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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002049-MR

CHAD YOUNG — APPELLANT

v.

APPEAL FROM MORGAN CIRCUIT COURT
HONORABLE REBECCA K. PHILLIPS, JUDGE
ACTION NO. 06-CR-00050

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND VANMETER, JUDGES; LAMBERT,[1] SENIOR JUDGE.

VANMETER, JUDGE: Chad Young appeals from the final judgment of the Morgan Circuit Court, following his conditional plea of guilty to one count of third-degree burglary. For the following reasons, we affirm.

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Young's guilty plea was conditioned upon the reservation of his right to appeal the trial court's ruling on his motion to suppress items seized from his residence and vehicle. His motion was denied by the court after a hearing; this appeal followed.

First, Young claims that the court erred by denying his motion to suppress items seized from his residence on the ground that the "plain view" exception to the warrant requirement did not authorize such a seizure. We disagree.

At the suppression hearing, the court heard the testimony of three police officers, a tow truck operator, and Young. The testimony revealed that a service station, Cougar Corner, was burglarized one night while Young was employed as a night watchman at an adjacent business. Cash and cartons of Marlboro cigarettes were reported stolen. The surveillance video showed that the perpetrator wore a pillowcase over his or her head during the burglary, and a pillowcase was found in the store's vicinity.

As officers surveyed the crime scene, Young approached them in his white Chevy Caprice. Young informed the officers that he had heard a loud noise during his shift and had observed a white vehicle driving away from Cougar Corner with its tires spinning. At this time, Officer Perkins observed in Young's vehicle bed linens which appeared to match the pillowcase found at the scene of the crime. The officers additionally discovered shoe prints at the scene of the burglary which they believed were created by a Nike shoe.

Armed with this information, two of the police officers drove from Cougar Corner to Young's residence, where they saw his white vehicle parked outside. When they looked in the vehicle's windows they observed bed linens. Officer Hensley testified that the bed linens were observable by anyone who approached and peered inside the vehicle.

Both officers testified that Young invited them into his residence, although the testimony is unclear as to whether the officers knocked on Young's door, or Young greeted them as they approached his door. Young, by contrast, denied that he gave the officers permission to enter his residence. He instead claimed that the officers knocked and stepped inside, without invitation, when he opened the door.

Regardless, once inside the officers spoke with Young and his wife while simultaneously glancing around the room. At this time, the officers neither had a search warrant for Young's residence, nor requested consent from Young or his wife to search the residence. However, the officers ultimately seized a pack of Marlboro cigarettes from the living room coffee table, bed linens located on living room furniture, a pair of Nike shoes which one officer testified was located in a basket in the "front room," and a plaid shirt which Young evidently was wearing at the time of the burglary. Although the officers did not specifically describe where the shirt was located, they testified that all of the seized items were in "plain view."

The appellate standard of review applicable to 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. Based upon 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.

Commonwealth v. Neal, 84 S.W.3d 920, 923 (Ky.App. 2002) (citations omitted).

"The Fourth Amendment of the United States Constitution and Section Ten of the Kentucky Constitution provide safeguards against an unwarranted and unreasonable search and seizure by the state." *Commonwealth v. Hatcher*, 199 S.W.3d 124, 126 (Ky. 2006). "As espoused by the United States Supreme Court, 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well delineated exceptions.'" *Id.* (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967)). "One such exception is evidence found within 'plain view.'" *Hatcher*, 199 S.W.3d at 126 (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971)).

In *Hazel v. Commonwealth*, 833 S.W.2d 831, 833 (Ky. 1992), the Kentucky Supreme Court noted that in order for the "plain view" exception to apply, the law enforcement officer must not have violated the Fourteenth Amendment in arriving at the place where the evidence could be plainly viewed, the officer must have a lawful right of access to the object itself, and the object's incriminating character must be immediately apparent. Here, the Commonwealth

presented evidence that the officers entered Young's residence, with permission, knowing that Marlboro cigarettes had been reported stolen, that what appeared to be a Nike shoeprint was left at the scene of the crime, that the perpetrator wore a pillowcase over his or her head during the burglary, and that bed linens which appeared to match the pillowcase had been observed in Young's vehicle.

Based on this information, the court found "that the officers were lawfully inside the home at the time they viewed the evidence seized," that the incriminating character of the items seized, including the cigarettes, shoes, and bed linens, was immediately apparent to the officers, and that seizure of said items in "plain view" was lawful.[2] We recognize that "a reviewing court should give due weight to the assessment by the trial court of the credibility of the officer[.]" *Commonwealth v. Whitmore*, 92 S.W.3d 76, 79 (Ky. 2002). The record reflects that the court's findings are supported by substantial evidence and thus are conclusive. *See Neal*, 84 S.W.3d at 923.

Finally, Young asserts that the court erred by denying his motion to suppress items seized from his vehicle, which he claims was unlawfully impounded. We disagree.

A vehicle may be impounded without a warrant if "'the police have probable cause to believe both that the vehicle contains evidence of a crime and that absent immediate impoundment the evidence will be lost or destroyed.'" *Cardwell v. Commonwealth*, 639 S.W.2d 549, 551 (Ky.App. 1982) (quoting

[2] While the circumstances surrounding seizure of the shirt are unclear, we find that any error resulting from its seizure was harmless. Kentucky Rules of Criminal Procedure 9.24.

Wagner v. Commonwealth, 581 S.W.2d 352, 356 (Ky. 1979), *overruled on other grounds by Estep v. Commonwealth*, 663 S.W.2d 213 (Ky. 1984)). Here, the officers testified that they observed in Young's vehicle bed linens which appeared to match the pillowcase discovered at the scene of the crime, and that they believed Young was alerted to their suspicions that he might have participated in the crime, as they had just discussed the burglary with him and had seized items from his residence. Based on this testimony, the court found that requisite probable cause for impoundment of the vehicle existed "[g]iven the information known to the officers at the time of impoundment and the fact that the vehicle was within the control of the suspect at the suspect's residence after he had been questioned by the officers and alerted to their suspicions[.]" Based upon our review of the record, the court's finding of probable cause for impoundment of Young's vehicle is supported by substantial evidence and as a result is conclusive. *See Neal*, 84 S.W.3d at 923.

The judgment of the Morgan Circuit Court is affirmed.

ALL CONCUR.

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