

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001306-MR

JOHN WADE

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
INDICTMENT NO. 03-CR-00647

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: BARBER, KNOFF, AND MINTON, JUDGES.

MINTON, JUDGE: John William Wade again appeals his conviction for possession of a controlled substance in the first degree and for being a persistent felony offender in the second degree. In an earlier appeal, a panel of this Court vacated Wade's conviction and sent the case back to the trial court for additional findings.¹ Wade now appeals from the trial court's order following remand. Finding no error, we affirm.

¹ Case No. 2004-CA-000045-MR, 2005 WL 735571.

In our opinion on Wade's first appeal, we set forth the relevant facts as follows:

The facts of the case, as testified to in the suppression hearing at issue, are as follows: On April 18, 2003, at approximately 8:50 [p.m.], Officers Richard Rice and William Persley of the Lexington-Fayette Urban County Police Department were driving down Race Street in the east end area of Lexington^{FN1} when they passed and observed two males sitting in a parked white vehicle looking at each other face-to-face. Officer Rice turned his car around and then pulled behind the white vehicle for further investigation. The two officers then stepped out of their car and approached the white vehicle on foot.

FN1. Officer Rice testified at the suppression hearing that this part of Lexington was known as a "high drug area."

Officer Rice testified that Appellant Wade stepped out of the white vehicle's driver's side, moved to the front of the vehicle, and opened its hood. He further testified that a Mr. Bobbitt stepped out of the passenger's side of the vehicle, stumbled and fell, and then attempted to walk away from the scene. Officer Persley approached Bobbitt, while Officer Rice approached Wade.

Officer Rice then testified that he noted a strong smell of marijuana coming from inside the white vehicle and also from Wade. According to Officer Rice, Wade then told him that he had been smoking marijuana. Officer Rice further testified that Wade's eyes were glassy and that he was evasive and nervous in his speech and actions. Officer Rice also indicated that Wade told him that he had come there to work on his aunt's car, but he did not know how the car had gotten

there. The engine of the car was warm, however, and the keys were in the ignition. Officer Rice then testified that he did not want Wade to drive away, so he arrested him for public intoxication.

Officer Rice next testified that, while talking to Wade, he looked in the white vehicle "for my safety." Officer Rice recalled that the vehicle was parked under a street light, but he did not believe that it had gotten dark yet. When asked if he had used a flashlight to look in the vehicle, Officer Rice testified that he may have used a flashlight, but he believed that he did not use one until he began his detailed search of the vehicle. When Officer Rice looked in the vehicle, he noticed a plastic baggie containing a white substance in the driver's side floorboard. Officer Rice removed the baggie from the vehicle and determined that it contained crack cocaine. Officer Rice then testified that Mr. Bobbitt told him that he was there to purchase crack cocaine from Wade, but the transaction had been interrupted by the police officers.

Wade also testified at the suppression hearing, but gave a somewhat different account of the events of that evening. He testified that the white vehicle was broken down, and that he was waiting in front of it for a tow truck when the police arrived. Wade further testified that the vehicle belonged to a friend named Brenda Jackson, and that he had not been in it or driven it. He also testified that he did not tell Officer Rice that he had been smoking marijuana and added, "I don't smoke marijuana."

***2** Following his arrest, Wade was indicted on counts of trafficking in controlled substance first degree,^{FN2} public intoxication, and being a persistent felony offender second degree. He entered a plea of not guilty to the indictment. Counsel

for Wade later made an oral motion to suppress evidence that was heard at the July 16, 2003[,] suppression hearing.

FN2. This count was later amended to possession of controlled substance first degree.

At the suppression hearing, Officer Rice and Wade testified as set forth above. Counsel for Wade then argued that there was a lack of probable cause to search the white vehicle because a factual dispute existed as to whether Wade was ever in the vehicle, as to whether a marijuana odor could have been coming from the vehicle, and as to whether Officer Rice could have seen the plastic baggie in the vehicle without the use of a flashlight. The Commonwealth argued that Officer Rice was allowed to search the vehicle incident to Wade's arrest for public intoxication and also argued that Officer Rice was justified in searching the vehicle because he saw the baggie in plain view. The trial court then denied the motion to suppress and entered an order to that effect.

On November 12, 2003, Wade entered a conditional guilty plea to the possession and persistent felony offender counts of the indictment, with the public intoxication count being dismissed. The ruling on the suppression motion was preserved for appeal. The trial court accepted the plea and entered a judgment sentencing Wade to five (5) years' imprisonment. This appeal followed.

Ultimately, we remanded Wade's case to the trial court because it had failed to make the findings required by Kentucky Rules of Criminal Procedure (RCr) 9.78. So, in the first appeal, we did not reach the merits of Wade's motion to suppress; although, we

did find that Wade's claim that there was insufficient evidence to support his arrest for public intoxication was unpreserved for appellate review.²

Before us this time, Wade raises several interrelated issues. First, he again contends that there was insufficient evidence to arrest him for public intoxication. Second, he contends that the search of his vehicle could not properly have been done incident to his arrest. Finally, he contends that the plain view doctrine does not support Officer Rice's search of Wade's vehicle. We find Wade's arguments to be unavailing.

Before we may address Wade's arguments on their merits, however, we must set forth the standard we employ when reviewing a trial court's decision to deny a motion to suppress. "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."³

As we noted in our first opinion in this case, Wade's argument that there was insufficient evidence to support his arrest for public intoxication was not preserved for appellate review. So we may review it only under RCr 10.26, which

² *Id.* at *2.

