

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001001-MR

MARK W. BANKS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NO. 01-CR-00095

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: BARBER, MCANULTY AND SCHRODER, JUDGES.

BARBER, JUDGE: Mark W. Banks ("Banks") appeals from a judgment of the Fayette Circuit Court, wherein he was convicted of burglary in the third-degree, resisting arrest and being a persistent felony offender in the first-degree after entering a conditional plea of guilty pursuant to Kentucky Rule of Criminal Procedure 8.09. Banks contends that the trial court erred in denying his motion to suppress testimony concerning items taken during the burglary that were later recovered by the police but not photographed or preserved for inspection due to negligence. Upon review of the record and the applicable law, we reject Banks's argument because no evidence exists that the Commonwealth

acted in bad faith in failing to photograph or preserve these items. Thus, we affirm.

During the early morning hours of December 3, 2000, Lexington Police Officer M.A. Abbondanza responded to a silent alarm at Winner's Circle Liquor Store. Upon his arrival, Officer Abbondanza observed Banks exiting the liquor store out of a rear door. The officer also noticed that the drive-thru window was broken. Officer Abbondanza identified himself to Banks, which prompted Banks to run toward a nearby parked vehicle. Officer Abbondanza pursued Banks and apprehended him. According to Officer Abbondanza, Banks was manifestly under the influence of alcohol during this series of events.

According to the record, Lexington police recovered several items believed to have been taken during the burglary. First, Banks possessed a carton of Marlboro cigarettes when Officer Abbondanza first saw him. Banks, while being pursued, discarded these cigarettes. Additionally, the police found several rolls of coins and a bag of credit card receipts in the car Banks was running toward during the pursuit. The credit card receipts contained identifying marks linking those documents to Winner's Circle Liquor Store. None of these items were photographed or preserved by Lexington police. Rather, the coins, cigarettes, and receipts were returned to the owner of the liquor store. Banks maintains that he was never able to examine these items or have them tested for the presence of exculpatory evidence.

The trial court held a suppression hearing on March 30, 2001. At that time, Banks moved to have the coins, cigarettes, receipts, and any testimony concerning them suppressed. The court overruled Banks's motion, prompting him to enter his conditional guilty plea. Banks received one year in prison for the burglary charge and twelve months in jail on the resisting arrest charge with the sentences ordered to run concurrently. This sentence, however, was enhanced to ten years in prison because of his persistent felony offender conviction.

The trial judge has the discretion to either grant or deny motions to suppress evidence. Freeman v. Commonwealth, Ky., 425 S.W.2d 575 (1967). The decision of the trial judge to suppress or not to suppress evidence will not be overturned on appeal unless there exists an abuse of discretion. Commonwealth v. Fox, Ky., 48 S.W.3d 24, 28 (2001). Here, we believe that the trial court did not abuse its discretion and properly denied Banks's motion to suppress.

In Collins v. Commonwealth, Ky., 892 S.W.2d 558 (1997), the Kentucky Supreme Court, relying on Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988), held that the failure to collect or preserve potentially exculpatory or useful evidence does not constitute a denial of due process absent any indication of bad faith on the part of the police. This principle has been reaffirmed in Kirk v. Commonwealth, Ky., 6 S.W.3d 232 (1999) and Crowe v. Commonwealth, Ky., 38 S.W.3d 379 (2001). Here, Banks has made no showing of bad faith by the Commonwealth and concedes that this is a case of the

Commonwealth's negligent failure to preserve material evidence. However, "mere negligence simply does not rise to the level of bad faith required by Youngblood." Collins, 951 S.W.2d at 573. Therefore, we find this portion of Banks's argument to have no merit.

Banks also argues that KRS 422.350 should apply in this matter. KRS 422.350 allows for the photographing of evidence and the utilization of those photographs as evidence for offenses contained in Chapters 514 or 515 of the Kentucky Penal Code. The burglary statute that Banks violated is not found in either of those chapters. Rather, the burglary statutes are found in Chapter 511 of the Kentucky Penal Code. Therefore, since the language of KRS 422.350 clearly indicates that its provisions fail to apply to a Chapter 511 crime, we find Banks's argument to be without merit.

For the aforementioned reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Karen S. Maurer
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler
Attorney General

Wm. Robert Long, Jr.
Assistant Attorney General
Frankfort, Kentucky