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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001950-MR

MARK T. ROUNTREE — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
ACTION NO. 05-CR-00556

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: VANMETER AND WINE, JUDGES; LAMBERT,[1] SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Mark Rountree appeals from a Hardin Circuit Court judgment based upon his conditional guilty plea to charges of complicity to commit manufacturing methamphetamine, complicity to commit first-degree possession of a controlled substance, complicity to commit second-degree

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

possession of a controlled substance, and complicity to commit possession of drug paraphernalia. Rountree was sentenced to a total of fourteen years confinement followed by five years of probation. His grounds for appeal are that the trial court erred by denying his motion to suppress evidence seized from his automobile. Upon our conclusion that the police had a reasonable suspicion that criminal activity was afoot and therefore had authority to stop Rountree's vehicle, and on our further conclusion that the subsequent warrantless search was not unreasonable, we affirm the judgment.

On August 28, 2005, at approximately 8:00 pm, Mark Rountree purchased two packages of over-the-counter allergy medication containing pseudoephedrine from Walgreens. Before the purchase was complete, Rountree was required to present his drivers license and sign a Kentucky narcotics log. Immediately after Rountree bought his allergy pills, another man attempted to purchase an unknown quantity of similar allergy medication also containing pseudoephedrine. However, the other man did not have a driver's license so Walgreens refused the sale.

After Rountree left the pharmacy, a Walgreens employee contacted the Elizabethtown Police Department and reported that two men had attempted to purchase pseudoephedrine, one successfully and the other unsuccessfully due to lack of a driver's license. The quantity of the successful purchase was reported to be 96 pills containing 5.7 grams of pseudoephedrine. Kentucky law prohibits the

purchase of more than 9 grams of pseudoephedrine within 30 days. KRS[2] 218A.1437.[3] In addition to Kentucky state law, at the time of the purchase Walgreens policy prohibited sale of allergy pills containing a total of 6 grams or more of pseudoephedrine at one time. Rountree's purchase was within the legal pseudoephedrine quantity limit and within Walgreens policy limit.

On being contacted by Walgreens, the Elizabethtown Police conducted a record check on Rountree based upon information contained in the driver's license record and the narcotics log. From the information search, the police learned that Rountree drove a maroon Dodge that was registered in Hart County, and they began searching for Rountree at various pharmacies in Elizabethtown. While searching for Rountree at Walmart, Detective Billy Edwards located a maroon Dodge Intrepid automobile. On confirming that it was registered to Rountree, Detective Edwards observed Rountree leave Walmart, circle around the parking lot and adjust his wind-shield wipers. Detective Edwards

[2] Kentucky Revised Statutes.

[3] KRS 218A.1437 provides:

> (1) A person is guilty of unlawful possession of a methamphetamine precursor when he or she knowingly and unlawfully possesses a drug product or combination of drug products containing ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers, with the intent to use the drug product or combination of drug products as a precursor to manufacturing methamphetamine or other controlled substance.
>
> (2)(a) Except as provided in paragraph (b) of this subsection, possession of a drug product or combination of drug products containing more than nine (9) grams of ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers, within any thirty (30) day period shall constitute prima facie evidence of the intent to use the drug product or combination of drug products as a precursor to methamphetamine or other controlled substance.

then observed another man, later identified as Jon Lindsay, enter Rountree's automobile. Detective Edwards followed as Rountree and Lindsey drove out of the parking lot, but Edwards did not know whether Rountree or Lindsay had purchased allergy medication or anything else at Walmart.

The police followed Rountree onto the US 31-W Bypass, where they initiated a traffic stop. Upon approaching the automobile, the police questioned Rountree about the pseudoephedrine he had purchased at Walgreens. Rountree admitted to the police that he had also purchased pseudoephedrine from other pharmacies and that he used methamphetamine. While talking with Rountree, Detective Edwards observed multiple packages of allergy pills in the car. Upon seeing the pills, the police officers searched the automobile and the search revealed numerous allergy pills containing a total of 94 grams of pseudoephedrine, lithium batteries, solvents used in manufacturing methamphetamine, receipts detailing pseudoephedrine purchases from Glasgow and Ohio, and receipts detailing purchases of piping and a funnel. Police also searched a green eye glasses case inside the automobile which was found to contain hydrocodone, aluminum foil, and a small bag of a substance later identified as methamphetamine. Based upon the evidence seized Rountree was arrested.

Following his October 28, 2005, indictment, a hearing was held on Rountree's motion to suppress evidence seized during the search of his automobile. Rountree claimed that both the initial stop and the subsequent search of the automobile were unlawful and that the evidence seized had to be suppressed.

The trial court denied Rountree's motion to suppress, explaining

> It is the finding of this Court based on the fact that Rountree had purchased the maximum amount of pseudoephedrine allowed by the Walgreens pharmacy and that his passenger had also attempted to purchase pseudoephedrine at the same pharmacy but had been turned down because of lack of identification that an articulable suspicion did exist for the stop in this case.

This appeal followed.

