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Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000619-MR
AND
NO. 2002-CA-000648-MR

NEIL SPILLMAN — APPELLANT

v.

APPEALS FROM JEFFERSON CIRCUIT COURT
HONORABLE STEVE K. MERSHON AND
HONORABLE GEOFFREY P. MORRIS, JUDGES
ACTION NOS. 99-CR-002618 & 00-CR-002703

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; KNOPF AND SCHRODER, JUDGES.

KNOPF, JUDGE: Neil Spillman appeals from two judgments of the Jefferson Circuit Court, each convicting him of being a felon in possession of a firearm. The court entered the first judgment February 26, 2002, confirming a jury verdict against Spillman on charges that he had been convicted of a felony in 1997 and had possessed a handgun in September 2000. A different division of

the Jefferson Circuit Court entered the second judgment February 27, 2002, following Spillman's guilty plea to charges that while a convicted felon he had possessed firearms in July 1999. For the first conviction Spillman was sentenced to five years in prison and for the second to two additional years. This Court consolidated his appeals. Spillman contends that in both cases the police illegally obtained evidence. He also contends that one of the cases, the case that went to trial, was tainted by a police officer's false testimony before the grand jury and by the prosecutor's closing argument. We affirm.

In July 1999, a Louisville police officer stopped Spillman for speeding and driving recklessly. The officer recognized Spillman as a former police-department property-room employee and knew that he had been convicted in 1997 of wanton endangerment, a felony. Having obtained Spillman's identification and registration, the officer asked him if his car contained guns or drugs. Spillman admitted that he had a rifle in the trunk. Immediately the officer arrested him and searched the trunk, where he found an assault rifle. He then searched the car's passenger compartment and found a handgun beneath the driver's seat.

In October 1999, the grand jury indicted Spillman for being a felon in possession of a firearm, a class-D felony.[1] While trial in that case was pending, in September 2000, Spillman was again arrested and this time was accused of fleeing from officers who had attempted to stop him for a traffic violation,[2] of wantonly endangering two of the officers by pointing a handgun at them,[3] and of illegally possessing the handgun.[4] He was indicted for these offenses in December 2000.

In both cases Spillman moved to suppress evidence on the ground that the officers had come by it illegally. With respect to the July 1999 incident, Spillman argued that the officer had illegally searched the car. The court ruled, however, that the officer, who recognized Spillman as a convicted felon, had probable cause to arrest when Spillman admitted possessing the rifle. The search of the trunk was thereupon permissible as there was probable cause to believe the trunk contained evidence of a crime.[5] And the search of the car's passenger compartment was permissible as an incident of

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[1] KRS 527.040.

[2] KRS 520.095.

[3] KRS 508.060.

[4] KRS 527.040.

[5] Maryland v. Dyson, 527 U.S. 465, 144 L. Ed. 2d 442, 119 S. Ct. 2013 (1999); Estep v. Commonwealth, Ky., 663 S.W.2d 213 (1983).

Spillman's arrest.[6] We believe both of these rulings were correct.

Noting that the officer did not verify Spillman's status as a convicted felon, Spillman contends that the officer could not have been sure that his possession of the rifle was illegal, and thus did not have probable cause for the arrest. Probable cause, however, does not require certainty. An officer has probable cause for an arrest if he is aware of such facts and circumstances as would persuade a person of reasonable caution that there is a fair probability that the suspect has committed a felony.[7] The officer's recollection of Spillman's felony conviction and Spillman's admitted possession of the rifle satisfied this standard. The trial court did not err, therefore, by denying Spillman's suppression motion.

With respect to the incident of September 2000, Spillman's suppression motion raised factual issues rather than legal ones. At the suppression hearing two officers testified that they had witnessed Spillman make an illegal turn into an old-Louisville alley. They had attempted to stop him and he had

[6] New York v. Belton, 453 U.S. 454, 69 L. Ed. 2d 768, 101 S. Ct. 2860 (1981); Commonwealth v. Ramsey, Ky., 744 S.W.2d 418 (1987).

[7] Illinois v. Gates, 462 U.S. 213, 76 L. Ed. 2d 527, 103 S. Ct. 2317 (1983); Beemer v. Commonwealth, Ky., 665 S.W.2d 912 (1984).

fled. They apprehended him several blocks later, after he had abandoned his vehicle and brandished a loaded handgun.

