

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001023-MR

SPENCER ALLEN BAUCOM, JR.

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN D. MINTON, JR., JUDGE
ACTION NO. 00-CR-00487 & 00-CR-00625

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: COMBS, McANULTY, AND MILLER, JUDGES.

MILLER, JUDGE: Spencer Allen Baucom, Jr., brings this appeal from a March 13, 2001 judgment of the Warren Circuit Court. We affirm.

Baucom and his brother, Terry, stole a van from a business in Bowling Green, Kentucky. They drove the van to a local home improvement store, and parked next to a truck owned by Dorietta Stivers. Stivers was in the store. Three new television sets and Stivers' purse were in the back of her truck. Upon exiting the store, Stivers witnessed Baucom and Terry load the television sets in the van, and then leave the parking lot. Stivers gave chase and contacted 911 on her cell phone.

Following the chase, Baucom and Terry were apprehended by law enforcement in a corn field some distance away. The television sets and Stivers' purse were recovered from the van. Baucom was returned to the home improvement store, where Stivers had also returned, for a "show-up." There Stivers identified Baucom as the driver of the van.

In August 2000, Baucom was indicted by the Warren County grand jury for fleeing or evading police in the first degree (Kentucky Revised Statutes (KRS) 520.095), receiving stolen property over \$300.00 (KRS 514.110), theft by unlawful taking over \$300.00 (KRS 514.030), and two counts of theft of a motor vehicle registration plate (KRS 186.990(6)). In October 2000, he was indicted for persistent felony offender first degree (PFO I) (KRS 532.080(3)).

Prior to trial, Baucom moved to suppress Stivers' out-of-court identification of him as the driver of the van. The court granted Baucom's motion. The court ordered a separate hearing made outside the presence of the jury to determine whether the Commonwealth could prove by clear and convincing evidence that an in-court identification by Stivers would not be tainted.

At the hearing, Stivers identified Baucom and Terry by pointing them out at the defense table. She further identified Terry as the driver. The court held that as Stivers now identified Terry instead of Baucom as the driver, there was no taint, and she could identify Baucom in court. Later in the trial, Baucom moved for a directed verdict on all charges. Based

on Stivers' identification of Terry as the driver, the court granted Baucom's motion on the charges of fleeing or evading police in the first degree, and the two counts of theft of a motor vehicle registration plate. Baucom was found guilty of theft by unlawful taking over \$300.00, receiving stolen property over \$300.00, and PFO I. On March 13, 2001, the court sentenced Baucom to three years for each offense, enhanced by the PFO I conviction to a total of ten years for each offense, to run concurrently. This appeal follows.

Baucom contends the circuit court erred in allowing Stivers' in-court identification of him. Specifically, Baucom asserts that his motion for suppression of evidence of Stivers' out-of-court identification of him applies to any identification of him by Stivers. The Commonwealth counters that Baucom's motion was limited to Stivers' identification of Baucom as the driver of the van. As such, the Commonwealth reasons that Baucom's motion to suppress any other identification of him was not preserved for appellate review. Upon review of the record, we are constrained to agree with the Commonwealth.

We believe that through his suppression motion, Baucom only sought to exclude evidence of Stivers' out-of-court identification of him as driver of the van. We are buttressed in our opinion by the evidentiary hearing. During the hearing, the court addressed Baucom's counsel, asking, "This [hearing] has to do with the fleeing and evading charge?" Baucom's counsel responded that the fact the fleeing and evading charges were made only against Baucom was his "purpose for filing [the suppression

motion].” Even if Baucom’s motion did seek to suppress an in-court identification of him, we think it clear the circuit court only ruled on the issue of Stivers’ out-of-court identification of Baucom as the driver of the van. “The Court of Appeals is without authority to review issues not raised in or decided by the trial court.” Regional Jail Authority v. Tackett, Ky, 770 S.W.2d 225, 228 (1989) (citations omitted). In any event, our review must proceed under the “palpable error” rule. Ky. R. Crim. P. (RCr) 10.26.

A “palpable error” is an error affecting the substantial rights of a party, which results in manifest injustice. RCr 10.26. If, upon consideration of the whole case, the reviewing Court does not conclude that a substantial possibility exists that the result would have been different, the error complained of will be held non-prejudicial. RCr 10.26; Jackson v. Commonwealth, Ky. App., 717 S.W.2d 511 (1986).

In the case *sub judice*, the victim witnessed two men loading her property into a van. She followed the van while in telephone contact with law enforcement, and did not end her pursuit until law enforcement took over. Law enforcement then followed the van and its two occupants to a corn field. The van, televisions, and Stivers’ purse were recovered, as well as Baucom and Terry. We believe the evidence against Baucom so overwhelming there exists little, if any, possibility the outcome of his trial would have been different absent Stivers’ identification of him as perpetrator of the crime. As such, we are of the opinion there was no palpable error, and the circuit

court did not commit reversible error by admitting Stivers' in-court identification of Baucom.

For the foregoing reasons, the judgment of the Warren Circuit Court is affirmed.

ALL CONCUR.

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