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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000069-MR

GREGORY SHAUN CURTIS — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 13-CR-00808

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, THOMPSON AND VANMETER, JUDGES.

THOMPSON, JUDGE: Gregory Shaun Curtis entered a conditional guilty plea to first-degree trafficking in heroin, over two grams, and persistent felony offender, first degree. Curtis reserved the right to appeal the denial of his suppression motion. He alleges that law enforcement did not have a reasonable suspicion to search his person and that the detectives were not acting on drug court procedures

as required in the drug court program consent form he signed as a condition of his participation in the program. We conclude the detectives had a reasonable suspicion that Curtis was selling heroin and the search, done with the knowledge of drug court officers and pursuant to the consent form signed by Curtis, was reasonable.

In 2013, a judgment and sentence of probation was entered pursuant to which Curtis became a drug court participant. On May 8, 2013, he signed a "Drug Court Program Consent to Search Form" which in its entirety states:

> I, Gregory S. Curtis, in consideration for the privilege of entry to the Fayette County Drug Court Program, do consent to allowing any law enforcement agency to search my person automobile, and residence when acting on drug court procedures. This search will be for the purpose of ensuring my compliance with the agreement of participation I have executed with the drug court. However, I acknowledge that any contraband that may be found may be used against me. This search may be without probable cause. I understand that I have a constitutional right to not have my person, automobile, or residence searched by law enforcement without probable cause, but I waive that right only for the period I am participating in the drug court program.

On June 12, 2013, Curtis was at the Central Baptist Hospital visiting his girlfriend and newborn child. Detectives King and McBride of the Lexington Police Department's narcotics unit went to the hospital after receiving a tip from a qualified confidential informant that Curtis was selling heroin in the bathroom on the first floor of the hospital.[1] After the detectives arrived, they waited near the

[1] As used by the Commonwealth a "qualified confidential informant" is one who, on prior occasions, has provided reliable information.

first floor bathroom for approximately thirty minutes. When Curtis did not appear, the detectives were provided Curtis's girlfriend's room number by hospital personnel. The detectives found Curtis in the room with his girlfriend and child.

Curtis recognized Detective King, called him by name, and asked why the detectives were in the room. Detective King responded they received calls that Curtis was selling heroin. He further advised Curtis he contacted Detective Jeffrey Haney, the supervisor of Fayette County's drug court, who told him Curtis was a drug court participant and consent to search his person was unnecessary based on his drug court agreement.

Initially, Curtis denied selling heroin or that he possessed heroin. However, when told by McBride that they were sure Curtis had "buy money" on him, Curtis turned around, put his hands behind his back, and said, "Go ahead and arrest me." A search of Curtis's front pant pocket revealed cash and a baggy wrapped in a rubber surgical glove containing heroin.

Detective Haney testified at the suppression hearing that he informed Detective King that Curtis was in the drug court program, had signed a drug court waiver, and could be searched. He sent King a copy of the consent form signed by Curtis.

Detective King testified that he previously arrested Curtis on drug charges. Soon after Curtis was released from jail in May, Detective King was aware of at least two anonymous calls informing police Curtis was selling drugs. That information was conveyed to Detective Haney. On the evening of June 12, 2013,

he and McBride were in a police vehicle conducting surveillance in an unrelated matter when McBride received a call on his cell phone. Although Detective King did not hear the conversation, McBride told him that it was a confidential informant who called and stated that Curtis was at Central Baptist Hospital selling heroin in the first floor bathroom. The same informant had been used in other cases by McBride and had shown truthfulness and accuracy. Although Detective King worked on other cases where Detective McBride used the same informant, King testified he had not been personally involved in "qualifying" the informant.

Following the hearing, the circuit court found Curtis waived his rights to be free from unreasonable searches and seizures by signing the drug court consent to search form and that the search did not have to be conducted by a drug court officer. It further found that as a drug court participant, Curtis was legally searched based on the officers' reasonable suspicion of criminal activity.

The issue here is whether the search of Curtis was constitutional under the Fourth Amendment to the United States Constitution and Section 10 of Kentucky's Constitution, which confer the right to be free from unreasonable search and seizure by providing that a search warrant must be based on probable cause. It is an established rule that any evidence seized as a result of an unreasonable search is not admissible against a defendant in court. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

It is often repeated that a warrantless search is "per se unreasonable under the Fourth Amendment---, subject only to a few specifically established and

well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967) (footnotes omitted). The exception in this case is the search of probationer who, as a condition of probation, consented to a warrantless search. Two United States Supreme Court cases are pivotal to our discussion.

