

RENDERED: August 1, 1997; 10:00 a.m.  
NOT TO BE PUBLISHED

NO. 97-CA-331-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM MARION CIRCUIT COURT  
HONORABLE WILLIAM M. HALL, JUDGE  
ACTION NO. 95-CR-108

WILLIAM G. MILLER  
AND ALAN F. METCALFE

APPELLEES

OPINION AFFIRMING

\* \* \* \* \*

BEFORE: DYCHE, GUDGEL, AND HUDDLESTON, JUDGES.

DYCHE, JUDGE. The Commonwealth brings this interlocutory appeal from an order suppressing evidence obtained from warrantless searches of William G. Miller, Alan F. Metcalfe, and Miller's vehicle. At issue is whether the Commonwealth showed that the searches fell within one of the exceptions to the search warrant requirement. We agree with the circuit court that the Commonwealth did not meet its burden, and affirm.

As a result of a warrantless search of the defendants and Miller's truck on November 5, 1995, state police officers charged Miller and Metcalfe with drug offenses, and Metcalfe with

carrying a concealed deadly weapon. On November 8, 1996, the defendants filed a motion to suppress the evidence obtained from these searches. The court held a hearing on December 2, 1996. Kentucky State Police Officers Broyles and Williams, defendants Miller and Metcalfe, Miller's girlfriend Melissa Horton, and Melissa's mother Janet Horton testified. In an order entered January 28, 1997, the court ordered the evidence suppressed. This appeal followed.

Searches without a valid search warrant are unreasonable unless shown to be within one of the recognized exceptions, and the burden is on the prosecution to show the search comes within an exception. Gallman v. Commonwealth, Ky., 578 S.W.2d 47, 48 (1979); Clark v. Commonwealth, Ky. App., 868 S.W.2d 101, 105 (1993). On review of a pre-trial hearing for suppression of evidence obtained during a search, a trial court's findings of fact are conclusive if supported by substantial evidence. RCr 9.78; Davis v. Commonwealth, Ky., 795 S.W.2d 942 (1990); Simpson v. Commonwealth, Ky. App., 834 S.W.2d 686, 687 (1992). The trial court's determinations of reasonable suspicion and probable cause should be reviewed de novo. Ornelas v. United States, \_\_\_ U.S. \_\_\_, 116 S. Ct. 1657, 1663, 134 L. Ed. 2d 911 (1996). Cf. Clark, supra.

The trial court did not make any findings of fact, further limiting our review. The undisputed testimony established that Miller and Melissa Horton, although unmarried,

had been living together for approximately ten years. Members of Horton's family told Broyles they believed she had received a black eye at the hands of Miller. Officer Broyles requested back-up from Officer Williams. En route to Miller's and Horton's house, the officers observed Miller driving in the opposite direction. When they arrived at the house, Horton's relatives told them that Miller had beaten Melissa, and had just left.

Both officers pursued Miller, and found him and Metcalfe sitting in Miller's parked truck. Miller got out and spoke with Officer Broyles. From this point on, much of the evidence is contested. Broyles said he arrested Miller for assault and drug possession, before he searched him, because Officer Williams had observed suspected drugs and paraphernalia in the truck. Miller said Broyles did not tell him he was under arrest when he was searched. Both Miller and Metcalfe testified that the truck doors were shut and the tinted windows rolled up, so that Williams could not have seen inside the truck. Broyles's search of Miller found pills, cocaine and a large amount of cash. Officer Williams ordered Metcalfe out of the truck and searched him, finding a hand gun. The officers searched the truck, finding additional drugs and drug paraphernalia.

After considering the testimony and the parties' memoranda, the trial court held "that the Commonwealth failed in its proof of probable cause for stopping the defendants,

arresting the defendants and/or conducting a search of the defendants or the subject vehicle."

On appeal, the Commonwealth attempts to justify the stop of Miller and Metcalfe under Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889, (1968). Terry permits police to stop an individual, without probable cause for arrest, if there is a "reasonable articulable suspicion" that the person is engaged in illegal activity. 392 U.S. at 27, 88 S. Ct. at 1883; Simpson v. Commonwealth, Ky. App., 834 S.W. 2d 686, 687 (1992). Based upon the information available to Officer Broyles, he may have been justified in stopping Miller.

A valid stop, however, does not necessarily validate the searches. The Commonwealth invokes the "plain view" rule, Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971), Hazel v. Commonwealth, Ky., 833 S.W.2d 831, 833 (1992), and search incident to a lawful arrest, Chimel v. California, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969). It argues that once the officers lawfully approached the defendants in the truck they observed drugs and paraphernalia, justifying the arrests and subsequent personal and vehicle searches.

To find for the Commonwealth would require us to resolve disputed testimony in its favor. We may not reverse the trial court or remand this case to it because of its failure to make a finding of fact on an essential issue unless such failure

is brought to that court's attention by a written request for a finding on the issue. See CR 52.04; Lovell v. Commonwealth, Ky. App., 695 S.W.2d 429 (1985). The Commonwealth made no such request.

The witnesses disputed whether the officers could have seen drugs or paraphernalia inside the truck. Any argument under KRS 431.005(1)(d), which permits a warrantless arrest when a misdemeanor is committed in an officer's presence, depends on accepting the officers' disputed testimony.

Without the officers' observation of drugs and paraphernalia before the arrests, there was no justification for the arrests and searches. The officers did not have warrants to arrest either defendant. They needed a warrant to arrest Miller on fourth-degree assault, a misdemeanor. Mash v. Commonwealth, Ky., 769 S.W.2d 42 (1989). KRS 431.005(2), at the time of the incident, allowed warrantless arrests in cases of intentional or wanton physical injury to a family member. The statute as amended effective July 15, 1996, includes members of unmarried couples, but did not before then. Thus, it did not include Melissa Horton, Miller's live-in girlfriend.

For the foregoing reasons, we conclude that the Commonwealth did not meet its burden in establishing the legality of the warrantless searches. We affirm the order of the circuit court.

ALL CONCUR.

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