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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001537-MR

JAMES C. TIPTON — APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
ACTION NO. 00-CR-00055

COMMONWEALTH OF KENTUCKY — APPELLEE

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

BEFORE: COMBS, McANULTY, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from a judgment on a conditional guilty plea challenging the denial of a suppression motion. Appellant argues that he was unlawfully prohibited from presenting evidence at the suppression hearing, that the police lacked probable cause to arrest him, and that the warrantless search of his car was improper. Appellant's claim that he was denied his right to present testimony at the suppression hearing was not preserved for review. Appellant's remaining arguments are without merit. Hence, we affirm.

On February 25, 2000, an employee of the London Wal-Mart called the London Police and reported that there were two

individuals who had been in the store for a long period of time who appeared intoxicated. London Police Officers Greg Lewis and Chuck Johnson were dispatched to the store and proceeded to the jewelry counter where the two subjects, identified as James Tipton and Vickie Lewis (now Tipton), were located. The officers observed the two for approximately three to five minutes and thereafter Tipton and Lewis split up and went in different directions in the store. Both officers noticed that Lewis was clearly unsteady on her feet. When the two splits, Officer Johnson approached Tipton and Officer Lewis approached Lewis. Officer Johnson noticed that Tipton was sweating profusely, although the weather was cold at the time. According to Officer Johnson, Tipton also had slurred or impaired speech and appeared to be nervous and fidgety. Based on his observation of Tipton, Officer Johnson administered five standard field sobriety tests, all of which Tipton failed. Thereupon, Officer Johnson arrested Tipton for public intoxication.

While Officer Johnson was administering the field sobriety tests to Tipton, Officer Lewis was administering the same tests to Vickie Lewis. During her attempt to perform one of the tests, Lewis nearly fell into a purse display, but was caught by Officer Lewis. According to the officers, Lewis's eyes were bloodshot and barely open. Hence, Lewis was likewise arrested for public intoxication.

The search incident to the arrest of Lewis and Tipton revealed $5,000 cash on Tipton's person and 300 pills, believed to be Xanax and Valium, located on Lewis's person. In addition,

after Tipton and Lewis were arrested and taken out of the store, a Wal-Mart associate at the jewelry counter noticed a bag of white powder, believed to be methamphetamine, lying on the floor where Tipton and Lewis had been previously standing. A small amount of marijuana was also found in Lewis's jacket later at the police station.

Upon arresting Tipton and Lewis and placing them in the police cruisers in the Wal-Mart parking lot, Officer Lewis radioed Sergeant House who, in turn, called in a K-9 unit or drug detection dog unit. Upon arriving on the scene, Officer Johnson indicated to Sergeant House which car in the Wal-Mart parking lot belonged to Tipton and Lewis. After Tipton and Lewis had been taken to the police station, Officer Doug Gregory, a K-9 officer, and Kilo, a trained narcotic's detection dog, arrived at Wal-Mart. At that time, Sergeant House explained the facts surrounding the arrests of Tipton and Lewis, including the fact that a large quantity of pills had been found on Lewis. Officer Gregory walked around the vehicle to make sure there was nothing to harm the dog and conducted a plain view search. In so doing, Officer Gregory noticed a police scanner through the driver's side window. Officer Gregory then walked Kilo around the vehicle. As Kilo passed on the passenger side of the vehicle, he indicated the presence of narcotics by biting on the passenger's side door handle. Officer Gregory explained to Sergeant House that Kilo's behavior demonstrated that he smelled narcotics in the car. Based on the dog's indication of the presence of drugs in the car and the presence of the illegal police scanner, the

officers decided to search the car. Upon opening the door of the vehicle, the odor of marijuana spilled out. A plastic bag containing in excess of four pounds of marijuana was discovered on the rear floor board on the passenger's side, and a firearm was found lying on the front floor board.

Based on the aforementioned events, Tipton and Lewis were indicted on the following charges: trafficking in marijuana in the amount of eight ounces to five pounds; trafficking in a controlled substance, second degree, first offense; public intoxication; possession of a controlled substance, first degree, first offense; and trafficking in a controlled substance, third degree, first offense. Tipton was further charged with being a persistent felony offender in the first degree (PFO I). Prior to trial, Tipton filed a motion to suppress the evidence seized from him, Lewis, and their vehicle. A hearing on the motion was held on August 28, 2000, during which the court denied the motion.

