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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000179-MR

JAMES FRANK PERDUE

APPELLANT

v. APPEAL FROM CLINTON CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 03-CR-00111

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: McANULTY, SCHRODER, AND VANMETER, JUDGES.

VANMETER, JUDGE: James Frank Perdue appeals from the Clinton Circuit Court's judgment and sentence in a multi-count criminal proceeding. Perdue asserts that the trial court erred by failing to grant his motion to suppress certain evidence as the fruits of an unlawful search and seizure, by admitting evidence of lab results despite an inadequate showing of chain of custody, and by failing to direct a verdict in his favor on the counts of possession of a controlled substance, possession of

drug paraphernalia, and carrying a concealed deadly weapon. For the following reasons, we affirm.

Sheriff Ricky Riddle¹ of the Clinton County Sheriff's Department testified at trial that on September 24, 2003, he received a call from a Tennessee 911 dispatcher, who had received a call reporting that a red truck with a certain license plate number was being driven erratically (possibly under the influence) on Highway 696 in Duvall Valley. The Tennessee dispatcher informed Riddle that the license plate had been run and that the truck was registered to Frank Perdue. As Riddle was preparing to leave, he received a second call reporting that Frank Perdue was driving erratically in the Duvall Valley area.

While driving down Highway 696 three to five minutes later, Riddle saw a red truck coming toward him from the opposite direction. Riddle turned around in a driveway and activated his blue lights. The red truck pulled into the neighboring driveway, drove to the end of the driveway behind the residence, and stopped. Riddle followed, parked behind the truck, and approached the driver's door, noticing tools, trash, and other items in the truck bed near the tool box. When the driver, Perdue, rolled down his window, Riddle smelled a strong

¹ During the events giving rise to this trial, Riddle was a Deputy Sheriff; however, by the time of trial, he was the Sheriff.

odor of alcohol. He directed Perdue and the passenger to exit the truck, which they both did via the passenger's door, because the driver's door would not open. While the passenger's door was open, Riddle observed for the first time two handguns under the passenger's seat, as well as a shotgun on the floorboard in front of the driver's seat, and he directed the men to stand at the back of the truck.

Riddle further testified that after removing the firearms and unloading the shotgun and one handgun, he noticed a small blue pouch in the truck bed near the tailgate that he had not seen when he initially approached the truck. Both men denied knowing anything about the pouch or the GPC cigarettes lying beside it. Riddle unzipped and observed the contents of the pouch, and he placed the pouch and the cigarettes on the hood of his police cruiser. Next, Riddle gave Perdue a portable breathalyzer test and arrested him for driving under the influence (DUI). He arrested the passenger for alcohol intoxication, and he searched both men and placed them in the police cruiser. Riddle then further examined the contents of the blue pouch, finding that it contained syringes, spoons, and a white powdery substance later determined to be cocaine.

At trial, the jury found Perdue guilty of first-degree

possession of a controlled substance (cocaine),² possession of drug paraphernalia,³ refusing to submit to blood/alcohol testing,⁴ DUI,⁵ and carrying a concealed deadly weapon.⁶ The trial court entered a judgment sentencing Perdue to ten years' imprisonment and further ordering him to pay \$1,500 in fines. This appeal followed.

I. Search and Seizure

Perdue's first argument is that the stop of his truck was unreasonable and in violation of the Fourth Amendment of the United States Constitution and Section 10 of the Kentucky Constitution. In holding that the stop of Perdue's vehicle was lawful, the trial court reasoned as follows:

The two (2) calls stating that Perdue was driving the vehicle while he was impaired, coupled with the meeting of the vehicle by Riddle, and the slow speed of the vehicle, accompanied by the evasive tactic of the Perdue vehicle turning into the driveway of the residence of Grover Miller, and proceeding to the rear or back of the Miller residence constituted articulable and reasonable suspicion that either the vehicle or an occupant is otherwise subject to seizure for violation of law.

² KRS 218A.1415.

³ KRS 218A.500.

⁴ KRS 189A.200.

⁵ KRS 189A.010.

⁶ KRS 527.020.

Our role in reviewing the trial court's order denying Perdue's suppression motion is to

first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive. Based on those findings of fact, we must then conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law.⁷

An investigatory stop of a motor vehicle must be supported by "a reasonable and articulable suspicion that a violation of the law is occurring."⁸ The stop in the matter now before us was supported in part by two anonymous tips -- one relayed to Riddle from a Tennessee 911 dispatcher, the other reported directly to Riddle. The United States Supreme Court has stated that an anonymous informant's "'veracity,' 'reliability,' and 'basis of knowledge' [are] 'highly relevant in determining the value of his report.'"⁹ Moreover, "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity inasmuch as ordinary citizens generally do not provide extensive recitations of the basis of their everyday observations and

⁷ *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky.App. 2002) (internal citations omitted).

⁸ *Collins v. Commonwealth*, 142 S.W.3d 113, 115 (Ky. 2004) (citing *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S.Ct. 1391, 1401, 59 L.Ed.2d 660, 673 (1979)).

