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OPINION RENDERED FEBRUARY 7, 2006, WITHDRAWN

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000062-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 02-CR-000999

DWIGHT INGRAM

APPELLEE

OPINION
REVERSING

** ** * * * * *

BEFORE: BUCKINGHAM,¹ JOHNSON, AND TAYLOR, JUDGES.

BUCKINGHAM, JUDGE: This case is again before the court on the Commonwealth's appeal of an order of the Jefferson Circuit Court granting Dwight Ingram's motion to suppress evidence. A panel of this court had remanded the case for reconsideration after the circuit court had initially granted the motion. We reverse the circuit court's order that again granted Ingram's motion.

¹ This opinion was completed and concurred in prior to Judge David C. Buckingham's retirement, effective May 1, 2006. Release of the opinion was delayed by administrative handling.

A grand jury indictment charged that on October 11, 2001, in Jefferson County, Kentucky, Ingram committed the offenses of trafficking in a controlled substance (cocaine) and unlawful possession of a controlled substance (Diazepam). The substances were seized by police officers from a vehicle following a warrantless search.

Testimony on behalf of the Commonwealth at the suppression hearing indicated that undercover narcotics officers were conducting surveillance in a high drug trafficking area in Louisville on October 11, 2001. Detective Damon Green testified that he witnessed Ingram three times enter and exit the passenger side of a van located in the parking lot of a barbershop on Hemlock Street. Detective Green further testified that with the aid of binoculars, he saw Ingram engage in a drug transaction with an unidentified male.² Detective Green stated that Ingram handed the unidentified male a plastic baggie and that Ingram received paper currency in return. Upon entering and then exiting the van again, Ingram walked into Red Dog Liquors where he was detained and searched by officers. The officers found \$463 in Ingram's left front pocket and arrested him.

² Detective Green stated that he was able to observe only one transaction from his vantage point.

Ingram was handcuffed and then walked to the van. Detective Green stated that he looked in the front passenger side window and saw a plastic bag of crack cocaine on the floor of the van. He stated that he took the key from Ingram's pocket, opened the door to the van, and retrieved the crack cocaine. Further, Detective Green testified that Detective O'Neil searched the van after the cocaine was discovered and that two bottles of cough syrup prescribed to other people were discovered under the driver's seat.³ Detective Green testified that Ingram then stated that the van belonged to his sister and that he did not sell drugs.

Ingram and his witness, Mary Malone, testified that Ingram was in the barbershop and did not leave to go to the van prior to going into the liquor store. Further, Ingram testified that the baggie of cocaine was not discovered in the search until after the officers had searched and found the cough syrup under the driver's seat.

In an opinion and order entered on February 10, 2003, the Jefferson Circuit Court granted Ingram's suppression motion. The court held that the automobile exception to the search warrant requirement did not apply because Ingram was not in the vehicle at the time of his arrest. Rather, the court held that

³ Apparently, the cough syrup contained Diazepam, which led to the misdemeanor charge of its illegal possession.

the search was one incident to arrest and that the search was invalid because Ingram was not in or near the van when he was arrested. The court cited U.S. v. Fafowora, 865 F.2d 360 (D.C. Cir. 1989).

In an opinion by a panel of this court rendered on March 26, 2004, this court vacated the circuit court's order and remanded the case for reconsideration. This court stated that the circuit court did not address the automobile exception to the warrant requirement, but rather addressed only the search incident to arrest exception. Thus, this court remanded the case for the circuit court to address the automobile exception.

Thereafter, in an opinion and order rendered on December 10, 2004, the circuit court again granted Ingram's motion to suppress evidence. At the bottom of page 2 and the top of page 3 of the order, the court concluded that the Commonwealth did not meet its burden of proving that the baggie of cocaine was in plain view. Thus, the court again rejected the Commonwealth's argument.⁴ This appeal by the Commonwealth followed.

