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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001398-MR

WENDELL T. WEBB — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 97-CR-000272

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS, JOHNSON AND McANULTY, JUDGES.

JOHNSON, JUDGE: Wendell T. Webb has appealed from the judgment of conviction entered by the Fayette Circuit Court on May 29, 1998, that convicted him of trafficking in a controlled substance in the first degree[1] (cocaine), possession of marijuana[2] and possession of drug paraphernalia.[3] Having concluded that the trial court did not err in denying Webb's motion to suppress

[1]Kentucky Revised Statutes (KRS) 218A.1412.

[2]KRS 218A.1422.

[3]KRS 218A.500.

evidence and in allowing the Commonwealth to play the tape recorded statement of a witness, we affirm.

On February 19, 1997, a Fayette Circuit Court Grand Jury indicted Harris for (1) trafficking in a controlled substance in the first degree (cocaine); (2) trafficking in marijuana under eight ounces;[4] (3) possession of marijuana; and (4) possession of drug paraphernalia. These charges arose out of an incident that occurred shortly before midnight on December 2, 1996. Officer Jeff Jacobs of the Lexington-Fayette Urban County Police Department went to an apartment complex in response to a dispatch call regarding a noise complaint. As Officer Jacobs approached the third floor apartment of Victoria Johnson, he heard a television and people laughing and talking loudly and smelled the odor of marijuana. Since the officer believed his knocking on the door might result in the apartment's occupants destroying evidence of drugs, he waited outside the apartment. When the officer heard the elevator opening, he hid behind a wall and watched Victoria Johnson approach the apartment and enter. Officer Jacobs walked behind Johnson as she entered the apartment so he could look inside. In plain view, Officer Jacobs saw Webb, Jermain Harris and Norlisha Johnson[5] sitting on a sofa and smoking marijuana. He also noticed a bag of marijuana sitting on a coffee table. Having observed Webb, Harris and Norlisha Johnson in the process of committing a crime, Officer Jacobs

[4]KRS 218A.1421(2).

[5]Norlisha Johnson and Victoria Johnson are sisters.

entered the apartment, called for assistance and arrested Webb, Harris and Norlisha Johnson.

When Webb was searched, Officer Jacobs found $1,388 in cash in Webb's front right pants pocket and Webb admitted to a second officer that he had 4.7 grams of marijuana in his right sock. Officer Jacobs also noticed that Webb had been sitting on the couch on a green jacket. As Officer Jacobs prepared to take Webb to jail, he retrieved the green jacket for Webb to wear since it was approximately 30 degrees outside. Before giving the jacket to Webb, the jacket was searched and Officer Jacobs found 51.5 grams of crack cocaine. Webb told Officer Jacobs that the jacket did not belong to him.

Webb was tried jointly with Harris before a jury on April 27, 1998. Webb was convicted of trafficking in a controlled substance in the first degree (cocaine), possession of marijuana and possession of drug paraphernalia, but acquitted of trafficking in marijuana. Instead of allowing the jury to set the penalty, Webb accepted the Commonwealth's offer of a five-year prison sentence, which the trial court imposed on May 29, 1998. This appeal followed.

We will first address Webb's claim that the trial court erred in denying his motion to suppress evidence. Webb claims that the trial court erred in ruling that it was proper: (1) under the "plain view" exception, for the police officer to enter the apartment without a warrant and to seize the bag of marijuana sitting on the coffee table; and (2) on the basis that the search was either incident to an arrest or consensual, for the police

officer to search the green jacket without a warrant and to seize the cocaine from the jacket.

Appellate review of a trial court's ruling on a motion to suppress is limited to determining whether the trial court's findings of fact are supported by substantial evidence.[6] Thus, the burden is on Webb to demonstrate that the trial court's ruling was clearly erroneous.[7]

In Hazel v. Commonwealth,[8] our Supreme Court, in an opinion written by Justice Spain, succinctly stated the elements that must exist for the "plain view" warrantless search exception to apply.

