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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001613-MR

DONNIE STRAUSS — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 07-CR-01207

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND TAYLOR, JUDGES; HENRY,[1] SENIOR JUDGE.

LAMBERT, JUDGE: Donnie Strauss entered a conditional guilty plea to possession of a controlled substance, first degree, second offense; possession of a firearm by a convicted felon; operating a motor vehicle under the influence, first offense, with aggravator; and persistent felony offender, second degree. Strauss

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

appeals the trial court's denial of his motion to suppress confessions he made to the police. After careful review, we affirm the trial court's denial of Strauss' motion to suppress.

On January 11, 2008, Strauss filed a motion to suppress statements he made to police officers following his arrest on July 15, 2007. Strauss argued that his statements should be suppressed because he was under the influence of alcohol and unable to make a knowing, intelligent or voluntary waiver of his rights. On March 18, 2008, the trial court conducted a suppression hearing.

At the suppression hearing, Officer Williams testified that on July 15, 2007, he was responding to a request for assistance with a suspected DUI traffic stop. Officer Williams explained that when he arrived Officer Slark and Strauss were already outside of the vehicle and the other occupants of Strauss' vehicle were sitting on the curb. Officer Williams questioned Strauss about how many drinks he had consumed, where he was going, and where he had come from and performed field sobriety tests. Strauss stated that he had consumed two drinks "fifteen minutes or so ago," that he was taking some friends home, and that he was coming from "this dude's house." Officer Williams could smell alcohol on Strauss' breath, Strauss was unsteady on his feet, and his eyes were bloodshot and watery. Officer Williams stated that Strauss' speech was "pretty normal." Strauss failed all four of the field sobriety tests.

While Officer Williams was talking to Strauss, Strauss indicated that he understood what Officer Williams was saying and did not have to be held or

propped up. Strauss refused to submit to any preliminary breath tests and was placed under arrest for DUI. During the search of Strauss' person, Officer Williams read Strauss his *Miranda* rights. Officer Williams testified that Strauss seemed to be paying attention while he was read his rights and that there was nothing in his statements or actions to indicate that Strauss did not understand his rights.

Officer Slark performed a search of Strauss' vehicle and retrieved a small plastic bag containing a white powdery substance from between the passenger seat and the center console of the vehicle. Officer Slark also found a handgun beneath the passenger seat of Strauss' vehicle and questioned the front passenger, who adamantly denied having knowledge of the contraband being in the vehicle. Given the location of the contraband, Officer Slark did not initially believe the passenger and placed him in handcuffs. At this point, Officer Graw arrived and as the front passenger was being transported to Officer Graw's police cruiser, Strauss began banging his head on the window of Officer Williams police cruiser in order to get the officer's attention. The three officers approached the vehicle where Strauss was located and used a digital recorder to record his statements.

Officer Williams testified that Strauss made the first statement and was apparently anxious to absolve his passenger of any wrongdoing, stating, "He didn't have any idea of what was in the car, nothing. . . The Tech Nine [handgun] is mine. The dope is mine. I got a record of trafficking dope so y'all already know

I'm a dope dealer with a nine." Strauss continued to ramble, stating that he was on probation and offering his probation officer's name. Strauss stated, "I'm a bad guy; I need to go to jail." Despite the contraband in the car, the front passenger was released.

Strauss was transported to the intoxilyzer room of the jail where he was read an implied consent warning. Officer Williams testified that Strauss was given an opportunity to contact an attorney and that when he asked Strauss who his attorney was, Strauss replied "I don't have a damn attorney." Williams did not inquire further and no other attempts were made to contact an attorney on Strauss' behalf. At this point Strauss began to ramble about the police needing to look for "baby rapists" or the "people who might bomb the Empire State building."

At the suppression hearing, Strauss also testified on his own behalf. Strauss explained that he had drunk quite a bit the night of his arrest and had snorted cocaine. Strauss did not recall the officers reading him his rights at the time of his arrest. He stated that he had an attorney he normally used but denied giving Officer Williams the name of any attorney to call and admitted he had been appointed counsel in the past in district court.

