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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001475-MR

CHARLES S. WILLIAMS, JR.

APPELLANT

v. APPEAL FROM BRECKINRIDGE CIRCUIT COURT
HONORABLE BRUCE T. BUTLER, JUDGE
ACTION NO. 07-CR-00007

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MOORE AND THOMPSON, JUDGES; HENRY,¹ SENIOR JUDGE.

MOORE, JUDGE: Charles Stanley Williams, Jr., appeals from a Judgment and Sentence on Plea of Guilty of the Breckinridge Circuit Court, after having reserved his right to appeal the court's overruling of his motion to suppress. Upon review, we affirm.

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

I. FACTUAL AND PROCEDURAL BACKGROUND

In an underlying matter, Williams entered a guilty plea to charges of trafficking in marijuana, possession of marijuana, and possession of a controlled substance in the first degree. He was sentenced to one year in prison. At his sentencing hearing, Williams requested probation. The Commonwealth agreed not to oppose probation if Williams passed an “on-the-stop” drug test, which he did.

After Williams passed his drug test, there was no opposition from the Commonwealth to probation. The trial court explained to Williams that to receive probation, he had to agree to and sign a “Waiver of Constitutional Rights and Consent to Search,” containing the following:

“I, the undersigned, have been informed by my attorney, Aaron Whaley, of my Fourth Amendment Right not to have a search of, or seizure of property owned by me, or in my care, custody, or control without a valid search warrant.”

“I, hereby, willingly give my permission to any properly identified law enforcement officers to conduct a complete search of me, my residence and any premises. . . . Additionally, I willingly consent for these officers to seize anything they desire as evidence for criminal prosecution.”

“My attorney has also informed me of my Fifth Amendment Right to not be compelled to testify against myself in a criminal case and that I have a right to remain silent if I feel my answer would incriminate me.”

“I, hereby, willingly agree to testify and answer All questions asked of me by my Probation Officer or law enforcement officers concerning any illegal activity

committed by me during the period of my probation. I realize that I might be called in front of a grand jury and questioned. I, hereby, willingly agree to appear and answer All questions.”

The court went into detail explaining to Williams what this waiver meant regarding searches of his home, person, vehicles, etc., without a warrant or probable cause. Williams answered that he understood this; his counsel was present and did not make any objection to the waiver. Thereafter, the court sentenced Williams to five years’ probation.

Williams now maintains that “the trial judge threatened [him] with prison time should he refuse to sign” the waiver and cites to a page in the record for this assertion. The page cited, however, is to the Commonwealth’s Memorandum Regarding Defendant’s Motion to Suppress and does not support Williams’s allegation.

On our own review of the sentencing hearing, we find Williams’s assertion that the trial court threatened him with prison time if he refused to sign the waiver is not supported. Obviously, if Williams did not agree with the conditions of the waiver, withdrew his request for probation, and accepted his one-year sentence, he would have then served jail time. Nonetheless, to describe what transpired as Williams’s signing of the waiver under threat of jail is a mischaracterization of the record. Williams signed the waiver as a condition of his probation, which indicated that he understood what he was doing, and he was

assisted by counsel when he did so. His counsel made no objections to any aspect of the waiver, including its constitutionality.

While Williams was serving probation, Breckinridge Deputy Tommy Styles introduced Breckinridge Detective Ron Eckart to an informant, who was arrested the prior day and offered information about drug activities in the area. This informant had given reliable information regarding illegal drugs, which proved to be truthful in the past, to the sheriff's department.

The informant revealed that he had been at Williams's trailer home the day before he spoke to Detective Eckart and that he had observed methamphetamine while there. The informant specifically noted that the methamphetamine was a "funny color." He also stated that Williams had a large bag of marijuana. According to the informant, Williams took the bag of marijuana to an outbuilding located behind Williams's trailer home.

Detective Eckart learned from checking Courtnet that Williams had signed the above noted waiver. He then contacted the Commonwealth's Attorney to obtain a copy of the consent form. Thereafter, Detective Eckart, accompanied by Sergeant Corey Knochel and Sheriff Todd Pate, went to Williams's home. Detective Eckart and Sergeant Corey wore their badges and Sheriff Pate wore his uniform.

The officers knocked on Williams's door and announced their presence. They heard the television playing, yet no one answered the door. The officers walked around his residence and the surrounding yard.

