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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002376-MR

FORTINO GARCIA MARTINEZ — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 09-CR-00290

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, COMBS, AND WINE, JUDGES.

CLAYTON, JUDGE: Fortino Garcia Martinez appeals from the judgment of the Fayette Circuit Court sentencing him to three years' imprisonment following his conditional guilty plea to one count of convicted felon in possession of a firearm. Martinez argues that the trial court erred in denying his motion to suppress

evidence that was seized in a warrantless search. After our review, we find no reversible error and affirm.

FACTS AND PROCEDURAL HISTORY

On January 2, 2009, Martinez, who admittedly had been drinking, left his apartment to walk to his van. Two Lexington police officers, Thomas and Frazier, were in the parking lot on another call and observed Martinez swaying from side to side as he walked and also stumble once as he approached the van. After Martinez got into the van, the officers move toward the van to speak with him because they believed he was intoxicated. As they walked toward the van, one officer saw Martinez put his keys into the ignition. Martinez, however, denies that he put the keys in the ignition.

When the officers reached the driver's side of the van, they asked Martinez what he was doing. He said that he was going to the store. Officer Thomas testified that he smelled alcohol coming from the van, and that, plus Martinez's appearance, convinced him that Martinez was intoxicated. The officer asked Martinez to step out of the van. As Martinez stepped out of the van, Officer Thomas saw some .45 caliber shell casings lying on the ground.

Officer Thomas then asked Martinez whether he was armed. Martinez denied having any guns or, for that matter, a gun in the van. Thereupon, the officer asked Martinez if he could search the van. Martinez gave him permission to do so. After a search of both Martinez and the van, the officer found

no weapons. But upon checking Martinez's identification in the patrol car's mobile data unit, the officer discovered that Martinez was a convicted felon.

Based on the shell casings and Martinez's prior felony conviction, Officer Thomas became concerned that Martinez might be a convicted felon in possession of a weapon. He asked Martinez for permission to search his apartment. Martinez again consented, led the police to his second floor apartment, unlocked the doors with his keys, and allowed the officers to enter his apartment. Once inside the apartment, Martinez informed the officers that he had a friend staying with him. At this time, his friend was sleeping in the apartment's only bedroom. The officers woke the friend up, took him into the living room with Martinez, and commenced the search of the apartment. In the bedroom, Officer Thomas discovered a SKS assault rifle and a long rifle wedged between the bed and the wall.

After the discovery of the weapons, Martinez and his friend were immediately arrested. The officers recited Miranda rights, and both individuals affirmed that they understood. In addition, Martinez and his friend denied that they owned the guns. Martinez said that the weapons belonged to another friend, and he was only keeping them for him. But Martinez was unable to provide the friend's name. Because the weapons had been found in the apartment, Officer Thomas was concerned that there was also ammunition in the apartment. Thus, the officers called for back-up so that a more thorough search could take place.

Another police officer arrived and after searching, found a duffel bag in the hall closet, which contained various kinds of ammunition.

Thereafter, Martinez was indicted for being a convicted felon in possession of a firearm, alcohol intoxication in a public place, and for being a persistent felony offender in the second degree. On March 26, 2009, he filed a motion to suppress the evidence of the guns and ammunition seized from his apartment. A suppression hearing was held on April 21, 2009. At the hearing, Martinez and Officer Thomas testified.

Martinez contended that there was insufficient evidence for the officers to have concluded that he was intoxicated. Moreover, Martinez alleged that Officer Thomas did not definitely connect the .45 shell casing lying on the parking lot to Martinez. Therefore, he argued that the officers had no reasonable, articulable suspicion of criminal activity when they arrested him for alcohol intoxication. And further, Martinez maintained that based on his intoxicated state and his attenuated ability to speak English, he was unable to render valid consent.

Following testimony and counsel's argument, the trial court found that the officers' actions were reasonable and that Martinez voluntarily consented to the searches of his van and apartment. In doing so, the trial court observed in particular that Martinez's alcohol intoxication did not vitiate his consent and that he spoke English well enough to consent to the searches. The trial court denied the motion to suppress the evidence.

Subsequently, on October 20, 2009, Martinez entered a conditional guilty plea and reserved the right to appeal the trial court's suppression ruling. In the plea agreement, Martinez pled guilty to being a convicted felon in possession of a firearm. As part of the plea agreement, the Commonwealth recommended that the alcohol intoxication and persistent felony offender counts be dismissed.

A sentencing hearing was held on November 25, 2009. The trial court accepted Martinez's guilty plea and adopted the Commonwealth's recommendation to dismiss the alcohol intoxication and persistent felony offender counts. Additionally, the trial court imposed the sentence recommended by the Commonwealth and sentenced Martinez to three years' imprisonment, to run consecutively with any prior felony sentences and with 323 days credited toward the prison term. Final judgment was entered on that day.

