

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001946-MR

KENNETH GREGORY

APPELLANT

v. APPEAL FROM CLAY CIRCUIT COURT
HONORABLE OSCAR G. HOUSE, JUDGE
ACTION NO. 09-CR-00107

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; MOORE AND THOMPSON, JUDGES.

MOORE, JUDGE: Kenneth Gregory appeals the Clay Circuit Court's order denying his motion to suppress. After a careful review of the record, we reverse and remand because the Commonwealth has failed to meet its burden of proof concerning the merits of the issues before us, as required by CR¹ 76.12(4)(d).

¹ Kentucky Rule of Civil Procedure.

I. FACTUAL AND PROCEDURAL BACKGROUND

Gregory was indicted on the following charges in the present case:

(1) first-degree possession of a controlled substance; (2) manufacture of methamphetamine, first offense; (3) second-degree hindering prosecution or apprehension; (4) second-degree possession of a controlled substance, second offense; (5) carrying a concealed deadly weapon; (6) first-degree persistent felony offender (PFO-1st); and (7) possession of drug paraphernalia.

Gregory filed a motion to suppress the property taken from his residence following the search of the residence. A suppression hearing was held, and the circuit court ultimately denied Gregory's motion to suppress.²

Gregory later signed a document titled "Conditional Plea," which provided that he would enter a guilty plea pursuant to *North Carolina v. Alford*,³ 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), to the charge of manufacturing methamphetamine, first offense. The document stated that he conditioned his plea "upon the filing of an appeal on the issue of [the circuit court's] denial of [his] pretrial motion to suppress seized evidence from [his] home wherein the Manchester City Police entered said home without consent and/or a search warrant." (Emphasis removed). Gregory's attorney and the circuit court also

² Gregory also filed other motions to suppress, but he only appeals the denial of this particular motion to suppress.

³ This type of plea, known as an *Alford* plea, "permits a conviction without requiring an admission of guilt and while permitting a protestation of innocence." *Wilfong v. Commonwealth*, 175 S.W.3d 84, 103 (Ky. App. 2004).

signed the “Conditional Plea” document. The Commonwealth did not sign the document. However, during the subsequent plea colloquy, the Commonwealth’s Attorney stated that he did not think it was necessary for him to sign the document. The circuit court asked the Commonwealth if it objected to the conditional plea, and the Commonwealth stated it did not object.

The written plea agreement in this case made no mention of the plea being conditional. Rather, the plea agreement merely provided that if Gregory entered a guilty plea to the charge of manufacturing methamphetamine, the Commonwealth would recommend a sentence of ten years of imprisonment for that conviction, to be served concurrently with the sentence Gregory would receive in another case (Indictment Number 10-CR-012), and the remaining charges in the present indictment (Indictment Number 09-CR-0107) would be dismissed.

Gregory moved to enter a guilty plea pursuant to *Alford*. The written motion to enter his guilty plea does not mention that the guilty plea is conditional. In fact, it is a form document that contains standard language, including the following: “I . . . understand the Constitution guarantees to me the following rights: . . . (e) The right to appeal my case to a higher court. I understand that if I plead ‘GUILTY,’ I waive these rights.”

During Gregory’s plea colloquy, the circuit court orally acknowledged that his guilty plea in this case was conditioned on Gregory being able to appeal the denial of his suppression motion. However, when the circuit court entered its judgment against Gregory, the written judgment did not mention that his guilty

plea was conditional. In fact, in what appears to be boilerplate language, the judgment provided:

Finding Defendant understands the nature of the charges against him including potential penalties, the Court finds: Defendant knowingly and voluntarily *waives his right* to plead not guilty, to be tried by a jury, to compel attendance of witnesses in his behalf, to confront and cross-examine witnesses *and to appeal his case to a higher court.*

(Emphasis added). The court then sentenced Gregory in accord with the Commonwealth's recommendation, *i.e.*, to a term of ten years of imprisonment, to be served concurrently to the sentence he received in Indictment number 10-CR-012.

Gregory now appeals, contending that: (a) the entry into his residence by Officer Goins with only an arrest warrant for Emilie Hinkle violated Gregory's Fourth Amendment right to be secure from unreasonable searches; and (b) the search warrant obtained after the illegal entry was "fruit of the poisonous tree" and it was tainted by the initial illegal search and any evidence obtained from the second search should be suppressed.

