RENDERED: MARCH 19, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000642-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 01-CR-001256

CLEAVON BRADLEY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; BUCKINGHAM AND VANMETER, JUDGES.

BUCKINGHAM, JUDGE: Commonwealth of Kentucky appeals from an order of the Jefferson Circuit Court granting Cleavon Bradley's motion to suppress evidence. We affirm.

On September 15, 2000, at 4:00 a.m., Cleavon Bradley was in his brother's car in the Iroquois housing project in Louisville when he was pulled over by Officer Bryan Royse. Bradley was arrested on a bench warrant charging him with being a probation violator, and he was also charged with driving on a suspended license. During a pat-down search of Bradley

following his arrest, Officer Royse discovered a folded bandana containing ten grams of crack cocaine in Bradley's pocket. Bradley was subsequently indicted for trafficking in cocaine, operating a motor vehicle without a license, and persistent felony offender in the second degree.

Prior to trial Bradley filed a motion to suppress the cocaine as evidence. Therein, he alleged that Officer Royse had illegally stopped and detained him and that the subsequently seized cocaine was therefore inadmissible evidence. An evidentiary hearing was held as required by RCr[1] 9.78.

Bradley testified at the hearing that he was not driving erratically or doing anything else to give Officer Royse a reason to stop his automobile. Although Officer Royse acknowledged that Bradley was not driving erratically or committing a traffic violation, he testified that he could see that it was Bradley in the automobile and that he knew Bradley was wanted on a bench warrant for being a probation violator. He stated that he had seen the bench warrant earlier the previous morning. Officer Royce also testified that he knew Bradley did not have a valid driver's license and should not have been driving. Further, Officer Royce testified that he recognized Bradley because he had stopped him on previous occasions.

[1] Kentucky Rules of Criminal Procedure.

During the cross-examination of Officer Royse, attacks were made on his credibility as a witness. Specifically, attacks were made on his testimony that he knew Bradley before pulling him over. Officer Royse maintained that he knew Bradley because he had previously stopped him and that the police radio room would have a record of these contacts. The records failed to support his testimony. Officer Royse also produced a notebook wherein he had written Bradley's name. Although he testified that this was written sometime before the night in question, that fact could not be positively established.

The court found "that the Officer did not have a lawful basis to stop Mr. Bradley." Although the court stopped short of saying that it did not believe the officer's testimony or that he was lying, it was clear that the court questioned the officer's credibility. Noting the weaknesses in the officer's testimony, the court held that the Commonwealth had not met its burden of proof. This appeal by the Commonwealth followed.

"[A] police officer can subject anyone to an investigatory stop *if* he is able to point to some specific articulable fact which, together with rational inferences from those facts, support 'a reasonable and articulable suspicion' that the person in question is engaged in illegal activity." Simpson v. Commonwealth, Ky. App., 834 S.W.2d 686, 687 (1992), citing Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d

889 (1968). Here, Officer Royse could have legally stopped Bradley if he had reason to believe Bradley was operating the automobile on a suspended license or if he believed there was an outstanding warrant for Bradley's arrest. While the officer testified that he stopped Bradley for those two reasons, the court obviously did not believe his testimony was credible.

"With regard to the factual findings of the trial court 'clearly erroneous' is the standard of review for an appeal of an order denying suppression." Commonwealth v. Banks, Ky., 68 S.W.3d 347, 349 (2001). "However, the ultimate legal question of whether there was reasonable suspicion to stop or probable cause to search is reviewed de novo." Id. In reviewing orders from the circuit court on suppression motions, "a reviewing court should give due weight to the assessment by the trial court of the credibility of the officer and the reasonableness of the inferences." Commonwealth v. Whitmore, Ky., 92 S.W.3d 76, 79 (2002).

"When a pre-trial hearing on the issue of suppression is conducted to determine the admissibility of evidence obtained during a search, a trial court's findings of fact are conclusive if they are supported by substantial evidence." Simpson, 834 S.W.2d at 687; RCr 9.78. "Substantial evidence" has been defined as "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of

reasonable men." Owens-Corning Fiberglas Corp. v. Golightly, Ky., 976 S.W.2d 409, 414 (1998). Having reviewed the tape of the suppression hearing, we conclude there was substantial evidence to support the court's findings. It is not for this court to second-guess the circuit court's determination of the officer's credibility.

The Commonwealth contends that the trial court erred in forcing it to meet a higher burden of proof than that required by law. The parties agree that the standard of proof was the preponderance of the evidence. The Commonwealth argues that the court required proof of some physical or documentary evidence that the officer knew Bradley previously and that the lack of such evidence caused the court to automatically reject the officer's testimony and hold that the burden of proof had not been met.

On the other hand, Bradley asserts that the court merely rejected the officer's testimony on grounds of credibility and that no higher burden of proof was assigned by the court. We agree with Bradley. As we have noted, this court must give the trial court's assessment of the credibility of the officer due weight. Whitmore, supra.

