Cite as 2013 Ark. App. 103

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR11-1187

MYCHAEL KINARD APPELLANT	**OPINION DELIVERED** FEBRUARY 20, 2013 APPEAL FROM THE GARLAND COUNTY CIRCUIT COURT [NO. CR2009-569]
V.	HONORABLE LYNN WILLIAMS, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

ROBERT J. GLADWIN, Chief Judge

Mychael Kinard was convicted of simultaneous possession of drugs and firearms and possession of a controlled substance with intent to deliver pursuant to a conditional guilty plea in Garland County Circuit Court. On appeal, Kinard claims that the trial court erred in denying his motion to suppress. We affirm because he failed to preserve the issue for appeal.

At the hearing on Kinard's motion to suppress, Hot Springs Police Officer Frank Sears testified that he and Officer Keith Hampton were on patrol when they heard gunshots. The officers searched for evidence around the Oaklawn Villa apartment complex and noticed two gunshot holes in the exterior wall of apartment number three. They found a bullet lying on the concrete next to the apartment.

Officer Sears said that Kinard stepped outside of apartment three and stated that "some guys" had tried to rob him. He told the officers that the robbers shot at him but that he did not return fire. Kinard indicated to the officers that the incident took place by the road, not near the apartment.

Sears testified that, while searching near the road indicated by Kinard, a neighbor told him that shots were fired from both directions and pointed back in the direction of apartment three. Sears claimed that he asked Kinard for consent to go into the apartment to look for any evidence of a firearm and that Kinard stated that he did not object because he had nothing to hide. Sears explained that Officer Hampton had with him a card that contained a form regarding consent to search and that Hampton read this to Kinard. Officer Hampton corroborated Sears's testimony. Hampton testified that, during the search, he located a box of nine-millimeter shells and fifty-nine grams of crack cocaine hidden in the toilet tank.

Kinard testified that he did not give his consent for police to search his apartment. He denied that Officer Hampton produced the card or read from the form on it to obtain his consent. He said that the officers fabricated their testimony.

After the trial court denied Kinard's motion to suppress, he entered a conditional plea to preserve his right to appeal the trial court's denial of his motion. The trial court sentenced him to twenty years in the Arkansas Department of Correction. This appeal followed.[1]

[1]Kinard's first appeal resulted in this court's ordering rebriefing to establish our jurisdiction. *Kinard v. State*, 2012 Ark. App. 543.

In arguing that the trial court erred in denying his motion to suppress because his consent was not obtained, Kinard contends that the form the officer claims to have read from did not advise him in plain language that he had the right to refuse consent. Kinard also contends that the form was misleading and did not define "probable cause." He argues that, without the benefit of knowing or being advised in unequivocal language of his rights, he could not have voluntarily waived those rights. He maintains that, even though Arkansas law does not require consent to search to be in writing, the officers here had available a written consent form that stated unequivocally, "You have the right to refuse this search." He maintains that the circuit court's denial should be reversed because this form was not utilized.

However, Kinard's argument has been waived because he never raised it before the circuit court. At trial, Kinard denied giving consent. On appeal, he argues that the language contained on the card does not state plainly that he had a right to refuse consent. It is well settled that an appellant must raise and make an argument at trial in order to preserve it on appeal. *Tryon v. State*, 371 Ark. 25, 263 S.W.3d 475 (2007). If a particular theory was not presented at trial, the theory will not be reached on appeal. *Id.* The circuit court was never asked whether the language contained on the card was sufficiently clear. Thus, Kinard has waived this argument.

Affirmed.

WYNNE and HIXSON, JJ., agree.

Mark S. Fraiser, Chief Public Defender, for appellant.

Dustin McDaniel, Att'y Gen., by: *Eileen W. Harrison*, Ass't Att'y Gen., for appellee.