

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001146-MR

CHEROSCO L. BREWER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE KATHLEEN VOOR MONTANO, JUDGE
ACTION NO. 04-CR-002141

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT, TAYLOR, AND WINE, JUDGES.

WINE, JUDGE: On July 23, 2004, a Jefferson County grand jury returned an indictment charging Cherosco Lamont Brewer with two counts of tampering with physical evidence, KRS 524.100; one count of possession of a handgun by a convicted felon, KRS 527.040; and one count of disorderly conduct in the second degree, KRS 525.060. Prior to trial, Brewer moved to suppress the evidence seized during a traffic stop on June 19, 2004. Following an evidentiary hearing, the trial court denied the motion.

The matter proceeded to a jury trial on February 17-20, 2006. Brewer moved for directed verdicts at the close of the Commonwealth's case and at the close of all the evidence. The trial court denied the motions. Thereafter, the jury found Brewer not guilty of one of the tampering counts and guilty on the remaining counts. Following the penalty phase, the jury fixed his sentence at a total of ten years' imprisonment, which the trial court imposed.

On appeal, Brewer argues that any evidence seized or obtained as a result of the traffic stop should be suppressed. He also contends that he was entitled to a missing evidence instruction and to a directed verdict. Finding no reversible error, we affirm.

Brewer first contends that the trial court erred by denying his motion to suppress the evidence obtained as a result of the traffic stop. RCr 9.78 sets out the procedure for conducting suppression hearings and establishes the standard of appellate review of the determination of the trial court. Our standard of review of a circuit court's decision on a suppression motion following a hearing is twofold: first, the factual findings of the court are conclusive if they are supported by substantial evidence; and second, this Court conducts a *de novo* review to determine whether the trial court's decision is correct as a matter of law. *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998).

The only witness to testify at the suppression hearing was Officer Mark Final of the Louisville Metro Police Department. Sometime after midnight on June 19,

2004, Officer Final and Officer Robert Button observed a vehicle driving south on 16th Street. Officer Final testified that the vehicle had only one operating headlight. Based on this violation, he pulled the vehicle over. KRS 189.040(1).

After stopping the car, Officer Final approached the driver, Brewer, and Officer Button approached the passenger, Chiquoya Brown. After checking the licenses of both individuals, Officer Final discovered that there was an outstanding arrest warrant for Brown. Upon returning to the car, Officer Final saw what appeared to be marijuana residue in Brewer's lap. Officer Final also testified that he and Officer Button had noticed a marijuana odor coming from the interior of the car. When asked about the residue, Brewer replied that it was nothing and threw it out the window. Brewer then left the scene and drove his vehicle about a block. Brewer stopped the car, ran from the car with a bag, and threw the bag over a fence. Brewer then surrendered to the officers while Brown escaped on foot. Officer Button recovered the bag, which contained a Colt .357 Magnum revolver wrapped in a t-shirt. Based on Officer Final's testimony, the trial court denied the motion to suppress, concluding that the officers had probable cause to stop the vehicle based on the headlight violation.

Brewer points to a number of inconsistencies between Officer Final's testimony at the suppression hearing, his initial report and his later trial testimony. In addition, Brewer gave a substantially different account of the traffic stop when he testified at trial. In particular, Brewer testified that he demonstrated to the officers by tapping on the headlight that it was in working order. He also testified that Brown

attempted to wrest control of the car, and that she was the one who was responsible for leaving the scene. Brewer also denied any knowledge of the bag containing the gun.

Brewer further notes that he was not charged with the headlight violation. Brewer also points out that the officers failed to preserve the bag and the t-shirt which were found with the gun. And while the officers took both his and Brown's licenses during the initial stop, Brown's license was lost. In addition, no trace of marijuana was ever found in the car, and no fingerprints were collected from the gun or the bag. In fact, he argues the officers' handling of the gun precluded any attempt to collect fingerprints. Finally, Brewer complains that there were no witnesses to confirm the officers' report that Brewer's actions caused a disturbance. When these factors are considered together, Brewer contends that they deeply undermine the credibility of Officer Final's testimony, and strongly suggest that the initial traffic stop was pretextual.

However, only Officer Final testified at the suppression hearing, and the trial court's ruling was based only on that evidence. There is no indication that Brewer renewed his motion to suppress based on the additional testimony at trial. Based on the evidence and issues presented at the suppression hearing, the trial court was clearly within its discretion to accept Officer Final's then-unrefuted testimony that Brewer's vehicle had a defective headlight. *See Commonwealth v. McManus*, 107 S.W.3d 175, 179 (Ky. 2003).

Furthermore, we agree with the trial court that the officers did not have a duty to charge Brewer with the headlight violation. The Commonwealth was not

required to prove the headlight violation to justify the stop. Rather, an officer must only have probable cause to believe that a traffic violation has occurred in order to stop a suspected vehicle. *Wilson v. Commonwealth*, 37 S.W.3d 745 (Ky. 2001); *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S.Ct. 1391, 1401, 59 L. Ed. 2d 660, 673 (1979). Officer Final's testimony was sufficient to establish that he observed the headlight to be defective. It is plausible that there was a loose connection and by tapping on the light Brewer restored the headlight to its proper operating condition. The officers' failure to charge Brewer with a headlight violation does not render the stop unlawful, nor does it definitively demonstrate that the stated reason for the stop was pretextual. Brewer's other factual and legal issues regarding the traffic stop are not preserved for review.

