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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001907-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 09-CR-00354

STEPHANIE DIETZ — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, MOORE, AND VANMETER, JUDGES.

CAPERTON, JUDGE: The Commonwealth appeals the Kenton Circuit Court's grant of Stephanie Dietz's motion to suppress the evidence obtained from a search of her person. On appeal, the Commonwealth argues that the trial court's grant of Dietz's motion to suppress is incorrect as a matter of law. After a thorough review of the parties' arguments, the record, and the applicable law, we disagree with the

Commonwealth and, accordingly, affirm the trial court's grant of Dietz's motion to suppress.

The following facts were testified to at a suppression hearing and the trial court entered the following findings of fact and conclusions of law. Dietz was a passenger in a vehicle operated by Lawrence Jones. While the vehicle was traveling along a street in Covington, Kentucky, Officer Hoyle observed that the tail lights of the vehicle were not illuminated. Officer Hoyle stopped the vehicle for this traffic violation and engaged the driver in conversation. During the course of this conversation with the driver, Dietz repeatedly interrupted and appeared nervous. Officer Hoyle testified that he had a previous encounter with Dietz approximately one and a half years earlier wherein she admitted to a drug addiction. Being suspicious of drug activity, Officer Hoyle requested a canine unit.

While preparing a citation for Jones charging him with operating a motor vehicle without tail lights, Officer Richardson, a Covington Canine Unit Officer, arrived. Officer Richardson approached the vehicle and requested that both occupants exit the vehicle before having his dog sniff the vehicle. As both Jones and Dietz exited the vehicle, they were patted down for weapons, but no weapons or contraband was found on either person. Jones and Dietz then stepped to the rear of the vehicle.

During the canine check of the vehicle, the dog alerted on the right rear passenger door. At this point, Officer Richardson advised Officer Hoyle[1] to search Jones and Dietz. At the same time as the search of Dietz and Jones, Officer Richardson searched the vehicle for drugs; however, no drugs were found inside the vehicle. During the second search of Dietz, methadone was discovered inside her pocket.

Relying on *Morton v. Commonwealth*, 232 S.W.3d 566 (Ky.App. 2007), and *Owens v. Commonwealth*, 291 S.W.3d 704 (Ky. 2009), the trial court concluded that the original search of Jones and Dietz for weapons upon the exit of the vehicle was appropriate; however, the subsequent search of Dietz lacked the additional nexus which would support an in-depth search of her person. The trial court concluded that there was insufficient basis to establish probable cause that she possessed contraband based on her nervous behavior and her interruption of Officer Hoyle.

Moreover, the court concluded that the fact that Officer Hoyle knew that Dietz had a drug habit approximately a year and a half earlier did not establish probable cause that she would be in possession of drugs on the evening in question. The trial court further concluded that had the officers searched Dietz *after* the completion of the search of the vehicle which produced no drugs, probable cause may well have been established. In other words, after the canine alerted on the vehicle but a search of the vehicle produced no drugs, then this would give rise to

[1] Officer Gray of the Covington Police Department also helped search Jones and Dietz.

the suspicion that the drugs which the dog detected may be on the occupants. Regardless, at the time Dietz was searched, the officers did not know that the vehicle did not contain any drugs. Thus, the trial court granted Dietz's motion to suppress the evidence obtained during the search of her person. It is from this order that the Commonwealth now appeals.

In review of the trial court's decision on a motion to suppress, this Court must first determine whether the trial court's findings of fact are clearly erroneous. Under this standard, if the findings of fact are supported by substantial evidence, then they are conclusive.[2] Kentucky Rules of Criminal Procedure (RCr) 9.78; *Lynn v. Commonwealth,* 257 S.W.3d 596, 598 (Ky.App. 2008). "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." *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky.App. 2002) (citing *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998); *Commonwealth v. Opell*, 3 S.W.3d 747, 751 (Ky.App. 1999)). Thus, the factual findings of the trial court in regard to the suppression motion are reviewed under the clearly erroneous standard and "the ultimate legal question of whether there was reasonable suspicion to stop or probable cause to search is reviewed *de novo*." *Commonwealth v. Banks,* 68 S.W.3d 347, 349 (Ky. 2001).

