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Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-002115-MR

BRUCE PLUMB, JR. APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES ISHMAEL, JUDGE
ACTION NO. 03-CR-00505

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DYCHE, KNOPF, AND TACKETT, JUDGES.

KNOPF, JUDGE: Bruce Plumb, Jr., appeals from a judgment of the Fayette Circuit Court, entered September 8, 2004, convicting him pursuant to his conditional guilty plea of the following crimes: being a felon in possession of a firearm,[1] first-degree

[1] KRS 527.040.

possession of a controlled substance,[2] and driving a motor vehicle under the influence of intoxicants (DUI).[3] The trial court probated Plumb's five-year sentence for a period of five years. Plumb's guilty plea reserved his right to seek review of the trial court's rulings refusing to suppress evidence allegedly derived from an illegal motor vehicle stop, refusing to suppress drug evidence allegedly rendered unreliable by an inadequate chain of custody, and granting the Commonwealth's motion to introduce evidence concerning Plumb's alleged prior drug dealing. Convinced that Plumb is entitled to relief on none of these grounds, we affirm.

Shortly after 1:00 a.m. on March 1, 2003, an officer of the Lexington Division of Police traveling southbound on the New Circle Road between North Broadway and Bryan Station Road observed a northbound white Isuzu traveling at what appeared to be an excessive speed. The officer's radar indicated that the Isuzu was going fifty-seven miles per hour in a forty-five mile-per-hour zone. The officer promptly crossed the median, pursued the Isuzu, and pulled it over as it approached Russell Cave Road. When the driver, Plumb, who smelled of alcohol and otherwise appeared intoxicated, failed all six field sobriety tests, the officer arrested him for DUI. In the ensuing search,

[2] KRS 218A.1415.

[3] KRS 189A.010.

the officer found, among other evidence, what eventually proved to be one small plastic packet and three small paper bindles of cocaine in the pocket of Plumb's jacket and, in the Isuzu's glove compartment, a loaded .38 pistol.

In May 2003, a Fayette County grand jury indicted Plumb for being a felon in possession of a handgun, for trafficking in a controlled substance, for possession of marijuana, for possession of drug paraphernalia, for DUI, for various traffic violations, and for being a second-degree persistent felon. Plumb moved to suppress the evidence the arresting officer discovered and on appeal contends that the trial court erred by denying the motion because the officer lacked a sufficient basis for the vehicle stop. We disagree.

An officer with probable cause to believe that a traffic violation has occurred may stop the suspected vehicle.[4] Plumb maintains that the officer in this case did not have probable cause to believe that he (Plumb) was speeding because the radar upon which the officer relied may have malfunctioned or may have been registering the speed of some vehicle other than Plumb's. As Plumb concedes, however, in Honeycutt v. Commonwealth,[5] Kentucky's highest court recognized the general

[4] Wilson v. Commonwealth, 37 S.W.3d 745 (Ky. 2001); United States v. Burns, 298 F.3d 523 (6th Cir. 2002).

[5] 408 S.W.2d 421 (Ky. 1966).

reliability of police radar detectors and held that radar evidence in a particular case may be deemed accurate if there is evidence that the device had been recently tested and that the operator had been adequately trained.

At the suppression hearing in this case, the officer testified that his squad car was equipped with a Custom HR 12 moving radar which was capable of registering the speed of oncoming cars even when the squad car was moving. The officer had tested the device at the beginning of his shift that night and had determined, by means of a built-in test, that the display lights were functioning and, by means of dual tuning forks, that the device was reading accurately. The dual-tuning-fork test is widely accepted as adequate.[6] The officer repeated these tests soon after Plumb's arrest and again confirmed that the device was working properly. The officer also testified that in his fourteen years as a policeman he had been extensively trained and had acquired considerable experience in the use of radar detectors. Finally, the officer testified that generally the radar registered the speed of the nearest vehicle. On the morning of Plumb's arrest, the New Circle Road traffic had been moderate, he said, but at the time the radar settled on the fifty-seven miles-per-hour reading the white Isuzu had been

[6] Thomas J. Goger, *Proof, by Radar or Other Mechanical or Electronic Devices, of Violation of Speed Regulations,* 47 ALR3d 822 (1973).

the nearest vehicle to him and was traveling by itself. The radar confirmed, moreover, the officer's unaided observation that the Isuzu was speeding.

In the absence of any countervailing evidence, this is more than substantial proof supporting the trial court's finding that the radar accurately measured the Isuzu's speed. That finding is thus conclusive.[7] That speed, in turn, amounted to probable cause of a traffic violation, which justified the stop of Plumb's vehicle. Plumb, therefore, is not entitled to relief on this ground.

In a second suppression proceeding, Plumb moved to suppress the cocaine seized from his coat pocket on the ground that the items tested at the state crime lab may have been contaminated or may not have been the items removed from Plumb's possession. As Plumb notes, to ensure that evidence is not shuffled or tainted during testing the Commonwealth is required to establish a chain of custody from the time of seizure until introduction of the evidence at trial. Even with respect to fungible materials such as cocaine, however,

> it is unnecessary to establish a perfect chain of custody or to eliminate all possibility of tampering or misidentification, so long as there is persuasive evidence that "the reasonable probability is that the evidence has not been altered in any material respect." . . .

[7] RCr 9.78.

> Gaps in the chain normally go to the weight of the evidence rather than to its admissibility.[8]

Here, Plumb has not identified any gaps in the chain of custody. On the contrary, at the suppression hearing the arresting officer identified a small plastic bag with white powder and three small paper bindles as the packages he had removed from Plumb's pocket, sealed in an evidence envelope, and submitted for testing at the crime lab. A chemist from the lab identified the same evidence envelope and the same four packages. She testified that the contents of all four of the packages had tested positive for cocaine.