Believing that Williams's father lived across the street and hearing music coming from there, the officers went there to find Williams. No one answered the door when they knocked.

Having failed to locate anyone, Sergeant Knochel contacted the Commonwealth's Attorney to determine if the waiver allowed the officers to enter Williams's home in his absence. Upon learning that this was permissible due to Williams's waiver of his rights, the officer removed the lock from Williams's door to enter his trailer home.

Once inside Williams's home, the officers found two baggies of methamphetamine. Consistent with what the informant told Detective Eckart, the methamphetamine was not a normal tan color; rather, it was white. The officers also found a set of scales and an 870 shotgun. Additionally, they recovered a partially burned marijuana cigarette from Williams's kitchen garbage can.

Relying on the information given to them by the informant, the officers then went to the outbuilding behind Williams's trailer home. They did not find a large bag of marijuana as referenced by the informant but did find some marijuana plant material.

Williams was subsequently indicted for a variety of offenses resulting from the search of his property.² Thereafter, the Commonwealth moved to revoke Williams's probation, which the trial court granted.

² These charges include first-degree trafficking in a controlled substance (methamphetamine) enhanced by possession of a firearm, possession of marijuana enhanced by possession of a firearm, possession of drug paraphernalia enhanced by possession of a firearm, possession of a firearm by a convicted felon, and being a second-degree persistent felony offender.

Williams then moved to suppress the evidence collected during the search of his property, arguing that: (1) a waiver of federal constitutional rights does not constitute a waiver of state constitutional rights; (2) the waiver only allowed a search if Williams was present to give permission to any properly identified law enforcement officers; (3) the search of Williams's home was unreasonable under the Fourth Amendment; and (4) the inclusion of a statement requiring Williams to waive his Fifth Amendment rights rendered the waiver invalid.

The trial court denied Williams's motion, ruling that "[a] waiver of Fourth Amendment rights pursuant to the United States Constitution is in essence a waiver of rights provided by Section 10 of the Kentucky Constitution which is the Kentucky version of the right to be free from unreasonable searches and seizures."

Regarding Williams's argument that the waiver included that he had to physically be present to give permission for a search, the trial court found no merit in this argument. The trial court held that "[t]he common sense reading of [the] provision does not mean that a police officer has to identify himself before he can search property clearly owned by a defendant who is on probation and is not present to give consent."

The trial court found no merit in Williams's Fourth Amendment argument. The court determined there was reasonable suspicion and that as a condition of being granted the probation Williams's requested, the search was reasonable in light of the waiver.

As to the officers' breaking into Williams's residence, the trial court found that given the situation this was reasonable. The officers attempted to locate Williams; they had heard a television playing when they knocked on the door; and they had reasonable suspicion that Williams was in violation of his probation by being in possession of illegal substances.

On appeal, Williams contends that: (1) the trial court erred in denying his motion to suppress because he waived his federal constitutional rights, not his state constitutional rights; (2) the trial court erred in interpreting the waiver form in favor of the Commonwealth when the waiver's plain language concerned only a waiver of federal constitutional rights; (3) the trial court erred when it held that the search of Williams's residence was reasonable pursuant to the Fourth Amendment; and (4) the inclusion of a provision in the waiver requiring Williams to waive his Fifth Amendment rights invalidates the entire agreement.

II. ANALYSIS

A. CLAIM THAT THE TRIAL COURT ERRED IN DENYING MOTION TO SUPPRESS

Williams first alleges that the trial court erred in denying his motion to suppress because he waived his federal constitutional rights, not his state constitutional rights. However, the Kentucky Supreme Court has held that "Section 10 of the Kentucky Constitution provides no greater protection than does the federal Fourth Amendment." *LaFollette v. Commonwealth*, 915 S.W.2d 747, 748 (Ky. 1996). That Court has also held "that the protection against self-

incrimination given by the Fifth Amendment to the United States Constitution is identical with that afforded by Section Eleven of the Kentucky Constitution.” *Commonwealth v. Cooper*, 899 S.W.2d 75, 77 (Ky. 1995). Thus, the applicable provisions in the Kentucky Constitution are construed the same as the Fourth and Fifth Amendments to the United States Constitution. Therefore, because the pertinent provisions of the Kentucky Constitution are construed the same as their federal counterparts, and because Williams consented to searches and waived his rights against self-incrimination, the circuit court did not err in denying Williams’s motion to suppress.

