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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001512-MR

BRYAN LAMONT MCKEE APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 05-CR-00443

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: SCHRODER, JUDGE; KNOPF,[1] SENIOR JUDGE; MILLER,[2] SPECIAL JUDGE.

SCHRODER, JUDGE: This is an appeal from a judgment pursuant to a conditional guilty plea convicting appellant of possession of a controlled substance in the first degree. Appellant argues that the evidence of the controlled substances found in the car and on his person should have been suppressed because they were

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[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] Retired Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

obtained as a result of an unlawful interrogation and strip search. We adjudge that appellant's argument that he was unlawfully interrogated before being read his Miranda rights was not preserved for appellate review and did not constitute palpable error. As to the strip search of appellant, we believe the strip search was proper in this case because appellant had been charged with a drug offense, he indicated that he had more drugs on his person, and he was about to be introduced into the jail population. Hence, we affirm.

At about midnight on February 12, 2005, Lexington police officer Franz Wolff observed a 2000 black Saturn pull into an alley behind 5th Street in Lexington. Just before the Saturn's arrival, Officer Wolff had been surveilling the area on foot based on reports of drug activity. Officer Wolff had observed suspicious activity and had briefly talked to an unknown confidential informant about narcotics activity in the area. After the Saturn parked at the curb in front of one of the surveilled houses, the driver got out and went inside the house through the back door. As Officer Wolff began to walk toward the Saturn, he smelled the odor of marijuana emanating from the car. As he got closer to the car, the smell got stronger. Officer Wolff went to the passenger-side door, knocked on the window, and asked the passenger, Bryan McKee, to roll the window down. McKee fumbled around, acted confused,

and eventually rolled the window down. As he did so, Wolff observed marijuana smoke billow out the window. Officer Wolff then asked McKee where the rest of the marijuana was located. According to Officer Wolff, McKee displayed a blunt and reached or looked toward the floorboard of the car. Officer Wolff then asked McKee to exit the car. Upon getting out of the car, McKee appeared to Wolff to be under the influence of an intoxicant because he seemed disoriented, off balance, and unsteady on his feet, and his eyes were bloodshot. Wolff thereupon handcuffed McKee, searched his person, placed him under arrest, and read him his Miranda rights. Wolff found 4.4 grams of marijuana in McKee's coat pocket, as well as $74 in cash and two cellphones in his pants pockets. Officer Schwartz, who arrived to provide backup, searched the car and found part of a marijuana cigarette on the passenger side floorboard where McKee's feet had been.

Officer Wolff took McKee to the Fayette County Detention Center and while they were in the sally port, Wolff warned McKee of the laws pertaining to the promotion of contraband. Officer Wolff asked McKee if he had any additional contraband on his person. McKee replied that he thought he had some additional marijuana in his sock or his shoe. Upon searching McKee's socks and shoes, no contraband was found. McKee stated that he must have smoked it already. Based on McKee's statement that he thought he had more marijuana on his

person, Officer Wolff submitted a request form for jail personnel to strip search McKee.

Fayette County Detention Center Sergeant John Reams testified at the suppression hearing that he, along with Sergeant Christopher Bowles, initially conducted the strip search of McKee. According to Sergeant Reams, McKee was taken to the room designated for such searches and he cooperated when asked to remove his clothes. When asked to turn around and spread his buttocks, which was part of the detention center's strip search procedure, McKee refused to do so. Sergeant Reams stated that at that point, the officers turned McKee around and leaned him over the counter. Reams testified that when they turned McKee around, they could see what appeared to be a plastic baggie protruding from between McKee's buttocks. Sergeant Reams then told McKee to hand the item over. McKee turned back around to face the officers and pulled off a small piece of plastic and handed it to the officers. Sergeant Reams again told McKee that he needed to give them what he was hiding. Sergeant Reams testified that McKee then reached back and appeared to push the item further into his rectum. The officers handcuffed McKee and again leaned him over the counter. Sergeant Reams summoned Officer Wolff into the strip search room as a witness and called a male nurse in to remove the baggie. The nurse pulled the protruding baggie from McKee's rectum

without having to conduct a manual cavity search. The baggie was turned over to Officer Wolff. The baggie was found to contain two separately wrapped rocks of crack cocaine – one weighing 6.0 grams and the other weighing 5.6 grams.

