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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001665-MR

MARCUS DWAYNE GREEN — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 06-CR-00055

COMMONWEALTH OF KENTUCKY — APPELLEE

<u>OPINION</u>
<u>AFFIRMING</u>

** ** ** ** **

BEFORE: CLAYTON, MOORE AND TAYLOR, JUDGES.

MOORE, JUDGE: Marcus Dwayne Green appeals from a Franklin Circuit Court order denying his motion to suppress evidence collected during a search of his person. Having properly preserved the issue for appeal, Green insists the trial court's findings of fact were not supported by substantial evidence, and the trial

court erred by not excluding evidence of his prior criminal history. Upon review of the record, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On April 20, 2007, Marcus Dwayne Green entered conditional guilty pleas to the offenses of Possession of a Controlled Substance, First Degree; Possession of Marijuana; Operating on a Suspended License; Excessive Window Tint; and Persistent Felony Offender in the Second Degree. Prior to Green's plea agreement, the trial court conducted an evidentiary hearing and subsequently denied Green's motion to suppress evidence obtained during a search of his person. It is this ruling from which Green now appeals.[1]

On March 3, 2006, Franklin County Police Officer Brian Wilhoite passed a vehicle driven by Green with excessively dark window tint.[2] At the suppression hearing, Officer Wilhoite testified that he turned around and followed Green for about half a block until Green turned into an apartment complex and parked. Officer Wilhoite stated that he ran Green's vehicle's license plate tag, which indicated that Green was driving on a suspended driver's license. After Green exited his vehicle and began walking towards his apartment, Officer Wilhoite asserted that he approached Green and asked if the two could talk.[3]Officer

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[1] It is noted that Green filed a motion to reconsider, but the trial court summarily denied the motion.

[2] Officer Wilhoite and Green dispute the events surrounding Green's arrest. As a result, the factual discussion will primarily address the testimony of Officer Wilhoite and Green at the suppression hearing.

[3] On cross-examination, Officer Wilhoite testified that he did not activate his police cruiser's blue lights when he parked in Green's apartment complex.

Wilhoite testified that Green acknowledged his window tint was too dark and that he would have it fixed. Officer Wilhoite stated that he became suspicious of other criminal activity because Green appeared nervous during their conversation and was "blading" his body.[4] As a result, Officer Wilhoite asked Green whether he possessed any illegal drugs or weapons, and Green replied that he did not. Officer Wilhoite testified that he then asked Green if he could search him, and Green consented to a search. Before he could conduct a search, Officer Wilhoite stated that Green began "searching himself" by putting his hands into his pockets and pulling out items. While doing so, a bag of marijuana fell out of Green's pocket and onto the ground. At that point, Officer Wilhoite testified that he put Green in handcuffs and placed the marijuana on the hood of Green's vehicle. Officer Wilhoite continued to search Green and discovered cocaine in his pocket.

According to Officer Wilhoite, at this point he realized his concern and conversation with Green about dark window tint had turned into something more serious. As a result, he turned on the video camera in his police cruiser. Officer Wilhoite testified that he read Green his *Miranda*[5] rights in front of the camera, and Green responded that he understood his rights. Officer Wilhoite then asked Green whether he thought his window tint was too dark, and Green replied that it was. Officer Wilhoite also asked Green if he consented to a search of his

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[4] For clarity purposes, a review of the suppression hearing videotape explains the meaning of the term "blading." When describing Green's conduct, Officer Wilhoite physically exhibited movement resembling an act of shielding or turning one's body away from another person.
[5] *See Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed. 2d 694 (1966).

pockets, and Officer Wilhoite maintained that Green answered yes. Officer Wilhoite further stated that when he asked Green whether marijuana and cocaine were found in his pockets, Green said yes and immediately turned around and asked for a lawyer.[6]

Green also testified at the suppression hearing and his description of the facts differed from Officer Wilhoite's testimony. Green stated that he parked his vehicle in the apartment complex and took several steps toward his apartment when Officer Wilhoite asked to speak with him about the window tint on his vehicle.[7] However, Green claimed that Officer Wilhoite never asked for consent to conduct a search at any time. Green also alleged that he never placed his hands in his pockets and started to pull out items. Rather, Green claimed that Officer Wilhoite pushed up on his pockets causing the marijuana to fall to the ground.

