

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000436-MR

MARVIN MURRELL

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE LEONARD L. KOPOWSKI, JUDGE
ACTION NO. 02-CR-00180

COMMONWEALTH OF KENTUCKY

APPELLEE

&

NO. 2003-CA-001345-MR

GAMBO OBA

APPELLANT

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE LEONARD L. KOPOWSKI, JUDGE
ACTION NO. 02-CR-00180

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: COMBS, TACKETT, and VANMETER, Judges.

COMBS, JUDGE. The appellants, Marvin Murrell and Gambo Oba, appeal the separate judgments entered upon their conditional guilty pleas to trafficking in a controlled substance pursuant

to RCr¹ 8.09. Both were sentenced to serve five years in prison. As part of their plea agreements, the appellants preserved their right to appeal the order of the trial court which denied their motion to suppress evidence of drugs seized from them at the time of their arrest.

In his appeal from the judgment of the Campbell Circuit Court entered on January 27, 2003, Murrell asserts that he was the victim of racial profiling in violation of his constitutional rights under the Fourth and Fourteenth Amendments to the United States Constitution. Oba, appealing from a final judgment entered on May 29, 2003, argues that the search of his person was unreasonable in scope, thus implicating Fourth Amendment protections as well. Finding no error in the evidentiary ruling of the trial court, we affirm.

Murrell and Oba were arrested on January 8, 2002, and they were subsequently indicted by a Campbell County grand jury on one count of first-degree trafficking in a controlled substance (cocaine) and possession of marijuana. In moving to suppress the crack cocaine seized from them at the time of their arrest, they argued that there was no reasonable justification for the extensive search of their persons conducted by the arresting officer.

¹ Kentucky Rules of Criminal Procedure.

At the suppression hearing, the Commonwealth presented the testimony of Officer Sean Donelan of the Highland Heights Police Department. While on traffic patrol, Officer Donelan had observed a vehicle traveling at a high rate of speed in his direction on U.S. 27. Using a laser unit, he determined that the vehicle was moving at a speed of 52 m.p.h. in an area posted at a limit of 35 m.p.h. Although the officer had intended to pull the vehicle over after it passed him, the driver turned off the highway onto a residential street before reaching the police officer.

By the time Officer Donelan caught up with the vehicle, it had already stopped in front of a residence. The officer activated his lights and pulled in behind the vehicle. He testified that as he approached the car, he observed Murrell completely reclined in the front passenger's seat, moving from side to side. Oba, the driver, was moving his head back and forth on the steering wheel, appearing to be distraught. Upon being confronted by Officer Donelan, Oba immediately blurted out voluntarily that he was driving on a suspended license from Ohio.

In addition to the strange behavior of the two men, Officer Donelan also became suspicious that they were hiding drugs due to the presence of an empty plastic bag and a small amount of marijuana on the center console of the vehicle. He

decided to arrest both men for possession of marijuana; Oba was also charged with driving on a suspended license and speeding.

Back-up police officers arrived at the scene. Officer Donelan performed a cursory search of Oba for weapons, handcuffed him, and placed him in the back of a police cruiser. He then searched Murrell for weapons. As the officer brushed the region of Murrell's inner thigh and buttocks, Murrell tensed up and attempted to grasp his legs together. He ordered Murrell to spread his legs and relax. When Murrell eventually complied, a large mass in his crotch area was revealed. Officer Donelan reached inside Murrell's trousers and retrieved a wadded five-dollar bill holding marijuana and a plastic bag containing crack cocaine. Suspecting that Oba might also be hiding drugs, Officer Donelan searched him and retrieved from Oba's underwear a wad of paper containing crack cocaine.

In the order challenged in these appeals, the trial court found that the matter was "very similar to the facts in New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981)." Because there was probable cause to arrest each of the men, "the arresting officer was clearly entitled to perform a complete search of the person of each Defendant." In the case before us, the court determined that the officer was authorized

to conduct a Terry² search, finding that “[i]t was during this pat down that the passenger’s actions in concealing something in his buttocks area led to the recovery of the cocaine in his underwear.”

Following the entry of this order on September 20, 2002, the appellants entered conditional guilty pleas to the trafficking charges. Murrell also pled guilty to possession of marijuana. These appeals followed.

We review an order denying a motion to suppress under two complementary standards: the trial court’s factual findings are reviewed under the deferential standard of whether they were “clearly erroneous;” ultimate questions of law are reviewed *de novo*. RCr 9.78; Commonwealth v. Banks, Ky., 68 S.W.3d 347 (2001), citing, Ornelas v. United States, 517 U.S. 690, 691, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996).

Appeal No. 2003-CA-000436-MR

Murrell, a young, African-American male, argues that the evidence against him should have been suppressed because the initial stop of the vehicle in which he was a passenger occurred as a result of illegal racial profiling. He contends that Officer Donelan pursued the car in which he was riding “due to

² Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

his interest being piqued by the race of the two young black men in that part of town." (Murrell's brief, p.3.) In support of his claim of racial discrimination, he has provided this Court with statistics from the 2000 United States Census to establish that only 1% of the residents of Campbell County are of African-American descent.

