

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2012-CA-001297-MR

ACERS DWAYNE GILL

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE PAMELA R. GOODWINE, JUDGE  
ACTION NO. 12-CR-00620

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: NICKELL, THOMPSON, AND VANMETER, JUDGES.

NICKELL, JUDGE: Acers Dwayne Gill entered a plea of guilty to an amended charge of possession with intent to distribute eight ounces to five pounds of marijuana. KRS 218A.1412(4)(a).<sup>1</sup> His plea was conditioned on his right to appeal the circuit court's denial of his motion to suppress evidence which Gill

---

<sup>1</sup> Kentucky Revised Statutes, a class D felony.

claims was recovered as the result of an unconstitutional search and subsequent custodial interrogation conducted in violation of his *Miranda*<sup>2</sup> rights. Having reviewed the record and the applicable law, we affirm.

On February 4, 2010, Louisville Metro Police informed the Kentucky State Police (KSP) that a suspicious package was being shipped by Federal Express from Arizona to Lexington, Kentucky. KSP officers intercepted the package when it arrived at the Federal Express facility in Lexington, and arranged for a drug detection canine to sniff the package. The dog alerted to the package, indicating it contained illegal drugs. The police officers also detected a strong odor of marijuana emanating from the package.

The next day, after obtaining a warrant to search and seize the package and its contents, the police opened the package and discovered a duffel bag containing six Ziploc bags of marijuana, each weighing approximately one pound. The package was addressed to Tim Morris, 2920 Polo Club Blvd, Apt. 3205, in Lexington. The sender was Wayne Carroll of Tempe, Arizona.

The police reassembled the package, and proceeded to the Lexington address, with one of the officers disguised as a Federal Express employee. They did not obtain a warrant to search the residence. Gill's girlfriend resided at the apartment. She and Gill have a child together. Although Gill did not reside at the apartment, he occasionally spent the night there, and he was present when the police arrived.

---

<sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

As the police approached the apartment, they saw a handwritten note on the door instructing the delivery person to leave the package at the door if no one was home. They knocked on the door. Gill's girlfriend answered the door and accepted the package from the officer disguised as a Federal Express employee. As she closed the door, the police officers yelled "Kentucky State Police," and rushed inside to secure the package. The police conducted a safety sweep of the apartment to ensure no other persons or weapons were present, and they handcuffed Gill, as he exited the bathroom. They did not handcuff the girlfriend.

According to Gill, he was placed under arrest. However, KSP Detective Keith Addison testified the officers were merely continuing their investigation at this point, neither Gill nor the girlfriend had been arrested, and neither was given a *Miranda* warning. The police did not search the apartment, although the girlfriend gave them verbal consent to do so. Following the protective sweep, the police began talking to Gill who was told he was not under arrest and was free to leave at any time. According to Gill, the police examined his cell phone without his consent, searching for Arizona telephone numbers. Detective Addison, however, testified that Gill gave verbal permission to the officers to search his cell phone. Addison testified that Gill began to cooperate with the police, and the handcuffs were removed.

In conducting their investigation, the police questioned Gill about the package and about the addressee, Tim Morris. Gill told officers he did not know anything about the marijuana and he had been expecting a shipment of clothes in

the mail that he was planning to resell. He also told officers the package might have been sent to the downstairs neighbor, about whom he knew little except he was from Detroit, Michigan. Gill called a relative in Indiana named Melvin regarding the package, and also an Arizona telephone number that the police found in his phone. He spoke to the individual who answered in Arizona and made up a false story about the package arriving wet and damaged, in an effort to obtain more information. Police stayed at the apartment for about two hours.

Gill told Detective Addison he would try to figure out what was going on with the package and promised to contact him by the end of the week. He never called Addison, however, and was arrested about one month later. He was indicted on one charge of trafficking in marijuana, greater than five pounds, first offense,<sup>3</sup> and being a persistent felony offender in the first degree.<sup>4</sup>

Gill filed a motion to suppress the information gathered from his cell phone, and his statements to police. He later filed a supplementary motion to exclude un-Mirandized statements. Following a hearing, at which Detective Addison and Gill testified, the defense motions were denied. Gill entered a plea of guilty to one count of possession of marijuana with intent to sell eight ounces to five pounds, conditioned on his right to appeal the denial of his motions to suppress. He was sentenced to serve one year, and this appeal followed.

