

RENDERED: JULY 25, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001852-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE, V, JUDGE
ACTION NO. 13-CR-00308

CHRISTOPHER M. HUGHES

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON, MOORE, AND NICKELL, JUDGES.

NICKELL: The Commonwealth has appealed from the September 24, 2013 order of the Campbell Circuit Court granting Christopher Hughes' motion to suppress evidence seized at his arrest. Having reviewed the record, we affirm.

On January 28, 2013, Officer Josh Zebell of the Alexandria Police Department was informed by an unidentified passerby that two men were smoking

marijuana in a vehicle in a Kroger grocery store parking lot. As Officer Zebell approached the vehicle, he noticed two men in the back seat of the car, and detected a faint odor of burnt marijuana. Officer Zebell ordered the two men out of the vehicle, and asked them if there were other people with them. The men advised that there were two other individuals with them, including Hughes. After the arrival of Officer Rhonda Helton, Officer Zebell went into Kroger and found Hughes and one additional individual. At Officer Zebell's request, the men returned to the car in the parking lot. Officer Zebell asked the men if they would consent to a patdown of their persons and a search of the vehicle. The men, including Hughes, consented to a patdown and vehicle search.

During the suppression hearing, Officer Zebell testified that he felt the crinkle of cellophane wrapping while conducting an open-handed patdown of Hughes. Based on his experience, Officer Zebell knew cellophane wrapping is often used to hold loose pills. According to Officer Zebell's testimony, he advised Hughes he would be reaching into the right front pocket of Hughes' gym shorts. Officer Zebell testified Hughes gave him permission to do so. The cellophane wrapper contained a single pill, which Hughes claimed was Tylenol, but was later identified as oxycodone. Hughes was charged with one count of possession of a controlled substance in the first degree,¹ and one count of possessing prescription drugs not in a proper container.²

¹ Kentucky Revised Statutes (KRS) 218A.1415, a Class D felony.

² KRS 218A.210, a Class B misdemeanor.

On May 31, 2013, Hughes filed a motion to suppress the pill found during the search, arguing that the search and seizure were illegal. The trial court heard oral arguments, and on September 24, 2013, issued an order granting the motion to suppress. The trial court held an officer making a stop based on reasonable suspicion may conduct a patdown search, and if the search reveals items whose illegality is immediately apparent by “plain feel,” the officer may conduct a more invasive search. Otherwise, an officer must obtain consent to perform a search of a suspect’s person. Officer Zebell did not testify, and the Commonwealth did not contend, that he was able to determine the item was contraband from the “plain feel” of the object. Therefore, the trial court determined that the Commonwealth had the burden of proving that Hughes consented to the search. Officer Zebell testified that he asked for, and received, Hughes’ consent to search Hughes’ pockets. However, Officer Zebell admitted he did not document obtaining consent in his incident report, nor had he previously testified to having obtained consent at either the grand jury or preliminary hearings. The trial court also found Officer Helton could not definitively corroborate Officer Zebell’s testimony. As such, the trial court determined Officer Zebell’s testimony at the suppression hearing was insufficient for the Commonwealth to meet its burden of proving consent to the search by a preponderance of the evidence.

The standard of review for a trial court’s ruling on a suppression motion is two-fold. *Bauder v. Commonwealth*, 299 S.W.3d 588, 599 (Ky. 2009). The trial court’s factual findings should be reviewed for clear error, and are deemed to be

conclusive if supported by substantial evidence. *Id.* Second, determinations of reasonable suspicion and probable cause are mixed questions of law and fact subject to *de novo* review. *Id.* Whether consent to a search was voluntarily given is a question of fact to be determined by a preponderance of the evidence based on the totality of the circumstances. *Talbott v. Commonwealth*, 968 S.W.2d 76, 82 (Ky. 1998).

The Commonwealth argues the trial court erred in failing to find substantial evidence that Hughes consented to a search. The Commonwealth claims the trial court found Officer Zebell's testimony to be truthful and erred by requiring corroboration of the testimony. In addition, the Commonwealth argues the trial court erred in weighing Officer Helton's testimony, and should have found it sufficient to support Officer Zebell's testimony.

The trial court found Officer Zebell's testimony, standing alone, was insufficient for the Commonwealth to carry its burden of proof "when looking at all of the circumstances of the case." The trial court found Officer Zebell failed to indicate on his incident report he obtained consent to conduct the search, and never previously testified he obtained consent at either the grand jury or preliminary hearings. Absent prior documentation of consent, the trial court found the Commonwealth did not meet its burden of proof. We find no clear error, and defer to the trial court's findings of fact.

We also find no clear error in the trial court's evaluation of Officer Helton's testimony. Officer Helton did not unequivocally testify she heard Hughes

consent to a search of his person. Rather, she testified she believed Officer Zebell obtained consent to a search, but her recollection was admittedly unclear as she could not remember the words exchanged, and she was unsure whether consent was given for the patdown or the search of Hughes' pockets. Judging the credibility of witnesses is a task within the exclusive province of the trial court. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). The trial court did not abuse its discretion in determining Officer Helton's testimony did not definitely corroborate Officer Zebell.

Based on the foregoing, the judgment of the Campbell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jack Conway
Attorney General of Kentucky

Adam Hill
Special Assistant Attorney General
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Samuel N. Potter
Assistant Public Advocate
Frankfort, Kentucky