

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001410-MR

RONNIE MOBLEY

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LEWIS G. PAISLEY, JUDGE
ACTION NO. 01-CR-00973

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

REVERSING AND REMANDING

** ** * * *

BEFORE: JOHNSON, SCHRODER, AND TACKETT, JUDGES.

SCHRODER, JUDGE. This is an appeal from a judgment convicting appellant of possession of cocaine and promoting contraband pursuant to a conditional guilty plea. Appellant argues that the search of his person and the car in which he was a passenger was incident to an unlawful arrest for possession of drug paraphernalia. Upon review of the facts and applicable law, we agree with appellant that he could not be arrested for constructive possession of a crack pipe found in the vehicle

where his proximity to the pipe was the sole basis for the arrest. Hence, the order denying appellant's motion to suppress is reversed and the matter remanded for further proceedings consistent with this opinion.

The only witness at the suppression hearing in this case was Officer Mike Abbondanza of the Lexington Police Department. He testified that on the evening of July 22, 2001, while on routine patrol, he drove into Martin Luther King Park at around 11:00 - 11:30 p.m., which was after the park had closed. While patrolling the park, Officer Abbondanza observed a black Chevy pickup truck parked in an unlit area of the park next to a baseball field. Officer Abbondanza drove up to the truck and illuminated it with the police cruiser headlights. He then stopped his cruiser and got out to investigate why the truck was there after hours. When he approached the truck, he observed three men, the driver and two passengers, sitting inside on bench seating. Officer Abbondanza then inquired of the driver why they were there when the park was closed. The driver responded first that he and his passengers had gathered some brush in the truck that evening and were looking for a place to dump it. The officer testified that the brush in the back of the truck looked to have been there for longer than a day. The officer next asked the driver for some identification and where he lived. When the officer further inquired about why

they would be dumping brush, the driver changed his story to indicate that he was actually taking someone home. Officer Abbondanza testified that the driver subsequently changed his story as to why they were at the park yet a third time, stating that the truck had overheated. Because of the conflicting stories, the officer decided to get identification from the two passengers and call for backup. In looking at the addresses of the two passengers, Officer Abbondanza noted that it would not have been necessary to go through the park to take either passenger home. He then ran a warrant's check on all three occupants. After that, the officer examined the truck and saw no sign that it had overheated.

Officer Abbondanza next asked the driver if there were any drugs or weapons in the vehicle, and the driver responded, "no." At that point, he asked the driver for permission to search the truck. At first, the driver said yes, but then immediately changed his mind. Officer Abbondanza testified that the driver began to look nervous and told him, "No, I don't think I want you to look inside the truck."

The officer stated that he then proceeded to ask the driver to step out of the truck so he could do a pat-down search for weapons, which yielded nothing. For safety reasons, the officer had the two passengers also get out of the truck for a pat-down search. Officer Abbondanza testified that as the

passengers were exiting the truck, he observed in plain sight a crack pipe on the floorboard of the passenger side of truck. The two passengers were patted down for weapons, although it is unclear from the officer's testimony if Officer Abbondanza did the pat-down search of the passengers or if the other officers that arrived on the scene did these searches. Apparently, nothing was found in the pat-down search of the passengers.

After the scene had been secured, Officer Abbondanza testified that he asked all three occupants who the crack pipe belonged to, and all three denied ownership thereof. The officer stated that in order to be fair, he then gave the occupants another chance for one of them to claim ownership of the pipe so that he would not have to arrest all three. Again, no one admitted ownership. Accordingly, all three were arrested for possession of drug paraphernalia. After the arrests, a search of the truck revealed three push rods and a .2 gram rock of cocaine wrapped in paper in the middle of the bench seat.