Subsequently, pursuant to a plea agreement, Tipton entered a conditional guilty plea to trafficking in marijuana over eight ounces and less than five pounds and PFO II, reserving the right to appeal the denial of his suppression motion. Tipton was sentenced to five years' imprisonment, enhanced to seven years pursuant to the PFO II conviction. This appeal followed.

The first argument we will address is Tipton's claim that the trial court erroneously denied him the right to present evidence at the suppression hearing. At the hearing, which was also the suppression hearing for Vicki Lewis, the Commonwealth presented the testimony of Officer Lewis and Officer Johnson to

establish that the police had probable cause to initially arrest Lewis and Tipton for public intoxication. Officer Lewis first testified as to his observations of Vicki Lewis. At the conclusion of Officer Lewis's testimony, counsel for Vicki Lewis sought to present the testimony of Vicki Lewis, which the trial court denied, adjudging that the testimony of Officer Lewis had established probable cause and that any testimony of Vicki Lewis would not change the court's mind on the issue. Officer Johnson then testified as to his observations of Tipton, after which the following exchange ensued:

> Court: And I furthermore state [inaudible] . . . that probable cause exists for the arrest and [inaudible] . . . any subsequent of his person thereupon as to James Tipton.
>
> Defense Counsel: And is that also regardless of what Mr. Tipton may have to say about it?
>
> Court: Well that creates an issue wouldn't it, that would be a trial issue if they deny it, I mean I don't really see any particular reason. . .
>
> Defense Counsel: I'm just asking, I just want to make the record clear Judge.
>
> Court: Okay. I say if they make a total denial that we're still looking at probable cause. Probable cause doesn't come from either of the defendants, it would come from the understanding of the police officers.

We would note that Tipton's counsel never offered to put Tipton's testimony in the record of the suppression hearing by avowal. Hence, this issue was not preserved for review. KRE 103(a)(2); RCr 9.52; Cain v. Commonwealth, Ky., 554 S.W.2d 369 (1977). Although we agree with Tipton that he had the right to present evidence at the suppression hearing, see Simmons v. United

States, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968) and Shull v. Commonwealth, Ky., 475 S.W.2d 469 (1971), we have no way of knowing what Tipton would have testified to at the hearing for purposes of determining how or if the denial of this right would have prejudiced him in this case.

Tipton also argues that the Commonwealth did not present sufficient evidence of probable cause to arrest Tipton for public intoxication, without which the police would not have had justification to conduct the search of Tipton or his car. Under RCr 9.78, the factual findings of the trial court relative to the suppression of evidence are conclusive if supported by substantial evidence. Clark v. Commonwealth, Ky. App., 868 S.W.2d 101 (1993). Under KRS 431.005(1)(d), a police officer can make an arrest without a warrant when a misdemeanor has been committed in his presence. Probable cause to arrest exists when the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a man of reasonable caution to believe that an offense has been committed. Shull, 475 S.W.2d at 471. The offense of public intoxication, which is a Class B misdemeanor, is defined in KRS 525.100 as follows:

> A person is guilty of public intoxication when he appears in a public place manifestly under the influence of a controlled substance, or other intoxicating substance, excluding alcohol (unless the alcohol is present in combination with any of the above), not therapeutically administered, to the degree that he may endanger himself or other persons or property, or unreasonably annoy persons in his vicinity.

At the suppression hearing, Officer Johnson testified that Tipton was sweating profusely, had slurred or impaired

speech, and appeared to be nervous and fidgety. Officer Johnson further described how Tipton failed the five field sobriety tests he administered. On cross-examination, Officer Johnson admitted that he did not observe Tipton harassing, threatening or arguing with anyone. Tipton maintains that since he was not bothering or threatening anyone or damaging any property in the store, Officer Johnson did not have probable cause to arrest him for public intoxication. We disagree. Under the standard set out in the above statute, a person is guilty of public intoxication if he is manifestly under the influence of an intoxicating substance such that he may constitute a danger to himself, others, or property in the vicinity. Although Tipton may not have yet bothered or threatened any person or property in the store, under the statute, the police did not have to wait until he actually caused damage to someone or something in the store to charge him with public intoxication. From Officer Johnson's observations, there was substantial evidence that Tipton was manifestly under the influence of an intoxicating substance. Given his impaired behavior and unsteadiness demonstrated in the field sobriety tests, it was quite possible that Tipton could have stumbled or fallen and damaged merchandise in the store or even hurt himself, a customer or employee. Accordingly, we believe the court properly adjudged that the police had probable cause to arrest Tipton for public intoxication.