---

<sup>3</sup> KRS 218A.1421, a Class C felony.

<sup>4</sup> KRS 532.080 (3).

Gill argues the evidence (the Arizona telephone number police recovered from his cell phone; and verbal statements he made to police; and statements made during the cell phone conversations) should be suppressed, because it was obtained as the result of an unlawful entry by police into the apartment, and was therefore fruit of the poisonous tree. *See Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). He further argues his statements to police should be suppressed because he was subjected to custodial interrogation without receiving a *Miranda* warning.

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. 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) (footnotes omitted).

We are also mindful that we must give "due weight to inferences drawn from [the] facts by resident judges and local law enforcement officers." *Ornelas v. United States*, 517 U.S. 690, 699, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911 (1996).

Gill argues the warrantless entry of the police into the apartment after delivering the package violated the Fourth Amendment stricture against unreasonable searches and seizures.<sup>5</sup>

---

<sup>5</sup> The trial court found Gill had standing as an overnight guest to challenge entry of police into the apartment. This finding has not been challenged on appeal.

Both the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution guarantee the fundamental right to be free from unreasonable searches and seizures, a right protected by the general rule proscribing searches not authorized by a valid search warrant.

*Commonwealth v. Wood*, 14 S.W.3d 557, 558 (Ky. App. 1999). Detective Addison testified the police did not obtain a search warrant for the apartment because the officers did not know if the package had been sent to the wrong address, if somebody was actually going to accept delivery of the package, if the package was going to be taken inside, or if the person receiving the package would deliver it elsewhere.

In a factually-similar case involving the “controlled delivery” of a container of contraband, the United States Court of Appeals for the Second Circuit stated:

in a typical “controlled delivery” case, the validity of the seizure is determined as of the time the drugs are first seized, not as of the time they are retaken. Having taken proper dominion over the drugs and kept them under close surveillance, the government is deemed to be in constructive possession of them, even though, for purpose of identification, they are delivered to another.

*United States v. Singh*, 811 F.2d 758, 761 (2d Cir. 1987).

The federal appeals court further held the police had a limited right to enter the premises (a storeroom in a warehouse) where the seized contraband had been delivered. The court explained its reasoning as follows:

for a controlled delivery to accomplish its intended purpose, there must be an actual delivery to a defendant and sufficient exercise of dominion by him to

demonstrate his participation in the unlawful importation of the narcotics in question. It would be strange indeed if the very acts upon which the government relied to establish the defendant's dominion over the contraband in the instant case would deprive the government of its constructive possession of the contraband. This does not mean that the government should have the general right to make a warrantless search of a private warehouse or dwelling for the purpose of terminating a controlled delivery. We are not confronted here with an unlimited search of appellant's storeroom, but with the retaking of contraband located just inside the open storeroom doors, under direct government surveillance and constructively in the government's possession.

*Id.* at 761.

As additional support for its holding, the *Singh* court relied on *United States v. DeBerry*, 487 F.2d 448 (2d Cir. 1973), a case in which police intercepted a suitcase of contraband being shipped by air. The defendant later claimed the suitcase at the airport and placed it in the trunk of his automobile. *DeBerry* held police had the right to enter the automobile without a warrant and seize the suitcase, because they were “merely reasserting control of the suitcase which had already been seized for legal purposes and which was merely being used as bait.” *DeBerry*, 487 F.2d at 451.

Under the persuasive reasoning of these federal cases, the police had a limited right to enter the apartment without a warrant in order to regain possession of the already lawfully-seized contraband in the package. The package remained in the constructive possession of the police after the delivery, and the police had the right to make limited entry of the residence to reclaim the package.

Gill further argues the entry and subsequent protective sweep of the apartment (which did not extend to an actual search of the premises) violated the holding of *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), where the United States Supreme Court held the Fourth Amendment prohibits police from making a warrantless and nonconsensual entry into a suspect's home to make an arrest. But police in this case did not enter the apartment to make a warrantless arrest; they entered for the limited purpose of retaking custody of the package which had already been seized pursuant to a valid warrant. The trial court found the subsequent brief, protective sweep of the premises was conducted to ensure no other persons or weapons were present.

