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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000825-MR

DEREK C. GUINN — APPELLANT

v.

APPEAL FROM WEBSTER CIRCUIT COURT
HONORABLE C. RENÉ WILLIAMS, JUDGE
ACTION NO. 10-CR-00045

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL, THOMPSON AND VANMETER, JUDGES.

NICKELL, JUDGE: On May 3, 2012, Derek C. Guinn entered a conditional guilty plea to multiple charges—fleeing or evading in the first degree;[1] operating a motor vehicle under the influence of alcohol or drugs (third offense);[2] failure of non-

[1] Kentucky Revised Statutes (KRS) 520.095, a Class D felony.

[2] KRS 189A.010, a Class A misdemeanor.

owner operator to maintain required insurance;[3] driving while license suspended for DUI (second offense);[4] operating ATV on roadway;[5] and, operating ATV without headgear (sixteen or over).[6] Guinn was sentenced to five-years' incarceration on the felony; thirty-days' incarceration on the three misdemeanors, to run concurrently; and a $50.00 fine on the remaining violation.

Guinn appeals denial of his motion to suppress and dismiss on the following grounds: (1) all information about and connecting him to the ATV was the result of an illegal search and should be suppressed; (2) his confession was the product of an improper custodial interrogation without *Miranda* [7]warnings; and (3) the officer could not refuse his request for a breathalyzer test and insist on a blood test.

On the evening of January 14, 2010, Officer Kenneth Vincent of the Clay City Police Department was on routine patrol when he observed a loud ATV speeding on a street. He activated his blue lights, made a U-turn and pursued the ATV. This pursuit and Officer Vincent's later interactions with Guinn were recorded on the patrol car's dashboard video camera.

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[3] KRS 304.99-060, a Class B misdemeanor.

[4] KRS 189A.090, a Class A misdemeanor.

[5] KRS 189.515, a violation.

[6] KRS 189.515, a violation. Guinn was not found guilty of this charge according to the judgment.

[7] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Officer Vincent lost sight of the ATV, but continued along its likely route following the sound of the ATV. After the sound stopped, Officer Vincent initially paused at one house, then resumed driving and spotted the ATV parked behind another house down the street. Officer Vincent approached the house, knocked on the door and Brandy Parrot answered.

Officer Vincent entered and searched the home. He found Guinn hiding in a back room. Officer Vincent instructed Guinn to go onto the porch and remain there. Guinn did not live at the residence but was related to the owners and frequently visited the home.

Officer Vincent questioned Guinn without first giving him *Miranda* warnings. Guinn confessed to driving the ATV and consuming alcohol.

Due to the speed of the ATV and lighting conditions, Officer Vincent could not identify Guinn as the driver. The only evidence establishing Guinn had driven the ATV was his own statement.

At some point during the night, Guinn requested a breathalyzer test. Officer Vincent administered a sobriety test and later, a portable breathalyzer test. It is unclear what the alcohol reading was on the test. Guinn was then taken to the police station where he refused to consent to a blood test.

After Guinn was indicted, he filed a motion to suppress and dismiss arguing the search of the house was illegal, his statements were made pursuant to a custodial interrogation without *Miranda* warnings, and his refusal to submit to a

blood test should be excluded. The parties stipulated to the introduction of the dashboard video recording of the pursuit in lieu of a suppression hearing.

The trial court denied Guinn's motion. Guinn appealed, but his appeal was dismissed as interlocutory.

On September 8, 2011, the trial court entered an amended order denying Guinn's motion. The trial court determined Officer Vincent was in hot pursuit of Guinn and exigent circumstances justified the officer's entrance into the residence because he could have arrested Guinn on first-degree fleeing and evading charges. The trial court found it was unclear from the tape whether Parrot had consented to the search. However, the trial court determined Guinn lacked standing to challenge the search of the residence because he had no privacy interest in Parrot's home.

The trial court determined Guinn was not taken into custody when he entered onto the front porch of Parrot's house. The trial court found Officer Vincent's commands to Guinn were direct, but Guinn was not forced to make incriminating statements and Guinn's interrogation was not custodial in nature.

