

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000708-MR

CHRIS A. MILLER

APPELLANT

v. APPEAL FROM CALDWELL CIRCUIT COURT,
HONORABLE CLARENCE A. WOODALL III, JUDGE
ACTION NO. 14-CR-00021

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KRAMER, LAMBERT, AND NICKELL, JUDGES.

KRAMER, JUDGE: Chris Miller appeals the Caldwell Circuit Court's judgment convicting him of possession of a handgun by a convicted felon following a jury trial. After careful review of the record and applicable law, we affirm.

Miller was indicted on several charges stemming from the incident described herein. However, the possession of a handgun by a convicted felon

charge was tried prior to the resolution of the other charges. That conviction is the sole subject of this appeal.

On January 21, 2014, Heather James, a former girlfriend of Miller, called the Princeton Police Department because Miller was allegedly knocking on her door, demanding entry, and threatening her.¹ The police officers observed Miller, whom they recognized, in front of James's apartment when they arrived at the scene. At that time, Miller ran from the front door around the back of James's apartment building. One officer ran after Miller, and another officer went around the other side of the building to cut off Miller. Miller eventually stopped behind the building, was arrested, and searched at that time.

While in custody, but still at the scene, Miller first claimed that a friend dropped him off at the location. However, when officers found keys on Miller's person, they searched nearby parking lots for a vehicle matching the Nissan insignia on the key. One of the officers, Jordan Choate, had prior knowledge that Miller was driving a black Nissan sedan. Officer Choate had this knowledge because he had recently dealt with another of James's complaints; namely, James previously reported Miller had stolen two of her cellular telephones

¹ Of note, James petitioned for an emergency protective order against Miller a few days prior to this incident. However, that had not been served upon Miller at the time of this incident.

a few days prior to this incident. One was a Samsung Galaxy model, and the other was an LG model.

The officers located a black Nissan in a parking lot nearby, and they used the key to ensure it matched the vehicle from Miller's pocket. Using the vehicle's license plate number, the officers determined that the vehicle belonged to Miller's ex-wife, Dana Miller. Officer Choate then looked inside the vehicle's window and observed a Samsung Galaxy cellular telephone with a grey and white OtterBox case sitting near a black backpack. James confirmed the cellular telephone she reported missing had the same color OtterBox case. After officers informed Miller they found the vehicle, he admitted he drove the vehicle to the location. However, he denied the police consent to search the vehicle. The vehicle was impounded and towed to the Princeton Police Department parking lot.

The following day a detective obtained consent to search the vehicle from Dana Miller, the registered owner. Officer Choate then performed a search of the vehicle.² During the search, Officer Choate observed an LG cellular telephone laying on the previously discussed black backpack. Additionally, the largest zipper on the backpack was open. Inside of that zipper, Officer Choate found several boxes of ammunition for guns of varying calibers and a number of other items of

² Several photographs were taken during this search. A number of those were placed in the record at the suppression hearing.

contraband that are not relevant to this appeal. Following this initial search, Dana came to the police station and identified the backpack and the items that were inside of it as belonging to Miller.

Shortly thereafter, on the same morning, Officer Choate returned to James's apartment to search the property again. Choate found a gun holster in the grass behind the apartment complex close to the area where Miller stopped fleeing. He then found a handgun near the same area. The gun was of the same caliber as some of the ammunition found in Miller's backpack.

Miller was eventually indicted by the Caldwell grand jury. The indictment consisted of seven counts. However, as previously mentioned, the count of possession of a handgun by a convicted felon is the sole subject of this appeal. In July 2014, Miller moved to suppress evidence discovered during the warrantless search of Dana's vehicle. The circuit court conducted the suppression hearing in October 2014 and denied Miller's motion.

In January 2017, a jury trial was held on the matter. The jury found Miller guilty of possession of a handgun by a convicted felon. Miller timely filed this appeal from that conviction. Further facts will be discussed as they become relevant.

On appeal, Miller makes two primary arguments. In his view, the circuit court erred when: (1) it failed to suppress the items discovered by the

search of his backpack in Dana’s car; and (2) it allowed testimony regarding Miller’s previous possession of a handgun. We will address each argument in turn.

Miller’s first argument on appeal takes issue with the circuit court’s denial of his motion to suppress the items seized from his backpack, which was in Dana’s vehicle. The bullets found in the backpack were used as circumstantial evidence at the trial. In his motion to suppress, Miller argued that Dana’s consent to search the vehicle did not cover the backpack and the police had no probable cause to search the backpack. However, the circuit court concluded that the police officers had probable cause to believe the vehicle and its contents contained evidence of other criminal activity. The circuit court further concluded the search was lawful under the consent, plain view, and automobile exceptions to the warrant requirement. We agree with the circuit court’s conclusion.