On cross-examination, Strauss testified that he remembered seeing Officer Williams the night of his arrest and remembered performing field sobriety tests. Strauss remembered the officers asking him where he came from and how much he had to drink. He also remembered being arrested and going to jail. However, Strauss did not remember being read his rights. He did remember

yelling and banging his head on the window of the police vehicle to get the officer's attention. Strauss remembered what he said to the officer and specifically remembered talking about the firearm.

Strauss remembered going to the jail and remembered the officers reading him the implied consent warning. He did not remember the officers asking him if he wanted an attorney, but admitted to hearing the officers ask him on the recording. Strauss stated that he had been through the court system before, had been arrested before, hired counsel before, and had also had a public defender appointed to him before when he could not afford one. He testified that he knew an attorney would be appointed for him if he needed one.

Strauss' counsel argued that his statements should be suppressed because Strauss was not read all of his rights and because he was intoxicated. The Commonwealth argued that Strauss' statements should not be suppressed because Strauss initiated all conversations and the officers never initiated questioning. The Commonwealth further argued that, based on everything Strauss was remembering, it was apparent that he was not hallucinating and that he was aware of the situation and that the firearm and cocaine were found in his vehicle. The Commonwealth urged the court to consider *Britt v. Commonwealth*, 512 S.W.2d 496 (Ky. 1974), which states:

> [i]t is only when intoxication reaches the state in which one has hallucinations or begins to confabulate to compensate for his loss of memory for recent events that the truth of what he says becomes strongly suspect. Loss of inhibitions and muscular coordination, impaired

> judgment, and subsequent amnesia do not necessarily (if at all) indicate that an intoxicated person did not know what he was saying when he said it. *In vino veritas* is an expression that did not originate in fancy. If we accept the confessions of the stupid, there is no good reason not to accept those of the drunk.

Id. at 500 (internal citations omitted).

In its order overruling Strauss' motion to suppress, the trial court stated:

> [t]he court finds that [Strauss] was fully *Mirandized*; however even if the officer omitted a portion of the *Miranda* warning, there was no violation of [Strauss'] rights since he was not interrogated by the police after that. Once [Strauss] was arrested and placed into the police car, [Strauss] was the one who initiated conversation with the police again. It is clear that once [Strauss] saw the passenger also being arrested, he was trying to get the officer's attention to explain that the passenger was not involved.
> Once [Strauss] was at the jail, the implied consent card was read to him. At first, [Strauss] indicated that he wanted a lawyer. He then explained that he didn't have a lawyer. The police did not question [Strauss] at any point regarding the charges. While [Strauss] was waiting to take the intoxilyzer, it was [Strauss] who kept on talking to the police. All of the statements were initiated by [Strauss].
>
> Based upon the evidence, the Court finds that while [Strauss] may have voluntarily been under the influence of alcohol and drugs, he was in sufficient possession of his faculties to deem his statements to be reliable. *Nichols v. Commonwealth*, 142 S.W.3d 683 (Ky. 2004). There was nothing during the hearing to indicate that [Strauss] did not understand the questions, nor appropriately respond to questions while at the scene for the D.U.I. stop or while at the jail for the intoxilyzer test. The Court has reviewed the tape recordings of [Strauss] and finds that [Strauss] appeared to be fully oriented.

On June 23, 2008, Strauss entered a conditional guilty plea, and on July 31, 2008, the trial court sentenced him to a total of ten years' imprisonment. As reserved by his conditional guilty plea, Strauss now appeals the trial court's judgment denying his motion 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. *See* Kentucky Rules of Criminal Procedure (RCr) 9.78. 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. *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998); *Commonwealth v. Opell*, 3 S.W.3d 747, 751 (Ky. App. 1999).

Strauss argues that the trial court should have suppressed his statements because they were not sufficiently reliable due to his level of intoxication. "In determining the voluntariness of statements obtained from an intoxicated defendant the basic question is whether the confessor was in sufficient possession of his faculties to give a reliable statement." *Nichols v. Commonwealth*, 142 S.W.3d 683, 691-692 (Ky. 2004) (citing *Britt*, 512 S.W.2d at 500). Self-induced intoxication is not enough to require exclusion without a showing that the defendant was intoxicated "to the degree of mania" or of being unable to

understand the meaning of his statements. *Halverson v. Commonwealth*, 730 S.W.2d 921, 927 (Ky. 1986).