Upon appellate review, this Court must affirm trial court findings of fact if those findings are supported by substantial evidence. RCr 9.78. Our review of the facts is for clear error and deference must be given to reasonable inferences available from the evidence. *Commonwealth v. Whitmore*, 92 S.W.3d 76, 79 (Ky. 2002), *quoting* *Ornelas v. United States*, 517 U.S. 690, 699, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911 (1996). If the trial court's findings of fact are determined to be supported by substantial evidence, we then conduct a *de novo* review of the trial court's application of the law to the facts found to determine whether the decision on the law is correct. *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky. App. 2002).

We have no doubt that the trial court's findings of fact are supported by substantial evidence. While it is true that Rountree did not purchase the absolute maximum amount of pseudoephedrine allowed by Walgreen's policy, the trial court's finding in that respect is not without sufficient evidentiary support. The minor factual discrepancy between the quantity purchased and Walgreens policy is insignificant. Of greater significance, however, is precisely what

information was communicated by Walgreens employees to the Elizabethtown police. Specifically, were the police informed that two men who were traveling together had attempted to purchase pseudoephedrine, or was it merely a coincidence that one man had successfully purchased pseudoephedrine and that immediately thereafter another man had tried but failed to make a similar purchase due to lack of identification? We have carefully reviewed the record of the suppression hearing and the testimony appears to support the view that the police could have reasonably inferred from information given by Walgreens employees that the two men were together in Walgreens during the relevant time. Accordingly, the trial court's finding of fact with respect to the amount of pseudoephedrine purchased by Rountree and its finding of fact that Rountree's companion had also attempted to purchase pseudoephedrine at the same pharmacy are supported by substantial evidence. RCr 9.78.

On the basis of the trial court's findings of fact, we must determine whether the police had a "reasonable suspicion" to stop Rountree. For a lawful automobile stop, police must have a reasonable suspicion of criminal activity afoot. *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Police suspicion need not rise to the level of probable cause, however the suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 22. The relevant inquiry in making a determination of reasonable suspicion is not whether particular conduct is "innocent" or "guilty," but the degree of suspicion that attaches to

particular types of even non-criminal conduct. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). The distinction is whether the police have a mere hunch or whether the facts give rise to a reasonable suspicion.

This Court considered a similar case in *Nichols v. Commonwealth*, 186 S.W.3d 761 (Ky. App. 2005). We held that reasonable suspicion existed when Nicholas was observed buying three or four boxes of allergy pills containing pseudoephedrine and exhibiting strange, nervous behavior. In *Nichols,* when the police stopped the defendant they did not know exactly how many boxes of pseudoephedrine he had purchased. However, an off-duty police officer working as a security guard testified that he had contacted police because in addition to the amount that the defendant purchased, the defendant also appeared to be nervous and fit the profile, from his experience as a law enforcement officer, of a person involved with methamphetamine.

As found by the trial court herein, when Rountree's car was stopped, the police had information that he had purchased two boxes of allergy pills and that another man who appeared to be with him had unsuccessfully attempted to make a similar purchase. The police did not know the identity of Rountree's automobile passenger but they could have reasonably inferred that the man with Rountree in his car was the same man who had unsuccessfully attempted to purchase pseudoephedrine a short while earlier from Walgreens. It is worth reiterating that the decisive inquiry is whether the police possessed a reasonable suspicion at the

time they stopped Rountree's vehicle. We conclude that the standard of reasonable suspicion was met and that the automobile stop was justified.

Upon our determination that the police had an articulable suspicion for stopping Rountree's automobile, we must also determine whether his constitutional rights were violated when his vehicle was searched without a warrant.

From the evidence presented at the suppression hearing, it appears that multiple packages of allergy pills were visible when Detective Edwards approached and looked inside Rountree's automobile. Upon questioning, Rountree admitted that he had also purchased pseudoephedrine from other pharmacies and that he used methamphetamine. In response to this information, an automobile search was conducted and it revealed numerous incriminating items.

Rountree now contends that the warrantless search of his vehicle was in violation of the Fourth Amendment to the Constitution of the United States and Section 110 of the Constitution of Kentucky. Our decision in *Gray v. Commonwealth*, 28 S.W.3d 316 (Ky. App. 2000), answers and defeats this contention.

> It is well established that "automobiles . . . may be searched without a warrant in circumstances that would not justify the search without a warrant of a house or an office, provided that there is probable cause to believe that the car contains articles that the officers are entitled to seize." Thus, an officer may search a legitimately stopped automobile where probable cause exists that contraband or evidence of a crime is in the vehicle. The search may be as thorough as a magistrate could

> authorize via a search warrant, including all compartments of the automobile and all containers in the automobile which might contain the object of the search.

Id. at 319. (Citations omitted.)

> When police officers have probable cause to believe there is contraband inside an automobile that has been stopped on the road, the officers may conduct a warrantless search of the vehicle, *even after it has been impounded and is in police custody.*

Id. (Emphasis added.)

Our view in this respect is consistent with the trial court's conclusion that "probable cause" and "exigent circumstances" were present justifying the warrantless search of Rountree's automobile.

For the foregoing reasons, the judgment of the trial court is affirmed.

ALL CONCUR.

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