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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001673-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE EDWIN M. WHITE, JUDGE
ACTION NO. 01-CR-00215

ANTOINE WATSON — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS, KNOPF, AND TACKETT, JUDGES.

TACKETT, JUDGE: The Commonwealth of Kentucky appeals from an order from the Christian Circuit Court suppressing evidence seized in a warrantless search from a vehicle driven by Antoine Watson. After a careful review of the legal issues presented, we affirm.

Watson was driving a car with an Illinois tag through a construction zone in Oak Grove, Kentucky, with his girlfriend, Linda Davis, who owned the car, and their infant child. Kentucky State Trooper John Clark pulled Watson over on

suspicion of driving under the influence after he allegedly observed the vehicle weaving across the road. Clark administered field sobriety tests to Watson and concluded that he was not intoxicated. However, a computer check revealed that his Georgia driver's license had been suspended and (incorrectly) indicated that the vehicle's registration had expired. Clark arrested Watson on traffic charges, handcuffed him, and placed him in the backseat of his police cruiser while he searched Davis' vehicle. During a search of the trunk, Clark encountered a sealed cardboard box with a bill of lading stating that it contained videotapes. Clark cut the box open and found tapes of movies which were still showing in theaters and had not been released on video.

Watson was subsequently indicted for multiple counts of unauthorized reproduction and distribution of a recorded article or device for sale or rent, pursuant to Kentucky Revised Statute 434.445. His attorney filed a motion to suppress the videotapes arguing that no probable cause existed to search the vehicle's trunk, no consent by the driver or owner of the car, no exigent circumstances, and that the search was not authorized by Watson's arrest on traffic charges. During the hearing, Clark testified that both Watson and Davis gave him permission to search the vehicle. On the other hand, Watson and Davis testified that Clark searched the vehicle without asking for

their consent. The trial court found that Clark's act of opening the sealed box violated Watson's rights under the Fourth Amendment to the United States Constitution and suppressed the videotapes. This appeal followed.

The Commonwealth first argues that Clark had sufficient probable cause to search the car's trunk and open the box of videotapes incident to Watson's arrest. The trial court properly determined that Clark had probable cause to stop the vehicle due to a suspicion that Watson was driving under the influence. Moreover, Clark also acted properly when he arrested Watson for driving on a suspended license. Pursuant to that arrest, Clark was allowed to search the **passenger compartment** of the car Watson was driving. Commonwealth v. Wood, Ky. App., 14 S.W.3d 557 (1999). However, the search of the trunk and the contents of the cardboard box located in the trunk exceeded Clark's authority to perform a search incident to Watson's arrest.

The Commonwealth also contends that Watson and Davis, who actually owned the car, consented to the search of the entire vehicle and the contents of the cardboard box. In support of this argument, the Commonwealth offered Clark's testimony that he received consent to search the car. However, additional testimony from Watson and Davis indicates that they gave no such consent. The one point on which the parties agree

is that Watson asked Clark to cut around the mailing label on the box when he opened it. The trial court held that this exchange was insufficient to establish that Watson consented to a search of the box's contents.

The trial court applied the following reasoning to explain its finding that Clark's warrantless search of the cardboard box in the trunk exceeded his authority:

> Regardless of whether consent was given or not given, Trooper Clark was not permitted to open the box of video tapes in the trunk. The Commonwealth's argument that defendant consented to the search of the box because he told Trooper Clark how to open the box is without merit. The consent to search is a question of fact that must be determined by the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S.218, 227 (1973). "[F]or where the government purports to rely on a defendant's statement to establish that a valid and voluntary consent was rendered, we must also examine the content of the statement to ensure that it 'unequivocally, specifically, and intelligently' indicates that the defendant consented." *U.S. v. Worley*, 193 F.3d 380, 386 (6th Cir. 1999). The statement made by defendant does not do that. Therefore, the evidence must be suppressed.
>
> The Commonwealth cites the case of *Florida v. Jimeno*, 500 U.S. 248 (1991) to support its position that defendant's consent to search the vehicle included not only the entire vehicle but also the containers in the vehicle. The Commonwealth argues that consent to search was not withdrawn when Trooper Clark brought the box of videotapes over to the car. In the case [of] *Florida v. Jimeno*, a police officer overheard Jimeno arranging what the police

officer suspected to be a drug deal. The officer pulled Jimeno over for a traffic violation. Suspecting that he was carrying drugs in his car, the officer asked to search it and Jimeno consented. The officer found cocaine in a folded bag on the car's floorboard. The Supreme Court, reversing the Florida Supreme Court stated that it was ". . . objectively reasonable for the police to conclude that the general consent to search respondent's car included consent to search containers within that car that might bear drugs. A reasonable person may be expected to know that narcotics are generally carried in some form of container." *Id.* At 251.

The Commonwealth attempts to use the *Jimeno* case to justify Trooper Clark's actions. However, *Jimeno* and this case are very different. In the case at bar, the defendant was arrested for driving on a suspended license. He was given and passed a field sobriety test. There was nothing unusual about his behavior. In *Jimeno*, the officer overheard the respondent arranging what appeared to be a drug deal. Respondent consented to the search of his vehicle and the officer found cocaine in a closed bag. The Supreme Court stated that the officer was permitted to open the bag because a reasonable person would conclude that drugs were likely to be found inside a bag on the floorboard of respondent's car. *Id.* At 250.

The Supreme Court also mentioned in dicta the case that the Supreme Court of Florida relied on when it affirmed the suppression order in *Jimeno* [State v. Wells, 539 So.2d 464 (1989), aff'd on other grounds 495 U.S. 1, 109 L.Ed.2d 1, 110 S.Ct. 1632 (1990)]. In that case, it was held that consent to search the trunk of a car did not include authorization to pry open a locked briefcase found inside the trunk. The Supreme Court stated, "It is very likely unreasonable to think that a suspect, by

> consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk, but it is otherwise with respect to a closed paper bag." [Supra] at 251-2.

The trial court concluded that it was unreasonable for Clark to open a sealed container, with a shipping label that clearly stated the box's contents, given the circumstances of Watson's traffic stop. "The touchstone of the Fourth Amendment is reasonableness." Jimeno at 250. Taking into account the facts that Watson has passed his field sobriety test and had done nothing to elicit the officer's suspicion that he was engaged in any illegal behavior other than driving on a suspended license, Clark lacked probable cause to search the trunk of the car and the contents of the box found in the trunk. Moreover, the trial court correctly concluded that Watson's request for Clark to cut around the shipping label did not establish unequivocal, specific, and intelligent consent as required by Worley.

For the forgoing reasons, the order of the Christian Circuit Court suppressing the fruits of an impermissible, warrantless search is affirmed.

ALL CONCUR.

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