

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000169-MR

JOSEPH LEE SULLIVAN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 09-CR-01232

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, LAMBERT AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Joseph Lee Sullivan appeals from the Fayette Circuit Court's judgment of conviction based on a conditional guilty plea to trafficking in marijuana within 1,000 yards of a school and first-offense possession of drug paraphernalia. Pursuant to his conditional guilty plea, Sullivan reserved the right to appeal the trial court's denial of his suppression motion. We affirm.

On April 16, 2009, while patrolling in a high crime area, which had been the subject of numerous citizen complaints of drug activity, Lexington Police Detectives Danny Page and Byron Smoot observed a Lincoln Town Car, with lightly tinted windows, legally parked on the side of the street. In a Ford Explorer, Detective Page drove toward the Lincoln where he observed a person counting money inside the car. When Detective Page looked through the car's front windshield, he observed a man counting money, an object that he believed was a digital scale, and a green leafy substance that he suspected was marijuana.

When Detective Page drove directly beside the Lincoln and looked through the driver's side window, he observed a bag of marijuana beside the right leg of the driver of the car. Detective Page drove past the Lincoln and parked his vehicle. At this point, the detectives approached the Lincoln from opposite sides. Standing on the sidewalk and looking through the open passenger side window, Detective Page observed a passenger with money, marijuana, and a digital scale. He further observed a large Ziploc bag of marijuana beside the driver's leg. From his training and experience, he believed that a drug transaction was occurring.

The detectives then requested the two men to exit the vehicle, informed them that they were being detained, and placed the men in handcuffs. Detective Smoot then observed the digital scales and marijuana on the center console of the vehicle. After searching the vehicle, Detective Page found 6.5 grams of marijuana on the digital scale and 240 grams of marijuana in the Ziplock

bag. He also found 4.2 grams of marijuana in a Starburst candy bag. Following the driver's arrest, he was identified as Sullivan and was later indicted.

Subsequently, Sullivan moved to suppress the evidence from the search of his vehicle. He argued that police did not have reasonable suspicion to execute a *Terry*¹ stop of his vehicle. He argued that his mere presence in a high crime area and his counting of money in a car did not provide a sufficient basis to permit the warrantless search of his vehicle. After conducting a suppression hearing, the trial court denied Sullivan's motion by ruling that there was probable cause for police to search Sullivan's car. The trial court found that Detective Page was lawfully in a position where he could observe contraband in plain view.

Following the denial of his suppression motion, Sullivan entered a conditional guilty plea to trafficking in marijuana within 1,000 yards of a school and first-offense possession of drug paraphernalia. In accordance with the plea, Sullivan was sentenced to one year's imprisonment. This appeal followed.

Sullivan contends that the trial court erred by not suppressing the evidence from the search of his car in violation of his rights under the Fourth Amendment of the United States Constitution and Section Ten of the Kentucky Constitution. Specifically, he contends that his presence in a high crime area, his counting of money inside of a legally parked car, and anonymous tips of drug activity were insufficient to establish reasonable suspicion to search his car. He

¹ *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

further contends that Detective Page's testimony about observing drugs through the Lincoln's tinted windows was not credible and should have been disregarded.

Our standard of review of a trial court's ruling on a motion to suppress requires that we first decide if the trial court's findings of fact are supported by substantial evidence. *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky.App. 2002). If supported by substantial evidence, the trial court's factual findings are conclusive and will not be disturbed by an appellate court. *Roberson v. Commonwealth*, 185 S.W.3d 634, 637 (Ky. 2006). A *de novo* review of the trial court's application of the law is then conducted to determine whether it correctly applied the law. *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998).

Sullivan argues that the trial court's findings of fact were erroneous because they were based on conflicting evidence and incredible testimony. He contends that Detective Page's suppression hearing testimony explained why he slowed down as he approached Sullivan's car but not his grand jury testimony. He further contends that Detective Page testified that he was within arm's length from the Lincoln Town Car when he first saw movement in the car. However, Detective Smoot testified that the detectives were approximately eight feet from the car. He also argues that the amount of time Page observed him in the car changed by a matter of seconds during his testimony. He next argues that Page's testimony placed the marijuana bag next to his right leg and then later next to his right arm.

"The determination of the weight of conflicting evidence and of the credibility of witnesses rests exclusively within the province" of the finder of fact.

Cross v. Clark, 308 Ky. 18, 22-23, 213 S.W.2d 443, 446 (1948). “It may believe any of the witnesses in whole or in part, and may accept the testimony of one set of witnesses to the exclusion of that of another or the testimony of one witness as against the testimony of a number of witnesses.” *Id.* While there were some minor inconsistencies in the record, the trial court was within its discretion to believe Detective Page’s testimony regarding the facts leading up to Sullivan’s arrest. Because an appellate court must give due weight to the factual inferences drawn by the trial court, we conclude that the trial court’s findings of fact were not clearly erroneous. *Roberson v. Commonwealth*, 185 S.W.3d 634, 637 (Ky. 2006). We now turn to the trial court’s application of the law.

Both the Fourth Amendment to the United States Constitution and Section Ten of the Kentucky Constitution guarantee citizens the right to be free from unreasonable searches and seizures, which is effectuated by the general rule prohibiting searches not authorized by a valid search warrant. *Commonwealth v. Wood*, 14 S.W.3d 557, 558 (Ky.App. 1999). However, a few exceptions have evolved to permit limited uses of warrantless entries and searches, including the automobile exception. *Dunn v. Commonwealth*, 199 S.W.3d 775, 776 (Ky.App. 2006). This exception permits police to search a legally stopped automobile where probable cause exists that evidence of a crime will be found in the vehicle. *Id.*

At the suppression hearing, Detective Page testified that he observed marijuana and a digital scale from his Ford Explorer and from the sidewalk. At both of these locations, Detective Page was legitimately in a position where he

could and did observe evidence of a drug crime. *Commonwealth v. Banks*, 68 S.W.3d 347, 350 (Ky. 2001) (police are free to approach or observe people in public areas). Consequently, when Detective Page observed the contraband in plain view from outside of Sullivan's car, he was authorized to search the vehicle under the automobile exception pursuant to the plain view exception. *Hazel v. Commonwealth*, 833 S.W.2d 831, 833 (Ky. 1992); *Dunn*, 199 S.W.3d at 776.

While Sullivan argues that his presence in a high crime area, his counting of money, and anonymous tips were insufficient to permit the warrantless search of his vehicle, the search was valid because of the totality of the circumstances, including the observance of the marijuana, digital scale, and counting of money. *Baltimore v. Commonwealth*, 119 S.W.3d 532, 539 (Ky.App. 2003) (probable cause is an objective standard based on the totality of the circumstances in each case). Based on the totality of the circumstances in the instant case, police had probable cause because their observations provided reasonable grounds to believe that contraband was located in the car. *Id.* at 538. Thus, we conclude that the trial court did not err by denying Sullivan's motion.

For the foregoing reasons, the judgment of conviction of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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