II. STANDARD OF REVIEW

On appeal, we review

a suppression hearing ruling regarding a search pursuant to a warrant . . . to determine first if the facts found by the trial judge are supported by substantial evidence, RCr^[4] 9.78, and then to determine whether the trial judge correctly determined that the issuing judge did or did not have a substantial basis for . . . concluding that probable

⁴ Kentucky Rule of Criminal Procedure.

cause existed. . . . In doing so, all reviewing courts must give great deference to the warrant-issuing judge's decision. . . . We also review the four corners of the affidavit and not extrinsic evidence in analyzing the warrant-issuing judge's conclusion.

Commonwealth v. Pride, 302 S.W.3d 43, 49 (Ky. 2010) (internal quotation marks, brackets, and footnotes omitted).

III. ANALYSIS

In the present case, Gregory challenges the denial of his motion to suppress. The Commonwealth argues in its response brief that Gregory's guilty plea was not conditional and, accordingly, that by pleading guilty, he waived his right to appeal the suppression issue. As previously mentioned, neither the plea agreement nor the motion to enter a guilty plea nor the judgment made any mention of Gregory's plea being conditional. However, Gregory filed a written document titled "Conditional Plea" in the circuit court that was signed by Gregory, his attorney, and the circuit court; when the circuit court asked the Commonwealth's Attorney if he had any objection to the "Conditional Plea," the Commonwealth's Attorney responded that he had no objection and that he did not think it was necessary for him to sign the document for it to be effective; and the circuit court noted during the plea colloquy that Gregory's guilty plea was conditioned on his right to appeal the denial of his motion to suppress.⁵ Thus, the

⁵ We understand that, due to various problems in getting the full record certified by the circuit court clerk and sent to this Court, the Commonwealth did not have access to a copy of the video recording of the plea colloquy at the time it filed its brief in our Court. However, it did have access to the written "Conditional Plea" document in this case, and that document was signed by the circuit court. Therefore, the Commonwealth was on notice that the circuit court considered the guilty plea to be conditional.

Commonwealth and the circuit court were both fully aware that the guilty plea was conditional and that Gregory was preserving his right to appeal the denial of his suppression motion. Pursuant to *Dickerson v. Commonwealth*, 278 S.W.3d 145, 148-49 (Ky. 2009), and contrary to the Commonwealth's argument on appeal, Gregory sufficiently preserved the denial of his suppression motion for our review.

As for the merits of the issues raised by Gregory, the Commonwealth's *entire* argument regarding the merits is as follows:

Concerning the merits, Gregory argues the evidence should be suppressed because Officer Goins's first search of the house was not pursuant to exigent circumstances, was illegal, and it tainted any search and seizure pursuant to a search warrant as a "fruit of the poisonous tree" because the affidavit for the warrant included information from the illegal search. In support, Gregory cites *Steagald v. United States*, 451 U.S. 204 (1981) and *Murray v. United States*, 487 U.S. 533 (1988).

The Commonwealth has reviewed Gregory's brief, the record on appeal, *Steagald*, and *Murray*. Should the Court adjudicate the merits of the instant case, the Commonwealth asks that this Court do so as required by applicable law.

The Commonwealth's "argument" concerning the merits of the issues raised by Gregory is simply insufficient. *See* CR 76.12(4)(d)(iv). The Commonwealth had access to the suppression hearing video recording and the written record concerning the motion to suppress, as well as to the circuit court's order denying that motion at the time the Commonwealth filed its brief in this case. However, the Commonwealth failed to address the merits of the issues. In *Ratliff v. Commonwealth*, 719 S.W.2d 445 (Ky. App. 1986), *overruled on other grounds*

by *Commonwealth v. Ramsey*, 920 S.W.2d 526 (Ky. 1996), the Commonwealth also neglected its duty under CR 76.12(4)(d). Our Court then held:

Due to that failure we feel justified in accepting appellant's argument on this point as true and concluding that the trial court should not have allowed the introduction of the results of the blood test. In consequence of our decision on this issue appellant Ratliff's conviction for driving under the influence must be reversed and remanded for a new trial, conducted without reference to the blood/alcohol test.

Ratliff, 719 S.W.2d at 452 (internal citations omitted).

Therefore, because the Commonwealth in the present appeal neglected to comply with CR 76.12(4)(d), pursuant to *Ratliff* we accept Gregory's arguments on the merits of the issues as true and conclude that the circuit court should have suppressed the property taken from his residence following the search of the residence. Consequently, Gregory's conviction for manufacturing methamphetamine is reversed. This case is remanded for further proceedings, conducted without reference to the property taken from his residence following the search.

ALL CONCUR.

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