

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-000045-MR

JOHN WILLIAM WADE, JR.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE GARY D. PAYNE, JUDGE  
INDICTMENT NO. 03-CR-00647

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
VACATING AND REMANDING

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BEFORE: BARBER, HENRY, AND JOHNSON, JUDGES.

HENRY, JUDGE: John William Wade was sentenced to five (5) years' imprisonment by the Fayette Circuit Court in a judgment entered on December 17, 2003 following his conditional guilty plea to charges of possession of a controlled substance first degree and being a persistent felony offender second degree. Wade appeals from the trial court's July 21, 2003 order denying his motion to suppress evidence following a July 16, 2003 suppression hearing.

The facts of the case, as testified to in the suppression hearing at issue, are as follows: On April 18, 2003, at approximately 8:50 p.m., Officers Richard Rice and William Persley of the Lexington-Fayette Urban County Police Department were driving down Race Street in the east end area of Lexington<sup>1</sup> when they passed and observed two males sitting in a parked white vehicle looking at each other face-to-face. Officer Rice turned his car around and then pulled behind the white vehicle for further investigation. The two officers then stepped out of their car and approached the white vehicle on foot.

Officer Rice testified that Appellant Wade stepped out of the white vehicle's driver's side, moved to the front of the vehicle, and opened its hood. He further testified that a Mr. Bobbitt stepped out of the passenger's side of the vehicle, stumbled and fell, and then attempted to walk away from the scene. Officer Persley approached Bobbitt, while Officer Rice approached Wade.

Officer Rice then testified that he noted a strong smell of marijuana coming from inside the white vehicle and also from Wade. According to Officer Rice, Wade then told him that he had been smoking marijuana. Officer Rice further testified that Wade's eyes were glassy and that he was evasive and nervous in his speech and actions. Officer Rice also indicated that

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<sup>1</sup> Officer Rice testified at the suppression hearing that this part of Lexington was known as a "high drug area."

Wade told him that he had come there to work on his aunt's car, but he did not know how the car had gotten there. The engine of the car was warm, however, and the keys were in the ignition. Officer Rice then testified that he did not want Wade to drive away, so he arrested him for public intoxication.

Officer Rice next testified that, while talking to Wade, he looked in the white vehicle "for my safety." Officer Rice recalled that the vehicle was parked under a street light, but he did not believe that it had gotten dark yet. When asked if he had used a flashlight to look in the vehicle, Officer Rice testified that he may have used a flashlight, but he believed that he did not use one until he began his detailed search of the vehicle. When Officer Rice looked in the vehicle, he noticed a plastic baggie containing a white substance in the driver's side floorboard. Officer Rice removed the baggie from the vehicle and determined that it contained crack cocaine. Officer Rice then testified that Mr. Bobbitt told him that he was there to purchase crack cocaine from Wade, but the transaction had been interrupted by the police officers.

Wade also testified at the suppression hearing, but gave a somewhat different account of the events of that evening. He testified that the white vehicle was broken down, and that he was waiting in front of it for a tow truck when the police arrived. Wade further testified that the vehicle belonged to a

friend named Brenda Jackson, and that he had not been in it or driven it. He also testified that he did not tell Officer Rice that he had been smoking marijuana and added, "I don't smoke marijuana."

Following his arrest, Wade was indicted on counts of trafficking in controlled substance first degree,<sup>2</sup> public intoxication, and being a persistent felony offender second degree. He entered a plea of not guilty to the indictment. Counsel for Wade later made an oral motion to suppress evidence that was heard at the July 16, 2003 suppression hearing.

At the suppression hearing, Officer Rice and Wade testified as set forth above. Counsel for Wade then argued that there was a lack of probable cause to search the white vehicle because a factual dispute existed as to whether Wade was ever in the vehicle, as to whether a marijuana odor could have been coming from the vehicle, and as to whether Officer Rice could have seen the plastic baggie in the vehicle without the use of a flashlight. The Commonwealth argued that Officer Rice was allowed to search the vehicle incident to Wade's arrest for public intoxication and also argued that Officer Rice was justified in searching the vehicle because he saw the baggie in plain view. The trial court then denied the motion to suppress and entered an order to that effect.

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<sup>2</sup> This count was later amended to possession of controlled substance first degree.

On November 12, 2003, Wade entered a conditional guilty plea to the possession and persistent felony offender counts of the indictment, with the public intoxication count being dismissed. The ruling on the suppression motion was preserved for appeal. The trial court accepted the plea and entered a judgment sentencing Wade to five (5) years' imprisonment. This appeal followed.