In *Griffin v. Wisconsin*, 483 U.S. 868, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987), the Court addressed a Wisconsin Department of Health and Social Services regulation. The regulation permitted any probation officer to search a probationer's home without a warrant with the supervisor's approval based on '"reasonable grounds' to believe the presence of contraband[.]" *Id*. at 870-71, 107 S.Ct. at 3167. The Court recognized there is an exception to the warrant requirement when there are '"special needs' beyond the normal need for law enforcement, [which] make the warrant and probable-cause requirement impracticable." *Id.* at 873, 107 S.Ct. at 3168 (quoting *New Jersey v. T.L.O.,* 469 U.S. 325, 351, 105 S.Ct. 733, 748, 83 L.Ed.2d 720 (1985) (Blackmun, J., concurring)). The state's interest in the supervision of probationers, who are more likely to engage in criminal conduct than ordinary citizens, was held to be such a special need. Holding that the regulation was constitutional the Court reasoned:

> A warrant requirement would interfere to an appreciable degree with the probation system, setting up a magistrate rather than the probation officer as the judge of how close a supervision the probationer requires. Moreover, the delay inherent in obtaining a warrant would make it more difficult for probation officials to respond quickly to evidence of misconduct, and would reduce the

> deterrent effect that the possibility of expeditious searches would otherwise create[.]

Id. at 876, 107 S.Ct. at 3170 (internal citations omitted).

The Fourth Amendment rights of probationers was revisited in *United States v. Knights*, 534 U.S. 112, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001). A state regulation was not involved; rather, at issue was a probation order stating that "Knights would '[s]ubmit his ... person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer.'" *Id*. at 114, 122 S.Ct. at 589. Knights's home was searched by law enforcement officers without a warrant and without probable cause.

The Court upheld the search based on the officer's reasonable suspicion but applied different reasoning than it did in *Griffin*, where it was concerned with a regulation rather than a condition of probation. In *Knights*, the Court focused on the reasonableness of the search. It pointed out that "[j]ust as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." *Knights*, 543 U.S. at 119, 122 S.Ct. at 591. While not relying on consent as an exception to the warrant requirement, *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), the Court concluded the probation search condition was "a salient circumstance." *Knights*, 543 U.S. at 118, 122 S.Ct. at 591.

Under the *Knights* approach, "the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *Id*. at 118-19, 122 S.Ct. at 591 (quoting *Wyoming v. Houghton,* 526 U.S. 295, 300, 119 S.Ct. 1297, 1300, 143 L.Ed.2d 408 (1999)). In balancing the probationer's and the state's interests, the Court concluded that the search condition in the probation order "significantly diminished Knights's reasonable expectation of privacy." *Id*. at 119-20, 122 S.Ct. at 592. That expectation of privacy, balanced against the government's interest in not only seeing that the probationer complete probation but also protecting the public from future criminal conduct by the probationer, rendered the warrantless search based on reasonable suspicion constitutional under the Fourth Amendment. *Id*. at 121, 122 S.Ct. at 592.

Although doing so in the context a warrantless search of a parolee, in *Bratcher v. Commonwealth*, 424 S.W.3d 411, 414-15 (Ky. 2014), our Supreme Court summarized the current law under United States Supreme Court precedent as it pertains to probationers, as follows:

> [T]he current state of Fourth Amendment analysis under United States Supreme Court precedent is that a warrantless search of a probationer who has given consent as part of his probation satisfies the Fourth Amendment if there is reasonable suspicion of criminal activity[.][2]

[2] In *Samson v. California,* 547 U.S. 843, 126 S.Ct. 2193, 165 L.Ed.2d 250 (2006) the Court addressed the warrantless search of a parolee. Noting "parolees have fewer expectations of privacy than probationers" *id.* at 850, 126 S.Ct. at 2198, the Court held that "the Fourth

While Curtis and the Commonwealth agree that the detectives were required to have a reasonable suspicion of criminal activity to search Curtis's person, they disagree as to whether such a suspicion existed. Our standard of review of a denial of a motion to suppress was stated in *Baltimore v. Commonwealth,* 119 S.W.3d 532, 539 (Ky.App. 2003) (footnotes and citations omitted):

> [F]actual findings of the court involving historical facts are conclusive if they are not clearly erroneous and are supported by substantial evidence. Second, the ultimate issue of the existence of reasonable suspicion or probable cause is a mixed question of law and fact subject to de novo review. In conducting this analysis, the reviewing court must give due weight to inferences drawn from the facts by the trial court and law enforcement officers and to the circuit court's findings on the officers' credibility.

Probable cause is a markedly higher standard than a reasonable suspicion. The United States Supreme Court explained in *Alabama v. White*, 496 U.S. 325, 330, 110 S.Ct. 2412, 2416, 110 L.Ed.2d 301 (1990):

> Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.

"Although an officer's reliance on a mere 'hunch' is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable

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Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee." *Id.* at 857, 126 S.Ct. at 2202. In *Bratcher*, the Court observed "[i]n view of *Samson,* it remains undecided whether a warrantless search without reasonable suspicion of a probationer, rather than parolee, is consistent with the Fourth Amendment." *Bratcher*, 424 S.W.3d at 415. *Samson* has no impact here because we conclude there was a reasonable suspicion.

cause, and it falls considerably short of satisfying a preponderance of the evidence standard[.]" *United States v. Arvizu,* 534 U.S. 266, 274, 122 S.Ct. 744, 751, 151 L.Ed.2d 740 (2002) (citations omitted). As stated in *Baltimore,* 119 S.W.3d at 535–39 (footnotes omitted) in reliance on United States Supreme Court precedent:

> Both the reasonable suspicion and probable cause objective standards are flexible concepts to be applied in a commonsense manner based on the totality of the circumstances in each case. In determining the totality of the circumstances, a reviewing court should not view the factors relied upon by the police officer(s) to create reasonable suspicion in isolation but must consider all of the officer(s) observations and give due regard to inferences and deductions drawn by them from their experience and training.

