RENDERED: June 20, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000098-MR

STEPHEN LUCAS — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 01-CR-00047

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: DYCHE, AND McANULTY, JUDGES; AND JOHN WOODS POTTER, SPECIAL JUDGE.[1]

McANULTY, JUDGE. Stephen Lucas (hereinafter appellant) entered a conditional plea of guilty pursuant to RCr 8.09 to two counts of Obtaining a Controlled Substance by Fraud and three counts of

[1] Senior Status Judge John Woods Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

Criminal Attempt to Obtain a Controlled Substance for which he was sentenced to two years imprisonment, probated for a period of three years. On appeal, appellant argues that the trial court should have granted his motion to suppress evidence pertaining to his KASPER (Kentucky All Schedule Prescription and Electronic Reporting system) report and any statements made by appellant. We affirm.

Appellant first complains that the trial court should have suppressed any evidence gleaned from the Lexington Police detective's use of the KASPER report because she did not follow the procedure mandated by the statute, KRS 218A.202. The KASPER reporting system is an electronic prescription-monitoring system for controlled substances maintained by the Cabinet for Health Services. The statute states that the data collected and a report created therefrom shall not be a public record. KRS 218A.202(8). The statute establishes the only authorized disclosures in KRS 218A.202(6), as follows:

> The Cabinet for Health Services shall be authorized to provide data to:
>
> (a) A designated representative of a board responsible for the licensure, regulation, or discipline of practitioners, pharmacists, or other person who is authorized to prescribe, administer, or dispense controlled substances and who is involved in a bona fide specific investigation involving a designated person;

> (b) A state, federal, or municipal officer whose duty is to enforce the laws of this state or the United States relating to drugs and who is engaged in a bona fide specific investigation involving a designated person;
>
> (c) A state-operated Medicaid program;
>
> (d) A properly convened grand jury pursuant to a subpoena properly issued for the records;
>
> (e) A practitioner or pharmacist who requests information and certifies that the requested information is for the purpose of providing medical or pharmaceutical treatment to a bona fide current patient; or
>
> (f) A person who receives data or any report of the system from the cabinet shall not provide it to any other person or entity except by order of a court of competent jurisdiction.

Appellant asserts that the officer's testimony before the grand jury in this case disseminated the contents of the KASPER report in an unauthorized manner under the statute. Appellant contends that the grand jury should have been required to subpoena the information under KRS 218A.202(6)(d), rather than having the officer testify. He argues that under subsection (f), it was in fact illegal for the officer to provide the KASPER information to the grand jury.

We believe that this issue was correctly resolved in this court's opinion in Thacker v Commonwealth, Ky. App., 80 S.W.3d 451 (2002). In that case, the defendant contended that

the investigating detective's communication with doctors and pharmacies to verify the data on his KASPER report, and his testimony before the grand jury violated the confidentiality provisions of the statute. Id. at 453-454. This Court concluded no disclosure had occurred because the detective did not show the report to anyone. This court further found that his contact with the doctors and pharmacists to inquire about the defendant's prescriptions did not inform them of anything. Id. at 456. In addition, the testimony before the grand jury was not considered a disclosure because the detective presented to the grand jury the information he had obtained from the doctors. Id.

Following these guidelines, the detective in the case at bar also did not violate the statute. The detective testified at the suppression hearing that she considers the KASPER report an investigative tool only, and would not charge a person solely on the basis of the information contained therein. She testified that instead she does further investigation to substantiate the information contained in it concerning overlapping prescriptions -- those filled during the same 30 day period for the same or similar medications. She said she does this by calling pharmacies and doctors to determine whether a patient is actually on overlapping prescriptions, whether the patient had a valid reason for having them, and whether the

patient withheld information from the doctor in obtaining the prescription. She testified that prior to the inception of the KASPER system narcotics officers' method of investigation was calling doctors and pharmacies directly for this information. She further stated that she did not disclose the KASPER report to the grand jury, but she testified before the grand jury using the results of her own investigation.

We agree that there was no illegal disclosure in this case. Appellant has failed to show that the contents of the KASPER report were disclosed. Instead, the testimony at the suppression hearing showed that it was used to conduct an investigation into appellant's prescription record, and was not disclosed thereby. The officer's testifying to her own investigation before the grand jury was proper. We find no violation of the statutory requirements.

Appellant also argues that it was a violation of his constitutional protections against unreasonable searches and seizures for the detective to obtain a copy of his KASPER report without a warrant. This issue was also addressed in Thacker, and this Court found therein that the police's ability to obtain the report with less than probable cause is appropriate under an exception to the warrant requirement for administrative searches. Thacker, 80 S.W.3d at 455. We agree with the analysis in Thacker, and conclude that appellant has not shown

that the detective's use of the KASPER report constituted an unreasonable search and seizure.