B. CLAIM THAT THE TRIAL COURT ERRED IN INTERPRETING THE WAIVER FORM IN THE COMMONWEALTH’S FAVOR

Williams next asserts that the trial court erred in interpreting the waiver form in favor of the Commonwealth when the waiver’s plain language concerned only a waiver of federal constitutional rights. However, this claim lacks merit because, as previously explained, the applicable provisions of the Kentucky Constitution are construed the same as the United States Constitution. Furthermore, the waiver did not state that Williams was only waiving his Fourth and Fifth Amendment rights under the United States Constitution. Rather, the waiver explicitly stated that Williams consented to searches of himself, his vehicle, and any premises under his care, custody, or control, and that he waived his right against self-incrimination. Therefore, the circuit court did not err concerning this claim.

C. CLAIM THAT THE TRIAL COURT ERRED WHEN IT HELD THAT THE SEARCH OF WILLIAMS’S RESIDENCE WAS REASONABLE

Williams next contends that the trial court erred when it held that the search of Williams’s residence was reasonable pursuant to the Fourth Amendment.

The 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 interests.

United States v. Knights, 534 U.S. 112, 118-19, 122 S. Ct. 587, 591, 151 L. Ed. 2d 497 (2001) (internal quotation marks omitted). In *Knights*, to receive probation for a prior conviction, the defendant had signed a waiver stating that he would submit himself, his “property, place of residence, vehicle, [and] personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause. . . .” *Id.* at 114, 122 S. Ct. at 589. In the present case, Williams signed a waiver that did not just promise to submit to a search, but straightforwardly provided consent for law enforcement to conduct a search of himself, his residence, etc.

The United States Supreme Court has held that: “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.” *Knights*, 534 U.S. at 121, 122 S. Ct. at 593.

Consent to search provided in a probation condition agreement, such as the one Williams signed in this case, “will support a warrantless search if the

officer has a reasonable suspicion that the person who gave the consent is presently engaged in criminal activity.” *Parks v. Commonwealth*, 192 S.W.3d 318, 330 (Ky. 2006) (internal quotation marks omitted).

“The Court held in *Knights* that a warrantless search of a probationer’s residence is reasonable under the Fourth Amendment when the search is supported by a reasonable suspicion that the probationer is engaged in criminal activity and such a search is authorized by a condition of probation.” *Riley v. Commonwealth*, 120 S.W.3d 622, 627 (Ky. 2003). “In support of this conclusion, the Court explained, ‘[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.’” *Id.* (quoting *Knights*, 534 U.S. at 121, 122 S. Ct. at 593).

In the present case, Williams’s home was searched because a confidential informant had provided a tip that drugs would be found at Williams’s residence and because Williams had signed a form providing his consent to search as a condition of his probation. In the past, the confidential informant had given the sheriff’s department reliable information regarding illegal drugs, which proved to be truthful.

Regarding Williams, the informant revealed that he had been at Williams’s trailer home the day before speaking to Detective Eckart and that he had observed methamphetamine while there. The informant specifically noted that

the methamphetamine was a “funny color.” He also stated that Williams had a large bag of marijuana. According to the informant, Williams took the bag of marijuana to an outbuilding located behind Williams’s trailer home.

Based on the informant’s tip, the officers had reasonable suspicion that Williams, who was subject to the search condition, was engaged in criminal activity. Therefore, the search of Williams’s residence was reasonable, and the circuit court did not err in this regard.

D. CLAIM THAT THE INCLUSION OF A PROVISION IN THE WAIVER REQUIRING WILLIAMS TO WAIVE HIS FIFTH AMENDMENT RIGHTS INVALIDATES THE ENTIRE AGREEMENT

Finally, Williams alleges that the inclusion of a provision in the waiver requiring him to waive his Fifth Amendment rights invalidates the entire agreement. However, Williams does not allege that he has ever been forced to incriminate himself pursuant to that provision. Thus, this claim is “remote and speculative” and Williams does not have standing to bring this claim at this time. *City of Louisville v. Stock Yards Bank & Trust Co.*, 843 S.W.2d 327, 329 (Ky. 1992) (internal quotation marks omitted).

E. CONCLUSION

Accordingly, the judgment of the Breckinridge Circuit Court is affirmed.

HENRY, SENIOR JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

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