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Commonwealth Of Kentucky

Court of Appeals

NO. 2007-CA-000844-MR

CHARLES C. LYNN, SR. APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN A. HAYDEN, JUDGE
ACTION NO. 06-CR-00281

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING IN PART& REVERSING IN PART & REMANDING

** ** ** ** **

BEFORE: ACREE, CAPERTON, JUDGES; ROSENBLUM,[1] SPECIAL JUDGE.

ROSENBLUM, SPECIAL JUDGE: Charles C. Lynn, Sr. appeals from a Henderson Circuit Court conviction of first-degree possession of a controlled substance (second offense); possession of drug paraphernalia (second offense); possession of marijuana; and being a second-degree persistent felony offender.

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

Lynn claims that the court erred by (1) admitting evidence seized in a search resulting from an anonymous uncorroborated tip; (2) failing to grant a mistrial when the prosecutor stated an intent to call Lynn's defense attorney as a witness; and (3) admitting a statement that was not provided in discovery. We will discuss each argument in turn.

On September 25, 2006, the Henderson Police Department received an anonymous tip from someone who claimed to have seen drugs at a residence located at 1612 Garfield Avenue. Officers went to the residence and found Lynn standing outside. The officers approached Lynn and told him about the tip. After talking with the officers and reading a consent form, Lynn gave oral and written consent to search the residence. A search of the home revealed methamphetamine, marijuana, and drug paraphernalia. As police investigated the scene and collected evidence, Lynn stated to his wife, "Tell them everything is yours. I can't take another charge."

On November 14, 2006, Lynn was indicted by the Henderson County Grand Jury for first-degree possession of a controlled substance (second defense), possession of drug paraphernalia (second offense), possession of marijuana, and being a second-degree persistent felony offender. On February 27, 2007, following a trial by a jury, Lynn was convicted of all charges.

First, Lynn claims that the trial court erred by admitting evidence seized during the September 25, 2006 search of his home. Lynn claims that the officers lacked probable cause to search his home because the search was based on

an anonymous tip that was uncorroborated by the police. Lynn further claims that his initial contact with the police and subsequent search with or without consent were unlawful.

An appellate court's standard of review of the trial court's decision on a motion to suppress requires that we determine whether the trial court's findings of fact are supported by substantial evidence. We must review the court's findings of fact only for clear error while giving deference to the inferences drawn from those facts by the trial judge. *Commonwealth v. Whitmore*, 92 S.W.3d 76, 79 (Ky.2002), *quoting* *Ornelas v. United States*, 517 U.S. 690, 699, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911 (1996). Based on those findings of fact, we must then conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law. *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky.App.2002).

Following a suppression hearing conducted on February 27, 2007, the trial court entered findings of fact and conclusions of law denying Lynn's motion to suppress the evidence seized from his residence. The court found that Lynn voluntarily consented to the search of his home.

We agree that probable cause does not exist merely from an uncorroborated anonymous tip. *Illinois v. Gates*, 462 U.S. 213, 242, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). In order to effectuate a stop, police must have reasonable suspicion that criminal activity is occurring. *Terry v. Ohio,* 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 229 (1968). Fourth Amendment protections are

only invoked when by show of police force or authority a reasonable person would believe that they are not free to leave. *Terry,* 392 U.S. at 19, footnote 16. Fourth Amendment protections do not extend to individuals who are merely approached by police and questioned about criminal actions. *Florida v. Royer*, 460 U.S. 491, 497, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). When officers have not seized or detained a person and that person is free to leave, no constitutional rights have been infringed.

The act of police walking up to a person outside a residence and asking questions pertaining to an investigation is often referred to as a "knock-and-talk." During a knock-and-talk, the person being questioned has the ability to leave and is in no way being detained by the police. Many courts, including the United States Court of Appeals for the Sixth Circuit, have recognized the legitimacy of knock-and-talk encounters at the home of a suspect or another person who is believed to possess information about an investigation. *United States v. Thomas*, 430 F.3d 274, 277 (6th Cir.2005). This Court, in *Perkins v. Commonwealth*, 237 S.W.3d 215, 219 (Ky.App. 2007) noted, "[w]e agree that there is nothing inherently unconstitutional or even inappropriate about the use of the knock-and-talk technique as an investigatory tool."

Lynn does not provide any information describing why he felt detained or that his liberty was being restricted. As previously noted, courts must determine whether a stop has occurred by a reasonable person standard. Testimony elicited at the suppression hearing indicated that Lynn was standing on

the sidewalk and actually walked toward the officers as they approached. A review of the record does not indicate that weapons were drawn. Furthermore, there is no indication that Lynn was told not to leave. The police were free to speak to Lynn without corroborating the anonymous tip.