When reviewing a circuit court’s denial of a motion to suppress, we consider its factual findings to be conclusive if supported by substantial evidence. *Buster v. Commonwealth*, 406 S.W.3d 437, 439 (Ky. 2013). If these findings are supported, we conduct a *de novo* review of the trial court’s application of the law to those facts to determine whether its decision was correct as a matter of law. *Id.*

“As a general rule, warrantless searches are . . . unreasonable, ‘subject only to a few specifically established and well-delineated exceptions.’”

Helphenstine v. Commonwealth, 423 S.W.3d 708, 714 (Ky. 2014) (quoting *Katz v.*

United States, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)). Those exceptions include the consent exception, the plain-view exception, and the automobile exception.

The consent exception to the requirement for a search warrant provides that “proper consent terminates the need for a search warrant.” *Lynn v. Commonwealth*, 257 S.W.3d 596, 598 (Ky. App. 2008) (citing *Commonwealth v. Jones*, 217 S.W.3d 190, 198 (Ky. 2006)). “Generally, the consenting party must share common authority over the premises to be searched.” *Id.* (citing *Perkins v. Commonwealth*, 237 S.W.3d 215, 219 (Ky. App. 2007)).

Here, Miller does not contest that Dana as the owner of the vehicle could give consent to search. However, he asserts that Dana could not give consent for the backpack to be searched because it did not belong to her.³ Accordingly, Miller takes issue with the scope of the search.

The United States Supreme Court reviewed the scope of consent to search in situations where automobiles and containers are involved in *Florida v. Jimeno*, 500 U.S. 248, 111 S. Ct. 1801, 114 L. Ed. 2d 297 (1991). In *Jimeno*, the Court found that the consenting party did not place any “explicit limitation on the

³ As an aside, Miller likely exceeded any authority over the vehicle because Dana had only given him permission to drive to and from work, which was in Hopkinsville.

scope of the search.” *Id.* at 251, 111 S. Ct. at 1804 . Therefore, the consent to search included the interior of the car and the *closed* containers located therein. *Id.*

Miller argues that Dana’s consent only allowed the police officers to obtain the stolen cellular telephones from the vehicle and not search the closed backpack. However, this argument misconstrues three points. First, while the officers mentioned the cellular telephones in the telephone call to Dana, the police officers ultimately asked Dana’s consent to search the vehicle for stolen items, not just the telephones. Dana replied, “yes, absolutely” and further told the detective to “do what you need to do.” Second, the backpack was not fully closed. In fact, the backpack’s largest pocket was unzipped and open. Third, at the time of the initial search, there is no evidence that the police officers knew if the backpack was owned by Miller or Dana. “Precedent demands that courts consider whether a person consented to a search from the objective perspective of a reasonable officer, not from the subjective perception of the person searched.” *Payton v. Commonwealth*, 327 S.W.3d 468, 472 (Ky. 2010) (citing *Jimeno*, 500 U.S. at 250). Therefore, Dana’s authority was proper consent to search the vehicle and the containers therein.

Even assuming *arguendo* that Dana’s consent to search the vehicle did not extend to the backpack, the plain-view exception to the requirement for a search warrant, coupled with the automobile exception, apply here as well. “The

plain-view exception to the warrant requirement applies when the object seized is plainly visible, the officer is lawfully in a position to view the object, and the incriminating nature of the object is immediately apparent.” *Chavies v. Commonwealth*, 354 S.W.3d 103, 109 (Ky. 2011) (citing *Horton v. California*, 496 U.S. 128, 136-37, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990)). Further, when automobiles are involved, officers have the authority to search the entire vehicle upon observing items in plain view they believe are stolen. *Id.* at 110-11.

Here, Officer Choate saw two cellular telephones while lawfully inside the vehicle. Because of James’s previous statements, the incriminating nature of the objects was readily apparent. Therefore, the analysis in *Chavies* applies, and the officers in this case were *at least* permitted to search the entire vehicle including any unlocked containers, including the backpack. For these reasons, the circuit court correctly denied Miller’s motion to suppress.

Miller’s second argument is that the circuit court erred when it allowed James to testify that Miller had carried a firearm on previous occasions and that he threatened James with a firearm on one of those previous occasions. In his view, both facts were introduced in violation of KRE⁴ 404(b) as improper evidence of prior bad acts. However, at the outset, we must address whether this argument was properly preserved.

⁴ Kentucky Rule of Evidence.