Plumb contends that the arresting officer might have contaminated the contents of the plastic package when he field-tested it, because he could not remember where he obtained the tiny scoop he used. As the trial court observed, however, even if this fact be thought to raise more than a de minimis possibility of contamination, the officer did not field-test the contents of the paper bindles and so could not have contaminated them. They too tested positive for cocaine and would have been sufficient to support the trafficking charge against Plumb.

Plumb next argues, however, that the bindles, too, are suspect because when the officer weighed them, including their

[8] Rabovsky v. Commonwealth, 973 S.W.2d 6, 8 (Ky. 1998) (citations omitted).

packaging, he obtained masses of .2, .2, and .1 grams, whereas the lab chemist obtained masses without the packaging of 210, 227, and 181, milligrams respectively.[9] If both individuals weighed the same, unadulterated bindles, Plumb asks, how could the masses without packaging be more than those with packaging? As the chemist explained, however, the triple-beam balance at the police station is far less accurate than the electronic balance at the lab so that minor discrepancies such as these are unavoidable and very common. Together with the officer's and the chemist's positive identification of the bindles, the measurements were close enough, the trial court found, to be persuasive evidence that the bindles had not been altered in any material respect. We are (willingly) bound by this finding, which is supported by substantial evidence.[10] Accordingly, the trial court did not err by denying Plumb's motion to suppress the cocaine.

Finally, Plumb contends that the trial court abused its discretion by granting the Commonwealth's motion to introduce KRE 404(b) evidence of Plumb's prior drug dealing. That rule provides that evidence of other crimes or wrongs is not admissible as proof of the defendant's character or his criminal disposition, but that it may be admissible "[i]f

[9] One-tenth of a gram equals 100 milligrams.

[10] RCr 9.78.

offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Plumb, who was charged with trafficking in cocaine, denied knowing how the four small packages of cocaine had gotten into his jacket pocket. The Commonwealth sought to introduce testimony by Plumb's former girlfriend that between December 2002 and the night of Plumb's arrest on the first of March 2003 she had on several occasions observed Plumb sell small packets of cocaine to employees and patrons of various Lexington bars. This evidence should be admissible, the Commonwealth argued, because it tended to show that Plumb knew the cocaine was in his pocket and that it was there because he intended to sell it. Plumb concedes that the girlfriend's testimony concerning alleged transactions on the night of the arrest would be admissible, but maintains that the trial court abused its discretion by admitting her evidence of earlier transactions because that evidence was too remote and too prejudicial.

Evidence of other crimes is admissible under KRE 404(b)

> only if it satisfie[s] the three-part test of *Bell v. Commonwealth,* Ky., 875 S.W.2d 882 (1994), viz: (1) Is the evidence relevant? (2) Does it have probative value? (3) Is its

probative value substantially outweighed by its prejudicial effect?[11]

In Walker v. Commonwealth,[12] our Supreme Court held that evidence of prior drug sales is indeed relevant to a trafficking charge because such evidence tends to show that the defendant intended to sell the drugs found in his possession.

The other-crime evidence has probative value if it provides sufficient assurance that the other crime actually occurred.[13] Here the girlfriend's eyewitness testimony would meet this standard.

Even if the other-crime evidence is relevant for a proper purpose and is sufficiently probative, however, such evidence is inherently prejudicial and should be excluded if the prejudice substantially outweighs its probative value.[14] Factors bearing on this balance include the similarity between the other crime and the charged crime, the time between them, whether the other crime was particularly egregious, whether the Commonwealth has available to it other means of proof which would reduce the

[11] Purcell v. Commonwealth, 149 S.W.3d 382, 399-400 (Ky. 2004).

[12] 52 S.W.3d 533 (Ky. 2001).

[13] Purcell v. Commonwealth, *supra.*

[14] Bell v. Commonwealth, 875 S.W.2d 882 (Ky. 1994).

need for the other-crime evidence, and the nature of any limiting instruction provided by the trial court.[15]

Here, of course, the trial court had no occasion to provide a limiting instruction, but the other factors do not suggest that the trial court abused its discretion. The other crimes were very similar to the charged crime and were not so egregious as to shock or appall the jury. In United States v. Myers,[16] moreover, the Sixth Circuit did not consider other drug sales more than six months apart from the charged sale too remote. Here the other sales were only two or three months apart from the charged trafficking. It is true that the Commonwealth's need for the earlier-sale evidence was not as strong in this case as in some others, since the girlfriend was apparently prepared to testify about a sale on the night of the arrest and since the bindles seized from Plumb's jacket appeared packaged for distribution. There may also have been evidence that at the time of the arrest Plumb was in possession of a large amount of cash. This evidence was not so compelling, however, as to render the earlier-sale evidence merely cumulative. Notwithstanding the arguably reduced need for the other-crime evidence, given its substantial probativeness we are

[15] Walker v. Commonwealth, *supra;* United States v. Myers, 123 F3d 350 (6th Cir. 1997).

[16] *supra.*

not persuaded that the trial court abused its discretion by deciding to admit it.

In sum, the officer validly stopped Plumb for speeding; the Commonwealth's chain of custody adequately accounted for the cocaine seized from him; and the trial court permissibly decided to admit evidence of Plumb's prior drug sales. Accordingly, we affirm the September 8, 2004, judgment of the Fayette Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Herbert T. West
Fayette County Legal Aid
Lexington, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Bryan D. Morrow
Assistant Attorney General
Frankfort, Kentucky