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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001281-MR

VINCENT ANDREW MASON APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 01-CR-000200

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, GUIDUGLI, and SCHRODER, Judges.

COMBS, JUDGE. The appellant, Vincent Andrew Mason (Mason), appeals from an order of the Jefferson Circuit Court of April 24, 2002, that granted in part and denied in part his motion to suppress evidence. On appeal, Mason argues that the circuit court erred when it failed to suppress all the evidence at issue after finding that the police officer had no consent either to enter or to search Mason's home. After our review of this case,

we conclude that the trial court’s careful analysis of this matter was correct. Therefore, we affirm.

In the early morning hours of December 1, 2000, the Jefferson County Police discovered an abandoned vehicle that had left the street and had run over at least one mail box. It came to rest in a front yard at 8806 Bost Lane in Jefferson County. While investigating the apparent accident, the police learned from a witness that an unidentified person had exited the wrecked vehicle and headed toward Maple Creek Drive. The police found documents in the vehicle containing his address as 8808 Maple Creek Drive, and they proceeded to that location to question Mason. When they arrived, Kelly Dean Blair (Blair) answered the door. Blair owned the home and identified himself as Mason’s roommate.

The events that followed and led to Mason’s arrest were the subject matter of testimony presented at his suppression hearing. That hearing was held on March 11, 2002, following Mason’s indictment by a Jefferson County Grand Jury on five counts: (1) Operating a Motor Vehicle under the Influence of Intoxicants; (2) Criminal Mischief I; (3) Tampering with Physical Evidence; (4) Operating a Motor Vehicle While License Is Revoked or Suspended for Driving under the Influence; and (5) Failure to Stop and Render Aid.

At the suppression hearing, Officer Glaser testified that it was very cold that night and that he asked Blair if he could come in from the cold. He testified that Blair stepped back without a word and let him enter. However, Blair testified to the contrary: that he did not consent to Glaser's entering the home.

After entering the house but while remaining near the door, Glaser saw a set of keys lying on the kitchen counter, which was visible from his location. While Glaser waited, Blair went to a bedroom and spoke with Mason. Mason soon came out to meet Glaser, and Glaser immediately detected the distinctive odor of airbag powder and of alcohol; he observed that Mason appeared to be inebriated. Glaser then arrested him.

Glaser testified that Mason was barefoot and was wearing only a T-shirt and sweat pants at the time. He needed shoes, which were in his bedroom. Since Mason was already under arrest, Glaser accompanied him to the bedroom to get his shoes and a jacket. While in Mason's bedroom, Glaser testified that he noticed a heightened odor of airbag powder. He shined his flashlight on a jacket lying on the floor and noticed a sparkle characteristic of airbag powder. He picked up the jacket, which smelled strongly of airbag powder. At this point, Glaser did not claim the jacket as evidence but allowed Mason to wear it to

jail. Glaser also took the keys from the kitchen counter after Blair denied ownership of them.

Mason moved to suppress both the arrest and all the evidence seized as fruits of an illegal, warrantless search. The Commonwealth argued exclusively on the consent exception to the warrant requirement, contending that a valid consent for Glaser's presence in the house had never been given. In its order of April 24, 2002, the Jefferson Circuit Court agreed that Glaser may have lacked consent to enter Blair's home initially. Accordingly, the court suppressed the keys as evidence since Glaser arguably discovered them while allegedly present unlawfully in Blair's house. However, the court concluded that Glaser had probable cause to arrest Mason based upon his observations of Mason inside the home, the odor of airbag powder, and Mason's inebriated condition. Moreover, it held that the jacket was also admissible since Glaser saw it in plain view incident to a lawful arrest – another notable exception to the warrant requirement. Subsequently, Mason entered a conditional plea pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), reserving the suppression issue for appeal to this Court.

Mason argues on appeal that the trial erred in failing to suppress all the evidence after it found that Glaser lacked consent to enter the house in the first instance. He contends

that but for an illegal entry, Glaser would not have been able to observe Mason and to detect the odor of airbag powder and alcohol. Thus, Glaser would not have arrested Mason.

It is true that in order for a warrantless search and seizure to be valid, a police officer must be in a place where he has a legal right to be. Cloar v. Commonwealth, Ky. App., 679 S.W.2d 827 (1984). Mason emphasizes that the court found that Glaser did not receive consent to enter the home; thus, when he entered, he was in a place where he had no legal right to be, a fact that Mason contends tainted both the arrest and all items of evidence seized. Howard v. Commonwealth, Ky. App., 558 S.W.2d 643 (1977).

