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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001722-MR

ANDRE MAYFIELD — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN E. REYNOLDS, JUDGE
ACTION NO. 17-CR-00627

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GOODWINE, SPALDING, AND L. THOMPSON, JUDGES.

GOODWINE, JUDGE: Andre Mayfield appeals the Fayette Circuit Court's October 4, 2018 order denying his motion to suppress. He argues the circuit court erred by incorrectly ruling that: (1) the warrantless search of his car and person was constitutional; and (2) he was not subjected to a custodial interrogation. Finding no error, we affirm.

BACKGROUND

On the evening of April 2, 2017, Lexington police officer Jesse Mascoe pulled over a blue Mercedes driving on West Jefferson Street with an improperly displayed license plate. Coincidently, Officer Mascoe stopped this same vehicle a few months earlier for driving with expired temporary tags from South Carolina. After the driver told him he left his license at home, Officer Mascoe gave him the benefit of the doubt and let him go. Officer Mascoe was not so forgiving a second time.

When Officer Mascoe approached the vehicle, he smelled marijuana. This prompted him to call for backup. Shortly after the call, two other police officers arrived at the scene. Officer Mascoe immediately asked the driver for his license, but, again, the driver was unable to produce it. The driver said his name was Demetrius Marin and he was born on November 20, 1990. Officer Mascoe went to his patrol car and ran the information given. This search yielded zero results.

At that point, Officer Mascoe asked the driver to exit the vehicle because he smelled marijuana. While the driver was exiting the vehicle, Officer Mascoe asked "if he had anything in the car he shouldn't have." (Video Record ("VR") 09/24/18; 15:03:20). The driver responded by saying he smoked a joint thirty minutes before being pulled over. *Id.* at 15:03:30. After a search of the

vehicle, Officer Mascoe could not find any evidence of marijuana. He then proceeded to search the driver. Officer Mascoe found a digital scale, $840 dollars in cash, and a bag of marijuana. Right away, and unprompted, the driver confessed to selling "a little bit of weed" earlier that evening. *Id.* at 15:04:05. At this point, Officer Mascoe *Mirandized* the driver, who ultimately admitted to giving a false name. *Id.* at 15:04:08. His real name was Andre Mayfield.[1]

Officer Mascoe continued his search of Mayfield. He believed he felt something between Mayfield's legs, to which Mayfield responded that it was his genitals, but that did not feel right—it felt like packing material. *Id*. at 15:04:30. Regardless, Officer Mascoe placed Mayfield under arrest and transported him to the Fayette County Detention Center. While at the jail, a strip search was performed. Bundles of narcotics were found between Mayfield's legs, including heroin, cocaine, and marijuana.

Mayfield was indicted on a variety of drug and traffic charges.[2] He filed a motion to suppress the "search of his person, and any statements he made to the police prior to his being given a *Miranda* warning." Record ("R.") at 71. The

[1] Mayfield said he gave the false name because his license was suspended due to a DUI charge.

[2] The charges were: (1) trafficking in a controlled substance in the first degree, first offense, greater than four grams of cocaine; (2) trafficking in a controlled substance in the first degree, first offense, greater than two grams of heroin; (3) promoting contraband in the first degree; (4) failure to register transfer of motor vehicle; (5) trafficking in marijuana, less than eight ounces; (6) operating on suspended/revoked operator's license; (7) failure to maintain required insurance; (8) giving an officer false identifying information; and (9) expired registration plates.

circuit court held a hearing on September 24, 2018, and entered an order on October 14, 2018, denying Mayfield's motion to suppress, concluding that "[a]ll the evidence gathered in this case flowed from a valid traffic stop and valid search." R. at 82. Due to this ruling, Mayfield entered a conditional guilty plea to one count of trafficking in a controlled substance, greater than two grams of cocaine. *Id*. at 90. He was sentenced to six years to run concurrent with a federal sentence. The remaining counts were dismissed. This appeal followed.

