RENDERED: OCTOBER 5, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001517-MR

JAMES T. DOWDY — APPELLANT

v.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 10-CR-00090

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, LAMBERT, AND VANMETER, JUDGES.

CAPERTON, JUDGE: James T. Dowdy appeals from the trial court's denial of his motion to suppress the evidence obtained from his residence and the accompanying conditional guilty plea to possession of a firearm by a convicted felon. After a thorough review of the parties' arguments, the record, and the

applicable law, we conclude that the trial court did not err in finding that Dowdy voluntarily consented to the search producing the firearm. Accordingly, we affirm.

The facts of this appeal were testified to at a suppression hearing by Trooper Pervine. Trooper Pervine responded with two other officers after receiving an anonymous tip that Dowdy, a convicted felon, possessed a firearm. The three officers went to Dowdy's residence and asked him if he had any rifles or had been deer hunting. Dowdy said no but then said that his mother owned a rifle. The officers went next door and asked Dowdy's mother if she owned a rifle. She said she had one and led them back to the bedroom. She pulled out an empty Remington rifle box from under the bed, began to cry, and told the officers that she had bought the rifle for her son to go deer hunting with and that the weapon was at his house. The officers then went back to Dowdy's residence. Trooper Pervine told Dowdy that he knew the truth and that he needed to retrieve the rifle. Dowdy told Trooper Pervine the rifle was in the bedroom; Trooper Pervine followed Dowdy to the bedroom and retrieved the rifle.

After hearing the evidence, the trial court found that Dowdy had voluntarily consented to the search which produced the firearm. Thus, the trial court denied Dowdy's motion to suppress the evidence. It is from this that Dowdy now appeals.

On appeal Dowdy argues that the trial court erred in finding that he gave consent to the search.[1] At the outset we note that in our review of the trial

[1] Dowdy additionally argues that the trial court erred in finding that the exigent circumstances exception also applied to the warrantless search. We decline to address this argument since we

court's decision on a motion to suppress, this Court must first determine whether the trial court's findings of fact are clearly erroneous. Under this standard, if the findings of fact are supported by substantial evidence, then they are conclusive. Kentucky Rules of Criminal Procedure (RCr) 9.78; *Lynn v. Commonwealth*, 257 S.W.3d 596, 598 (Ky.App. 2008). "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) (citing *Adcock v. Commonwealth,* 967 S.W.2d 6, 8 (Ky. 1998); *Commonwealth v. Opell*, 3 S.W.3d 747, 751 (Ky.App. 1999)).

Thus, the factual findings of the trial court in regard to the suppression motion are reviewed under the clearly erroneous standard and "the ultimate legal question of whether there was reasonable suspicion to stop or probable cause to search is reviewed *de novo*." *Commonwealth v. Banks*, 68 S.W.3d 347, 349 (Ky. 2001). Additionally, preliminary questions such as whether consent was voluntarily given are questions of fact to be determined from the totality of all the circumstances and are subject to review only for clear error, the most deferential standard of review. *Talbott v. Commonwealth*, 968 S.W.2d 76, 82 (Ky. 1998); *Hampton v. Commonwealth*, 231 S.W.3d 740, 749 (Ky. 2007) (citing *Schneckloth*

---

conclude that the trial court did not err in finding that Dowdy consented to the search. It is well-settled that an appellate court may affirm a lower court for any reason supported by the record. *McCloud v. Commonwealth*, 286 S.W.3d 780, 786 n. 19 (Ky. 2009).

v. Bustamonte, 412 U.S. 218, 227, 93 S.Ct. 2041, 2047–48, 36 L.Ed.2d 854 (1973), and *Miller v. Eldridge*, 146 S.W.3d 909, 915 (Ky. 2004)).

At a suppression hearing the trial court acts as the finder of fact. As such, it has the sole responsibility to weigh the evidence before it and judge the credibility of all witnesses. *Dunn v. Commonwealth*, 286 Ky. 695, 151 S.W.2d 763, 764–765 (1941). The trial court has the duty to weigh the probative value of the evidence and has the discretion to choose which testimony it finds most convincing. *Commonwealth, Dept. of Highways v. Dehart*, 465 S.W.2d 720, 722 (Ky. 1971). The trial court is free to believe all of a witness's testimony, part of a witness's testimony or none of it. *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996); *see also Gillispie v. Commonwealth*, 212 Ky. 472, 279 S.W. 671, 672 (1926).

The Fourth Amendment of the United States Constitution and Section Ten of the Kentucky Constitution prohibit subjecting citizens to unwarranted and unreasonable searches and seizures by police. *Commonwealth v. Hatcher*, 199 S.W.3d 124, 126 (Ky. 2006). "This prohibition on unreasonable searches and seizures ordinarily requires all such encounters to be conducted pursuant to a judicially-issued warrant—that is, the criterion by which the reasonableness of a given search or seizure typically is measured is whether it was authorized by a warrant." *Williams v. Commonwealth*, 147 S.W.3d 1, 4 (Ky. 2004).

Despite this general rule, several exceptions to the warrant requirement have been recognized due to the unique circumstances that arise in

search and seizure cases. *Cook v. Commonwealth*, 826 S.W.2d 329, 331 (Ky. 1992). One such exception is that a properly given consent obviates the need for a search warrant. *Commonwealth v. Jones*, 217 S.W.3d 190, 198 (Ky. 2006). The Commonwealth has the burden to prove that the defendant voluntarily consented to the search. *Smith v. Commonwealth*, 181 S.W.3d 53, 58 (Ky.App. 2005).

In *Schneckloth v. Bustamonte*, 412 U.S. 218 at 248, 93 S.Ct. 2041 at 2059. The United States Supreme Court addressed the issue of consent:

> [W]hen the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied.

"The question of voluntariness turns on a careful scrutiny of all the surrounding circumstances in a specific case." *Id.* "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." *Krause v. Commonwealth*, 206 S.W.3d 922, 924 (Ky. 2006) (internal citations omitted).

We agree with the trial court that Dowdy's consent was voluntary. In assessing the surrounding circumstances of the case *sub judice*, there was substantial evidence to support the trial court's conclusion that Dowdy's consent was voluntary. Indeed, there was no coercive action whatsoever by the officers. *See Anderson v. Commonwealth,* 902 S.W.2d 269, 272 (Ky.App. 1995). As such, the trial court did not err in finding Dowdy's consent to be voluntary.

In light of the aforementioned, we affirm.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Shannon Dupree
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Frankfort, Kentucky

Joshua Farley
Assistant Attorney General
Frankfort, Kentucky