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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000152-MR

RODNEY GILCHRIST APPELLANT

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM G. CLOUSE, JR., JUDGE
ACTION NO. 17-CR-00493

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, NICKELL, AND K. THOMPSON,, JUDGES.

NICKELL, JUDGE: Rodney Gilchrist appeals from the Madison Circuit Court's judgment of conviction and sentence imposed following his entry of a conditional guilty plea to two counts of trafficking in a controlled substance in the first degree[1]

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[1] Kentucky Revised Statutes (KRS) 218A.1412, a Class C felony. One count charged Gilchrist with possessing more than two ounces of heroin with intent to sell, transfer or distribute the drug, while the second count charged him with the same intent related to more than two grams of Fentanyl.

and one count of being a convicted felon in possession of a handgun,[2] specifically reserving the right to appeal the trial court's denial of his motion to suppress evidence seized at the time of his arrest. Following a careful review, we affirm.

On May 17, 2017, a vehicle being operated by Gilchrist drove past Officer Hunter Harrison of the Richmond Police Department. Officer Harrison was aware Gilchrist's driver's license was suspended and determined a traffic stop was in order. Officer Harrison had also recently received complaints Gilchrist was trafficking in narcotics in the area. After initiating the traffic stop, Officer Harrison approached the passenger side of Gilchrist's vehicle and asked him to provide a driver's license, registration and proof of insurance. Gilchrist voluntarily acknowledged his license was suspended; he provided the other requested documentation. Officer Harrison observed an odor of marijuana emanating from the vehicle but made no mention of it at that time. Instead, he informed Gilchrist if everything "was good" he would only cite Gilchrist for operating his vehicle on a suspended license rather than arresting him for the offense. Officer Harrison also informed Gilchrist if he could secure a licensed driver to retrieve the vehicle it would not be impounded.

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[2] KRS 527.040, a Class C felony.

At some point during the stop, Officer Corey Barron arrived on scene to provide assistance; he waited near Officer Harrison's cruiser and observed the interaction. When Officer Harrison returned to his cruiser to check the validity of Gilchrist's insurance and confirm the license suspension, he informed Officer Barron of the odor of marijuana he had observed and suggested Officer Barron attempt to gain consent to search the vehicle. Officer Barron approached the car, told Gilchrist Officer Harrison had smelled marijuana and he too noticed the odor, and asked for permission to search the car. Gilchrist denied the request.

Officer Barron informed Officer Harrison of Gilchrist's response and suggested they tow the vehicle. Officer Harrison returned to Gilchrist upon completing the checks of his documentation. He told Gilchrist of his desire to search the vehicle because of the various complaints he had received along with the distinct odor of marijuana emanating from the vehicle and Gilchrist's person. Officer Harrison told Gilchrist he did not want to have to tow the vehicle to search it. Gilchrist then consented to the search. As Officer Harrison began the search, Gilchrist told him to look in a backpack located in the back seat; a loaded 9mm handgun was in the backpack. As Officer Harrison was retrieving the gun and calling for a criminal history check, Officer Barron decided to conduct a pat-down search for weapons and asked Gilchrist if he had anything on him; Gilchrist answered affirmatively. Officer Barron told Gilchrist he was being detained,

placed him in handcuffs, and inquired if Gilchrist had anything on him that would poke or stick the officer. Gilchrist said he had no needles but did have "some weed in [his] pocket and ten grams of heroin." Officer Barron read Gilchrist his *Miranda*[3] warnings and Gilchrist agreed to answer whatever questions were posed.

In addition to the 9mm handgun and a partially-loaded thirty round magazine found in the backpack, officers recovered 10.4 grams of heroin, 3.1 grams of marijuana, and $1,331.25 in cash from Gilchrist's pockets. Gilchrist was arrested and charged with trafficking in a controlled substance, being a felon in possession of a handgun, carrying a concealed weapon as a convicted felon,[4] possession of marijuana,[5] and operating a motor vehicle with a suspended license.[6] He subsequently moved to suppress the evidence collected during the warrantless search of his vehicle and person.