Tipton next argues that the warrantless search of his vehicle was in violation of Section 10 of the Kentucky Constitution. The automobile exception to the warrant

requirement "allows officers to search a legitimately stopped automobile where probable cause exists that contraband or evidence of a crime is in the vehicle." Clark v. Commonwealth, 868 S.W.2d at 106, citing United States v. Ross, 456 U.S. 798, 800-1, 102 S. Ct. 2157, 2159-61, 72 L. Ed. 2d 572, 578 (1982), and Estep v. Commonwealth, Ky., 663 S.W.2d 213 (1983). Tipton claims that since he and Lewis were arrested in the store and were never stopped by police in the vehicle, the vehicle was not "legitimately stopped" such that the automobile exception would apply. We could find no cases in Kentucky directly on point on this issue. In Clark, 868 S.W.2d at 106, where the issue was whether the police had probable cause to search a lawfully stopped vehicle, this Court stated:

> This [automobile] exception is based upon exigencies created by an automobile's mobility, and upon the diminished expectation of privacy one has in an automobile, which arises from the pervasive regulatory schemes applicable to automobiles. California v. Carney, 471 U.S. 386, 390-93, 105 S. Ct. 2066, 2068-70, 85 L. Ed. 2d 406, 413-14 [(1985)]; Estep, 663 S.W.2d at 215.

As for the exigency factor in the present case, Tipton points out that he and Lewis were arrested and taken to the police station before the car was searched, and they had no opportunity to remove or tamper with anything in the car. Hence, there were no exigent circumstances. In Adams v. Commonwealth, Ky. App., 931 S.W.2d 465 (1996), the defendant was lawfully stopped by police in his car and arrested before the search of the car was conducted. The defendant argued the absence of exigent circumstances, since he was in police custody at the time

of the search of the car. This Court rejected that argument, noting that the defendant in United States v. Ross, 456 U.S. 798, had also been arrested prior to the search of the car and the Supreme Court nevertheless found the search constitutionally permissible. Adams, 931 S.W.2d at 468.

In California v. Carney, 471 U.S. 386, the Supreme Court did not require the vehicle in question to be actually stopped by police when it upheld as constitutional a warrantless search of a fully mobile motor home lawfully parked in a public parking lot under the automobile exception. Although the defendant in that case was in the motor home when the search took place, the Court's decision did not turn on that fact. Rather, the Court based its decision on the inherent mobility of the vehicle and the reduced expectation of privacy of a vehicle parked in a public place. The Carney Court cited its earlier decision in Cardwell v. Lewis, 417 U.S. 583, 94 S. Ct. 2464, 41 L. Ed. 2d 325 (1974), wherein the Court held a warrantless search and seizure of a car parked in a public parking lot to be proper where the car was suspected of containing evidence of a crime. In Cardwell as in the instant case, the defendant was never stopped in the car and was in police custody at the time of its search and seizure. In addressing the fact that the car was not stopped by police, the Court in Cardwell stated:

> The fact that the car in Chambers [v. Maroney, 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970)] was seized after being stopped on a highway, whereas Lewis' car was seized from a public parking lot, has little, if any, legal significance. The same arguments and considerations of exigency,

> immobilization on the spot, and posting a guard obtain.

Cardwell, 417 U.S. at 594-595 (footnote omitted); see also United States v. Bagley, 772 F.2d 482 (9th Cir. 1985), cert. denied, 475 U.S. 1023, 196 S. Ct. 1215, 89 L. Ed. 2d 326 (1986) (wherein search and seizure of a car parked on the street after being abandoned by fleeing robbery suspect was upheld).