STANDARD OF REVIEW

"The standard of review for a trial court's ruling on a suppression motion is two-fold. We review the trial court's factual findings for clear error and deem conclusive the trial court's factual findings if supported by substantial evidence." *Williams v. Commonwealth*, 364 S.W.3d 65, 68 (Ky. 2011) (footnote omitted). We review the trial court's application of the law to the facts *de novo*. *Commonwealth v. Kelly*, 180 S.W.3d 474, 477 (Ky. 2005).

ANALYSIS

On appeal, we must determine: (1) whether the circuit court correctly denied Mayfield's motion to suppress based on the plain smell doctrine; and (2) whether it correctly ruled that Mayfield was not subject to a custodial interrogation during the traffic stop and search.

First, Mayfield concedes in his brief that under precedent set forth by this Court, "the smell of marijuana coming from a person's vehicle [gives] an officer probable cause to search the person." *Dunn v. Commonwealth*, 199 S.W.3d 775, 777 (Ky. App. 2006). Rather than arguing the search of his person does not rise to *Dunn*'s standard, Mayfield contends the *Dunn* Court incorrectly adopted a holding by the Illinois Supreme Court, which extended the plain smell doctrine from an officer's search of a car to the subsequent search of the person, as well. *People v. Stout*, 477 N.E.2d 498 (Ill. 1985).

In this contention, Mayfield moves this Court to "meet *en banc* and reverse *Dunn* to prohibit warrantless search[es] based on the smell of cannabis without corroboration and require the Commonwealth [to] fulfill its burden in future cases to justify a search with proof beyond the subjective grounds allowed in *Dunn*." We decline Mayfield's request. Doing so warrants a brief explanation of the history and evolution of the "plain smell" doctrine and how its adoption by this Court accords with, and is constitutional under, United States Supreme Court and Kentucky precedent.

The United States Supreme Court allows several exceptions for searches and seizures without warrants, one being evidence found within "plain view." *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). An officer may lawfully seize evidence under this doctrine, if: (1) the

officer is lawfully located in a place from which he can plainly see the object; (2) he has a lawful right of access to the object itself; and (3) the object's "incriminating character" is also "immediately apparent." *Id*. at 465-67. Thus, the Court carved an exception to the warrant requirement for searches and seizures, allowing justified intrusions of a police officer when probable cause arises from his sense of sight. It also took special care to leave the door open for an officer's use of his other four senses by not confining the exception to only "plain view." Kentucky courts adopted this doctrine, making it applicable to the Commonwealth. *See Hazel v. Commonwealth*, 833 S.W.2d 831, 833 (Ky. 1992).

Kentucky courts have held this doctrine extends to other senses. In 2002, the Kentucky Supreme Court extended the "plain view" doctrine to encompass evidence that the officer can plainly feel. In *Commonwealth v. Whitmore*, the Court held that "evidence can be properly seized under the plain feel doctrine." 92 S.W.3d 76, 80 (citing *United States v. Hughes*, 15 F.3d 798 (8th Cir. 1994); *United States v. Ashley*, 37 F.3d 678 (D.C. Cir. 1994); *United States v. Craft*, 30 F.3d 1044 (8th Cir. 1994)). It also opined that "plain feel" is a narrowly drawn exception to the warrant requirement and it only applies when "contraband is immediately apparent from a sense of touch." *Id*. (citing *Pitman v. Commonwealth*, 896 S.W.2d 19 (Ky. App. 1995); *Commonwealth v. Crowder*, 884 S.W.2d 649 (Ky. 1994)).

While this case does not involve the senses of sight or touch, it does involve the sense of smell and the "plain smell" doctrine. This Court recognizes the constitutional analogue between the "plain smell," "plain feel," and "plain view" doctrines. *See Chapman v. United States*, 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961); *see also Johnson v. United States*, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948). While the "plain view" and "plain feel" doctrines are not at issue here, we recognize that each holds equal constitutional footing as the "plain smell" doctrine because "[a]ny attempt to create a hierarchy of senses under the Fourth Amendment probable cause standard defies common sense and unjustifiably hinders effective law enforcement." Michael A. Sprow, *Wake Up and Smell the Contraband: Why Courts That Do Not Find Probable Cause Based on Odor Alone Are Wrong*, 42 Wm. & Mary L. Rev. 289, 308-09 (2000) (citations omitted).

