

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001475-MR

PEDRO M. MCKEE

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 00-CR-01050

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: BARBER, McANULTY, AND TACKETT, JUDGES.

TACKETT, JUDGE: Pedro McKee appeals from a judgment of the Fayette Circuit Court wherein he pled guilty to possession of a controlled substance in the first degree and to being a persistent felony offender in the second degree and was sentenced to six years' imprisonment. McKee's plea was a conditional guilty plea to these offenses as well as to the misdemeanor charges of possession of marijuana and possession of drug paraphernalia for which he received a sentence of twelve months' concurrent jail time. McKee argues that the trial court

improperly failed to suppress evidence seized from his car during a warrantless search and failed to hold a competency hearing prior to accepting his conditional guilty plea. After a thorough review of the issues involved, we affirm.

Officer April Gresham-McCrickard stopped McKee's car at 1:00 a.m. on August 20, 2000, after observing that only one headlight was working. When the officer checked his driver's license, she discovered that McKee had an outstanding arrest warrant and was driving on a suspended license. Officer McCrickard arrested McKee and, during a pat down search, she found a plastic baggie in his pocket. Although the officer asked permission to search McKee's car, there is some dispute as to whether he agreed to the search. Nevertheless, Officer McCrickard searched the passenger compartment of McKee's car and found in the glove box a pouch containing eleven hemostats, a scale, two baggies of marijuana and some crack cocaine.

After indictment, McKee filed a motion to suppress the evidence seized from his car arguing that he had not consented to the search and that it was not a search incident to his arrest. While his case was pending in the Fayette Circuit Court, McKee went through five different appointed attorneys. The first and last attorneys to represent McKee filed suppression motions and the trial court held two hearings on the issue of whether to suppress the evidence taken from McKee's

car. After each of the hearings, the trial court overruled McKee's suppression motion.

Meanwhile, the third attorney to represent McKee informed the trial court that McKee wished to be evaluated for mental competency. At defense counsel's request, the trial court approved funds for a private mental health professional to evaluate McKee, report on his competency and criminal responsibility, and assist the defense in preparing for trial. After the mental health expert interviewed McKee, defense counsel informed the trial court that there was no necessity for a hearing because McKee had been found competent. Moreover, defense counsel instructed the doctor not to file a written evaluation with the court. The Commonwealth questioned the defense's ability to waive a competency hearing; however, the trial court ultimately accepted McKee's conditional guilty plea without holding a competency hearing. This appeal followed.

McKee first argues that the trial court improperly refused to suppress the evidence seized from his car. When McKee was pulled over by Officer McCrickard, he legally parked his car so that he could return for it later. He planned to pay his outstanding fine in order to get out of jail and then return for the car. At the hearing, there was conflicting testimony about whether or not McKee consented to the search of his car. McKee testified that the officer asked twice for permission to

search the car and that he refused both times. However, the second time he was asked, McKee responded that she would do what she wanted to do anyway. Officer McCrickard testified that McKee gave his unequivocal consent to the search although she could not recall his exact words.

After the first hearing, the trial court found that, even if the consent issue was not addressed, the search of McKee's car was valid as a search incident to his arrest. The trial court determined at the second hearing that the search was justified by consent based on the fact that both parties testified that McKee was asked for consent and Officer McCrickard testified that he gave consent to have his car searched. We have previously recognized that police officers may perform warrantless searches of the passenger compartment of a car when the driver is arrested. Commonwealth v. Wood, Ky. App., 14 S.W.3d 557 (1999). In Wood, the warrantless search of a car's glove compartment was upheld after the driver was stopped for having expired tags and arrested for driving on a suspended license.

Both the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution guarantee the fundamental right to be free from unreasonable searches and seizures, a right protected by the general rule proscribing searches not authorized by a valid search warrant. However, in order to accommodate the exigencies of police work, a number of

exceptions to the warrant requirement have evolved, including an "incident to arrest" exception which directs itself at concerns for the safety of the arresting officer as well as at the prompt discovery and preservation of evidence. Clark, supra, and United States v. Robinson, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973).

Practically speaking, the "incident to arrest" exception allows for the warrantless search of an arrestee's person and of the area within his immediate control. The United States Supreme Court defined area of "immediate control" as "the area from within which [the arrestee] might gain possession of a weapon or destructible evidence." Chimel v. California, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969). The parameters of the exception were the subject of further Supreme Court scrutiny in New York v. Belton, supra, which concluded that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." 453 U.S. at 460. Applying the rationale of these cases to the facts here, we are convinced that the search of Wood's vehicle fits within this exception to the warrant requirement.

