RENDERED: NOVEMBER 30, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002016

GARRY MCCLAIN — APPELLANT

v.

APPEAL FROM SPENCER CIRCUIT COURT
HONORABLE REBECCA OVERSTREET, JUDGE
ACTION NO. 06-CR-00002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND NICKELL, JUDGES; AND GUIDUGLI, SENIOR JUDGE.[1]

NICKELL, JUDGE: Garry McClain ("McClain") entered a conditional guilty plea pursuant to Kentucky Rules of Criminal Procedure (CR) 8.09 in the Spencer Circuit Court to the charges of trafficking in a controlled substance, first degree, first offense (methamphetamine);[2] trafficking in marijuana, less than eight ounces, first offense;[3]

[1] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5) (b) of the Kentucky Constitution and KRS 21.580.

[2] Kentucky Revised Statutes (KRS) 218A.1412, a Class C felony.

[3] KRS 218A.1421, a Class A misdemeanor.

operating a motor vehicle under the influence of drugs or alcohol, first offense;[4] failure to wear a seatbelt;[5] and no insurance.[6] He received a sentence of seven years. Within his guilty plea, McClain reserved the right to appeal the circuit court's denial of his motion to suppress evidence. It is from this denial that he appeals to this Court. For the following reasons, we affirm.

On October 26, 2005, at approximately 7:02 p.m., troopers from the Kentucky State Police[7] established a traffic safety checkpoint on U.S. 31E at the intersection of Max Rouse Road in Spencer County, Kentucky. The officers stopped every vehicle approaching the roadblock for the stated purposes of reducing accidents, detecting operators who were driving under the influence of drugs or alcohol, conducting vehicle inspections, checking licensing compliance, and detecting any other attendant violations.

McClain was stopped at the checkpoint at approximately 9:00 p.m. Trooper Robert Mitchell Harris ("Trooper Harris") testified he observed that McClain had bloodshot eyes and detected a strong odor of marijuana emanating from McClain's vehicle. Upon request, McClain and his female passenger exited the vehicle and Trooper Harris observed a handgun between the front passenger seats.

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[4] KRS 189A.010, a Class B misdemeanor.

[5] KRS 189.125, a violation.

[6] KRS 304.39-080, a Class B misdemeanor.

[7] A review of the record indicates two troopers were conducting the checkpoint. They were accompanied by a deputy from the Spencer County Sheriff's Office.

Upon exiting the vehicle, McClain was unsteady on his feet. He handed Trooper Harris a container holding seven burnt marijuana cigarettes. The trooper then searched McClain's vehicle and recovered a leather pouch containing seventeen individually wrapped plastic baggies of methamphetamine and approximately two ounces of marijuana. Based upon statements from McClain's passenger[8] that she believed McClain was "cooking" methamphetamine at his residence and that he had other narcotics in his home, Trooper Harris requested and received from McClain, permission to search his residence which was located a short distance away from the checkpoint on Max Rouse Road. At that point, the officers closed the safety checkpoint and went to McClain's residence to search the premises. No further contraband was located at McClain's home.

A Spencer County grand jury returned an indictment naming McClain on January 5, 2006, charging him with the aforementioned drug and traffic offenses. The case was scheduled for a jury trial on July 19, 2006. However, on the morning of trial, McClain filed a motion to suppress the evidence seized from him at the traffic safety checkpoint. The motion was heard that same morning. McClain argued the traffic safety checkpoint was improperly executed in that it failed to meet the visibility requirements set forth in General Order OM-E-4.[9] He further alleged a violation of General Order

[8] McClain's passenger was found to have a quantity of marijuana in her possession and was placed under arrest for same. The record is unclear as to whether her statements were made prior to her arrest or subsequent thereto, but for purposes of this appeal, the timing is irrelevant.

[9] General Order OM-E-4 is an internally created Kentucky State Police policy setting forth the protocol for establishing and conducting traffic safety checkpoints. *See Commonwealth v. Bothman*, 941 S.W.2d 479 (Ky.App. 1996). According to the written policy, checkpoints are to

OM-B-19, a wholly separate policy statement, which requires that all "enforcement activities" be videotaped if the police vehicles used in such activities are equipped with video equipment.[10]

McClain, Trooper Harris, and a private investigator[11] were the only witnesses to testify at the suppression hearing. Following the testimony and argument of counsel, the trial court denied the motion to suppress the evidence. McClain then entered a conditional guilty plea to all counts of the indictment, reserving the right to appeal the trial court's denial of his motion to suppress. On August 24, 2006, McClain was sentenced to seven years' imprisonment, which was probated for a period of five years. This appeal followed.

Before this Court, McClain first contends the trial court erred in finding the traffic safety checkpoint was properly conducted because there was no media announcement preceding establishment of the checkpoint as required under General Order OM-E-4(A)(8).[12] However, our review of the record convinces us that the traffic

be "established on roadways with clear visibility in all directions of travel."

[10] Trooper Harris testified his cruiser was equipped with video recording equipment. However, he testified he manually turned off the equipment at the beginning of the traffic safety checkpoint because the location of his cruiser did not afford a view of the vehicles being stopped and the anticipated length of the checkpoint could exceed the recording capability of the videotape. There was no dispute that traffic safety checkpoints are considered "enforcement actions."

