

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001675-MR

CRYSTAL L. DALTON

APPELLANT

v.

APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 13-CR-00013

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * ** * **

BEFORE: DIXON, JONES, AND VANMETER, JUDGES.

JONES, JUDGE: Crystal Dalton appeals from a judgment of the Lawrence Circuit Court sentencing her to a total of ten years' imprisonment after a jury found her guilty of trafficking in a controlled substance in the first degree, possession of drug paraphernalia, possession of a controlled substance not in original container, and of

being a Persistent Felony Offender in the second degree. Upon careful review of the record and applicable law, we vacate and remand for a new trial.

I. FACTUAL AND PROCEDURAL BACKGROUND

On January 16, 2013, Deputy Sheriff Mason Keefer was patrolling in Lawrence County, Kentucky, when he noticed the license plate of the vehicle Appellant was driving was not illuminated. As a result, Deputy Keefer decided to initiate a traffic stop. While approaching the vehicle, Deputy Keefer observed the passenger in the front seat hide something under the seat. Deputy Keefer engaged with the driver of the vehicle, who identified herself as Crystal Dalton, the Appellant. Deputy Keefer observed Dalton to be nervous, have glassy eyes and slurred speech. He believed Dalton to be under the influence of either drugs or alcohol.

Per Deputy Keefer's request, Dalton stepped out of her vehicle and emptied the contents of her pockets onto the hood of the police cruiser. These contents included a cell phone that was later seized. Deputy Keefer then placed Dalton in the police cruiser and went to speak with the other two passengers of the vehicle. Deputy Keefer asked the two passengers to exit the vehicle and empty the contents of their pockets. Anthony Childers was located in the front passenger seat and Zandol Parrigan was located in the back passenger seat. Both men exited the vehicle, emptied their pockets onto the hood of the vehicle, and then consented to a search of the vehicle. Deputy Keefer also placed Childers and Parrigan in the

cruiser prior to searching the vehicle. Deputy Keefer did not ask Appellant for consent to search the vehicle.

Deputy Keefer searched the vehicle and found pills in a container under Childers's seat and pills in a separate container located between Childers's seat and the middle console. These pills were later identified as a combination of Oxycodone and Alprazolam (Xanax). One hundred and eight Oxycodone pills and four Xanax pills were seized. Deputy Keefer also seized a cell phone that was found on the middle console between the two front seats, a global positioning (GPS) unit on the dashboard, and a small tablet. Deputy Keefer also seized two syringes found in a black bag in the back seat of the vehicle and three notebooks. The black bag also contained toilet paper and clothes. Appellant's and Childers's wallets were searched and revealed various medical business cards. Handwritten notations of appointment dates and times appeared on these cards. Deputy Keefer observed that there was information about medical offices and pharmacies from locations spanning a wide distance, from Maryland to Texas. Additionally, a total of \$1,619 in cash was recovered from the three individuals.

As noted, two cellular telephones were seized during Deputy Keefer's search: the AT&T telephone Appellant removed from her pocket and a Samsung telephone that Deputy Keefer located in the automobile's center console. On January 18, 2013, a search warrant was executed to allow investigators to search the content of the telephones on the basis that investigators reasonably believed the telephones harbored evidence of illegal drug activity. Investigators located text

messages on both telephones that the Commonwealth claims are indicative of illegal drug transactions.

Thereafter, Appellant and Childers were each indicted for trafficking in a controlled substance in the first degree (Oxycodone), trafficking in a controlled substance in the third degree (Alprazolam), possession of drug paraphernalia, and possession of a controlled substance not in original container. With respect to each charge, Appellant and Childers were also charged with acting in complicity. Appellant was also indicted with being a persistent felony offender (PFO) in the second degree.

Prior to trial, Appellant moved to suppress all the evidence seized from the vehicle. The other two passengers, Childers and Parrigan, orally moved to join the motion during a July 9, 2013, hearing. The trial court denied the motion, with respect to Childers and Parrigan because they consented to the search of the vehicle. The trial court also denied Appellant's motion on the basis that Deputy Keefer had probable cause to believe Appellant was driving under the influence (DUI) and that evidence of that crime could be found in the vehicle.

