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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002262-MR
AND
NO. 2008-CA-000652-MR

DUWAN LAMAR ROBBINS — APPELLANT

v.

APPEALS FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 05-CR-003773

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND VANMETER, JUDGES; GRAVES,[1] SENIOR JUDGE.

VANMETER, JUDGE: Following his conditional *Alford*[2] plea, Duwan Lamar Robbins appeals from the final judgment of the Jefferson Circuit Court sentencing

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[1] Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

[2] *North Carolina v. Alford*, 394 U.S. 956, 89 S.Ct. 1306, 22 L.Ed.2d 558 (1969).

him to four years' imprisonment for illegal possession of a controlled substance and tampering with physical evidence. Consolidated with that appeal is Robbins' appeal from an order forfeiting the currency found at the time of his arrest. For the following reasons, we affirm as to both appeals.

An outstanding bench warrant existed for Robbins' arrest for failure to appear for sentencing in a drug trafficking case. In September 2005, police officers located Robbins at a restaurant. As Robbins and his two companions exited the restaurant, Robbins unlocked his vehicle with a remote, and one companion opened the passenger door on the driver's side. The officers then identified themselves and informed Robbins that he was under arrest.

Robbins, who was about an arm's length away from the driver's door, ran to the other side of his vehicle, where his second companion was standing. Robbins pulled something from his pocket and threw it under his vehicle. Thereafter, the officers arrested him, recovering $1,010 in cash from his person and more than three grams of cocaine from under his vehicle. The officers then searched Robbins' vehicle and discovered more than three grams of cocaine in the driver's door.

Robbins first contends that the trial court erred by failing to suppress the cocaine found in his vehicle on the ground that the search was not justifiable – either pursuant to probable cause or as a search incident to an arrest. Robbins claims that his rights under the Fourth Amendment to the United States

Constitution and under Section Ten of the Kentucky Constitution were violated.[3] We disagree.

As stated in *Welch v. Commonwealth*, 149 S.W.3d 407, 409 (Ky. 2004):

> Appellate review of a motion to suppress is governed by the standard expressed by the Supreme Court of the United States in *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996), and adopted by this Court in *Adcock v. Commonwealth*, 967 S.W.2d 6 (Ky. 1998). The approach . . . is a two-step process that first reviews the factual findings of the trial court under a clearly erroneous standard. *Ornelas*, 517 U.S. at 699, 116 S.Ct. at 1663. The second step reviews *de novo* the applicability of the law to the facts found. *Id.*

Our analysis begins, as it should in every case addressing the reasonableness of a warrantless search, with the basic rule that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." *Arizona v. Gant*,[4] __ U.S. __, 129 S.Ct. 1710, 1716, 173 L.Ed.2d 485 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967) (footnote omitted)). One exception, a search incident to a lawful arrest, derives from interests in officer safety and

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[3] The general rule is that Kentucky courts construe Section Ten consonant with the Fourth Amendment absent a compelling reason in our Constitution, tradition, and precedents to diverge from it. *Henry v. Commonwealth*, 275 S.W.3d 194, 201 (Ky. 2008). Robbins has failed to identify such a reason.

[4] At this time, the full cite for *Arizona v. Gant* has yet to be provided.

evidence preservation that are typically implicated in arrest situations. *See Gant*, 129 S.Ct. at 1716.

As stated above, officers searched Robbins' vehicle after they arrested him on the outstanding bench warrant for drug trafficking charges and recovered cocaine from under his vehicle. The trial court held that the warrantless search of the vehicle was justified by the existence of both probable cause and exigent circumstances. *See Chambers v. Maroney*, 399 U.S. 42, 51, 90 S.Ct. 1975, 1981, 26 L.Ed.2d 419 (1970) (only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search); *Cooper v. Commonwealth*, 577 S.W.2d 34, 37 (Ky.App. 1979), *overruled on other grounds by Mash v. Commonwealth,* 769 S.W.2d 42 (Ky. 1989). However, in light of the United States Supreme Court's recent decision in *Gant*, we find it more apt to justify the search as a valid search incident to a recent occupant's arrest.