At a suppression hearing the trial court acts as the finder of fact. As such, it has the sole responsibility to weigh the evidence before it and judge the credibility

[2] We note that the Commonwealth does not contest the basic factual findings of the trial court.

of all witnesses. *Dunn v. Commonwealth*, 286 Ky. 695, 151 S.W.2d 763, 764-765 (1941). The trial court has the duty to weigh the probative value of the evidence and has the discretion to choose which testimony it finds most convincing. *Commonwealth, Dept. of Highways v. Dehart,* 465 S.W.2d 720, 722 (Ky. 1971). The trial court is free to believe all of a witness's testimony, part of a witness's testimony, or none of it. *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996); *see also Gillispie v. Commonwealth*, 212 Ky. 472, 279 S.W. 671, 672 (1926). With this standard in mind we turn to the parties' arguments.

The Commonwealth argues that the trial court's order granting Dietz's suppression motion is incorrect as a matter of law and the trial court's application of the facts to the law is clearly erroneous. In support thereof,[3] the Commonwealth argues that there was nothing improper in the subsequent search of Dietz and that the drugs found on Dietz should fall under the inevitable discovery rule.

Dietz argues that substantial evidence supports the trial court's decision that the search was unlawful and the decision to suppress the evidence seized during

[3] The Commonwealth also argues that the vehicle in which Dietz was a passenger was properly stopped; there was nothing improper concerning Officer Hoyle's use of a canine unit and no unreasonable delay occurred; there was nothing improper in removing Dietz from the vehicle. Dietz argues that the majority of issues presented by the Commonwealth are not before this Court because the trial court ruled in favor of the Commonwealth concerning whether the vehicle was properly stopped; the propriety of the canine unit and any delay; and the removal of Dietz from the vehicle and the pat-down for weapons. Dietz also argues the delay in implementing the dog search was too long. After our review of the parties' arguments, the record, and the applicable law, we have concluded that the trial court's findings of fact concerning these issues were properly supported by substantial evidence and are thus conclusive. Moreover, we do not find error in the trial court's legal conclusions concerning these issues. Dietz additionally argues that under KRS 22A.020, this Court should refrain from addressing the propriety of the use of a dog to search Jones's vehicle as it might prejudice Dietz's right to directly appeal this issue should an appeal by Dietz ever become necessary. This argument is rendered moot given that we are affirming the trial court's grant of Dietz's motion to suppress.

the search was not an abuse of the trial court's discretion. In support thereof, Dietz argues that the second search of her person was unlawful; that the Commonwealth never presented its inevitable discovery doctrine to the trial court and, thus, the issue is not properly preserved for this Court; that by even arguing the inevitable discovery rule, the Commonwealth admits that the second search of Dietz was unlawful; and that the trial court correctly ruled as a matter of law. With these arguments in mind, we now turn to the applicable law.

The crux of the Commonwealth's argument[4] is that the trial court erred in its determination that the contemporaneous search of Dietz and the vehicle did not provide the officers with probable cause as to the search of Dietz. However, the Commonwealth's primary authority for this argument is the inevitable discovery doctrine, which we have for reasons set forth, *infra,* determined to be inapplicable. While the Commonwealth argues that an additional nexus existed based on Dietz's known drug abuse and her nervous and strange behavior during the stop, we agree with the trial court that this was an insufficient basis to establish probable cause.

We also disagree with the Commonwealth that the trial court misapplied the applicable law. In *Morton v. Commonwealth*, 232 S.W.3d 566 (Ky.App. 2007), this Court determined that:

> As for the instant case, Morton was the driver and lone occupant of the vehicle, and the dog alerted police to the

[4] The parties agree that the Commonwealth bore the burden of proof. *See Commonwealth v. Erickson*, 132 S.W.3d 884, 887 (Ky.App.2004) ("A warrantless search is presumed to be unreasonable and unlawful, requiring the Commonwealth to bear the burden of justifying the search and seizure under one of the exceptions to the warrant requirement.")(internal citations omitted).

> presence of drugs inside the vehicle. From these facts and our analysis in this case, and from the guidance of case law from other jurisdictions, we conclude that a positive canine alert, signifying the presence of drugs inside a vehicle, provides law enforcement with the authority to search the driver for drugs but does not permit the search of the vehicle's passengers for drugs unless law enforcement can articulate an independent showing of probable cause as to each passenger searched.

Morton at 570.