The Court in *Baltimore* stressed that the totality of the circumstances approach is not an "atomistic" one "focusing on individual factors in isolation[.]" *Id* at 541. Moreover, whether a conclusion that there was a reasonable suspicion "need not rule out the possibility of innocent conduct." *Arvizu,* 534 U.S. at 277, 122 S.Ct. at 753. Curtis's approach to the determination of a reasonable suspicion question is premised on the same atomistic approach rejected by our Courts and the United States Supreme Court.

Curtis argues that although "[a]n officer's knowledge about a suspect's prior record can be a relevant factor in the reasonable suspicion analysis[,]" *Commonwealth. v. Morgan*, 248 S.W.3d 538, 541 (Ky. 2008), it alone will not provide a reasonable suspicion. *Collier v. Commonwealth*, 713 S.W.2d 827, 828 (Ky.App. 1986). Additionally, he points out that anonymous

uncorroborated tips "alone seldom demonstrates the informant's basis of knowledge or veracity[.]" *Florida v. J.L.,* 529 U.S. 266, 270, 120 S.Ct. 1375, 1378, 146 L Ed.2d 254 (2000) (quoting *White,* 496 U.S. at 329, 110 S.Ct. at 2415). He also emphasizes that while the tip that led the detectives to the hospital was provided by a qualified confidential informant and, therefore, the informant did not lack the indicia of reliability of a truly anonymous tip, the only fact conveyed Curtis was at the hospital—was a predictable fact because his girlfriend had just given birth to his child.

Again, the facts are to be viewed cumulatively. When viewed together they support a determination that there was a reasonable suspicion: (1) Detective King knew Curtis's criminal history involving drugs; (2) Detective King knew Curtis was a drug court participant; (3) Detective King knew two anonymous tips were received by police that Curtis was selling drugs after entering the drug court program; (4) Detective King knew Detective McBride received a tip from a qualified confidential informant that Curtis was at the hospital and was selling heroin; (5) the information that Curtis was at the hospital was corroborated; and (6) Curtis's behavior and invitation to arrest him was inconsistent with the action and words of an innocent person not willing to succumb to an arrest. Under the totality of the circumstances, we conclude there was a reasonable suspicion to search Curtis.

Curtis contends that even if reasonable suspicion existed for the search, probable cause was required because there was no proof that the search was

conducted "when acting on drug court procedures" as required by the consent to search form. Curtis admits that in the trial court, he argued only that he consented to warrantless searches if drug court personnel had a reasonable suspicion of activity in violation of his drug court conditions and the search was conducted by a drug court officer. On appeal, his argument is a variation of that argument. To the extent his argument is unpreserved, he requests palpable error review. Kentucky Rules of Criminal Procedure (RCr) 10.26. Under either standard of appellate review, we find his argument unpersuasive.

We reiterate that the *Knights* decision did not turn on consent. The consent form and its resulting diminished expectation of privacy was "a salient circumstance" in the reasonableness approach. *Knights*, 543 U.S. at 118, 122 S.Ct. at 591. The issue is not the scope of Curtis's consent but whether, as result of the consent to search form, his expectation of privacy was diminished to such an extent that the warrantless search was reasonable.

Curtis could not have reasonably believed that he was safe from warrantless searches by all officers except drug court officers. The consent to search form states that Curtis consented to a search by "any law enforcement agency." Moreover, the facts also do not support his contention that Detective King was not acting on drug court procedures when he searched Curtis.

In *People v. Sanders,* 31 Cal.4th 318, 333, 2 Cal.Rptr.3d 630, 642, 73 P.3d 496, 507 (2003), the Court held that "if an officer is unaware that a suspect is on probation and subject to a search condition, the search is not justified by the

state's interest in supervising probationers or by the concern that probationers are more likely to commit criminal acts." Consequently, the officer cannot be acting pursuant to a condition of probation. *Id*. We do not disagree.

However, Curtis's argument fails based on the facts. The detectives were aware of Curtis's participation in drug court and that possession of or trafficking in heroin would violate the conditions of his participation. Moreover, although Haney did not conduct the search, he was aware of the information provided to the detectives that a search was planned, and instructed Detective King that Curtis was a drug court participant who could be searched pursuant to the drug court agreement.

We conclude that under the circumstances, a warrantless search was reasonable. Pursuant to *Knights*, all that was constitutionally required to support the search was a reasonable suspicion.

Based on the foregoing, we affirm Curtis's conviction and sentence.

ALL CONCUR.

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