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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000553-MR

DEON ELLIS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 05-CR-000094

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CAPERTON, AND CLAYTON, JUDGES.

ACREE, JUDGE: Deon Ellis appeals from a judgment of the Jefferson Circuit Court convicting him of complicity to commit first-degree trafficking in a controlled substance while in possession of a handgun and possession of marijuana. He takes issue, primarily, with two rulings by the trial court which denied his motions to exclude evidence seized in a warrantless search of his apartment. Having reviewed the arguments and the record, we affirm.

Ellis and a co-defendant were in his apartment in the Beecher Terrace housing complex when Louisville Metro Police received a call reporting a shooting in the

area. Officer Peter Glauber questioned a witness at the scene who described the suspects and indicated the door of the apartment they had entered. Officer Glauber knocked on the door with two back-up officers and Ellis answered. He gave the officers permission to enter the apartment. Inside, they smelled a strong odor of marijuana. When the officers questioned the two men, Ellis' co-defendant opened his hand to show several buds of marijuana.

Officer Joshua Judah was conducting a protective sweep of the apartment when he opened a kitchen closet and saw a bag of cocaine sitting on a box. He picked up the bag and saw a second bag underneath. Officer Judah showed the cocaine to Officer Glauber. They questioned Ellis about the presence of additional drugs in the apartment, and he admitted that there was a joint on his bedside table. Ellis and his co-defendant were then arrested.

When they arrived at the police station, Ellis repeatedly asked to make a phone call. Eventually, Officer Glauber loaned him a cell phone to call his uncle. The officer inadvertently heard part of the conversation and gleaned from it that Ellis had guns in his apartment. A search warrant was obtained and executed. Officers found a .38 caliber pistol in the pocket of a leather jacket hanging in the kitchen closet and a Glock 19 semi-automatic handgun hidden inside the kitchen trashcan, under the plastic garbage bag.

Ellis and his co-defendant were indicted on charges of complicity to commit first-degree trafficking in a controlled substance while in possession of a handgun, possession of marijuana, and theft because the Glock had been reported as stolen. The theft charge was severed from the remaining counts of the indictment. Ellis

filed a pretrial motion asking for suppression of the items seized during the warrantless search of his apartment. At the suppression hearing Officer Glauber testified about the circumstances surrounding Officer Judah's discovery of the cocaine in the kitchen closet. The trial court denied the motion to suppress.

At trial, some of Officer Judah's testimony seemed to contradict Officer Glauber's account. Ellis moved, again, for the evidence to be suppressed and the motion was denied a second time. The trial court also refused to instruct the jury on facilitation as requested by Ellis. Ellis was convicted and sentenced to twelve years' imprisonment. His co-defendant was only convicted of possession of marijuana. This appeal followed.

On appeal, Ellis first argues the trial court erred when it refused to suppress the drugs seized from Ellis' apartment during a warrantless search. Although the constitutions of both the United States and the Commonwealth of Kentucky require a warrant before conducting a search of someone's property, there are certain recognized exceptions, such as when officers encounter contraband in plain view. The plain view exception has three requirements: (1) the officer's presence on the scene must be justified, (2) the discovery must be inadvertent, and (3) the contraband nature of the items seized must be readily apparent. *Commonwealth v. Johnson*, 777 S.W.2d 876, 879 (Ky. 1989). Ellis concedes the first two elements of the plain view requirement, but disputes that the contraband nature of the bags of cocaine was readily apparent.

The standard of review for a suppression ruling is twofold. The trial court's findings of fact are conclusive if supported by substantial evidence; however, we review

de novo the legal correctness of the trial court's ruling. *Stewart v. Commonwealth*, 44 S.W.3d 376, 380 (Ky.App. 2000). Officer Glauber was the only witness at Ellis' pretrial suppression hearing. He testified that Officer Judah conducted a protective sweep of the apartment while he and another officer were in the room with Ellis and his co-defendant. Officer Judah called Officer Glauber to the kitchen where he had opened a closet door and "pointed to a box and on that box was a pretty sizeable bag of what appeared to be powder cocaine and crack cocaine." Based on Officer Glauber's testimony, the trial court correctly found that the plastic bags containing the cocaine were in plain view and, thus, denied the motion to suppress.

