

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002642-MR

MARK JOSEPH LABER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 03-CR-01547

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: GUIDUGLI AND SCHRODER, JUDGES; MILLER, SPECIAL JUDGE.¹
SCHRODER, JUDGE: Mark Joseph Laber appeals from his conviction of possession of a handgun by a convicted felon. Having reviewed the record and the applicable law, we affirm.

This case arises from the seizure of a handgun from appellant's vehicle following a traffic stop. A suppression hearing was held on May 6, 2004. Trooper Trevor Harris, of the Kentucky State Police, testified as follows. At approximately

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.

12:45 a.m., on October 8, 2003, Harris had pulled into the Shell station on Richmond Road near Man O'War, and saw an unmarked Lexington police department vehicle in the nearby Wal-Mart parking lot. Believing it might be someone he knew, he pulled up next to the unmarked car. In the car were Detective Ramsey and Detective Welch of the Lexington Police Department. They told Harris that they were watching a subject (appellant) who was out on bond for a rape charge and who had been in the area of the victim, and that the subject had been accused of using a gun in the rape. They pointed out appellant's truck to Harris, which was across the Wal-Mart parking lot towards the Shell. Appellant briefly went into the Shell and returned to the truck. He then began to pull onto the access road between Wal-Mart and Richmond Road. Harris testified that as appellant pulled onto Richmond Road, he failed to use his turn signal. Harris testified that appellant then accelerated rapidly down Richmond Road, looked like he was going to switch lanes, but did not, and was "just kind of weaving across the road." Harris then conducted a traffic stop. Harris testified that he initiated the stop based on appellant's not using his turn signal and his driving, in combination with what he had been told by the detectives concerning the rape charge and that appellant had been in the area where the victim lived. Detectives Ramsey and

Welch immediately joined Harris at the stop. The videotape of the stop was placed into evidence at the suppression hearing.

After stopping appellant, Harris told him to step out of the truck. Harris testified that when appellant opened the door, he saw what appeared to be a holster on the bottom side of the seat. The videotape shows the following then occurred.

Harris asked, "What you got right there, partner, that ain't a gun is it?" Appellant replied that he had a stun gun. Harris asked if appellant had any knives or guns on him (appellant appears to indicate that he did not), and patted him down.

Harris told appellant that he was stopped for not using his signal when he turned onto Richmond Road, and that he acted like he was in a hurry to go somewhere. Harris asked appellant where he was heading to. Appellant replied back to Wilmore. Asked what he was doing in Lexington, appellant said he was visiting.

Asked who he came to visit, appellant said his girlfriend, Susan Ramsey. When asked if he had been to her house tonight, appellant said that he had been to her parking lot. Asked if he had any knives or guns in the truck, appellant said a stun gun.

Harris asked appellant if he had ever been arrested for anything, and appellant said he had just got out of prison eight months ago. Harris asked appellant if he had ever been convicted of a felony, and appellant replied affirmatively. The following exchange then occurred:

Trooper Harris: So you know you can't have any kind of weapons, right?

Appellant: I can't have a stun gun?

. . . .

Harris: You say you don't have any knives or guns, or nothing illegal?

Appellant: I don't have anything . . .

Harris: You got a problem if I look through there?

Appellant: There's a gun in there but it's not mine.

Harris: There's a gun in there but it's not yours.

Appellant: . . . it's not mine.

Harris: OK, what kind of gun is it?

Appellant: It's a . . .

Harris: Where's it at?

Appellant: It's in the glove box. . .

Harris: . . . I'm gonna put you in the back of my car, for my safety. You're not under arrest right now . . .

. . . .

Appellant: . . . Is there a problem?

Harris: Well the problem is you're a convicted felon and you've got a gun in your car . . .

Appellant: . . . But it doesn't belong to me . . . you can call² Brian Begley.

Appellant was placed in the back of the police car. Harris confirmed with dispatch that appellant was a convicted felon (lifetime registered sex offender), and a handgun was retrieved from the glove box. Appellant was subsequently placed under arrest.

Harris testified that after appellant had been placed in the back of the police car, he learned from Detective Ramsey that the alleged rape victim was Ramsey's daughter, and that Susan Ramsey was Detective Ramsey's ex-wife. At the suppression hearing, Detective Ramsey was called by the defense and testified that his daughter had called him earlier that evening to say that appellant was in the parking lot of her apartment complex. Ramsey and Welch drove to the parking lot but did not see appellant. Ramsey testified that his ex-wife, whom appellant was dating and with whom his daughter resides, subsequently called to say appellant was at Wal-Mart. Ramsey admitted that he did not like appellant.

The trial court found there was no contradictory proof rebutting Trooper Harris's testimony that he observed a traffic violation occurring in his presence, and therefore he was authorized to initiate the stop. The court found that Harris's

² We note that the words immediately preceding "Brian Begley" are difficult to discern from the videotape. We will accept appellant's version, which is not disputed by the Commonwealth, that the words are "you can call".

questions to appellant were not incriminating by nature, and were appropriate for an investigative stop. The court characterized appellant's response to Harris's request to search as "nonresponsive", but found that his statement that he had a gun in the truck established probable cause to believe a felony offense was being committed, and therefore, a warrantless search of the vehicle was proper. Accordingly, the trial court denied the suppression motion.

A jury trial was held on October 18, 2004. Appellant's defense at trial was that the gun found in his truck was not his, but belonged to his employer, Brian Begley. Appellant was found guilty of possession of a handgun by a convicted felon, and sentenced to ten years' imprisonment.³ This appeal followed.

