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Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001010-MR

GEORGE A. PAYNE — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS J. KNOPF, JUDGE
ACTION NO. 00-CR-000734

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: COMBS, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. George A. Payne ("Payne") appeals from a judgment of the Jefferson Circuit Court reflecting a jury verdict of guilty on the charge of first-degree trafficking in a controlled substance and first-degree persistent felony offender. We affirm.

On or about December 10, 1999, Louisville Police Officer Joe Dennis ("Dennis") received information from a

confidential informant that Payne would be at a particular location in Louisville to deliver cocaine. At the specified time and place, Dennis observed Payne's vehicle driving down Gaulbert Avenue. Dennis activated his emergency lights and pulled Payne's vehicle over. He would later state in the report and at trial that he observed Payne reaching down to his right and toward the back of the car before it stopped.

After approaching Payne's vehicle, Dennis told Payne to exit the vehicle and he performed a patdown of Payne's outer clothing. Payne was then handcuffed and his car was searched. Dennis, or another officer, found a plastic bag containing cocaine, and also found cash and other items.

On March 29, 2000, Payne was indicted on charges of first-degree trafficking in a controlled substance, tampering with physical evidence, and with being a persistent felony offender ("PFO"). Trial on the charges was conducted on April 10, 2002, whereupon Payne was found guilty on the trafficking and PFO charges, and found not guilty as to tampering with evidence. He received a sentence of 15 years in prison, and this appeal followed.

Payne first argues that the trial court erred in failing to grant its motion to suppress the admission of the cocaine, money, and other items found in his car. As a basis for the motion, he maintained at trial that the search was

constitutionally infirm because it was not supported by probable cause. He argues that while the police may have had a basis for conducting a stop and Terry style patdown, the circumstances did not warrant a full search of the vehicle's interior. As such, he claims that the incriminating evidence should have been suppressed, and that the trial judge erred in failing to so rule.

We have closely studied this issue and find no error. The first question, which Payne seems not to contest, is whether Dennis acted within constitutional confines in pulling over Payne's vehicle and conducting a patdown search. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) indicates that Dennis's actions were proper in this regard. It states in relevant part that,

> [W]here a police officer observes unusual conduct which leads him reasonably to conclude that in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

Terry, 392 U.S. at 30. See also, Collier v. Commonwealth, Ky. App., 713 S.W.2d 827 (1986); Johantgen v. Commonwealth, Ky. App., 571 S.W.2d 110 (1978); and Waugh v. Commonwealth, Ky. App., 605 S.W.2d 43 (1980). Information sufficient to form a reasonable suspicion is not confined to what the officer observed personally but may come from a known or even anonymous informant. Alabama v. White, 496 U.S. 325, 330, 110 S.Ct. 2412, 110 L.Ed.2d 301, 309 (1990). See, also Cook v. Commonwealth, Ky., 649 S.W.2d 198 (1983).

In the matter at bar, Dennis acted on the tip of an informant who the police later described as known and reliable. As such, we must conclude that Dennis acted properly in pulling Payne's vehicle over and conducting a Terry style patdown search.

The next question, then, is whether the police acted properly in conducting a search of the vehicle's interior. This is critical to Payne's appeal, as evidence found therein formed the basis for the charges against him.

A warrantless search is presumed to be unreasonable unless it is shown that the search falls within one of the recognized exceptions. Stewart v. Commonwealth, Ky. App., 44 S.W.3d 376 (2000). The automobile exception to the warrant requirement, however, ". . . allows officers to search a legitimately stopped automobile where probable cause exists that

contraband or evidence of a crime is in the vehicle." Clark v. Commonwealth, 868 S.W.2d at 101 (1994), citing United States v. Ross, 456 U.S. 798, 800-1, 102 S. Ct. 2157, 72 L. Ed. 2d 572, 578 (1982), and Estep v. Commonwealth, Ky., 663 S.W.2d 213 (1983). This exception is based upon exigencies created by an automobile's mobility, and upon the diminished expectation of privacy one has in an automobile, which arises from the pervasive regulatory schemes applicable to automobiles. California v. Carney, 471 U.S. 386, 390-93, 105 S. Ct. 2066, 2068-70, 85 L. Ed. 2d 406, 413-14 (1985); Estep, 663 S.W.2d at 215.

The question then becomes whether the police had probable cause to believe that contraband or evidence of a crime was in Payne's vehicle. Clark, supra. We must conclude that probable cause did exist. As we noted above, information sufficient to form a reasonable suspicion (i.e., probable cause) is not confined to what the officer observed personally but may come from a known or even anonymous informant. Alabama v. White, supra; Cook v. Commonwealth, supra. In the matter at bar, the police were acting in response to an informant, and the information received from that informant was reliable.

Furthermore, Dennis observed Payne making a suspicious movement inside the vehicle while it was being pulled over. While this fact, taken alone, may have not given rise to

probable cause, when taken in the context of everything known to Dennis at the time it supports a finding that the police had probable cause to believe that the vehicle contained contraband or evidence. Clark, supra. Accordingly, we find no error on this issue.

Payne next argues that the trial judge made statements to the jury which improperly bolstered the police officers' credibility. The record indicates that some jurors submitted a written question to the judge in which they asked why Dennis stopped Payne's car. Over Payne's objection, the court advised the jury that the stop was lawful. Payne argues that the validity of the vehicle stop was not relevant to the issues before the jury, and that the court should have so stated. He maintains that the statement to the jury was prejudicial, and seeks to have his conviction reversed for a new trial.

