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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001192-MR

DERRYL D. BLANE — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE ANDREW C. SELF, JUDGE
INDICTMENT NOS. 08-CR-00655 AND 09-CR-00181

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS AND THOMPSON, JUDGES; LAMBERT,[1] SENIOR JUDGE.

COMBS, JUDGE: Derryl Blane appeals two orders of the Christian Circuit Court denying his motions to suppress evidence. His appeals arise from indictment numbers 08-CR-00655 and 09-CR-00181. Following our review, we affirm.

The first indictment, 08-CR-00655, involved an incident that occurred on July 24, 2008. The dispatch office of the Trigg County Sheriff's Department

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

issued a "be-on-the-look-out" bulletin to the Christian County Sheriff's dispatch for a cream and red pickup truck with two black males inside, allegedly carrying stolen metal in the bed of the truck. Dispatch also provided the license plate number. Captain Johnson and Deputy Wint of the Christian County Sheriff's Department saw a truck matching the description. Captain Johnson pulled the truck over to identify the suspects. Deputy Wint joined Captain Johnson in detaining them.

Deputy Wint first approached the passenger in order to identify him. The passenger gave false information and then admitted that there were outstanding child support warrants against him. Deputy Wint removed the passenger from the vehicle, placed him in cuffs, and verified the warrants. Captain Johnson then asked Blane, the driver, to exit the vehicle. Deputy Wint asked Blane whether he had anything illegal, any weapons, or other items that might hurt him. Blane responded that he did not. Deputy Wint conducted a pat-down of the outside of Blane's clothes to check for weapons. Upon feeling an item in Blane's shirt pocket, Deputy Wint asked Blane what it was. Blane stated that it was a cellular phone. Deputy Wint asked Blane if he could remove the cell phone. According to Deputy Wint, Blane consented. Rather than a cellular phone, the item was a bag containing marijuana and crack cocaine. Blane was arrested for drug possession. After officers transported Blane to jail, the officers searched the vehicle and found drug paraphernalia.

The second indictment, 09-CR-00181, involved controlled drug buys on December 29, 2008, and January 13, 2009. Blane sold crack cocaine to a confidential informant, John Lyle, and the transactions were captured on audio and video equipment. For both sales, Lyle was given a $20 bill by police officers, who recorded the serial numbers prior to the purchase of crack cocaine from Blane. Officer Pacheco monitored the drug buys. After viewing the tapes, Officer Pacheco filed an affidavit to obtain a search warrant of Blane's home on January 14, 2009. The warrant was granted and executed on January 15.

On June 25, 2010, Blane, *pro se*, filed a motion to dismiss because the informant, Lyle, had died. The trial court treated the motion as a motion *in limine*. On July 29, 2010, a suppression hearing was held. Officer Pacheco testified that it is possible for recording equipment to be tampered with -- but that the download procedure would have revealed evidence of the tampering. There was no evidence of tampering. Both recordings had a continuous feed with no stops or interruptions.

Officer Pacheco was present when Officer Spurling installed the recording equipment and monitored both drug buys. During the buys, the officers maintained visual contact with Lyle. Officer Pacheco testified that the video recordings matched what he had seen and heard during the drug buys. Although the videos were not played at the hearing (because there was no equipment in the courtroom to do so), the court found that the videos accurately reflected Officer Pacheco's testimony. This finding satisfied the authentication requirement as set

forth in the Kentucky Rule[s] of Evidence (KRE) 901. Blane subsequently entered conditional guilty pleas on September 8, 2010. This appeal followed.

Blane contends the trial court erred in denying his motions to suppress. He first argues that there was insufficient probable cause to stop his vehicle, rendering any subsequent search a violation of his Fourth Amendment rights. We disagree.

The standard of review on a motion to suppress is a two-part analysis as set forth in *Ornelas v. United States*, 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996), and as adopted in the Kentucky Rule[s] of Criminal Procedure (RCr) 9.78. *See also Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998). First, factual findings of the court are conclusive if they are not clearly erroneous and if they are supported by substantial evidence. A finding of fact "is not clearly erroneous if it is supported by substantial evidence." *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky. App. 2005). We have defined "substantial evidence" as "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Smyzer v. B. F. Goodrich Chem. Co*., 474 S.W.2d 367, 369 (Ky. 1971); *O'Nan v. Ecklar Moore Exp., Inc.*, 339 S.W.2d 466, 468 (Ky. 1960). Second, when the facts are supported by substantial evidence, we determine by *de novo* review whether the rule of law was correctly applied. S*ee Ornelas*, 517 U.S. at 697; *Adcock*, 967 S.W. 2d at 8.