Next, appellant argues that his statements to police should have been suppressed because he was not informed that he was under investigation, and officers did not inform him of his rights pursuant to Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Two investigating officers from the Lexington Police narcotics division, with a state trooper, went to appellant's trailer to ask him questions about his prescriptions. They identified themselves as police and told appellant that he did not have to talk to them. They did not advise him of his Miranda rights. Appellant was clearly concerned, and repeatedly asked if he was going to be arrested. The officers told him that he was not going to be arrested or go to jail that day. They did not inform appellant that he was a suspect in the investigation. At one point, one of the officers told appellant that they were looking into the activities of the doctors they were asking him about.

The court found there were no grounds to suppress appellant's statements on the basis of a failure to give the Miranda warnings because appellant was not in custody and the warnings were not required. Appellant argues that Miranda warnings were required because he was being interrogated and the investigation had begun to focus on a particular suspect. We

disagree. The protections afforded by Miranda are necessary only when the defendant is under formal arrest or there is a restraint on the defendant's freedom of the degree associated with a formal arrest. California v. Beheler, 463 U.S. 1121, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983). There is no question in this case that appellant was not in custody nor was his freedom of movement limited. He was informed that he did not have to speak to the officers and could have remained inside his home. Moreover, Miranda warnings are not required because the person questioned is the "focus of the investigation" or someone whom the police suspect. Farler v. Commonwealth, Ky. App., 880 S.W.2d 882, 884-85 (1994). Thus, the trial court correctly denied the motion to suppress on the basis of a failure to warn appellant of his rights.

Appellant further argues that his statements should have been suppressed on the basis that they were not given voluntarily. He states that he was misinformed about the reason for the visit because the officers told him they were investigating the doctors, not him, and that he would not be arrested. He argues that the trial court should have determined whether his statements were given voluntarily, within the meaning of the Due Process clause, due to misrepresentations by the officers. Although this issue was raised below the trial court did not address it in its order. However, in Jackson v.

Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), the United States Supreme Court stated that absent a substantial factual dispute in the evidence, voluntariness of a confession may be properly decided by a reviewing court. Id. at 391-92, 84 S. Ct. at 1789; Mills v. Commonwealth, Ky., 996 S.W.2d 473 (1999). See also Lewis v. Commonwealth, Ky., 42 S.W.3d 605 (2001).

The voluntariness of a confession is assessed based on the totality of circumstances surrounding the making of the confession. Mills v. Commonwealth, Ky., 996 S.W.2d 473, 481 (1999). Under the Due Process Clause of the Fourteenth Amendment, the question of the voluntariness of a confession turns on the presence or absence of coercive police activity. Colorado v. Connelly, 479 U.S. 157, 167, 107 S. Ct. 515, 522, 93 L. Ed. 2d 473 (1986); Mills v. Commonwealth, 996 S.W.2d 473 (1986).

Despite the lack of findings by the trial court on this matter, we review the question because we find that there was no substantial factual dispute. The Commonwealth did not challenge appellant's characterization of the police officers' method of questioning him about his prescription activity. Therefore, we accept as true appellant's contention that he was never informed that he was a suspect and that he was further led

to believe that officers were inquiring into the activities of his physicians.

We do not find that this rises to the level of coercion which would negate the voluntariness of his statements to the police. The mere employment of a ruse, or "strategic deception," does not render a confession involuntary so long as the ploy does not rise to the level of compulsion or coercion. Springer v. Commonwealth, Ky., 998 S.W.2d 439 (1999), citing Illinois v. Perkins, 496 U.S. 292, 297, 110 S. Ct. 2394, 2397, 110 L. Ed. 2d 243 (1990). The Kentucky Supreme Court in Springer noted that a misrepresentation by interrogators of the strength of their case against the suspect did not render an otherwise voluntary confession inadmissible. Id. at 447. Similarly, we do not believe that the misrepresentations or lack of candor asserted in this case are such as would render the statements involuntary. Appellant was aware at all times of potential hazard in speaking to the police as demonstrated by his repeatedly asking them if he was going to be arrested. The officers did not promise appellant that he would never be arrested or that he was assured of not going to jail, but told him that was not their purpose in being there that day. We do not believe that the failure to tell appellant he was being investigated rendered appellant’s statements involuntary.

Therefore, we affirm the denial of the motion to suppress appellant's statements.

For the foregoing reasons, we affirm the order of the Fayette Circuit Court which denied the motion to suppress evidence. Accordingly, appellant's conviction is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Andrew DeSimone
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BRIEF FOR APPELLEE:

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