³ Stewart v. Commonwealth, 44 S.W.3d 376, 380 (Ky.App. 2000) (internal footnote omitted).

provides that “[a] palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.” For an error to be palpable, it must be “easily perceptible, plain, obvious[,] and readily noticeable.”⁴ A palpable error “must involve prejudice more egregious than that occurring in reversible error[.]”⁵ In fact, a palpable error must be so serious in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings.⁶ Thus, what a palpable error analysis “boils down to” is whether the reviewing court believes there is a “substantial possibility” that the result in the case would have been different without the error.⁷ If not, the error cannot be palpable.

A person is guilty of public intoxication if “he appears in a public place manifestly under the influence of a

⁴ Burns v. Level, 957 S.W.2d 218, 222 (Ky. 1997) (citing BLACK’S LAW DICTIONARY (6th ed. 1995)).

⁵ Ernst v. Commonwealth, 160 S.W.3d 744, 758 (Ky. 2005).

⁶ *Id.*

⁷ Schoenbachler v. Commonwealth, 95 S.W.3d 830, 836 (Ky. 2003) (quoting Abernathy v. Commonwealth, 439 S.W.2d 949, 952 (Ky. 1969), *overruled in part on other grounds*, Blake v. Commonwealth, 646 S.W.2d 718 (Ky. 1983)).

controlled substance . . . to the degree that he may endanger himself or other persons or property, or unreasonably annoy persons in his vicinity.”⁸ Here, Officer Rice testified that Wade smelled of marijuana, had glassy eyes, was evasive in responding to some questions, and admitted to having smoked marijuana. The fact that Wade’s version of the events differed from Officer Rice’s is of no real consequence on appeal because the trial court had the authority to choose which evidence to believe.⁹ Thus, given Officer Rice’s testimony, we do not believe that Wade’s being charged with public intoxication rises to the level of a palpable error.

Next, despite Wade’s argument to the contrary, once he arrested Wade, Officer Rice was permitted to search the passenger compartment of the vehicle incident to that arrest.¹⁰ And although Wade contends that the search was improper because he was arrested outside the vehicle, the United States Supreme Court has recently made clear that a search of the passenger compartment of an automobile incident to arrest is proper even if the arrestee was outside the automobile at the time of the arrest, provided that the arrestee was a recent occupant of the

⁸ Kentucky Revised Statutes (KRS) 525.100.

⁹ Commonwealth v. Anderson, 934 S.W.2d 276, 278 (Ky. 1996).

¹⁰ Brown v. Commonwealth, 890 S.W.2d 286, 290 (Ky. 1994).

vehicle.¹¹ In Wade's case, Officer Rice testified that he saw Wade exit the vehicle. So Wade was a recent occupant of the vehicle, meaning that the trial court correctly concluded that the search of the passenger compartment of the car was a proper search incident to Wade's arrest.

Finally, we note that the search of the passenger compartment and accompanying seizure of the baggie containing cocaine was also permissible under the plain view doctrine. A recognized exception to the warrant requirement, under the plain view doctrine, "any evidence that the officers come across in the course of an investigation or arrest which they detect without making a physical search of the subject or his surroundings is admissible[.]"¹² In order to fall within the plain view doctrine, an officer must be lawfully located at a place from whence he can view the evidence; and the evidence's incriminating nature must be readily apparent.¹³

Officer Rice testified that when he walked past the vehicle he saw a plastic baggie containing a white substance in the floor. Officer Rice testified that he did not think that he used a flashlight to see into the vehicle because the vehicle was parked under a street light. Again, Wade's version of the

¹¹ Thornton v. United States, 541 U.S. 615 (2004).

¹² Kuhl v. Commonwealth, 497 S.W.2d 710, 711-712 (Ky. 1973).

¹³ Hazel v. Commonwealth, 833 S.W.2d 831, 833 (Ky. 1992).

events differs; but the trial court had the discretion to choose to accept Officer Rice's version of the facts while rejecting Wade's. Thus, there is evidence in the record to support a finding that while in a permissible location, Officer Rice saw the incriminating white baggie with his naked eye. Accordingly, the search of the car and seizure of the baggie falls within the plain view exception to the warrant requirement.

For the foregoing reasons, the Fayette Circuit Court's decision denying John Wade's motion to suppress is affirmed.

BARBER, JUDGE, CONCURS.

KNOPF, JUDGE, CONCURS AND FILES SEPARATE OPINION.

KNOPF, JUDGE, CONCURRING: I fully concur with the reasoning and the result of the majority opinion, but I write separately to add an additional point. In challenging the trial court's suppression ruling, Wade suggests that the baggie was not in plain view because Officer Rice used a flashlight to illuminate the inside of the car. The trial court accepted Officer Rice's testimony that he did not use a flashlight. Nevertheless, the use of the flashlight does not preclude application of the plain view doctrine. United States v. Booker, 461 F.2d 990 (6th Cir. 1972). The use of the flashlight to illuminate at night what is plainly visible during the day is not an unconstitutional intrusion into a citizen's privacy interests. State v. O'Neil, 148 Wash.2d 564, 62 P.3d 489, 497

(2003). Consequently, even if Officer Rice had used a flashlight, the plastic baggie on the floorboard would have been within his plain view and provided ample justification for a more thorough search of the car.

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