Murrell's arguments suffer from both procedural and substantive defects. First, Murrell did not raise the issue of racial profiling or racial discrimination in the trial court, failing to preserve it for our review. He did not allow the trial court to consider whether his right to equal protection guaranteed by the Fourteenth Amendment had been violated by selective enforcement of the law by the police. An appellate court may not review an issue that was neither raised in nor decided by the trial court. Regional Jail Authority v. Tackett, Ky., 770 S.W.2d 225, 228 (1989).

Even if we were to examine the merits of his claim despite the preservation obstacle, it would fail because Murrell failed to present any evidence to support a dismissal of his case on grounds of selective enforcement or racial profiling. There was no evidence offered at the suppression hearing permitting or even alerting the trial court to find or to infer that Officer Donelan may have initiated the traffic stop based on the race of the occupants of the vehicle. Contrary to

Murrell's interpretation of Officer Donelan's testimony, there was no objective evidence that the officer was able even to perceive the race of Murrell or Oba when he directed his laser unit at their vehicle -- much less that he undertook pursuit based on that factor. Furthermore, there was no evidence -- statistical or otherwise -- that similarly situated persons of other races were treated differently by Officer Donelan or by any other officer employed by the Highland Heights Police Department.

The United States Supreme Court has long recognized the authority of the police to conduct a search incident to a lawful arrest. In United States v. Robinson, 414 U.S. 218, 224, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973), the Court held as follows:

The justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial. . . . It is the fact of the lawful arrest which establishes the authority to search, and . . . **in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that amendment.** (Citations omitted; internal quotation marks omitted; emphasis added.)

Id., at 234-35; see also, Collins v. Commonwealth, Ky., 574 S.W.2d 296 (1978). Under this unambiguous authority, the trial

court correctly determined that the warrantless search of Murrell was lawful.

Murrell also maintains that he is entitled to relief pursuant to Sections 2, 3 and 11 of the Kentucky Constitution. This argument also was not preserved for review or supported by any evidence of record. As Murrell has not raised any other issues concerning the propriety of his search incident to his arrest, his conviction must be affirmed.

Appeal No. 2003-CA-001345-MR

In his appeal, Oba argues that the cocaine found on his person should have been suppressed because of the improper nature of the search during which it was discovered. He characterizes the search as highly intrusive and unreasonable. While he acknowledges that the officer was justified in searching him initially, he contends that the officer's act of reaching inside his underwear to retrieve the drugs "exceeded the scope of a search incident to arrest or a search incident to Terry." (Oba's brief, p. 6.) Relying on Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), Oba argues that the warrantless "cavity search" of his body required a showing of exigent circumstances in order to be justified. He claims that after patting him down for weapons

and placing him in handcuffs, Officer Donelan should have postponed any further search of his person until he reached the police station. We disagree.

As discussed above, the search-incident-to-arrest exception allows for a full search of the person for weapons and/or contraband. Robinson, 414 U.S. at 234-35. Nevertheless, Oba is correct in arguing that strip searches and/or body cavity searches are not contemplated or authorized by Robinson, supra. "[T]he interests supporting a search incident to arrest would hardly justify disrobing an arrestee on the street. . . ." Illinois v. Lafayette, 462 U.S. 640, 645, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983).

Oba errs in arguing that the search performed by Officer Donelan was of such an intrusive nature as to fall beyond the parameters of a search incident to an arrest. His claim that he was subjected to a body cavity search is unsupported by the evidence. On the contrary, the evidence reveals that Oba was not required to remove any of his clothing when the officer reached between his buttocks. His rectum was not probed nor were his genitals disturbed in the process. There was no evidence that Oba was harmed when the officer briefly slid his hand inside his underwear and pulled out the wad of paper containing cocaine. By definition, Oba was neither subjected to a strip search nor to a body cavity search.

Oba relies on Amaechi v. West, 237 F.3d 356 (4th Cir.2001), and Fuller v. M.G. Jewelry, 950 F.2d 1437 (9th Cir.2001). Both of these civil rights actions were brought pursuant to 42 USC §1983 and concerned searches far more intrusive than the search in the case before us. In Amaechi, the Court addressed the reasonableness of a strip search of a woman arrested for a violation of a noise ordinance. Naked from the waist down, she was searched on the street in front of her residence in full view of her husband, her five children, and her neighbors. Fuller addressed the reasonableness of a warrantless strip search and full visual inspection of the vagina and rectum of a person suspected of theft of a ring from a jeweler. By comparison with these searches, Officer Donelan's brief foray into Oba's underwear did not constitute a significant invasion of the appellant's privacy. Thus, we do not agree that these cases provide a basis for reliance for Oba.

We conclude that the trial court did not err in upholding as valid the searches of Oba and Murrell. Consequently, the seizure of the narcotics was reasonable and did not constitute a violation of the Fourth Amendment in either case. Thus, the trial court did not err in refusing to apply the exclusionary rule to suppress the evidence.

The judgments of the Campbell Circuit Court are affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT MURRELL:

Lisa Clare
Frankfort, Kentucky

BRIEF AND ORAL ARGUMENT FOR
APPELLANT OBA:

Emily Holt
Frankfort, Kentucky

BRIEFS FOR APPELLEES:

Albert B. Chandler III
Attorney General of Kentucky

Gregory C. Fuchs
Assistant Attorney General
Frankfort, Kentucky

George G. Seelig
Assistant Attorney General
Frankfort, Kentucky

ORAL ARGUMENT FOR APPELLEES:

George G. Seelig
Frankfort, Kentucky