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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001579-MR

PEGGY SUE ROGERS — APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NOS. 06-CR-00920 & 06-CR-00920-003

COMMONWEALTH OF KENTUCKY — APPELLEE

AND NO. 2007-CA-001631-MR

DENISE LEWIS — APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NOS. 06-CR-00920 & 06-CR-00920-001

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

DIXON, JUDGE: Denise Lewis[1] and Peggy Sue Rogers appeal their criminal convictions following a joint jury trial in Fayette Circuit Court. Although Lewis and Rogers filed separate appeals, this Court will hear their appeals together, as they arise from the same criminal case. In our review, we will first address a suppression issue raised by both Lewis and Rogers; thereafter, we will address their remaining individual issues.

On May 16, 2006, Lexington Police Officer Larry Saval received a call dispatching him to the Super 8 Motel to answer a complaint of suspicious narcotics activity. The motel's manager advised Officer Saval that there had been frequent suspicious traffic entering and exiting room 122, which was registered to Lewis. The manager also told Officer Saval that several motel guests had complained about loud noise coming from room 122.

Officer Saval, accompanied by Officer Sommer Cook, knocked on the door of room 122. A woman, later identified as Rogers, answered the door. Officer Saval advised Rogers that there had been noise complaints, and Rogers admitted the television had been playing loudly prior to the officers' arrival. Officer Saval asked Rogers if he could step inside the room to speak with the

[1] Denise Lewis is also known as Denise Michelle Lewis Bankston.

occupants. Rogers responded that a man inside needed to get dressed. Officer Saval offered to have Officer Cook wait outside and repeated his query about entering the room. Rogers stepped aside and opened the door for Officer Saval to enter the room.

Inside the motel room, a man, later identified as Maurice Long, was on the bed, and Rogers advised that Lewis was in the bathroom. Officer Saval made small talk with Long and Rogers while he waited for Lewis. In plain view, Officer Saval noticed white powder on top of a mini-refrigerator and a metal "push rod" on the table. Officer Cook entered the room behind Officer Saval and saw a crack pipe on the floor beside the bed. Lewis, Rogers, and Long were ultimately arrested and charged with various drug-related offenses.[2]

A Fayette County Grand Jury indicted Lewis and Rogers for 1) trafficking in a controlled substance, first degree (cocaine); 2) trafficking in a controlled substance, second degree (hydrocodone); and 3) possession of drug paraphernalia. Lewis was also charged with being a persistent felony offender (PFO), first degree. Prior to trial, Lewis and Rogers moved the trial court to suppress all evidence seized from the motel room, arguing that the warrantless entry and subsequent search violated their state and federal constitutional rights. U.S. Const. amend. IV; Ky. Const. § 10. Following a suppression hearing on February 27, 2007, the trial court denied the motion. Thereafter, on June 4, 2007, a joint jury trial commenced.

[2] Although Maurice Long was tried jointly with Lewis and Rogers, he is not a participant in this appeal.

The jury found Lewis guilty of possession of a controlled substance (cocaine) and possession of drug paraphernalia. The jury recommended a sentence of five-years' imprisonment, which was enhanced to eighteen years upon the jury's finding that Lewis was a first-degree PFO. The jury found Rogers guilty of possession of a controlled substance (cocaine), possession of a controlled substance in an unauthorized container, and possession of drug paraphernalia. The jury recommended a sentence of four-years' imprisonment.

On July 3, 2007, the trial court sentenced Rogers to four-years' imprisonment, suspended and probated for four years. On August 6, 2007, the court sentenced Lewis to eighteen-years' imprisonment pursuant to the jury's recommendation. These appeals followed.

I. Motion to Suppress Evidence

When this Court reviews a determination on a motion to suppress evidence, we are bound by the factual findings of the trial court if they are supported by substantial evidence. *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998) (citing Kentucky Rules of Criminal Procedure (RCr) 9.78). We then review *de novo* the application of the law to the facts. *Id*.

Specifically at issue here is whether Rogers voluntarily allowed Officer Saval to enter the motel room, or whether her consent was coerced by the officer's alleged ruse. Consequently, if the officer did not enter the room with valid consent, the resulting seizure of the contraband, pursuant to the plain view exception to the warrant requirement, would be unconstitutional. *Hazel v.*

Commonwealth, 833 S.W.2d 831, 833 (Ky. 1992) ("[T]he officer [must] be lawfully located in a place from which the object can be plainly seen[.]"). "[W]hether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S.Ct. 2041, 2047-48, 36 L.Ed.2d 854 (1973).

At the conclusion of the hearing, the judge briefly commented on the arguments of the parties. Although written findings of fact would be helpful, we have reviewed the hearing and conclude that the court adequately conveyed its factual findings. *Coleman v. Commonwealth*, 100 S.W.3d 745, 749 (Ky. 2002). The only testimony presented at the hearing was from Officer Saval. The court specifically found that Officer Saval did not employ a "ruse" and that Rogers had apparent authority to consent to the officers' entry. We infer from the court's comments that it found Rogers's consent to be voluntary.

Lewis and Rogers contend that the court's findings are clearly erroneous because Rogers' consent was invalidated by Officer Saval's deception. They argue that Officer Saval's testimony clearly shows that he deceived Rogers. Specifically, at the suppression hearing, Officer Saval admitted that, although he was investigating suspicious narcotics activity, he only advised Rogers that he was investigating a noise complaint. To support their argument, Appellants primarily rely on a Kentucky Supreme Court case, *Krause v. Commonwealth*, 206 S.W.3d 922 (Ky. 2006).

