RENDERED: March 26, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-000382-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 02-CR-000999

DWIGHT INGRAM — APPELLEE

OPINION
VACATING AND REMANDING
** ** ** ** **

BEFORE: BARBER, KNOPF, AND SCHRODER, JUDGES.

KNOPF, JUDGE: The Commonwealth alleges that on October 11, 2001, Dwight Ingram committed the offense of trafficking in cocaine in violation of KRS 218A.1412. During the afternoon of that day undercover narcotics officers allegedly witnessed Ingram three times enter and exit the passenger side of a beige van parked in the lot of a barber shop on Hemlock Street in Louisville. Following his second trip to the van, the officers

claim that Ingram gave another person a small baggie, like those often used to package illegal drugs, in exchange for cash. After the exchange, Ingram returned briefly to the van, then entered a liquor store across the street from the barber shop. The officers arrested Ingram in the liquor store. A search of his person yielded $463.00 in small bills in the pocket of his pants; a search of the van yielded a small baggie containing cocaine and two bottles of prescription cough syrup.

Asserting that the warrantless search of the van violated his constitutional rights, Ingram moved to suppress the cocaine and cough-syrup evidence. Following a hearing in August and December 2002, the Jefferson Circuit Court, by order entered February 6, 2003, granted Ingram's motion. It is from that order that the Commonwealth appeals. It contends that the Court's order fails to address material aspects of its response to Ingram's motion. We agree and so must vacate the suppression order and remand.

At the suppression hearing, one of the officers testified as just noted. He claimed to have witnessed Ingram getting into and out of the van and conducting the suspected drug transaction. He also testified that when he approached the van after having taken Ingram into custody, he saw the small baggie of cocaine in plain view on the van's floor. He thereupon used Ingram's key to gain access to the van and seized

the suspected cocaine. He or his partner then searched beneath the seats and found the cough syrup.

As the Commonwealth notes, under the Fourth and Fourteenth Amendments to the United States Constitution and Section 10 of the Kentucky Constitution unreasonable searches and seizures by the police are unlawful and, as a general rule, warrantless searches and seizures are unreasonable.[1] Several exceptions to this general rule have evolved, however. It is well established under the so-called automobile exception that a police officer may search an automobile without a warrant if he has probable cause to believe that the automobile is operable and contains contraband or other evidence of a crime.[2] Probable cause exists if, in the totality of circumstances known to the officer, he can reasonably infer that "there is a fair probability that contraband or evidence of a crime will be found" in the automobile.[3] If the officer's testimony in this case is accepted, particularly his testimony that he saw through the van's window what appeared to be a package of cocaine lying

[1] United States v. Ross, 456 U.S. 798, 72 L. Ed. 2d 572, 102 S. Ct. 2157 (1982); Clark v. Commonwealth, Ky. App., 868 S.W.2d 101 (1993).

[2] Pennsylvania v. Labron, 518 U.S. 938, 135 L. Ed. 2d 1031, 116 S. Ct. 2485 (1996); Estep v. Commonwealth, Ky., 663 S.W.2d 213 (1983).

[3] Beemer v. Commonwealth, Ky., 665 S.W.2d 912 (1984).

in plain view on the floor, then it is beyond cavil, we believe, that he had probable cause to search the van.

Ingram testified, however, that the officer could not have seen what he claimed, because during that afternoon he, Ingram, had not been outside getting into and out of the van, but had been inside the barber shop having his hair cut. He had not driven the van that day, he claimed, did not know how it had arrived in the barber shop parking lot (although one of his siblings could have put it there), and, aside from walking past it on his way from the barber shop to the liquor store, had been no where near it. According to Ingram, therefore, the officer did not have probable cause to enter and search the van.

Although the Commonwealth relied upon the automobile exception in response to Ingram's suppression motion, the trial court's order does not address that exception, but rather discusses the so called incident-to-arrest exception. Under that doctrine, when a police officer lawfully arrests a person from an automobile, the officer may search the immediately surrounding passenger area with or without probable cause.[4] Although we agree with the trial court that that exception does not justify the search in this case, the court erred by failing to address the automobile exception. As noted above, if the court finds the officer's testimony credible, then the search of

[4] Clark v. Commonwealth, *supra.*

Ingram's van would appear to have been lawful. Because the officer's credibility is a matter addressed to the trial court,[5] and because the court did not make findings either accepting or rejecting his testimony, we must vacate the court's suppression order and remand for reconsideration.

Accordingly, we vacate the February 6, 2003, order of the Jefferson Circuit Court and remand for additional proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR THE APPELLANT:

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No brief for appellee.

[5] RCr 9.78; Commonwealth v. Whitmore, Ky., 92 S.W.3d 76 (2002).