After he was placed under arrest, Green testified that Officer Wilhoite told him they were going to go in front of his police cruiser camera, and Officer Wilhoite explained to him what he was supposed to say. Green also claimed that Officer Wilhoite's conduct confused him, and he never once consented to a search.

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[6] A review of the videotape from Officer Wilhoite's police cruiser corroborates his testimony describing the sequence of events that occurred after his police cruiser camera was activated. However, Green's admission to possessing marijuana and cocaine was not audible because his back was towards the police cruiser camera, but it does appear Green slightly nodded his head in acknowledgement. In addition, after Green asked to speak with an attorney, Officer Wilhoite is heard stating that Green did admit to possessing the illegal substances.

[7] Contrary to Officer Wilhoite's testimony that he suspected Green was operating on a suspended driver's license when he first pulled into the apartment complex, Green alleged that Officer Wilhoite was not aware of the suspension until he was placed in the back of the police cruiser when Officer Wilhoite, in the presence of another officer, asked him if it was suspended.

On cross-examination, Green again alleged that Officer Wilhoite tricked him into stating in front of the police cruiser camera that he consented to a search.

Following the suppression hearing, the trial court held that Officer Wilhoite made a legal stop after he suspected the driver of the vehicle had a suspended driver's license.[8] Furthermore, the trial court determined that Officer Wilhoite had probable cause to approach Green, and the search was conducted pursuant to Green's consent.[9] As a result, the trial court denied Green's motion to suppress, referring to Officer Wilhoite's conduct as legal, routine police activity.

II. STANDARD OF REVIEW

Appellate review of a motion to suppress involves a two-step process. First, the trial court's findings of fact are conclusive if they are supported by substantial evidence. *Hallum v. Commonwealth*, 219 S.W.3d 216, 220 (Ky. App. 2007); RCr[10] 9.78. We then review *de novo* the trial court's application of the law to the facts. *Id.* at 220; *see also Commonwealth v. Banks*, 68 S.W.3d 347, 349 (Ky. 2001). "We review findings of fact for clear error, and we give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Hallum*, 219 S.W.3d at 220 (internal quotation marks omitted).

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[8] Although the Commonwealth conceded Officer Wilhoite merely approached Green and was eventually given consent to conduct a search, the trial court held Officer Wilhoite's contact with Green was pursuant to a legal stop.

[9] The trial court also noted Officer Wilhoite's duty to cite Green for his illegal window tint.

[10] Kentucky Rules of Criminal Procedure.

III. ANALYSIS

The Fourth Amendment of the United States Constitution and Section 10 of the Kentucky Constitution protect citizens from unreasonable and unwarranted searches and seizures. *Commonwealth v. Hatcher*, 199 S.W.3d 124, 126 (Ky. 2006). "A search conducted without a warrant is unreasonable unless it falls within one of the few exceptions to the warrant requirement." *Hallum*, 219 S.W.3d at 221. A well-established exception to the warrant requirement is a search conducted pursuant to proper consent. *Colbert v. Commonwealth*, 43 S.W.3d 777, 779-800 (Ky. 2000).

Green argues the trial court's finding that he gave Officer Wilhoite consent to search his person was not supported by substantial evidence, and without consent, the search was otherwise unlawful.[11] Citing *Bumper v. North Carolina*, 391 U.S. 543, 88 S.Ct. 1788, 20 L. Ed. 2d 797 (1968), Green contends that his consent was the result of coercion by Officer Wilhoite. In *Bumper*, the issue was whether the search of a residence was unlawful when consent was given after police officers conducting the search claimed to have a warrant. *Id.* at 548. The Court held the police officers' act of claiming to have a search warrant when no such warrant was ever produced was a situation "instinct with coercion-albeit colorably lawful coercion." *Id.* at 550. Thus, the Court ruled it was constitutional

[11] Green appears to mesh several different arguments into one general assertion that the trial court's finding of consent was not supported by substantial evidence. As a result, we have done our best to flesh out each separate dispute.

