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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2009-CA-000297-MR

MARCUS JACKSON — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 08-CR-00056

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; NICKELL AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Marcus Jackson appeals from a judgment of the McCracken Circuit Court following a jury verdict finding him guilty of trafficking in marijuana greater than five pounds and being a first-degree persistent felony offender. For the reasons stated herein, we affirm.

On December 1, 2007, McCracken County Deputy Sheriffs Jessie Riddle and Greg Wilson conducted a "knock and talk" investigation at the private residence of Chris Cole. As a result of their investigation, the deputies seized several pounds of marijuana and arrested Cole. Following a conversation with law enforcement, Cole agreed to cooperate and telephoned Jackson to obtain more marijuana. During the recorded phone calls, Jackson agreed to sell six pounds of marijuana to Cole.

Officers from the Sheriff's Department and the Paducah Police Department transported Cole back to his residence. After Cole returned home, Jackson was contacted and drove to the residence. When Jackson exited his vehicle, he was stopped by police and an open duffel bag containing marijuana was observed in plain view inside his vehicle. Deputy Riddle testified that Jackson was not under arrest and that he was being detained. According to Deputy Riddle, "[Jackson] was advised of what was going on . . . we looked inside the vehicle and saw the marijuana in plain view. . . . As soon as we saw marijuana inside the vehicle, he was told he was under arrest."

After his arrest, Jackson was indicted by a McCracken County grand jury for (1) trafficking in marijuana over five pounds; (2) possession of drug paraphernalia, first offense; and (3) being a persistent felony offender in the first degree (PFO-I). Following a jury trial, Jackson was found not guilty for the possession of drug paraphernalia charge but guilty on the remaining charges. His

ten-year sentence for marijuana trafficking was then enhanced to fifteen years by virtue of his PFO-I conviction. This appeal followed.

Jackson contends that the trial court erred by denying his motion to suppress evidence obtained against him in violation of his constitutional rights. He contends that his handcuffing prior to arrest and the warrantless stop and search of his vehicle were not supported by a sufficient evidentiary basis. Thus, he contends that the trial court should have suppressed the drug evidence used against him.

Our review of a trial court's suppression ruling is a two-step process whereby we review its factual findings under a clearly erroneous standard, and its application of the law to those facts under *de novo* review. *Henry v. Commonwealth*, 275 S.W.3d 194, 197 (Ky. 2008). Findings of fact are not clearly erroneous if they are supported by substantial evidence. *Hallum v. Commonwealth*, 219 S.W.3d 216, 220 (Ky.App. 2007). Substantial evidence constitutes facts that a reasonable mind would accept as sufficient to support a conclusion. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003).

The trial court found that the police's witnessing of Jackson making a drug deal over the telephone with Cole and the observance of Jackson's arrival at Cole's residence provided reasonable suspicion to detain Jackson for a preliminary drug investigation. When police observed drugs in plain view inside Jackson's vehicle, police had probable cause to search under the automobile exception to the warrant requirement. Additionally, the trial court found that the vehicle search was valid as a search incident to an arrest.

The Fourth Amendment of the United States Constitution and Section Ten of the Kentucky Constitution prohibit unwarranted and unreasonable searches and seizures by law enforcement against citizens. *Commonwealth v. Hatcher*, 199 S.W.3d 124, 126 (Ky. 2006). One exception to this general prohibition is the automobile exception whereby police can search a legitimately stopped vehicle where probable cause exists that contraband will be found in the vehicle. *Dunn v. Commonwealth,* 199 S.W.3d 775, 776 (Ky.App. 2006).

Police may constitutionally stop an automobile and conduct a brief, investigatory stop of a person when they have a reasonable, articulable suspicion that criminal activity is afoot. *Bauder v. Commonwealth*, 299 S.W.3d 588, 590-91 (Ky. 2009). Although reasonable suspicion does not support the making of a valid arrest, it may provide police with the authority to detain a suspect if the intrusion to the suspect falls far short of the traditional intrusions associated with an arrest. *Dunaway v. New York*, 442 U.S. 200, 212, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979). Consequently, courts have held that merely handcuffing a suspect does not constitute an arrest or require more than reasonable suspicion if necessary for officer safety. *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 309 (6th Cir. 2005).

Here, police learned that Jackson was transporting a large quantity of marijuana to Cole's residence. According to Deputy Riddle, police discovered that Jackson had an "extensive criminal history," including convictions for trafficking drugs, wanton endangerment, and second-degree assault. Deputy Riddle testified

that police believed that Jackson might be a flight risk and safety threat due to his criminal history and the seriousness of his potential charges. Based on this belief, after Jackson exited his vehicle, police approached Jackson with weapons drawn and handcuffed him to secure him.

