a trial court's admission or suppression of evidence, the Court utilizes a two part evaluation. "We will apply a clear error standard of review for factual findings and a de novo standard of review for conclusions of law." *Bishop v. Commonwealth*, 237 S.W.3d 567, 568-9 (Ky.App. 2007) (internal quotations omitted). *See also* RCr[5] 9.78.

> All searches without a valid search warrant are unreasonable unless shown to be within one of the exceptions to the rule that a search must rest upon a valid warrant. The burden is on the prosecution to show the search comes within an exception.

Gallman v. Commonwealth, 578 S.W.2d 47, 48 (Ky. 1979) (citing *City of Danville v. Dawson*, 528 S.W.2d 687 (Ky. 1975)). "Consent to search is an exception to the warrant requirement." *Farmer v. Commonwealth*, 169 S.W.3d 50, 52 (Ky.App. 2005) (citation omitted). "The Commonwealth has the burden of showing by a preponderance of the evidence, through clear and positive testimony, that valid consent to search was obtained." *Id.* (citation omitted).

Logan argues that the officers were limited by the consent to searching only for a DVD/VCR combination and thus exceeded the scope of the consent that was given. The officers contend that they had made Logan aware that they were also looking for stolen jewelry, and that they had been given general consent to search the apartment.

[5] Kentucky Rules of Criminal Procedure.

"The standard for determining whether consent has been given 'is one of objective reasonableness.'" *Hallum v. Commonwealth*, 219 S.W.3d 216, 221 (Ky.App. 2007) (citing *Commonwealth v. Fox*, 48 S.W.3d 24, 28 (Ky. 2001)). "To determine whether consent to search is constitutional in a particular case, we review 'all the surrounding circumstances.'" *Id.* (citing *Cook v. Commonwealth*, 826 S.W.2d 329, 331 (Ky. 1992)). The objective reasonableness standard is also applied when measuring the scope of a consensual search. This is done by discerning what a reasonable person would have understood by the exchange between the party giving consent and the party receiving it. *Commonwealth v. Fox*, 48 S.W.3d 24, 27 (Ky. 2001).

After the suppression hearing, the trial court found that the evidence and the testimony indicated that, although Logan had made comments regarding the likelihood of finding a DVD/VCR combination in certain locations, the search was continued without objection. The judge noted that Logan had several very specific opportunities to object to the search and did not.[6] The trial court stated:

> [t]here doesn't appear to be any evidence in the record that either Mr. Logan or Mr. Perry, either by word or action, made any attempt to terminate the search.

The trial court then concluded that a "valid consensual search" had taken place. The court explained that Logan's failure to discontinue the search after the officers began searching small spaces negated the testimony that he was unaware the officers were searching for something other than a DVD player. After some

[6] The judge specifically cited Logan's failure to object when the officers asked him if they could search the couch he was sitting on, asked him to stand up and asked him to remove the cushions.

discussion between the trial court and the prosecutor, the trial court stated "the officers' testimony is consistent with what happened."

"At a suppression hearing, the ability to assess the credibility of witnesses and to draw reasonable inferences from the testimony is vested in the discretion of the trial court." *Sowell v. Commonwealth*, 168 S.W.3d 429, 431 (Ky.App.2005) (internal citation omitted). Those decisions are conclusive provided they are supported by substantial evidence. *Stewart v. Commonwealth*, 44 S.W.3d 376, 380 (Ky.App.2000). The trial court accepted the officers' interpretation of the events over that of Logan which necessarily includes a finding that consent had not been withdrawn. This is well within the court's discretion. We do not find clear error in this conclusion and therefore we hold that the trial court did not err in finding that the search was permissible and that the evidence should not be suppressed.

Logan next argues that the trial court erred by failing to enter written findings of fact following the suppression hearing. Logan concedes that the issue is unpreserved and therefore we must review this matter under the palpable error rule of RCr 10.26.

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

RCr 10.26.

After a suppression hearing, the trial court is required to make findings "resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling." RCr 9.78. Here, the trial court entered its findings orally from the bench. Although written findings are preferred, they are not mandatory. *See, e.g., Coleman v. Commonwealth*, 100 S.W.3d 745, 749 (Ky. 2002). Therefore, we hold that the trial court's failure to enter written findings does not rise to the level of palpable error.

For the foregoing reasons, the March 19, 2007, judgment and sentence on guilty plea of the Boyd Circuit Court is affirmed.

ALL CONCUR.

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