The Commonwealth asserts that *Dunn v. Commonwealth*, 199 S.W.3d 775 (Ky.App. 2006), is controlling. In *Dunn*, this Court relied upon the reasoning of a sister state that the odor of burnt cannabis emanating from a vehicle gave probable cause to search the occupants of a vehicle. We find *Dunn* to be distinguishable from the case *sub judice*. In *Dunn* the smell of burnt cannabis emanated from within a vehicle containing more than one occupant. This necessarily meant that some or all of the occupants had, at some point, been exposed to burnt cannabis.[5] In *Dunn*, the particularized suspicion of criminal activity arose not only as to the vehicle but as to the occupants as well**.**

In the facts *sub judice* the canine alerted on the vehicle and not on Dietz, an occupant. *Morton* permits a search of the person in control of the vehicle as a result of particularized criminal suspicion arising from the canine alert on the vehicle. *Morton* does not extend that individualized criminal suspicion to the

[5] As with most any burning substance, the burnt smell which emanates disperses into the surrounding area and all those in the area would, most likely, acquire the smell of the burning substance. Thus, in a vehicular stop, all occupants may have acquired the smell that gives rise to the probable cause to search each occupant.

remaining occupants, nor does *Dunn*. The canine alert on the vehicle gave no independent showing of probable cause as to Dietz, a mere occupant of the vehicle. Moreover, this Court in *Morton, supra,* analyzed case law specifically addressing the constitutional rights of a passenger; whereas, in *Dunn*, the constitutional rights of a passenger were not addressed by this Court. Thus, we agree with the trial court that *Morton* is controlling. Accordingly, we find no error in the trial court's application of the law to the facts.

Turning now to the Commonwealth's argument concerning the inevitable discovery rule,[6] we agree with Dietz that this argument was not presented to the trial court;[7] therefore, we will not consider it now for the first time on appeal. *See Combs v. Knott County Fiscal Court,* 283 Ky. 456, 141 S.W.2d 859, 860 (Ky.App.

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[6] The Kentucky Supreme Court addressed the inevitable discovery rule in *Hughes v. Commonwealth,* 87 S.W.3d 850 (Ky. 2002). Therein, the Court noted:

> In *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984), the United States Supreme Court adopted the "inevitable discovery rule" to permit admission of evidence unlawfully obtained upon proof by a preponderance of the evidence that the same evidence would have been inevitably discovered by lawful means. *Id*. at 444, 104 S.Ct. at 2509. Noting that the rationale behind excluding the "fruit of the poisonous tree," *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1963), was that the prosecution should not be put in a better position than it would have been if the illegality had not transpired, the Court concluded in Nix that, conversely, the prosecution should not be put in a worse position than if no police error or misconduct had occurred. *Nix, supra*, at 443, 104 S.Ct. at 2508-09.

Hughes at 853.

[7] Assuming arguendo that the issue had been preserved, we disagree with the Commonwealth that the inevitable discovery rule would necessarily be applicable to the case *sub judice.* The cases which have applied the inevitable discovery rule have admitted evidence that truly would ultimately be discovered. *See Hughes, supra,* (applying the inevitable discovery rule to a decomposing body) and *Richardson v. Commonwealth,* 975 S.W.2d 932 (Ky.App. 1998) (evidence would have been discovered through a search incident to arrest). Similarly, the independent source doctrine has been applied to the issuance of a search warrant. *Horn v. Commonwealth,* 240 S.W.3d 665, 669-670 (Ky.App. 2007).

1940) ("It is an unvarying rule that a question not raised or adjudicated in the court below cannot be considered when raised for the first time in this court."); *Skaggs v. Assad, By and Through Assad,* 712 S.W.2d 947, 950 (Ky. 1986) ("It goes without saying that errors to be considered for appellate review must be precisely preserved and identified in the lower court."); *Kennedy v. Commonwealth*, 544 S.W.2d 219, (Ky. 1976) ("[A]ppellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court."). Additionally, the Commonwealth does not request a palpable error analysis under RCr 10.26. "Absent extreme circumstances amounting to a substantial miscarriage of justice, an appellate court will not engage in palpable error review pursuant to RCr 10.26 unless such a request is made and briefed by the appellant." *Shepherd v. Commonwealth*, 251 S.W.3d 309, 316 (Ky. 2008) (internal citations omitted). Accordingly, we decline to review the Commonwealth's argument that the drugs found on Dietz should fall under the inevitable discovery rule.

Finding no error, we accordingly affirm the trial court's grant of Dietz's motion to suppress.

ALL CONCUR.

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