RENDERED: NOVEMBER 23, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001459-MR

ALPHONSO LINDELL CLEAVER — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
ACTION NO. 99-CR-00053 & 99-CR-00063

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HENRY AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.[1]

VANMETER, JUDGE: Alphonso Cleaver appeals pro se from the Hardin Circuit Court's order denying his motion for relief pursuant to RCr 11.42. For the following reasons, we affirm.

This court previously affirmed Cleaver's 15-year sentence of imprisonment in an unpublished opinion rendered on January 11, 2002, which set forth the events giving rise to this matter as follows:

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Cleaver and a passenger were en route from Radcliff to Elizabethtown when his vehicle forced a police car, driven by Officer Craig Pavey, off the road. Officer Pavey radioed his partner, Officer Branson McCloud, and reported that he had been run off the road by a red, Ford Bronco type vehicle. A few minutes later, Officer McCloud saw Cleaver in a vehicle matching Officer Pavey's description and pulled him over. Officer McCloud asked Cleaver whether he had been drinking, took his license and registration, and administered three pre-exit tests to him. Cleaver was told that he had passed all three tests and he subsequently refused Officer McCloud's request to search the vehicle.

At some point during these proceedings, Officer Pavey had arrived on the scene. When Officer McCloud went back to his police cruiser to check Cleaver's license and registration, Officer Pavey advised him to proceed with caution since Cleaver had previously been involved in a shooting. Officer Pavey had Cleaver exit from his vehicle and questioned him about the odor of alcohol which Officer McCloud had noticed in the vehicle. Cleaver agreed to allow the officers to search the brown paper bag lying in the back floorboard area, and Officer McCloud returned to his cruiser to obtain a consent form. Meanwhile, Cleaver asked Officer Pavey whether he could leave the scene; however, at that time, the officer placed him under arrest for reckless driving.

As Cleaver was being handcuffed, a small baggie of suspected cocaine fell from his waistband onto the ground. Officer McCloud filled out the complaint charging Cleaver with reckless driving while Officer Pavey removed the passenger and searched the vehicle. He found $9,280.00 cash in a diaper hidden under a seat. Based on the amount of money found in the vehicle and the drugs on

> Cleaver's person, the Narcotics Task Force was called to the scene. Detective Billy Edwards took custody of the drugs, money, and vehicle; in addition, he obtained a search warrant for 605 Standiford Drive, where Cleaver's girlfriend resided with their son. An additional large amount of money and a handgun were found at the residence.
>
> Cleaver filed a pretrial motion seeking to suppress all of the evidence found on his person and in his vehicle on the grounds that the officers had no probable cause to stop him. The trial court denied the motion and the evidence was introduced against Cleaver during his trial. The Commonwealth also introduced the facts and circumstances surrounding Cleaver's prior felony convictions during the persistent felony offender phase of the trial. The jury returned guilty verdicts on the charges of first degree trafficking, possession of a handgun by a convicted felon, and being a persistent felony offender in the first degree.[2]

Cleaver argued on direct appeal that the trial court erred in failing to suppress the evidence found at the scene subsequent to his car being stopped because it was found during an unreasonably long stop.[3] This court disagreed, finding that Cleaver's motion to suppress the evidence at the trial level instead was based on the theory that the officers lacked probable cause to initiate the traffic stop in the first place.[4]

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[2] *Cleaver v. Commonwealth*, 2000-CA-002294-MR, slip op. at 2 (unpublished opinion rendered Jan. 11, 2002).

[3] *Id.* at 4.

[4] *Id.*

This court further rejected Cleaver's arguments that the trial court erred in not suppressing evidence obtained from his home and in admitting evidence regarding the circumstances of his prior convictions.[5]

Cleaver subsequently moved the trial court for relief pursuant to RCr 11.42 and CR 60.02, alleging, inter alia, ineffective assistance of counsel and that the jury instructions were incorrect because they did not require the jury to find all of the elements of the charges beyond a reasonable doubt. After Cleaver filed a supplemental motion to vacate, the trial court denied Cleaver's motions on June 21, 2004, with no evidentiary hearing. This appeal followed.