Appellant raises two arguments on appeal, first that reversible error occurred when the prosecutor made improper statements in his closing argument, and second, that the evidence taken from his truck should have been suppressed as the search violated the Fourth Amendment. We shall address the suppression issue first.⁴

³ Appellant was also found guilty of failure to notify Department of Transportation of address change, and failure to signal, which are not at issue on appeal.

⁴ The Commonwealth argues that the suppression issue is unpreserved, as the record does not contain a written motion. In light of the fact that a suppression hearing was held, and the trial court ruled on the motion to suppress, we conclude the issue was sufficiently preserved for review.

Appellant contends that the trial court erred in admitting evidence from the traffic stop, as he did not voluntarily consent to the search of his truck. Appellant contends that any alleged consent was the product of coercion, resulting from the fact that he was surrounded by police officers, in particular, Detective Ramsey, who had animosity towards him for dating his ex-wife and allegedly raping his daughter.

Our standard of review of a trial court's ruling on a suppression motion is as follows. "First, the factual findings of the court are conclusive if they are supported by substantial evidence. The second prong involves a *de novo* review to determine whether the court's decision is correct as a matter of law." Stewart v. Commonwealth, 44 S.W.3d 376, 380 (Ky.App. 2000) (citations omitted).

The facts of this case are not in dispute. Accordingly, our review becomes whether the search of the glove compartment was lawful. Appellant concedes that the traffic stop, even if pretextual, was proper under Whren v. United States, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996), and that, per Pennsylvania v. Mimms, 434 U.S. 106, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977), Harris's request that he step out of the vehicle did not violate his Fourth Amendment rights.

As appellant exited the vehicle, Trooper Harris immediately noticed a holster, and appellant admitted he had a stun gun. At this point, we believe a search of the passenger compartment already would have been lawful based on Trooper Harris's observation and appellant's admission that he had a stun gun. "[A] police officer may conduct an area search of the passenger compartment of an automobile to recover weapons, as long as they possess an articulable and objectively reasonable belief that the suspect is potentially dangerous." Dockstader v. Commonwealth, 802 S.W.2d 149, 151 (Ky.App. 1991), citing Michigan v. Long, 463 U.S. 1032, 1052, 103 S. Ct. 3469, 3482, 77 L. Ed. 2d 1201, 1221 (1983).

Trooper Harris then started asking appellant a few questions. "'Questions that hold potential for detecting crime, yet create little or no inconvenience, do not turn reasonable detention into unreasonable detention.'" Commonwealth v. Erickson, 132 S.W.3d 884, 888 (Ky.App. 2004), quoting United States v. Burton, 334 F.3d 514, 518 (6th Cir. 2003). Having told Harris that he was a convicted felon, appellant's admission that there was a gun in the truck gave Trooper Harris probable cause to believe that evidence of a crime, possession of a firearm by a convicted felon, was contained in the truck.

The "automobile" exception to the warrant requirement . . . allows officers to search a legitimately stopped automobile where

probable cause exists that contraband or evidence of a crime is in the vehicle. *United States v. Ross*, 456 U.S. 798, 800-01, 102 S.Ct. 2157, 2159-61, 72 L.Ed.2d 572, 578 (1982) (citations omitted); *Estep* [v. Commonwealth, 663 S.W.2d 213, 215 (Ky. 1983)]. The search may be as thorough as a magistrate could authorize via a search warrant, including all compartments of the automobile and all containers in the automobile which might contain the object of the search. *Ross*, 456 U.S. at 823-24, 102 S.Ct. at 2172-73, 72 L.Ed.2d, at 593; *Estep*, 663 S.W.2d, at 215.

Clark v. Commonwealth, 868 S.W.2d 101, 106 (Ky.App. 1993).

Trooper Harris was therefore permitted to search all compartments of or containers in the truck which may have contained the gun. Id. Appellant's consent was not necessary. Accordingly, we conclude the search was lawful, and that the trial court, therefore, properly denied appellant's motion to suppress.

Appellant additionally argues that reversible error occurred when the prosecutor made allegedly improper statements of personal opinion regarding the credibility of witnesses. Appellant concedes these alleged errors are unpreserved, but requests this court review for palpable error under RCr 10.26.

A palpable error is one which affects the substantial rights of a party and relief may be granted for palpable errors only upon a determination that a manifest injustice has resulted from the error. This means, upon consideration of the whole case, the reviewing court must conclude that a substantial possibility exists that the

result would have been different in order to grant relief.

Partin v. Commonwealth, 918 S.W.2d 219, 224 (Ky. 1996). It was undisputed at trial that appellant was a convicted felon, and that a gun was found in the glove compartment of his truck, which he was driving. If there was error in any of the prosecutor's statements regarding the credibility of the witnesses at issue, it did not rise to the level of palpable error because these witnesses were testifying as to ownership of the firearm, whereas KRS 527.040 prohibits the mere possession of a firearm by a convicted felon.

Appellant also claims reversible error occurred when the prosecutor referred to evidence outside the record in his closing argument, that he had a "secret tape" that would prove defense witness Brian Begley was lying. This argument is also unpreserved, and without merit. The prosecutor did not refer to a "secret tape". The videotape referred to was that of Begley's prior testimony, which had been referred to previously by the prosecutor on cross-examination, but not shown to the jury. The videotape was referred to in the closing argument in the context of the rules of evidence regarding prior inconsistent statements. Again, no palpable error occurred.

For the aforementioned reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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