As reserved by his guilty plea, Martinez now appeals the Fayette Circuit Court's order denying his suppression motion.

STANDARD OF REVIEW

An appellate court's standard of review of the trial court's decision on a motion to suppress requires that we first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive. Kentucky Rules of Criminal Procedure (RCr) 9.78. Then, after such a determination, we conduct a de novo review of the trial court's application of the law to the facts to resolve whether its decision is correct as a matter of law. *Adcock v. Com.,* 967 S.W.2d 6, 8 (Ky. 1998); *Com. v. Opell*, 3 S.W.3d 747, 751

(Ky. App. 1999). Finally, we observe that questions of fact are subject to review only for clear error, the most deferential standard of review. *Miller v. Eldridge*, 146 S.W.3d 909, 915 (Ky. 2004). Keeping these various standards of review in mind, we turn to the issues herein.

ANALYSIS

Martinez argues that the evidence was the result of an illegal search and seizure because the consent to the search was given during the course of an illegal detention. Furthermore, Martinez claims that he did not give knowing, voluntary or intelligent consent to search his apartment. Conversely, the Commonwealth maintains that the police officers did have a reasonable and articulable suspicion to approach Martinez and probable cause to arrest him for alcohol intoxication. Moreover, the Commonwealth states that Martinez voluntarily consented to the search of his apartment.

The trial court in denying Martinez's motion to suppress, explained in its oral findings of fact that Martinez was in a public place under the influence of alcohol, and therefore, it was reasonable for the officers to arrest him for alcohol intoxication. With regard to the warrantless search of Martinez's apartment, the trial court concluded that Martinez's testimony established that he agreed to the search of his apartment.

We begin our analysis of the case at hand by recognizing that the Fourth Amendment of the United States Constitution protects "[t]he right of the people to be secure in their persons, . . . against unreasonable searches and

seizures[.]" And similar protections are found in Kentucky Constitution Section 10, which provides that "[t]he people shall be secure in their persons, . . . from unreasonable search and seizure[.]"

The facts involved here are essentially undisputed. The trial court's oral rendition of the facts at the suppression hearing accurately reflected the testimony given by Officer Thomas and Martinez. Findings of fact are not erroneous if they are supported by substantial evidence. Substantial evidence constitutes facts that reasonable minds would accept as sufficient to support a conclusion. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). We conclude that the findings of fact are reasonable and accurate.

Having determined that the trial court had sufficient findings, we now review whether the trial court properly applied the law to these factual events. Initially, we address Martinez's reasoning that once the officers found no weapons in the van or on him, the continued detention by the officers was without reasonable suspicion, and hence, unconstitutional. He further asserts that because the consent to the search of his apartment was obtained during an illegal detention, it was invalid.

A warrantless search is presumed to be unreasonable and unlawful, and requires the Commonwealth to bear the burden of justifying the search and seizure under one of the exceptions to the warrant requirement. *Cook v. Com.,* 826 S.W.2d 329, 331 (Ky. 1992). In fact, consent is one of those exceptions.

Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); *Farmer v. Com.,* 6 S.W.3d 144, 146 (Ky. App. 1999).

Because Martinez's consent to search his apartment was obtained while stopped by police officers, he maintains that the consent was not valid since, according to him, it was during an illegal detention. Martinez does admit his awareness of case law, which holds that if a person is first stopped for a valid purpose and gives consent for a search, the voluntariness of the person's consent is the sole Fourth Amendment issue. *See Com. v. Erickson*, 132 S.W.3d 884 (Ky. App. 2004). But Martinez requests that this Court reconsider this ruling and expand the holding in *U. S. v. Mesa*, 62 F.3d 159 (6th Cir. 1995), beyond its facts.

In *Erickson*, a sheriff observed a vehicle committing a traffic violation and stopped it. After the vehicle was stopped, the sheriff issued the driver a verbal warning. But the conversation continued and the sheriff eventually asked for consent to search the vehicle. The driver acquiesced and drugs were found in the vehicle. Later, the driver, Erickson, was indicted by the grand jury on drug possession and trafficking charges. He then filed a motion to suppress the evidence obtained during the search. Relying on *Mesa*, Erickson claimed that the alleged unconstitutional detention should bar the Commonwealth from introducing any evidence obtained during that period of detention. The trial court in *Erickson* was persuaded by this argument and sustained Erickson's motion to suppress.

On appeal, our Court determined that the dispositive inquiry for purposes of the Fourth Amendment was not whether the detention was supported

by reasonable suspicion, but rather whether the consent was voluntary. Citing *U. S. v. Burton*, 334 F.3d 514, 518 (6th Cir. 2003), we stated:

> In harmony with the argument advanced by the Commonwealth throughout this litigation, *Burton* holds that where a motorist is initially stopped for a valid purpose and subsequently gives consent to a search of his vehicle, the voluntariness of his consent is the only issue to consider for purposes of the Fourth Amendment-and not whether the continued detention was justified by reasonable suspicion. [Citation omitted]. Accordingly, we are compelled to agree with the Commonwealth that the McCracken Circuit Court erred in suppressing the evidence absent a specific finding that Erickson's consent was not voluntary after engaging in an analysis of all of the circumstances surrounding his encounter with Deputy Archer.