> The Fourth Amendment of the United States Constitution and Section Ten of the Kentucky Constitution provide safeguards against an unwarranted and unreasonable search and seizure by the state. Through the years, however, the courts have allowed several exceptions for seizures without warrants--one of these being evidence found within "plain view." Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2002, 29 L.Ed.2d 564 (1971).
>
> Several elements must exist for this exception to be allowed. First, the law enforcement officer must not have violated the Fourteenth Amendment in arriving at the place where the evidence could be plainly viewed. Second, "not only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must have a lawful right of access to the object itself." Finally, the object's "incriminating character must also be 'immediately apparent.'" Id., at 2038; Cf.

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[6]Kentucky Rules of Criminal Procedure (RCr) 9.78.

[7]Harper v. Commonwealth, Ky., 694 S.W.2d 665, 668 (1985).

[8]Ky., 833 S.W.2d 831, 833 (1992).

> Com. v. Johnson, Ky., 777 S.W.2d 876, 879 (1989).

In his brief, Webb argues that the trial court erred in finding that the required elements for a valid "plain view" search existed:

> Under the facts as stated by Officer Jacobs at the hearing, the case at bar does not present a situation for a valid plain view seizure. The officer by his actions basically created his own plain view opportunity. This was not a situation where an officer was lawfully where he was supposed to be and incidentally observes illegal contraband. Officer Jacobs, though legitimately present on the scene to investigate a noise complaint, did not knock on the apartment door to investigate. Rather, he waited several minutes and then went around a corner when he heard the sound of an elevator. He then emerged behind the back of the female subject who was going to enter the apartment. Jacobs said she appeared startled [citation to the record omitted]. After claiming to see marijuana on the table, Jacobs then entered the apartment itself.
>
> Certainly, occupants of an apartment have an expectation of privacy and should not expect police officers to be secretly lurking about their doors waiting for someone to enter so the officers can peek inside.

Webb apparently contends that even though Officer Jacobs was "legitimately present on the scene to investigate a noise complaint," that Webb had "an expectation of privacy and should not expect police officers to be secretly lurking about [the] door[] waiting for someone to enter so the officers can peek inside." While Webb cites no authority to support his argument, he is partially correct when he states "occupants of an apartment have an expectation of privacy."

In its brief, the Commonwealth identifies the real issue and provides the correct statement of the law as set forth in the often-cited case of Katz v. United States.[9]

> Because of the misleading way the issues have been formulated, the parties have attached great significance to the characterization of the telephone booth from which the petitioner placed his calls. The petitioner has strenuously argued that the booth was a "constitutionally protected area." The Government has maintained with equal vigor that it was not [footnote omitted]. But this effort to decide whether or not a given "area," viewed in the abstract, is "constitutionally protected" deflects attention from the problem presented by this case [footnote omitted]. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection [citations omitted]. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected [citations omitted].

Thus, the issue is whether Webb, Harris and Norlisha Johnson knowingly exposed to public view their smoking of marijuana and the bag of marijuana that was sitting on the coffee table. Since the trial court found that the contraband was in plain view, it obviously concluded that Webb, Harris and Norlisha Johnson knowingly exposed the contraband to public view. In light of the fact that Webb, Harris and Norlisha Johnson were sitting in the front room of the apartment near the door with the knowledge that Victoria Johnson was not home but obviously possessed a key and might be returning to her apartment, the

[9]389 U.S. 347, 351-52, 88 S.Ct. 507, 19 L.Ed.2d 576, 581-82 (1967).

trial court's finding that Webb, Harris and Norlisha Johnson had knowingly exposed the contraband to public view was supported by substantial evidence. While it was Officer Jacobs who happened to be standing behind Victoria Johnson as she unlocked her apartment door, it could just as well have been a neighbor or another visitor to the apartment complex, so the occupants' expectation of privacy was limited by what was within "plain view" from the hallway.[10] We affirm the trial court's findings that under the "plain view" exception the seizure of the bag of marijuana was constitutional.