On the morning of trial, Appellant and Parrigan each made a motion to sever the trial on the basis of an alleged inculpatory statement made by Childers. At a hearing on that motion, the parties revealed that three days prior to the trial, the Commonwealth disclosed a recently discovered statement by Childers to Deputy Keefer on the night of the arrest claiming ownership of the pills found in the vehicle. Deputy Keefer had initially not reported the statement because he

believed it was inadmissible. Parrigan's motion was granted, but Appellant's motion was denied on the basis that evidence produced from Appellant's and Childers's cell phones showed complicity of trafficking and obtaining the pills between the two of them.

Appellant and Childers were tried as co-defendants and both were convicted of trafficking in the first degree, possession in the third degree, possession of drug paraphernalia, possession of a controlled substance not in original container. Appellant was also convicted of being a PFO in the second degree and sentenced to a total of ten years' imprisonment. Both Childers and Appellant appealed as a matter of right. The appeals were originally consolidated; however, Childers's appeal was later dismissed at his request.

II. ANALYSIS

On appeal, Appellant makes several claims of errors. Each of her arguments is addressed below.

A. Motion to Suppress

First, Appellant claims that the search of her car was an unreasonable warrantless search lacking probable cause. Because a probable cause determination is a mixed question of law and fact, we apply a *de novo* standard of review. *Baltimore v. Commonwealth*, 119 S.W.3d 532, 539 (Ky. App. 2003). However, it is a slightly modified *de novo* standard in that “reviewing courts must give due weight to inferences drawn from the facts by the trial court and law enforcement officers and to the trial court’s findings on the officers’ credibility.”

Id.

After a hearing, the trial court determined that Deputy Keefer's search was supported by probable cause. The trial court denied Appellant's motion to suppress as follows:

With respect to Defendant Dalton [Appellant], the court has reviewed the important case of *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710 (2009). In that case, the court limited the searches that can be made of vehicles without warrants. The court did state, however, that if there is probable cause to believe that a vehicle contains evidence of criminal activity, the police may lawfully search any area of the vehicle in which the evidence might be located. The court also held that circumstances unique to a vehicle justify a search incident to a lawful arrest when it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle.

In this case, there were a number of factors which provided the officer probable cause to believe the vehicle contained evidence of criminal activity. The driver had glassy eyes and slurred speech. She professed an inability to take a field sobriety test, which is unusual, considering that she is less than thirty years of age. The

officer noted that the Defendant Childers appeared to place something under the front seat of the car. Finally, Defendants Childers and Parrigan gave consent to the search of the vehicle. All of that clearly constituted probable cause for the officer to search the areas that he searched, which consisted of the portion of the vehicle occupied by Defendants Childers and Parrigan, that being the rear seat of the vehicle and the right front passenger seat. All that being the case, the Court finds that there was sufficient probable cause for the search of the vehicle.

“A warrantless search is presumed to be both unreasonable and unlawful both under the United States Constitution and Kentucky Constitution and the prosecution has the burden of proving the warrantless search was justifiable under a recognized exception to the warrant requirement.” *Gray v. Commonwealth*, 28 S.W.3d 316, 318 (Ky. App. 2000). In this case, we are dealing with the automobile exception to the warrant requirement. The automobile exception applies when there is probable cause to believe an automobile contains evidence of criminal activity and the automobile is readily mobile. *Chavies v. Commonwealth* 354 S.W.3d 103, 108 (Ky. 2011).

An inquiry into whether the automobile exception applies necessarily requires determining whether the stop of the vehicle was justified. “Stopping an automobile and detaining its occupants constitutes a seizure under the Fourth Amendment. Traffic stops are similar to *Terry* stops and must be supported by articulable reasonable suspicion of criminal activity.” *Id.* (internal quotations, brackets, and footnotes omitted)

Deputy Keefer observed that the vehicle's license plate was not illuminated and initiated a traffic stop of the vehicle. The lack of illumination was a proper basis for a traffic stop. *See* KRS¹ 186.170 ("Plates shall be kept legible at all times and the rear plate shall be illuminated when being operated during the hours designated in KRS 189.030").