The Commonwealth's second argument is that, even if the stop was illegal, the search and seizure of the crack cocaine incident to Bradley's arrest is not improper as a "fruit

of the poisonous tree" from the illegal stop because the search was "so attenuated as to dissipate the taint." See United States v. Fazio, 914 F. 2d 950, 957 (7th Cir. 1990). This argument may have some merit. See United States v. Green, 111 F. 3d 515 (7th Cir. 1997). However, the Commonwealth did not raise this issue to the circuit court.

"A new theory of error cannot be presented on appeal." Ruppee v. Commonwealth, Ky., 821 S.W.2d 484, 486 (1991), overruled on other grounds by Lovett v. Commonwealth, Ky., 103 S.W.3d 72 (2003). Because the Commonwealth raised only the issue of the legality of the stop at the trial court level, we decline to address this issue. Neither the Commonwealth's argument that questions of law are to be reviewed *de novo* nor its argument that the error constitutes palpable error under RCr 10.26 persuades us otherwise.

The order of the Jefferson Circuit Court is affirmed.

EMBERTON, CHIEF JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS BY SEPARATE OPINION.

VANMETER, JUDGE, DISSENTING BY SEPARATE OPINION:

Respectfully, I dissent from the majority opinion, which agrees that the Commonwealth's argument regarding attenuation "may have some merit," but fails to consider the argument under the palpable error rule of RCr 10.26.

The plain language of RCr 10.26 states that "[a] palpable error which affects the substantial rights of **a party** may be considered . . . by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error." (Emphasis added.) While the Commonwealth has not cited and we have not found any case which extends the benefits of RCr 10.26 to the Commonwealth, the language of the rule does not foreclose its use by the Commonwealth, and no reported case holds that the rule is not to be so applied. In addition, the history of the rule supports its application to the Commonwealth, as well as to a defendant. Prior to the 1981 promulgation of RCr 10.26, RCr 9.26 provided that "[a] **conviction** shall be set aside . . ., or the **judgment** reversed on appeal, for any error or defect when, upon consideration of the whole case, the court is satisfied that the substantial rights of the **defendant** have been prejudiced." (Emphasis added.) This rule was substantially modified in 1981, when it was effectively replaced by RCr 10.26 as quoted above. Thus, the rule clearly applies to the substantial rights of both defendants and the Commonwealth.[2]

[2] A defendant may not be retried following an acquittal, notwithstanding that the acquittal may have been based on an improper ground. *Commonwealth v. Mullins*, 405 S.W.2d 28, 29 (1966). Therefore, as a practical matter, the application of RCr 10.26 to the benefit of the Commonwealth has limited

Kentucky courts have consistently held that an appellate court may consider an unpreserved issue if the error is a palpable one which affected the party's substantial rights and resulted in a manifest injustice. *Schoenbachler v. Commonwealth*, Ky., 95 S.W.3d 830, 836 (2003); *Commonwealth v. Pace*, Ky., 82 S.W.3d 894, 895 (2002). "In determining whether an error is palpable, 'an appellate court must consider whether on the whole case there is a substantial possibility that the result would have been any different.'" *Id.* at 895 (quoting *Commonwealth v. McIntosh*, Ky., 646 S.W.2d 43, 45 (1983)).

In the instant case, this standard has been met. The trial court has determined to suppress evidence without which the Commonwealth cannot proceed. If the unpreserved error were to be considered and the evidence were not excluded, a substantial possibility exists that the result would be different. The facts are that the defendant had an active warrant against him, which made him subject to arrest. In *United States v. Green*, 111 F.3d 515 (7th Cir. 1997), the court found that the initial stop of the defendant's automobile was not justified. However, the court stated:

> It would be startling to suggest that because the police illegally stopped an automobile, they cannot arrest an occupant who is found to be wanted on a warrant. . . . Because the arrest is lawful, a search incident to the

---

impact, and only on appeal of the grant of a defendant's suppression or similar pretrial motion.

> arrest is also lawful. The lawful arrest of [the occupant] constituted an intervening circumstance sufficient to dissipate any taint caused by the illegal automobile stop.

Id. at 521. Similarly, courts in other jurisdictions have held that the discovery of an outstanding warrant overcomes any taint of an impermissible initial encounter. *See, e.g., People v. Hillyard*, 589 P.2d 939 (Colo. 1979); *State v. Foust*, 262 So.2d 686, 687 (Fla. App. 1972); *People v. Murray*, 728 N.E.2d 512, 516-17 (Ill. App. 2000); *Quinn v. State*, 792 N.E.2d 597, 599-601 (Ind. App. 2003); *State v. Jones*, 17 P.3d 359, 360 (Kan. 2001); *State v. Hill*, 725 So.2d 1282, 1284-87 (La. 1998); *State v. Thompson*, 438 N.W.2d 131 (Neb. 1989); *Neese v. State*, 930 S.W.2d 792, 801-03 (Tex. App. 1996); *Reed v. State*, 809 S.W.2d 940 (Tex. App. 1991); *State v. Rothenberger*, 440 P.2d 184 (Wash. 1968). *But see Frierson v. State,* 851 So.2d 293, 300 (Fla. App. 2003); *Jefferson v. State*, 780 N.E.2d 398, 400 (Ind. App. 2002) (holding that illegal initial detention required suppression of subsequently found evidence, notwithstanding existence of outstanding arrest warrant).