Miller admits there was no contemporaneous objection when this testimony occurred; but, he asserts this issue was nevertheless properly preserved by a pretrial motion in limine. In *Lanham v. Commonwealth*, 171 S.W.3d 14, 22 (Ky. 2005), the Kentucky Supreme Court held that a motion in limine must specifically state the evidence sought to be excluded in order to preserve appellate review.⁵ Here, Miller’s counsel orally moved to preclude all testimony concerning the other charges for which Miller was indicted. Simply put, the testimony Miller takes issue with had nothing to do with his other charges, which were the subject of his pretrial motion in limine. Therefore, because Miller’s motion in limine was unspecific and there was no contemporaneous objection, this argument is

⁵ The Court in *Lanham* further explained its reasoning with the following:

This is because of the nature of a motion in limine: it is primarily a *pretrial* tool aimed, in essence, at “heading off at the pass” the introduction of evidence. KRE 103(a)(1) allows a general contemporaneous objection during trial to preserve an error for review because it is usually clear from the context what the grounds for the objection are (and if they are not, the rule provides that the trial judge can ask for grounds). But motions in limine cannot function in this manner because they are not contemporaneous with the introduction of the evidence that they are aimed at. If motions in limine are not required to be specific, then KRE 103(d) could be turned into a catch-all, allowing the preservation of all manner of errors through the artful use of vague, broad motions in limine. This is clearly not what was intended by the rule. Thus, we reaffirm the portion of *Tucker*, as extended by *Davis* and *Metcalf*, that requires a motion in limine to specify the evidence objected to in order to preserve an error for appeal.

Id.

unpreserved. *Id.*; see also *Montgomery v. Commonwealth*, 505 S.W.3d 274, 280 (Ky. App. 2016); *Bratcher v. Commonwealth*, 151 S.W.3d 332, 350 (Ky. 2004).

Miller requests that if the argument was indeed unpreserved, we review James's testimony under the palpable error standard pursuant to RCr⁶ 10.26.⁷ For palpable error relief to be available, the purported error must have: (1) been clear or plain under existing law; (2) been more likely than ordinary error to have affected the judgment; and (3) so seriously affected the fairness, integrity or public reputation of the proceeding to have been jurisdictionally intolerable. See *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009). After a thorough review of the trial and applicable law, Miller's argument does not satisfy the first part of the three-part palpable error test.

The purpose of KRE 404(b) is to exclude evidence of other crimes, wrongs or acts when the purpose of introducing such evidence is to prove a defendant's character or that he acted in a way conforming to such prior bad acts. Such evidence may be introduced for other purposes such as proof of "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]" KRE 404(b)(1). It may also be offered if such evidence is so

⁶ Kentucky Rule of Criminal Procedure.

⁷ RCr 10.26 states: "A palpable error which affects the substantial rights of a party may be considered . . . by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error."

inextricably intertwined with other essential evidence that separating the two would have a “serious adverse effect” on the party offering the evidence. KRE 404(b)(2). Further, the Kentucky Supreme Court has stated that, “[t]rial courts must apply [KRE 404(b)] cautiously, with an eye towards eliminating evidence which is relevant *only* as proof of an accused’s propensity to commit a certain type of crime.” *Kerr v. Commonwealth*, 400 S.W.3d 250, 260 (Ky. 2013) (emphasis added) (quoting *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994)). Therefore, if there was *any* other relevant reason for James to discuss Miller’s prior possession of the firearm, then there was no palpable error. Indeed, there were other relevant reasons for this testimony.

As adduced at the trial, Miller took steps to conceal the handgun by wearing it in his waistband or in a holster on his ankle. Because Miller was not seen with a handgun on the night of his arrest and a handgun was not found on his person at that time, the Commonwealth was required to prove he possessed it through circumstantial evidence. In that vein, James’s testimony evinced that Miller had access to a handgun and the opportunity to possess one that night, which are permissible reasons to admit evidence despite KRE 404(b)’s “bad acts” prohibition. For this reason, the identity and opportunity exception of KRE 404(b)(1) applied. Identity applied because James had to explain that she did not see him with a gun the night of the incident. As an explanation, she *identified* that

it was a handgun Miller frequently carried, and she did not see it because it was probably concealed in a holster the night of the incident. Opportunity applied because James saw Miller with a handgun a few days prior to the night in question and frequently saw him with a handgun on other occasions. This shows that Miller had access to a handgun and the *opportunity* to possess one on January 21, 2014. Lastly, any other testimony concerning purported threats with the handgun were inextricably intertwined with this relevant evidence; therefore, separating the two would have a serious adverse effect upon the Commonwealth. KRE 404(b)(2). For these reasons, the alleged error was not clear or plain from existing law; therefore, the circuit court did not commit palpable error when it allowed James to testify regarding Miller and the firearm.

In light of the foregoing, the judgment of the Caldwell Circuit Court is AFFIRMED.

ALL CONCUR.

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