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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001868-MR

CARLOS OLEN CHANDLER — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 07-CR-00261

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

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

NICKELL, JUDGE: Carlos Olen Chandler (Chandler) entered a conditional guilty plea pursuant to Kentucky Rules of Criminal Procedure (RCr) 8.09 in the Fayette Circuit Court on July 6, 2007, to the amended charges of possession of a controlled

[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.

substance in the first degree,[2] possession of marijuana,[3] and being a persistent felony offender in the second degree (PFO II).[4] He received a sentence of three years' imprisonment on the possession of a controlled substance charge, enhanced to five years by virtue of his PFO II conviction, and a sentence of twelve months on the marijuana charge to run concurrently with his felony sentence, for a total sentence of five years' imprisonment. By agreement with the Commonwealth, a charge of promoting contraband[5] was dismissed. Within his guilty plea, Chandler reserved the right to appeal from the trial court's denial of his motion to suppress the evidence seized upon his arrest. It is from this denial that he appeals to this Court.

On January 19, 2007, officers from the Lexington Metro Police Department (LMPD) were dispatched to investigate a 911 call regarding possible narcotics activity at a home located at 339 Roosevelt Avenue in Lexington, Kentucky. Upon arrival, the officers approached the home to investigate the suspicious activity report. After a brief investigation, the officers determined no drug activity was occurring on the premises. As the officers were leaving the scene, they noticed a sports utility vehicle with two or three passengers inside parked on the street near their cruisers. The officers decided to approach the

[2] KRS 218A.1415, a Class D felony.

[3] KRS 218A.020, a Class A misdemeanor.

[4] KRS 532.080, a Class C felony.

[5] KRS 520.050, a Class D felony.

vehicle to initiate "casual contact" with the occupants and talk with them about the suspicious activity report.

One officer approached the driver's side of the vehicle and requested the driver to roll down the window. The driver instead opened the door and the officer detected a strong odor of marijuana and saw smoke rolling from the vehicle. Chandler, the front seat passenger, acted nervous, had difficulty producing identification, and would not make eye contact with the officers. His eyes were glassy and fixed, he smelled strongly of marijuana, he was lethargic, and his speech was slurred. Based on these observations, Chandler was arrested for public intoxication. Because of his nervous demeanor, once at the detention center, officers requested a strip search of his person. The search revealed quantities of cocaine and marijuana located in his underpants. Chandler was then charged with the additional offenses of trafficking in a controlled substance in the first degree,[6] trafficking in a controlled substance in or near a school,[7] and promoting contraband in the first degree.

Chandler was indicted on February 26, 2007, by a Fayette County grand jury on the charges of trafficking in a controlled substance in the first degree, promoting contraband, possession of marijuana, and being a PFO II. The grand jury did not act on the public intoxication charge[8] for which Chandler was initially

[6] KRS 218A.1412, a Class C felony.

[7] KRS 218A.1411, a Class D felony.

[8] We note the grand jury did not return a "No True Bill" or a recommendation of dismissal, but rather was completely silent on the public intoxication charge.

arrested. Chandler subsequently moved the court to suppress the evidence seized arguing that since the grand jury "dismissed" the charge underlying his arrest, the officers lacked probable cause to arrest him thus rendering the search unlawful and anything seized inadmissible. Following a hearing on June 12, 2007, the trial court found the facts as related herein, concluded as a matter of law that the officers had probable cause to arrest Chandler for public intoxication, and denied Chandler's suppression motion. Chandler subsequently entered his conditional guilty plea and this appeal followed.

Chandler now contends the trial court erred in denying his motion to suppress the evidence seized as a result of his arrest. He contends the arresting officer lacked probable cause to believe he committed the offense of public intoxication as evidenced by the grand jury's "dismissal" of that charge. Thus, he argues the search incident to that arrest was illegal and the fruits of the search should have been suppressed. We disagree.