As an initial matter, the Commonwealth claims that we need not reach the merits of Cleaver's appeal, because he failed to properly sign and verify his motion for relief as required by RCr 11.42(2), which provides as follows:

> The motion shall be signed and verified by the movant and shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds. Failure to comply with this section shall warrant a summary dismissal of the motion.

The Kentucky Supreme Court has stated that "[t]he requirement of verification means more than just a signature by the movant

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[5] *Id.* at 4-5.

before a notary public."[6] In the matter now before us, Cleaver merely signed his motion for relief pursuant to RCr 11.42. However, this alleged error was neither raised by the Commonwealth nor addressed by the trial court below. Thus, it was not preserved for review, and we shall not address it on appeal.

Cleaver argues on appeal that the trial court erred in denying him relief pursuant to RCr 11.42, because his attorney erroneously based the motion to suppress on incorrect grounds. Cleaver maintains that although his attorney moved to suppress the evidence on the ground that the officer lacked probable cause to stop him, the motion instead should have been based on the ground that the officers stopped him for an unreasonable amount of time. We disagree.

RCr 11.42 "is not designed to give a convicted defendant an additional appeal or a review of trial errors that should have been addressed upon the direct appeal. A trial error asserted in an RCr 11.42 motion must rise to the level of a constitutional deprivation of due process."[7] Typically, allegations of unlawful search and seizure are not grounds for relief under RCr 11.42.[8] However, Cleaver couched his motion in

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[6] *Stanford v. Commonwealth*, 854 S.W.2d 742, 748 (Ky. 1993).

[7] *Commonwealth v. Basnight*, 770 S.W.2d 231, 237 (Ky.App. 1989).

[8] *Carter v. Commonwealth*, 450 S.W.2d 257, 258 (Ky. 1970).

terms of ineffective assistance of counsel. Thus, in reviewing Cleaver's allegation, we must determine "(1) whether counsel made errors so serious that he was not functioning as 'counsel' guaranteed by the Sixth Amendment, and (2) whether the deficient performance prejudiced the defense."[9] We will not disturb the trial court's decision unless it is clearly erroneous.[10]

There is no doubt that Officer McCloud had the requisite reasonable suspicion[11] to stop Cleaver's vehicle, which matched one alleged to have forced Officer Pavey off the road minutes earlier. Cleaver in essence urges that Officer McCloud was obliged to terminate the stop once he passed the three pre-exit tests. However,

> [i]n assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.[12]

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[9] *Fraser v. Commonwealth*, 59 S.W.3d 448, 456-57 (Ky. 2001) (citing, inter alia, *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)).

[10] *Robbins v. Commonwealth*, 719 S.W.2d 742, 744 (Ky.App. 1986), *overruled on other grounds by Norton v. Commonwealth*, 63 S.W.3d 175 (Ky. 2001).

[11] *U.S. v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989).

[12] *U.S. v. Sharpe*, 470 U.S. 675, 686, 105 S.Ct. 1568, 1575, 84 L.Ed.2d 605 (1985).

Here, we find no error in McCloud's decision to call in Cleaver's driver's license number after Cleaver passed the three pre-exit tests, especially in light of the fact that McCloud smelled alcohol in the vehicle. Further, we find no error in Pavey's simultaneous questioning of Cleaver, or in the officers' eventual arrest of Cleaver for reckless driving.[13] Since the arrest was valid, the bag of cocaine was legally seized when it was in plain view, and the search of Cleaver's vehicle was proper pursuant to probable cause or incident to the arrest.[14] Accordingly, there would have been no merit to a suppression motion based upon the theory that the officers stopped Cleaver for an unreasonable amount of time, and counsel did not render ineffective assistance by failing to proffer this theory to the trial court. Certainly defense counsel functioned as "counsel" for Sixth Amendment purposes.[15]

The Hardin Circuit Court's order is affirmed.

ALL CONCUR.

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[13] An officer may effect a warrantless arrest for a misdemeanor committed in his presence, excepting minor traffic violations. *Commonwealth v. Hagan*, 464 S.W.2d 261, 264 (Ky. 1971).

[14] *Brown v. Commonwealth*, 890 S.W.2d 286, 290 (Ky. 1994).

[15] *See generally Fraser*, 59 S.W.3d at 457.

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