

RENDERED: OCTOBER 23, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001083-MR

VINCENT NAPIER

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 06-CR-00184

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING
WITH DIRECTIONS

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BEFORE: FORMTEXT LAMBERT AND TAYLOR, JUDGES; HENRY,
SENIOR JUDGE.

TAYLOR, JUDGE: Vincent Napier brings this appeal from a January 28, 2008,
Order of the Boyle Circuit Court denying his motion to suppress evidence. We
reverse and remand with directions.

On October 28, 2006, Boyle County Sheriff Deputies Derek Robbins and Chris L. Stratton approached the Holiday Inn Express in Danville after receiving a tip that Vincent Napier and Lisa Benedict were engaged in illicit drug-related activities. As they arrived at the hotel, Deputy Robbins saw Napier walking from the hotel toward the parking lot. Deputy Robbins stopped Napier and asked if he had any warrants outstanding for his arrest or weapons on his person. Napier responded in the negative. Deputy Robbins then asked Napier if the Deputy could conduct a pat down of Napier's person to search for weapons. Napier consented. Upon patting down Napier, Deputy Robbins felt what he described as quarter-inch thick lump in the front left pants pocket. Deputy Robbins twice asked Napier what the lump was, and Napier responded that it was "nothing." Deputy Robbins then reached into the pocket and removed the object, which was crack cocaine. After removing the cocaine from Napier's pocket, Deputy Robbins conducted a more extensive search of Napier's person and discovered more cocaine. The officers then secured a search warrant for Napier's hotel room. A search of the hotel room yielded illicit drugs and drug paraphernalia.

A Boyle County Grand Jury indicted Napier upon possession of a controlled substance in the first degree, promoting contraband in the first degree, possession of drug paraphernalia, trafficking in a controlled substance in the first degree, and with being a persistent felony offender in the second degree. Napier filed a motion to suppress the evidence seized during his arrest. Kentucky Rules of

Criminal Procedure (RCr) 9.78. Therein, Napier claimed that Deputy Robbins violated his constitutional rights “when after consent from [Napier] to perform a *Terry* search for weapons, [Deputy Robbins] then exceeded the scope of that search.” Napier moved to exclude any evidence improperly seized as a result of the search of his person and of his hotel room. The circuit court held a suppression hearing. By order entered January 28, 2008, the circuit court denied Napier’s motion to suppress.

Napier subsequently entered a conditional plea of guilty to two counts of possession of a controlled substance (first degree), promoting contraband (first degree), possession of drug paraphernalia (second degree), and with being a persistent felony offender (second degree). He was ultimately sentenced to a total of eight-years’ imprisonment. Pursuant to the conditional guilty plea, Napier reserved the right to appeal the denial of his motion to suppress. This appeal follows.

Napier contends that the circuit court committed reversible error by placing the burden of proof upon him to demonstrate that the search and seizure was unlawful. In response, the Commonwealth concedes that the burden of proof is properly upon the Commonwealth but argues that the circuit court merely “misspoke at the hearing” and that the circuit court actually placed the burden of proof upon the Commonwealth.¹

¹ Generally, the Commonwealth carries the burden of proof to justify a warrantless search and seizure. *Gallman v. Com.*, 578 S.W.2d 47 (Ky. 1979); *Cook v. Com.*, 826 S.W.2d 329 (Ky. 1992); *Dunn v. Com.*, 199 S.W.3d 775 (Ky. App. 2006); and *Washington v. Com.*, 231 S.W.3d 762 (Ky. App. 2007).

At the suppression hearing, the circuit court indisputably stated that the burden of proof was upon Napier and proceeded to hold the hearing in accordance with such belief. The record reflects that the defense put on its evidence first and presented closing argument last. Immediately following the hearing, the circuit court orally announced its ruling denying the motion to suppress and then instructed the Commonwealth to submit a written order for entry. Considering the circuit court's plain oral statement and the procedure employed at the suppression hearing, we think it clear that the circuit court placed the burden of proof upon Napier.

However, Napier's trial counsel failed to object or to raise this error before the circuit court. Napier first argues on appeal that the circuit court committed reversible error by placing the burden of proof upon him. Napier asks this Court to review the unpreserved error under the palpable error rule of RCr 10.26.

RCr 10.26 reads:

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.

To constitute palpable error, the substantial rights of the defendant must be affected resulting in manifest injustice. RCr 10.26.

It is axiomatic that the proper allocation of the burden of proof is a necessary prerequisite to a fair trial, especially in a criminal proceeding. Indeed, the burden of proof naturally affects the outcome of any proceeding by placing the evidentiary onus of the burden of production and of the ultimate burden of persuasion upon a particular party. To erroneously place the burden of proof upon a party so fundamentally affects the trial proceeding as to render the outcome irreparably tainted.

In this case, the circuit court erroneously placed the burden of proof upon Napier. Fair play and justice demand that Napier be given another suppression hearing before the circuit court with the burden of proof placed upon the Commonwealth. As such, we believe that Napier's substantial rights were affected, thus resulting in manifest injustice under RCr 10.26.

In sum, we reverse the circuit court's order denying Napier's motion to suppress. Upon remand, the circuit court is directed to hold another suppression hearing placing the burden of proof upon the Commonwealth and thereafter to reconsider its ruling upon Napier's motion to suppress evidence.

We view Napier's remaining contentions as moot.

For the foregoing reasons, the Order of the Boyle Circuit Court is reversed and this cause is remanded with directions that the circuit court conduct

another suppression hearing with the burden of proof upon the Commonwealth and to reconsider its ruling upon Napier's motion to suppress evidence.

ALL CONCUR.

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