Webb also argues that the trial court erred in refusing to suppress as evidence the 51.5 grams of crack cocaine found in the green jacket. Officer Jacobs testified that Webb told the police that the green jacket was not his. Byron Smith, who had been in the car with Webb and Harris that night, testified that Webb was wearing a brown coat that night and that Webb and Harris

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[10] See also United States v. Nohara, 3 F.3d 1239, 1243 (9th Cir. 1993) ("The plain view seizure of the meth pipe was proper. Since Nohara did not have a reasonable expectation of privacy in the hallway outside his apartment, Agent Aiu did not conduct a Fourth Amendment search when he peeked around the corner of the hallway as Nohara opened the door."); United States v. Conception, 942 F.2d 1170, 1172 (7th Cir. 1991) ("[T]enant has no reasonable exception of privacy in the common areas of an apartment building."); United States v. Peters, 912 F.2d 208, 210 (8th Cir. 1990)("When an individual voluntarily opens the door of his or her place of residence in response to a simple knock, the individual is knowingly exposing to the public anything that can be seen through that open door and thus is not afforded fourth amendment protection."); United States v. Barrios-Moriera, 872 F.2d 12, 14 (2nd Cir. 1989)("Here the police entry was into a hallway, an area where there is no legitimate expectation of privacy."); and United States v. Wright, 641 F.2d 602, 604 (8th Cir. 1981) ("The fact is that the undercover officers, by standing at the opened door of appellant's motel unit, like any member of the public, could see inside and observe various items in 'plain view'.").

both left their coats in the car.[11] Harris also testified that Webb had on a brown coat that night and that all their coats were left in the car and not taken into the apartment. Webb did not testify or call any witnesses.

In his brief, Webb states:

> Finally, the search of the jackets, which contained the cocaine and marijuana that resulted in the placing of charges of trafficking, was not justified as a search incident to arrest. The testimony was that Webb, Harris, and Norlisha Johnson were arrested for possession of marijuana. Jacobs called for backup. When Florence arrived, Webb and Harris were secure and away from the jackets that they were alleged to be sitting on. They were not in a position to get to them. The jackets were not in the area of control of the person being arrested. Even assuming the entry and arrests were lawful under the plain view exception, a warrant should have been obtained for a search of the jackets.
>
> The trial court disagreed with this defense assertion because the officer claimed Victoria Johnson gave consent to a search of the premises and because Webb and Harris denied ownership of the jackets [citation to the record omitted]. But Victoria Johnson never testified at the hearing or at trial and the evidence of any consent to search is hearsay and should not have been relied on.

Webb is incorrect when he states that "[t]he trial court disagreed with [his claim that]" "[t]he jackets were not in the area of control of the person being arrested" "because the

[11]We note that Webb's brief failed to comply with Kentucky Rules of Civil Procedure 76.12(4)(c)(iii) by failing to make "ample references to the specific . . . digital counter number in the case of untranscribed tape-recordings, supporting each of the statements narrated in the summary." For example, in referring to Smith's testimony about Webb's jacket the brief refers to "Tape, 14:30:00 - 14:43:00." The correct cite is 14:34:56 - 14:36:10.

officer claimed Victoria Johnson gave consent to a search of the premises and because Webb and Harris denied ownership of the jackets." Webb is confusing and incorrectly mixing three separate grounds relied upon by the trial court to hold that the search of the jackets was proper.

First, as the Commonwealth correctly points out, there was a sufficient basis for the trial court to find that the search of the jacket was incident to Webb's arrest:

> The facts of this case indicate that appellant was subject to a lawful arrest, for the offense of possession of marijuana; because he committed it in the presence of an officer. See KRS 431.005. Consequently, Officer Jacobs was entitled to search the area within appellant's "immediate control." Chimel [ ]; Collins [ ][12]. The jackets were clearly within that area because appellant could have easily accessed them at the time he was arrested.

