

RENDERED: MARCH 12, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000316-MR

TONY NEAL

APPELLANT

v. APPEAL FROM POWELL CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NO. 08-CR-00024

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; CAPERTON, JUDGE; WHITE,¹ SENIOR JUDGE.

COMBS, CHIEF JUDGE: Tony Neal brings this appeal from the final judgment of the Powell Circuit Court sentencing him to serve twelve-months' imprisonment on a conditional plea of guilty to the offenses of possession of a controlled substance and tampering with physical evidence. Neal challenges the court's

¹ Senior Judge Edwin M. White sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

denial of his motion to suppress the evidence seized following his arrest. We affirm the judgment.

At the suppression hearing, testimony revealed that on December 11, 2007, Officer James Kirk of the Clay City Police Department responded to a citizen complaint concerning a possibly impaired driver on Tenth Avenue who was operating a car with a North Carolina license plate. Officer Kirk was in the vicinity, and with the assistance of the citizen caller, he quickly located the vehicle at an apartment building on Tenth Avenue. When Officer Kirk first observed Tony Neal, Neal was standing on the front porch of his apartment.

Officer Kirk saw Neal put down a small cooler and reach into his front pocket for a door key. Officer Kirk testified that he could smell the odor of alcohol as he approached Neal and that Neal admitted to Kirk that he had consumed several drinks on his way home from work. Officer Kirk reported that Neal's eyes were red, glassy, and blood-shot and that his speech was slurred. The hood of Neal's car was still warm, and the vehicle bore a North Carolina license plate. Officer Kirk believed that Neal was impaired to such a degree that he posed a danger to himself or others. As Neal stood on the porch, Kirk advised him that he was under arrest for alcohol intoxication.

In response, Neal asked Officer Kirk if he could go inside the apartment to use the bathroom and to call his girlfriend. The officer agreed, and the two men entered Neal's apartment. Neal walked down the hallway and entered his bedroom. Officer Kirk observed him as he pulled a small bundle from his

trouser pocket and slid it under the bed sheet. Kirk immediately retrieved a plastic bag containing more than 100 Xanax pills from under the bed sheet.

After Officer Kirk's testimony was presented, Neal's attorney argued that Kirk lacked probable cause to arrest Neal for alcohol intoxication. Counsel argued that the arrest was unlawful and, therefore, that the subsequent seizure of the bag of pills was also illegal and that the evidence should be suppressed. The circuit court rejected this argument and denied the motion to suppress. The court concluded that Neal's warrantless arrest on his front porch was lawful because the officer was reasonable in concluding that a violation was being committed in his presence.

On appeal, Neal contends that the trial court erred by failing to characterize as unlawful his warrantless arrest for alcohol intoxication, a misdemeanor. Neal claims that Officer Kirk could have lawfully arrested him for alcohol intoxication **only** if the violation had been committed in Kirk's presence. Since he did not commit the offense of alcohol intoxication in a public place and in the presence of Officer Kirk, Neal claims that he was unlawfully seized.

In *Commonwealth v. Fields*, 194 S.W.3d 255 (Ky. 2006), the Supreme Court of Kentucky reiterated the analysis to be used in determining whether an officer made a lawful misdemeanor arrest. Referring to the decision in *Maryland v. Pringle*, 540 U.S. 366, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003), and relying on its own decision in *Commonwealth v. Mobley*, 160 S.W.3d 783 (Ky. 2005), the Court held that the proper analysis centers on whether a reasonable

officer would conclude under the circumstances that a misdemeanor had been committed in his presence.

Neal was initially arrested for alcohol intoxication. A person is guilty of alcohol intoxication when he “appears in a public place manifestly under the influence of alcohol to the degree that he may endanger himself or other persons or property, or unreasonably annoy persons in his vicinity.” Kentucky Revised Statute(s) (KRS) 222.202(1). KRS 222.201 provides that the phrase *public place* shall have the same meaning as it does in KRS 525.010, which defines a *public place* as a “place to which the public . . . has access. . . .” An act is deemed to occur in a public place “if it produces its offensive or proscribed consequences in a public place.” *Id.*

We are persuaded that Officer Kirk reasonably determined that Neal was committing the misdemeanor offense of alcohol intoxication in his presence. Contrary to Neal’s assertion, Officer Kirk testified that it was immediately apparent to him visually that Neal was under the influence. When the officer approached Neal, he smelled of alcohol, his speech was slurred, and his eyes were bloodshot. Kirk suspected that Neal had driven to his apartment (just moments before) so erratically as to cause another driver to be concerned for his welfare and the welfare of others. Thus, Kirk concluded that Neal might be so impaired as to pose a risk to the safety of himself and others. Officer Kirk’s decision to arrest Neal was consistent with his impression that the suspect had been impaired and that he continued to remain intoxicated, thus committing the offense of alcohol

intoxication in his presence. The circuit court did not err in holding that Officer Kirk had probable cause to arrest Neal for alcohol intoxication.

The appellant also argues that the front porch was not a public place. We disagree. For purposes of the alcohol intoxication statute, KRS 525.010 defines *public place* to mean a “place to which the public . . . has access. . . .” This broad definition does not exclude even those parts of private property that are ordinarily and readily accessible to the public. In another context, the Supreme Court of Kentucky observed as follows:

However, the main entrance to a home is so widely perceived by the public as the point of access for the public engaged in legitimate business, whether it is by pollsters, persons seeking assistance, postal carriers, delivery persons, or Girl Scouts selling cookies, that it amounts to common knowledge that the public may at least go up to a home’s front door, if the way is not barred. . . . Thus, certain areas such as driveways, walkways, or the front door and windows of a home . . . are properly approachable by any member of the public, unless obvious steps are taken to bar the public from the door.

* * * *

The back door of a home is not ordinarily understood to be publicly accessible. . . .

* * * *

A back yard is not normally an area that the general public would perceive as public access.

Quintana v. Commonwealth, 276 S.W.3d 753, 758-760. (Ky. 2008).

There was nothing about Neal’s front porch that appeared to impede the public’s ready access to his front door. There was no fence, no gate, no dog, no

signage. Under these circumstances, we are not persuaded by Neal's citation to the statutes and court decisions of our sister states. Kentucky has clearly articulated its position on this issue in *Quintana, supra*.

Neal's warrantless arrest was lawful. A reasonable officer could conclude from all the facts and circumstances that a misdemeanor was being committed in his presence. Since the arrest was lawful, the evidence recovered as a result of the subsequent search was not subject to suppression by the court.

There was no error.

We affirm the judgment of the Powell Circuit Court.

ALL CONCUR.

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