

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-002148-MR

ALAN MCGEE

APPELLANT

v. APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 07-CR-00004

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: COMBS, CHIEF JUDGE; DIXON AND TAYLOR, JUDGES.

DIXON, JUDGE: Alan McGee appeals from a judgment of conviction following a jury trial in Logan Circuit Court. We affirm.

On December 12, 2006, Logan County Sheriff's Deputy David Kitchens responded to a call from Darryl Eddings regarding a disturbance at his home. When Deputy Kitchens arrived, Eddings informed him that McGee, along

with William Howitt, trespassed on Eddings's property and threatened to assault him. Although the men left prior to the deputy's arrival, Eddings provided a description of the vehicle McGee was driving.

Approximately two and one-half hours later, Deputy Kitchens encountered McGee's vehicle while on patrol. Deputy Kitchens initiated a traffic stop to inquire about the disturbance at the Eddings residence. Upon approaching the vehicle, the deputy detected an odor of marijuana. A subsequent search of the vehicle uncovered four marijuana "roaches" and a pink straw with white residue inside a cigarette package in the driver's side visor. Inside the glove compartment, the deputy found a small nylon bag containing a small quantity of methamphetamine and a "bulb" pipe. McGee was arrested; his passenger, Howitt, was not charged.

McGee was indicted by a Logan County grand jury and subsequently stood trial on August 27, 2007. The jury found McGee guilty of (1) possession of marijuana; (2) possession of drug paraphernalia; and (3) first-degree possession of a controlled substance (methamphetamine). McGee waived jury sentencing and entered into an agreement with the Commonwealth wherein he received a five-year sentence which would be probated after he served six months and entered a rehabilitation program. The court imposed its final judgment on September 27, 2007, and this appeal followed.

McGee argues that the trial court erred by denying his pre-trial motion to suppress evidence seized during the search of his vehicle. McGee also argues the court erroneously denied the introduction of impeachment evidence at trial.

I.

When this Court reviews a determination on a motion to suppress evidence, we are bound by the factual findings of the trial court if they are supported by substantial evidence. *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998) (*citing* Kentucky Rules of Criminal Procedure (RCr) 9.78). We then review *de novo* the application of the law to the facts. *Id.*

At the outset, we note that McGee, in his appellate brief, failed to cite evidence in the record supporting his argument. Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(v). Based upon our review of the proceedings, it is clear that the record largely refutes McGee’s characterization of the evidence.

At the suppression hearing, the court heard testimony from Deputy Kitchens. He stated that, after initiating the traffic stop, he asked McGee to exit the vehicle. As McGee exited, Deputy Kitchens detected the odor of marijuana emanating from either the truck or McGee himself. McGee consented to a pat down search, which revealed nothing. Deputy Kitchens then asked McGee for permission to search the cab of the truck, and McGee stared “blankly” at him. Before McGee responded, Deputy Kitchens followed-up his inquiry by advising McGee that he did not have to consent because the deputy could call for the police

dog to come to the scene and sniff the vehicle. McGee then consented to the search.

McGee contends his consent was coerced because Officer Kitchens threatened to call the K-9 unit to inspect the vehicle. We disagree.

“[W]hether a consent to a search was in fact ‘voluntary’ or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.” *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S. Ct. 2041, 2047-48, 36 L. Ed. 2d 854 (1973). In the case at bar, the trial court concluded that McGee voluntarily consented to the search of his vehicle.

McGee opines that the court clearly erred in its finding because the deputy had “no reason” to believe drugs were in the vehicle, impermissibly detained McGee, and coerced him into consenting. Despite McGee’s assertions, a review of the record shows substantial evidence supports the trial court’s finding that McGee’s consent was voluntary.