At trial, the jury heard testimony from Officer Judah who actually found the cocaine. He described opening the kitchen closet and finding two bags of cocaine, one with smaller baggies of cocaine inside it.

> I happened to notice a large bag of crack cocaine on top of a Christmas tree box inside a closet. I removed that and found another bag of powdered cocaine underneath it.

On cross-examination, Officer Judah stated that he could see the end of the bag sticking out from the box and also that the entire top of the bag was visible. At that point, Ellis' trial counsel approached the bench and asked for the cocaine to be suppressed. The trial court initially stated that the issue had already been determined during the pretrial suppression hearing. Counsel argued that suppression could be sought at any time and, further, pointed out that Officer Judah had not testified at the pretrial hearing. The trial court again denied the motion based on the officer's statement that he had seen the cocaine. The trial court also made a finding that Officer

Judah decided to search a little bit further after seeing part of the bag sticking out of the box.

If the evidence in fact supported a finding that Officer Judah decided to search a little bit further after seeing part of a plastic bag, then the legally correct ruling required suppression of the evidence. *Arizona v. Hicks,* 480 U.S. 321, 325, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987), *see also Commonwealth v. Hatcher*, 199 S.W.3d 124, 128 (Ky. 2006). As in the case at hand, *Hicks* involved police officers responding to a reported shooting. While inside the apartment from where the gun was fired, officers noticed an expensive stereo set-up, even though the rest of the apartment was ill-furnished. One of the officers decided to record the serial numbers of the pieces, even moving some of them in order to be able to locate the numbers. Further investigation revealed that some of the components had been stolen in an armed robbery. The United States Supreme Court upheld the lower courts' decisions rejecting the state's assertion that the serial numbers were subject to the plain view exception.

> [T]he "distinction between 'looking' at a suspicious object in plain view and 'moving' it even a few inches" is much more than trivial for purposes of the Fourth Amendment. It matters not that the search uncovered nothing of any great personal value to respondent-serial numbers rather than (what might conceivably have been hidden behind or under the equipment) letters or photographs. A search is a search, even if it happens to disclose nothing but the bottom of a turntable.

Hicks, 480 U.S. 321 at 325.

The Kentucky Supreme Court explicitly relied on the *Hicks* decision in *Hatcher, supra*. That case involved police responding to a call about an abandoned minor. The defendant's child answered the door, and the officer saw a ceramic pipe

sitting on a coffee table of a type which could be used to smoke illegal substances. The child gave him permission to enter the apartment where he seized the pipe and examined it, detecting an odor of marijuana. This Court held that the pipe should have been suppressed since its contraband nature was not readily apparent. The Kentucky Supreme Court agreed finding "no distinction between the manipulation of a pipe to discern the odor of marijuana and the manipulation of stereo components to retrieve serial numbers." *Hatcher*, 119 S.W.3d at 128.

We must next examine the evidence to determine whether or not it supports the trial court's finding that Officer Judah, spotting a plastic bag in a box of Christmas tree parts, decided to search a little further and, thus, found cocaine. As previously noted, Officer Judah testified on direct examination that he noticed a large bag of cocaine on top of the box when he opened the closet door. Picking up the first bag, he spotted the second bag of cocaine underneath it. Ellis characterizes the officer's testimony during cross-examination as contradicting his earlier description. We cannot agree.

At different points during cross-examination, Officer Judah did say that he saw the end of the bag sticking out of the box and the entire top of the bag. However, this is not inconsistent with his earlier statement that he could see the cocaine in the bag. Furthermore, the officer was never asked whether he could see the bag's contents and, therefore, his initial statement on this point was never directly challenged.