Regarding Guinn's claim that he should have received a breathalyzer test and his refusal of the blood test was inadmissible, the trial court determined under KRS 189A.103, Guinn gave implied consent to a blood, breath or urine test and the language of the statute permits police discretion to determine which test to use as the facts of any particular case may require. The trial court found Guinn admitted having consumed half a fifth of whiskey. The trial court ruled when

Guinn refused to take a blood test, he effectively refused testing pursuant to the implied consent statute, making his refusal to submit to a blood test admissible.

When reviewing a trial court's denial of a motion to suppress, we consider its factual findings to be conclusive if supported by substantial evidence in accordance with RCr[8] 9.78. If these findings are supported, we conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision was correct as a matter of law. *Buster v. Commonwealth*, 406 S.W.3d 437, 439 (Ky. 2013).

Guinn alleges the search of Parrot's house was illegal because Parrot did not consent to the search and it was justified by neither probable cause nor exigent circumstances. In *Wong Sun v. United States*, 371 U.S. 471, 485, 83 S. Ct. 407, 416, 9 L. Ed. 2d 441 (1963), the Supreme Court explained, "verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion." Subsequent case law clarifies that if sufficiently attenuated from an illegal search or seizure, witness statements may still be admissible. *U. S. v. Ceccolini*, 435 U.S. 268, 274-279, 98 S. Ct. 1054, 1060-1062, 55 L. Ed. 2d 268 (1978).

However, a defendant who lacks standing to challenge an illegal search cannot use the exclusionary rule to suppress witness statements resulting from an illegal search. *See e.g. United States v. Gray*, 491 F.3d 138, 141 (4th Cir. 2007).

[8] Kentucky Rules of Criminal Procedure.

We agree with the trial court—Guinn had no standing to challenge the search of Parrot's house because he did not claim to own or live there at the time of the search and, thus, had no reasonable expectation of privacy in the home. *Mackey v. Commonwealth*, 407 S.W.3d 554, 557-556 (Ky. 2013).

Guinn's second argument is his confession should be suppressed as fruit of an illegal interrogation. Guinn argues he was in police custody when he was questioned and confessed to driving the ATV and using alcohol. In his view, therefore, he should not have been interrogated prior to receiving *Miranda* warnings.

Guinn argues he was seized when Officer Vincent demanded he remain on the porch by ordering him to "stand right there and don't move," come outside with him, and come to the police car. The Commonwealth argues Officer Vincent did not seize Guinn and his interactions with him were akin to a *Terry*[9] stop. The Commonwealth explains that after Guinn was questioned, he was permitted to call his girlfriend on his phone, have a cigarette and can be seen walking around on the video recording.

Under *Miranda,* 384 U.S. at 478–479, 86 S. Ct. at 1630, suspects cannot be subjected to a custodial interrogation until advised of their rights. *United States v. Salvo*, 133 F.3d 943, 948 (6th Cir. 1998); *Cummings v. Commonwealth,* 226 S.W.3d 62, 65 (Ky. 2007). Determination of whether a suspect is in custody for purposes of a *Miranda* warning is based upon totality of the circumstances.

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

Wilson v. Commonwealth, 199 S.W.3d 175, 180 (Ky. 2006). The proper inquiry is explained in *Smith v. Commonwealth*, 312 S.W.3d 353 (Ky. 2010):

> [c]ustody does not occur until police, by some form of physical force or show of authority, have restrained the liberty of an individual. The test is whether, considering the surrounding circumstances, a reasonable person would have believed he or she was free to leave. The United States Supreme Court has identified factors that suggest a seizure has occurred and that a suspect is in custody: the threatening presence of several officers; the display of a weapon by an officer; the physical touching of the suspect; and the use of tone of voice or language that would indicate that compliance with the officer's request would be compelled. Other factors which have been used to determine custody for *Miranda* purposes include: (1) the purpose of the questioning; (2) whether the place of the questioning was hostile or coercive; (3) the length of the questioning; and (4) other indicia of custody such as whether the suspect was informed at the time that the questioning was voluntary or that the suspect was free to leave or to request the officers to do so, whether the suspect possessed unrestrained freedom of movement during questioning, and whether the suspect initiated contact with the police or voluntarily admitted the officers into the residence and acquiesced to their requests to answer some questions.

