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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001650-MR

ERIC LUCKL — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC COWAN, JUDGE
ACTION NO. 08-CR-002699

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, NICKELL, AND WINE, JUDGES.

WINE, JUDGE: On September 11, 2008, a Jefferson County grand jury indicted Eric Luckl on one count each of first-degree trafficking in a controlled substance (methamphetamine) and possession of drug paraphernalia. Following a jury trial, Luckl was convicted of these offenses and sentenced to seven years of imprisonment. On appeal, he argues that the trial court erred by denying his

motion to suppress evidence seized and statements made following the police's entry of his residence pursuant to an anticipatory warrant. We agree with the trial court that the warrant authorized the police to enter Luckl's residence upon delivery and his acceptance of a package known to contain methamphetamine. The police interaction with a codefendant did not break the sure course of delivery of the package so as to invalidate the anticipatory warrant. Luckl also argues that the trial court abused its discretion by denying his motions for a mistrial due to improper comments by a police witness. While the comments were inappropriate, we cannot find that they were so inflammatory or unfairly prejudicial as to create a manifest necessity for a mistrial. Hence, we affirm.

The charges in this case arose in February of 2008, as part of a drug-interdiction program at the Louisville airport. Detective Steve Boughey, a member of the Louisville Metro Police Department (LMPD) narcotics unit, testified that he was working at the airport interdiction unit in February of 2008. The unit's goal was to intercept illegal drugs sent through parcel services. As part of the process, the unit would profile packages for further examination. If a parcel met certain criteria, it was pulled aside for a canine sniff.

On February 21, 2008, the package at issue was pulled aside. The package was addressed to a "Craig Perkins" at 717 Lampton Street in Louisville. Detective Boughey noted that the package was overly wrapped and sent via overnight express. He also noticed that the package was shipped from a United Parcel Service (UPS) retail outlet, was paid for in cash, and was a person-to-person

shipment. Furthermore, Detective Boughey's research indicated both the sender and the addressee were fictitious. Detective Boughey testified that these factors are all common indicators that a package is being used to ship illegal drugs.

When a drug dog alerted on the package for narcotics, a search warrant to open the package was obtained. Detective Boughey also obtained a second warrant, which authorized police to place an electronic tracking device in the package, to reseal and deliver the package, and "to enter any such residence, structure, or vehicle to seize the parcel and contents thereof if the beeper signals indicate that the . . . parcel has been opened or if the device ceases transmitting." This warrant was to be effective for three days. Finally, the police obtained a search warrant for 717 Lampton Street, the address listed on the package.

Upon opening the package, police discovered approximately 115 grams of methamphetamine. The tracking device and half of the methamphetamine were placed in the package, which was then resealed. The package was subsequently delivered to 717 Lampton Street by an undercover officer posing as a UPS delivery driver. Since no one was at home at the time, the package was left on the porch and the police set up surveillance of the property. Sometime later, Eric Povill picked up the package and took it inside. He then came back outside with the package and drove away. After following the vehicle for a short time, the officers conducted a traffic stop of Povill's vehicle. They then took him back to 717 Lampton Street and searched the residence pursuant to the warrant. Nothing was found during the search of the house.

The police interviewed Povill for a considerable period of time. He eventually admitted that he had an arrangement with Luckl to have the supplier ship the drugs to the Lampton Street address. Povill told the police that he had accepted several prior deliveries and delivered them to Luckl in exchange for the use of some of the drugs. He also told the police that he was to deliver the package to Luckl at an apartment at 750 Zorn Avenue.

Povill agreed to drive to that address followed by the police. The police observed and recorded Luckl accepting the package. When the tracking device indicated that the package had been opened, the police entered the house pursuant to the parcel warrant. At that time, Luckl admitted that there was other methamphetamine in his apartment. The police then obtained another warrant to search Luckl's Zorn Avenue residence. Upon a search of the residence, the police discovered methamphetamine packaged for sale; $7,934 in cash; digital scales; and handwritten notes relating to drug sales. The police notified Luckl of his *Miranda*[1] rights, and he subsequently stated that he had received several parcels of drugs from a person named "Bryan" in southern California.

Luckl and Povill were both charged with trafficking in methamphetamine. Thereafter, Luckl moved to suppress all items seized and statements which he made to the police on February 21, 2008. After conducting a hearing, the trial court denied the motion to suppress. Subsequently, Povill accepted a guilty plea offer, which included an agreement to testify against Luckl.

