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OPINION OF APRIL 8, 2011, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002315-MR

JEFFREY LAMONT GREENE — APPELLANT

v.

APPEAL FROM CLARK CIRCUIT COURT
HONORABLE WILLIAM G. CLOUSE, JR., JUDGE
ACTION NO. 09-CR-00031

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS AND MOORE, JUDGES; ISAAC,[1] SENIOR JUDGE.

MOORE, JUDGE: Jeffrey Lamont Greene appeals the Clark Circuit Court's judgment convicting him of first-degree possession of a controlled substance, first

[1] Senior Judge Sheila R. Isaac, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

offense, and use/possession of drug paraphernalia, first offense. After a careful review of the record, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Greene was indicted on the following counts: first-degree possession of a controlled substance, second offense; possession of drug paraphernalia, first offense; and possession of marijuana less than eight ounces, first offense. The uniform citation that was issued by the arresting officer, Officer Joshua McFarland of the Winchester Police Department, stated the facts leading up to the arrest to include that the vehicle in which Greene was a passenger was stopped because only one headlight was working. According to Officer McFarland, the driver[2] appeared "emotionally distraught" and told Officer McFarland that she was having trouble with her boyfriend. Greene also appeared very nervous. While checking the driver's information, Officer McFarland called for backup assistance. The officer found no problems with the driver's record; so he gave her a verbal warning regarding the headlight and told her she was free to leave. While the driver was walking back toward her car, the officer asked whether she had anything in her vehicle or on her person that he needed to know about. The driver said she did not. Officer McFarland thereafter asked the driver for consent to search her vehicle, which she gave.

Up to this point, Greene remained in the vehicle. When Officer McFarland proceeded to search the vehicle, he asked Greene to step out of it. Both

[2] We note that both Greene and the Commonwealth refer to the vehicle's driver as "Ms. Carter," but they do not provide her first name.

Officer McFarland and Officer Thompson, who came to assist, told Greene several times to keep his hands visible. Greene, however, continued to put his hands inside of his jacket and pants pockets. After Greene failed to comply with the officers' repeated instructions not to place his hands in his pockets, Officer McFarland frisked him for weapons. Officer McFarland asked Greene if he had anything illegal; Greene stated he had marijuana. Greene was then handcuffed, and Officer McFarland located two individually wrapped baggies of marijuana, a glass crack pipe and an individually wrapped baggie of what the officer believed to be crack cocaine[3] in Greene's left front jacket pocket.

In reference to the driver, Officer McFarland included in the written citation that the driver stated that Greene had given her a baggie of marijuana in exchange for a ride in her vehicle.

After being charged, Greene moved to suppress all of the evidence against him, claiming that it was fruit of the poisonous tree. The record reveals that a suppression hearing was held after which, the court denied the motion. The court determined that the initial traffic stop was proper because there was a light out on the vehicle; so Officer McFarland acted appropriately in stopping the vehicle to speak with the driver (*i.e.*, Carter) about the light. At the conclusion of the stop, Officer McFarland gave Carter a verbal warning and told her she was "free to go." As Carter turned to leave, the court found that the stop ended at that time because the "articulable suspicion" ended then.

[3] The substance tested positive for cocaine.

The court then stated that, under current law, Officer McFarland had a right to ask Carter, after she was free to leave, whether he could search the vehicle. The court found that during the vehicle's search, the officer did "the reasonable thing" in asking Greene to exit the vehicle. The circuit court held that Greene, upon exiting the vehicle, drew attention to himself by being nervous and by putting his hands in his pockets. Additionally, according to Officer McFarland's testimony, Greene was in an area that had a reputation as having a high drug crime rate. The court reiterated the officer's statement that in his training, he was taught to watch a person's hands, and if that person repeatedly reaches for his/her pocket, then there might be "something of danger there." The court noted that more than one officer told Greene to keep his hands away from his pockets, yet he continued to reach for his pockets. The court held that the officer then had a reasonably articulable suspicion that Greene may have a weapon in his pockets. Officer McFarland conducted a *Terry*[4] pat down of Greene and felt an object. The court noted that although it was a large object, the officer could not tell if it was a weapon. The officer then asked Greene if he had anything on him and told Greene that if he did, he needed to tell the officers. Greene told the officers that he had marijuana. Thus, the court held that the stop, the consensual search, the *Terry* frisk, the officer's question about whether Greene had anything on him, and Greene's voluntary admission that he had marijuana on him were all proper.