Blane's first argument is that the trial court erred in denying his motion to suppress because the police did not have probable cause to make an investigative

stop resulting from an anonymous tip. *See Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

Reasonable suspicion rather than probable cause is the standard used for stopping a vehicle. Officers need "at least articulable and reasonable suspicion" to justify a stop. *Delaware v. Prouse*, 440 U.S. 648, 648, 99 S. Ct. 1391, 1393, 59 L. Ed. 2d 660 (1979); *Terry, supra.* This court has held that an anonymous tip providing a generic description of the vehicle contained enough indicia of reliability in light of the totality of the circumstances to support a stop. *Graham v. Commonwealth*, 667 S.W.2d 697, 698 (Ky. App. 1983).

In this case, the tip was not anonymous. It came from the more reliable source of law enforcement dispatch. Furthermore, the information provided by dispatch was highly descriptive and particularized. Officers were given a description of the vehicle, a description of the occupants, the license plate number, the direction in which the vehicle was travelling, and the type of material that was in the bed of the truck. The officers had no doubt that Blane's vehicle was the truck sought by Trigg County because every detail of the "be-on-the-look-out" bulletin was confirmed by the officers'observations. *See also Cook v. Commonwealth*, 649 S.W.2d 198 (Ky. 1983); *United States v. Cortez*, 449 U.S. 411, 101 S. Ct. 690, 66 L.Ed.2d 621 (1981); *Commonwealth v. Hagan*, 464 S.W.2d 261 (Ky. 1971) (holding that police need a reasonable, articulable suspicion that the persons in the vehicle are, or are about to become, involved in criminal

activity). The court did not err in finding that the officers had sufficient corroboration to initiate an investigatory stop.

Blane next argues that he did not give the officers consent to search his person. Whether Blane gave consent for a search is an issue of fact, not law. "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Kentucky Rule[s] of Civil Procedure (CR) 52.01; *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986).

After hearing testimony from the Christian County officers and from Blane, the trial court found that the officers were more credible. Their testimony provided substantial evidence to support the finding that Blane provided consent to search his person. Therefore, the court's ruling that the Commonwealth met the burden of substantial evidence is not clearly erroneous.

Blane's final contention is that the trial court erred in holding admissible the video recordings of a deceased informant conducting controlled drug buys. He argues that the Confrontation Clause of the Sixth Amendment to the United States Constitution bars the admissibility of the videotapes. We disagree.

The trial court found the tapes to be admissible because Officer Pacheco authenticated the tapes. Officer Pacheco testified that he was present at all times during the drug buys. He verified that the recordings matched what he had seen and heard during the course of the buys and that the tapes had not been tampered with. The trial court found this testimony satisfied KRE 901, which provides:

"admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

Blane then entered into a plea agreement. Since the case never went to trial, the Confrontation Clause issue is moot. The Confrontation Clause is **a right at trial** pertaining to the specific context of a trial. *See Lovett v. Commonwealth*., 103 S.W.3d 72, 82 (Ky. 2003); *Barber v. Page*, 390 U.S. 719, 725, 88 S. Ct. 1318, 1322, 20 L. Ed. 2d 255 (1968) (holding that the right to confrontation is a trial right). Furthermore, we have held in *Harris v. Commonwealth*., 315 S.W.2d 630, 632 (Ky. 1958), and again in *Flatt v. Commonwealth*., 468 S.W.2d 793, 795 (Ky. 1971), that "[t]he constitutional right of the defendants to be confronted by the witnesses in the trial of a criminal case imposes no obligation on the government to call any specific persons as witnesses." (quoting *Aycock v. United States*, 62 F.2d 612, 613 (9th Cir. 1932), *certiorari* denied 289 U.S. 734, 53 S. Ct. 595, 77 L.Ed. 1482.)

The Commonwealth had no obligation to call the confidential informant and indeed could not do so because Lyle was deceased. KRE 804 provides exceptions to the hearsay rule due to the unavailability of a witness. Among those situations satisfying the rule's definition of unavailability is the absence of a declarant/witness because of death. KRE 804(a)(4). However, the ruling concerned only the admissibility of evidence which would have been presented at trial. Therefore, the only issue not rendered moot by the conditional plea is whether the video was properly authenticated pursuant to KRE 901. We can find

no basis for error in the trial court's decision that the video was properly authenticated.

We affirm the judgment of the Christian Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Molly Mattingly
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Perry T. Ryan
Assistant Attorney General
Frankfort, Kentucky