[1] *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694 (1966).

After a three-day jury trial, Luckl was convicted of complicity to first-degree trafficking in a controlled substance (methamphetamine) and possession of drug paraphernalia. Luckl now appeals to this Court.

Luckl first argues that the trial court erred by denying his motion to suppress evidence found and statements made during the search of his residence. Kentucky Rules of Criminal Procedure (RCr) 9.78 sets out the procedure for conducting suppression hearings and establishes the standard of appellate review of the determination of the trial court. Our standard of review of a circuit 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[;]" and second, this Court conducts "a *de novo* review to determine whether the [trial] court's decision is correct as a matter of law." *Stewart v. Commonwealth*, 44 S.W.3d 376, 380 (Ky. App. 2001), citing *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998). Luckl does not challenge the trial court's factual findings.

As the trial court noted, this case involves a challenge to the seizure of evidence growing out of the issuance of a search warrant based upon a tracking device placed in a package known to contain narcotics. Such warrants are called "anticipatory warrants" because they do not become effective until some future event occurs, such as the delivery or opening of the package. *See U. S. v. Grubbs*, 547 U.S. 90, 126 S. Ct. 1494, 164 L. Ed. 2d 195 (2006). Anticipatory warrants require the same degree of probable cause as ordinary warrants. *Id.* at 96, 126 S.

Ct. at 1500. For a conditioned anticipatory warrant to comply with the Fourth Amendment's requirement of probable cause, the supporting affidavit must satisfy two prerequisites of probability: that there is probable cause to believe the triggering condition will occur, and "that if the triggering condition occurs 'there is a fair probability that contraband or evidence of a crime will be found in a particular place,'" when the triggering condition occurs. *Id.* at 96-97, 126 S. Ct. at 1500.

Luckl does not argue that the police lacked probable cause to obtain the warrant to place the tracking device in the package. Rather, he notes that some Federal courts have adopted a "sure and irrevocable course" standard to govern the use of anticipatory search warrants. Under this doctrine, if the contraband to be delivered is the only evidence of criminal activity that the police believe will be located in the place to be searched, it is logical to condition the search upon the contraband's arrival at its destination. *U. S. v. Penney*, 576 F.3d 297, 312 (6th Cir. 2009), citing *U. S. v. Ricciardelli*, 998 F.2d 8, 12 (1st Cir.1993). The purpose of the sure course requirement is to ensure that a sufficient nexus between the parcel and the place to be searched exists, and "to prevent law enforcement authorities or third parties from mailing or otherwise sending a controlled substance to a residence to 'create probable cause to search the premises where it otherwise would not exist.'" *U. S. v. Brack*, 188 F.3d 748, 757 (7th Cir. 1999) (quoting *U.S. v. Dennis*, 115 F.3d 524, 529 (7th Cir. 1997)).

Luckl argues that the police interrupted the sure course of delivery of the parcel when they stopped and interrogated Povill. But as the trial court pointed out, the sure course requirement applies when an anticipatory warrant authorizes a search of the premises where the parcel is delivered. *See U. S. v. Garcia*, 882 F.2d 699 (2nd Cir. 1989), and *U. S. v. Hendricks*, 743 F.2d 653 (9th Cir. 1984). In this case, the warrant authorized a seizure of only the package at the address where it was delivered and opened. This description in the warrant was sufficient to meet the particularity requirement of the Fourth Amendment. *U. S. v. Karo*, 468 U.S. 705, 104 S. Ct. 3296, 82 L. Ed. 2d 530 (1984).

Moreover, the police did not create the chain of events which led to the delivery of the package to Luckl's residence. The police delivered the package to 717 Lampton Street, then observed Povill retrieve the package and immediately leave with it and drive away. They stopped him only when it became apparent that he knew he was being followed. Povill admitted that Luckl had directed him to deliver the package to his Zorn Avenue address. The police independently corroborated at least part of Povill's account. Povill completed his delivery of the package to Luckl's Zorn Avenue address, where Luckl accepted and opened it. The officers' prior involvement with Povill did not interrupt the occurrence of the triggering condition required by the anticipatory warrant. Therefore, the trial court properly denied Luckl's motion to suppress the evidence.

