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OPINION RENDERED MAY 15, 2009, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000489-MR

MCCLELLAN GAINES — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 07-CR-01127

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND STUMBO, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

STUMBO, JUDGE: This is an appeal in which McClellan Gaines, Appellant, seeks the reversal of his multiple convictions, including criminal possession of a forged instrument and possession of marijuana. Appellant contends that the trial

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

court erred when it did not suppress the evidence found from an alleged illegal stop and search of an automobile. He also argues that the trial court erred when it allowed improper habit evidence; when it refused to allow Appellant's counsel to ask two witnesses questions relating to bias; when it did not exclude the testimony of Lauro Sanchez; and when a potential juror member was improperly removed for cause. We find that the actions of the trial court were not in error and affirm the conviction.

On June 17, 2007, Appellant and Vivian Raleigh visited a store owned by Marcelo Cassiano. Cassiano's nephew, Lauro Sanchez, was working at the store when Appellant and Raleigh arrived. Raleigh purchased some underwear and paid with a fifty-dollar bill. It is disputed as to whether Appellant came into the store or waited in the car. Regardless, Appellant himself returned to the store later and tried to purchase a pair of jeans with another fifty-dollar bill. After receiving the first bill, Sanchez suspected the bills were fake. Sanchez declined to make the sale to Appellant and Appellant left.

Cassiano later returned to the store and Sanchez showed him the original bill and explained what had happened. As they were discussing the incident, Sanchez saw the vehicle Appellant and Raleigh had driven. Sanchez and Cassiano followed the car to a nearby gas station, and wrote down the license plate number.

Cassiano located Officers Slark, Kidd, and Hawkins who were parked nearby. Although Cassiano's English was limited, he explained that a fake

"receipt" (which Officer Slark took to mean "bill") had been used at his store and he gave Officer Slark a description of the Appellant and Raleigh's car, the license plate number, and its current location. Officer Slark left Cassiano and Sanchez with Officers Hawkins and Kidd and proceeded to the gas station. Officer Slark located the vehicle as it was leaving the gas station. He then stopped the car to investigate.

Appellant was driving the vehicle. Officer Slark asked for his identification, which Appellant claimed not to have. Appellant also gave the officer a fake name. Officer Slark testified that Appellant appeared to be nervous and was not making eye contact. Officer Slark asked Appellant to exit the vehicle. Slark and the Appellant then crossed the street where Slark asked if he could search the car. Appellant stated that the car was Raleigh's and that he could not consent to a search, but that he would allow Slark to search his person. During the search, Officer Slark found marijuana and Appellant's driver's license. Appellant was then arrested.

Meanwhile, Officer Hawkins had arrived and was speaking to Raleigh. Raleigh gave Officer Hawkins permission to search the vehicle. Officers Slark and Hawkins searched the vehicle and found a backpack full of counterfeit money. Allegedly, also in the backpack were men's clothing and documents with Appellant's name on them. The backpack, some of the papers, and clothing were not kept as evidence, nor were pictures taken. Officers Kidd and Slark both

testified at a suppression hearing that Appellant admitted the backpack containing the fake bills was his.

Appellant's first argument is that the court erred when it denied his motions to suppress the evidence gained from the stop of the vehicle and from the search of the backpack. Appellant claims the police were unjustified in stopping the car and in searching the backpack. Appellant moved to suppress the evidence gained from the stop of the car because he claims the police did not have enough reliable information to form a reasonable and articulable suspicion that Appellant had committed a crime at the time Officer Slark stopped the vehicle. Appellant equates the information relayed via Mr. Cassiano to the officers as that of an anonymous informant. The Commonwealth's argument is that Officer Slark was justified in stopping the vehicle Appellant was in because he had a reasonable and articulable suspicion that a crime had been committed or that criminal activity was afoot.

"When reviewing a trial court's denial of a motion to suppress, we utilize a clear error standard of review for factual findings and a *de novo* standard of review for conclusions of law." *Jackson v. Commonwealth*, 187 S.W.3d 300, 305 (Ky. 2006).

> [A] warrantless stop of a vehicle is permissible if the officer has an "articulable and reasonable suspicion" of criminal activity.
>
> The objective justification for the officer's actions must be measured in light of the totality of the circumstances. When considering the totality of the circumstances, a

> reviewing court should take care not to view the factors upon which police officers rely to create reasonable suspicion in isolation. Courts must consider all of the officers' observations, and give due weight to the inferences and deductions drawn by trained law enforcement officers. (Citations omitted).

