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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-002100-MR

MATTHEW DIETERLEN — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 12-CR-00904

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: J. LAMBERT, STUMBO, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Matthew Dieterlen brings this appeal from a December 2, 2013, Kenton Circuit Court Final Judgment sentencing appellant to a total of three and one-half years' imprisonment. We affirm.

On October 5, 2012, appellant was on probation for a previous conviction. Covington police and probation officers were preparing for a monthly

procedure known as Operation Night Vision, when appellant's probation officer received an anonymous tip that appellant was growing marijuana in a residence located at 1505 Madison. Under the terms of his probation, appellant was not authorized to reside at 1505 Madison.[1] The probation officers conducted a home visit in conjunction with Operation Night Vision and spotted appellant walking in an alley behind the 1505 Madison residence. Appellant was noticeably intoxicated for which the police officers arrested him. Upon a search of his person incident to the arrest, the officers seized crack cocaine from appellant's front pocket. Appellant also had on his person keys to the residence at 1505 Madison. Thereafter, the probation officers searched appellant's residence at 1505 Madison and seized numerous marijuana plants growing in buckets.

On December 6, 2012, appellant was indicted upon first-degree possession of a controlled substance (cocaine), cultivating marijuana, and with being a first-degree persistent felony offender. Appellant then filed a motion to suppress the marijuana seized from his residence. Appellant argued that the warrantless search of his residence constituted an unconstitutional search and seizure. On March 13, 2013, the circuit court denied appellant's motion to suppress the marijuana from his residence. The circuit court determined that the probation officers possessed reasonable suspicion that appellant was using drugs or contraband at his residence, thus justifying the search of his residence.

[1] Appellant's probation conditions provided that he would reside at a Ryland Heights address, not the address on Madison.

Appellant then filed a motion to sever the possession of controlled substance charge and the cultivating marijuana charge for trial; the trial court ultimately granted the motion. In June 2013, appellant was tried by jury upon the offense of first-degree possession of a controlled substance. The jury found appellant guilty thereof, and the jury recommended a two-year sentence of imprisonment.

Subsequently, the Commonwealth and appellant reached a plea agreement upon the remaining charges of cultivating marijuana and first-degree persistent felony offender (PFO I). In exchange for appellant's guilty plea to cultivating marijuana, the Commonwealth agreed to dismiss the PFO I charge and to recommend a three-year sentence of imprisonment upon the cultivating marijuana charge. Appellant entered an unconditional guilty plea to cultivating marijuana on October 10, 2013.

By final judgment entered December 2, 2013, the circuit court sentenced appellant to two-years' imprisonment for first-degree possession of controlled substance upon the jury's guilty verdict and to eighteen months for cultivation of marijuana upon the guilty plea. These sentences were ordered to be served consecutively. This appeal follows.

The sole issue in this appeal looks to whether the police and probation officers could legally search appellant's residence after his arrest on October 5, 2012. In his brief, appellant's sole argument is that the "evidence seized from [appellant's] house should have been suppressed." Appellant's Brief at 3.

Appellant sets forth various legal arguments in support thereof. In response, the Commonwealth points out that the evidence seized from appellant's residence was marijuana plants that formed the basis for the indicted offense of cultivating marijuana. The Commonwealth also correctly notes that appellant entered an unconditional guilty plea to the offense of cultivating marijuana and as a result was precluded from directly appealing the issue regarding the suppression of the marijuana from the search of the residence. In his reply brief, appellant essentially changes the emphasis of his argument to maintain that the circuit court erred by denying the motion to suppress the cocaine seized from the search of his person incident to arrest.

Upon review of the record, appellant did file a motion to suppress evidence in the circuit court; however, in that motion, appellant only sought suppression of the evidence seized from his residence (the marijuana), not his person. And, in the March 13, 2013, order, the circuit court solely addressed whether the search of appellant's residence was constitutional. It is clear that appellant did not file a motion to suppress the cocaine seized from the search of appellant's person or otherwise seek to suppress same before the circuit court.

Where appellant fails to raise an issue in the circuit court, he may not present it "for the first time on appeal." *Jones v. Commonwealth*, 239 S.W.3d 575, 578 (Ky. App. 2007).[2] This rule is particularly applicable to suppression of evidence allegedly seized in an unconstitutional manner. Under the Kentucky

[2] There is an exception to this rule found under Kentucky Rules of Civil Procedure (RCr) 10.26.

Rules of Criminal Procedure, a defendant must file a motion to suppress evidence in the circuit court, and the circuit court then conducts an evidentiary hearing. Kentucky Rules of Criminal Procedure (RCr) 9.78.[3] Following a hearing, the circuit court renders its findings of fact and conclusions of law on suppression of the evidence. RCr 9.78. Thereafter, the appellate court reviews the findings of fact to determine if they are supported by substantial evidence and reviews issues of law *de novo*.

As appellant failed to file a motion to suppress the cocaine seized from his person, we think that this issue has been waived, and our review is precluded.[4] *See Jones*, 239 S.W.3d 575. And, as appellant entered an unconditional guilty plea to cultivating marijuana, he did not preserve his right to appeal and thus may not bring a direct appeal challenging the denial of his motion to suppress the marijuana seized from his residence. *See Jackson v. Commonwealth*, 363 S.W.3d 11 (Ky. 2012). Appellant waived such by entry of the unconditional guilty plea. *See Parrish v. Commonwealth*, 283 S.W.3d 675 (Ky. 2009). Accordingly, we hold that the circuit court committed no reversible error in denying appellant's motion to suppress.

For the foregoing reasons, the Final Judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

[3] Effective January 1, 2015, RCr 9.78 was deleted, and a new version was promulgated in RCr 8.27. However, as final judgment was entered in 2013, we apply RCr 9.78.

[4] Appellant does not seek review under RCr 10.26.

BRIEFS FOR APPELLANT:

Julia Pearson
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Christian K. R. Miller
Assistant Attorney General
Frankfort, Kentucky