Ellis seizes upon the trial court's comment that Officer Judah "searched a little bit further" after seeing the bags. Like Officer Judah's testimony, however, that statement does not indicate that the bag's contents – the cocaine itself – was not in

plain view. In fact, the trial court, both before and after that comment, ruled that it was. If the officer had actually searched a little bit farther, he would likely have found contraband we know was not in plain view – the gun in the pocket of the jacket hanging in the closet just above the cocaine.

As previously stated, Ellis conceded the first two elements of the plain view exception found in *Johnson*, the officer's presence in the kitchen was justified, and his discovery of the cocaine was inadvertent. The third element, whether or not the contraband nature of the cocaine was readily apparent, is the basis of Ellis' contention that the evidence should have been suppressed. Since Officer Judah never contradicted his testimony that he saw the cocaine upon first opening the closet door, the Commonwealth met the third element of establishing the plain view exception. Therefore, the trial court correctly allowed the evidence to be admitted, albeit for the wrong reason.

Ellis next contends that the trial court erred by refusing to instruct the jury on facilitation to commit first-degree trafficking, while in possession of a handgun, and facilitation to commit first-degree trafficking. Criminal facilitation is defined by statute as "acting with knowledge that another person is committing or intends to commit a crime, [a defendant] engages in conduct which knowingly provides such person with means or opportunity for the commission of the crime and which in fact aids such person to commit the crime." Kentucky Revised Statute (KRS) 506.080(1). Facilitation is a lesser included offense of complicity and would have lowered the penalty range on Ellis' charge to a Class D felony for first-degree trafficking while in possession of a handgun, or to a Class A misdemeanor for first-degree trafficking. The trial court did instruct the

jury on the lesser included offense of first-degree trafficking, but refused to instruct on facilitation.

Ellis contends he was entitled to a facilitation instruction because the jury could have "[entertained] reasonable doubt of [his] guilt on the greater charge, but [believed] beyond a reasonable doubt that the [he] is guilty of the lesser offense." *Skinner v. Commonwealth*, 864 S.W.2d 290, 298 (Ky. 1993). He argues that the jury was presented with a question of fact as to whether the Commonwealth proved his participation in trafficking beyond a reasonable doubt, or whether the evidence showed that Ellis merely allowed another to store drugs in his apartment, knowing that person was engaged in trafficking. Ellis claims that his own testimony supported the theory that he facilitated trafficking.

During his trial, Ellis admitted to owning the .38 caliber revolver, but denied any knowledge of the Glock or the cocaine. His trial counsel argued in closing argument that Ellis' co-defendant had the opportunity to hide the Glock and the cocaine before Ellis answered the door. KRS 406.080(1) requires a defendant to act "**with knowledge** that another person is committing or intends to commit a crime[.]" (Emphasis added.) Since Ellis denied having any knowledge that there was cocaine in his kitchen closet, his testimony does not support an instruction on facilitation. The trial court's "duty to prepare and give instructions on the whole law of the case . . . does not require an instruction on a theory with no evidentiary foundation." *Neal v. Commonwealth*, 95 S.W.3d 843, 850 (Ky. 2003).

Finally, Ellis argues that the trial court improperly allowed hearsay evidence to be presented relating to his parole eligibility. During the penalty phase of

his trial, the Commonwealth sought to introduce a document titled "Certification on the Calculation of Parole Eligibility." Ellis objected to the introduction of the four-page document absent a live witness from the Department of Corrections. The trial court ruled that the document was a certified, attested copy of a government record and, thus, admissible. Kentucky Rule of Evidence 201. Ultimately, only the first page of the document was admitted as an exhibit. Ellis claims his right to confront and cross-examine adverse witnesses was violated by introduction of a document, which could not be cross-examined. This issue has previously been decided by the Kentucky Supreme Court, and we are bound by that ruling to uphold the trial court's decision. *Abbott v. Commonwealth*, 822 S.W.2d 417, 491 (Ky. 1992).

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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