RENDERED: JUNE 3, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000925-MR

GREGORY HENDERSON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NOS. 03-CR-003036 AND 04-CR-000653

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM, KNOPF, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Gregory Henderson brings this appeal from an April 8, 2004, judgment of the Jefferson Circuit Court upon a jury verdict finding him guilty of first-degree trafficking in a controlled substance, public intoxication, and with being a first-degree persistent felony offender. We affirm.

On November 18, 2003, the Jefferson County Grand Jury indicted appellant upon first-degree trafficking in a controlled substance and alcohol intoxication in a public place. On February 24, 2004, the Jefferson County Grand Jury indicted

appellant with being a first-degree persistent felony offender. The matter went to a jury trial on March 5, 2004. The jury ultimately returned a verdict of guilty upon all indicted offenses, and appellant was sentenced to a term of twelve years' imprisonment. This appeal follows.

Appellant first contends the trial court committed reversible error by admitting the testimony of Detective Robert O'Neal. Detective O'Neal was called by the Commonwealth as an expert witness in the field of narcotics. Detective O'Neal opined that appellant was trafficking in cocaine based upon the amount of crack cocaine found (2.68 grams) and based upon the fact that appellant had no paraphernalia for use of the cocaine in his possession. Appellant objected to this testimony "on the basis that Detective O'Neal was not listed in discovery nor did the defense have notice as to what the expert's testimony would be." While it is true that the Commonwealth gave notice of intent to call an expert witness in the filed of narcotics, appellant contends that it failed to specifically identify Detective O'Neal as an expert witness.

Appellant seems to be arguing that such notice is required under Ky. R. Crim. P. (RCr) 7.24. In so doing, appellant relies upon Barnett v. Commonwealth, 763 S.W.2d 119 (Ky. 1988) as authority. We view Barnett as distinguishable. In that case, the Commonwealth tendered a report by a testifying

expert witness; however, the report was deficient as it failed to include a "significant piece of . . . the expert's opinion . . . ." In the case at hand, appellant makes no argument that Detective O'Neal possessed results or reports of physical/mental examinations or of scientific tests or experiments. Upon a reading of RCr 7.24(1)(b), it is clear that the Commonwealth need only disclose "results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with a particular case, or copies thereof, that are known by the attorney for the Commonwealth . . . ." Thus, we do not believe RCr 7.24(1)(b) mandated disclosure of Detective O'Neal as an expert witness.

Additionally, appellant argues that Detective O'Neal was not qualified as an expert witness and that the trial court erred by failing to hold a Daubert hearing on the reliability of Detective O'Neal's expert testimony. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). We, however, observe that defense counsel did not object to Detective O'Neal's testimony upon this basis, and the trial court did not have the opportunity to rule upon this issue. Where a party fails to specifically object to the reliability of the expert testimony and request a Daubert hearing, we are of the opinion that the issue of the reliability of expert testimony has been waived. See R. Lawson, The

Kentucky Evidence Law Handbook §6.20[6] (4th ed. 2003). Upon the whole, we hold the trial court did not commit reversible error by admitting the expert testimony of Detective O'Neal.

Appellant next asserts the trial court committed reversible error by denying his motion to suppress evidence. Appellant sought to suppress as evidence the cocaine found in his mother's automobile. The events leading to the search and seizure of the cocaine from his mother's automobile are rather straight forward.

The police responded to a call concerning several people in a rear parking lot of Turners Liquor Store and Tavern. When the police officers arrived, they observed appellant leaning into a car. The car was later determined to be owned by his mother. It appears that appellant stepped away from the vehicle and tried to walk away from the police officers. The officers testified that appellant appeared to be intoxicated and was acting nervously. The officers further testified that appellant appeared "agitated and belligerent in a loud voice." The keys were in the ignition of the automobile, and appellant was questioned concerning the ownership of the automobile. Appellant denied owning or possessing the automobile several times and even suggested that he observed a person park the automobile sometime in the past. During jury trial, appellant's

mother testified that she had given him permission on the night in question to drive the automobile.

The trial court concluded that appellant did not have standing to object to the search of the automobile. Appellant contends the trial court committed error by concluding that he did not have standing to object to the search.

Although there is no Kentucky case directly on point, we are persuaded that an individual has standing to challenge the search of a motor vehicle even though he does not own that vehicle if he had permission from the owner to drive the vehicle. See Maysonet v. State of Texas, 91 S.W.3d 365 (Tex.Ct.App. 2002). Here, appellant had permission from his mother to drive the vehicle. If our inquiry ended here, we would have to conclude that appellant had standing. However, we think it pivotal that appellant disavowed ownership or possession of the vehicle to the police officers.

