

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002351-MR

DEREK CLEMONS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 04-CR-00190

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, HENRY, AND KNOPF, JUDGES.

BARBER, JUDGE: Appellant, Derek Clemons, was charged with trafficking in a controlled substance, third degree and unrelated vehicular charges. Clemons entered an Alford plea to the charges. On appeal Clemons denies that he was trafficking in Xanax, claiming that he possessed it for personal use. He also contends that the search of his vehicle was improper. We affirm the conviction.

A police officer noted Clemons operating a vehicle with only one working headlight. The officer testified that she

stopped the car and requested identification. Clemons did not provide proof of insurance. He provided a license and registration. When the officer checked his license she found that it was suspended for DUI. Clemons was then taken to the rear of his vehicle and arrested. Almost \$2,000 was found on his person. Clemons was handcuffed and placed in the police officer's vehicle. Immediately after he was placed in the vehicle, his car was searched by the officer. The officer found 67 Xanax pills in the vehicle in a bottle with Clemons' name on it. The uniform citation shows that the pills were prescribed to Clemons. The Commonwealth asserts on appeal that Clemons did not have a prescription for the Xanax. The pills were of varying sizes.

Clemons made a motion to suppress all evidence found in his vehicle. He argued that the search was not incident to arrest. At the pre-trial suppression hearing the officer testified that she searched Clemons' car because he had in excess of \$1,000 on his person when he was stopped; because he used his cell phone while she was checking his license and because third parties came and requested possession of the car after Clemons was arrested. She stated that she believed there might be evidence of another crime in the vehicle. The trial court denied the motion to suppress the evidence. The court

held that the officer had the right to search the car incident to the arrest of Clemons.

Clemons argues that the search of his vehicle was not incident to arrest, and that the evidence should have been suppressed. Clemons asserts reversible error in the court's denial of his motion to suppress. The Commonwealth argues that the search of the vehicle occurred only minutes after the arrest, and was therefore incident to the arrest. The Commonwealth relies on Commonwealth v. Ramsey, 744 S.W.2d 418 (Ky. 1987) as permitting such a search immediately after the arrest of the car's driver. The United States Supreme Court has held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that vehicle." New York v. Belton, 453 U.S. 454, 460 (1981). The Commonwealth contends that the search of the car was properly incident to Clemons' arrest.

Clemons relies on Clark v. Commonwealth, 868 S.W.2d 101 (Ky.App. 1993), as prohibiting a search of his vehicle. In Clark, the vehicle operator was stopped for minor traffic offenses. The court noted that those offenses were not commonly such that lead to arrest. A search of Clark's person gave rise to no reasonable suspicion that evidence of a crime existed in the car. The officer did not search the car until significant

time had passed after Clark's arrest. In contrast, while Clemons was pulled over for a minor traffic offense, the search of his person and his behavior after being stopped gave rise to a reasonable suspicion that the car might contain evidence of a separate crime. This Court has found that where the search is made incident to the driver's arrest, and other circumstances give rise to concerns about evidence of a crime in the vehicle, a search may be found proper. Commonwealth v. Wood, 14 S.W.3d 557, 558 (Ky.App. 1999). There was no reversible error in the denial of the motion to suppress evidence obtained during the search of Clemons' vehicle.

On September 25, 2004 Clemons appeared in Fayette Circuit Court for a jury trial. At that time, Clemons made a motion to amend the indictment, arguing that he did not have a prior conviction for trafficking in a controlled substance. The indictment was for a second or subsequent offense of trafficking in a controlled substance. Clemons admitted a prior conviction for trafficking in marijuana within 1,000 yards of a schoolhouse. Clemons asserted that KRS 218A.1414(2)(b) required a prior conviction of trafficking in a controlled substance classified as a Schedule IV or V drug before the charge of trafficking in a controlled substance third degree would apply. He claimed that a marijuana trafficking offense did not fulfill

that requirement. The court denied Clemons' request and stated that the trial would be on a felony charge.

The court then informed Clemons that he admitted to possession of the Xanax. The court stated that the penalty for trafficking was the same as that for possession where Clemons had the prior conviction for trafficking. For that reason, the court stated that it would permit Clemons to enter a conditional plea.

Clemons contended that he was improperly classified as a subsequent offender. He argued that he had no prior convictions for trafficking in a controlled substance as defined by KRS 218A.1414. Clemons asserts that his prior conviction, for trafficking in marijuana within 1,000 yards of a school, was not a conviction for trafficking in a controlled substance. Marijuana is defined separately from controlled substances. Marijuana is not one of the substances classified as a controlled substance in KRS 218A.010(4).

The Commonwealth claims that because the pre-trial motion was one to amend the felony indictment to a misdemeanor, as he claimed there was no prior offense, it was improper. The Commonwealth attempts to assert that this was a request that the court weigh the evidence before trial. This argument is without merit.

The Commonwealth then asserts that this claim was not properly preserved for appellate review. The record does not support this contention. Clemons entered a conditional plea of guilty allowing him to raise this issue on appeal. The conditional plea was approved by the trial court. Clemons raised this issue before the trial court and supported his argument with a written motion. The record contains ample evidence upon which review is proper. The argument was properly preserved for appellate review.

The Commonwealth contends that Clemons admitted a prior conviction for trafficking in Xanax, but admits that "the record contains no documentation" of this alleged prior offense. The Commonwealth argues that because Clemons failed to provide this Court with evidence regarding his possible prior offenses that alleged failure is fatal to his claim. It is the duty of the prosecution, and not the defendant, to prove offenses. Failure of the Commonwealth to provide the trial court and the appellate court with any evidence supporting its contention that Clemons had prior offenses for trafficking in Xanax requires a finding that no such offenses could have been considered. The Commonwealth's request that this Court rely on some unspecified "prior offense" relating to Xanax to hold Clemons liable as a subsequent offender would clearly be improper.

The Commonwealth asserts that any prior trafficking conviction, whether or not it was for a controlled substance, is sufficient to make the defendant legally a subsequent offender pursuant to KRS 218A.101(25). This contention is correct. This Court held in Commonwealth v. Churchwell, 938 S.W.2d 586 (Ky.App. 1997), that a trafficking offense involving marijuana is legally indistinguishable from a prior conviction for trafficking in controlled substances. Either prior offense gives rise to the charge of being a repeat offender. Id., at 586. This holding was cited with approval in Morrow v. Commonwealth, 77 S.W.3d 558, 565, (Ky. 2002). The prior charge of trafficking in marijuana could properly be used to hold Clemons liable as a subsequent offender. Therefore, the conviction is affirmed.

ALL CONCUR.

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