error to admit at trial evidence collected during the search because where "there is coercion there cannot be consent." *Id.*

Pointing to the videotape from Officer Wilhoite's police cruiser, Green alleges the coercion occurred during Officer Wilhoite's "dress rehearsal" just before he activated his police cruiser camera. Specifically, Green argues that he became confused when Officer Wilhoite laid out a script for him to follow while the camera was off and then conducted a subsequent interview after the camera was activated. As a result, Green claims that although he appears to nod on the videotape when asked by Officer Wilhoite whether he consented to the search, his testimony confirms that he never consented to any search and did not voluntarily empty his own pockets.

It is well settled that consent cannot be the result of implicit or explicit coercion. *Schneckloth v. Bustamonte*, 412 U.S. 218, 228, 93 S.Ct. 2041, 2048, 36 L. Ed. 2d 854 (1973). However, a thorough review of the trial court's order reveals that it did not rely on Green's recorded statements in the videotape when it determined whether consent was given. Rather, the trial court simply determined that Officer Wilhoite, upon approaching Green, asked Green if he could search him and Green consented. Therefore, the argument that Officer Wilhoite's "dress rehearsal" before activating his police cruiser camera amounted to coercion is misplaced because the trial court held consent was given before Green was ever placed in handcuffs. Thus, we decline to address Green's coercion argument.[12]

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[12] Nevertheless, we do not believe the conduct of Officer Wilhoite was coercive. Whether consent is the product of coercion is a question of fact, and we must give deference to the trial

Relying upon *United States v. Laughton*, 437 F.Supp.2d 665 (E.D. Mich. 2006), Green also insists the trial court's consent finding was not supported by substantial evidence. In *Laughton*, it was held that under the totality of the circumstances, the trial court record did not contain clear and positive testimony sufficient to support a finding that the defendant consented to the search of his vehicle. *Id.* at 670-671. Like Green, the defendant in *Laughton* testified that he did not consent to a search, nor did the police officer ask for consent.

Green moves this Court to consider the unlikelihood that he would consent to a search of himself knowing he possessed illegal substances, along with the greater unlikelihood that he would begin to search himself.[13] While we recognize the irony behind the argument, we agree with the Commonwealth that the trial court did not err when it determined otherwise. In *Laughton*, the Court's decision to grant the defendant's motion to suppress was ultimately based on its finding that neither the credibility of the defendant nor the police officer deserved an advantage. *Id.* at 670.

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court's finding if it is supported by substantial evidence. *Krause v. Commonwealth*, 206 S.W.3d 922, 924 (Ky. 2006). Based on the videotape, Officer Wilhoite clearly read Green his *Miranda* rights, and Green acknowledged that he understood his rights. Thereafter, Green freely answered yes to having illegal window tint on his car, admitted that he consented to Officer Wilhoite's search, and acknowledged he possessed both marijuana and cocaine. More importantly, immediately after making the assertions, Green asked for a lawyer, showing Green understood his right to remain silent and this defeats any claim of coercion.

[13] Green also points out that the police officer's testimony in *Laughton* was found to be somewhat inconsistent. However, although Green claims otherwise, there is nothing to indicate Officer Wilhoite's testimony was inconsistent.

However, the trial court in the case now before this Court chose to believe Officer Wilhoite's testimony. "The trial court is in the best position to judge the **credibility** of witnesses and this Court is bound by the trial court's findings of fact unless there is a clear error or abuse of discretion." *Greene v. Commonwealth*, 244 S.W.3d 128, 136 (Ky. App. 2008). With respect to credibility determinations, Green notes the *Laughton* Court's reliance on police officers' motives to prevaricate their testimony to avoid personal liability. *Laughton*, 437 F.Supp.2d at 670 (citing *Hudson v. Michigan*, 547 U.S. 586, 126 S.Ct. 2159, 165 L. Ed. 2d 56 (2006)).

