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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002735-MR

WILLIE RAY HINES — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 00-CR-00823

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: BAKER, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Willie Ray Hines (hereinafter “Hines”) appeals his conviction for criminal mischief, first degree (KRS 512.020) and tampering with physical evidence (KRS 524.100), and sentence of one year, probated for five years, following a jury trial. We affirm.

On December 13, 2000, a Warren County grand jury returned an indictment against Hines charging him with wanton

endangerment, first degree (KRS 508.060), criminal mischief, first degree, and tampering with physical evidence. The charges resulted from an automobile collision between Hines and Freddie Brown (hereinafter "Brown"). The indictment alleged that Hines had engaged in conduct which created a substantial danger of death or serious physical injury to Brown when Hines rammed his truck into a vehicle driven by Brown. Additionally, the indictment alleged that Brown's vehicle sustained damage in excess of $1,000 and that after the collision Hines had altered physical evidence with the intent to impair its verity or availability which would be used in an official proceeding. Hines pled not guilty and requested a trial by jury.

The facts relating to the collision are greatly disputed with Hines claiming Brown actually intentionally struck his vehicle while Brown alleges Hines had backed his truck into Brown's and then rammed him a second time. Each claimed the other intentionally caused the collision and that each feared for his own safety due to the actions of the other. Each contacted the State Police Headquarters and reported the collision immediately after the incident. Two state troopers were dispatched to investigate. One trooper stopped at the scene of the collision and spoke with Hines while the other trooper responded to Brown's residence and took a statement from him. After taking initial statements and reviewing the

collision site, Trooper Mike Yates (hereinafter “Trooper Yates”) arrested Hines and transported him to the Warren County Jail. At that time, Hines was charged with wanton endangerment and tampering with evidence.

It should also be noted that this was not the first incident between these parties. At trial, testimony revealed on-going disputes between Hines and Brown. Some prior problems included a civil suit relative to Brown’s cattle being on Hines’s property (resulting in a civil judgment rendered for Brown in the sum of $37,000), a criminal complaint filed by Brown against Hines’s son (resulting in an assault conviction and a six month sentence), Hines’s allegations of harassing telephone calls from Brown (as many as 30-40 calls), Hines’s allegations that Brown had threatened to kill him, financially destroy him (bankrupt him), and attempted to run him off the road (at least 3-4 times).

At trial, both Hines and Brown testified, as well as, Trooper Yates, Mrs. Hines, Hines’s expert, Frederick Grim, the Commonwealth’s accident reconstructionist Trooper David Tarrance, and several other witnesses. Based upon the evidence presented to the jury during the trial, the jury returned a verdict of not guilty to wanton endangerment, first degree, but guilty to criminal mischief, first degree and tampering with physical evidence. The trial court followed the sentence

recommended by the jury of one year on each charge, to run concurrent, and probated the sentence for five years. This appeal followed.

On appeal, Hines sets forth the following three issues:

> Question #1: Is the factual information needed to support a finding of probable cause without a warrant a less stringent standard than that to be employed by a reviewing magistrate as a preclude to issuing an arrest or search warrant?
>
> Question #2: If Trooper Yates had approached a magistrate with the information supplied in his Uniform Offense Report and contained in an affidavit, would that affidavit have been sufficient to support a warrant of arrest?
>
> Question #3: When the Commonwealth Attorney stated "You have a felony conviction! Don't you?", (VR 1 – 3:29:29) did the Court err in refusing to grant a mistrial? The Defendant/Appellant answers emphatically, YES.

The Commonwealth argues that questions #1 and #2 have not been properly preserved for appellate review. It contends that Hines did not file a motion to suppress his arrest nor did he object to evidence regarding his arrest at trial. Pursuant to RCr 9.22 it is necessary for a party to "make known to the court the action which that party desires the court to take or any objection to the action of the court, and on request of the court, the grounds therefore . . .". The rule has been

interpreted to require "a party to render a timely and appropriate objection in order to preserve an issue for review." Collett v. Commonwealth, Ky.App., 686 S.W.2d 822, 823 (1984). Failure to present a timely objection results in the alleged error being waived. See Blanton v. Commonwealth, Ky., 429 S.W.2d 407 (1968); Todd v. Commonwealth, Ky., 716 S.W.2d 242 (1986); Shevley v. Commonwealth, Ky., 889 S.W.2d 794 (1994). While we agree that Hines's questions #1 and #2 may not have been properly preserved for appellate review, in light of the on-going problems which exist between Hines and Brown, we will address the issues presented instead of dismissing them on a legal "technicality" which may only add the proverbial fuel to an already violative situation.

> KRS 431.005(1) states in relevant part:
>
> A peace officer may make an arrest:
>
> (a) In obedience to a warrant; or
>
> (b) Without a warrant when a felony is committed in his presence; or
>
> (c) Without a warrant when he has probable cause to believe that the person being arrested has committed a felony . . . .