Appellant, Ronnie Mobley, was one of the passengers in the truck. When Mobley was taken to jail and searched incident to the arrest, .36 grams of cocaine was found on his person. Mobley was ultimately indicted for first-degree possession of a controlled substance, promoting contraband in the first degree, and possession of drug paraphernalia. Mobley claimed that his arrest for drug paraphernalia was unlawful and, thus, moved to

suppress all the evidence resulting from the searches incident to this arrest. The trial court denied the motion to suppress.

On May 24, 2002, Mobley entered a conditional guilty plea to first-degree possession of a controlled substance and first-degree promoting contraband for which he was sentenced to one year in prison. He reserved the right to appeal the denial of his suppression motion, which is now before us.

Mobley argues that the trial court erred in not granting the suppression motion because the police had no right to arrest him for possession of drug paraphernalia under the evidence. The trial court found that there was definitely probable cause to arrest the driver for possession of the crack pipe. The trial court further found that the arrest of the two passengers in the truck for possession of the crack pipe was lawful because it was found on the floorboard of the passenger side of the truck. It must be noted that the Commonwealth asserts no other justification for the searches in question other than being searches incident to the lawful arrest of Mobley for possession of drug paraphernalia.

Mobley first notes that under KRS 431.005(1)(d), an individual can be arrested for a misdemeanor violation only when the misdemeanor is committed in the authority's presence. Since possession of drug paraphernalia was a misdemeanor relative to Mobley, having probable cause to believe Mobley was in

possession of the crack pipe would not be sufficient grounds to arrest Mobley; the officer would have had to actually witness Mobley committing the offense of possession of drug paraphernalia in his presence. See KRS 218A.500; Mash v. Commonwealth, Ky., 769 S.W.2d 42 (1989).

As stated earlier, the crack pipe was observed by the officer to be on the floorboard of the passenger side of the truck. Officer Abbondanza could not say if it was between or closer to the legs/feet of either passenger. In fact, Officer Abbondanza testified that he could not remember in which order the passengers were sitting.

"To prove constructive possession, the Commonwealth must present evidence which establishes that the contraband was subject to the defendant's dominion and control." Burnett v. Commonwealth, Ky., 31 S.W.3d 878, 881 (2000) (citing Hargrave v. Commonwealth, Ky., 724 S.W.2d 202, 203 (1986), cert. denied, 484 U.S. 821, 108 S. Ct. 81, 98 L. Ed. 2d 43 (1987)). Mobley argues that only the driver in the present case could have been in constructive possession of the crack pipe under the dictates of Leavell v. Commonwealth, Ky., 737 S.W.2d 695 (1987) and Paul v. Commonwealth, Ky. App., 765 S.W.2d 24 (1988).

In Leavell, the Court adopted the position of the United States Fifth Circuit that "[t]he person who owns or exercises dominion or control over a motor vehicle in which

contraband is concealed, is deemed to possess the contraband." Leavell, 737 S.W.2d at 697 (citing United States v. Vergara, 687 F.2d 57 (5th Cir. 1982)). In that case, the defendant was not in the car containing the contraband at the time of his arrest, but had the ignition key in his possession. In addition, there was evidence that the ignition key was given to the defendant for the purpose of transferring possession of the contraband. Id.

In Paul v. Commonwealth, Ky. App., 765 S.W.2d 24 (1988), the officer observed marijuana at the driver's feet and a roach in the dashboard ashtray, and smelled marijuana inside the vehicle. Also, the driver admitted that he had been smoking marijuana. The defendant was a back seat passenger who did not own the vehicle. The Paul Court held that under the presumption that the owner or driver is in constructive possession of contraband found in the car set out in Leavell, combined with the other evidence that the driver was in possession of the marijuana, there was probable cause to arrest the driver for possession of marijuana, but not the defendant. The Court went on to say:

Furthermore, a person's mere presence in the same car with a criminal offender does not authorize an inference of participation in a conspiracy. United States v. Di Re, 332 U.S. 581, 68 S. Ct. 222, 92 L. Ed. 210 (1948). The probable cause requirement is not satisfied by one's mere propinquity to others independently suspected of criminal

activity. Ybarra v. Illinois, 444 U.S. 85, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979).

