

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002641-MR

DONATHAN MASON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 04-CR-00281

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: JOHNSON, KNOPF, AND VANMETER, JUDGES.

JOHNSON, JUDGE: Donathan Mason has appealed from a judgment of the Fayette Circuit Court entered on December 9, 2004, following a conditional plea of guilty to possession of a controlled substance in the first degree,¹ fleeing and evading police in the second degree,² possession of a firearm by a convicted felon,³

¹ Kentucky Revised Statutes (KRS) 218A.140.

² KRS 520.100.

³ KRS 527.040.

resisting arrest,⁴ and being a persistent felony offender in the second degree.⁵ Having concluded that the trial court properly denied Mason's motion to suppress evidence, we affirm.

On January 9, 2004, Officer Jonathan Whitaker of the Lexington-Fayette County Police Department observed a vehicle he believed to be operating with only one headlight.⁶ Officer Whitaker observed the vehicle as it met his patrol car. The officer then turned around and followed the vehicle. Shortly after Officer Whitaker began following the vehicle, it turned into an apartment complex. Officer Whitaker testified that he then stopped near the complex to see if the vehicle returned to the roadway. A few minutes later, according to Officer Whitaker, the vehicle left the apartment complex and returned to the roadway.

Officer Whitaker then began to follow the vehicle again, and testified that as the vehicle approached a stop sign he activated the emergency lights on his patrol car to stop the vehicle. Officer Whitaker testified that he wanted to stop the vehicle to advise the operator that the headlight was inoperable and to see if there was anything else he needed to investigate.

⁴ KRS 520.090.

⁵ KRS 532.080(2).

⁶ Mason disputes that the vehicle's headlight was not working. Rather, he contends that the light was burning, but it was pointed upward as a result of damage to the vehicle following an accident. Regardless, it is clear that the headlight was not functioning properly.

The vehicle, however, failed to stop after Officer Whitaker turned on his emergency lights. Officer Whitaker testified that the vehicle was not speeding, but that it was not stopping either. The officer stated that he then notified dispatch that he was following the vehicle and it was not stopping.

Officer Whitaker testified that he continued to follow the vehicle with his emergency lights on as the vehicle approached a stop sign. The vehicle slowed down, but did not stop at the stop sign and slowly made a left turn. At this point, Officer Whitaker activated his siren in addition to his emergency lights. Officer Whitaker continued to follow the vehicle while notifying dispatch of his speed and location. He testified that the vehicle did not speed, but it did not stop. Officer Whitaker was then ordered by a commanding officer through dispatch to terminate the pursuit of the vehicle because no serious violation was involved. Officer Whitaker testified that he then turned off his siren and emergency lights. He did, however, continue to follow the vehicle making sure that when the vehicle stopped, he was going to be there.

Officer Whitaker testified that it had been the policy of the police department that when ordered to terminate a pursuit, the officer is to cease and desist all efforts to overtake the vehicle or to capture the suspect. Officer Whitaker stated that he was not aware of this policy on January

9, 2004, but instead believed the policy to be that the officer should continue to observe the vehicle and suspect from a distance, which is what he did. Officer Whitaker testified that after turning off his emergency equipment, he switched his radio to channel two which enables car-to-car communications and advised other officers in the area of the location of the vehicle as he continued to follow it from a distance.

As the other officers took positions to watch for the vehicle, Officer Whitaker observed it make a turn and slow down. Officer Whitaker then sped up to the vehicle to see what it was going to do. When the officer observed the driver's door open, he "shot up" behind the car and Mason then exited the vehicle and ran behind a house. Officer Whitaker testified that he exited his patrol car and began to run after Mason while yelling for him to stop. Officer Whitaker testified that he continued to pursue Mason behind the house as the other officers arrived and chased Mason back towards Officer Whitaker. Officer Whitaker testified that Mason resisted being arrested for three to five minutes until he was handcuffed. After being handcuffed, Officer Whitaker testified that Mason's person was searched and the officers discovered a handgun and crack cocaine.

Mason gave limited testimony at the suppression hearing regarding the headlight on the vehicle he was operating.

He testified that the light was operable, but that it did not shine onto the roadway because it had been damaged in an accident, but that it did shine upward. This testimony was corroborated by Mason's father, who testified on his son's behalf. Mason further admitted that he saw the emergency lights on Officer Whitaker's patrol car, but that he did not stop. He testified that Officer Whitaker was following him closely the entire time the officer was behind him.

Mason moved the trial court to suppress the evidence discovered during the search of his person following his seizure after running from the vehicle. He asserts that the seizure was unlawful because Officer Whitaker violated the police department policy after being ordered to terminate the pursuit of Mason for the inoperable headlight.

The trial court denied Mason's motion and found that Officer Whitaker had a legal basis to stop Mason due to the inoperable or faulty headlight. When Mason failed to stop, he committed the arrestable offense of fleeing and evading. Further, the trial court found that when Mason ran from Officer Whitaker after exiting the vehicle, he committed a second arrestable offense of fleeing and evading. As such, the trial court found that the search of Mason's person was proper because it was incidental to his arrest. In regard to Officer Whitaker's failure to follow the order to terminate the pursuit,

the trial court ruled that the police department policy was not a law or rule upon which Mason could rely as a defense to the search.

Our review of a trial court's decision on a suppression motion following a hearing is twofold. First, the factual findings of the trial court are conclusive if they are supported by substantial evidence, and, second, we review the trial court's decision de novo to determine whether it is correct as a matter of law.⁷ Here, the trial court heard testimony from Officer Whitaker as well as Mason and his father and weighed the credibility of their testimony. The court's findings of fact are supported by substantial evidence.

Since Mason was searched by Officer Whitaker without a warrant, we must determine whether the search comes within one of the recognized exceptions as set out in Baltimore v. Commonwealth,⁸ as follows:

A warrantless search more extensive or intrusive than a pat-down for weapons is illegal unless it is supported by probable cause or one of the other exceptions such as consensual search, a plain view search, a search incident to an arrest, a search based on exigent circumstances or an inventory search [footnote omitted].⁹

⁷ Stewart v. Commonwealth, 44 S.W.3d 376, 380 (Ky.App. 2001).

⁸ 119 S.W.3d 532 (Ky.App. 2003).

⁹ Id. at 538.

We agree with the trial court that this search was proper as a search incident to the arrest of Mason.

Officer Whitaker was clearly acting with a legal basis when he decided to stop the vehicle Mason was operating because it had a faulty headlight. Although Officer Whitaker could have followed the vehicle into the apartment complex parking lot, it was certainly within his discretion to wait and see if the vehicle reemerged. Once Mason failed to stop his vehicle, despite admitting that he saw the emergency lights, he committed the offense of fleeing and evading a police officer, an arrestable offense. We agree with the trial court that Officer Whitaker's failing to follow the police department policy to cease all efforts to capture Mason after the order to terminate the pursuit does not provide Mason a defense to the subsequent arrest and search.

Regardless, when Officer Whitaker approached the vehicle after it finally stopped, Mason attempted to flee on foot from the officer, thereby committing a second arrestable offense. Once Mason was apprehended, he was arrested for fleeing and evading the police. As a result of his arrest, he was searched and the gun and drugs were discovered. Therefore, the search was incident to his arrest and the trial court properly denied Mason's motion to suppress.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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