In the instant case, there was ample evidence presented to the trial court that demonstrated that Strauss was in sufficient possession of his faculties and that his statements were reliable. At the scene of the arrest, Strauss gave officers his social security number and the name of his parole officer. Most telling of Strauss' level of comprehension at the time of his arrest is the fact that he was able to recognize that the passenger of his vehicle was being arrested for the possession of his firearm and cocaine, and he made attempts to stop such arrest. Further, Strauss' testimony at the suppression hearing indicated that he remembered most of the events from the night of his arrest. The trial court found that Strauss was in sufficient possession of his faculties and appeared fully oriented. The trial court's findings are supported by substantial evidence and are thus conclusive. RCr 9.78. Strauss' level of intoxication did not rise to the level of "mania" required by *Britt* to render his statements involuntary.

Strauss next argues that his jailhouse statements and refusal to take the breathalyzer should have been suppressed because the police made no effort to honor his request for an attorney, as required by Kentucky Revised Statutes (KRS) 189A.105(3). The Commonwealth argues that Strauss failed to preserve this issue for appellate review because the issue was not presented in Strauss' motion to suppress. We agree. Strauss' motion to suppress requested that his statements be suppressed because of alleged violations of *Miranda* and because of the degree of

his intoxication. Thus, the trial court did not consider Strauss' arguments that under KRS 189A.105(3) he was entitled to an attorney. An appellate court is not at liberty to review alleged errors when the issue was not presented to the trial court for decision. *Henson v. Commonwealth*, 20 S.W.3d 466, 470 (Ky. 1999)(alleged error found unpreserved for review because Appellant failed to raise specific issue regarding confession in motion to suppress and thus was not presented to the trial court for decision.)

If an appellant fails to timely preserve his argument for review, this court will not address it unless it warrants review as palpable error pursuant to RCr 10.26. *Commonwealth v. Maricle*, 15 S.W.3d 376, 380 (Ky. 2000). Strauss has not argued that the trial court committed palpable error that warrants relief under RCr 10.26. Therefore, we need not review his claim for palpable error.

In any event, had Strauss properly preserved his claim of a violation of KRS 189A.105(3), his argument would fail because he was afforded an opportunity to contact an attorney, which is all that KRS 189A.105(3) requires. The trial court found that *Miranda* was not applicable to the facts of the instant case because Strauss initiated all statements to the police and because his statements were in no way a product of interrogation. *See Jackson v. Commonwealth*, 187 S.W.3d 300, 305-306 (Ky. 2006)(only statements made during custodial interrogations are subject to suppression pursuant to *Miranda.*) (internal citations omitted). KRS 189A.105(3) states:

> [d]uring the period immediately preceding the administration of any test, the person shall be afforded an opportunity of at least ten (10) minutes but no more than fifteen (15) minutes to attempt to contact and communicate with an attorney and shall be informed of this right. Inability to communicate with an attorney during this period shall not be deemed to relieve the person of his obligation to submit to the tests and the penalties specified by KRS 189A.010 and 189A.107 shall remain applicable to the person upon refusal. Nothing in this section shall be deemed to create a right to have an attorney present during the administration of the tests, but the person's attorney may be present if the attorney can physically appear at the location where the test is to be administered within the time period established in this section.

When Officer Williams read Strauss the implied consent warning, he initially said that he wished to contact an attorney. However, when Officer Williams asked Strauss who his attorney was, Strauss stated that he did not have "a damn attorney." Officer Williams complied with KRS 189A.105(3) by affording Strauss an opportunity to contact an attorney. Thus, even if Strauss had preserved this claim for review, we do not find that any violation of KRS 189A.105(3) occurred under the facts of this case.

Accordingly, the Fayette Circuit Court's March 19, 2008, order denying Strauss' motion to suppress is hereby affirmed.

ALL CONCUR.

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