Wade makes the following arguments on appeal: (1) the trial court erred when it failed to make any findings of fact to support its denying of Wade's motion to suppress as required by RCr<sup>3</sup> 9.78; (2) Officer Rice was not justified in arresting Wade for public intoxication; (3) the vehicle search by Officer Rice was not justified under the search incident to arrest exception to the search warrant requirement; (4) the vehicle search by Officer Rice was not justified under the plain view exception to the search warrant requirement; and (5) the vehicle search by Officer Rice was not justified under the automobile exception to the search warrant requirement.

As an initial matter, we can find no indication in the record that Wade ever raised an objection or made a motion to the trial court relating to a lack of sufficient evidence to support Wade's arrest for public intoxication. This certainly is an argument that could have been raised at the suppression

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<sup>3</sup>Kentucky Rules of Criminal Procedure.

hearing. "An appellate court will not consider a theory unless it has been raised before the trial court and that court has been given an opportunity to consider the merits of the theory." Shelton v. Commonwealth, 992 S.W.2d 849, 852 (Ky.App. 1998) (citing Hopewell v. Commonwealth, 641 S.W.2d 744, 745 (Ky. 1982)). "Regardless of the merits of this argument, these grounds, being different from those asserted in the court below, are not properly preserved for appellate review." Daugherty v. Commonwealth, 572 S.W.2d 861, 863 (Ky. 1978). Accordingly, we find that this issue is unpreserved for our review.

We can also find no indication in the trial court record that Wade ever raised an objection or made a motion relating to any failure of the trial court to provide sufficient findings of fact in accordance with RCr 9.78. Precedent also allows us to consider this issue as unpreserved for our review. See Cooper v. Commonwealth, 577 S.W.2d 34, 41 (Ky. 1979) (overruled on other grounds by Mash v. Commonwealth, 769 S.W.2d 42 (Ky. 1989)); see, e.g., Blankenship v. Commonwealth, 554 S.W.2d 898, 903 (Ky.App. 1977). With this said, however, we are compelled to consider this contention in light of the requirements of RCr 9.78 and the standard of review that we must employ in examining denials of motions to suppress.

"An appellate court's standard of review of the trial court's decision on a motion to suppress requires that we first

determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive." Commonwealth v. Neal, 84 S.W.3d 920, 923 (Ky.App. 2002) (citing RCr 9.78); see also Commonwealth v. Banks, 68 S.W.3d 347, 349 (Ky. 2001) ("With regard to the factual findings of the trial court 'clearly erroneous' is the standard of review for an appeal of an order denying suppression.") (citing Ornelas v. United States, 517 U.S. 690, 691, 116 S. Ct. 1657, 1659, 134 L. Ed.2d 911 (1996)). "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." Id. (citing Adcock v. Commonwealth, 967 S.W.2d 6, 8 (Ky. 1998); Commonwealth v. Opell, 3 S.W.3d 747, 751 (Ky.App. 1999)).

The problem with which we are met here is the record's lack of any findings of fact made by the trial court as to the evidence presented at the suppression hearing. RCr 9.78 clearly provides that, upon a motion to suppress, "the trial court shall conduct an evidentiary hearing outside the presence of the jury and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling." The provisions of this rule are mandatory. Moore v. Commonwealth, 634 S.W.2d 426, 433 (Ky. 1982), cert. denied, 494 U.S. 1060, 110

S. Ct. 1536, 108 L. Ed.2d 774 (1990); see also Brown v. Commonwealth, 564 S.W.2d 24, 31 (Ky.App. 1978).

Here, the trial record contains only a general oral statement from the trial court agreeing with the position of the Commonwealth following the testimony and arguments made at the suppression hearing. The record also contains a written order denying the motion to suppress, but the order contains no factual predicate for the ruling. We are not satisfied that these items alone comply with the mandatory requirements of RCr 9.78. Moreover, we are simply incapable of reviewing factual findings of a trial court for error when no factual findings have been entered into the record. See Lee v. Commonwealth, 547 S.W.2d 792, 794 (Ky.App. 1977).

Consequently, in the case sub judice, we hold that the trial court failed to enter into the record the necessary findings resolving the essential issues of fact presented at the suppression hearing as required by RCr 9.78. Accordingly, the order of the Fayette Circuit Court denying suppression of the evidence is vacated, and this matter is remanded so that the trial court can review the record of the suppression hearing previously conducted and enter into the record specific findings of fact and conclusions as to whether the evidence taken as a result of Officer Rice's search of the white vehicle should be suppressed. See Neal, 84 S.W.3d at 925; Lee, 547 S.W.2d at 794.

ALL CONCUR.

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