Spillman described a very different sequence of events. He denied having turned illegally into the alley as claimed by the police. He admitted having been in the alley on the day in question, but denied having entered it the way the police described. He claimed that after he exited the alley the police followed him for several blocks without signaling him to pull over, but that he had finally pulled over because he felt the officers were harassing him. Without provocation, he asserted, the officers had knocked him to the ground and searched his car. He denied having possessed the handgun and asserted that the police had planted it.

In support of his allegation that the police had fabricated their version of events, Spillman sought to show that the officers had initially accused him, as reflected in the police report, of driving the wrong way in a one-way alley, but then had changed their stories at the suppression hearing when they learned that the alley was in fact two-way. The arrest report said that the officer observed Spillman "go wrong way in S[outh]. alley." The officers testified that this referred to Spillman's illegal turn into the alley from the wrong end, although the reporting officer admitted that at the time his impression had been that the alley was one-way. The trial court

credited the officers' account of Spillman's illegal turn and ruled that their seizure of the handgun had been lawful.

Spillman later learned that one of the officers had told the grand jury that Spillman's prior felony was for a drug offense when in fact it was for wanton endangerment. At trial, he confronted the officer with his misstatement and the officer conceded the mistake, although he denied Spillman's charge that he had lied to the grand jury. At the close of the Commonwealth's evidence Spillman renewed his suppression motion on the ground that the allegedly perjurious grand-jury testimony was new evidence that the police had fabricated the entire incident. Again the trial court rejected this contention and allowed the case to go to the jury.

On appeal, Spillman's contention is apparently twofold. He asserts that the trial court should have granted his motion to suppress, implying that the trial court erred by accepting the police version of the traffic infraction, the chase, and Spillman's possession of the gun. RCr 9.78 provides, however, that "[i]f supported by substantial evidence the factual findings of the trial court [at a suppression hearing] shall be conclusive." The officers' testimony in this case was substantial evidence upon which the trial court was entitled to rely. This Court may not second-guess that reliance.

Spillman also seems to contend that the officer's admittedly inaccurate grand-jury testimony, in and of itself, entitles him to relief. He did not, however, present this claim to the trial court. He did not move for a mistrial or to have the indictment quashed. The issue, therefore, is not preserved.

The claim, furthermore, is without merit. Courts are reluctant to intrude upon the grand jury process, which is meant to be independent.[8] Kentucky courts are authorized to remedy abuses of the grand-jury system,[9] but only if it appears that the alleged abuse prejudiced the accused.[10]

Even were we to agree with Spillman that the officer's mistaken grand-jury testimony amounted to an abuse of the system, we would not agree that the mistake prejudiced Spillman. The officer was not mistaken about the fact that Spillman was a convicted felon, and that was the fact that criminalized his possession of the handgun. The grand jury would have issued the indictment, we believe, even had there been no mistake.

Finally, during his closing argument, Spillman's counsel reiterated his theory that the police had stopped

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[8] United States v. Williams, 504 U.S. 36, 118 L. Ed. 2d 352, 112 S. Ct. 1735 (1992); Costello v. United States, 350 U.S. 359, 100 L. Ed. 2d 397, 76 S. Ct. 406 (1956).

[9] Commonwealth v. Baker, Ky. App., 11 S.W.3d 585 (2000).

[10] *Id.*

Spillman without reason, had beaten him, and had falsely accused him of possessing a handgun. In response, the prosecutor asked the jurors if they thought it likely that several police officers would jeopardize their jobs by fabricating a routine case such as this one. Spillman objected on the ground that this argument unfairly appealed to the jury's sentiment. The trial court ruled, however, that it was a fair response to Spillman's accusations. We agree. Both sides are allowed great leeway during closing argument to comment on tactics, evidence, and the falsity of the other side's position.[11] The trial court did not abuse its discretion by allowing the prosecutor to ask the jury to consider Spillman's accusations within the context of the officers' careers.

In sum, we are persuaded that Spillman's suppression motions were properly denied and that his trial was fair. Accordingly, we affirm the Jefferson Circuit Court's February 27, 2002, judgment in case number 99-CR- 02618 and its February 26, 2002, judgment in case number 00-CR-02703.

ALL CONCUR.

[11] Slaughter v. Commonwealth, Ky., 744 S.W.2d 407 (1987).

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