[W]hen police make a valid arrest, they may conduct a protective sweep of areas adjoining the place of arrest from which an attack may be made even without probable cause or reasonable suspicion of the presence of dangerous individuals. Police may also conduct a broader protective sweep of areas not adjoining the place of arrest if supported by articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.

*Kerr v. Commonwealth*, 400 S.W.3d 250, 266-67 (Ky. 2013).

Justification for a protective sweep is “the safety threat posed by the house, or more properly by unseen third parties in the house.” *Id.* (quoting *Maryland v. Buie*, 494 U.S. 325, 336, 110 S.Ct. 1093, 1099, 108 L.Ed.2d 276 (1990)).

Although the protective sweep in this case was not made while executing an arrest warrant, the police were lawfully on the premises due to the presence of the



contraband, and had similar safety concerns. In any event, Gill's girlfriend gave verbal consent for a search of the premises, which the police never performed.

Gill argues his subsequent statements to the police and his telephone conversations should have been suppressed because they were the products of a custodial interrogation without a *Miranda* warning. Such warnings are required

when the suspect being questioned is "in custody." Custodial interrogation has been defined as questioning initiated by law enforcement after a person has been taken into custody or otherwise deprived of freedom of action in any significant way. . . . The inquiry for making a custodial determination is whether the person was under formal arrest or whether there was a restraint of his freedom or whether there was a restraint on freedom of movement to the degree associated with formal arrest. Custody does not occur until police, by some form of physical force or show of authority, have restrained the liberty of an individual. The test is whether, considering the surrounding circumstances, a reasonable person would have believed he or she was free to leave. Some of the factors that demonstrate a seizure or custody have occurred are the threatening presence of several officers, physical touching of the person, or use of a tone or language that might compel compliance with the request of the police.

*Commonwealth v. Lucas*, 195 S.W.3d 403, 405-406 (Ky. 2006) (internal citations omitted).

Gill likens his situation to that of the appellant in *Smith v. Commonwealth*, 312 S.W.3d 353 (Ky. 2010). Smith was at home when police executed a search warrant by way of a "dynamic entry" and immediately handcuffed her. Without giving a *Miranda* warning, police asked Smith whether she had any drugs or weapons on her person. She told them she had "something in her pocket." Police

searched her pocket and removed four rocks of crack cocaine. The Kentucky Supreme Court held , based on the totality of the circumstances, Smith was in custody when she was questioned and should have received a *Miranda* warning. As factors in its decision, the Court cited the “dynamic entry” of the police followed by the influx of several police officers, creating “an inherently coercive atmosphere;” the handcuffing of Smith which was a physical touching and a restraint on her freedom akin to formal arrest; and the fact that it was clear that she was not free to leave and did not possess unrestrained freedom of movement. *Smith*, 312 S.W.3d at 359.

The trial court acknowledged the factual similarities between Gill’s situation and that in *Smith*: the sudden appearance of several police officers at the residence; the physical touching of Gill as he was handcuffed; and Gill not being free to leave and not possessing unrestrained freedom of movement when police entered the apartment. The trial court concluded Gill was in custody during the period he was placed in handcuffs, describing the handcuffing as a restraint on freedom akin to formal arrest. The trial court further found, however, Gill’s incriminating statements were made only after the handcuffs had been removed, and he had agreed to cooperate with the police in an effort to help himself by implicating others.

The trial court’s findings are supported by substantial evidence in the record. By the time he made the incriminating statements, Gill’s girlfriend had given the police consent to search the apartment, Gill’s handcuffs had been removed, and he

was free to leave. Gill was only arrested a month later because he failed to contact Detective Addison as he had promised with more information about the origins of the package. Under these circumstances, a *Miranda* warning was unnecessary.

For the foregoing reasons, the trial court did not err in refusing to suppress the evidence, and its judgment is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Jason A. Hart  
Assistant Public Defender  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

David W. Barr  
Assistant Attorney General  
Frankfort, Kentucky