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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-002216-MR

TERRENCE MARTIN — APPELLANT

v.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 11-CR-00040

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL, THOMPSON, AND VANMETER, JUDGES.

VANMETER, JUDGE: Terrence Martin appeals from the November 29, 2011, judgment and sentence of the Graves Circuit Court. That judgment found Martin guilty of possession of matter portraying a sex performance by a minor and first-degree distribution of matter portraying a sex performance by a minor and sentenced him to a total of four years' incarceration. On appeal, Martin challenges

the trial court's denial of his motion to suppress certain evidence and further argues that his charges subjected him to double jeopardy. Finding no error, we affirm.

On December 13, 2010, Chris Fulton, a realtor, arrived at the Mayfield Police Department and requested a police escort to a home located at 1001 Macedonia Road. Fulton informed the police that he was involved in selling the home and that the home was an unoccupied foreclosure. He relayed that upon arriving at the home to ensure that the locks had been changed, he saw smoke coming from the chimney.

Officer Rodney Smith and another officer accompanied Fulton back to the home. When they arrived, a locksmith was present and in the midst of changing the locks. After receiving permission from Fulton and the homeowner, John Edwards, the officers entered the home. Once in the home, the officers saw a fire burning in the fireplace, a mattress on the floor, and several bags. In order to identify who had been in the house, the officers searched the bags. Therein they found a folder with the name "Terrence Martin" written on it, containing naked pictures of young girls.

That evening, the officers returned to the home to see if anyone was there. Shortly thereafter, David Justus and Terrence Martin arrived. Justus, who possessed a key to the home, stated that he and Martin had been given permission to spend the night at the house. He also said that he was unaware the home had been foreclosed on. Martin later stated to officers that neither he nor Justus had been given permission to stay there and that he had relied on Justus's statement

that they had been given permission. Martin also admitted that the photographs of the children belonged to him and that he had printed them while in Michigan.

Martin was subsequently indicted for one count of possession of matter portraying a sex performance by a minor and one count of first-degree distribution of matter portraying a sex performance by a minor. Martin filed several pre-trial motions, including a motion to suppress the photographs discovered during the search of his bag; a motion to suppress statements made to the police during his interrogation; and a motion to dismiss the distribution charge for lack of jurisdiction and/or venue. All of Martin's motions were denied.

Martin then entered a conditional guilty plea to both charges and reserved the right to appeal the denial of his pre-trial motions. He was sentenced to four years on each count, to run concurrently, for a total of four years' imprisonment. This appeal followed.

Martin's first argument on appeal is that the warrantless search of his bags was illegal and any evidence resulting from that search should have been suppressed. When reviewing a trial court's decision on a motion to suppress, we first determine whether the trial court's findings of fact are supported by substantial evidence. *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky. App. 2002). Substantial evidence is evidence possessing sufficient probative value to induce conviction in the minds of reasonable men. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). If supported by substantial evidence, the findings of fact are

conclusive. RCr[1] 9.78. We then conduct a *de novo* review of the trial court's application of the law to those facts and determine whether the decision is correct as a matter of law. *Neal*, 84 S.W.3d at 923 (citations omitted).

The Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution protect an individual from unreasonable search and seizure. *Katz v. United States*, 389 U.S. 347, 350, 88 S.Ct. 507, 510, 19 L.Ed.2d 576 (1967); *Lukjan v. Commonwealth*, 358 S.W.3d 33, 44 (Ky. App. 2012) (citation omitted). This constitutional protection has been recognized as prohibiting a warrantless search where a reasonable expectation of privacy exists in the object searched. *Williams v. Commonwealth,* 213 S.W.3d 671, 682 (Ky. 2006) (citation omitted). An expectation of privacy is considered reasonable where "'(1) the individual manifests a subjective expectation of privacy in the object of the challenged search; and (2) society is willing to recognize that subjective expectation as reasonable.'" *Hause v. Commonwealth*, 83 S.W.3d 1, 11 (Ky. App. 2001) (quoting *LaFollette v. Commonwealth*, 915 S.W.2d 747, 749 (Ky. 1996)). Moreover, consent to search may serve as a valid exception to a warrant requirement. *Neal*, 84 S.W.3d at 923. Such consent may be given "from the individual who is the target of the search or from a third party who possesses common authority over the premises." *Id.* (citations omitted). In addition, this court has previously held that one who is wrongfully present on searched premises cannot invoke the privacy of those premises. *Commonwealth v. Johnson*, 420

[1] Kentucky Rules of Criminal Procedure.