Although this Court, in *Perkins*, *supra*, upheld knock-and-talk techniques as an investigatory tool free of constitutional ramifications, the Court noted the constitutional implications when subsequent consent is obtained under duress during a knock-and-talk. Here, Lynn argues that his consent was a product of duress.

The Fourth Amendment of the United States Constitution generally prohibits a warrantless entry into a person's home. 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).

Lynn argues that the presence of two police cars and two uniformed officers at his home created a coercive and confrontational atmosphere whereby he

did not voluntarily consent to the search of his home. In *Krause v. Commonwealth*, 206 S.W.3d 922, 924 (Ky. 2006), the Kentucky Supreme Court stated that

> "the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means . . . [f]or, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed." (quoting *Schneckloth v.Bustamonte*, 412 U.S. 218, 228 (1973)). Whether consent is the result of express or implied coercion is a question of fact and thus, we must defer to the trial court's finding if it is supported by substantial evidence. (citations omitted).

The trial court found Lynn's consent to be voluntary. The record reflects that the officers arrived at his home and that Lynn voluntarily approached the officers. Not only did Lynn verbally consent to the search, he also signed a consent to search form. The presence of uniformed law enforcement officers and two patrol cars alone does not create a coercive environment. We find that substantial evidence exists which permitted the trial court to determine that Lynn's consent was voluntary.

Lynn next claims that the trial court erred by refusing to grant a mistrial in light of the prosecutor's statement in *voir dire* that defense counsel was a potential witness. The Commonwealth claimed defense counsel was a potential witness because defense counsel also represented Lynn's wife. Lynn's brief makes the following statement, "The argument from the Commonwealth was that

[defense counsel] was a potential material witness because he had gone to the prison to get Mr. Lynn's wife to sign an affidavit that she in fact had possessed the [evidence] seized at the house." Prior to trial the Commonwealth made a motion to call defense counsel as a witness and a motion to disqualify defense counsel based on a conflict of interest. Both motions were denied. Lynn argues that by then naming defense counsel as a potential witness during *voir dire* allowed the Commonwealth to gain a competitive advantage and encouraged jurors to speculate as to defense counsel's veracity. We agree that the Commonwealth should not have mentioned defense counsel as a potential witness during *voir dire* when the motion to call defense counsel as a witness was previously denied. However, it appears from the record that the trial court's denial of Lynn's motion for a mistrial does not constitute an abuse of discretion.

A trial court's decision to deny a mistrial is reviewable based on an abuse of discretion standard. *Martin v. Commonwealth*, 170 S.W.3d 374, 381(Ky. 2005). "A manifest necessity for a mistrial must exist before it will be granted." *Id*. Further, in *Bray v. Commonwealth*, 177 S.W.3d 741 (Ky. 2005), the Kentucky Supreme Court provided:

> [w]hether to grant a mistrial is within the sound discretion of the trial court, and such a ruling will not be disturbed absent an abuse of that discretion. A mistrial is an extreme remedy and should be resorted to only when there appears in the record a manifest necessity for such an action or an urgent or real necessity. The error must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial

effect can be removed in no other way . . . .

Bray at 752.

When the Commonwealth mentioned defense counsel as a potential witness during *voir dire*, defense counsel moved for a mistrial. The trial court denied the motion for a mistrial but offered to admonish the jury. Defense counsel refused an admonition by maintaining that an admonition would not sufficiently cure the harm. However, juries are presumed to follow an admonition. *Mills v. Commonwealth*, 996 S.W.2d 473, 485 (Ky. 1999). In *Combs v. Commonwealth*, 198 S.W.3d 574, 581-582 (Ky. 2006), the Court provided:

> [t]here are only two circumstances in which the presumptive efficacy of an admonition falters: (1) when there is an overwhelming probability that the jury will be unable to follow the court's admonition and there is a strong likelihood that the effect would be devastating to the defendant; or (2) when the question was asked without a factual basis and was "inflammatory" or "highly prejudicial."

Combs at 581-582.

We find neither circumstance present in this case. An admonition could have cured any harm caused by the Commonwealth's statements. The trial court did not abuse its discretion by refusing to grant a mistrial.

Lynn finally contends that the trial court erred by admitting a statement allegedly made by Lynn, "Tell them everything is yours. I can't take another charge." Lynn argues that the second portion of the statement was not provided to the defense until the day of trial, in violation of *Brady v. Maryland*,

373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).[2] The Commonwealth argues that the statement does not constitute a *Brady* violation because the statement is not exculpatory. Furthermore the Commonwealth alleges that even if the statement does constitute a discovery violation, it is not reversible error. We disagree.