McKee was indicted for trafficking in a controlled substance in the first degree, possession of marijuana, public intoxication, and being a persistent felony offender in the second degree. McKee moved to suppress the evidence of the marijuana and the crack cocaine on grounds that Officer Wolff's initial stop of McKee was unlawful, the strip search was unlawful, and the below the surface search of McKee's person required a warrant. After a suppression hearing in which Officer Wolff, Sergeant Bowles, and Sergeant Reams testified, the court denied the suppression motion. Subsequently, McKee entered a conditional guilty plea to possession of a controlled substance (the misdemeanor charges being dismissed and the trafficking charge being amended to the possession charge) and was sentenced to five years' imprisonment. McKee reserved the right to appeal the ruling on the suppression motion. This appeal followed.

A trial court's findings of fact on a suppression motion will be conclusive if they are supported by substantial evidence. Talbott v. Commonwealth, 968 S.W.2d 76 (Ky. 1998); RCr 9.78. Questions of law, however, will be reviewed *de novo*.

McKee first argues that the initial search of McKee and the car was illegal due to the failure to advise McKee of his Miranda rights before questioning him. McKee admits the issue was not preserved because he did not raise the Miranda rights issue before the lower court. It is well settled that the defendant cannot feed one can of worms to the lower court and another to the appellate court. Kennedy v. Commonwealth, 544 S.W.2d 219, 222 (Ky. 1976). McKee nevertheless urges this Court to review the issue for palpable error under RCr 10.26. Under RCr 10.26, an appellate court can review unpreserved error if the error affected the substantial rights of the party and the defendant can show that manifest injustice resulted from the error i.e., there is a substantial possibility that the result would have been different absent the error. Schoenbachler v. Commonwealth, 95 S.W.3d 830 (Ky. 2003).

McKee claims that after Officer Wolff approached the car and smelled marijuana, McKee was in custody when he rolled down the window and the officer asked him where the rest of the marijuana was. Hence, he should have been advised of his Miranda rights prior to any questioning. We need not address the issue of whether McKee was in custody at the time of questioning because even if the officer had not asked McKee where the rest of the marijuana was, it is likely that the officer would have found the marijuana on the floorboard of the

passenger side of the vehicle during a search of the vehicle pursuant to a lawful arrest for public intoxication. See New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981) (Fourth Amendment allows police to search passenger compartment of vehicle incident to lawful custodial arrest.); Commonwealth v. Wood, 14 S.W.3d 557 (Ky.App. 1999). Officer Wolff testified that he smelled marijuana when he approached the vehicle and saw smoke coming out of the car when the window was rolled down. Further, McKee appeared disoriented, off balance, unsteady on his feet, and his eyes were bloodshot. Thus McKee could have been lawfully arrested for public intoxication alone, and a search of the vehicle would have likely followed in which the marijuana cigarette on the passenger side floorboard would have been found. Also, the search of McKee's person incident to the lawful arrest for public intoxication yielded 4.4 grams of marijuana from McKee's pocket. So even had the police not found the marijuana cigarette on the floorboard of the car, the marijuana found on McKee's person alone could have served as the basis for the possession of marijuana charge. Accordingly, this claimed error did not constitute palpable error.

McKee next argues that he was subjected to an illegal strip search. McKee maintains that because he had been arrested for only misdemeanors (possession of marijuana and public intoxication) up to the point of the strip search, a strip

search was not justified. The Supreme Court of the United States stated as follows regarding strip searches:

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Bell v. Wolfish, 441 U.S. 520, 558-559, 99 S. Ct. 1861, 1884, 60 L. Ed. 2d 447 (1979).

The Court went on to recognize:

> A detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence. And inmate attempts to secrete these items into the facility by concealing them in body cavities are documented . . . .

Id.

Regarding strip searches for minor misdemeanor charges or traffic offenses, the Sixth Circuit stated in Dobrowolskyj v. Jefferson County, 823 F.2d 955, 957 (6th Cir. 1987), cert. denied, 484 U.S. 1059, 108 S. Ct. 1012, 98 L. Ed. 2d 978 (1988):

> The majority of the circuits have held unconstitutional blanket strip search policies of all inmates including those detained only on minor misdemeanor charges or traffic offenses. These courts have held that automatic strip searches of all detainees violate the fourth amendment

> without a reasonable suspicion, based on the nature of the charge, the characteristics of the detainee, or the circumstances of the arrest, that the detainee is concealing contraband.