A review of Deputy Kitchens’ testimony shows that, prior to asking for consent to search, he explained to McGee that he smelled marijuana, and he asked McGee if he had been smoking marijuana. Further, as the trial court noted in its findings, “no more than a few seconds” elapsed between the time Deputy Kitchens asked for consent to search and then stated he could call for the K-9 unit. Indeed, Deputy Kitchens testified that he initiated the traffic stop at approximately 8:30 p.m., and the citation shows that McGee was arrested at 8:38 p.m. Finally, in

his appellate brief, McGee contends he initially refused consent and then relented pursuant to Deputy Kitchens' "badgering." However, our review of the hearing supports the trial court's finding that McGee did not respond to the deputy's initial inquiry.

McGee further points out that Deputy Kitchens admitted he did not know the exact location of the K-9 unit in Logan County; rather, he only knew the K-9 unit was on routine patrol. Pursuant to this theory, McGee speculates that the K-9 unit could have been unavailable, thereby making Deputy Kitchens' statement a hollow threat. We disagree.

As McGee correctly points out, "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491, 500, 103 S. Ct. 1319, 1325, 75 L. Ed. 2d 229 (1983). Deputy Kitchens testified that he smelled marijuana when McGee exited the vehicle. Once Deputy Kitchens patted down McGee's clothing and found nothing, it was reasonable for the officer to believe that marijuana was located inside the vehicle. *See Dunn v. Commonwealth*, 199 S.W.3d 775, 776 (Ky. App. 2006). Consequently, Deputy Kitchens would have been "entitled to bring in the drug-sniffing dog for the exterior of the vehicle so long as there was not any unreasonable delay." *Meghoo v. Commonwealth*, 245 S.W.3d 752, 755 (Ky. 2008) (citing *Illinois v. Caballes*, 543 U.S. 405, 407, 125 S. Ct. 834, 837, 160 L. Ed. 2d 842 (2005)).

The facts demonstrate that Deputy Kitchens had a valid basis for telling McGee that he could call for the K-9 unit to sniff the vehicle. We are not persuaded that the statement was coercive because Deputy Kitchens did not know the whereabouts of the K-9. McGee's contention that he would have been detained an unreasonable amount of time if the K-9 unit had been called is mere speculation. In sum, the trial court correctly found that McGee's consent was voluntary. The court properly denied the motion to suppress evidence.

II.

McGee next argues that the trial court abused its discretion by denying his request to introduce evidence intended to impeach the credibility of Deputy Kitchens. McGee concedes this alleged error is unpreserved for our review, but opines the court's decision constituted palpable error. Pursuant to the rule regarding palpable error, RCr 10.26, this Court may grant relief upon an otherwise unpreserved error that resulted in "manifest injustice" to the movant.

During McGee's cross-examination of Deputy Kitchens, McGee asked the deputy why he did not charge Howitt with a crime. Deputy Kitchens explained he made the decision based upon several factors. McGee then questioned the deputy about the cigarette package found in the truck. Deputy Kitchens stated he believed McGee had been smoking at the time of the traffic stop. The deputy further testified that he was familiar with Howitt and knew that Howitt did not smoke cigarettes. On re-direct, the Commonwealth asked if there were any other reasons Howitt was not charged, and Deputy Kitchens stated that

he had never known Howitt to be involved with methamphetamine. McGee objected that Deputy Kitchens' testimony was speculative, and, in open court, argued that Deputy Kitchens had no knowledge of Howitt's activities. The court sustained the objection.

Before the trial resumed the following day, McGee's attorney addressed the court in a bench conference. Counsel informed the court that he believed Howitt had recently been convicted of a methamphetamine offense. He claimed that he had been searching court records and "if" he found proof of Howitt's conviction, he wanted to impeach Deputy Kitchens' reasoning for not charging Howitt. The court denied the request.

McGee contends the court's ruling prevented him from presenting a viable defense. We disagree. McGee testified on his own behalf and presented several witnesses in his defense. However, the Commonwealth presented sufficient evidence for the jury to infer that the drugs belonged to McGee. Based upon our review of the record, we conclude there was no palpable error.

For the reasons stated herein, the judgment of the Logan Circuit Court is affirmed.

ALL CONCUR.

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