After reviewing the record, we conclude that the seizure and detention of Jackson by police did not violate his constitutional rights. While Jackson alleges that Cole's reliability was not corroborated, police observed the drug transaction from the beginning stages to Jackson's arrival at Cole's residence. Thus, the police had independent reasonable suspicion to conduct an investigatory stop of Jackson. *Bauder*, 299 S.W.3d at 590-91.

Further, Jackson's forcible detention was not unconstitutional because police reasonably believed that he needed to be secured for their safety. Although certain procedures may burden a person's freedom of movement, police have the authority to take any reasonably necessary step to "protect their personal safety and to maintain the status quo during the course of the stop." *U.S. v. Hensley*, 469 U.S. 221, 235, 105 S.Ct. 675, 684, 83 L.Ed.2d 604 (1985). Here, the nature of the offense combined with Jackson's criminal history was sufficient to justify the brief detention of Jackson. *Johantgen v. Commonwealth*, 571 S.W.2d 110, 112 (Ky.App. 1978).

We further conclude that Jackson's constitutional rights were not violated when police searched his vehicle and duffel bag. Police may search a vehicle and the containers therein when they have probable cause to believe that

criminal evidence will be found in the vehicle. *Dunn*, 199 S.W.3d at 776. Police heard Jackson discuss and plan a drug deal with Cole. They then detained Jackson and observed an open duffel bag containing marijuana in "plain view" inside the vehicle.

Under the plain view exception to the warrant requirement, police may seize evidence if the evidence is immediately incriminating, they were in a lawful place when they saw the evidence, and they have a lawful right of access to the object itself. *Hazel v. Commonwealth*, 833 S.W.2d 831, 833 (Ky. 1992). Therefore, beyond the probable cause obtained by observing the formation of a drug deal, the police's plain view of the marijuana in conjunction with the automobile exception provided sufficient grounds to seize the drug evidence. *Id*. Accordingly, the trial court did not err by admitting the evidence against Jackson.

Jackson also argues that the trial court erred by denying his defense counsel's motion to withdraw thereby denying him the right to a fair trial. Jackson contends that his counsel should have been permitted to withdraw, so he could have been permitted to obtain the counsel of his choice to present his defense.

When determining whether counsel can withdraw from representation of a client, the trial court must look at the unique circumstances of each case. *Deno v. Commonwealth*, 177 S.W.3d 753, 759 (Ky. 2005). A trial court must determine whether there has been good cause shown before granting a motion to withdraw. *Id.* An appellate court reviews the trial court's decision under the abuse of discretion standard. *Jacobs v. Commonwealth*, 58 S.W.3d 435, 449 (Ky. 2001).

During Jackson's suppression hearing, his counsel expressed a desire to withdraw because Jackson had changed his mind about pleading guilty. Defense counsel stated that he felt bad having represented to the court that his client was going to plead guilty when his client changed his mind in a last-minute decision. The trial court assured counsel that this issue had no affect on counsel's standing. Defense counsel then stated that he wanted to continue his representation of his client, and Jackson expressed his desire for his counsel to continue representation.

Based on this review of the record, the trial court did not abuse its discretion by denying Jackson's counsel's motion to withdraw. First, defense counsel essentially withdrew his motion to withdraw by declaring that he wanted to represent Jackson if Jackson desired his representation. Second, defense counsel failed to demonstrate good cause sufficient to permit his withdrawal. The mere withdrawal of a guilty plea does not require the granting of a motion to withdraw. Therefore, we conclude that the trial court's decision was not erroneous.

Jackson next contends that the trial court erred when it permitted him to participate in his defense as co-counsel. Jackson contends that he lacked the free will to decide to act as counsel and was forced to assume a greater role in his defense based on his trial counsel's deficient performance. We disagree.

When a defendant desires to make a limited or complete waiver of his Sixth Amendment right to counsel, trial courts must conduct a *Faretta*[1] hearing which requires the completion of three steps. *Hill v. Commonwealth*, 125 S.W.3d

[1] *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

221, 226 (Ky. 2004). "First, the trial court must hold a hearing in which the defendant testifies on the question of whether the waiver is voluntary, knowing, and intelligent." *Id*. "Second, during the hearing, the trial court must warn the defendant of the hazards arising from and the benefits relinquished by waiving counsel." *Id*. Third, the trial court must make a finding on the record that the waiver was made knowingly, intelligently, and voluntarily. *Id*.

During the trial, Jackson desired to participate in asking certain witnesses questions. When informed he would have to be appointed counsel, he requested the court's permission to proceed as co-counsel. The trial court then conducted a *Faretta* hearing wherein it discussed the perils of self-representation, including negative feelings the jury might have and handling objections while questioning. The trial court then advised Jackson not to become co-counsel because of the high risks associated with self-representation.

Jackson responded that his main concern was that he did not want his participation to subject him to having to testify. The trial court then discussed several situations that Jackson's questions might require him to take the stand. At the conclusion of the colloquy, the trial court found Jackson's decision to proceed with hybrid representation was valid. Having reviewed the record, we conclude that the trial court did not err by granting his motion to be co-counsel.

