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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001751-MR

ETHAN SAMUEL BATES

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 08-CR-01142

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON AND LAMBERT, JUDGES; HENRY,¹ SENIOR JUDGE.

HENRY, SENIOR JUDGE: Ethan Samuel Bates entered a conditional guilty plea to possession of a controlled substance (cocaine) and possession of drug paraphernalia, first offense. He was sentenced to serve four years, but that

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 Kentucky Revised Statutes (KRS) 21.580.

sentence was probated for a period of five years. He reserved the right to appeal the trial court's denial of his motion to suppress certain evidence seized by the police. After our review, we affirm the judgment of the trial court.

On a Friday evening in June 2008, Lexington police officers Schnelle, McBride, and Thomas were patrolling the downtown area on bicycles. There had been a series of thefts from parked vehicles and the officers were told to make their presence known in an effort to diminish the thefts. Around 11:30 p.m. they noticed Bates' vehicle parked in a deserted area of a public parking lot. The vehicle was backed in and parked up against a building bordering the lot. Based on prior experience, the officers knew that patrons of local establishments would sometimes go out to their vehicles and smoke marijuana or consume other drugs.

The three officers approached Bates. Officer Thomas went to the passenger side of Bates' vehicle and began examining the interior of the passenger area. Officer McBride approached Bates and started to ask him a series of questions. Officer Schnelle placed himself six to eight feet in front of Bates' vehicle. Schnelle testified he believed Bates could have navigated around him.

Bates appeared to be very focused on Officer Thomas, who was examining the interior of the vehicle with the flashlight. When first asked what he was doing in the parking lot, Bates said he was meeting his friend Dave. Later, he changed his answer and stated he was waiting for his girlfriend. When asked for

his driver's license, he stated he had inadvertently left it at home. Officer McBride detected the odor of alcohol coming from the vehicle. He was not able to tell if the smell emanated from Bates or just the interior of the vehicle. He asked Bates to exit the vehicle and Bates rolled up the car window and announced he was going to call his lawyer. Bates then reached for his keys in the vehicle's ignition. Officer McBride drew his baton and appeared ready to break in the windshield of the car before Bates complied and exited the vehicle. Officer Schnelle approached Bates and began talking to him while Officer McBride went around to the passenger side of the vehicle. He looked into the rear of the passenger area and saw what his experience and training led him to believe was a bag containing an illegal controlled substance partially sticking out from the map pocket on the back of the passenger front seat. That item was removed along with a small set of digital scales and Bates was placed under arrest.

Bates filed a motion to suppress the evidence seized from his vehicle alleging he had been detained absent a reasonable articulable suspicion of criminal activity and that the search of the vehicle was not based upon probable cause. The trial court held a hearing on December 18, 2008, and issued an order entered February 17, 2009, denying the motion to suppress the evidence.

Bates first argues that he was surrounded by the police from their initial contact with him and was, therefore, illegally seized or detained. The trial court specifically found that based on the evidence before it and the totality of the circumstances "that at the initial phase of the interaction it would have been

unreasonable for this Defendant to have concluded that he was not free to leave.”

The trial court further determined the entire encounter up until Bates was ordered out of the car and detained lasted “no more than five (5) minutes.”

The findings of the trial court are conclusive provided they are supported by substantial evidence. Kentucky Rules of Criminal Procedure (RCr) 9.78; *Harris v. Commonwealth*, 793 S.W.2d 802, 804 (Ky. 1990). “Section 10 of the Kentucky Constitution provides no greater protection than does the federal Fourth Amendment.” *LaFollette v. Commonwealth*, 915 S.W.2d 747, 748 (Ky. 1996) (internal citation omitted). A simple interaction between a police officer and a citizen does not reach the level of a seizure until, “in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” *U. S. v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980). Here, there was substantial evidence in the form of the police officer’s testimony that had Bates wished to leave in the early moments of the encounter, he was free to go.

Bates then argues that the officers lacked probable cause to further detain him. We disagree. The trial court specifically found that an officer smelled the odor of alcohol coming from either Bates or his vehicle. His answers were inconsistent when he first stated he was waiting for his friend Dave and then later stated he was waiting for his girlfriend. Bates was concentrating on the officer who was shining the flashlight into the rear of the passenger compartment instead of being focused on the officer talking to him. Bates then rolled up the car window

and appeared to begin to reach for the keys to start the ignition after being asked to exit the vehicle. We agree that these facts, “viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or probable cause.” *See Ornelas v. U.S.*, 517 U.S. 690, 696, 116 S.Ct 1657, 1661-62, 134 L.Ed.2d 911 (1996).

The officers observed what they believed to be illegal drugs in Bates’ vehicle. Once probable cause was established, the warrantless search of the vehicle was valid based on the automobile exception to the general search warrant requirements. *Chambers v. Maroney*, 399 U.S. 42, 51, 90 S.Ct 1975, 1981, 26 L.Ed.2d 419 (1970); *Morton v. Commonwealth*, 232 S.W.3d 566, 569 (Ky. App. 2007).

Further, we agree with the trial court that the seizure was also permissible under the “plain view” exception to the warrant requirement. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); *Hazel v. Commonwealth*, 833 S.W.2d 831 (Ky. 1992). We believe that the officers observed the cocaine from a place where they were lawfully permitted to be, that they had a lawful right of access to the cocaine and that the incriminating character of the cocaine was immediately apparent to them. *Id.* at 833. Hence, the seizure was justified under both the automobile exception and the plain view exception to the warrant requirement.

The judgment and sentence of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Russell J. Baldani
Lexington, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General Of Kentucky

Heather M. Fryman
Assistant Attorney General
Frankfort, Kentucky