

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000044-MR

TAMAL RENEE WEATHERS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NOS. 09-CR-01741 & 09-CR-01741-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART,
AND REMANDING

** ** * * * **

BEFORE: MOORE, NICKELL AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Tamal Renee Weathers appeals from the Fayette Circuit Court's judgment of conviction after a jury trial for first-degree trafficking in a controlled substance, possession of marijuana, and being a persistent felony offender in the first degree. We affirm in part, vacate in part, and remand.

On September 23, 2009, Lexington Police Detective Byron Smoot received information from a confidential informant (CI) that a black female in her mid-thirties was trafficking drugs from her green Dodge Durango. The CI stated that the woman's nickname was "T-Dub," and that she lived in the Coldstream area. Accompanied by Detective Danny Page, Detective Smoot drove to the Coldstream area of town and began looking for the green Dodge Durango.

From their unmarked car, Detectives Smoot and Page observed a green Dodge Durango turning onto Georgetown Road. Police were able to run the license plate of the Durango which identified Weathers as the vehicle's owner. When police contacted the CI, the CI confirmed that Weathers was "T-Dub," and stated that Weathers was en route to complete a drug transaction at a local Kroger. The detectives followed Weathers who entered a shopping center parking lot containing a Kroger and a shoe store. Weathers parked and walked toward the shoe store.

Before Weathers entered the store, she was confronted by police and asked to return to her vehicle. Weathers was then read her *Miranda* rights by Detective Smoot and acknowledged these rights. Detective Smoot told Weathers that she was stopped based on a CI's tip regarding her suspected drug trafficking. Weathers then interjected, "They're in my Nike bag." Weathers gave Detective Smoot the bag and consented to a search of the Nike bag. Weather's bag contained eighty-seven grams of powder cocaine in three plastic bags and 0.9 grams of marijuana. Weathers was then arrested.

After the arrest, police asked Weathers whether she possessed any illegal drugs at her residence. Weathers denied possession of other drugs but stated that a gun was at her home. After Detective Smoot asked Weathers for her consent, Weathers consented to the search of her residence. When police arrived at Weathers's residence and used Weathers's key to enter, they heard scuffling inside and a toilet running. After the police gained access to the residence, David Moseley exited the attic covered in insulation. The police discovered 194 suspected Ecstasy tablets, digital scales, a spoon with residue, Pyrex with residue and three guns. Moseley was also arrested.

On November 18, 2009, Weathers was indicted for two counts of trafficking in a controlled substance in the first-degree, one count of trafficking in a controlled substance near a school, one count of possession of a firearm by a convicted felon, and being a persistent felony offender in the first degree. Later, Weathers filed a motion to suppress arguing that she was not given proper *Miranda* rights and that she did not consent to a search of her property. She further argued that she was stopped without reasonable suspicion or probable cause.

After a suppression hearing wherein Detective Smoot and Weathers testified, the trial court ruled that the CI's tip and the officer's corroboration of the CI's information provided reasonable suspicion to stop Weathers. The trial court found that Detective Smoot informed Weathers of her *Miranda* rights. The trial court further found that Weathers gave consent to the searches.

Following a jury trial, Weathers was found guilty of one count of trafficking in a controlled substance in the first degree, one count of possession of marijuana and being a persistent felony offender in the first degree. In accordance with the jury's recommendation, the trial court sentenced Weathers to eighteen-years' imprisonment, which was enhanced by virtue of her PFO-I conviction. Additionally, after the denial of her suppression motion, Weathers entered a conditional guilty plea to felony possession of a handgun and accepted a PFO-I enhanced sentence of five years in prison to run concurrently with her other sentences.

Weathers contends that the trial court erred by denying her motion to suppress, because she did not consent to the searches. Alternatively, she argues that her consent to permit the police to search her property was coerced by oppressive police conduct.

On appellate review of a trial court's denial of a motion to suppress, we apply the two-step process adopted in *Adcock v. Commonwealth*, 967 S.W.2d 6 (Ky. 1998). First, we review the trial court's findings of fact under a clearly erroneous standard. *Welch v. Commonwealth*, 149 S.W.3d 407, 409 (Ky. 2004). Under this standard, the trial court's findings of fact will be conclusive if they are supported by substantial evidence. *Drake v. Commonwealth*, 222 S.W.3d 254, 256 (Ky.App. 2007). We then conduct a *de novo* review of the trial court's application of the law to the facts to determine whether its ruling was correct as a matter of law. *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky.App. 2002).

Although Weathers testified at her suppression hearing that she was not given a *Miranda* warning and that she did not consent to any searches, the trial court found that Weathers voluntarily consented. The trial court based its findings on Detective Smoot's testimony that he advised Weathers of her *Miranda* rights and she consented to each search. When the record contains conflicting testimony, we must give due regard to the trial court's exclusive role of judging the credibility of witnesses. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Accordingly, we conclude that the trial court's factual findings were supported by substantial evidence. We now turn to Weathers's alternative argument that she was coerced into giving consent.

Weathers contends that she did not consent to the searches because she was coerced by the show of force by police. She argues that police blocked her vehicle after she parked, and that she was surrounded by three officers when she was asked to give her consent. Weathers contends that the show of force deprived her of the right to make a voluntary decision to consent to the searches.