Two key distinctions distinguish *Laughton* from the case before this Court. Unlike *Laughton*, there is nothing in the record to indicate any inconsistency in Officer Wilhoite's testimony. More importantly, the videotape from Officer Wilhoite's police cruiser camera shows Green admitting to having given Officer Wilhoite consent to search his person.[14] As a result, we are bound by

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[14] Although the trial court held that Officer Wilhoite conducted a legal stop of Green, we agree with the Commonwealth that no such stop occurred. Instead, pursuant to Officer Wilhoite's testimony, we believe Officer Wilhoite merely approached Green as he began to walk to his apartment. As correctly stated by the Commonwealth, the Kentucky Supreme Court has held that police officers are free "to approach anyone in public areas for any reason." *Commonwealth v. Banks*, 68 S.W.3d 347, 350 (Ky. 2001). By merely asking Green questions, Officer Wilhoite's conduct did not amount to a seizure. Accordingly, we find it more proper to consider the discovery of Green's marijuana as the result of a search pursuant to valid consent. However, Officer Wilhoite's testimony indicates that he placed Green under arrest after finding the marijuana. Therefore, we believe the cocaine was the product of a lawful search incident to an arrest under the Fourth Amendment of the United States Constitution. *See Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L. Ed. 2d 576 (1967). Nonetheless, we may affirm a trial court's ruling despite the fact that it reached the correct result for the wrong reason. *See Hodge v. Commonwealth*, 116 S.W.3d 463, 470 (Ky. 2003).

the trial court's credibility determination and affirm the ruling that Green consented to Officer Wilhoite's search.[15]

Lastly, Green alleges a statement included in the Commonwealth's memorandum to the trial court was an improper use of impeachment evidence and constitutes reversible error. After the suppression hearing, each party submitted a memorandum to the trial court in support of their respective positions. The Commonwealth's memorandum included the following:

> [s]hould the Court feel it necessary to compare the credibility of the witnesses, it has on the one hand a well respected, experienced police officer with nothing at stake here and on the other hand a twice convicted felon facing a persistent felony offender indictment and revocation of pretrial diversion or probation upon conviction.

Green, in his motion to reconsider, insisted the use of the impeaching evidence was a violation of KRE[16] 609, which permits the introduction of credibility evidence "if elicited from the witness or established by public record if denied by the witness." By failing to elicit the impeaching evidence while he was on the witness stand at the suppression hearing, Green argues the Commonwealth's subsequent reference to his prior criminal record in its memorandum to the trial court was improper.

The Commonwealth relies upon KRE 1101(d)(5), which provides the rules of evidence do not apply to preliminary hearings in criminal cases, to prove the inclusion of the impeaching evidence in the memorandum was valid. Green

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[15] Relying on the belief that he did not consent, Green contends Officer Wilhoite lacked the reasonable suspicion needed to conduct a search without consent. Because we affirm the trial court's finding of consent, Green's reasonable suspicion argument need not be addressed.

[16] Kentucky Rules of Evidence.

admits the Commonwealth may not have been bound by the Kentucky Rules of Evidence had his past criminal convictions been introduced before the trial court at the suppression hearing. However, Green insists the Commonwealth still had to offer the evidence at the suppression hearing for it to be properly introduced.

It is unclear from its order whether the trial court considered Green's prior criminal convictions when it determined he gave consent. Yet, assuming the trial court erred when it denied Green's motion to reconsider the admissibility of his prior criminal history, we believe there is substantial evidence in the record to support the trial court's finding of consent. The Kentucky Supreme Court held a trial court's erroneous exclusion of a witness's testimony to be harmless error after it found "no substantial possibility" that the ultimate decision would have been any different had the testimony been admitted. *Rogers v. Commonwealth*, 60 S.W.3d 555, 559 (Ky. 2001).

Likewise, we do not believe the trial court would have ruled differently had the reference by the Commonwealth to Green's prior criminal history been excluded. The trial court's decision ultimately came down to one of credibility. However, the videotape from the police cruiser camera alone is enough to support the determination that Green consented to the search of his person. Therefore, whether the trial court erred by not excluding the evidence of Green's prior criminal history was harmless error at best. Accordingly, we affirm the trial court's order denying Green's motion to suppress.

ALL CONCUR.

BRIEF FOR APPELLANT:

Mark A. Bubenzer
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky