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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001653-MR

DANTE WILLIAMS

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HON. FRED A. STINE, V, JUDGE
INDICTMENT NO. 14-CR-00982

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KRAMER, CHIEF JUDGE; ACREE AND JOHNSON, JUDGES.

ACREE, JUDGE: Dante Williams appeals from the Campbell Circuit Court's order entered May 18, 2015, denying his motion to suppress evidence obtained during a traffic stop. He also appeals the denial of a motion for directed verdict at his subsequent bench trial in which the circuit court found him guilty of possession of a handgun by a convicted felon and of being a first-degree persistent felony offender (PFO). We affirm the circuit court on both issues.

In the early morning hours of September 30, 2014, Dante Williams was with his girlfriend Rednicka Palmer in Cincinnati, Ohio, when the couple decided to travel to Palmer's residence in Newport, Kentucky. They paid James Anderson, an unlicensed taxi operator, to transport them to Newport in his vehicle. At approximately 3:00 a.m., Officer Chris Boyd of the Newport Police Department noticed Anderson's vehicle had only one operating headlight and pulled the vehicle over for a routine stop based upon the traffic violation. As Officer Boyd approached the vehicle and the driver rolled down his window, he was met with a strong smell of marijuana. Additionally, Officer Boyd saw what he believed to be marijuana residue, also known as "shake," on the rear seat behind the driver. Officer Boyd collected the names of the vehicle's occupants and radioed dispatch with the information. He also requested the assistance of a canine unit. Officer Boyd then removed the three individuals from the vehicle and searched them. Williams had a single stray 9mm cartridge in his pocket. In the meantime, Officer Gallichio had arrived at the scene with his canine partner, and Officer Roller had also arrived to support the other officers.

The canine alerted at the driver's side door of the vehicle. Officer Boyd testified that James Anderson, the vehicle's owner, also consented to a search. Inside the car, Officer Gallichio discovered a glass pipe in the driver's side door. Officer Gallichio's dog then alerted on a black bag that was located on the floorboard of the vehicle behind the driver's seat. The bag was found to contain a Walther 9mm handgun. Officer Gallichio handed Officer Roller the firearm,

because he was the police department's handgun instructor. Officer Roller checked the handgun and found it to be loaded, but containing one cartridge less than its maximum capacity. The rounds contained within the gun appeared identical to the one discovered in Williams's pocket. Anderson was cited for possession of drug paraphernalia and driving on a suspended license. He was thereafter permitted to leave the scene on foot. The officers then read Williams his *Miranda*¹ rights and questioned him about the gun. Williams eventually admitted his ownership of the firearm and also admitted to the police that he had one or more prior felony convictions.

The police officers arrested Williams on the charge of possession of a handgun by a convicted felon.² The Campbell County grand jury indicted Williams for the firearm charge on November 25, 2014, and also added a charge of being a first-degree PFO.³ Williams filed a motion to suppress all evidence obtained during the traffic stop, which the circuit court denied on May 18, 2015. In a bench trial on August 25, 2015, the circuit court found Williams guilty on both charges and sentenced him to six years' imprisonment for possession of the firearm, enhanced to twelve years by his status as a PFO. The court's judgment and sentence were entered on October 14, 2015. This appeal followed.

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

² Kentucky Revised Statutes (KRS) 527.040, a Class C felony.

³ KRS 532.080.

Williams raises two issues on appeal. First, Williams argues he was subjected to an unreasonable search and seizure and, therefore, contends the circuit court erred in denying his motion to suppress all evidence obtained from the stop of Anderson's vehicle. We disagree.

“When reviewing a trial court's denial of a motion to suppress, we utilize a clear error standard of review for factual findings and a *de novo* standard of review for conclusions of law.” *Jackson v. Commonwealth*, 187 S.W.3d 300, 305 (Ky. 2006) (citing *Welch v. Commonwealth*, 149 S.W.3d 407, 409 (Ky. 2004)).

“[A]ll searches without a warrant are unreasonable unless it can be shown that they come within one of the exceptions to the rule that a search must be made pursuant to a valid warrant.” *Cook v. Commonwealth*, 826 S.W.2d 329, 331 (Ky. 1992) (citation omitted). Under the “automobile exception,” police are permitted “to search a legitimately stopped automobile where probable cause exists that contraband or evidence of a crime is in the vehicle.” *Dunn v. Commonwealth*, 199 S.W.3d 775, 776 (Ky. App. 2006) (quoting *Clark v. Commonwealth*, 868 S.W.2d 101, 106 (Ky. App. 1993) and citing *United States v. Ross*, 456 U.S. 798, 800-01, 102 S.Ct. 2157, 2159-61, 72 L.Ed.2d 572, 578 (1982)).

The Commonwealth relies on *Dunn* for the proposition that the smell of marijuana coming from a vehicle gives an officer probable cause to search the vehicle as well as its occupants. *Id.* at 777 (citing *People v. Stout*, 106 Ill.2d 77, 87 Ill. Dec. 521, 477 N.E.2d 498, 503 (1985)).

Williams urges this Court to overturn *Dunn* and asks this Court to find instead that individualized suspicion is necessary to search the occupants when there is probable cause to search the vehicle. However, we are not persuaded.