Luckl next argues that the trial court erred by denying his motions for a mistrial when Detective Boughey twice interjected nonresponsive, inflammatory

and prejudicial material into his testimony at trial. In the first instance, the Commonwealth asked whether Povill changed his course after he initially left his residence. Detective Boughey responded,

> He started driving erratically. We like to follow the individual because we know, nine times out of ten, the box always goes to an individual that's totally unexpected or they're being paid a few dollars, or they're getting a little bit out of the box.

Defense counsel moved for a mistrial, pointing out that there was no foundation for Detective Boughey's "nine times out of ten" comment. When the trial court pointed out that Povill had already testified he was taking the package to someone else, defense counsel argued that the detective was attempting to bolster Povill's testimony without any supporting facts. The trial court overruled the objection.

In the second instance, the Commonwealth was questioning Detective Boughey about the police search of Luckl's residence pursuant to the warrant. The Commonwealth asked, "Was there anything significant about finding that amount of money in the house?" Detective Boughey responded,

> Well, when dealing with the amount of drugs that we deal with, yeah, that usually falls into place. We usually find a large quantity of, usually money and scales and dope, it usually all falls in hand. So we find a large amount of cash, y'know, the only thing we're missing, honestly, the only thing we're missing out of the whole thing is a gun, and there was never any weapon located.

Defense counsel again moved for a mistrial, pointing out that Detective Boughey had no basis to mention the existence of a gun and arguing that

it only served to suggest that a gun existed. The Commonwealth offered to further question Detective Boughey to verify that no gun was found, and the trial court offered to admonish the jury to disregard the comment. Defense counsel declined both offers, arguing that either option would only emphasize the possibility of a gun. The trial court overruled the motion for a mistrial.

"The standard for reviewing the denial of a mistrial is abuse of discretion." *Bray v. Commonwealth*, 68 S.W.3d 375, 383 (Ky. 2002). A mistrial is an extreme remedy and should be resorted to only when there appears in the record a manifest necessity for such an action or an urgent or real necessity. "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 any other way." *Tunstull v. Commonwealth*, 337 S.W.3d 576, 591 (Ky. 2011) (quoting *Bray v. Commonwealth,* 177 S.W.3d 741, 752 (Ky. 2005)).

In the first instance, Detective Boughey made the "nine times out of ten" comment without establishing a sufficient foundation for his opinion that Povill's behavior was consistent with other drug couriers. Luckl suggests that the comment also amounted to improper bolstering of Povill's testimony. However, Luckl did not request an admonition instructing the jury to disregard the response. Moreover, he fails to establish that the comment was so unfairly prejudicial as to require a mistrial.

In the second instance, Luckl contends that Detective Boughey improperly suggested the presence of a gun where there was no evidence that any

gun was involved. He also argues that an admonition would not have been sufficient to dispel the idea of a gun which Detective Boughey had raised. However, "[a] jury is presumed to follow an admonition to disregard evidence; thus, the admonition generally cures any error." *Combs v. Commonwealth*, 198 S.W.3d 574, 581 (Ky. 2006).

> There are only two circumstances in which the presumptive efficacy of an admonition falters: (1) when there is an overwhelming probability that the jury will be unable to follow the court's admonition and there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant; or (2) when the question was asked without a factual basis and was "inflammatory" or "highly prejudicial."

Benjamin v. Commonwealth, 266 S.W.3d 775, 788 (Ky. 2008) (quoting *Combs*, 198 S.W.3d at 581–582, and *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003)).

In this case, Luckl has failed to establish either basis showing that an admonition would have been ineffective. While Detective Boughey commented that guns are often found in the presence of drugs and money, he immediately qualified his answer by stating that no gun was found in this case. Thus, his own response immediately dispelled any suggestion that a gun was involved in this case.

Furthermore, Luckl does not allege that the Commonwealth directly elicited the answer from Detective Boughey. Indeed, Luckl concedes that Detective Boughey's response was not responsive to the prosecutor's question.

While the comment was inappropriate, we find no indication that Detective Boughey deliberately made the reference to a gun with the intent to mislead the jury or to interject improper matters into evidence. He was simply explaining that large amounts of cash are typically found near drugs used for trafficking and then began to generally discuss other possible indicators of drug trafficking. When considered in context, we cannot find that Detective Boughey's comments were so inflammatory or prejudicial as to deprive Luckl of his right to a fair trial. Therefore, the trial court did not abuse its discretion by denying his motion for a mistrial.

Accordingly, the judgment of conviction by the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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