

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000101-MR

MARTY J. PATTERSON

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
ACTION NO. 06-CR-00309

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: DIXON AND THOMPSON, JUDGES; LAMBERT,¹ SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: The issues presented are whether a search conducted prior to arrest may constitute a search incident to arrest, and whether the police had probable cause to arrest Marty Patterson although they had no acquaintance with him or prior knowledge of his likely criminal conduct.

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.

On March 25, 2006, during a Hardin County Narcotics Task Force investigation, a confidential informant (CI) told police that Henry Perkins was a 60-year-old Louisville drug dealer who delivered drugs to Elizabethtown. The CI gave the police a physical description of Perkins and told them that Perkins drove a tan Lincoln Town Car. The CI then placed a series of telephone calls to Perkins to arrange a cocaine buy and delivery to the Fort Knox Inn, room number 115. Police officers were present during these phone calls.

At approximately 9:45 p.m., a tan Lincoln Town Car entered the Fort Knox Inn parking lot. The officer noted that the driver matched the CI's description of Perkins. Perkins, a female passenger riding in the front seat, and a male passenger riding in the back seat, all exited the automobile. The three then walked toward room number 115. Police officers approached Perkins and his passengers with guns drawn, directed them to the ground, and handcuffed them. The police identified Perkin's female passenger as Alesha Quarrels and the male passenger as Appellant Marty Patterson. The officers searched all three individuals and seized 9 grams of cocaine from Appellant's right sock. Twenty minutes later, Patterson was charged with complicity to commit trafficking in a controlled substance.

At the evidence suppression hearing, a police detective admitted that Patterson did not consent to the search. Further, the detective admitted that the CI did not provide any information concerning Patterson and that police did not know

anything about Patterson until he arrived at the Fort Knox Inn with Perkins.

Patterson argued to the trial court that the police lacked probable cause to arrest him because they had no information pertaining to him. The trial court found that probable cause to arrest existed because Patterson accompanied Perkins to a monitored drug transaction. The court emphasized that Patterson exited the car with Perkins and began walking toward room number 115. The court reasoned that as a result, there was probable cause to believe that Patterson was an active participant in a drug transaction.

On November 6, 2007, Patterson entered a conditional guilty plea to the charge of complicity to traffic in a controlled substance. On December 14, 2007, he was sentenced to 6 years' imprisonment. This appeal followed.

As a reviewing Court we first examine the evidence to determine whether the trial court's findings were supported by substantial evidence. RCr 9.78; *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998). If the trial court's findings were properly supported, we then conduct a *de novo* review of the applicable law. *Id.* In this case, the trial court's findings were based on the following substantial evidence: Patterson arrived with Perkins, a known drug dealer who was then engaged in a drug transaction. Patterson exited the car at the Fort Knox Inn, and Patterson walked toward room number 115, the designated meeting place.

The trial court provided an excellent analysis of the law applicable to this case. Accordingly, we quote at length from her opinion:

The issue before the court is whether the officers had probable cause to arrest and search Patterson. Prerequisite to making a warrantless arrest for a felony offense is the existence of probable cause. KRS 431.005(1)(c). A warrantless search is reasonable so long as probable cause to arrest existed before the search, and the arrest and search were substantially contemporaneous. *Williams v. Commonwealth*, 147 S.W.3d 1(Ky. 2004)(internal citations omitted). Probable cause cannot be precisely defined, but it is a non-technical common sense standard that depends upon the totality of the circumstances. *Id.* When probable cause is based in part on a tip from an informant, the “totality of the circumstances test requires a balancing of the relative indicia of reliability accompanying an informant’s tip.” *Lovett v. Commonwealth*, 103 S.W.3d 72, 78 (Ky. 2003). Furthermore, “probable cause for search or seizure of a person must be particularized with respect to that person.” *Ybarra v. Illinois*, 444 U.S. 85 (1979). The *Ybarra* Court also stated “this requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be.” *Id.* at 91. Additionally, “a person’s mere presence in the same car with a criminal offender does not authorize an inference of participation in a conspiracy.” *United States v. Di Re*, 332 U.S. 581 (1948).

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The probable cause to arrest Patterson was particularized because he was not an unwitting bystander or passenger in the car. In *Ybarra*, the officers executed a warrant during daylight that authorized them to search a bar and the person of a bartender who allegedly sold heroin there. They had no objective grounds to believe that any patron then on the premises, including Ybarra, had purchased heroin from the bartender or anyone else. They did not recognize Ybarra or see him do anything suspicious. Nevertheless, they searched him, along with the other patrons, and found heroin on him. The Supreme Court held the drug evidence should have been

suppressed because a person's mere proximity to others who were "independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." *Id.* Similarly in *Di Ri*, the defendant was arrested because he was in the front seat of a car next to the driver, who an informant sitting in the backseat said had given him two gasoline ration coupons later determined to be counterfeit. While in custody, defendant was found to have a large number of counterfeit gasoline and fuel ration coupons in his possession. At the time of the defendant's arrest, however, the police had no information that he played any role in the driver's transaction with the informant. The Supreme Court stated that the defendant's mere presence in the car was not sufficient to justify his arrest and subsequent search. The Court held that a person's mere presence in a car does not authorize an inference of a conspiracy. *Id.* In reaching that conclusion, the Court noted the following factors: *Di Re*'s presence in the car, the fact that the meeting was on a public street in a large city in broad daylight and was not a suspicious hideout, and the fact that the alleged substantive crime did not necessarily involve any act visibly criminal. The Court also focused on the fact that the informant did not single out *Di Re* at the scene. *Id.*

In this case, when the tan town car pulled up, the police had no knowledge of anything illegal regarding Patterson. However, showing up at a monitored drug transaction involving a confidential informant at 9:45 p.m. can clearly be distinguished from the warrantless search of a bar patron. More important, though, is the fact that Patterson exited the car with the other two individuals and began walking toward Room #115. At that point, Patterson became more than just a "mere passenger" in the car, and instead an active participant. The officers had probable cause to believe he was involved in committing a felony. The Motion to Suppress is overruled.

Accordingly, we affirm the decision of the Hardin Circuit Court.

DIXON, JUDGE, CONCURS.

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