⁹ *Alabama v. White*, 496 U.S. 325, 328, 110 S.Ct. 2412, 2415, 110 L.Ed.2d 301 (1990) (citing *Illinois v. Gates*, 462 U.S. 213, 230, 103 S.Ct. 2317, 2328, 76 L.Ed.2d 527 (1983)).

given that the veracity of persons supplying anonymous tips is 'by hypothesis largely unknown, and unknowable.'"¹⁰ In *Florida v. J.L.*,¹¹ the United States Supreme Court held that an anonymous tip that a person was carrying a gun, without more, was insufficient to justify a police officer's stop and frisk of that person.

However, in the matter now before us, there were two anonymous tips regarding Perdue's erratic driving. One tip identified Perdue by name, the other described Perdue's truck and relayed his license plate number. Both tips identified Perdue's location. Only a few minutes after Riddle received these tips, Perdue attempted to evade Riddle by driving behind a private residence in the area the tipsters had described. We are satisfied from the totality of these circumstances¹² that Riddle had the requisite reasonable, articulable suspicion to stop Perdue's truck.¹³

Perdue also argues that the search of the blue pouch found in his truck bed was unreasonable. The trial court upheld this search as being incident to Perdue's arrest; however, we

¹⁰ *Id.* at 329, 110 S.Ct. at 2415 (citing *Gates*, 462 U.S. at 237, 103 S.Ct. at 2332).

¹¹ 529 U.S. 266, 268, 120 S.Ct. 1375, 1377, 146 L.Ed.2d 254 (2000).

¹² *Commonwealth v. Kelly*, 180 S.W.3d 474, 479 (Ky. 2005).

¹³ See *White*, 496 U.S. at 326-27, 110 S.Ct. at 2414 (anonymous telephone tip "corroborated by independent police work, exhibited sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop").

need not reach this issue, because Perdue denied owning or knowing anything about the pouch when questioned by Riddle. Indeed, Perdue continued to maintain at trial that the pouch was not his, thereby creating an issue of fact for the jury's determination. Absent any claim of ownership, however, Perdue had no expectation of privacy in the pouch at the time of the stop, and it was not "searched" for Fourth Amendment purposes.¹⁴

II. Identification of Drug Evidence

Testimony at trial revealed that after the evidence was seized on September 24, the six items found in the blue pouch were inventoried and listed on an evidence examination request form. Riddle then stored the evidence in a locked file cabinet, to which he had the only key, until the evidence was given to Sheriff Kay Riddle, who delivered it to H. Hay at the Kentucky State Police (KSP) laboratory in London, Kentucky on September 30, as confirmed by the notations on a request form. Riddle testified further that the evidence was later returned to his office and was kept in his possession until it was sent back to the state police laboratory about two weeks prior to trial for additional testing.

During an in camera hearing, KSP chemist Beverly Wagner stated that she maintained all of the records regarding

¹⁴ See *James v. Commonwealth*, 647 S.W.2d 794, 795 (Ky. 1983), *revd. on other grounds sub nom.*, *James v. Kentucky*, 466 U.S. 341, 104 S.Ct. 1830, 80 L.Ed.2d 346 (1984).

the evidence in Perdue's case. Wagner further stated that on September 30 the evidence was delivered by Kay Riddle to Henry Hay, who because of a testing backlog sent the evidence via UPS on November 10 to National Medical Services (NMS), a private laboratory in Pennsylvania. NMS's December 10 report indicated that it received the six items listed on the original inventory sheet in a sealed envelope, that all chain of custody documents were in order, and that the white powder tested positive for cocaine. Wagner further testified that she logged in the evidence when it was returned from NMS on December 16 via Federal Express. On June 3, 2004, Wagner returned the evidence via Federal Express to the Clinton County Sheriff's Department, which returned it to her on October 27 via express mail. Wagner personally tested and confirmed the presence of cocaine in the evidence on November 16, and she took the evidence to Perdue's jury trial on November 19.

Perdue argues that the trial court erred by admitting evidence of the white powdery substance and the lab results. In support thereof, Perdue emphasizes that neither Kay Riddle, Henry Hay, A. Daniels,¹⁵ nor any NMS employee testified regarding their handling of the evidence. Further, no testimony was presented regarding how the evidence was packaged and handled at

¹⁵ A. Daniels purportedly signed for the package returned to the Clinton County Sheriff's Department on June 3.

various times, nor was the evidence "tracked" when it was shipped. Finally, Perdue stresses the fact that the substance weighed 40 mg when the KSP initially received it but that it weighed only 15 mg when the KSP finally tested it prior to trial.

A party offering physical evidence must establish "that the proffered evidence was the same evidence actually involved in the event in question and that it remains materially unchanged from the time of the event until its admission."¹⁶ The court in *Muncy v. Commonwealth*¹⁷ discussed proving the chain of custody for drug evidence as follows:

Drugs, of course, are evidence which is not clearly identifiable or distinguishable, as is for instance, a gun. With regard to such substances, "it is unnecessary to establish a perfect chain of custody or to eliminate all possibility of tampering or misidentification, so long as there is persuasive evidence that 'the reasonable probability is that the evidence has not been altered in any material respect.'" *Rabovsky v. Commonwealth*, Ky., 973 S.W.2d 6, 8 (1998) (quoting *United States v. Cardenas*, 864 F.2d 1528, 1532 (10th Cir.1989), cert. denied, 491 U.S. 909, 109 S.Ct. 3197, 105 L.Ed.2d 705 (1989)).