In Shull v. Commonwealth, KY., 475 S.W.2d 469, 471 (1971), the Court addressed the issue of probable cause as follows:

> Probable cause exists when the facts and circumstances within the arresting officers' knowledge or of which they have reasonably trustworthy information are sufficient in

> themselves to warrant a man of reasonable caution to believe that an offense has been committed or is being committed. Appellant cites a whole ream of federal court opinions on the subject as if the courts of this Commonwealth had not been dealing with it. We have for many years held that before an officer can effect an arrest he must have "reasonable grounds" for believing the person has committed a felony. We have held that reasonable grounds as here used mean practically the same as the words probable cause as used in Section 10 of our Constitution, which forbids the issuing of a search warrant unless supported by an affidavit showing probable cause. Mattingly v. Commonwealth, 197 Ky. 583, 247 S.W. 938; Smallwood v. Commonwealth, 305 Ky. 520, 204 S.W.2d 945. In elaborating on the meaning of probable cause, we have held the reasonable and probable grounds that justify arrest without a warrant are such as would actuate a reasonable man acting in good faith.

In 5 Am.Jur.2d, Arrest, § 40, the determination of probable cause is addressed in the following manner:

> It is incumbent upon law enforcement officials to make a thorough investigation and exercise reasonable judgment before invoking the awesome power of arrest and detention, and the standards for evaluating the factual basis supporting a probable cause assessment are not less stringent in a warrantless arrest situation than in a case where a warrant is sought from a judicial officer. The probable cause determination for a warrantless arrest is based upon the information possessed by the officer at the time of the arrest and not by later acquired information. In evaluating probable cause, probability and not certainty is the touchstone of reasonableness under the Fourth Amendment. Probable cause involves probabilities similar to the factual and

> practical questions of everyday life upon which reasonable and prudent persons act. It is a pragmatic question to be determined in each case in the light of the particular circumstances and the particular offense involved.
>
> Probable cause does not depend on the actual state of the case in point of fact, as it may turn out upon legal investigation, but on knowledge of facts and circumstances that would be sufficient to induce a reasonable belief in the truth of the accusation. If probable cause existed at the time of the arrest, the fact that investigation proves the person arrested to be innocent does not make the arrest unjustifiable.
>
> In determining probable cause, all the information in the officer's possession, fair inferences therefrom, and observations made by the order, are generally pertinent.

See also Wilson v. Commonwealth, Ky., 403 S.W.2d 705 (1966).

In the case before us, Trooper Yates's probable cause was based upon the prior history of the two families, the fact that Hines was coming from his son's sentencing hearing, statements made by Brown, the inconsistencies in Hines's statements, the fact that Hines had tampered with evidence at the scene of the collision, the Trooper's observations at the collision site, and the Trooper's training and experience. While Hines contends that Trooper Yates lacked sufficient reasonable cause to effectuate a warrantless arrest, we conclude, after a thorough examination of the facts, that there

was reasonable cause to make a lawful arrest pursuant to KRS 431.005(1).

Hines also argues that the court erred by failing to grant a mistrial when the Commonwealth's first question to Hines on cross-examination was, "You have a felony conviction, don't you?" Hines objected to the question because his felony conviction was over ten (10) years old. The trial court sustained the objection and admonished the jury to disregard the Commonwealth's question regarding the prior conviction. The issues of curative admonition and mistrial were recently addressed by the Kentucky Supreme Court in the case of Maxie v. Commonwealth, Ky., 82 S.W.3d 860 (2002). In that case, the Court held:

> Appellant argues that this admonition was not sufficient to ensure his right to a fair trial, because the entire venire panel was irrevocably tainted by Mr. Rock's statements. However, a trial court's decision to deny a motion for mistrial will not be disturbed absent an abuse of discretion. Gould v. Charlton Co., Inc., KY., 929 SW.2d 734 (1996).
>
> Although Mr. Rock's comments were stated in the presence of the venire panel, the detailed curative admonition given by the trial court provided a legally sufficient remedy. The record must reveal a manifest necessity for a mistrial before such an extraordinary remedy will be granted. Skaggs v. Commonwealth, Ky., 694 S.W.2d 672, 678 (1985). This Court in Gould, supra, held that for a mistrial to be proper, the harmful event must be of such

> magnitude that a litigant would be denied a fair and impartial trial and the prejudicial effect could be removed in no other way. 929 S.W.2d at 738. The curative admonition in this case obviated the necessity of a mistrial and sufficiently negated whatever prejudice Mr. Rock's comments had inserted. There is a presumption that the jury follows such an admonition. Alexander v. Commonwealth, Ky., 862 S.W.2d 856, 859 (1993), overruled on other grounds in Stringer v. Commonwealth, Ky., 956 S.W.2d 883 (1997), cert. denied, 523 U.S. 1052, 118 S.Ct. 1374, 140 L.Ed.2d 522 (1998). Since Appellant has shown no actual prejudice, we just assume that the jury followed the trial court's admonition to disregard Mr. Rock's comments.

Id. At 863-864.

Hines has failed to provide this Court with any authority to support his claim of error nor has he shown actual prejudice. We believe the admonition given sufficiently addressed this issue and Hines received a fair trial.

For the foregoing reasons, the judgment and sentence entered by the Warren Circuit Court is affirmed.

ALL CONCUR.

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