Greene v. Commonwealth, 244 S.W.3d 128, 133 -134 (Ky. App. 2008).

We find that the motion to suppress due to an illegal stop was correctly denied. Here, Officer Slark was approached by Cassiano who spoke broken English. Officer Slark understood that a fake bill had been passed at the man's store. Mr. Cassiano also gave a description of the car, the license plate number, and the car's current location. Additionally, Officer Slark believed the incident had just occurred because Cassiano was excited and insistent. These facts were used by the court to deny the motion to suppress. We find that the trial court's findings are supported by substantial evidence; i.e., the testimony of Officers Slark and Hawkins, and thus are not clearly erroneous.

Further, Appellant's theory that Mr. Cassiano was an anonymous tipster also fails. The officers knew who Mr. Cassiano was and in fact kept him available during the apprehension of Appellant. Since Mr. Cassiano was not an anonymous tipster, all Officer Slark needed to stop Appellant's vehicle was an "articulable and reasonable suspicion of criminal activity." *Greene*, *supra*. Based on the above facts, we find that Officer Slark did have an articulable and reasonable suspicion that Appellant's vehicle and its occupants were involved in

criminal activity. The trial court's findings of fact were not clearly erroneous and its conclusions of law were correct. We affirm the denial of the motion.

We also find that the trial court correctly denied the motion to suppress the evidence found in the backpack. Appellant argues that Raleigh, the passenger and owner of the car, could not consent to searching the backpack because it was not hers. We find that the search of the backpack was valid. Raleigh gave unfettered consent to search the car. This included all containers inside the vehicle. It was only after the backpack had been opened and searched that Raleigh stated it was not hers.

Appellant next argues that the trial court erred in allowing habit evidence to be introduced regarding Appellant's use of a backpack. As stated above, the backpack containing the counterfeit money was not retained by the police. In order to connect Appellant to the backpack, the Commonwealth sought to have Rebecca Hicks, Appellant's ex-girlfriend, testify about Appellant's habit of always carrying a backpack with him. Defense counsel objected to this type of evidence, but was overruled.

Kentucky Rule of Evidence (KRE) 406 states that

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Ms. Hicks' testimony was that in the three months they dated, Appellant always carried a backpack with him. Also, she testified that in the backpack Appellant would keep a change of clothing and any important papers he might need. This testimony is supportive of the testimony of the police officers that in addition to the counterfeit money, papers containing Appellant's name and men's clothing were also found in the backpack and indicative of his ownership.

Questions of the admissibility of evidence are addressed to the sound discretion of the lower court and will be reviewed on appeal for an abuse of discretion. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* We find that the testimony of Ms. Hicks, that Appellant "always" carried a backpack which had clothes and important documents in it, was the kind of habit evidence contemplated by KRE 406. There was no abuse of discretion in admitting this evidence and we agree with the trial court's decision.

Appellant next argues that the trial court erred in not permitting Appellant to impeach Ms. Hicks and Mr. Sanchez with evidence of a motive to fabricate their testimony. As to Hicks, Appellant sought to impeach her with specific aspects of a plea agreement.[2] Counsel for Appellant questioned Hicks regarding her plea agreement. She stated that she was pleading guilty to a felony, that she would be receiving a 5-to-10-year sentence, and that she had not yet been

[2] Ms. Hicks pled guilty to charges stemming from the counterfeit investigation surrounding Appellant.

sentenced. Counsel sought to question her regarding a recommendation by the Commonwealth that she receive the 5-year minimum. Counsel was attempting to demonstrate to the jury that Hicks could be giving testimony favorable to the Commonwealth in exchange for the recommended minimum sentence. However, during questioning, Hicks stated that she had not yet been sentenced, did not know what the Commonwealth recommended her sentence to be, and would not know what her ultimate prison term would be until her sentencing.

Appellant's counsel sought to impeach this testimony by playing a tape of Hicks' guilty plea in which she stated that she knew the Commonwealth was recommending the minimum. The Commonwealth objected arguing that Hicks had given a definitive answer to the question and there was no evidence that Hicks was lying about her not knowing the recommendation. The trial court sustained the objection.