Contrary to Mayfield's assertions, Kentucky adopted the "plain smell" doctrine—as pertaining to marijuana—long before *Dunn*. In 1979, this Court wrote that "[i]t is a fundamental principle that a policeman may 'observe' with any of his five senses for purposes of a misdemeanor arrest." *Cooper v. Commonwealth*, 577 S.W.2d 34, 36 (Ky. App. 1979), *overruled on other grounds by Mash v. Commonwealth*, 769 S.W.2d 42 (Ky. 1989). Further, we explained that as far back as 1925, our highest court of the time recognized "that a warrantless

search could be based upon smelling illegal liquor." *Id*. (citing *Commonwealth v. Johnson*, 206 Ky. 701, 268 S.W. 345 (1925)). Therefore, we held that when an officer approaches a "car and smell[s] marijuana smoke, he ha[s] probable cause to believe that a misdemeanor [is] being committed[.]" *Id.*; *see DeCoursey v. Commonwealth*, No. 2012-CA-001618-MR, 2013 WL 4511937, at *2 (Ky. App. Aug. 23, 2013), *as modified* Jan. 31, 2014 (citing *Cooper*, 577 S.W.2d at 36) ("Kentucky recognizes the 'plain smell' rule, which is akin to the 'plain sight' rule, whereby an officer may infer probable cause based on the smell of illegal substances.").

Looking at this Court's rationale in prior cases, one can easily see how the "plain smell" doctrine is deeply rooted in Kentucky jurisprudence. Thus, while Mayfield concedes that Officer Mascoe's search was constitutional under *Dunn*, he argues *Dunn*'s holding is malleable and simply subjective, allowing the Commonwealth to not fulfill its burden to justify the search of a person with substantiated proof. We disagree.

What Mayfield fails to recognize is that for the purposes of a probable cause search under the "plain smell" doctrine, the search of a car for contraband and the subsequent search of the person in question bear a causal link. Mayfield argues the *Dunn* Court "provided no analysis to why it adopted the approach of the Illinois Supreme Court." Brief of Appellant, p. 9. We disagree.

In *Stout*, Officer Stephen Eakle saw the defendant make an illegal turn in his automobile. *Stout*, 477 N.E.2d at 499. Officer Eakle signaled for the defendant to pull over, which he did. After that, Officer Eakle and the defendant met halfway between the two cars. Officer Eakle informed the defendant that he pulled him over for an illegal right turn, and the defendant displayed his driver's license upon Eakle's request. While speaking with the defendant, Officer Eakle observed that two passengers remained in the defendant's car. Upon approaching the defendant's car, Officer Eakle detected the odor of burning cannabis through an open window. After smelling the cannabis, Officer Eakle performed a warrantless search of the defendant, which produced a vial of cocaine and several codeine capsules. *Id.* at 499-500.

Stout does not rationalize why the "plain smell" doctrine extends from a search of the car to the person of interest involved because the Illinois Supreme Court never addressed the extension. The *Stout* Court explained:

> [The Illinois Supreme] [C]ourt has recognized that automobiles, by their nature, are mobile and has distinguished the search of automobiles from the search of buildings. Because automobiles may readily be driven away, it is often impossible for law-enforcement officers to obtain warrants for their search, and the courts have taken this factor into consideration in determining the reasonableness of the searches of automobiles. This so-called "automobile exception" to the warrant requirement is also supported by the diminished expectation of privacy which surrounds the automobile and which arises from the facts (1) that a car is used for transportation and

> not as a residence or a repository of personal effects, (2) that a car's occupants and contents travel in plain view, and (3) that automobiles are highly regulated by government.
>
> Police officers often must act upon a quick appraisal of the data before them, and the reasonableness of their conduct must be judged on the basis of their responsibility to prevent crime and to catch criminals.