Id. at 358-59 (internal citations and footnotes omitted).

The parties waived a suppression hearing and stipulated to be bound by the trial court's review of the dashcam video. Therefore, there is no evidence to review regarding the interaction between Officer Vincent and Guinn inside the house, what precipitated Guinn's departure from the house, and whether the manner of his removal suggested a seizure had occurred.

Having reviewed the video recording, we agree with the trial court—the interaction between Officer Vincent and Guinn on the porch and outside did not establish custody. While Officer Vincent's order to Guinn that he remain on the porch implied Guinn did not have unrestrained freedom of movement during the questioning, other factors suggest Guinn was not in custody. There was no obvious physical contact or show of force. The questioning took place in a non-coercive environment and Guinn was questioned only briefly. Based on the totality of the circumstances, Guinn was not in custody and a *Miranda* warning was not required.

Guinn's final argument is his refusal of a blood test should not be admissible. Guinn's argument is based on well-established case law that the Fourth Amendment of the United States Constitution and Section Ten of the Kentucky Constitution protect citizens from unreasonable searches and seizures without a warrant unless narrow exceptions apply, such as exigency. *Hallum v. Commonwealth*, 219 S.W.3d 216, 221 (Ky. App. 2007). This protection has been extended to the drawing of blood to test for one's blood alcohol level. *See Missouri v. McNeely*, __U.S.__, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013); *Schmerber v. California*, 384 U.S. 757, 769-770, 86 S. Ct. 1826, 1835, 16 L. Ed. 2d 908 (1966).[10]

[10] Based on the same Fourth Amendment principles, a refusal to submit to a warrantless blood test would be inadmissible in a DUI prosecution. The Fourth Amendment does not protect defendants solely against warrantless searches; it also protects defendants from having their refusal to consent to a warrantless search be used against them as evidence of guilt. *United States v. Runyan*, 290 F.3d 223, 249 (5th Cir. 2002); *United States v. Moreno*, 233 F.3d 937, 941 (7th Cir. 2000); *United States v. Dozal*, 173 F.3d 787, 794 (10th Cir. 1999); *United States v.*

In the context of DUI cases, our Supreme Court held in *Helton v. Commonwealth*, 299 S.W.3d 555, 563-64 (Ky. 2009), a blood test search is reasonable without a warrant due to the exigent circumstances of blood alcohol dissipation so long as the officer had probable cause to believe the suspect violated the DUI statutes when he requested the blood test. In the recently decided *McNeely*, however, the United States Supreme Court held, "in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." 133 S.Ct. at 1568. The holding in *McNeely,* therefore, brings into question the continued viability of the *Helton* decision, and a state's ability to require DUI suspects to submit to nonconsensual blood testing without a warrant, or an exigency demonstrated in a particular case based on the totality of the circumstances. *Id*. at 1556, 1563.

However, this claim of error does not require decision, since any error was harmless. RCr 9.24. Guinn admitted consuming alcohol and driving the ATV. Further, his recorded interaction with Officer Vincent and subsequent sobriety testing showed him to be intoxicated. Allowing DUI to be presumed based on his refusal to submit to a blood test was merely cumulative of other evidence and harmless error at most. *See Combs v. Commonwealth*, 965 S.W.2d 161, 165 (Ky. 1998) (admission of refusal in DUI prosecution deemed harmless error where

Thame, 846 F.2d 200, 207 (3rd Cir. 1988); *United States v. Prescott*, 581 F.2d 1343, 1350-51 (9th Cir. 1978).

defendant entered conditional guilty plea in face of overwhelming evidence of intoxication).

Accordingly, we affirm the Webster Circuit Court's denial of Guinn's motion to suppress and convictions.

ALL CONCUR.

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