In this case, Officer Boyd stopped Anderson's vehicle because of a traffic violation and then was met with a strong smell of marijuana coming from the vehicle when Anderson rolled down his window. Officer Boyd additionally noticed marijuana residue in the backseat behind the driver. This incident gave police probable cause to search the vehicle and its occupants under *Dunn*.

Williams offers no compelling justification as to why this method of detection is insufficient to establish probable cause to investigate illegal drug use inside the vehicle. The weapon and cartridge were discovered through a series of events that began with the smell of marijuana emanating from the vehicle. As the situation unfolded, the officers' actions were reasonable under the circumstances.

Additionally, according to the officer's testimony, the driver consented to a search of the vehicle. Upon the canine unit's arrival upon the scene, the canine almost immediately alerted to the vehicle. Accordingly, we find no error and affirm the circuit court's denial of the motion to suppress.

The second issue Williams argues on appeal is that the circuit court erred in denying his motion for directed verdict at the close of the Commonwealth's evidence. The Commonwealth asserts this issue is not preserved for appellate review because a motion for directed verdict is not proper in a bench trial. "[A] directed verdict 'is clearly improper in an action tried by a court without

a jury.’ Instead, ‘the appropriate procedural mechanism for early dismissal is found in CR⁴ 41.02(2).’” *R.S. v. Commonwealth*, 423 S.W.3d 178, 184 (Ky. 2014) (quoting *Brown v. Shelton*, 156 S.W.3d 319, 320 (Ky. App. 2004)).

“[I]nvoluntary dismissal⁵ under CR 41.02(2) . . . is similar to a motion for a directed verdict, CR 50.01, but utilized in actions tried by the court without a jury.” *Brown*, 156 S.W.3d at 321 (quoting *Moore v. Asente*, 110 S.W.3d 336, 345 n.17 (Ky. 2003) (citation and internal quotation marks omitted). A difference between the two motions is that, when contemplating early dismissal, “[t]he trial court ‘must weigh and evaluate the evidence’ rather than, with regard to directed verdict, ‘indulge every inference in the [Commonwealth’s] favor.’” *R.S.*, 423 S.W.3d at 184 (quoting *Morrison v. Trailmobile Trailers, Inc.*, 526 S.W.2d 822, 823-24 (Ky. 1975)).

Despite the noted distinction between the two procedures, the motion for early dismissal “fulfills the same mid-trial function as a motion for a directed verdict in a jury case.” *Morrison*, 526 S.W.2d. at 823. The Supreme Court of Kentucky has also repeatedly held that an appellate court may affirm a judgment or decision of a trial court, “even if that court reached the right result for the wrong reason.” *Commonwealth v. Fields*, 194 S.W.3d 255, 257 (Ky. 2006) (citations

⁴ Kentucky Rules of Civil Procedure.

⁵ To avoid confusion, we note here that *Moore v. Asente* and CR 41.02(2) refer to this as a motion for “involuntary dismissal,” but *Brown v. Shelton* and *R.S. v. Commonwealth* both refer to it as a motion for “early dismissal.” The difference appears to be only one of nomenclature.

omitted). Accordingly, we will examine the court's decision in light of the proper rule, CR 41.02(2).

“On appellate review of a ruling on a defendant's CR 41.02 motion, we will overturn the trial court only for an abuse of discretion. An abuse of discretion will be found when the trial court's decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *R.S.*, 423 S.W.3d at 184 (citations and internal quotation marks omitted).

The court found there was sufficient evidence against Williams to deny his motion for dismissal. Williams does not contest his status as a convicted felon, and “[p]ossession may be proven through either actual possession or constructive possession.” *Deboy v. Commonwealth*, 214 S.W.3d 926, 930 (Ky. App. 2007) (quoting *Johnson v. Commonwealth*, 90 S.W.3d 39 (Ky. 2002)). The court heard testimony from police officers that Williams was a passenger in the vehicle, and on the floorboard of the vehicle was a bag containing a 9mm handgun. The testimony also indicated a 9mm cartridge was found in Williams's pocket, and this cartridge was identical to the cartridges found in the 9mm handgun. Further testimony elicited that the handgun was missing one round of ammunition and that Williams admitted to being the owner of the handgun at the time of the incident. The court also heard testimony provided by Williams and his girlfriend denying these events. “It has long been held that the trier of fact has the right to believe the evidence presented by one litigant in preference to another.” *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996) (citation omitted). Furthermore,

It is not within the province of this Court to substitute our judgment for the trial court's. The opportunity to view witnesses testify and observe their demeanor, as well as weighing their credibility, cannot be overstated. Accordingly, we do not reexamine the evidence but only the trial court's decision *in light of* the evidence.

R.S., 423 S.W.3d at 187. Based on these circumstances, we find that the circuit court was within its sound discretion under CR 41.02 to deny Williams' motion for early dismissal.

For the foregoing reasons, the Campbell Circuit Court's May 18, 2015 order denying Williams' motion to suppress and his subsequent convictions of possession of a handgun by a convicted felon and of being a first-degree persistent felony offender are affirmed.

ALL CONCUR.

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