The Commonwealth's first argument on appeal is that the plain view exception to the search warrant requirement is applicable and that the circuit court erred in not denying the

⁴ The circuit court again failed to specifically address the automobile exception.

motion on that ground. Because the circuit court concluded that the Commonwealth did not meet its burden of proving that the cocaine baggie was in plain view, we reject this argument. The factual findings of the trial court are conclusive if those findings are supported by substantial evidence. Stewart v. Commonwealth, 44 S.W.3d 376, 380 (Ky. 2000). Ingram's testimony constituted substantial evidence to support the court's fact finding in this regard.

The Commonwealth's second argument is that the seized items were admissible pursuant to the automobile exception because the officers had probable cause to search the van based on their observations of Ingram participating in a drug transaction and going back and forth to the van. In support of its argument, the Commonwealth cites Clark v. Commonwealth, 868 S.W.2d 101 (Ky.App. 1993). Therein, this court stated that "[t]he automobile exception allows officers to search a legitimately stopped automobile where probable cause exists that contraband or evidence of a crime is in the vehicle." Id. at 106.

Earlier Kentucky cases hold that for the automobile exception to the warrant requirement to apply, probable cause must be accompanied by exigent circumstances. See Cooper v. Commonwealth, 577 S.W.2d 34, 37 (Ky.App. 1979). "Neither 'probable cause' nor 'exigent circumstances' alone will justify

a warrantless search; both factors must be present." Id. See also Chambers v. Maroney, 399 U.S. 42, 51, 90 S.Ct. 1975, 1981, 26 L.Ed.2d 419 (1970) ("only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search").

Shanks v. Commonwealth, 574 S.W.2d 688 (Ky.App. 1978), is similar. In that case, the officers had probable cause to search a residence and a Chrysler automobile. However, the search warrant described only the residence. The search of the residence produced no contraband, but the officers located the keys to the Chrysler and searched it. Packets of heroin were found in the locked glove compartment.

The court in Shanks agreed that there was probable cause to search the automobile. Id. at 691. However, the court held that the evidence should have been suppressed by the trial court due to the lack of exigent circumstances. Id. The court noted that the defendants were under arrest and that the officers had the keys to the car in their possession. The facts in the Shanks case are similar to those herein.

Neither the Cooper case nor the Shanks case has been overruled by the Kentucky Supreme Court. However, despite its opinion in Chambers v. Maroney in 1970, the U.S. Supreme Court has come to view the automobile exception differently. In Maryland v. Dyson, 527 U.S. 465, 119 S.Ct. 2013, 144 L.Ed.2d 442

(1999), the Court stated that "under our established precedent, the 'automobile exception' has no separate exigency requirement." See also United States v. Ross, 456 U.S. 798, 809, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), and Pennsylvania v. Labron, 518 U.S. 938, 116 S.Ct. 2485, 135 L.Ed.2d 1031 (1996).

In State v. Cooke, 751 A.2d 92 (N.J. 2000), the New Jersey Supreme Court declined to apply the holding of the aforementioned cases under its state constitution. Id. at 99. Likewise, in State v. Elison, 14 P.3d 456 (Mont. 2000), the Montana Supreme Court declined to follow the U.S. Supreme Court cases of Dyson and Labron and continued to require a showing of exigent circumstances in addition to the probable cause requirement of the automobile exception. Id. at 468.

The question is whether Kentucky will continue to require exigent circumstances under the automobile exception like the courts in New Jersey and Montana or whether Kentucky will follow the U.S. Supreme Court cases. In LaFollette v. Commonwealth, 915 S.W.2d 747 (Ky. 1996), our supreme court held that "Section 10 of the Kentucky Constitution provides no greater protection than does the federal Fourth Amendment." Id. at 748. Therefore, we conclude that the aforementioned holdings in the Cooper and Shanks cases are no longer good law in Kentucky and that the automobile exception to the warrant requirement does not require exigent circumstances. As the U.S.

Supreme Court stated in the Labron case, "if a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more." 518 U.S. at 940.

The order of the Jefferson Circuit Court granting Ingram's motion to suppress evidence is reversed. This case is remanded for further proceedings consistent herewith.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

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