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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002377-MR

JAMES MATTHEWS — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 08-CR-00648

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; CLAYTON, JUDGE; LAMBERT,[1] SENIOR JUDGE.

TAYLOR, CHIEF JUDGE: James Matthews brings this appeal from a December 9, 2009, judgment of the Kenton Circuit Court sentencing him to seven-years'

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

imprisonment following his conviction for first-degree possession of a controlled substance. For the reasons hereinafter stated, we affirm.

On June 6, 2008, Covington Police Officers conducted a "knock and talk" at a residence located on 122 Pleasant Street in Covington, Kentucky. At 4:30 a.m., police knocked on the door of the residence, and Matthews answered. Matthews told officers he did not live at the residence but was watching the house for its owner. The officers asked Matthews if they could search the residence. Matthews again told officers he was not the owner of the house but agreed to the search. Thereafter, officers discovered marijuana and over $300 in a dresser drawer. Based upon this discovery, the officers decided to conduct a protective sweep of the house. Thereafter, officers discovered several baggies containing crack cocaine. Officers then desired to conduct a full search of the residence and sought advice concerning the necessity of a search warrant from Commonwealth Attorney Rob Sanders. Sanders personally went to the residence that morning and spoke with Matthews. Sanders determined that Matthews' consent to search the house was sufficient. Thereupon, officers searched the house and discovered a handgun and body armor.

Matthews was indicted by the Kenton County Grand Jury upon complicity to commit first-degree trafficking in a controlled substance while in possession of a handgun and possession of a handgun by a convicted felon. The charges were bifurcated for trial. Following a jury trial upon the charge of complicity to commit first-degree trafficking in a controlled substance, Matthews

was found guilty of first-degree possession of a controlled substance. Matthews then entered into a plea agreement with the Commonwealth as to the remaining charge. In exchange for Matthews' plea of guilty to possession of a handgun by a convicted felon, the Commonwealth agreed to recommend a sentence of seven-years' imprisonment. Matthews entered a guilty plea in accordance with the plea agreement. By a December 9, 2009, judgment, Matthews was sentenced to a total of seven-years' imprisonment in accordance with the plea agreement. This appeal follows.

Matthews contends the circuit court erred by denying two motions for mistrial. We disagree.

A mistrial is an extreme remedy and may only be utilized if the record demonstrates a "manifest necessity" for a new trial. *Shemwell v. Commonwealth*, 294 S.W.3d 430, 437 (Ky. 2009). In other words, the alleged error must be of such magnitude that defendant would be prevented from receiving a fair and impartial trial and the resulting prejudice could not be removed without granting a mistrial. *Id.* The trial court's decision to delay a motion for mistrial is within the court's sound discretion and will not be disturbed absent an abuse of such discretion. *Id.*

Matthews initially asserts a mistrial was warranted because of the testimony of Commonwealth Attorney Rob Sanders. Matthews points out that during trial Sanders testified regarding statements Matthews made to him at the time of the search even though these statements were not provided during discovery as required by Kentucky Rules of Criminal Procedure (RCr) 7.24.

Hence, Matthews argues that the introduction of such testimony entitled him to a mistrial.

The record reveals that Sanders specifically testified that Matthews admitted he could supply the names of the people who were selling drugs from the residence. Sanders continued by recounting that Matthews was reluctant to do so because he was "scared of these guys." It appears that the testimony about Matthews claiming to be afraid was not disclosed by the Commonwealth during discovery. However, the record also reveals that no contemporaneous objection was made by the defense.[2] Rather, on cross-examination, Matthews attempted to impeach Sanders' trial testimony as inconsistent with his testimony during the suppression hearing. The next morning Matthews then made a motion for mistrial claiming that Sanders' testimony was prejudicial and erroneously admitted because same had not been disclosed during discovery. The circuit court denied the motion for a mistrial; no request for admonition was made.

Matthews has failed to demonstrate how introduction of Sanders' testimony regarding Matthews' fear of the drug dealers prevented him from receiving a fair and impartial trial or how it caused prejudice to him. Moreover, if the testimony were erroneously admitted, the proper remedy would either be an objection to same or a request for an admonition to the jury. Matthews did neither. Simply stated, we do not believe the admission of Sanders' testimony resulted in

[2] We harbor grave doubt as to whether this issue was properly preserved for appellate review as there was no contemporaneous objection to the testimony at trial. *See Commonwealth v. Pace*, 82 S.W.3d 894 (Ky. 2002). Despite our reservation, we will, nevertheless, review the issue upon the merits.

"manifest necessity" requiring a mistrial. *See Shemwell*, 294 S.W.3d 430, 437. In sum, we conclude that the circuit court did not abuse its discretion by denying Matthews' motion for a mistrial.

Matthews next asserts that the circuit court erred by denying his motion for a mistrial based upon the testimony of Officer Michael Lusardi, a witness for the Commonwealth. Before trial, Matthews filed a motion *in limine* seeking to limit testimony regarding the reason that a "knock and talk" was conducted at the residence. The circuit court ultimately ruled that officers could only testify in general terms that they were conducting an investigation. During trial, Officer Lusardi testified that the "knock and talk" was conducted as part of "an investigation of narcotics use in the area." Matthews objected, and when counsel approached the bench, Matthews moved for a mistrial. The court denied Matthews' motion, and no admonition to the jury was given per Matthews' request.

