

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-002197-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 07-CR-00750

DONALD COLWELL

APPELLEE

OPINION
REVERSING AND REMANDING

** ** *

BEFORE: NICKELL AND THOMPSON, JUDGES; ROSENBLUM,¹ SPECIAL JUDGE.

NICKELL, JUDGE: The Commonwealth of Kentucky has appealed from the October 1, 2007, order of the Fayette Circuit Court sustaining Donald Colwell's ("Colwell") motion to suppress evidence seized from him at the time of his arrest.

For the following reasons, we reverse and remand for further proceedings.

¹ Retired Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

On June 6, 2007, a Fayette County grand jury indicted Colwell for possession of a controlled substance in the first degree² and possession of drug paraphernalia.³ On August 29, 2007, Colwell filed a motion to suppress all of the evidence seized on the night of his arrest. An evidentiary hearing was held on September 13, 2007, at which the trial court heard testimony from the two officers involved in the arrest. The facts presented in this appeal are relatively simple and undisputed.

On April 18, 2007, the Lexington Division of Police (“LDP”) received a dispatch call to the Catalina Hotel located on West New Circle Road in Lexington, Kentucky. The anonymous complainant informed the dispatcher that a man in his mid-50’s was at the rear of the Catalina Hotel in a silver Ford Escort bearing Hazard city tags brandishing a gun. The caller further stated the man was talking about narcotics and was upset about a drug deal gone awry. Officer Randall Kloss (“Officer Kloss”) was dispatched to the scene and arrived approximately one minute later.

Upon his arrival at the Catalina Hotel, Officer Kloss discovered an unoccupied silver Mercury Tracer⁴ bearing Hazard city tags located in the rear parking lot. As he approached the front of the vehicle, Colwell began approaching him from the rear entrance of the hotel. Colwell admitted ownership of the

² Kentucky Revised Statutes (KRS) 218A.1415, a Class D felony.

³ KRS 218A.500, a Class A misdemeanor.

⁴ Officer Kloss testified that a Mercury Tracer is virtually indistinguishable from a Ford Escort.

Mercury Tracer. Officer Dawn Dunn (“Officer Dunn”) then arrived on-scene. She inquired whether Colwell was armed and gained consent for a pat-down for weapons, which she testified was intended to ensure officer safety due to the nature of the dispatch call. Officer Dunn informed Colwell he was not under arrest prior to performing the pat-down search. No weapons were located on Colwell’s person. Officer Dunn read Colwell his *Miranda* rights and again informed him he was not under arrest.

Officer Kloss requested Colwell’s identification and some other general information. Colwell then voluntarily stated he had come from Frankfort to the hotel with a female companion in an effort to obtain crack cocaine. Shortly thereafter, Officer Dunn requested and received consent to search Colwell’s vehicle. In a cup holder in the center console, she located approximately 1.5 grams of cocaine, as well as a box of baking soda and a butane lighter. Colwell informed the officers he had the baking soda and lighter to make crack cocaine from any powdered cocaine he might obtain. Colwell was then placed in custody for possession of a controlled substance and drug paraphernalia.

Following the evidentiary hearing, the trial court took Colwell’s suppression motion under advisement. On September 28, 2007, the trial court orally sustained the motion stating there was insufficient corroboration of the anonymous tip as the information provided was readily ascertainable by general observation, and there was no predictive behavior provided within the tip. The court cited *Florida v. J.L.*, 529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000),

and an unpublished opinion of this Court⁵ as the basis for its decision. A brief written order sustaining the motion was entered on October 2, 2007. This appeal followed.

Pursuant to RCr⁶ 9.78, following an evidentiary hearing on a motion to suppress, a trial court “shall enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling.” Unfortunately, the record before us contains no findings of fact and thus a remand is necessitated. *See Hebert v. Commonwealth*, 566 S.W.2d 798, 800 (Ky.App. 1978); *Lee v. Commonwealth*, 547 S.W.2d 792, 794 (Ky.App. 1977) (citing *Francis v. Commonwealth*, 468 S.W.2d 287 (Ky. 1971)). Because the record is devoid of findings of fact it is impossible to determine whether the trial court believed the officers had unlawfully seized Colwell in violation of the Fourth Amendment thus tainting the remainder of the encounter, whether the trial court believed any such taint was not cured by Colwell’s voluntary consent to search his vehicle after he had been informed he was not under arrest, whether the trial court believed Colwell’s consent to search his vehicle was involuntarily given, or whether the trial court believed there was some other reason to suppress the evidence. The trial court does not indicate the facts it relied upon in making its

⁵ The opinion of this Court relied upon by the trial court was under discretionary review by the Supreme Court of Kentucky at that time. The Supreme Court has now rendered its decision in an unpublished opinion reversing this Court and reinstating that defendant’s conviction, thus rendering the trial court’s reliance upon our opinion suspect.

⁶ Kentucky Rules of Criminal Procedure.

decision, but rather made only legal conclusions from the bench. The written order merely states “the Defendant’s motion to Suppress is SUSTAINED as to the reasons stated on the video record.” Unfortunately, the referenced video record is likewise devoid of any stated findings of fact to support the trial court’s legal conclusion. In the absence of the required factual findings, we are unable to conduct a meaningful review of the issues presented. *Commonwealth v. Neal*, 84 S.W.3d 920 (Ky.App. 2002); *Brown v. Commonwealth*, 564 S.W.2d 24 (Ky.App. 1978). Further, the mere citation of authority is insufficient to stand in the place of the required findings of fact. *Clark v. Commonwealth*, 868 S.W.2d 101 (Ky.App. 1993).

Therefore, without speaking to the merits of any arguments presented on appeal, we must reverse and remand this matter to the Fayette Circuit Court for further proceedings and the entry of factual findings supporting its resolution of the suppression motion.

ALL CONCUR.

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