In its brief, the Commonwealth argues that Appellant's counsel should have sought to refresh Hicks' memory or laid a foundation for the introduction of her plea agreement. We agree. As stated above, evidence matters are reviewed for abuse of discretion. *English*, *supra*. Here, counsel had other avenues to bring in the Commonwealth's recommendation regarding the 5-year minimum. Also, Hicks testified to the fact that she entered into a plea agreement with the Commonwealth and that she was to be sentenced at a later date. This in and of itself was relevant to show bias. Appellant's counsel should have sought to refresh Hicks' memory, but did not. As such, we find no abuse of discretion and affirm.

Appellant also sought to show bias on behalf of Sanchez. Sanchez did not appear on the first day of trial even though he had been subpoenaed by the Commonwealth. He had left Kentucky and moved to Florida, apparently due to a job offer. The Commonwealth and trial judge contacted Sanchez over a two-day period and told him how important it was that he return to Kentucky and that a warrant could be issued for his arrest if he did not. Sanchez eventually did return and testified at trial.

During cross-examination, counsel asked Sanchez if he had been subpoenaed to come to trial. The Commonwealth objected. Defense counsel wanted to question Sanchez about why he ultimately came back to Kentucky. Counsel wanted to question him and see if he was going to testify favorably for the Commonwealth because he was afraid he would be arrested or deported.

The court went off the record at this point, removed the jury from the room, and put on avowal testimony. The judge, Commonwealth, and defense all questioned Sanchez. Sanchez stated that he did not appear initially because he was new to the country and did not know the laws. He stated that he did not know what a subpoena was, but once he understood its significance, he immediately returned to Kentucky. He also stated that he did not flee to Florida to avoid testifying, but that he left due to a job opportunity. He stated that he was testifying based on his memory of the events and that he was not saying whatever the Commonwealth wanted. He also stated that he was not worried about being deported because he was voluntarily returning to Mexico soon.

The trial judge sustained the Commonwealth's objection because he felt Sanchez was telling the truth and that there was no bias to be revealed by the line of questioning defense counsel wanted to pursue. During avowal, Sanchez was adamant about testifying truthfully and that the reason he did not obey the subpoena was because he did not understand the law.

As stated before, this issue is reviewed for abuse of discretion. *English*, *supra*. The trial judge considered both positions regarding this line of questioning and even put on avowal testimony to flesh it out. We do not find that the lower court acted unreasonably or arbitrarily in this instance. The trial court's ruling was proper.

Appellant next claims that the testimony of Sanchez should have been excluded. Defense counsel only learned of Sanchez's involvement in the incident the day of trial. All evidence, including the police reports, indicated Cassiano was the primary witness and the one who was given the counterfeit bill. It was not until two weeks before trial, when the Commonwealth interviewed Cassiano, that he informed the prosecutor that it was Sanchez who was given the counterfeit bill. The Commonwealth Attorney did not inform defense counsel of this fact and defense counsel never interviewed Cassiano.

Defense counsel moved to exclude Sanchez's testimony under Kentucky Rule of Criminal Procedure (RCr) 7.24. The relevant subsections of this rule require the Commonwealth to permit the defense attorney to inspect all documents and tangible objects in the Commonwealth's possession, including

police reports. Appellant also argues that the Commonwealth has a duty to turn over evidence that may be exculpatory. *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). This also includes impeachment evidence. *Commonwealth v. Bussell*, 226 S.W.3d 96 (Ky. 2007). In essence, Appellant argues that the lack of notice concerning Sanchez was a discovery violation, one in which there exists a reasonable probability that had the defense known of it the result of the trial would have been different. *U.S. v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

The trial court denied the motion to exclude Sanchez's testimony on the basis that RCr 7.24 compels the Commonwealth to turn over all documents and police reports regarding the alleged criminal activity. The Commonwealth did so in this case and RCr 7.24 does not require the Commonwealth to correct mistakes in those documents. The court stated that the mistake in the police report went to the credibility of the evidence and not the admissibility. We agree.

Appellant's trial counsel did not interview Cassiano, the supposed only witness to the actual criminal activity. Counsel was going to question Cassiano based on the information in the police report. Had counsel interviewed Cassiano prior to trial, he would have discovered the identity of Sanchez. We find that the case of *Weaver v. Commonwealth*, 955 S.W.2d 722 (Ky. 1997), is persuasive regarding this issue.

