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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000213-MR

ANTHONY MALONEY — APPELLANT

v.

APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 12-CR-00168

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, COMBS, AND VANMETER, JUDGES.

VANMETER, JUDGE: Anthony Maloney appeals from a Montgomery Circuit Court judgment entered on his plea of guilty to being a convicted felon in possession of a handgun, carrying a concealed deadly weapon, and alcohol intoxication, third or greater offense. Maloney's plea was conditioned on his right

to appeal the trial court's denial of his motion to suppress evidence. Having reviewed the record and pertinent law, we affirm.

On June 5, 2012, an informant telephoned the Mount Sterling police to report that an intoxicated man was wandering in the street. The informant, who gave the police his name, address, and phone number, described the man as wearing a blue t-shirt and green shorts. Officer Vernon Rogers went to the area to investigate and found Maloney wearing clothing matching the description given by the informant. Maloney was sleeping or passed out on the front porch of a house. He was lying on the porch, which had waist-high railings, in such a way that Officer Rogers could see his legs. When Officer Rogers walked onto the porch and woke Maloney, he smelled alcohol. Maloney told Officer Rogers that he was staying at the residence, which was owned by a relative. Officer Rogers placed Maloney under arrest for alcohol intoxication. After the arrest, he began searching Maloney, who told him he had a handgun in his pocket. Maloney was charged with being a convicted felon in possession of a handgun, one count of carrying a concealed deadly weapon and one count of alcohol intoxication.

Maloney filed a motion to suppress the evidence, arguing that no probable cause existed for the alcohol intoxication arrest because, at the time Officer Rogers approached him, he was asleep on the porch and did not represent a danger or an annoyance to anyone. The trial court denied the motion, reasoning that Maloney matched the description provided by the informant, and that Maloney was a danger to himself, since he had passed out, half on and half off the porch,

and could have wandered back into the street. Maloney entered a conditional guilty plea to the charges, and this appeal followed.

On review of a trial court's decision on a motion to suppress,

> we first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive. Based on those findings of fact, we must then conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law.

Commonwealth v. Neal, 84 S.W.3d 920, 923 (Ky. App. 2002) (internal citations omitted).

Maloney argues that Officer Rogers did not have probable cause to arrest him, and therefore, the statement he made about having a handgun, and the firearm recovered as a result of the search incident to that arrest, should be suppressed. A search incident to arrest "allows an officer to conduct a warrantless post-arrest search of an arrestee's person as well as all areas within the arrestee's immediate control." *Frazier v. Commonwealth*, 406 S.W.3d 448, 457-58 (Ky. 2013).

"A person is guilty of alcohol intoxication when he appears in a public place manifestly under the influence of alcohol to the degree that he may endanger himself or other persons or property, or unreasonably annoy persons in his vicinity." Kentucky Revised Statutes (KRS) 222.202(1). For purposes of KRS 222.202(1), a "public place" is defined as

> a place to which the public or a substantial group of persons has access and includes but is not limited to

> highways, transportation facilities, schools, places of amusements, parks, places of business, playgrounds, and hallways, lobbies, and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence. An act is deemed to occur in a public place if it produces its offensive or proscribed consequences in a public place.

KRS 525.010(3); KRS 222.201.

Maloney argues that Officer Rogers never observed him acting in a dangerous or offensive manner, since Maloney was peacefully sleeping on the porch of a private residence. He further argues that a private porch does not fall within the statutory definition of a "public place." But probable cause to make an arrest need not be based solely on the observations of a police officer; it can be based in part on a tip from an informant. *Williams v. Commonwealth*, 147 S.W.3d 1, 8 (Ky. 2004). "In order to show probable cause justifying a warrantless arrest which is based upon an informant's tip, it must be established that the informant is a reliable source and that substantial parts of the information furnished were confirmed by police before the arrest." *Faught v. Commonwealth*, 656 S.W.2d 740, 741 (Ky. 1983).

The informant in this case provided his name, phone number, and address. The behavior he reported observing, an apparently intoxicated individual wandering around in the street, constitutes dangerous behavior in what is undoubtedly a public place. The informant's statement to the police was substantially confirmed by Officer Rogers when he discovered Maloney, wearing clothes matching the informant's description, passed out on a nearby porch,

smelling of alcohol. Under these circumstances, the officer had probable cause to arrest Maloney, even though he had not personally observed Maloney's behavior in the public thoroughfare.

Maloney further argues, in reliance on a recent United States Supreme Court opinion, which was issued after Maloney's suppression motion had been denied and Maloney had entered his conditional plea, that the officer's entry onto the porch violated his Fourth Amendment rights. In *Florida v. Jardines*, __ U.S. __, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013), the police received an unverified tip that marijuana was being grown in Jardines's house. The police conducted surveillance of the house but did not observe anything incriminating. They then approached the house with a drug-sniffing dog. They stepped on the porch, and the dog alerted to the presence of drugs after sniffing at the base of the front door. Based on the dog's behavior, the police obtained a warrant to search the house and recovered contraband.

The Supreme Court held that the use of a trained police dog to investigate the porch was a "search" within the meaning of the Fourth Amendment, and that consequently the police had conducted an impermissible warrantless search unsupported by probable cause. The Court explained that the porch of a house is part of its curtilage, and therefore entitled to Fourth Amendment protections. These protections are waived when the owner gives an implicit license to enter; for instance, visitors typically may "approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation

to linger longer) leave." *Jardines*, 133 S.Ct. at 1415. Similarly, "a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.'" *Id*. at 1416 (quoting *Kentucky v. King*, 563 U.S. __, __, 131 S.Ct. 1849, 1862, 179 L.Ed.2d 865 (2011)). Allowing a trained police dog to explore an area around the home in the hopes of discovering incriminating evidence, however, goes beyond the scope of this implied license. *Id.*

In this case, Officer Rogers did enter the curtilage of the home, an area protected by the Fourth Amendment, when he stepped onto the porch, but his actions were well within the limited scope of the implied license. He did not attempt to search the porch for incriminating evidence; he simply spoke to Maloney. When he smelled alcohol, the informant's tip was corroborated and Officer Rogers had probable cause to arrest Maloney and conduct a search of his person.

The trial court's decision to deny the suppression motion was correct as a matter of law, and we affirm its judgment.

ALL CONCUR.

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