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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2009-CA-001546-MR

BRIAN D. BROWN — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 07-CR-01010

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; DIXON, JUDGE; HENRY,[1] SENIOR JUDGE.

DIXON, JUDGE: In August 2008, Appellant, Brian D. Brown, entered a conditional guilty plea in the Fayette Circuit Court to charges of first degree possession of a controlled substance, giving an officer a false name, and being a second-degree persistent felony offender. Appellant was sentenced to five years'

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

imprisonment, probated for a period of five years. Pursuant to the plea agreement, Appellant now appeals the denial of two suppression motions. Finding no error, we affirm.

On June 16, 2007, Lexington Police Officer Charles Burkett received a report of suspicious activity in an area of Lexington known for drug activity and prostitution. Specifically, an anonymous caller reported that cars had been coming and going from an empty house located at 351 Chestnut Street. The caller described several people at the scene including a black male wearing jeans and no shirt; a black male wearing a tank top and green shorts; and a female wearing a pink top and jeans. The caller further stated that a third black male was hiding in the bushes in front of the house.

Upon arriving at the scene, Officer Burkett observed three individuals walking away from the house that matched the descriptions provided by the caller. When Officer Burkett asked them to stop, the three turned around and walked back toward the house, but did so by way of passing behind some bushes which obscured Officer Burkett's view of their hands. At this point, Officer Williams arrived as back-up and detected Appellant hiding in the same bushes. When questioned, Appellant initially gave the officers a false name. However, once all of the individuals provided their identities, the officers discovered that Appellant and the female, Ariane Brown, had outstanding warrants. Both were arrested and transported in separate vehicles to the jail.

At the jail, Appellant was placed in a holding cell while Officer Burkett completed the booking process with Ms. Brown. After Officer Burkett was finished with Ms. Brown, he walked by Appellant's holding cell and noticed that he had a white powdery substance around his mouth and appeared to be chewing on something. Fearing that Appellant may have ingested crack cocaine, Officer Burkett ordered him to spit the substance out of his mouth. Appellant replied, "I can't spit it out, I am numb." It is unclear from the record whether Officer Burkett then actually removed the substance from Appellant's mouth or whether he was able to spit it out. Regardless, Officer Burkett collected the substance from Appellant's mouth as well as what he had already spit on the ground. Officer Burkett also discovered what looked like more crack cocaine on and under the bench where Appellant was seated. Everything was collected in one evidence bag and sent for testing, which confirmed that it was, in fact, crack cocaine.

In August 2007, Appellant was indicted by a Fayette County Grand Jury for first-degree trafficking in a controlled substance, first-degree promoting contraband, tampering with physical evidence, giving an officer a false name, and for being a second-degree persistent felony offender. Appellant thereafter filed a motion to suppress all of the physical evidence on the grounds that he was unlawfully searched and seized in violation of the Fourth Amendment to the United States Constitution.

The trial court held a suppression hearing on October 29, 2007. At the conclusion of such, the trial court denied the motion, finding that given the totality of the circumstances, Officer Burkett had reasonable and articulable suspicion of criminal wrongdoing to stop Appellant and conduct further investigation. The trial court observed,

> So the court feels like the initial stop of the defendant, [sic] asked to come out of the bushes, the totality of the circumstances – the information from the anonymous tip; the corroboration at the scene; the fact that the defendant was hiding – all this was a reasonable and articulable suspicion that criminal activity was afoot. It was perfectly proper for the officers to get the defendant out, ask him further questions.

At a subsequent hearing in November 2007, Appellant again moved to suppress evidence of the crack cocaine, this time on the grounds that it had been subject to "spoilation" when it was collected by Officer Burkett in the holding cell. Specifically, Appellant maintained that Ms. Brown had been in the holding cell with him and she dropped the cocaine on the floor. As such, when Officer Burkett improperly combined the substance that Appellant spit from his mouth with the substance he found on the floor, he essentially prevented Appellant from being able to prove through testing that what was in his mouth was not, in fact, crack cocaine.