It is generally recognized that "disclaimer by a person of ownership of property results in an abandonment thereof or the loss of a reasonable expectation of privacy therein, so that such person cannot challenge a search or seizure . . . ." 79 C.J.S. Search and Seizures §38 (1995). See People v. Exum, 382 Ill. 204, 47 N.E.2d 56 (1943); Bevans v. State, 180 Md. 443, 24 A.2d 792, (1942). Under the facts of this case, we are of the opinion that appellant abandoned any

expectation of privacy in the automobile by his disclaimer of possession thereof and thus, cannot challenge the constitutionality of the search and seizure. Accordingly, we hold the trial court did not commit reversible error by denying appellant's motion to suppress the cocaine seized from his mother's vehicle.

Appellant's final argument is that the trial court committed error by denying his motion for directed verdict of acquittal upon first-degree trafficking in a controlled substance. A directed verdict of acquittal is proper if under the evidence as a whole it would have been clearly unreasonable for a jury to have found appellant guilty of first-degree trafficking in a controlled substance. Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991).

First-degree trafficking in a controlled substance is codified in Kentucky Revised Statutes (KRS) 218A.1412(1) and reads as follows:

> A person is guilty of trafficking in a controlled substance in the first degree when he knowingly and unlawfully traffics in: a controlled substance, that is classified in Schedules I or II which is a narcotic drug; a controlled substance analogue; lysergic acid diethylamide; phencyclidine; a controlled substance that contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers; gamma hydroxybutyric acid (GHB), including its salts, isomers, salts of isomers, and analogues; or flunitrazepam,

> including its salts, isomers, and salts of isomers.

The term trafficking is defined is KRS 218A.010(28) as meaning "to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance." Appellant particularly maintains there was insufficient direct evidence of intent to traffic and the circumstantial evidence of intent introduced through Detective O'Neal was insufficient to sustain the conviction. We disagree.

The facts developed at trial indicate that appellant was leaning into his mother's vehicle when the police officers arrived and there were other people in the parking lot. Appellant was acting nervous and tried to avoid the police officers. The police seized 2.68 grams of cocaine from his mother's automobile and seized $187.00 in cash from appellant. Of particular significance is that appellant possessed no paraphernalia with which to use the cocaine seized from the automobile. We think the above evidence coupled with Detective O'Neal's expert testimony was sufficient to induce a reasonable juror to find appellant guilty of first-degree trafficking in a controlled substance. In sum, we are of the opinion the trial court did not commit reversible error by denying appellant's

motion for a directed verdict of acquittal upon first-degree trafficking in a controlled substance.

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

BUCKINGHAM, JUDGE, CONCURS.

KNOPF, JUDGE, CONCURS AND FILES SEPARATE OPINION.

KNOPF, JUDGE, CONCURRING: I agree with the reasoning and the result of the majority opinion. However, I share the trial court's concern about the Commonwealth's conduct in this case. The majority correctly notes that RCr 7.24 does not specifically require the Commonwealth to disclose the names and opinions of experts that it intends to call at trial. But RCr 7.24(1)(b) does require that, on motion, the Commonwealth must produce "results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case."

The trial court's pre-trial order did require disclosure of expert witnesses. Where there is an order requiring the Commonwealth to disclose the substance of expert testimony, the defendant is entitled under RCr 7.24 to be confronted with the fact that this opinion would be presented against him before the trial started so that he has a reasonable

opportunity to defend against the premise.[1] Pre-trial disclosure of the substance of expert testimony in a criminal trial is a matter of fundamental fairness that goes to the very heart of the adversarial process. Where the Commonwealth is not required to comply with the court's pre-trial discovery orders, the result is trial by ambush.[2]

In this case, the Commonwealth's response that it intended to call "an expert in the field of narcotics" was so vague that it provided no meaningful notice to Henderson regarding the substance of Detective O'Neil's testimony. However, the Commonwealth did provide notice that it intended to call a witness. Despite the clearly inadequate notice, Henderson's counsel did not move for additional discovery about the proposed expert witness. Rather, he waited until trial to challenge the sufficiency of the Commonwealth's response.

Furthermore, when faced at trial with the Commonwealth's inadequate response, the trial judge had the discretion to: 1) grant a continuance; 2) exclude material not disclosed; or 3) issue "any other order as may be just under the

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[1] Barnett v. Commonwealth, 763 S.W.2d 119, 123 (Ky. 1988).

[2] Id. *See also* Vires v. Commonwealth, 989 S.W.2d 946, (Ky. 1999), and James v. Commonwealth, 482 S.W.2d 92 (Ky. 1972).

circumstances".[3] Henderson only asked for exclusion of the evidence, but he did not attempt to set out how Detective O'Neil's testimony would be otherwise inadmissible. In hindsight, Henderson now presents several reasonable bases on which he could have challenged the admissibility of the evidence, but he presented none of these grounds to the trial court. While this is a close case, I would conclude that the trial court did not abuse its discretion by denying the motion to exclude. And since Henderson failed to ask for any other remedy short of exclusion of the evidence, he has waived any claim of error in that regard.

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[3] RCr 7.24(9); Neal v. Commonwealth, 95 S.W.3d 843, 848 (Ky. 2003); Berry v. Commonwealth, 782 S.W.2d 625, 627-28 (Ky. 1990).