When reviewing the denial of a suppression motion, we first review the factual findings of the trial court, which are deemed conclusive if supported by substantial evidence; we then review the trial court's legal conclusions *de novo*. *Garcia v. Commonwealth*, 185 S.W.3d 658, 661 (Ky.App. 2006) (*citing Stewart v. Commonwealth*, 44 S.W.3d 376, 380 (Ky.App. 2000)). Having reviewed the trial court's determination regarding the relatively simple and undisputed facts of this case, we hold the trial court's findings were supported by substantial evidence and

are thus conclusive. Thus, we now turn to a review of the trial court's legal conclusions.

This case presents the interesting issue of the legal effect of a grand jury failing to issue indictments on all charges presented to it. Chander believes such failure represents a dismissal of the un-indicted charges. Additionally, Chandler believes such failure indicates a finding by the grand jury that the arresting officers lacked probable cause to initiate an arrest or sustain a criminal charge, especially since in this case one of the two un-indicted acts is the one which precipitated his initial arrest. We find Chandler's arguments to be without merit.

First, Chandler cites no authority for his position that a grand jury's failure to return an indictment on a charge constitutes a dismissal of that charge. He also fails to cite any authority for the proposition that a grand jury has the inherent power to dismiss a criminal charge. As such, we are convinced no such authority exists and we will not now hold the failure of a grand jury to return an indictment on a particular charge is tantamount to dismissal of that charge, nor that a grand jury has such authority. In fact, under RCr[9] 5.22, the failure to indict acts only to release a defendant from custody, exonerate any bail, or mandate a refund of any bond posted, but "does not prevent the charge from being submitted to another grand jury." Additionally, under RCr 9.64, only the Commonwealth has the authority to dismiss a criminal complaint prior to commencement of a trial. In

[9] Kentucky Rules of Criminal Procedure.

Commonwealth v. Gonzales, 237, S.W.3d 575, 578 (Ky.App. 2007) (quoting *Commonwealth v. Isham*, 98 S.W.3d 59, 62 (Ky. 2003)), a panel of this Court noted "the authority to dismiss a criminal complaint before trial may only be exercised by the Commonwealth, and the trial court may only dismiss via a directed verdict following a trial." Thus, the plain language of the criminal rules is in direct opposition to Chandler's argument.

Further, contrary to Chandler's argument, the trial court did not take judicial notice of a "dismissal" of any charges. Rather, the trial court merely took judicial notice that the grand jury did not return an indictment on the public intoxication charge. Therefore, we are unable to agree with Chandler that the grand jury "dismissed" the public intoxication charge against him.

Next, although Chandler believes otherwise, our review of the officers' testimony at the suppression hearing clearly indicates a sufficiency of probable cause to place him under arrest for the offense of public intoxication, as correctly found by the trial court. The officers testified regarding their detection and observation of a strong odor of marijuana, smoke coming from the vehicle when the door opened, Chandler's eyes being glassy and fixed, the strong smell of marijuana about Chandler's person, his slurred speech, difficulty producing identification, nervous actions, and other signs the officers recognized from their training and experience as indicative of a person being under the influence of a controlled substance other than alcohol. Thus, we hold the trial court correctly

found the arresting officers had probable cause to initiate Chandler's arrest and the resulting search was proper.

Finally, we are unable to agree with Chandler's premise that the grand jury's failure to indict indicates they believed the officers lacked probable cause to arrest him on the initial charge. The record is completely silent on this point and we will not engage in gratuitous speculation to invent support for Chandler's argument. *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985). Further, we do not believe the determination of probable cause to initiate an arrest is a function of a grand jury, but rather one for the trial court. The proper function of a grand jury is to determine whether "sufficient evidence" has been presented to support an indictment. RCr 5.10. Chandler provides no authority to the contrary and we are convinced none exists. Contrary to Chandler's contention, the trial court did not supplant its judgment for that of the grand jury by holding the officers had probable cause to arrest Chandler, nor did the trial court engage in speculation as to why the grand jury chose not to return an indictment on the public intoxication charge. The trial court acted properly in making its legal determinations in accordance with the law, and there was no error in denying the motion to suppress.

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

ALL CONCUR.

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