When police have made a lawful arrest, they may search an arrestee and the area "within his immediate control," which means the "area from within which he might gain possession of a weapon or destructible evidence."[13] In United States v. Robinson,[14] the Court also held that a search of the area within the arrestee's immediate control is permissible regardless of whether the circumstances of a particular case indicate that it

[12]Chimel v. Commonwealth, 395 U.S. 752, 763 89 S.Ct. 2034, 23 L.Ed.2d 685, 694 (1969); Collins v. Commonwealth, Ky., 574 S.W.2d 296 (1978).

[13]Chimel, supra at 395 U.S. 763.

[14]414 U.S. 218, 234-35, 94 S.Ct. 467, 38 L.Ed.2d 427, 440 (1973).

is probable that either weapons or evidence would, in fact, be found.[15]

Second, as the Commonwealth states, the trial court also found that after Webb's arrest Victoria Johnson gave the police her consent to search her apartment, and the jackets would have been searched as a part of the consensual search of the apartment and the contraband would have been seized at that time. Webb argues that the trial court's finding of consent was not supported by substantial evidence because Victoria Johnson's alleged oral consent for the police to search her apartment was hearsay and not admissible at the suppression hearing. This argument is also without merit.

Kentucky Rules of Evidence (KRE) 104(a) provides that "[p]reliminary questions concerning . . . the admissibility of evidence shall be determined by the court . . . [and] [i]n making its determination it is not bound by the rules of evidence . . . ." This Kentucky rule is the same as Federal Rules of Evidence 104(a), and the Unites States Supreme Court has held hearsay testimony to be admissible evidence at a suppression hearing.

> There is, therefore, much to be said for the proposition that in proceedings where the judge himself is considering the admissibility of evidence, the exclusionary rules, aside from rules of privilege, should not be applicable; and the judge should receive the evidence and give it such weight as his judgment and experience counsel [footnote omitted]. However that may be, certainly there should be no automatic rule

[15]See also New York v. Belton, 453 U.S. 454, 460-61, 101 S.Ct. 2860, 69 L.Ed.2d 768, 774-75 (1981)(Arrestee separated from a car before the search).

> against the reception of hearsay evidence in such proceedings. . . .[16]

Thus, the hearsay testimony was properly relied upon by the trial court and constitutes substantial evidence to support the trial court's finding that Victoria Johnson gave consent to the police to search her apartment. It follows that if the jackets had been left in the apartment after Webb, Harris and Norlisha Johnson were taken to jail, whether the jackets belonged to Webb and Harris or not, they would have been searched when the apartment was searched and the contraband would have been discovered at that time.

As a third ground for denying the motion to suppress, the trial court noted that on the one hand Webb and Harris were denying possession of the jackets, and on the other hand, they were asserting privacy rights in the same jackets they denied possessing. As an alternative ground for denying the motion, the trial court opined that if they did not possess the jacket their rights were not violated by the warrantless search. This issue has not been addressed by the parties in their briefs, and due to our holding that the search was proper as incident to Webb's arrest, we will not address it any further.

Webb also contends that the trial court erred when it allowed the Commonwealth to introduce as evidence and play for the jury a tape recorded statement from Norlisha Johnson. Norlisha was at her sister's apartment with Webb and Harris and was arrested by Officer Jacobs for possession of marijuana. When

[16]United States v. Matlock, 415 U.S. 164, 175, 94 S.Ct. 988, 39 L.Ed.2d 242, 252 (1974).

she was called as a witness for the Commonwealth and asked about the arrests, she testified that she did not "remember much of that night" and that she had "mentally blocked it out." Prior to testifying at the trial, the Commonwealth allowed Norlisha to listen to a tape recorded statement that she had given to Sergeant Weathers, but she testified that listening to the tape did not help her remember much about that night.