In denying Appellant's motion, the trial court concluded:

> Although the Defendant testified that he remembered a co-defendant or another person in the holding cell with him . . . , the Court makes a finding of Fact, based upon Officer Burkett's sworn testimony, the Defendant was

> alone in the holding cell at all times pertinent to this issue. The Court finds as Fact that Officer Burkett was able to observe the white powdery substance around the Defendant's lips, the substance that had been spit out by the Defendant and could also observe and handle the substance on and under the bench where the Defendant had been sitting. Officer Burkett testified, and the Court so finds that the "other" substances on and under the bench, were also wet. This fact is consistent with Officer Burkett's testimony that he was able to observe the Defendant chewing and spitting out the substance and that the only substance in the holding cell was substance belonging to this defendant.
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> Recognizing that the Defendant gave different testimony at the Suppression Hearing, this argument is really one of "weight" as opposed to "admissibility." At trial, Defendant can certainly deny that all of the substance came from him and the jury can weigh that credibility with that of any contrary testimony by Officer Burkett.

The trial court further noted that there was no evidence of bad faith or misconduct on the part of Officer Burkett and that at the time the substances were collected, "[the] evidence was not so clearly of an exculpatory nature that was apparent . . . ."

Appellant thereafter entered a conditional guilty plea to first-degree trafficking in a controlled substance, giving an officer a false name, and PFO II, reserving his right to appeal the trial court's suppression rulings. The promoting contraband and tampering with physical evidence charges were dismissed. This appeal ensued.

In this Court, Appellant first argues that he was unlawfully detained in violation of the Fourth Amendment because the anonymous tip did not have sufficient detail, was not corroborated, and did not create reasonable articulable

suspicion of criminal activity. As a result, Appellant contends that any contraband seized as a result of the unlawful detention was "fruit of the poisonous tree" and should have been suppressed. *See Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). We disagree.

Our standard of review of a trial court's decision on a suppression motion following a hearing is twofold. First, the factual findings of the court are conclusive if they are supported by substantial evidence. RCr 9.78; *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998); *Stewart v. Commonwealth*, 44 S.W.3d 376 (Ky. App. 2000). The second prong involves a *de novo* review to determine whether the court's decision is correct as a matter of law. *Commonwealth v. Opell*, 3 S.W.3d 747, 751 (Ky. App. 1999). Kentucky has adopted the standard of review approach articulated by the United States Supreme Court in *Ornelas v. United States*, 517 U.S. 690, 698-700, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911 (1996), wherein the Court observed:

> [A]s a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal. Having said this, we hasten to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.

In *Alabama v. White*, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990), the United States Supreme Court discussed the standards applicable to establishing reasonable articulable suspicion with respect to an anonymous telephone tip. The Court held that even when an unverified tip would have been

insufficient to establish probable cause for an arrest or search warrant, where the information supplied carries sufficient "indicia of reliability," it would support a forcible investigatory stop under *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). *Alabama,* 496 U.S. at 328, 110 S.Ct. at 2415. *See also Raglin v. Commonwealth*, 812 S.W.2d 494 (Ky. 1991). The *Alabama* Court held that the "totality of the circumstances" approach adopted in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), applied to the reasonable-suspicion analysis for an anonymous tip. "Reasonable suspicion ... is dependent upon both the content of information possessed by police and its degree of reliability." *Alabama*, 496 U.S. at 330, 110 S.Ct. at 2416. The information must be viewed based on the personal observation and independent investigation of the police that would tend to corroborate significant, but not necessarily all, of the facts supplied by the informant.

At the conclusion of the October 2007 suppression hearing, the trial court specifically found that the totality of the circumstances -- the fact that the area was known for drug activity, that the individuals at the scene matched the physical and clothing descriptions provided by the anonymous caller, and further that Appellant was found hiding in the bushes -- created a reasonable and articulable suspicion that criminal activity was afoot. We agree and conclude that evidence supported Officer Burkett's investigatory stop.

