

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002834-MR

ROBERT G. COLSON

APPELLANT

v. APPEAL FROM CALLOWAY CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 99-CR-00002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING
** **

BEFORE: JOHNSON, KNOFF, AND MILLER, JUDGES.

MILLER, JUDGE: Robert G. Colson brings this appeal from a November 15, 1999, judgment and sentence of the Calloway Circuit Court, sitting without jury. We reverse.

Our gleaning of the record generally reveals the following: On January 11, 1999, Colson was indicted for possession of drug paraphernalia (second offense). Kentucky Revised Statutes (KRS) 218A.500(2). On February 11, 1999, Colson filed a motion to suppress evidence. The evidence consisted of what was referred to as "rolling papers (rice papers)" found in

search of Colson's person. It was this material upon which Colson was prosecuted for possession of drug paraphernalia.

On March 22, 1999, the court held a suppression hearing. During the hearing, Officer Chris Garland and Officer Doug Chaney testified about the events surrounding the seizure on October 29, 1998. Officer Garland testified that he was the first officer to arrive at the scene around 5:30 p.m. He stated that he saw a white pickup truck, appearing to have mechanical trouble. Officer Garland pulled up behind the truck and turned on his warning lights to warn other traffic. The pickup pulled into a parking lot and stopped. Officer Garland did likewise. Officer Garland stated that he got out of his patrol car and offered his assistance to the driver, a person later identified as one Michael Duncan. He stated that Colson was a passenger. Duncan said that he wanted to try to get the car home. Officer Garland called Officer Chaney to the scene. Because Officer Garland was not a certified patrolman, it was up to Officer Chaney to decide whether the vehicle was safe to return to the road.

Officer Chaney arrived and decided that the occupants should try to fix the vehicle in the parking lot or to call a tow truck. Officer Chaney did not want Duncan to take the ailing vehicle back onto the road. When the two men began working on the vehicle, Officer Chaney took a "quick glance" into the cab of the truck through the driver's window and noticed Duncan giving him "some odd looks." Based upon the suspicion created by Duncan's action, Officer Chaney had the following conversation

with him. He asked if Duncan had any alcohol, drugs, or weapons in the vehicle. In response thereto, Officer Chaney stated that Duncan said "I have some marijuana" and pulled out a tin container containing marijuana seeds, marijuana, and paraphernalia.

At this time, Colson was working under the vehicle. Officer Chaney placed Duncan under arrest and seated him in the patrol car. Officer Chaney then proceeded to look through the vehicle which was owned by Duncan. Colson remained underneath the vehicle during this time. Officer Chaney asked another officer who had arrived on the scene, Patrolman Scott Svebakken, to stand by Colson, who was still working on the vehicle. He did this as a precaution because he thought something might be found in the vehicle implicating Colson. As Officer Chaney looked through the vehicle, he discovered a leather portfolio bag between the gear shift and passenger seat. Upon examining the contents of the vehicle, Officer Chaney also found a loaded revolver, a knife, and three or four bags of marijuana.¹ Officer Chaney testified under direct examination as follows:

Commonwealth: What did you do once you found those items?

Chaney: Once I found the firearm and the other bags of marijuana in a possession where Officer Garland said both of the people were sitting, I had Officer Svebakken cuff Mr. Colson, or Mr. Duncan, excuse me, and uh placed him under arrest also. And upon patting down Mr. Duncan,

¹There was also within the vehicle a can of tobacco.

found a pack of rolling papers on his person in his back right pocket . . .

West: Excuse me your honor, he said Mr. Duncan, did he mean Mr. Colson? Sorry to interrupt.

Judge: Yes, I'm curious, too.

Commonwealth: Mr. Duncan? I thought you had already placed him under arrest?

Chaney: Correct.

Commonwealth: So who did you pat down after you found the guns or gun and marijuana?

Chaney: I patted down Mr. Colson, excuse me.

Commonwealth: This person over here? (motioning towards defense table.)

Chaney: Yes Ma'am.

During Colson's cross-examination of Officer Chaney, the following transpired:

West: What if anything did you use as a basis for searching Mr. Colson?

Chaney: Upon finding the items inside the vehicle placed where both people, as stated by Officer Garland, had been seated I arrested him for the same charges and upon further investigation I found out that Mr. Duncan claimed responsibility for the marijuana and the firearm, however, like I said I did detect an odor of marijuana in the vehicle.

. . . .

Chaney: The reason Mr. Colson was searched is that he was placed under arrest.

West: What was the reason you placed him under arrest?

Chaney: For all of the items that were found in the vehicle and for what, the items he had on his person.

West: But you didn't find the items on his person until after you placed him under arrest.

Chaney: Correct.

West: So why did you place him under arrest?

Chaney: I initially was going to charge everyone with what was found inside the vehicle. Mr. Colson asked me if, you know, we could find out who it belonged to. Michael Duncan claimed that it was his . . .

West: At the point in time . . .

Chaney: I didn't see any point in charging . . . (inaudible because Mr. West is speaking over Officer Chaney).

West: At the point in time you placed Mr. Colson under arrest, Mr. Duncan had already told you that all that other stuff was his.

Chaney: No sir, it was after I arrested him.

