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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-002384-MR

KEVIN PAUL CRUM

APPELLANT

v. APPEAL FROM MERCER CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 03-CR-00077

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MINTON, SCHRODER, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Kevin Paul Crum brings this appeal from an October 21, 2004, judgment of the Mercer Circuit Court upon a conditional plea of guilty to two counts of attempted murder, four counts of wanton endangerment, receiving stolen property, carrying a concealed weapon, improper registration, and third-degree criminal trespass. We affirm.

At approximately 2:00 a.m. on August 30, 2003, the Harrodsburg Police Department received a call from a security guard at Corning Glass Works in Harrodsburg. The security guard

reported that a white car had been driven into the parking lot. A white male stepped out of the car and put on a "body armor" type vest. The security guard also reported that the white male put on what appeared to be a wig and a beard and retrieved something from the trunk that resembled a rifle or shotgun.

Sergeant James L. Thomas and Officer Granville Peyton were dispatched to the scene. Sergeant Thomas testified that when he pulled into the Corning parking lot he saw appellant standing next to a white car. He further testified that appellant appeared to place something in the trunk of the car and quickly slammed it shut. Sergeant Thomas approached appellant, and appellant identified himself as a police officer with the Illinois Police Department in Champaign, Illinois. Sergeant Thomas also testified that he noticed what appeared to be the outline of a strap holding body armor underneath appellant's shirt. When questioned about the armor, appellant stated that he wore it at all times.

Eventually, appellant was arrested for third-degree criminal trespass in violation of Kentucky Revised Statutes (KRS) 511.080 and for having an improper registration plate in violation of KRS 186.020. Appellant's car was searched. The search of the vehicle revealed firearms and a note which appeared to be a checklist for the murder of a child and other persons.

The Mercer County Grand Jury indicted appellant upon six counts of attempted murder, one count of receiving stolen property, one count of carrying a concealed weapon, improper registration plate, and criminal trespass in the third-degree. The Commonwealth alleged that appellant wanted to avoid paying child support so he attempted to murder April Sullivan and her infant child allegedly fathered by appellant. It was also alleged that appellant intended to murder other members of Sullivan's family.

Appellant filed a motion to suppress evidence seized from the warrantless search of his automobile. After conducting an evidentiary hearing, the circuit court entered an order denying the motion. Consequently, appellant entered a conditional plea of guilty to two counts of attempted murder, four counts of wanton endangerment, receiving stolen property, carrying a concealed weapon, improper registration, and criminal trespass. Ky. R. Crim. P. (RCr) 8.09. He was sentenced to a total of eighteen years' imprisonment. This appeal follows.

Appellant contends the circuit court erroneously denied his motion to suppress evidence. Specifically, appellant contends that police officers did not have probable cause to arrest him; thus, the subsequent search of his automobile was improper. We disagree.

The record indicates that appellant was arrested for criminal trespass in the third degree. This offense is codified in KRS 511.080:

(1) A person is guilty of criminal trespass in the third degree when he knowingly enters or remains unlawfully in or upon premises.

(2) Criminal trespass in the third degree is a violation.

KRS 431.005(1)(e) clearly provides that a police officer may arrest an individual for a violation of KRS 511.080 if that violation is committed in the officer's presence.

In the case at hand, the record indicates the police found appellant in a partially fenced-in parking lot of the Corning factory at approximately 2:00 a.m. The record further reveals that a security guard called police to the factory because of appellant's presence there. Moreover, Sergeant Thomas testified that it was his belief appellant was on the private property of Corning and that the property was not open to the public. Considering the evidence as a whole, we believe it was reasonable for the police to conclude that appellant had committed the offense of third-degree criminal trespass in their presence, thus justifying appellant's subsequent arrest for that offense.

Appellant next argues that even if he were properly arrested, the subsequent search of his automobile was unlawful.

Specifically, appellant maintains the search of his automobile was not justified under the search incident to the arrest exception because he was located outside his vehicle when the police first approached him.

A search incident to an arrest provides an exception to the general rule that searches and seizures must be accompanied by a warrant. The search incident to arrest exception has been extended to a warrantless search of an automobile made contemporaneously to the lawful arrest of its occupant. However, the United States Supreme Court in Thornton v. United States, 541 U.S. 615, 124 S. Ct. 2127, 158 L. Ed. 2d. 905 (2004) recently held that a police officer may search a vehicle's passenger compartment incident to the lawful arrest of a "recent occupant" of the vehicle. In Thornton, the Supreme Court clearly rejected the contention that the officer must make initial contact with the defendant while he is still an occupant of the vehicle.

In this case, the evidence indicates that appellant was a recent occupant of the automobile. The security guard reportedly saw him exit the vehicle, and he was in close proximity to the vehicle when police arrived on the scene. As such, we reject appellant's contention that the search of his vehicle was not justified under the search incident to arrest exception.

In sum, we hold the police could have reasonably concluded that appellant had committed the offense of third-degree criminal trespass in their presence, thus justifying appellant's arrest for that violation under KRS 431.005(1)(e). As a result, we also hold that the subsequent search of the automobile was justified under the search incident to arrest exception.

We consider appellant's remaining contentions as moot.

Accordingly, we affirm the circuit courts denial of appellant's motion to suppress evidence albeit upon different grounds. See Vega v. Kosair Charities Committee, Inc., 832 S.W.2d 895 (Ky.App. 1992).

For the forgoing reasons, the judgment of the Mercer Circuit Court is affirmed.

ALL CONCUR.

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