In *Krause*, the Court condemned the use of a ruse by a Kentucky State Police Trooper to gain entry into a home for the ulterior purpose of searching for drugs. *Id*. at 923-24. Specifically, the trooper had learned from an arrestee that cocaine was located in a house shared by Krause and his roommate, Joe Yamada. *Id*. at 923. Thereafter, at 4:00 a.m., the trooper approached the home occupied by Krause and Yamada and knocked on the door. *Id*. at 924. When Krause answered the door, the trooper fabricated a ruse, telling Krause that he needed to look around inside the house because a young girl had reported that Yamada raped her at the residence. *Id*. Krause allowed the trooper to look around the house, and the trooper subsequently discovered drugs in plain view. *Id*. The trial court found Krause voluntarily consented to the warrantless search, and a panel of this Court, in a two-to-one decision, affirmed. *Id*.; *Krause v. Commonwealth*, 2003-CA-002092-MR (Oct. 29, 2004). The Kentucky Supreme Court granted discretionary review and concluded that the ruse was coercive and rendered Krause's consent to search invalid. *Id*. at 927-28.

The *Krause* Court considered several factors in determining whether Krause's consent was coerced. The Court specifically noted that the early morning hour coupled with the "heinous and shameful accusation" of rape was startling. The Court concluded,

> What distinguishes this case most, perhaps, from the bulk of other ruse cases is the fact that [the trooper] exploited a citizen's civic desire to assist police in their official duties for the express purpose of incriminating that citizen. The use of this particular ruse simply crossed the

> line of civilized notions of justice and cannot be sanctioned without vitiating the long established trust and accord our society has placed with law enforcement.

Id. at 927. Furthermore, the Court acknowledged,

> We are careful to note that our holding is limited and narrow. We do not hold that the use of ruses, in general, is unconstitutional.

Id. at 926.

Appellants argue that the facts in the case at bar are "indistinguishable" from those in *Krause*. They contend that Officer Saval deceived Rogers and exploited her willingness to assist the officer in the noise complaint investigation. After carefully considering Appellants' argument, we disagree and find *Krause*, *supra*, distinguishable.

Here, Officer Saval, in uniform, encountered Rogers at 5:00 p.m. He approached room 122 in the course of investigating a legitimate complaint of suspicious narcotics activity, with a secondary complaint of loud noise. He did not fabricate a "heinous" accusation, as in *Krause*, *supra*. In fact, when the officer asked Rogers about the noise, she admitted the television had been playing very loudly.

Based on the record before us, we are not persuaded that Officer Saval's failure to tell Rogers about the complaint of suspicious activity was "so unfair and unconscionable as to be coercive[.]" *Id*. at 927-28. We conclude substantial evidence supports the finding that Rogers voluntarily consented to Officer Saval's entry. Accordingly, because the officer was lawfully in the room,

he properly seized the contraband in plain view. See *Hazel*, 833 S.W.2d at 833. The trial court did not err by denying the motion to suppress.

Lewis' Second Argument

Lewis separately contends that the trial court committed reversible error by allowing a police narcotics detective, Sergeant Shane Ensminger, to testify as an expert witness without holding a hearing pursuant to *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Lewis asserts that Sgt. Ensminger's impermissible drug trafficking "profile" testimony was prejudicial.

We review a trial court's evidentiary decision for an abuse of discretion. *Ratliff v. Commonwealth*, 194 S.W.3d 258, 270 (Ky. 2006). Accordingly, we will not disturb the court's ruling unless it was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted).

Kentucky Rules of Evidence 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Furthermore, in *Dixon v. Commonwealth*, 149 S.W.3d 426, 430-31 (Ky. 2004), our Supreme Court approved of expert testimony offered by a narcotics detective where the testimony assisted the jury in understanding the evidence.

Sgt. Ensminger had more than thirteen-years' experience with the Lexington Police Department. At the time of his testimony, Sgt. Ensminger had handled more than 1,000 narcotics cases and was in his sixth year as supervisor of the narcotics unit. Sgt. Ensminger testified generally regarding different types of drug transactions and he described the relationship between a drug supplier and street-level dealer. Sgt. Ensminger also explained different ways the police investigate narcotics offenses.

The record reflects that Sgt. Ensminger was well qualified to render an expert opinion to help the jury understand the evidence. Furthermore, despite Lewis' argument to the contrary, the court did not abuse its discretion by allowing Sgt. Ensminger's testimony without holding a *Daubert* hearing. *Id*. at 431.

Finally, Lewis contends that she was prejudiced by Sgt. Ensminger's description of drug trafficking stereotypes. We note, and Lewis concedes, that the jury convicted her of possession of cocaine rather than trafficking. We are not persuaded by Lewis' speculative theory that the jury was influenced by Sgt. Ensminger's testimony when it found Lewis to be a PFO. Accordingly, we find no error.

Rogers' Second Argument

Although Rogers concedes that her second argument is unpreserved, she opines that the trial court's failure to issue written findings of fact following the suppression hearing constitutes palpable error. RCr 10.26. We disagree.

Contrary to Rogers' assertion, RCr 9.78 does not mandate written findings of fact; rather, the rule requires findings of fact to be entered into the record. As our Supreme Court has noted,

> Although we agree that written findings greatly facilitate appellate review, and we recognize that it is sometimes difficult to discern the basis for a trial court's ruling from on-the-record free-form analysis, we do not believe this is a case where we are 'left in the dark' as to the basis for the trial court's ruling.

Coleman, 100 S.W.3d at 749.

Here, although the court's failure to make written findings of fact hampers our review, we are not "left in the dark" as to the court's ruling. *Id*. Consequently, there is no palpable error.

CONCLUSION

For the reasons set forth above, we affirm the judgments of the Fayette Circuit Court as to both Lewis and Rogers.

ALL CONCUR.

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