Erickson, 132 S.W.3d at 889. Thus, based on *Erickson*, the constitutionality of Martinez's detention has no bearing on whether the evidence obtained must be suppressed. The sole issue is whether Martinez's consent was voluntary.

Moreover, we are not persuaded by Martinez's argument that *Mesa* is more pertinent to the case at hand. In *Mesa*, a search following a consent obtained from a woman who had been detained in the back seat of a squad car was declared invalid. Unlike the facts in the instant case, those in Mesa clearly indicated that the original objective of the police stop ended well before the Mesa provided her consent. And prior to that consent, Mesa was locked in a vehicle and not free to leave. Although the case did not indicated the precise time period that Mesa was detained, it did state that she was detained "for a considerable period of time." Under those circumstances, the Sixth Circuit held that the defendant's consent to

search was not validly obtained. Here, the facts are distinguishable and similar to the stop described in *Erickson.* Similarly, our Court acknowledged in the aforementioned *Erickson* that *Ohio v. Robinette*, 519 U.S. 33, 117 S. Ct. 417, 136 L. Ed 2d 347 (1996), severely limited *Mesa:*

> Despite its scrupulous adherence to the *Mesa* ruling, the Ohio Supreme Court was reversed by the Supreme Court of the United States, which essentially held that a prolonged detention and request to search a detainee's car following a traffic stop was reasonable despite the absence of that extra "something" to generate an additional basis for reasonable suspicion of other criminal activity. Citing *Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996), the Supreme Court observed that "the subjective intentions of the officer did not make the continued detention of [Robinette] illegal under the Fourth Amendment." 519 U.S. at 38, 117 S. Ct. 417.

Erickson, 132 S.W.3d at 887.

In summary, under the holding of *Erickson*, Martinez's argument concerning the legality of his detention has no import to the suppression of the guns found in his apartment. The sole issue is whether or not his consent was voluntary.

Now, we consider the voluntariness of Martinez's consent. We begin by reiterating that consent is one of the exceptions to the requirement for a warrantless search. *See Farmer*, 6 S.W.3d at 146. Nevertheless, it is important to note that the United States Supreme Court has long recognized a heightened privacy interest in a person's own residence. Still, this general prohibition may be overcome by any of the valid exceptions to the warrant requirement, including the aforementioned consent to search. Consent may be "obtained from the individual

who is the target of the search, . . . or from a third party who possesses common authority over the premises." *Colbert v. Com.,* 43 S.W.3d 777, 779-80 (Ky. 2001) (citing *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980)).

Whether the consent was voluntary, and without coercion "is a question of fact to be determined from the totality of all the circumstances." *Schneckloth*, 412 U.S. at 227; *Cook,* 826 S.W.2d at 332. Martinez maintains that his consent to search was not freely given because he was under the influence of alcohol. In addition, Martinez asserts that he does not speak English fluently. Hence, based on these two factors, he claims that his consent was not voluntary. But a review of the trial court's oral findings of fact demonstrates that the court specifically found that Martinez's intoxication did not vitiate his consent and that his understanding and ability to speak English allowed him to voluntarily consent to the search.

In fact, during the suppression hearing the trial court cited to *Cook,* a Kentucky Supreme Court decision that held a question of a voluntary consent requires careful scrutiny of the surrounding circumstances. The trial court found that the police officers had probable cause to arrest Martinez for alcohol intoxication and that his English was proficient enough for him to know and understand his consent. Supporting that he was fluent in English is the fact that during the suppression hearing although an interpreter was present, Martinez testified without the interpreter's assistance.

The trial court noted that when asked for consent, Martinez testified that he agreed to the searches because he had done nothing wrong and had nothing to hide. Furthermore, although Martinez was intoxicated, he did not claim that the officers made any threats or promises or misrepresentations to induce his consent. The record does not indicate that Martinez was confused or tricked. In sum, under the totality of the circumstances and the testimony provided, the court concluded that the consent to search was freely and voluntary given by Martinez. As already stated, the law provides that consent to search is a valid exception to a warrantless search of one's residence. Therefore, if the trial court ascertains that the facts support such a finding, the search of Martinez's apartment is not illegal.

We concur with the trial court's findings as they are based squarely on the evidence presented at the suppression hearing. Merely because a trial court may be required to choose between various competing and inconsistent versions of the events does not undermine a decision. Indeed the essential function of the trial court, as the trier of fact, is to make findings of facts based on the totality of the circumstances. The trial court's finding that Appellant's consent to search was voluntary and based on substantial evidence is not clearly erroneous.

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

ALL CONCUR.

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