Brady, supra, involves the prosecution's duty to disclose exculpatory statements to the defense. While the statement at hand is not a *Brady* violation *per se*, because it is not exculpatory, the Commonwealth has a duty to disclose all inculpatory statements that it plans to use against the defendant. RCr[3] 7.24 (1)[4] requires the Commonwealth, upon motion by the defense, to provide "any oral incriminating statement known by the attorney for the Commonwealth to have been made by a defendant to any witness." In addition, RCr 7.26 (1)[5] provides

[2] We note that no Kentucky Rules of Evidence 404(b) argument has been preserved. However, in the event that the second portion of this statement is sought to be introduced upon remand, the trial court should determine whether the second portion of this statement may have such implications.

[3] Kentucky Rules of Criminal Procedure.

[4] RCr 7.24 (1) provides: Upon written request by the defense, the attorney for the Commonwealth shall disclose the substance, including time, date, and place, of any oral incriminating statement known by the attorney for the Commonwealth to have been made by a defendant to any witness, and to permit the defendant to inspect and copy or photograph any relevant (a) written or recorded statements or confessions made by the defendant, or copies thereof, that are known by the attorney for the Commonwealth to be in the possession, custody, or control of the Commonwealth, and (b) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, that are known by the attorney for the Commonwealth to be in the possession, custody or control of the Commonwealth.

[5] RCr 7.26 (1) provides: Except for good cause shown, not later than forty-eight (48) hours prior to trial, the attorney for the Commonwealth shall produce all statements of any witness in the form of a document or recording in its possession which relates to the subject matter of the witness's testimony and which (a) has been signed or initialed by the witness or (b) is or purports to be a substantially verbatim statement made by the witness. Such statement shall be made available for examination and use by the defendant.

"except for good cause shown, not later than forty-eight (48) hours prior to trial, the attorney for the Commonwealth shall produce all statements of any witness in the form of a document or recording in its possession which relates to the subject matter of the witness's testimony[.]"

The Commonwealth relies on *Mathews v. Commonwealth*, 997 S.W.2d 449 (Ky. 1999) and argues that the statement is neither inculpatory nor exculpatory but rather is ambiguous. We find nothing ambiguous about the second portion of the statement. The second portion of the statement suggests prior criminal conduct on Lynn's part and a request that his wife take the fall for him. We also note that *Mathews* was overruled by *Chestnut v. Commonwealth*, 250 S.W.3d 288 (Ky. 2008). The Kentucky Supreme Court stated, "The Commonwealth's ability to withhold an incriminating oral statement through oversight, or otherwise, should not permit a surprise attack on an unsuspecting defense counsel's entire defense strategy. Such a result would run afoul of the clear intent of RCr 7.24(1)." *Chestnut, supra* at 296.

A review of the record indicates that the statement was only provided to the defense on the day of trial just minutes before the testimony of the police officer who told the jury about this statement. The prosecutor stated that he did not interview the officer until the day of trial and therefore did not know about the complete statement. The trial court reasoned that the statement was admissible because the prosecutor did not have knowledge of the statement prior to trial.

The Commonwealth cannot choose to wait until the day of trial to interview a witness and then disclose previously unknown evidence. As previously noted, RCr 7.24 and 7.26 and case law clearly require evidence to be submitted within a sufficient amount of time to allow defense counsel to review the evidence and properly adjust its strategy. The admission of the second portion of the statement created a surprise attack and thus resulted in a denial of Lynn's due process protections.

Accordingly, the judgment and conviction of the Henderson Circuit Court is affirmed in part, reversed in part and remanded for a new trial in conformity with this opinion.

ACREE, JUDGE, CONCURS.

CAPERTON, JUDGE, CONCURS BY SEPARATE OPINION.

CAPERTON, JUDGE, CONCURRING: I write separately only to express my belief that RCr 7.26 has a more narrow application than the majority opinion implies.

The plain reading of RCr 7.26 applies to witness statements in contrast to RCr 7.24 (1) which specifically applies to incriminating statements of a defendant. In *Hicks v. Commonwealth*, 805 S.W.2d 144, 148 (Ky.App.1990), this Court stated "[t]his rule [referring to RCr 7.26] was enacted for the purpose of allowing defense counsel a reasonable opportunity to inspect any such previous statements, before the witness is called, to enable counsel an opportunity to fully cross-examine the witness concerning any contradictory statements made by him."

See also *Wright v. Commonwealth*, 637 S.W.2d 635 (Ky. 1982) and *Commonwealth v. Jackson*, 281 S.W.2d 891 (Ky. 1955). Therefore, I would not apply RCr 7.26 so broadly as to require disclosure of statements made by a defendant.

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