The Commonwealth made numerous futile attempts to get Norlisha to state that the jackets belonged to Webb and Harris. The following is a representative excerpt from Norlisha's testimony.

Commonwealth-- Were [Webb] and [Harris] wearing jackets on the way over there?

Johnson-- I can't remember

Commonwealth-- Do you remember telling Detective Sergeant Weathers that [Webb] had the green jacket, [Harris] had the black jacket?

Johnson-- I listened to that on the tape.

Commonwealth-- Was that you saying that?

Johnson-- Yes.

Commonwealth-- You did tell Detective Weathers, then, that [Webb] had the green jacket, [Harris] had the black jacket?

Johnson-- I think on the tape, from what I heard this morning, it said "I believe." I wasn't really for sure who had on what.

Furthermore, during cross-examination Norlisha stated, "I don't remember. Right now, I can't say I remember either one of them having on a jacket."

At the conclusion of Norlisha Johnson's testimony, the Commonwealth moved the trial court through the testimony of Sergeant Weathers to allow it to introduce as evidence and to play for the jury Norlisha's tape recorded statement.[17] The Commonwealth relied upon Wise v. Commonwealth,[18] where the appellant's convictions for assault were based primarily upon the tape recorded statements of two "obviously hostile witnesses." In affirming the convictions, this Court stated:

> The sum of the testimony presented by [the two witnesses] at trial was, "I don't remember." The trial judge properly permitted the prior statements by the witnesses to be admitted as evidence.
>
> The case of Jett v. Commonwealth, Ky., 436 S.W.2d 788 (1969), and the many cases subsequently citing Jett, supra, have throughly settled this issue. For one thing, the credibility of any witness, including one's own witness, may be impeached by showing that the witness has made prior inconsistent statements. This rule applies in both criminal and civil proceedings. CR 43.07. Another point emphasized in Jett, supra, and relevant to this case is that when a witness has testified about some of the facts in a case, the jury is entitled to know what else the witness has said about this

[17]Unfortunately, at the sidebar conference the attorneys and the judge spoke in whispers such that it is extremely difficult to hear the arguments and the ruling. We are sensitive to the time constraints faced by a trial judge in moving a trial along; however, in this case it is particularly perplexing as to why the conference was not moved to chambers since the conference occurred immediately before and immediately after the lunch break.

[18]Ky.App., 600 S.W.2d 470, 472 (1978).

> case, so long as it is relevant to the merits of the case as distinguished from mere collateral issues. Probably, the most important point established by Jett, supra, is that any out-of-court statement made by a witness which is material and relevant to the issues in the case may be received as substantive evidence through testimony of another witness. The admission of the additional testimony need not be limited to impeachment purposes.
>
> The Jett rule is not only well-established in Kentucky, but it appears to be especially sound. No person should have the power to obstruct the truth-finding process of a trial and defeat a prosecution by saying, "I don't remember." The trial judge has a broad discretion in deciding whether or not to permit the introduction of such contradictory evidence, and in this case, we do not find that he abused that discretion.

Abuse of discretion has been defined as "impl[ying] arbitrary or capricious disposition under the circumstances, at least an unreasonable and unfair decision."[19] Based upon Norlisha Johnson's evasive answers and the statements that she did not "remember much of that night" and that she had "mentally blocked it out," we hold that the trial court did not abuse its discretion in ruling that her previous tape recorded statement was material and relevant to the merits of the case and could be received as substantive evidence through the testimony of Sergeant Weathers and the introduction of the cassette tape.[20]

Accordingly, the judgment of the Fayette Circuit Court is affirmed.

COMBS, JUDGE, CONCURS IN RESULT ONLY.

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[19]Kuprion v. Fitzgerald, Ky., 888 S.W.2d 679, 684 (1994).

[20]Muse v. Commonwealth, Ky.App., 779 S.W.2d 229, 230 (1989).

McANULTY, JUDGE, CONCURS IN RESULT ONLY.

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