

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000713-MR

STEPHON PEAKE

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE LEONARD L. KOPOWSKI, JUDGE
ACTION NO. 02-CR-00386

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: MINTON, SCHRODER, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Stephon Peake brings this appeal from a March 27, 2003, judgment of the Campbell Circuit Court. We affirm.

On July 4, 2002, Newport City Police Officer Ronnie Gross stopped a vehicle because the light above the rear license plate was not illuminated in violation of Kentucky Revised Statutes (KRS) 186.170. Appellant occupied the front passenger seat of the car. After speaking with both the driver and appellant, the officer requested and received consent from the

driver/owner to search the automobile. The search revealed a bag of marijuana under the front passenger seat of the automobile. The driver and appellant disclaimed ownership of the marijuana. The officer arrested appellant for possession of marijuana. At the Campbell County Detention Center, Deputy Shawn Simms conducted a strip search of appellant. He testified that he found a bag with suspected cocaine pinned to appellant's boxer shorts. The substance was tested and found to be cocaine.

The Campbell County Grand Jury indicted appellant for first-degree trafficking in a controlled substance and for being a second-degree persistent felony offender. Appellant filed a motion to suppress evidence which was denied by the circuit court. Following a jury trial, appellant was found guilty of the above stated offenses and was sentenced to a total of fifteen years' imprisonment. This appeal follows.

Appellant initially contends the circuit court committed reversible error by denying his motion to suppress evidence. Specifically, appellant asserts that Officer Gross lacked probable cause to arrest appellant for possession of marijuana. Appellant cites to Paul v. Commonwealth, Ky. App., 765 S.W.2d 24 (1988) and argues that "[p]robable cause to arrest the passenger in a vehicle does not exist where authorities discover contraband in the vehicle and the vehicle is owned and/or operated by someone other than the passenger."

Essentially, appellant believes Paul stands for the proposition that "a person who owns or exercises dominion or control over a motor vehicle is deemed to be the possessor of any contraband discovered inside it." We believe appellant has misinterpreted the holding of Paul. As explained in Burnett v. Commonwealth, Ky., 31 S.W.3d 878, 880-881 (2000):

[W]e do not believe that either Leavell[v. Commonwealth, Ky. 737 S.W.2d 695 (1987)] 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 holds that a passenger of an automobile may constructively possess contraband seized therein if such contraband is within the passenger's dominion and control. In Burnett, the Court concluded there was sufficient evidence to establish the passenger constructively possessed the contraband seized within the car because the contraband was found within an area of the car next to where the passenger had been sitting and because the owner of the car disavowed ownership thereof.

In the case at hand, the marijuana was found under the front passenger seat of the automobile where appellant had been sitting, and both the driver and appellant disavowed ownership

of the marijuana. We view this case strikingly similar to Burnett. As such, we conclude the facts sufficiently demonstrated appellant to be in constructive possession of the seized marijuana and, thus, Officer Gross had probable cause to arrest appellant for possession of marijuana.

Appellant also argues that Officer Gross improperly arrested him for the misdemeanor charge of possession of marijuana because such misdemeanor had not been committed in his presence as required by KRS 431.005(1)(d). More particularly, appellant argues:

If Appellant had had marijuana in his lap, in his pockets or otherwise on his person, then Off. Gross would have had authority under KRS 431.005(1)(d) to arrest Appellant. But that is not the case. There was no connection between Appellant and the marijuana, and Appellant did not possess the marijuana in the officer's presence. Under Kentucky law, the officer had no authority to arrest Appellant for possession of marijuana.

Appellant's Brief at 8. If appellant's argument were meritorious, an individual could never be arrested for possession of marijuana if that marijuana was in his constructive possession. We view appellant's argument to be without merit.

Officer Gross directly discovered and observed the marijuana in appellant's constructive possession. It was Officer Gross's observations that led to appellant's arrest.

Thus, we hold that appellant committed the misdemeanor offense of possession of marijuana in the presence of Officer Gross as required by KRS 431.005(1)(b).

Appellant further argues the circuit court erred by permitting Deputy Shawn Sims to bolster his own testimony by introduction of hearsay evidence. Deputy Sims testified that he found a baggie containing cocaine when he strip searched appellant at the detention center. He further testified that he had created two reports, one handwritten and one typed, concerning the strip search and discovery of the cocaine; however, the reports were lost prior to trial.

Appellant failed to object to Officer Sims's testimony at trial; therefore, he asks this Court to review the alleged error under the palpable error rule of Ky. R. Crim. P. 10.26:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

In the case at hand, even if Officer Sims's testimony referring to the lost reports were error, we do not believe that it constitutes palpable error. Considering the totality of the evidence presented at trial, we cannot say there exists a substantial probability that jury's verdict would have been

different absent the introduction of the testimony. See Jackson v. Commonwealth, Ky. App., 717 S.W.2d 511 (1986). In short, the introduction of such testimony did not result in manifest injustice to appellant.

Appellant finally maintains the circuit court committed reversible error by failing to exclude the testimony of Detective Floyd Combs. We disagree.

Detective Combs testified that he was assigned to the Northern Kentucky Drugs Strike Force, had extensive DEA training and was a member of the two-year FBI drug task force. He also stated that he headed an investigation into drug trafficking at the Newport Housing Authority and participated in a substantial number of narcotics related arrests. Based upon his qualifications, the circuit court determined Detective Combs was qualified as an expert upon drug trafficking.

Detective Combs testified as to the quantities of contraband indicative of drug trafficking. He explained that he had reviewed reports and spoken to Officer Gross about this particular case. In his expert opinion, he believed appellant did possess cocaine with intent to sell it based upon the large quantity seized.

In Sargent v. Commonwealth, Ky., 813 S.W.2d 801 (1991), the Court held that a police officer may give expert opinion upon whether the seized drugs were for trafficking or

for personal use. Hence, we are of the opinion the circuit court properly admitted the testimony of Detective Combs.

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

Joanne Lynch
Public Advocate
POLK & LYNCH
Louisville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Carlton S. Shier, IV
Assistant Attorney General
Frankfort, Kentucky