Similarly, in Masters v. Crouch, 872 F.2d 1248, 1255 (6th Cir. 1989), cert. denied, 493 U.S. 977, 110 S. Ct. 503, 107 L. Ed. 2d 506 (1989), the Court recognized that:

> authorities may not strip search persons arrested for traffic violations and nonviolent minor offenses solely because such persons will ultimately intermingle with the general population at a jail when there were no circumstances to support a reasonable belief that the detainee will carry weapons or other contraband into the jail.

While McKee had only been charged with misdemeanors in the present case when the strip search was conducted, one of the charges, possession of marijuana, was a drug offense which by its definition involved contraband. In Lusby v. T.G. & Y Stores, Inc., 749 F.2d 1423, 1434 (10th Cir. 1984), vacated and remanded for reconsideration on other grounds, 474 U.S. 805, 106 S. Ct. 40, 88 L. Ed. 2d 33 (1985), the Court held that "[a] strip search is not improper when a suspect is going to be placed in the general jail population and has been charged with a drug offense such as possession of marijuana."

And, in the present case, there was no blanket policy of strip searching all detainees. Sergeant Reams testified that the jail's policy was that detainees who are charged with drug-

related offenses may be strip searched upon completion of processing at intake. The strip search policy of the Lexington-Fayette Urban County Government Division of Detention Services, which was admitted into evidence, states that strip searches may be conducted on: all violent felony offenders, misdemeanor offenders charged with violence related offenses, <u>all scheduled drug possession and trafficking offenses</u>, fugitives, and concealed weapons charges. (Emphasis added.) The policy also allows strip searches where there is a reasonable belief that the inmate is carrying contraband and an immediate search is necessary to prevent the destruction, disposal or ingestion of the evidence, where the arrestee refuses to allow a clothes search, or where a clothed search supports a reasonable suspicion of possession of contraband. It should be noted that marijuana is a Schedule I controlled substance in Kentucky. KRS 218A.050(3).

In addition to being charged with a drug offense, we believe McKee also gave the police probable cause to reasonably suspect that he had drugs on his body prior to the strip search. After taking McKee to the Fayette County Detention Center, Officer Wolff asked McKee if he had any additional contraband on his person, to which McKee replied that he thought he had some additional marijuana in his sock or his shoe. When Officer Wolff searched McKee’s socks and shoes and found no marijuana,

McKee stated that he must have already smoked it. Wolff stated that he felt that McKee might be hiding it elsewhere on his body, whereupon Officer Wolff submitted the request to have McKee strip searched. We agree with the lower court that McKee's statement at the jail that he thought he had more marijuana in his sock or shoe constituted probable cause to conduct the strip search.

As for the invasive nature of the strip search to retrieve the plastic baggie from McKee's rectum, we also believe such actions were justified under the circumstances. In Williams v. Commonwealth, 147 S.W.3d 1 (Ky. 2004), cert. denied, 544 U.S. 986, 125 S. Ct. 1859, 161 L. Ed. 2d 745 (2005), the Court held that the strip search which yielded crack cocaine from the defendant's buttocks was justified because police had received a tip that the defendant was hiding cocaine in his buttocks and the officers feared the drugs could be destroyed.

> [T]he officers had good reason to fear that, unless restrained, Appellant would destroy the drugs before they could obtain a warrant. The probability of destruction in anticipation of a warrant exemplifies the kind of present risk that undergirds the accepted exigent circumstances exception to the general warrant requirement. *Schmerber v. California*, 384 U.S. 757, 770-771, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). Thus, police imposed a restraint that was limited and tailored to reasonably secure law enforcement need.

Williams, 147 S.W.3d at 8.

In the instant case, Sergeant Bowles and Sergeant Reams testified that when they observed the plastic baggie protruding from McKee's buttocks, they believed it contained drugs and needed to be immediately removed from the rectum. McKee had already tried to push the plastic baggie farther into his rectum and the officers were concerned he may try to insert it even farther, necessitating a more invasive cavity search. Additionally, Sergeant Bowles testified about the danger that the detainee could overdose if the bag of drugs ruptured in the rectum. In our view, the exigent circumstances in this case supported the retrieval of the baggie from McKee's rectum. See Schmerber, 384 U.S. at 770-771, 86 S. Ct. at 1835-1836.

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

ALL CONCUR.

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