After reviewing the order entered by the trial court, we note that it scrupulously exercised an abundance of caution by holding in favor of Mason with respect to the contradictory testimony offered by Blair and Officer Glaser as to consent to the initial entry by Glaser. It entered a finding that consent had not been given. Accordingly, it suppressed the keys as evidence because Glaser first observed them while standing by the front door waiting for Mason to appear.

Then the dynamics of the situation began to change. Regardless of the arguable, disputed issue of consent, Mason came out voluntarily to meet with Glaser rather than remaining in his room. In electing to appear and to cooperate in an

interview with a police officer, Mason effectively consented to being observed by Glaser. Neither the Commonwealth, Mason, nor the order of the trial court has alluded to a fact that we find significant: documents clearly bearing Mason's identity in a wrecked vehicle littered with containers emptied of alcohol. Those documents under those circumstances gave Glaser the requisite probable cause to proceed to Mason's house. Consent as to original entry notwithstanding, Glaser legitimately conversed with and observed Mason when Mason voluntarily came forth to meet with him. Mason's appearance of inebriation, the smell of alcohol, and the odor of the powder associated with airbags all validated the arrest that followed. We agree with the analysis of the trial court as to the sequence of events:

> Despite the fact that the Commonwealth has not met its burden of proving Blair's consent it is worth noting that once inside the house Glaser did not perform a search in the traditional sense of the word. Every indication suggests that Glaser waited by the door and observed only those things in plain sight. He did not rummage through drawers or closets nor did he walk through the house and look for Mason. Instead, it was Mason who approached Glaser. Mason could have refused to meet with Glaser. He could have told Blair to tell Glaser to leave. Instead Mason got close enough to Glaser for Glaser to smell the air bag powder and to suspect that he was intoxicated. At this point, given all the circumstances, Glaser had probable cause to arrest Mason. Order of April 24, 2002, p.4.

Mason particularly argues that the court should have suppressed the jacket since Glaser took it from an area outside the immediate area of the arrest. He relies on Commonwealth v. Elliott, Ky. App., 714 S.W.2d 494 (1986), in support of this contention. In Elliott, a parole officer arrested Elliott, a parolee, who needed proper attire before being transported to jail. The parole officer entered the bedroom alone to retrieve clothes for Elliott. While in the bedroom, the parole officer saw illegal drugs in plain view. This Court held that the officer had improperly entered a room outside the scope of Elliott's control; therefore, the plain view exception to the warrant requirement accordingly did not apply because the officer was not in a place where he had a legal right to be when he observed the illegal items that he seized. Id.

We believe that the Commonwealth has correctly distinguished Elliott from the circumstances of this case. Mason needed shoes and a jacket; he was already under arrest. Glaser did not proceed alone to the bedroom but merely accompanied Mason. Thus, the surrounding premises remained in the area immediately within Mason's control while Officer Glaser properly accompanied him to insure that he would not escape. While he was legally in Mason's bedroom incident to the arrest, Glaser smelled and observed the jacket in keeping with the plain view exception to the warrant requirement. Clark v.

Commonwealth, Ky.App., 868 S.W.2d 101 (1996). We find no error in the court's ruling not to suppress the jacket as evidence.

The Commonwealth argued in the alternative that the jacket should have been deemed admissible pursuant to yet another exception to the warrant requirement, the inevitable discovery rule first announced in Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984). Nix held that evidence improperly obtained should nonetheless be admissible if it were inevitable that it would ultimately be discovered by lawful means. We agree with the Commonwealth that the inevitable discovery rule applies in this case as an additional ground to validate the admissibility of the jacket.

Even if Glaser had remained outside in the cold, Mason was coming to meet him after being summoned from bed by his roommate -- whether inside the door or outside. The smells of airbag powder and alcohol, the appearance of inebriation, coupled with the documents in the car linking Mason to the accident, all would have induced Glaser to arrest Mason. The trip to the bedroom for shoes and a jacket would inevitably have followed the arrest prior to going to the police station. Thus, Glaser very likely would have been led to the plain view of the jacket even if he had waited outside the door for Mason. This alternative basis further bolsters the propriety of the ruling

of the trial court to allow the jacket to be admitted into evidence.

We affirm the order of the Jefferson Circuit Court of April 24, 2002.

GUIDUGLI, JUDGE, CONCURS IN RESULT ONLY.

SCHRODER, JUDGE, CONCURS.

BRIEF FOR APPELLANT:

John M. Longmeyer
Louisville, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General for Kentucky

Nyra Shields
Assistant Attorney General
Frankfort, Kentucky