In the context of the automobile exception, probable cause requires knowledge of facts that would cause a reasonably prudent person to believe that a crime had occurred and that evidence of that crime could be found in the vehicle. In talking with the Appellant, Deputy Keefer testified that he noted Appellant, who was located in the driver's seat, appeared to have glassy eyes and slurred speech. Based on his experience, Deputy Keefer believed that Appellant's conduct and appearance suggested that she was driving under the influence of drugs and/or alcohol. He had also observed the occupants of the automobile making furtive movements he believed indicated that they were trying to hide some kind of contraband from him. We agree with the circuit court that these factors gave Deputy Keefer sufficient probable cause to believe drugs would be found in Appellant's car.

B. Joint Trial

Next, Appellant contends that she was denied a fair trial by being tried together with Anthony Childers. Appellant argues that the trial court denied her due process rights when it did not allow her to cross-examine Deputy Keefer

¹ Kentucky Revised Statutes.

regarding an alleged inculpatory statement by Childers. Alternatively, Appellant argues that if the statement was not admissible against Childers, the trial court should have granted her motion to sever the trial and then permitted her to admit the statement in a separate trial. We agree.

On the Friday before trial, after business hours, the Commonwealth disclosed that it had been discovered Childers made a statement to Deputy Keefer on the night of his arrest, which the Commonwealth had not previously turned over to the defense.² Responding to Deputy Keefer's statement that he was going to arrest all three (Appellant, Childers, and Parrigan), Childers told Deputy Keefer that all of drugs found in the car belonged to him.

On the morning trial was scheduled to begin, counsel for all the parties met with the trial court in chambers to discuss the statement. Both Appellant and Parrigan moved the trial court to sever their cases because they intended to introduce Childers's statement. The trial court granted Parrigan's motion, but denied Appellant's motion on the basis that she was engaged in a higher level of concert with Childers than Parrigan. Further, the trial court ruled that if Appellant tried to introduce the statement at trial over the Commonwealth's objection, the trial court would sustain the objection.

² The Commonwealth explained that it did not intentionally keep the statement from the defense, but rather had only recently learned about it from Deputy Keefer. Apparently, Deputy Keefer had failed to disclose the statement to the prosecution team because he did not believe that it would be admissible at trial. Nevertheless, deputies and investigators are agents of the Commonwealth and any statements taken by them are in the possession of the Commonwealth, regardless of whether the Commonwealth's Attorney is personally aware of them. *Anderson v. Commonwealth*, 864 S.W.2d 909, 912 (Ky. 1993).

The trial proceeded as to Childers and Appellant. While the trial court did not allow Appellant to introduce Childers's statement to Deputy Keefer before the jury, it permitted her to introduce it by way of avowal. Outside the presence of the jury, Deputy Keefer testified that after he told Childers he was “getting” all three for trafficking, Childers told him that the pills located in the car all belonged to him. Appellant argues that the trial court's refusal to allow her to introduce Childers's inculpatory statement before the jury violated her due process rights. We agree.

We begin by recognizing that the Commonwealth has a right to charge two or more defendants jointly "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.” RCr³ 6.20. As in effect at the time of Appellant's trial, RCr 9.16 provided:

[i]f it appears that a defendant or the Commonwealth is or will be prejudiced . . . by joinder for trial, the court shall order separate trials of counts, grant separate trials of defendants or provide whatever other relief justice requires. A motion for such relief must be made before the jury is sworn. . . . In ruling on a motion by a defendant for severance the court may order the attorney for the Commonwealth to deliver to the court for inspection in camera any statement or confessions made by the defendants that the Commonwealth intends to introduce in evidence at trial.

³ Kentucky Rules of Criminal Procedure.

*Id.*⁴ Where the trial court has denied a motion to sever, the burden is on the appellant to show that the denial was in fact unfairly prejudicial. *Quisenberry v. Commonwealth*, 336 S.W.3d 19 (Ky. 2011).