In *Gant,* the Court rejected a broad reading of *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), and held that the rationale under *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search. *See Gant*, 129 S.Ct. at 1719. The Court also concluded, albeit not following from *Chimel*, that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *See*

id. (quoting *Thornton v. United States*, 541 U.S. 615, 632, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004) (Scalia, J., concurring in judgment)).

In *Gant*, the defendant was handcuffed and locked in a patrol car before officers searched his vehicle and found cocaine in a jacket pocket. The Court held that, as the defendant clearly was not within reaching distance of his vehicle at the time of the search, it was not reasonable to believe that he might access the vehicle at the time of the search. *See Gant*, 129 S.Ct. at 1719. Moreover, the Court held that an evidentiary basis for the search was also lacking, since the defendant's arrest for driving with a suspended license was not an offense for which police could expect to find evidence in the passenger compartment of the defendant's vehicle. *Id.*; *cf. Knowles v. Iowa*, 525 U.S. 113, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998) (holding that a search, without consent or probable cause, of a car belonging to a person given a citation for speeding, violates the Fourth Amendment). As a result, the Court held that the vehicle search was unreasonable. The Court distinguished the circumstances before it from those of *Belton* and *Thornton*, where the defendants were arrested for drug offenses. In those cases, the offense of arrest supplied a basis for searching the passenger compartment of the arrestees' vehicles and any containers therein. *See Gant*, 129 S.Ct. at 1719.

Similar to *Belton* and *Thornton*, Robbins was arrested for drug offenses. Officers followed Robbins' vehicle to the restaurant, confirmed Robbins' identity while he was in the restaurant, and awaited Robbins' exit from the restaurant out of concern for public safety. For purposes of our analysis, when

the officers arrested Robbins, he was a "recent occupant" of his vehicle. In addition to being arrested for drug offenses, Robbins' act of throwing drugs under his vehicle when confronted by the police created additional reason to believe that drugs were in his vehicle. Under *Gant*, the search of Robbins' vehicle incident to his arrest was clearly justified. Thus, the trial court did not err in denying Robbins' motion to suppress.

Second, Robbins claims that the trial court erred in ordering forfeiture of the $1,010 in currency found at the time of his arrest. We disagree.

KRS 218A.410(1)(j) permits forfeiture of:

> Everything of value furnished . . . in exchange for a controlled substance in violation of this chapter, all proceeds . . . traceable to the exchange, and all moneys . . . used, or intended to be used, to facilitate any violation of this chapter[.] . . . It shall be a rebuttable presumption that all moneys, coin, and currency found in close proximity to controlled substances . . . are presumed to be forfeitable under this paragraph. The burden of proof shall be upon claimants of personal property to rebut this presumption by clear and convincing evidence.

Examination of this statute reveals that "any property subject to forfeiture under (j) must be traceable to the exchange or intended violation." *Osborne v. Commonwealth*, 839 S.W.2d 281, 284 (Ky. 1992).

In proving "traceability," the statute provides a special burden-shifting procedure for use in situations where, as here, currency is found in close proximity to controlled substances. As described in *Osborne*, *id.*:

> The Commonwealth may meet its initial burden

> by producing **slight evidence of traceability**. Production of such evidence plus proof of close proximity . . . is sufficient to sustain the forfeiture in the absence of clear and convincing evidence to the contrary. In practical application, the Commonwealth must first produce some evidence that the currency or some portion of it had been used or was intended to be used in a drug transaction. Additional proof by the Commonwealth that the currency sought to be forfeited was found in close proximity is sufficient to make a *prima facie* case. Thereafter, the burden is on the claimant to convince the trier of fact that the currency was not being used in the drug trade.

(Emphasis added.) Discretion in determining whether to order property forfeited lies with the trial court. *See Commonwealth v. Shirley*, 140 S.W.3d 593, 598 (Ky.App. 2004). "An abuse of discretion occurs when a 'trial judge's decision [is] arbitrary, unreasonable, unfair, or unsupported by sound legal principles.'" *Farmland Mut. Ins. Co. v. Johnson*, 36 S.W.3d 368, 378 (Ky. 2000) (quoting *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000)).