Paul, 765 S.W.2d at 26. Although the instant case can easily be distinguished from Paul by the fact that Mobley was not a back seat passenger and the crack pipe was seen on the passenger side floorboard, we are still faced with the presumption that the contraband belongs to the owner/driver of the vehicle and the fact that the only evidence tying Mobley to the crack pipe was his proximity thereto.

The Commonwealth argues that the more recent case of Burnett v. Commonwealth, Ky., 31 S.W.3d 878 (2000), is controlling. In Burnett, the defendant was the only passenger in the car, was seated in the back seat, and was not the owner of the vehicle. The cocaine was found in a bag in the back seat near where the defendant was sitting. In addition, the driver/owner of the car explicitly denied ownership of the cocaine, stating "it had to be his [the defendant's]." The Court held that although the passenger was not the owner/driver of the car, he could nevertheless be adjudged in constructive possession of the contraband found therein. The Court distinguished the case from Paul as follows:

First, the crack cocaine was found in the back seat next to where Burnett had been sitting as opposed to being found near the driver in the dashboard ashtray as was the case in Paul. In other words, in the case at bar, the cocaine was found in an area in

the car within Burnett's immediate control. Whereas, in Paul, the marijuana was found in an area outside of the appellant's immediate control and inside an area within the immediate control of the front seat passengers of the vehicle. Second, in Paul, none of the occupants admitted to possessing the marijuana. In the case at bar, Elizabeth [the driver] disavowed possession and claimed that the crack cocaine must have belonged to Burnett.

We agree that Leavell, supra, establishes the principle that proof that a defendant has possession and control of a vehicle is evidence to support a conviction for constructive possession of contraband found within the vehicle. However, we do not believe that either Leavell or Paul establishes the principle that proof that someone other than a passenger-defendant had possession or control of a vehicle in which contraband is found, precludes a finding that the passenger-defendant was in constructive possession of the contraband. Rather, we believe that ownership and control of the vehicle is only one factor to consider in these types of cases.

Burnett, 31 S.W.3d at 880-881.

In the present case, as in Burnett, the contraband was found in an area where Mobley was sitting. However, that was the only evidence connecting Mobley to the crack pipe. Unlike Burnett, there was no statement by the driver or other passenger indicating that the pipe belonged to Mobley. Nor was there any evidence that the pipe had recently been used by anyone in the car. In fact, Officer Abbondanza testified that he observed no suspicious behavior on the part of the passengers, whereas the

driver gave three different explanations as to why they were in the park and appeared nervous. Further, the officer could not identify in which order the two passengers were sitting or state if the pipe was closer to one passenger or the other.

It has been held that in order to prove constructive possession of contraband where there is joint occupancy in an automobile, there must be direct or circumstantial evidence demonstrating some connection or nexus individually linking the defendant to the contraband. United States v. Valadez-Gallegos, 162 F.3d 1256 (10th Cir. 1998). Physical proximity to the contraband or the mere presence in an area where it is found is not sufficient. United States v. White, 932 F.2d 588 (6th Cir. 1991) (citing United States v. Gordon, 700 F.2d 215 (5th Cir. 1983)). Since Mobley's physical proximity to the crack pipe was his only connection to the pipe in the present case, there was not sufficient evidence that Mobley committed the misdemeanor offense of possession of drug paraphernalia in the presence of the police. Hence, Mobley's arrest on that charge was unlawful.

Accordingly, for the reasons stated above, we reverse the denial of Mobley's motion to suppress all evidence obtained as a result of the arrest for possession of drug paraphernalia and remand the matter for further proceedings consistent with this opinion. Given our decision above, appellant's second argument is rendered moot.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gene Lewter
Lexington, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler, III
Attorney General

Anitria M. Franklin
Assistant Attorney General
Frankfort, Kentucky