In *Weaver*, the defendant was involved in a drug sting operation in which he sold cocaine to a police informant. He was convicted of first-degree

trafficking in a controlled substance and second-degree persistent felony offender. One issue on appeal was an alleged violation of a discovery order. A pre-trial discovery order required the Commonwealth to provide Weaver with the names and addresses of people known to the Commonwealth who were present at the scene of the criminal activity. The Commonwealth responded that only the informant and police officer were present. During trial, the informant testified that there were three other men, one he identified as Paul Robey, present when he bought the cocaine. It appeared that neither the police officer nor the Commonwealth were aware of these three individuals prior to trial.

At the close of the Commonwealth's case, Weaver's counsel moved for a mistrial because of the violation of the discovery order. The lower court denied the motion. The Kentucky Supreme Court affirmed stating "[a]s a general proposition, the Commonwealth cannot be required to disclose names of persons present at the time of the acts charged in the indictment." *Weaver* at 725 (citing *Lowe v. Commonwealth*, 712 S.W.2d 944 (Ky. 1986)).

The Court went on to state:

> A discovery violation justifies setting aside a conviction "only where there exists a 'reasonable probability' that had the evidence been disclosed the result at trial would have been different." The withholding of the identity of an alleged eye-witness to the crime ordinarily would prejudice a defendant's ability to prepare his defense. However, it developed that Robey was readily available for interview by defense counsel, who chose not to avail himself of the opportunity. (Internal citations omitted).

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> Among the remedial measures available to a trial judge under RCr 7.24(9) is to grant a continuance to enable the defendant to investigate whether the belatedly provided information might be exculpatory. Here, defense counsel had an immediate opportunity prior to presenting his defense to interview Robey and determine whether he had information favorable to the defense. He cannot intentionally decline to avail himself of that opportunity and then claim on appeal that he was prejudiced.

Id. at 725-726.

In the case *sub judice*, Appellant's counsel did not interview Cassiano prior to trial. Nor did he request a continuance once he was informed of Sanchez. Further, "[a] discovery violation justifies setting aside a conviction 'only where there exists a 'reasonable probability' that had the evidence been disclosed the result at trial would have been different.'" *Id.* It is unlikely that the result of the trial would have been different had the defense known of Sanchez prior to trial or had his testimony been excluded. The defense prepared itself based on Cassiano being the witness/victim. We doubt that the questions counsel intended to pose to Cassiano would differ to those posed to Sanchez to such a degree as to change the result of the trial. We affirm the lower court's judgment.

Appellant's final argument is that Juror 135 should not have been excused for cause.

> Under Kentucky Rules of Criminal Procedure (RCr) 9.36(1), a prospective juror should be struck for cause if there is "reasonable ground to believe" that the prospective juror "cannot render a fair and impartial verdict on the evidence . . . ." The decision as to whether to strike a prospective juror for cause "lies within the

> sound discretion of the trial court, and unless the action of the trial court is an abuse of discretion or is clearly erroneous, an appellate court will not reverse the trial court's determination."

Chatman v. Commonwealth, 241 S.W.3d 799, 801 (Ky. 2007) (quoting *Commonwealth v. Lewis*, 903 S.W.2d 524, 527 (Ky. 1995)).

When reviewing this issue, we must give "due deference to the opportunity of the trial court to observe the demeanor of the prospective jurors and understand the substance of their answers to *voir dire* questions . . . ." *Stopher v. Commonwealth*, 57 S.W.3d 787, 797 (Ky. 2001). The video record of this case shows a thorough *voir dire* of the jurors. Juror 135 indicated during *voir dire* that he may have problems with some of the issues being presented. Two bench conferences were held regarding this prospective juror where the trial judge, Commonwealth Attorney, and defense counsel all asked him questions.

Juror 135 stated that he probably would not give the maximum penalty, especially when he discovered there was a drug charge involved. Juror 135 had been previously arrested on marijuana possession charges because he was found with a single seed. He was upset about the arrest and stated he would be lenient toward drug charges. He also stated that the judge presiding over the case had previously sentenced him to probation.

We find that this potential juror was properly excused and the trial judge did not abuse his discretion.

Based on the foregoing, we affirm the judgment and sentence of the Fayette Circuit Court.

ALL CONCUR.

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