At the suppression hearing, Detective Chris Sanders testified that at or immediately after the time of his arrest, Robbins was a fugitive from justice on drug charges, he was not employed in any occupation from which taxes were being withheld, more than three grams of cocaine were found under his vehicle, and more than three grams of cocaine were found in the driver's door of his vehicle. Robbins offered no evidence to rebut the presumption supporting forfeiture. In these circumstances, the trial court did not abuse its discretion by concluding that

the Commonwealth satisfied its burden of making a *prima facie* case for forfeiture and by ordering forfeiture of the currency.

Next, Robbins avers that the trial court abused its discretion by refusing to compel discovery regarding an unidentified expert witness in the field of narcotics, whom the Commonwealth intended to call if the case went to trial. We disagree.

Robbins moved for exclusion of the proffered testimony and, in the alternative, argued that an evidentiary hearing should have been conducted pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), to assess the reliability of the proffered testimony prior to trial. The trial court disagreed, holding that discovery disclosure of the expert and his or her qualifications was not required, since the Commonwealth did not indicate that the expert witness conducted any examinations, tests, or experiments that were discoverable under RCr[5] 7.24. Rather, the trial court held that the appropriate avenue for Robbins' challenge of the witness's reliability would be through cross-examination, after the Commonwealth "laid a proper foundation" for the expert's opinion.

The standard of review for RCr 7.24 matters is whether the trial court abused its discretion. *See Penman v. Commonwealth*, 194 S.W.3d 237, 249 (Ky. 2006) (quoting *Beaty v. Commonwealth*, 125 S.W.3d 196, 202 (Ky. 2003)). In *King v. Venters*, 596 S.W.2d 721 (Ky. 1980), the Kentucky Supreme Court

[5] Kentucky Rules of Criminal Procedure.

recognized that the "extent to which either party to a criminal proceeding may require information of the other is set forth in RCr 7.24 [ ]" which provides, in part, as follows:

> (1) Upon written request by the defense, the attorney for the Commonwealth shall . . . permit the defendant to inspect and copy or photograph any relevant . . . (b) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, that are known by the attorney for the Commonwealth to be in the possession, custody or control of the Commonwealth.

Thus, RCr 7.24(1)(b) does not compel disclosure of the Commonwealth's expert witness in the absence of examinations, tests, or experiments made in connection with the particular case.

Furthermore, "[t]his Court clearly stated in *King* that a party to a criminal proceeding may not be compelled to provide a witness list to an opposing party." *Lowe v. Commonwealth*, 712 S.W.2d 944, 945 (Ky. 1986). Only known witnesses, exculpatory witnesses, or persons observing or participating in the crime must be disclosed pursuant to RCr 7.24. *See id.* As stated in *Burks v. Commonwealth*, 471 S.W.2d 298, 300-01 (Ky.App. 1971):

> [W]hen an informer participates in or places himself in the position of observing a criminal transaction he ceases to be merely a source of information and becomes a witness. We have no quarrel with the general proposition that the state should not be required to disclose its sources of information, including the identities of informers, but there simply can be no valid principle under which the identity of a known witness may be concealed from adversary parties in any kind of a judicial proceeding, criminal or civil.

Because Robbins is not contending that the Commonwealth's expert witness is a known witness, an exculpatory witness, or a person who observed or participated in the crime, the trial court did not abuse its discretion by refusing to compel discovery and by denying Robbins' motion to exclude the expert witness's testimony.

Nor did the trial court abuse its discretion by declining to conduct a *Daubert* hearing to assess the reliability of the proffered testimony. KRE[6] 702 provides that a witness qualified as an expert by knowledge, skill, experience, training, or education may provide opinion testimony if scientific, technical, or specialized knowledge will assist the trier of fact. "Application of KRE 702 is addressed to the sound discretion of the trial court." *Farmland,* 36 S.W.3d at 378 (quoting *Ford v. Commonwealth*, 665 S.W.2d 304, 309 (Ky. 1983)).

