

RENDERED: AUGUST 10, 2012; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2011-CA-000703-MR

WOODY CABBIL, JR.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE A. C. MCKAY CHAUVIN, JUDGE  
ACTION NO. 09-CR-002663

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CAPERTON, LAMBERT, AND MOORE, JUDGES.

LAMBERT, JUDGE: Woody Cabbil, Jr. appeals the April 11, 2011, order of the Jefferson Circuit Court denying his motion to suppress evidence and the imposition of a subsequent five-year sentence. After careful review of the record, we affirm.

This case arose from events occurring on February 26, 2008.

Detective Nick Presley and other officers in a drug suppression platoon had been

advised of suspicious drug activity at 740 South Shelby Street, in Louisville, Kentucky. They stopped a man who had just left that address and discovered that he had “pills.” This person said he bought the pills at 740 South Shelby. After processing this arrest, Presley and another officer returned to the house and began watching for activity. A few minutes later, a red Pontiac Grand Prix containing two men pulled up. The men, one of whom was the appellant, Cabbil, exited the car and then made “some kind of” hand to hand transaction.

Detective Presley testified that he was unable to tell exactly what was exchanged between the two men because it was dark, but he did see each man extend a hand to the other in a way that indicated an exchange. Immediately after the exchange, the other man drove away. Cabbil went into the house at 740 Shelby and remained there for “a brief period, no more than 1-2 minutes.” He then came out and drove off in the Grand Prix. The officers followed Cabbil south on Shelby to Breckinridge Street, west on Breckinridge to Preston Street, and then south on Preston Street. On Preston, Cabbil sped up. Detective Presley stated that the officers “paced” Cabbil for two to three blocks and determined that he was going 43 mph in a 35 mph zone. They turned on their lights and conducted a traffic stop.

When Detective Presley and another officer approached the car, they discovered that Cabbil was the sole occupant. When they asked Cabbil for his license, he responded that he did not have one. On further inquiry, Cabbil admitted that his license was suspended. When asked whether there was anything illegal in

the car, Cabbil responded “no.” Detective Presley then asked if Cabbil minded if they took a look in the car, to which Cabbil responded “no problem.”

Outside the car, Detective Presley patted down Cabbil. He found a “large amount” of cash in different pockets and a baggie of pills. At that point, he placed Cabbil in handcuffs and put him in the back of the police vehicle. A search of Cabbil’s vehicle revealed a bottle of “Special K” in the console. The bottle was opaque but when Detective Presley smelled the contents, he suspected that it contained liquid codeine. Another bottle of “Special K” containing liquid codeine was found in the glove compartment.

Cabbil was arrested and charged with trafficking in hydrocodone and codeine. Cabbil was also charged with possession of codeine, speeding, and driving without a valid operator’s license. Cabbil entered a guilty plea pursuant to Kentucky Rules of Criminal Procedure (RCr) 8.09 and reserved the right to appeal the trial court’s ruling on his motion to exclude the evidence seized by police. In his written motion to suppress the evidence, Cabbil argued that the police did not have probable cause to search the vehicle he was driving, that he did not consent to a search of the vehicle, that the police did not have probable cause to search his person, and that he did not consent to any search of his person.

At the hearing on the motion to suppress, Detective Presley testified to the above events. On cross-examination, he testified that the pills found on Cabbil’s person were actually ibuprofen. When asked why he decided to handcuff Cabbil, Detective Presley responded that they were arresting Cabbil based on the

pills found on his person and because he was operating a car with a suspended driving license.

The trial court orally stated that the evidence indicated that because he was speeding, the officers had probable cause to stop Cabbil's car. Although the stop was pretextual, the trial court held that under governing case law, the motive for the stop was not part of the inquiry. The evidence of record indicated that Cabbil freely consented to the searches and that, once that consent to search was given, the officer could search both Cabbil and his car. Finding no evidence of record to justify suppression, the trial court denied the motion to suppress by order dated April 11, 2011, and, per the plea agreement, Cabbil was sentenced to five years' imprisonment for the following offenses: trafficking in a controlled substance (hydrocodone), two counts of trafficking in a controlled substance (codeine), operating on a suspended license, speeding, and persistent felony offender (PFO) II.

Cabbil now appeals the denial of his motion to suppress the evidence seized. Cabbil admits that his arguments on appeal were not raised to the trial court below, but requests this Court to review for palpable error under RCr 10.26. Under RCr 10.26, an unpreserved error may be considered on appeal if the appellant can show that a manifest injustice occurred. *See* RCr 10.26. In *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006), the Kentucky Supreme Court held that in order to establish palpable error, "the required showing is probability of a

different result or error so fundamental as to threaten a defendant's entitlement to due process of law.”

On appeal, Cabbil admits that under Fourth Amendment case law, his car was properly stopped. He does not deny giving consent for the police to search him or his car, as he did in the trial court below. Rather, Cabbil argues that Sections 2 and 10 of the Kentucky Constitution prevent pretextual police activity.

Kentucky courts have long held that Section 10 of the Kentucky Constitution does not provide greater protection than does the Federal Fourth Amendment. *See LaFollette v. Commonwealth*, 915 S.W.2d 747, 748 (Ky. 1996) (*abrogated on other grounds by Kyllo v. United States*, 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001)). In fact, Section 10 is consonant with the Federal Fourth Amendment. *See Estep v. Commonwealth*, 663 S.W.2d 213, 215 (Ky. 1983).

Kentucky Courts have also long held that a police officer's subjective intentions are irrelevant. *See Wilson v. Commonwealth*, 37 S.W.3d 745, 749 (Ky. 2001). Cabbil now asks this Court to change that long-held precedent and to determine, contrary to the Kentucky Supreme Court, that Section 10 of the Kentucky Constitution grants more protection to criminal defendants than the Federal Fourth Amendment. Clearly, we are not permitted to do so. *See Supreme Court Rules (SCR) 1.030(8)(a)* (“The Court of Appeals is bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court.”). *See also Special Fund v. Francis*, 708 S.W.2d 641, 642

(Ky. 1986). Thus, Cabbil's arguments that Section 10 of the Kentucky Constitution provides greater protection than the Fourth Amendment are without merit.

Cabbil also makes an attenuated argument regarding Section 2 of the Kentucky Constitution, which states, "Absolute and arbitrary power over the lives, liberty, and property of freemen exist nowhere in a republic, not even in the largest majority." Cabbil argues that "pretextual arrests, essentially phony arrests that would not otherwise be made, to allow investigation of a potential crime certainly are inconsistent with the concept of government espoused by Section 2."

However, Cabbil fails to point out how granting him relief under Section 2 would be permissible by the Court under the prohibitions in SCR 1.030(8)(a). Kentucky law states that an officer's subjective intent in conducting an authorized stop is irrelevant. *Wilson, supra*. This Court is bound by the established precedent of the Kentucky Supreme Court. As noted in *Special Fund v. Francis*, 708 S.W.2d 641, 642 (Ky. 1986):

If every tier of courts in the judicial hierarchy were free to disregard the decisions of a higher court, the Court of Appeals could freely disregard the decisions of the Supreme Court, the circuit courts could freely ignore the decisions of the Court of Appeals and the Supreme Court and our District Courts would be bound by no law at all, free to ignore the decisions of all higher courts. The result of that course is anarchy.

Discerning no reversible error, we affirm the Jefferson Circuit Court's order denying Cabbil's motion to suppress the evidence seized in this case.

MOORE, JUDGE, CONCURS.

CAPERTON, JUDGE, CONCURS IN RESULT ONLY.

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