Here, Wagner testified that she saw no signs of the evidence being changed or altered in any way and that she received less substance to test than did NMS, because NMS's

¹⁶ *Thomas v. Commonwealth*, 153 S.W.3d 772, 779 (Ky. 2004).

¹⁷ 132 S.W.3d 845, 848-49 (Ky. 2004).

testing necessarily diminished the amount of substance. In light of all of the evidence, we do not believe that the trial court abused its discretion¹⁸ by admitting the evidence of the white substance and the lab results.

III. Directed Verdicts

Perdue's next argument is that the trial court erred by failing to direct a verdict in his favor on the counts of possession of a controlled substance, possession of drug paraphernalia, and carrying a concealed deadly weapon. A criminal defendant is entitled to a directed verdict of acquittal on appeal "if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt[.]"¹⁹

Perdue argues first, in essence, that the trial court should have directed a verdict in his favor regarding the counts of possession of drugs and drug paraphernalia, because there was no proof that he possessed the contraband found in his truck. "Possession" is defined in KRS 500.080(14) as "to have actual physical possession or otherwise to exercise actual dominion or control over a tangible object[.]" As explained in *Hargrave v. Commonwealth*,²⁰ "[p]ossession' sufficient to convict under the law need not be actual; 'a defendant may be shown to have had

¹⁸ *Thomas v. Commonwealth*, 153 S.W.3d 772, 781 (Ky. 2004).

¹⁹ *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991).

²⁰ 724 S.W.2d 202, 203 (Ky. 1986) (quoting *Rupard v. Commonwealth*, 475 S.W.2d 473, 475 (Ky. 1972)).

constructive possession by establishing that the contraband involved was subject to his dominion or control.'" Indeed, the Kentucky Supreme Court has opined that its holding in *Leavell v. Commonwealth*²¹ establishes "that proof that a defendant has possession and control of a vehicle is evidence to support a conviction for constructive possession of contraband found within the vehicle."²² Here, Perdue owned and was driving the truck in which the contraband was found. Moreover, there was evidence that Perdue, but not his passenger, smoked the brand of cigarettes found in the truck bed next to the pouch. Given such evidence, the trial court did not err by failing to direct a verdict for Perdue.

With regard to the count of carrying a concealed weapon, KRS 527.020(1) provides that such an offense occurs when a person "carries concealed a firearm or other deadly weapon on or about his person." A firearm is carried on or about one's person if it is "convenient of access and within immediate physical reach."²³ Moreover, "a weapon is generally held to be concealed when so placed that it cannot be readily seen under

²¹ 737 S.W.2d 695 (Ky. 1987).

²² *Burnett v. Commonwealth*, 31 S.W.3d 878, 880 (Ky. 2000).

²³ *Collier v. Commonwealth*, 453 S.W.2d 600, 601 (Ky. 1970) (citing *Hampton v. Commonwealth*, 257 Ky. 626, 78 S.W.2d 748 (1934)).

ordinary observation[,]"²⁴ which "means the weapon must be open to ordinary observation to those who may come in contact in the usual and ordinary associations with one carrying the weapon."²⁵ In other words, "[t]he concealment must be such as to prevent persons from seeing the weapon whose vision is not obscured by the carrier's person or by anything other than the covering used to conceal it."²⁶

KRS 527.020(8) directs that a deadly weapon located in a vehicle's regularly-installed glove compartment "shall not be deemed concealed on or about the person[.]" As Professors Lawson and Fortune reason, the fact that the glove compartment, but no other part of a vehicle, is excepted "implies that accessible weapons in other parts of a vehicle could violate the statute, a construction that would be consistent with pre-penal code case law."²⁷ In one such pre-penal code case, Kentucky's highest court upheld a conviction for carrying a concealed deadly weapon when the pistol "was on the floor, under the front seat frame, of a car being operated by [the defendant]."²⁸ Thus,

²⁴ *Prince v. Commonwealth*, 277 S.W.2d 470, 472 (Ky. 1955) (quoting 56 Am.Jur., Weapons and Firearms, Section 10).

²⁵ *Id.*

²⁶ *Delk v. Commonwealth*, 344 S.W.2d 832, 833 (Ky. 1961).

²⁷ Robert G. Lawson & William H. Fortune, *Kentucky Criminal Law* § 16-5(a)(1), at 585-86 (1998).

²⁸ *Collier v. Commonwealth*, 453 S.W.2d 600, 601 (Ky. 1970). Collier was convicted under KRS 435.230, the predecessor to the current statute.

despite Riddle's testimony that Perdue could not access the handguns, we believe that *Collier* is controlling and that the trial court did not err by failing to grant a directed verdict in Perdue's favor.

The Clinton Circuit Court's judgment is affirmed.

ALL CONCUR.

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