At the conclusion of a suppression hearing, Gilchrist contended his consent to Officer Harrison's search request was coerced. He asserted he had been stopped by several different officers over several days and felt he was being

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

[4] KRS 527.020(10), a Class D felony. It was later determined this charge was erroneously coded and was amended to a misdemeanor charge of carrying a concealed deadly weapon. Nevertheless, the grand jury ultimately declined to indict Gilchrist on either of these charges.

[5] KRS 218A.1422, a Class B misdemeanor.

[6] KRS 186.620, a Class B misdemeanor.

harassed; Officer Harrison told him he would not be arrested for driving with a suspended license and the vehicle would not be towed if a licensed driver were available to remove it from the scene; and he was not properly administered his *Miranda* warnings prior to making incriminating statements. He alleged the officers' actions were implicitly coercive and tainted the search, therefore requiring suppression of all evidence seized.

The trial court disagreed. It first found Officer Harrison had a reasonable and articulable suspicion to initiate the traffic stop. After both Officers Harrison and Barron detected the odor of marijuana, probable cause existed to search the car. The trial court then recounted the testimony adduced during the hearing regarding Officer Harrison gaining consent and specifically concluded no coercive or improper actions occurred which influenced Gilchrist's consent. Gilchrist entered a conditional guilty plea, specifically reserving the right to challenge the trial court's denial of his suppression motion. This appeal followed.

Before this Court, Gilchrist presents an entirely new theory of entitlement to suppression in his sole allegation of error. He contends the extension of the traffic stop without a reasonable and articulable suspicion of criminal activity constituted an unlawful seizure which tainted his subsequent consent. The Commonwealth notes these arguments are made for the first time on appeal and contends they are unpreserved for our review. In his reply brief,

Gilchrist requested palpable error review pursuant to RCr[7] 10.26. We conclude the issue presented is unpreserved and not palpable error.

Gilchrist would have this Court address an issue not ruled on by the trial court. It is well-settled an issue not raised in the circuit court may not be presented for the first time on appeal. *Gabow v. Commonwealth*, 34 S.W.3d 63, 75 (Ky. 2000), *habeas granted on other grounds, Gabow v. Deuth*, 302 F.Supp.2d 687 (W.D.Ky. 2004); *Shelton v. Commonwealth*, 992 S.W.2d 849, 852 (Ky. App. 1998); *Ruppee v. Commonwealth*, 821 S.W.2d 484 (Ky. 1991), *overruled on other grounds by Lovett v. Commonwealth*, 103 S.W.3d 72 (Ky. 2003); *Tamme v. Commonwealth*, 973 S.W.2d 13, 33 (Ky. 1998). This rule is stated for good reason. At the suppression hearing, the Commonwealth put on evidence to rebut Gilchrist's argument his consent was coerced. It did not, however, put on evidence about extension of the traffic stop or existence of reasonable and articulable suspicion of criminal activity because those issues were not being raised. If Gilchrist wanted to appeal those issues, it was incumbent on him to request a hearing exploring those issues and securing a ruling on them from the trial court. Failure to obtain a ruling on these issues prior to pleading guilty precludes appellate review.

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[7] Kentucky Rules of Criminal Procedure.

Gilchrist alternatively requests we address these unpreserved errors as palpable error under RCr 10.26. "For an error to rise to the level of palpable, it must be easily perceptible, plain, obvious and readily noticeable." *Martin v. Commonwealth*, 409 S.W.3d 340, 344 (Ky. 2013) (citations and internal quotation marks omitted). Reversing a conviction based on palpable error requires this Court to determine manifest injustice resulted from an error affecting the substantial rights of a party. *See* RCr 10.26. Manifest injustice is found where the court "believes there may have been miscarriage of justice." *Commonwealth v. M.G.*, 75 S.W.3d 714, 719 (Ky. App. 2002). Such is simply not the case in this instance. Therefore, we conclude the issue is unpreserved and evades review.

For the foregoing reasons, the judgment of the Madison Circuit Court is AFFIRMED.

MAZE, JUDGE, CONCURS.

THOMPSON, K., JUDGE, CONCURS IN RESULT ONLY.

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