Jackson next contends that there were several palpable errors during his trial which he contends affected his substantial rights. Having reviewed each alleged palpable error, we disagree and will address them in turn.

Under RCr 10.26, we may review a case for palpable error which affects the substantial rights of a party even when the alleged errors were not preserved by a proper objection at trial. *Bell v. Commonwealth*, 245 S.W.3d 738, 741 (Ky. 2008). An error is palpable when it is so easily perceptible and obvious that it must be corrected to prevent "manifest injustice." *Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003). Palpable error review ultimately seeks to determine if there is a substantial possibility that the defendant's case would have resulted differently absent the error. *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006). If not, the error cannot be palpable. *Id*.

Jackson contends that Detective Carter's testimony constituted prior bad acts and inadmissible investigative hearsay testimony. However, Jackson cites to testimony that does not constitute hearsay testimony or evidence of prior bad acts. Detective Carter testified about the action that he took during the sting operation. KRE 801(c) provides that "'[h]earsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Detective Carter's testimony does not meet the definition of hearsay as defined in KRE 801(c).

Further, there was no testimony of prior bad acts by Jackson. The fact that the jury might infer that Jackson was a drug dealer who had sold drugs before cannot prevent the prosecution from introducing evidence regarding how the drug deal was set up. The prosecution is permitted to prove its case by competent

evidence of its own choosing, not just the evidence that the defendant may want the jury to see. *Barnett v. Commonwealth*, 979 S.W.2d 98, 103 (Ky. 1998).

Jackson contends that the prosecution introduced testimony regarding his failure to talk to police after his arrest. He contends that this testimony violated his right to remain silent and the prohibition of stating this fact to a jury. However, Jackson failed to cite to the record where this testimony was introduced. So, not only did Jackson not object to this testimony at trial, he has not cited to this Court where the alleged palpable error can be found in the record. Therefore, because there was no citation to the record, we conclude that there was no palpable error. *Johnson v. Commonwealth*, 231 S.W.3d 800, 808 (Ky.App. 2007).

Jackson contends that the trial court erred by excluding his questions and evidence that he asked or introduced at trial. However, Jackson makes no specific arguments regarding any of these claims but states that his constitutional rights were violated. Accordingly, we conclude that the allegations of error do not constitute palpable error. *Grief v Wood*, 378 S.W.2d 611, 612 (Ky. 1964).

Jackson contends that the trial court admitted inconsistent photographs of the black duffel bag, one showing an open bag and another showing a closed bag. This evidence was relevant to the prosecution's case because the drugs were found in the duffel bag inside Jackson's car. The alleged inconsistencies in the photographs go to the weight rather than the admissibility of the evidence. *Davis v. Commonwealth*, 147 S.W.3d 709, 727 (Ky. 2004).

Jackson contends that the trial court failed to strike Juror Chris Stone

after Stone informed the court that he was not present during some of *voir dire*. Despite his defense counsel's failure to strike, Jackson argues that the trial court should have struck Juror Stone because he was not vetted to ensure fairness. Despite Jackson's claim, Juror Stone received detailed individual questioning in order to get him to the level of understanding as the rest of the *veniremen*. After one question, Juror Stone indicated that he believed that marijuana laws were too harsh on individuals but stated he could still be fair to the prosecution. After reviewing the record, Jackson's factual claim is not supported by the record.

Jackson contends that the trial court failed to order a mistrial when Juror Aesha Wharton stated that she was contacted regarding the trial. According to Juror Wharton, a Mr. Story telephoned her and asked her to take care of him because he knew she was on the jury. Juror Wharton did not know how Mr. Story's case was connected to Mr. Jackson's. When the trial court asked the prosecutor about Mr. Story, the prosecutor informed the court that Story was one of the individuals Cole stated that he could call to obtain marijuana. Following further discussion, the trial court dismissed Juror Wharton.

While Jackson argues for a different result, the trial court did not commit palpable error by failing to, *sua sponte*, declare a mistrial. Mistrials are an extreme remedy and should be granted only when there is a "manifest necessity" for such an action. *Bray v. Commonwealth*, 177 S.W.3d 741, 752 (Ky. 2005). "The error must be 'of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way

[except by grant of a mistrial].'" *Id*. (quoting *Gould v. Charlton Co., Inc.*, 929 S.W.2d 734, 738 (Ky. 1996)). Consequently, we conclude that the nature of Juror Wharton's knowledge did not mandate that the trial court issue a mistrial.

Having reviewed Jackson's numerous claims, we conclude that his claims do not rise to the level of palpable error. We believe that Jackson received a fair trial and that the alleged errors did not affect the outcome of his case.

For the foregoing reasons, the judgment of the McCracken Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lisa A. DeRenard
Benton, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Perry T. Ryan
Assistant Attorney General
Frankfort, Kentucky