Similarly, in the instant case, although Tipton was not stopped in the car and was in police custody at the time of the search, there was still a chance that the car could have been moved or contraband therein removed by a person at the direction of Tipton or Lewis. Further, the car was not parked on private property. Rather, it was parked in a public parking lot for patrons of the store where Tipton committed the offenses and was arrested. Accordingly, the fact that the car in question was not actually stopped by police does not affect the applicability of the automobile exception to the warrant requirement in this case.

Tipton also argues that the search was invalid because the police did not have probable cause to search his car. Tipton concedes that a positive indication by a properly trained and reliable drug detection dog is sufficient to establish probable cause for the presence of drugs to justify a warrantless search of an automobile. United States v. Hill, 195 F.3d 258 (6th Cir. 1999), cert. denied, 528 U.S. 1176, 120 S. Ct. 1207, 145 L. Ed. 2d 110 (2000). However, it is Tipton's contention that the Commonwealth did not meet its burden of proving that the drug detection dog used by police was properly trained and reliable.

At the suppression hearing, Officer Gregory testified that the drug detection dog used, Kilo, was trained by the United States Customs Agency for narcotics detection and officer safety, that he has worked with Kilo for approximately two years, and that he went through the training with Kilo. Officer Gregory testified that he was trained as an instructor to certify and re-certify drug detection dogs. He further stated that Kilo was originally certified in 1997 and has been re-certified annually, including in 2000 when the search at issue took place. Written documentation of Kilo's original 1997 certification as a drug detection dog and Officer Gregory's certification as a canine narcotic technical trainer were filed in the record, as well as records of Kilo's evaluations for 1999 and 2000. As to reliability, Officer Gregory testified that Kilo had never hit on substances that were not controlled substances or given a false alert.

Tipton asserts that the above testimony was not sufficient proof of the dog's training and reliability because Officer Gregory was the individual who evaluated and certified the dog. Tipton further maintains that the written documents submitted did not show that Kilo was certified in 1998. Finally, he claims that Kentucky State Police ("KSP") canine training and certification guidelines were not met as to Kilo.

In United States v. Diaz, 25 F.3d 392 (6th Cir. 1994), the defendant argued that the government could not establish the drug detection dog's training and reliability because the government failed to introduce the dog's training and performance

records. The Court rejected the argument, adjudging that the credible testimony of the officer who handled the dog was sufficient to establish the dog's training and reliability. Id. at 395. Likewise, in the instant case, we believe the testimony of Officer Gregory was sufficient proof of Kilo's training and reliability to support the trial court's ruling, despite the fact that Officer Gregory was the individual who evaluated and certified the dog. Regarding the claim that the written records did not include Kilo's evaluation for 1998, as stated above, Officer Gregory testified that Kilo had been certified annually since 1997. As to Tipton's contention that the KSP canine and training guidelines were not met, Tipton did not raise this issue until after the order on the suppression motion had been entered. In any event, we nevertheless believe it was within the trial court's discretion to find that Kilo was properly trained and reliable from the testimony of Officer Gregory.

Tipton also complains that the police did not have probable cause to search his car because there was evidence that the police scanner which Officer Gregory purportedly saw in plain view through the driver's side window was actually under the seat. Without passing on the legitimacy of this claim, in our view, the police had probable cause to search Tipton's car even without the sighting of the police scanner. Probable cause to search an automobile exists when "the totality of the circumstances then known to the investigating officer creates a fair probability that contraband or evidence of crime is contained in the automobile." Clark, 868 S.W.2d at 106-7, citing

Sampson v. Commonwealth, Ky., 609 S.W.2d 355, 358-59 (1980). At the time of the vehicle search, Officer Gregory and Sergeant House were aware that Tipton and Lewis had just been arrested for public intoxication and that a large amount of cash and a large quantity of pills had been found on Tipton and Lewis respectively. Additionally, the drug detection dog had indicated the presence of drugs in the car. See City of Indianapolis v. Edmond, 531 U.S. 32, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000), (wherein it was held that walking a drug detection dog around an automobile did not constitute a search because there was no entry into the car.) From the totality of the above circumstances, we adjudge that the police had sufficient probable cause to believe that there were drugs in the car. Accordingly, the warrantless search of the vehicle was proper.

For the reasons stated above, the judgment of the Laurel Circuit Court is affirmed.

COMBS, JUDGE, CONCURS.

McANULTY, JUDGE, CONCURS IN RESULT ONLY.

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