The record upon which a trial court can make an admissibility decision without a hearing usually will consist of "the proposed expert's reports, affidavits, deposition testimony, and existing precedent." *Dixon v. Commonwealth*, 149 S.W.3d 426, 430 (Ky. 2004) (quoting *Commonwealth v. Christie*, 98 S.W.3d 485, 488-89 (Ky. 2002)). In *Dixon*, the Kentucky Supreme Court was presented with the issue of whether a law enforcement officer could testify about the drug trade as an expert. The court held that the trial court did not abuse its discretion by permitting the officer to render his opinion that a certain list of initials and numbers found in the defendant's vehicle at the time of his arrest

[6] Kentucky Rules of Evidence.

constituted evidence of drug transactions and money exchanged, based upon his specialized knowledge as a law enforcement officer. *See Dixon,* 149 S.W.3d at 430-31. No formal *Daubert* hearing was necessary in order for the trial court to make its determination. *See id.* at 431. The court noted:

> The trial court's "gatekeeping" function as described in *Daubert*, applies as well to "specialized knowledge" as it does to scientific knowledge. However, a trial court has wide latitude in deciding *how* to test an expert's reliability and in deciding whether or when . . . a *Daubert* hearing [ ] is needed to investigate reliability.

Id. at 430 (citations omitted).

Similarly, in *Allgeier v. Commonwealth*, 915 S.W.2d 745, 747 (Ky. 1996), the Kentucky Supreme Court distinguished a law enforcement officer's opinion, based on training and experience as to whether, *e.g.*, a forced entry occurred, "from the more extensive and complex knowledge required for testimony by traditional experts, such as accident reconstructionists and forensic pathologists." The court held that the opinion of the officer was properly admitted. *See id.*

Here, as in *Dixon* and *Allgeier*, a law enforcement officer was expected to opine on the drug trade, based on his training and experience. The trial court considered *Dixon*, as well as other existing precedents, before determining that a *Daubert* hearing was not necessary to assess the reliability of the officer's testimony. This determination fell within the "wide latitude" of discretion afforded to a trial court. *Dixon*, 149 S.W.3d at 430.

Finally, Robbins asserts that the trial court erred by refusing to compel disclosure of the identity of a confidential informant on the ground that such information was privileged. We disagree.

KRE 508(a) gives the Commonwealth a privilege to refuse to disclose the identity of confidential informants. Exceptions to the general rule of privilege, as set forth in KRE 508(c)(1), may occur in several situations, including voluntary disclosure by the holder of the privilege or by the informer's own action, or if the informer appears as a witness for the state. Furthermore, KRE 508(c)(2) provides, in part: "If it appears that an informer may be able to give relevant testimony and the public entity invokes the privilege, the court shall give the public entity an opportunity to make an in camera showing in support of the claim of privilege." The situation here does not come within any of the exceptions to the rule. As noted by the Kentucky Supreme Court in *Taylor v. Commonwealth*, 987 S.W.2d 302, 304 (Ky. 1998):

> The Kentucky rule in KRE 508 reflects the decision of the United States Supreme Court in *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), which indicates that a proper balance regarding nondisclosure must depend on the particular circumstances of each case, taking into consideration the crimes charged, the possible defenses, the possible significance of the informer's testimony and other relevant factors.

In the present case, the trial court apparently found disclosure unnecessary, based on the testimony of Detective Sanders at the suppression hearing. Sanders testified that information provided by a confidential informant

was one factor leading to an investigation of Robbins. When pressed for disclosure of the informant's identity, the Commonwealth argued, based on Sanders' testimony, that the informant was not a material witness and that the informant had only provided general information to the officers prior to Robbins' date of arrest and was not present at the time of his arrest. Thus, the informant's testimony was not relevant to the issues of the case and did not fall under any exception to the claim of privilege. The trial court agreed, finding that the informant was not able to give relevant testimony to the issues of the case. Such a finding of fact shall not be set aside unless clearly erroneous. CR[7] 52.01. Having reviewed the entire record herein, we will not set aside that finding, which is well supported by the record.

The judgment and order of the Jefferson Circuit Court are affirmed.

ALL CONCUR.

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[7] Kentucky Rules of Civil Procedure.