The rationale behind the cases that do not suppress due to intervening warrants lies in the Supreme Court's rejection of the argument that a "but for" test exists under the fourth amendment. In *Brown v. Illinois*, 422 U.S. 590, 599, 95 S.Ct. 2254, 2259, 45 L.Ed.2d 416 (1975), the Court noted that

"not . . . all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police" (quoting *Wong Sun v. United States*, 371 U.S. 471, 487-88, 83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1963)). The real question is whether, given the original illegality, the evidence came to light by reason of the "'exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *Brown*, 422 U.S. at 599, 95 S.Ct. at 2259. *See also Wilson v. Commonwealth,* Ky., 37 S.W.3d 745, 748 (2002) (court recognizing attenuation doctrine, citing *Segura v. United States*, 468 U.S. 796, 805, 104 S.Ct. 3380, 3385, 82 L.Ed.2d 599, 608 (1984), and *Wong Sun*, *supra*). In making this determination of whether the discovery of evidence is attenuated, the Court in *Brown* suggested the consideration of three factors: (1) temporal proximity; (2) "the presence of intervening circumstances"; and (3) "the purpose and flagrancy of the official misconduct." 422 U.S. at 603-04, 95 S.Ct. at 2261-62.

Applying the *Brown* test to the instant case, while the first factor points to exclusion, the second factor clearly favors attenuation. Although the arrest and subsequent search were close in time to the improper stop, the preexisting outstanding warrant constitutes an intervening circumstance which carries more weight than temporal proximity. *See Green*,

111 F.3d at 521 (court holding time span of five minutes between police misconduct and search is not dispositive).

The 7th Circuit Court of Appeals noted in *Green* that the third factor, that of the "purpose and flagrancy of the official misconduct," is tied to the purpose of the exclusionary rule, *i.e.*, to deter, to compel respect for constitutional guaranties, and to remove any incentives to disregard these guaranties. *Id.* at 523. As noted by the 10th Circuit, this prong of *Brown* "can only be aimed at exploring whether the police have exploited their illegal" action. *United States v. Melendez-Garcia*, 28 F.3d 1046, 1055 (10th Cir. 1994). In this case, although the trial court did not believe the police officer's testimony that he had had prior contact with the appellee and was aware of the outstanding warrant, the facts are undisputed that the search came only after the officer called in to verify the existence of the outstanding warrant and placed the appellee under arrest. Thus, as recognized by the court in *Green*, the search was not an exploitation of the illegal stop. 111 F.3d at 523.[3]

[3] The instant facts are unlike those present in *United States v. McSwain*, 29 F.3d 558 (10th Cir. 1994), in which the stop was illegal and no arrest warrant had been issued. In that case, the court found the police exploited the illegal stop to obtain "consent" to search. In *State v. Hill,* 725 So.2d at 1287, the court looked to whether the police officers had a "quality of purposefulness" in their conduct, whether that conduct was calculated to cause surprise, fright or confusion, and whether that conduct was a flagrant abuse of police power. The record in this case indicates there was no flagrant show of police authority, and no lights or sirens. Instead, the officer simply pulled over the appellee, asked for identification and

The appellee cites *Churchwell v. Commonwealth*, Ky. App., 843 S.W.2d 336 (1992), and *United States v. McSwain*, 29 F.3d 558 (10th Cir. 1994), in support of his argument that the illegal stop dictated that all subsequently-discovered evidence must be suppressed. However, both cases are factually distinguishable in that neither involved the existence of an outstanding warrant for an occupant of the car involved in the stop.

I would vacate the order of the Jefferson Circuit Court, and remand for further proceedings.

BRIEFS FOR APPELLANT:

Albert B. Chandler III
Attorney General of Kentucky

Jeanne Anderson
Special Assistant Attorney General
Louisville, Kentucky

BRIEF FOR APPELLEE:

Franklin P. Jewell
Louisville, Kentucky

---

license, and called the radio room which verified a suspended license and warrant. These facts stand in contrast to those present in *Brown v. Illinois*, in which the defendant was approached by armed detectives, with revolvers drawn, and was advised that he was under arrest. The detectives had previously broken into and searched his apartment, all without probable cause or warrant. 422 U.S. at 592-94, 95 S.Ct. at 2256-57.