Antagonistic defenses, including defendants casting blame on each other, standing alone, are not unfairly prejudicial and do not invariably mandate separate trials. *See, e.g., Davis v. Commonwealth*, 967 S.W.2d 574, 581 (Ky.1998) (“Even if the defendants attempt to cast blame on each other, severance is not required.”); *Ware v. Commonwealth*, 537 S.W.2d 174, 177 (Ky.1976) (“neither antagonistic defenses nor the fact that the evidence for or against one defendant incriminates the other amounts, by itself, to unfair prejudice.”); *Paulley v. Com.*, 323 S.W.3d 715, 730 (Ky. 2010).

Had this case proceeded in the ordinary course, we would have no issue with the joint trial of Childers and Appellant. The problem is that the matter strayed off course when the Commonwealth failed to disclose Childers's statement

⁴ Effective January 1, 2015, RCr 9.16 was deleted by the Kentucky Supreme Court by way of Order 2014-22. The current version of this Rule is now codified at RCr 8.31. It provides as follows:

If it appears that a defendant or the Commonwealth is or will be prejudiced by a joinder of offenses or of defendants in an indictment, information, complaint or uniform citation or by joinder for trial, the court shall order separate trials of counts, grant separate trials of defendants or provide whatever other relief justice requires. A motion for such relief must be made before the jury is sworn or, if there is no jury, before any evidence is received. No reference to the motion shall be made during the trial. In ruling on a motion by a defendant for severance the court may order the attorney for the Commonwealth to deliver to the court for inspection in camera any statements or confessions made by the defendants that the Commonwealth intends to introduce in evidence at the trial.

in a timely fashion. Even though the Commonwealth's failure was inadvertent, it was

a discovery violation nonetheless. *See Anderson v. Commonwealth*, 864 S.W.2d 909, 914 (Ky. 1993) (notwithstanding a prosecutor's good faith, a discovery violation is a violation). Given the untimely disclosure of the statement, its introduction at Childers's trial would have unduly prejudiced his defense.

Chestnut v. Commonwealth, 250 S.W.3d 288, 299 (Ky. 2008). Thus, the trial court was correct in determining that the statement could not be introduced in Childers's trial. *See* RCr 7.24(9).

However, Childers's interest was not the only one at issue. Appellant, who was to be tried jointly with Childers, had a due process interest in presenting a full defense. As no contraband was found on Appellant, Appellant argues that the introduction of Childers's statement is essential to her defense and, as such, she has a constitutional right to introduce it. The Commonwealth counters that because Appellant was charged both as an actor and as acting in complicity to commit trafficking, the statement was not highly probative.

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297 (1973). In this case, another person, Childers, admitted to police that the drugs found in Appellant's car were his alone. Appellant was prevented from questioning Deputy Keefer about Childers's statement. We cannot agree that the prejudicial

effect of not being allowed to elicit Childers's incriminating statement to Deputy Keefer outweighed the benefits of joinder of the indictments. Importantly, the Commonwealth's motion to combine the indictments for the purposes of trial stated that all "allegations arose from one singular event, a traffic stop, *where all three individuals made no directly admissible statements as to ownership of the alleged contraband.*" The very reasoning for the Commonwealth's motion to join was directly contradicted by the statement Childers's made to Deputy Keefer.

Faced with this dilemma, the trial court should have either continued the joint trial or granted Appellant's motion to sever. Forcing Appellant to proceed with a joint trial, but limiting her ability to cross-examine Deputy Keefer, was in error. Moreover, having reviewed the record, we cannot conclude that it was a harmless error. Had the jury been privy to Childers's statement, it might have reached a different result. Accordingly, we must reverse and remand.

C. Remaining Issues

Given that any retrial of Appellant will not involve Childers as a co-defendant, we do not believe that the remaining issues raised by Appellant regarding authenticity and the like are likely to come up in the same manner if the Commonwealth elects to retry her. Accordingly, we decline to address Appellant's remaining assignments of error.

III. CONCLUSION

For the reasons set forth below, we VACATE Appellant's conviction and sentence and REMAND for a new trial.

ALL CONCUR.

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