Nevertheless, Brewer argues that this Court should find that the traffic stop was a pretext for racial discrimination under the palpable error standard in RCr 10.26. A palpable error is one that affects the substantial rights of a party resulting in manifest injustice. In order to find palpable error occurred, an appellate court must believe there is a substantial possibility that the outcome would have been different had the error not occurred. *Partin v. Commonwealth*, 918 S.W.2d 219, 224 (Ky. 1996). *See also Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003). Even considering the additional evidence obtained at trial and the arguments raised by Brewer on appeal, we cannot find a substantial possibility that the trial court's ruling on the suppression motion would have been different.¹

¹ In his brief, the Appellant Brewer included various exhibits to show the racial composition of Jefferson County as well as the number of African-Americans currently incarcerated in Kentucky's penal institutions. This Court will not consider those exhibits as materials and

As noted above, Officer Final's observation of the defective headlight was sufficient to justify the stop. Although Brewer testified that the headlight was in working order, there was no evidence to challenge the validity of Officer Final's initial observation. Nor was there any evidence that Officer Final's testimony was a fabrication to cover an improper racial motivation for the stop. To the contrary, Officer Final testified that he could not see the driver when he made the stop. Furthermore, there was no evidence of any racial animus displayed by either officer during the stop.

Brewer also contends that the evidence regarding the marijuana, the gun and Brewer's flight should have been suppressed based upon the officers' failure to collect and preserve evidence collected at the scene. He again points to the loss of the bag, t-shirt and license, the officers' failure to collect fingerprints from the gun or the bag, the absence of any evidence of marijuana in the car, and the absence of any witnesses' statements supporting the officers' testimony that Brewer's flight created a disturbance. Brewer contends that the officers' failure to preserve and collect such evidence amounts to a violation of his due process rights, and thus compels suppression of the evidence obtained during the search.

However, the Due Process Clause is implicated only when the failure to preserve or collect the missing evidence was intentional and the potentially exculpatory nature of the evidence was apparent at the time it was lost or destroyed. *Estep v.*

Commonwealth, 64 S.W.3d 805, 809-10 (Ky. 2002). Furthermore, in *Collins v.*

documents not included in the record shall not be used as exhibits in support of briefs. CR 76.12(4)(c)(vii). See also *Rankin v. Blue Grass Boys Ranch, Inc.*, 469 S.W.2d 767, 769 (Ky. 1971).

Commonwealth, 951 S.W.2d 569, 572 (Ky.1997), the Supreme Court of Kentucky adopted the ruling of *Arizona v. Youngblood*, 488 U.S. 51, 57-58, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281 (1988), holding there is no denial of due process absent a showing of bad faith on the part of law enforcement or the Commonwealth in their failure “to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.” *Collins*, 951 S.W.2d at 572, quoting *Arizona v. Youngblood*, 488 U.S. at 57, 109 S. Ct. at 337.

The loss of the bag, t-shirt and license and Officer Final’s improper handling of the gun were at most negligent, which does not rise to the level of bad faith. *Collins*, 951 S.W.2d at 573. Brewer does not substantiate his allegations of ill motive or intention on the part of the officers in failing to collect and preserve the evidence. The Commonwealth’s failure to check Brewer’s pants and the interior of the car for microscopic indications and their failure to obtain witnesses’ statements go to the sufficiency of the evidence, but do not indicate bad faith in failing to collect such evidence.

For the same reasons, the trial court properly denied Brewer’s request for a missing evidence instruction. “[T]he purpose of a ‘missing evidence’ instruction is to cure any Due Process violation attributable to the loss or destruction of *exculpatory* evidence by a less onerous remedy than dismissal or the suppression of relevant evidence.” *Estep*, 64 S.W.3d at 810. In the absence of any evidence that the loss of or failure to collect evidence was intentional, no due process interests are implicated. While

Brewer had the opportunity to comment on the missing and uncollected evidence, as well as the inconsistencies in Officer Final's testimony, he was not entitled to a missing evidence instruction. *Id.*

Finally, Brewer argues that the trial court erred in denying his motion for a directed verdict.

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

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

We question whether the evidence was sufficient to submit the tampering charge related to the marijuana. Although Officer Final testified at the suppression hearing that he smelled marijuana in the car, he did not repeat this portion of his testimony when he testified at trial. When coupled with the absence of any evidence that the substance in Brewer's lap was marijuana, we agree with Brewer that the Commonwealth failed to prove the essential elements of tampering with physical evidence. But since the jury acquitted Brewer on this charge, any error in denying the motion for a directed verdict was harmless.

The remaining charges essentially involve a credibility determination between Officers Final and Button and the Appellant Brewer. Both officers testified that they saw Brewer throw the bag in which the gun was found. This testimony was sufficient to support the other tampering charge and the firearm possession charge. Likewise, the officers' testimony that Brewer's actions created a disturbance was sufficient to support the disorderly conduct charge. Any inconsistencies in the officers' testimony were purely questions of weight and credibility that are within the jury's province to determine. The jury's determination of the credibility of witnesses will not be disturbed unless it is so incredible on its face as to require its rejection as a matter of law. *Taylor v. Commonwealth*, 301 Ky. 109, 113, 190 S.W.2d 1003, 1005 (1945). *See also Bussey v. Commonwealth*, 797 S.W.2d 483, 484 (Ky. 1990) and *Holland v. Commonwealth*, 272 S.W.2d 458, 459 (Ky. 1954). We cannot say that the officers' testimony was so improbable as to render their accounts unworthy of credence.

We are troubled by the poor handling of the evidence in this case. There was no reasonable explanation for the loss of the bag, t-shirt and Brown's license or the improper handling of the gun. But apart from his general complaints of "structural error," Brewer does not identify how these issues affected the fundamental fairness of his trial. While this evidence was not available at trial, Brewer had the opportunity to raise these matters with the jury. And as discussed above, there was no evidence that the loss of the evidence was intentional or in bad faith. Under the circumstances, we cannot find

that the missing evidence was so prejudicial as to compel a directed verdict in Brewer's favor.

Accordingly, the judgment of conviction of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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