[11] The investigator was employed by the defense to photograph the location of the traffic safety checkpoint. His testimony was limited to authentication of several photographs he had taken of the scene on two different dates following the night of McClain's arrest.

[12] General Order OM-E-4(A)(8) states as follows: "Media announcements shall be made periodically to inform the public that traffic safety checkpoints would be established in the area. The specific locations and times need not be announced."

safety checkpoint passed constitutional muster because it was established in such a manner as to avoid unconstrained discretion by the police and was reasonably calculated to protect public safety. *Commonwealth v. Bothman*, 941 S.W.2d 479 (Ky.App. 1996). In *Bothman*, we held that technical noncompliance with departmental guidelines, such as General Order OM-E-4, "does not inexorably lead to the conclusion that the establishment of the checkpoint was violative of the constitutions of the United States or of the Commonwealth."

In support of his argument, McClain cites us to *Monin v. Commonwealth,* 209 S.W.3d 471 (Ky.App. 2006), *discretionary review denied*, and urges reversal of the trial court's determination. In *Monin*, a panel of this Court found a traffic safety checkpoint to have been conducted in violation on General Order OM-E-4, in small part because there was no testimony given that a media announcement of possible checkpoints preceded its establishment. However, our holding in *Monin* is clearly distinguishable in that there was more than a mere technical noncompliance with a single departmental guideline. In *Monin,* there was insufficient evidence to show the checkpoint had been approved by a supervisor, the trooper who conducted the checkpoint could not identify the officers who helped him conduct the checkpoint, there was no evidence regarding who was in charge of the checkpoint, the trooper could not recall the time when the checkpoint had been established, there was no evidence showing the primary purpose of the checkpoint, and the log did not show any approval for a checkpoint at the time and location.

Even so, in the case *sub judice* we need not address McClain's contention that the failure to provide a media announcement was fatal to the establishment of the traffic safety checkpoint. At the suppression hearing, McClain urged only two arguments: the checkpoint was not visible in all directions as required by General Order OM-E-4 and no videotape was made of the "enforcement activity" as required by General Order OM-B-19. McClain did not argue to the trial court, as he argues to this Court, that the seized evidence should be suppressed because the checkpoint was not announced via the media. "It is an elementary rule that trial courts should first be given the opportunity to rule on questions before those issues are subject to appellate review. *Akers v. Floyd County Fiscal Court*, 556 S.W.2d 146 (Ky. 1977); *Pittsburg and Midway Coal Mining Company v. Rushing*, 456 S.W.2d 816 (Ky. 1969); *Kaplon v. Chase*, 690 S.W.2d 761 (Ky.App. 1985); *Carr v. Cincinnati Bell, Inc.*, 651 S.W.2d 126 (Ky.App. 1983)." *Swatzell v. Natural Resources and Environmental Protection Cabinet*, 962 S.W.2d 866, 868 (Ky. 1998), *overruled on other grounds by Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004). "It is only to avert a manifest injustice that this court will entertain an argument not first presented to the trial court." *Pittsburg, supra*, 456 S.W.2d at 818. We perceive no manifest injustice here. Therefore, we decline to entertain that argument and are compelled to affirm the trial court's decision.

McClain next argues the traffic safety checkpoint was established solely to target him. Although it is uncontroverted that the traffic safety checkpoint was discontinued following his arrest, McClain fails to cite us to any location in the record

supportive of his contention that he was the target of the roadblock. The traffic safety checkpoint had been in operation for nearly two hours prior to McClain's arrest. Trooper Harris produced records showing the location had been preapproved for the establishment of a checkpoint and he had obtained a supervisor's approval before operating the checkpoint that evening. The troopers activated their emergency equipment and wore reflective vests identifying themselves as law enforcement officers. Every vehicle that approached the roadblock was stopped, thus trooper discretion was eliminated. Further, the strong odor of marijuana emanating from McClain's vehicle alerted Trooper Harris to his illegal activities. Additionally, based upon the information from McClain's passenger regarding the possibility of an active methamphetamine operation, Trooper Harris obtained consent to search McClain's residence for further evidence of criminal activity. Upon obtaining that consent, the traffic safety checkpoint was discontinued and all three officers left the scene, along with McClain and his passenger, to search his home. The troopers' closure of the traffic safety checkpoint was reasonable in light of these overriding legitimate law enforcement interests.

Finally, McClain contends the trial court erred in allowing the Commonwealth to introduce certain documents at the suppression hearing which had not been provided to the defense during the discovery period. However, McClain did not object to the introduction or use of these documents during the suppression hearing. In the absence of a contemporaneous objection or a motion to strike the documents made before the trial court, McClain cannot be heard to complain for the first time on appeal.

Collett v. Commonwealth, 686 S.W.2d 822 (Ky.App. 1984); RCr 9.22. McClain's request for a trial continuance to review the documents in question was insufficient to preserve any alleged error for appellate review as the trial court did not rule on the motion and he failed to insist on a ruling from the trial court. *Bell v. Commonwealth*, 473 S.W.2d 820 (Ky. 1971); *Hatton v. Commonwealth*, 409 S.W.2d 818 (Ky. 1966). Therefore, this allegation of error is wholly unpreserved and warrants no further discussion.

For the foregoing reasons, the judgment and sentence of the Spencer Circuit Court is affirmed.

ALL CONCUR.

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