Wood at 558. The facts surrounding McKee's arrest and the search of his car are noticeably similar to the fact pattern in the Wood case; consequently, the trial court's determination that Officer McCrickard was permitted to search McKee's car pursuant to his arrest is supported by controlling precedent.

We next turn to McKee's assertion that Kentucky Revised Statute (KRS) 504.100 prohibited the trial court from

accepting defense counsel's waiver of a competency hearing on behalf of McKee. The statute reads as follows:

(1) If upon arraignment, or during any stage of the proceedings, the court has reasonable grounds to believe the defendant is incompetent to stand trial, the court shall appoint at least one (1) psychologist or psychiatrist to examine, treat and report on the defendant's mental condition.

(2) The report of the psychologist or psychiatrist shall state whether or not he finds the defendant incompetent to stand trial. If he finds the defendant is incompetent, the report shall state:

(a) Whether there is a substantial probability of his attaining competency in the foreseeable future; and

(b) What type treatment and what type treatment facility the examiner recommends.

(3) After the filing of a report (or reports), the court shall hold a hearing to determine whether or not the defendant is competent to stand trial.

The Kentucky Supreme Court has previously determined "once facts known to a trial court are sufficient to place a defendant's competence to stand trial in question, the trial court must hold an evidentiary hearing to determine the question." Mills v. Commonwealth, Ky., 996 S.W.2d 473, 486 (1999).

McKee claims that the trial court entertained doubts about his competence; however, the evidence does not support his assertion. McKee's third defense counsel advised the court that

McKee wanted an evaluation. Although the trial court entered an order for an evaluation to be performed, there was no indication that defense counsel himself believed McKee to be incompetent nor had the trial court observed any behavior on McKee's part which would lead it to question McKee's competence. In fact, when McKee's counsel waived the competency hearing, he specifically stated that the evaluator had found McKee unquestionably competent.

Although McKee's fifth counsel informed the trial court that McKee was not being rational with regard to the Commonwealth's plea offer, the refusal to consider a plea offer is not, by itself, an indication of mental incompetence. This attorney had no hesitation in filing a second suppression motion with regard to the search of McKee's car. Had he seen evidence that his client lacked the mental capacity to enter a conditional guilty plea, we are confident that he would have requested a hearing on that issue as well. Further during his guilty plea colloquy, McKee stated on the record that he was not suffering from or being treated for any mental illness or defect.

The standard of review in such a case is, "Whether a reasonable judge, situated as was the trial court judge whose failure to conduct an evidentiary hearing is being reviewed, should have experienced doubt with respect to competency to stand trial." Williams v. Bordenkircher, 696 F.2d 464, 467

(6th Cir. 1983), cert. denied, 461 U.S. 916,
103 S. Ct. 1898, 77 L. Ed. 2d 287 (1983).

Mills at 486. In affirming the trial court's acceptance of Mills' counsel's waiver of a competency hearing, the Kentucky Supreme Court found that "it is clear from the record that the trial judge did not order the psychiatric examination due to a belief that there were reasonable grounds to question Mills' competency to stand trial. Rather, the trial court merely ordered the examination out of expediency in response to Mills' notice of November 7, 1995." Id.

McKee cites the more recent decision in Thompson v. Commonwealth, Ky., 56 S.W.3d 406 (2001) wherein the Kentucky Supreme Court remanded a case for a competency hearing after defense counsel had waived such a hearing as a matter of strategy. In Thompson, the Court reasoned that the trial court's order for the evaluation "noted its concerns about Thompson's mental state:

The "problems" brought to the Court's attention ... include possible serious and chronic mental illnesses, neurological problems which may be organic in nature, and the presence of a mental condition which may affect defendant's ability to perceive and interpret information provided to him by counsel.

Order, 86-CR-033 at 1 (Lyon Circuit Court entered Oct. 25, 1994)." Id. at 407-408. The Mills Court specifically

contrasted the facts underlying its reasoning in Thompson with those in Mills as follows:

In Mills, the trial court ordered a psychiatric evaluation in response to notice filed by the defense that it intended to introduce evidence concerning mental illness, insanity, or mental defect. Id. at 485. But there was no behavior exhibited by Mills in court, or information provided to the court by counsel or other sources, that should have caused the trial court to experience doubt as to Mills' competence to stand trial. Id. at 486. In the case at bar, the trial court's own order establishes the sufficiency of the trial judge's level of doubt as to Thompson's competence to plead guilty.

Thompson at 408. The trial court which ordered McKee's competency evaluation was operating under a set of circumstances more analogous to those found in Mills. We are persuaded by the Commonwealth's argument that a reasonable trial judge would not have experienced doubts about McKee's competence; therefore, KRS 504.100(3) did not mandate a competency hearing.

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

ALL CONCUR.

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