Again, Matthews has failed to demonstrate how Officer Lusardi's testimony that there was "an investigation of narcotics use in the area" was prejudicial, thus necessitating a mistrial. The officer did not state there was suspected narcotics activity coming from the residence. Rather, Officer Lusardi merely stated police were conducting "an investigation of narcotics use in the area." Matthews' Brief at 8. Matthews was not directly implicated nor was the residence where he was staying. As such, we cannot conclude that this testimony deprived Matthews of a fair trial or resulted in "manifest necessity" requiring a

mistrial; consequently, the circuit court did not abuse its discretion by denying the motion for a mistrial. *See Shemwell*, 294 S.W.3d 430.

Matthews also contends the circuit court erred by denying his motion for suppression of evidence seized during the search of the residence. Matthews argues that the warrantless search of the residence violated the Fourth and Fourteenth Amendments to the United States Constitution and Section 10 of the Kentucky Constitution. Matthews specifically alleges that he did not own the residence and, therefore, lacked the requisite authority to consent to a search of same. As he lacked authority to consent, Matthews argues that the warrantless search of the residence was unconstitutional, thus requiring suppression of the evidence seized.

It is well-established that an individual may waive his constitutional right against unreasonable search and seizure. *Short v. Commonwealth*, 519 S.W.2d 828 (Ky. 1975).[3] The constitutional right against unreasonable search and seizure is a personal right and exists where the individual possesses a reasonable expectation of privacy in the thing searched. *LaFollette v. Commonwealth*, 915 S.W.2d 747 (Ky. 1996)(citing *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). Concomitant thereto is the notion that to challenge the constitutionality of a search and seizure one must possess standing to do so. As

[3] *Short v. Commonwealth*, 519 S.W.2d 828 (Ky. 1975) *superseded on other grounds by* Kentucky Rules of Criminal Procedure 9.26 as recognized in *Jackson v. Commonwealth*, 113 S.W.3d 128 (Ky. 2003).

such, a challenge cannot be vicariously asserted. *U.S. v. Smith*, 783 F.2d 648 (6th Cir. 1986); *Foley v. Commonwealth*, 953 S.W.2d 924 (Ky. 1997).

Matthews' argument that the search of the residence was unconstitutional as he lacked authority to consent is legally self-refuting. If Matthews lacked authority to consent, it necessarily follows that Matthews did not possess a reasonable expectation of privacy in the residence, thus depriving Matthews of standing to challenge the constitutionality of the search in the first instance. Simply stated, if Matthews lacked authority to consent to the search, he, likewise, lacked standing to challenge the constitutionality of the search. Nevertheless, it is evident that at the very least the objective facts led to the reasonable belief that Matthews possessed common authority over the residence, thus validating his consent to search the residence. *See Commonwealth v. Nourse*, 177 S.W.3d 691 (Ky. 2005). As such, we conclude that the circuit court properly denied Matthews' motion to suppress evidence seized from the search.

Matthews finally asserts that the Commonwealth's closing argument was inflammatory and placed "community pressures on jurors to find guilt." Matthews' Brief at 17. This error was not preserved for appellate review, but Matthews has requested that we review the issue for palpable error under RCr 10.26. *See Carver v. Commonwealth*, 303 S.W.3d 110 (Ky. 2010). A palpable error is one that affects the substantial rights of a party. RCr 10.26. Upon appellate review, if the Court of Appeals does not believe there is a substantial

possibility that the result would have been different, the error is considered nonprejudicial. *Brewer v. Commonwealth*, 206 S.W.3d 343 (Ky. 2006).

During closing argument, the Commonwealth Attorney stated the following to the jury:

> Ladies and gentlemen, at the beginning of this trial, I told you this case was really simple. And I think you will agree it is. It is about four things: drugs, guns, the law and people who break the law. After the last two days of all the testimony and the presentation of evidence, I think you will agree with me that there is only one reasonable conclusion and that is a verdict of guilty under instruction number 8 – Possession of a controlled substance, first degree while in possession of a handgun. And I ask you to help me to seek justice and do the right thing and return a verdict of guilty under instruction number eight. Thank you.

In this Commonwealth, trial counsel is granted wide latitude in making closing argument. *Brewer v. Commonwealth*, 206 S.W.3d 343 (Ky. 2006). And, upon review of a claim of prosecutorial misconduct, we must view the fairness of the trial overall and reverse only if the prosecutor's misconduct is so "improper, prejudicial, and egregious as to have undermined the overall fairness of the proceedings." *Brewer*, 206 S.W.3d at 349. After reviewing the closing argument made by the Commonwealth, we do not believe the argument was so prejudicial or egregious as to constitute prejudicial error. The closing argument did not ask the jury to "send a message" to the community; rather, the Commonwealth merely asked the jury to review the evidence and "seek justice" by finding Matthews guilty. Simply stated, there is not a substantial possibility that

the verdict would have been different. *See Brewer v. Commonwealth*, 206 S.W.3d 343. As such, we view Matthews' contention of error to be without merit.

For the foregoing reasons, the judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

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