S.W.2d 103, 104 (Ky. 1967) (citing *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960), *overruled on other grounds by United States v. Salvucci*, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980)).

In support of its decision to deny Martin's motion to suppress, the trial court found that the officers had been given consent to search the home and they reasonably believed they had consent. Additionally, the trial court found that Martin was a trespasser. These findings, which Martin does not challenge, are supported by substantial evidence and are therefore conclusive. Based on these findings, the trial court then concluded that the search was appropriate, based on the consent of the property owner, and Martin's status as a trespasser eliminated any reasonable expectation of privacy.

In support of its judgment, the trial court relied on the case of *Commonwealth v. Nourse*, 177 S.W.3d 691 (Ky. 2005), in which the trial court concluded that officers reasonably relied on a landlord's permission to search an apartment inhabited by "squatters." *Id.* at 695. On appeal, the Kentucky Supreme Court held that the trial court had appropriately denied suppression based upon the searching officer's belief that he had been given consent to search and that any inhabitants were trespassers. *Id.* at 696. Here, despite Martin's argument that such permission would not extend to closed containers such as his bag, we find no fault with the trial court's analysis. As a trespasser, Martin had no reasonable expectation of privacy. *See id*.

Martin's second argument on appeal is that the trial court subjected him to double jeopardy when it charged him with both possession and distribution of matter portraying a sex performance by a minor. This argument appears to be unpreserved. Nonetheless, unpreserved double jeopardy claims may be reviewed for palpable error. *Clark v. Commonwealth*, 267 S.W.3d 668, 674-75 (Ky. 2008); RCr 10.26.

When examining double jeopardy claims, Kentucky has adopted the same-elements test, also referred to as the *Blockburger* test, in order to determine whether each offense contains an element not contained in the other. *Id.* at 675; *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Under the *Blockburger* test, if each offense does not contain an element unique from the other offense, they are considered the same offense therefore barring successive prosecution. *Id.* Here, Martin was charged with possession of matter portraying a sexual performance by a minor, pursuant to KRS[2] 531.335, and distribution of matter portraying a sexual performance by a minor pursuant to KRS 531.340. Under KRS 531.335, a person is guilty of possession of matter portraying a sexual performance by a minor if he or she knowingly possesses matter which visually depicts an actual sexual performance by a minor person. Alternatively, a person can be found guilty of distribution of matter portraying a sexual performance by a minor if he or she:

[2] Kentucky Revised Statutes.

> (a) Sends or causes to be sent into this state for sale or distribution; or
>
> (b) Brings or causes to be brought into this state for sale or distribution; or
>
> (c) In this state, he or she:
>
> 1. Exhibits for profit or gain; or
> 2. Distributes; or
> 3. Offers to distribute; or
> 4. Has in his or her possession with intent to distribute, exhibit for profit or gain or offer to distribute, any matter portraying a sexual performance by a minor.

KRS 531.340(1). Furthermore, "[a]ny person who has in his or her possession more than one (1) unit of material coming within the provision of KRS 531.300(2)[3] shall be rebuttably presumed to have such material in his or her possession with the intent to distribute it." KRS 531.340(2).

Clearly, the charge of distribution contains elements which are not found in the possession charge. And while each statute uses the word "possession," the mere appearance of identical words within two statutes does not create a double jeopardy violation. In addition, the element of "possession" is not identical to the element of "possession with intent to distribute." The indictment charged Martin with possession of more than one unit of material, thereby subjecting him to the rebuttable presumption under KRS 531.340(2) of intent to distribute. The count of

[3] KRS 531.300(2) defines "matter" as "any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, live image transmitted over the Internet or other electronic network, or other pictorial representation or any statue or other figure, or any recording transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines, or materials[.]"

the indictment relating to distribution further charged that Martin "knowingly and unlawfully posted photos on his Facebook page that portrayed minor females in sexual positions." Under these facts, concurrent prosecution of the two charges passes the *Blockburger* test.

For the foregoing reasons, the November 29, 2011, judgment and sentence of the Graves Circuit Court is affirmed.

ALL CONCUR.

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