However, even if we were to conclude that Officer Burkett was without reasonable suspicion to stop and detain Appellant, the discovery that

Appellant had an outstanding warrant was an intervening circumstance that cured any possible illegality in the initial stop. In *Birch v. Commonwealth*, 203 S.W.3d 156, 159 (Ky. App. 2006), a panel of this Court held:

> [T]he United States Supreme Court "has rejected a 'but for' test when determining whether an 'intervening circumstance' is sufficient to dissipate the taint caused by prior unlawful conduct on the part of the police." *Hardy v. Commonwealth*, 149 S.W.3d 433, 435 (Ky. App. 2004) (*quoting United States v. Ceccolini*, 435 U.S. 268, 276, 98 S.Ct. 1054, 55 L.Ed.2d 268 (1978)). Rather, we have previously held that "a valid arrest may constitute an intervening event that cures the taint of an illegal detention sufficient to rebut the application of the exclusionary rule to evidence recovered in a search incident to an arrest." *Baltimore v. Commonwealth*, 119 S.W.3d 532, 541 n. 37 (Ky. App. 2003) (*citing United States v. Green,* 111 F.3d 515 (7th Cir.1997)). Kentucky is not alone in adopting this rule. In fact, several other courts have also adopted the rule that a valid arrest, such as one incident to a valid, outstanding warrant, is a sufficiently independent, untainted justification for the arrest and concomitant search. We adopt the opinion of our sister court in [*McBath v. State*, 108 P.3d 241, 248 (Alaska Ct. App. 2005)] as the best summation of this rule:
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> > If, during a non-flagrant but illegal stop, the police learn the defendant's name, and the disclosure of that name leads to the discovery of an outstanding warrant for the defendant's arrest, and the execution of that warrant leads to the discovery of evidence, the existence of the arrest warrant will be deemed an independent intervening circumstance that dissipates the taint of the initial illegal stop vis-à-vis the evidence discovered as a consequence of a search incident to the execution of the arrest warrant.

It is undisputed that the warrant for Appellant's arrest was valid. Furthermore, there is no allegation that Officer Burkett's encounter with Appellant was unduly lengthy or that Officer Burkett engaged in dilatory tactics. So the seizure, even if illegal, was not so flagrant as to destroy the independent, untainted nature of the arrest warrant pending against Appellant. *See Birch*, 203 S.W.3d at 160. Therefore, since Appellant's arrest was lawful, the subsequent seizure of the crack cocaine was also lawful. Accordingly, the trial court did not err by denying Appellant's motion to suppress the evidence on constitutional grounds.

Next, Appellant argues that Officer Burkett essentially destroyed exculpatory evidence when he combined the substance initially spit from Appellant's mouth with that found on the jail floor. As previously noted, it was Appellant's theory that the substance found on the floor was thrown there by Ms. Brown and that it should have been tested separately from the substance spit from Appellant's mouth. Appellant maintains that as a result of Officer Burkett's alleged misconduct, the evidence should have been suppressed. Again, we disagree.

Before a motion concerning "spoliation of evidence" can result in a due process violation, a criminal defendant must show bad faith on the part of the police. *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988). In *Arizona*, the State failed to refrigerate the victim's clothing for the purposes of preserving it for semen tests, as well as failed to properly preserve

semen samples which were collected. In holding that no due process violation occurred, the United States Supreme Court stated:

> [T]he Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than it could have been subjected to tests, the results of which might have exonerated the defendant.... We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process.

*Id.* at 57-58, 109 S.Ct. at 337. The same bad faith criterion has been adopted in Kentucky. *See Collins v. Commonwealth*, 951 S.W.2d 569 (Ky. 1997).

As previously noted, the trial court was of the opinion that because Officer Burkett testified that Appellant was alone in the holding cell, but Appellant testified that Ms. Brown was placed in the cell with him, the issue was one of credibility rather than admissibility. Importantly, however, the trial court also specifically found neither any apparent exculpatory value of the evidence nor any bad faith or misconduct on the part of Officer Burkett in collecting it. Thus, even if we were to determine that Officer Burkett was negligent in failing to separate the substances he collected, mere negligence simply does not rise to the level of bad

faith required by *Youngblood*. *Collins,* 951 S.W.2d at 573. Accordingly, the trial court did not err in refusing to suppress the evidence on spoliation grounds.

The judgment and sentence of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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