We find no error on this issue. Pursuant to Rogers v. United States, 422 U.S. 35, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975), and its progeny, Payne, through counsel, was availed of the opportunity to be heard on this issue. He argued in camera that the court should advise the jury that a hearing was conducted as to the legality of the traffic stop, and that all issues regarding the propriety of the stop were resolved. As the Commonwealth notes, this is, in essence, what the trial judge told the jury when he stated that the stop was legal. We see

little difference in Payne's proffered answer (i.e., that the legal issues as to the vehicle stop were resolved) and the trial court's actual statement to the jury (i.e., that the stop was legal). Payne admits in his brief that this was a question of law properly before the trial court, and we cannot conclude that the court erred in answering the jury's question. As such, we find no error on this issue.

Payne's third argument is that the trial court erred in failing to order the Commonwealth to reveal the identity of the confidential informant whose tip to the police resulted in the vehicle stop. He maintained at trial that the informant may have planted the drugs in his car and, in the alternative, asked the court to listen to taped statements to determine if the informant actually existed. He seeks to have the matter remanded with directions that the trial court determine if the informant actually exists and to ascertain whether the informant is reliable.

Taylor v. Commonwealth, Ky., 987 S.W.2d 302 (1999), on which the Commonwealth relies, disposes of Payne's claim of error. Taylor reiterated the general rule that where the evidence shows that an informant merely provides a tip to the police which leads to a police investigation and the discovery of evidence of a crime, disclosure of the informant's identity is not required. Id., citing Hargrave v. Commonwealth, Ky., 724

S.W.2d 202 (1986). In the matter at bar, the informant was not a material witness and presumably was not present when Payne's car was stopped and searched. That is, the informant could not have testified as to what occurred during the vehicle stop and search. As such, the facts at bar fall within the confines of Taylor, and we have no basis for concluding that the trial court erred in refusing to compel the disclosure of the informant's identity.

Payne also argues that the trial court erred in permitting the Commonwealth to cross examine his aunt, Mattie Jones ("Jones"), as to whether she knew that he was currently under indictment for a first-degree robbery charge that involved a firearm. He maintains that reference to a pending indictment is unduly prejudicial because it dilutes the presumption of innocence and allows the Commonwealth to bypass the Kentucky Rules of Evidence by introducing evidence of other crimes.

The record indicates that Payne, through counsel, asked Jones during the sentencing phase if she had ever known Payne to be violent. She replied that she had not. On cross-examination, the Commonwealth then asked her if she was aware that Payne was currently under separate indictment for using a firearm in a robbery. She testified that she knew of the indictment.

Having solicited an opinion as to his good character, a defendant opens the door to cross examination which impeaches the credibility of that opinion even if the impeachment takes the form of a specific instance of defendant's bad conduct. Commonwealth v. Higgs, 59 S.W.3d 886 (2001), citing KRE 405(b). This has long been the rule in Kentucky, even prior to the adoption of the Kentucky Rules of Evidence. Id.

In the matter at bar, we believe, arguendo, that a prior conviction for robbery while using a firearm would have been admissible given that Payne solicited and received a statement from the defense witness that she did not believe Payne was violent. Given the fact that the indictment in question was merely an allegation of bad conduct, it can hardly be argued that the trial court erred in allowing the Commonwealth's question. The question was proper in the context of what preceded it, and we find no error on this issue.

Payne goes on to argue that the Commonwealth's argument to the jury during the sentencing phase amounted to a violation of his due process rights when the Commonwealth improperly stated that he would be eligible for parole under a PFO I conviction in 7 ½ years. Payne contended that he would be eligible for parole in 10 years, and that a parole officer so stated on the witness stand. He argues that the trial court's

admonition to the jury was inadequate and that he is entitled to have the matter remanded for re-sentencing.

The record indicates that the parole officer, Rob Powers ("Powers") stated during the proceeding that Payne would be eligible for parole in 10 years, but eligible for release in 7 ½ years if given good time credit in prison. It appears, then, that one could reasonable state that Payne could be released from prison in 7 ½ years as a result of both good time credit and parole. When Payne objected to the Commonwealth's characterization of this potential outcome, the court admonished the jury to rely on the witness testimony and to draw their own conclusion therefrom as to a possible release date. This admonition was reasonable in every respect, and we do not believe Payne's arguments to the contrary form a basis for tampering with the outcome of the sentencing phase. We find no error on this issue.

Lastly, Payne raises arguments relating to whether the trafficking instruction allowed a conviction based on theories that were not supported by the evidence; that it was prejudicial to refer to his prior PFO II conviction; and, that KRS 532.110 and KRS 533.060 limit the duration of the aggregate sentence. Payne acknowledges that these issues are not preserved for appellate review. We have studied them, and cannot conclude

that they represent palpable error which allows or requires appellate review in the absence of preservation. RCr 10.26.

For the foregoing reasons, we affirm the judgment and sentence of the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Daniel T. Goyette
Frank William Heft, Jr.
Office of the Jefferson
District Public Defender
Louisville, KY

BRIEF FOR APPELLEE:

A. B. Chandler
Attorney General

Perry T. Ryan
Assistant Attorney General
Frankfort, KY