At the conclusion of the hearing, Colson's counsel argued that the search abridged his constitutional rights.² On March 31, 1999, the circuit court denied Colson's motion to suppress. The court concluded that at some point in time it became clear that the officers had probable cause to arrest Colson, and that the search of his person discovered "rolling papers" which formed the basis for his indictment for second offense possession of drug paraphernalia. On July 21, 1999, after a bench trial, the court found Colson guilty of possessing drug paraphernalia (rolling papers). On November 15, 1999, the court sentenced Colson to three years' imprisonment, thus precipitating this appeal.

The Commonwealth claims the search of Colson was incident to a lawful arrest and perforce the evidence was admissible. Colson argues the seizure of the material from his hip pocket was improper and should have been excluded by the circuit court.

In the order denying suppression, the circuit court concluded as follows:

1. The facts are very simple in that Defendant and another individual were in another automobile which was marked in a parking lot. A local police officer stopped to render assistance to the individuals and called for another officer to assist him with this matter. When this occurred, the officer saw contraband in plain view and discussed it

²Our federal and state constitution protections are co-extensive. See Holbrook v. Knopf, Ky., 847 S.W.2d 52 (1993).

with the individuals, including the Defendant.

2. At some point, it became clear that the officers had probable cause to arrest the Defendant and his co-defendant. During a search incident to a lawful arrest, rolling papers were found on the Defendant, and the Defendant was subsequently indicted for second offense Possession of Drug Paraphernalia.

3. The Court is of the opinion that because the search was incident to a lawful arrest, that Defendant is not entitled to suppression, and hence Defendant's Motion is DENIED. (Emphasis added.)

From the foregoing, the circuit court obviously considered the search of Colson as incident to his arrest. From Officer Chaney's testimony, Colson's arrest was based upon the contraband found in the vehicle -- marijuana, knife, and revolver. We, therefore, look to the validity of the arrest in determining whether the seizure from his person was permissible. His arrest was, of course, without a warrant. Under the law of this Commonwealth, a police officer may make an arrest without a warrant "when he has probable cause to believe that the person being arrested has committed a felony." KRS 431.005(1)(c). Of course, probable cause must exist and must be known by the arresting officer at the time of the arrest. It is not sufficient that probable cause is founded upon retrospect after viewing evidence. See Sampson v. Commonwealth, Ky., 609 S.W.2d 355 (1980).

It is well established that a person who owns or exercises dominion or control over a motor vehicle is legally

deemed to possess any contraband found therein. See Paul v. Commonwealth, Ky. App., 765 S.W.2d 24 (1988). In the case at hand, there is no evidence that Colson owned or exercised dominion or control over the vehicle; rather, the evidence established that Colson was a mere passenger. Moreover, the evidence fails to establish that Colson exercised dominion or control over the contraband found in the vehicle so as to be in constructive possession of same. In fact, Colson was never charged with a crime growing out of the contraband seized from the vehicle. Officer Chaney apparently concluded that the seized contraband belonged to Duncan, the owner of the vehicle.

In Paul at 26, the Court concluded that "a person's mere presence in the same car with a criminal offender does not authorize an inference of participation in a conspiracy." We simply do not believe that probable cause existed to arrest Colson based upon the contraband found in the vehicle. As such, we view the search incident to Colson's arrest as improper.

It has also been suggested that the search of Colson was proper under Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), accord, Martin v. Commonwealth, Ky., 592 S.W.2d 134 (1979). In Terry, the Court recognized an exception of the warrant requirement by sanctioning both investigatory stops and limited pat-down searches of suspects. When there is reasonable suspicion that criminal activity is afoot, a police officer may briefly detain an individual on the street even though there exist no probable cause to arrest him. Id. Terry

also acknowledged the legitimacy of a police officer taking steps to assure himself that a person with whom he is dealing is not armed and dangerous by permitting a limited search for weapons.

In Commonwealth v. Crowder, Ky, 884 S.W.2d 649, 651 (1994), our Supreme Court examined a Terry pat-down seizure:

[T]he premise of *Terry* is that an officer will be able to detect the presence of a weapon through the sense of touch when the police "pats down a suspect's outer clothing and feels an object **whose contour or mass makes its identity immediately apparent**, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain view context." . . . [Minnesota v. Dickerson, 508 U.S. 366, 375-376, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993)] (footnote omitted). Thus, **if the non-threatening contraband is immediately apparent from the sense of touch**, during an otherwise lawful patdown, an officer should not be required to ignore it. See e.g., Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). (Emphases added.)

In the case at hand, we do not believe that the rolling papers constituted "non-threatening contraband" that was "immediately apparent from the sense of touch." Simply stated, we do not believe that the contour and mass of the rolling papers made their identity immediately apparent as contraband. A syringe or certain other drug paraphernalia could be readily identified as contraband by an officer's touch; however, the contour and mass of rolling papers are simply not uniquely distinctive of contraband. Considering the totality of

circumstances, we are of the opinion that the seizure of rolling papers from Colson was unconstitutional. See Ornelas v. United States, 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996).

In sum, the circuit court erred by failing to exclude from evidence the rolling papers seized from Colson's person. Under the precepts of Johantgen v. Commonwealth, Ky. App., 571 S.W.2d 110 (1978), we reverse as a conviction is impossible absent the unconstitutionally seized rolling papers.

For the foregoing reasons, the judgment of the Calloway Circuit Court is reversed.

JOHNSON, JUDGE, CONCURS.

KNOPF, JUDGE, CONCURS IN RESULT.

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