

Commonwealth of Kentucky
Court of Appeals

NO. 2002-CA-000481-MR

MICHAEL R. WAGNER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LAURANCE B. VANMETER, JUDGE
ACTION NO. 01-CR-01016-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: DYCHE AND McANULTY, JUDGES; AND POTTER, SPECIAL JUDGE.¹

POTTER, SPECIAL JUDGE: Michael Wagner appeals from a conditional guilty plea to charges of first-degree trafficking in a controlled substance and flagrant non-support. Wagner contends that the trial court denied him the opportunity to cross-examine the arresting officer at the evidentiary hearing on his motion to suppress by prematurely terminating his cross-

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.

examination of the witness. For the reasons stated below, we affirm.

On October 4, 2001, Wagner was indicted for first-degree trafficking in a controlled substance, Kentucky Revised Statutes (KRS) 218A.1412, and flagrant non-support, KRS 530.050. The trafficking charge resulted from the allegation that on August 24, 2001, Wagner sold crack-cocaine to Helen Faye Falk. The flagrant non-support charge resulted from the allegation that Wagner had accrued a child-support arrearage of \$5,825.28.

Following a motion by the Appellant, on December 17, 2001, a suppression hearing was held. At the conclusion of the hearing, the trial court denied Wagner's motion to suppress. On December 21, 2001, Wagner and the Commonwealth entered into a plea agreement. Under the agreement, Wagner pled guilty to both the trafficking charge and the non-support charge and the Commonwealth recommended a sentence of five years and one year, respectively. Further, Wagner reserved his right to appeal the suppression ruling. On January 30, 2002, the trial court entered final judgment and sentencing consistent with the plea agreement; imposition of sentencing was withheld and Wagner was placed on probation for a period of five years. This appeal followed.

Wagner contends that the trial court erred when it denied his motion to suppress in a manner violative of the

protections accorded by the United States and Kentucky Constitutions. Specifically, Wagner contends that the trial court denied him the opportunity to fully cross-examine Commonwealth witness Officer Franklin Patrick during the suppression hearing.

Wagner does not question the trial court's ruling if based upon the evidence before it. Rather he alleges that the trial court erred by prematurely terminating his cross-examination of Officer Patrick. The evidentiary portion of the suppression hearing involved one witness, Officer Patrick, and lasted approximately thirty-two minutes. The Commonwealth presented its case in eight minutes, and the court terminated the defendant's cross-examination after twenty-four minutes.

On direct examination Officer Patrick related a straightforward and detailed account of the events of August 24, 2001. Patrick was on duty as part of a plain-clothes detail charged with curbing prostitution in downtown Lexington. He and a partner were parked when they observed Ms. Falk, a "known prostitute," come down the street, sit on a wall near the intersection of North Limestone and Alabama Avenue and begin to wave at passing vehicles. After 4-5 minutes a car pulled over. Falk opened the rear passenger door and got into the back seat. When it appeared the car was not going to drive away, Officer Patrick and his partner approached the car on foot from the

rear. Officer Patrick was on the passenger side, and when he got abreast of the front seat he turned and shined a flashlight into the car. He observed that Ms. Falk was buying, not selling. According to Officer Patrick he observed Wagner, who was in the front passenger seat, handing a baggie containing a white substance to Falk, who had money in her outstretched hand. Falk dropped the money, Wagner stuffed the baggie between the seats, and Officer Patrick ordered them both out of the car. A search and an arrest followed.

Defense counsel spent a great deal of time questioning Officer Patrick about the events leading up to, and his reason for, his approaching the car. For example, how long he had been observing the area, how long he had been watching Falk, what he saw Falk do, what he knew about who was in the car, what were his plans, why didn't he arrest or cite Falk earlier, etc. While in his brief Wagner alleges that Officer Patrick was vague, repetitive, rambling, and non-responsive to these questions, to the contrary, a review of the taped suppression hearing discloses that the Officer was quite forthcoming in his responses during cross-examination.

After twenty-four minutes of cross-examination the trial court politely interrupted and asked defense counsel what was the point of her examination. She replied that it was to determine whether Officer Patrick had probable cause to approach

the car. The trial court pointed out that Officer Patrick made his observations on a public street and that he did not need probable cause to approach the car and shine his light in the window. Defense counsel argued that Officer Patrick was not just walking down the street; he had been watching the car. Thereafter the trial court terminated the cross-examination and denied the motion to suppress.

Kentucky Revised Statutes 611 provides that the "court shall exercise reasonable control over . . . presenting evidence so as to . . . [a]void needless consumption of time." There is no question that Wagner had a right to effectively cross-examine Officer Patrick. Cross-examination is a fundamental constitutional right and limitations should be cautiously applied. Commonwealth v. Maddox, Ky., 955 S.W.2d 718, 720 (1997).

However, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed. 674, 683 (1986).

"Defendants cannot run rough-shod, doing precisely as they please, simply because cross-examination is underway." Maddox

at 721 (*quoting* U.S. v. Boylan, 898 F.2d 230, 254 (1st Cir.1990)). Trial courts retain broad discretion to regulate cross-examination. Id.

We agree with the trial court's assessment of defense counsel's cross-examination regarding whether Officer Patrick had probable cause to approach Wagner's vehicle. See Texas v. Brown, 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983).

(There is no legitimate expectation of privacy shielding that portion of the interior of an automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers, and the use of artificial means to illuminate a darkened area simply does not constitute a search and thus triggers no Fourth Amendment protection.) Since under the facts here it was irrelevant why Officer Patrick happened to approach and shine his light into the car in which Wagner was sitting or why he had not arrested Falk sooner, the testimony defense counsel was seeking to elicit was similarly irrelevant.²

In summary, it was not a violation of either the Confrontation Clause or the Rules of Evidence to cut off Wagner's attempt to cross-examine Officer Patrick regarding irrelevant issues, and the trial court did not abuse its

² In his brief Wagner asserts that his trial counsel "was questioning Patrick as to whether Falk should have been arrested prior to getting into the vehicle occupied by [Wagner]." This issue is similarly irrelevant to whether the search was constitutionally permissible.

discretion when it terminated defense counsel's cross-examination of Officer Patrick.

For the foregoing reasons the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John Rampulla
Fayette County Legal Aid, Inc.
Lexington, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

Carlton S. Shier, IV
Assistant Attorney General
Frankfort, Kentucky