[4] *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

The circuit court further indicated that it was swayed by the officer's testimony. The court stated that if it had not heard the officer's testimony and found the officer credible in his concern for his safety and in his assertion that Carter had consented to the search, it may have held that the consensual search and the events following it were improper.

After the court denied Greene's motion to suppress, Greene moved the court to enter a conditional guilty plea. His written petition to enter a conditional guilty plea does not specify upon what ground he conditioned his plea. However, his counsel informed the court during the videotaped proceedings that it was a plea that was conditioned on "the right to appeal [the court's] ruling." Because this was said within minutes after the court orally denied the motion to suppress, we assume that was the "ruling" to which defense counsel was referring.

The circuit court entered a written order reflecting Greene's guilty plea, the court's acceptance of it, and the Commonwealth's motion to dismiss the charge of possession of marijuana less than eight ounces, first offense. Additionally, the order stated that Greene entered his guilty plea to the charges of: first-degree possession of a controlled substance, first offense (as opposed to second offense, as he had been indicted on), and possession of drug paraphernalia. However, the court's written order did not include that the plea was conditional. Nevertheless, it is apparent, upon review of the videotaped plea colloquy, that the court knew it was a conditional guilty plea. In fact, the court referenced the fact that the plea was conditional multiple times.

The circuit court entered its judgment sentencing Greene to two years of imprisonment for the first-degree possession of a controlled substance, first offense, conviction; and to one hundred eighty days of imprisonment for the use/possession of drug paraphernalia, first offense, conviction. Both sentences were ordered to be run concurrently. Greene thereafter filed his "notice of conditional appeal."

II. STANDARD OF REVIEW

> If the trial court's findings of fact are supported by substantial evidence, then they are conclusive. We conduct *de novo* review of the trial court's application of the law to the facts. We review findings of fact for clear error, and we give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.

Hallum v. Commonwealth, 219 S.W.3d 216, 220 (Ky. App. 2007) (internal quotation marks and citations omitted).

III. ANALYSIS

A. CLAIM CHALLENGING VALIDITY OF CONSENT TO SEARCH

Greene first contends that Carter's consent to the search of her vehicle was not valid. However, Greene has not shown that he had a subjective expectation of privacy in the vehicle. *See Garcia v. Commonwealth*, 185 S.W.3d 658, 666 (Ky. App. 2006). Thus, as the passenger in the vehicle, Greene does not have standing to challenge the search of the vehicle. *Id*; *see also Commonwealth v. Fox*, 48 S.W.3d 24, 28 (Ky. 2001).

B. CLAIM CHALLENGING SCOPE AND DURATION OF STOP

To the extent Greene challenges the scope and duration of the stop, his argument lacks merit. The United States Court of Appeals for the Sixth Circuit held in *United States v. Burton*, 334 F.3d 514 (6th Cir. 2003), that an officer's act during a traffic stop of asking "a handful of questions, including whether [the vehicle's driver] would consent to a search of the automobile . . . [was not] intrusive [and] asking them [did not render the] traffic stop any more coercive than a typical traffic stop." *Burton*, 334 F.3d at 518-19. The Court in *Burton* further noted that the traffic stop at issue in that case occurred in a high-crime area, then holding that "the scope and duration of the traffic stop in [Burton's] case was reasonable, which validate[d] Burton's consent to search the automobile." *Id*. at 519; *see also Commonwealth v. Erickson*, 132 S.W.3d 884, 887 (Ky. App. 2004) ("[A] prolonged detention and request to search a detainee's car following a traffic stop was reasonable despite the absence of that extra 'something' to generate an additional basis for reasonable suspicion of other criminal activity.").

As in *Burton*, the stop at issue in the present case occurred in a high-crime area and the officer's act of asking the driver if he could search her vehicle was not intrusive. Consequently, it did not render the scope and duration of the traffic stop unreasonable. Therefore, Greene's argument is without merit.

Accordingly, the judgment of the Clark Circuit Court is affirmed.

ISAAC, SENIOR JUDGE, CONCURS AND FILES SEPARATE OPINION IN WHICH COMBS, JUDGE, JOINS.

ISAAC, SENIOR JUDGE, CONCURRING: I concur with the majority's opinion, but share the trial judge's concern about the nature of this extended stop. When a police officer tells a driver and/or passenger that they are free to leave, but then immediately asks for consent to search, the officer is sending mixed signals. There is an inherently coercive nature to a traffic stop and it is not clear that any consent given, under these circumstances, is truly voluntary. However, the trial court found the consent was voluntary and its findings will not be disturbed absent an abuse of discretion. The consent having been found to be voluntary, the scope and duration of the extended portion of the stop was therefore, not unreasonable.

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