The Fourth Amendment of the United States Constitution and Section Ten of the Kentucky Constitution prohibit subjecting citizens to unwarranted and unreasonable searches and seizures by police. *Commonwealth v. Hatcher*, 199 S.W.3d 124, 126 (Ky. 2006). "This prohibition on unreasonable searches and seizures ordinarily requires all such encounters to be conducted pursuant to a judicially-issued warrant—that is, the criterion by which the reasonableness of a

given search or seizure typically is measured is whether it was authorized by a warrant.” *Williams v. Commonwealth*, 147 S.W.3d 1, 4 (Ky. 2004).

Despite this general rule, several exceptions to the warrant requirement have been recognized due to the unique circumstances that arise in search and seizure cases. *Cook v. Commonwealth*, 826 S.W.2d 329, 331 (Ky. 1992). One such exception is that a properly given consent terminates the need for a search warrant. *Commonwealth v. Jones*, 217 S.W.3d 190, 198 (Ky. 2006). The Commonwealth has the burden to prove that the defendant voluntarily consented to the search. *Smith v. Commonwealth*, 181 S.W.3d 53, 58 (Ky.App. 2005).

While Weathers correctly argues that consent cannot be coerced by unjustified police intrusion, the record does not demonstrate that the conduct of police was unjustified and excessive in this particular case. Because there is substantial evidence to support the trial court’s finding that Weathers’s consent was voluntarily given to police, we conclude that trial court’s ruling was proper. *Krause v. Commonwealth*, 206 S.W.3d 922, 924 (Ky. 2006).

Weathers also contends that the trial court erred by failing to instruct the jury on criminal facilitation to commit first-degree trafficking as a lesser included offense of trafficking in a controlled substance in the first degree. She argues that the evidence presented to the jury established that she could have been a mere facilitator of drug trafficking rather than a principal in drug trafficking.

“A defendant has the right to have every issue of fact raised by the evidence and material to the defense submitted to the jury on proper instructions.”

Thomas v. Commonwealth, 170 S.W.3d 343, 349 (Ky. 2005). Specifically, a defendant is entitled to an instruction on a lesser included offense if, and only if, a reasonable juror could entertain a reasonable doubt of the defendant's guilt on the greater charge but believe beyond a reasonable doubt that the defendant is guilty of the lesser offense. *Osborne v. Commonwealth*, 43 S.W.3d 234, 244 (Ky. 2001).

A defendant commits facilitation when, without the intent to commit a crime, she acts with knowledge that the principal actor is committing or intends to commit a crime and such conduct provides such person with the means or opportunity for the commission of the crime. *Thompkins v. Commonwealth*, 54 S.W.3d 147, 150 (Ky. 2001). Essentially, facilitation reflects a mental state where the defendant is wholly indifferent as to the completion of the crime. *Id.*

Weathers was convicted on one count of first-degree trafficking in a controlled substance (cocaine), which was discovered in her Nike bag when she was stopped and searched by police. Weathers's tendered facilitation instruction embraced a theory that she knew Moseley was committing drug trafficking, but that she was transporting his drugs in a manner reflecting complete indifference to the actual completion of drug trafficking. However, there was no evidence to support Weathers's theory of reduced criminal liability. The cocaine was found in Weathers's possession. Although Weathers disagrees, she was not entitled to a facilitation instruction because no reasonable juror could acquit her on the greater charge but convict her on the lesser. *Allen v. Commonwealth*, 338 S.W.3d 252, 255 (Ky. 2011).

Weathers next argues that the trial court erred by imposing court costs totaling \$155 upon her because she was adjudged indigent by the court. Prior to *Maynes v. Commonwealth*, 361 S.W.3d 922 (Ky. 2012), this Court and our Supreme Court held that it was palpable error to impose court costs on an indigent defendant. *See Edmonson v. Commonwealth*, 725 S.W.2d 595, 596 (Ky. 1987). However, in *Maynes*, the Court held that a “needy” person under KRS 31.100 does not necessarily qualify as a “poor” person exempt from the imposition of court costs under KRS 23A.205. The Court held that even if a public defender has been appointed, the imposition of costs may be proper unless the defendant qualifies as a “poor person” as defined by KRS 453.190(2), and is unable to pay costs presently or within the foreseeable future without depriving himself and his dependents of the basic necessities of life. *Id.* at 933.

Based on *Maynes*, the trial court is required to find whether Weathers is a “poor person” as defined in KRS 453.190(2), and is unable to pay court costs and will be unable to pay court costs in the foreseeable future.¹ Thus, we vacate the imposition of court costs and remand for appropriate findings.

For the foregoing reasons, we affirm in part, vacate in part, and remand for a determination of whether Weathers is a “poor person” as defined in KRS 453.190(2) and whether she will be unable to pay court costs in the foreseeable future.

¹ Because of the length of Weather’s sentence, if she is a “poor person” now, she will necessarily be a poor person in the foreseeable future. *Smith v. Commonwealth*, 361 S.W.3d 908, 921 n. 15 (Ky. 2012).

ALL CONCUR.

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