Id. at 502 (internal citation omitted). After noting this, the Court spends the rest of its holding explaining why "what constitutes probable cause for searches and seizures must be determined from the standpoint of the officer, with *his skill and knowledge* being taken into account, and the subsequent credibility determinations must be made by the trial court[,]" rather than some quantum of knowledge test, dissecting how and what qualifies an officer to detect marijuana odor. *Id*. at 503 (emphasis in original). Thus, *Stout* made the logical leap from searching a car for contraband to searching the person in question, when the "plain smell of marijuana" gives rise to probable cause and the reasonableness prong of the automobile exception dictates doing so.

Dunn also lists two other cases that adopt *Stout*, *State v. K.V.*, 821 So.2d 1127, 1128 (Fla. Dist. Ct. App. 2002), and *State v. Doren*, 654 N.W.2d 137, 142 (Minn. Ct. App. 2002). In *K.V.*, the Florida District Court of Appeal held that "the odor of burnt marijuana 'unquestionably' provides probable cause not only to conduct a stop of a vehicle, but also to search the entire passenger compartment

and each of its occupants." *K.V.*, 821 So.2d at 1128 (citing *State v. Betz*, 815 So.2d 627 (Fla. 2002); *State v. Chambliss*, 752 So.2d 114, 115 (Fla. Dist. Ct. App. 2000)).

In *Betz*, the Florida Supreme Court held "[a]s the odor of previously burnt marijuana certainly warranted a belief that an offense had been committed, this unquestionably provided the police officers on the scene probable cause to search the passenger compartment of the respondent's vehicle." *Betz*, 815 So.2d at 633 (citing *United States v. Ross*, 456 U.S. 798, 825, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982); *State v. Reed*, 712 So.2d 458, 460 (Fla. Dist. Ct. App. 1998)).

In *Reed*, acknowledging the "plain smell" doctrine, the Florida District Court of Appeal wrote "the smell of cannabis emanating from a person or a vehicle, gives the police officer probable cause to search the person or the vehicle." *Reed*, 712 So.2d at 460. Further, it explained "the smell of cannabis alone can provide probable cause to *search*" a defendant's person during a traffic stop. *Id*. (emphasis in original).

Furthermore, in *Doren*, the Minnesota Court of Appeals held "[t]he odor of burned marijuana inside a stopped motor vehicle provides probable cause for the search of the vehicle's occupants." *Doren*, 654 N.W.2d at 142 (citing *State v. Wicklund*, 295 Minn. 403, 405, 205 N.W.2d 509, 511 (1973)).

The *Wicklund* Court determined that the officers in the case were "clearly justified" in searching the defendant after: (1) lawfully pulling over defendant on suspicion of breaking a curfew law; and (2) "smell[ing] an odor which their professional training and experience told them was the odor of burned marijuana." *Wicklund*, 205 N.W.2d at 511. These circumstances led the Minnesota Supreme Court to hold "the officers [had] probable cause to believe that one or more of the occupants of the automobile had smoked marijuana in violation of the law" and, therefore, the officers could search their person, along with the inside of the car. *Id.*

Dunn correctly extended the "plain smell" doctrine to searches of a person subject to a traffic stop, rather than solely the search of the car. When an officer pulls someone over, the individual's car is readily moveable, the operator and other occupants have been alerted to the officer's presence, and the car's or individual's contents "may never be found again if a warrant must be obtained." *Chambers v. Maroney*, 399 U.S. 42, 51, 90 S.Ct. 1975, 1981, 26 L.Ed.2d 419 (1970). Because of this, the automobile exception to the warrant requirement extends to the operator of the vehicle when the "plain smell" of marijuana results in the existence of probable cause, which justifies a search independently of an arrest. Therefore, we deny Mayfield's request for this Court to convene *en banc* to determine whether we should overturn *Dunn*.

Second, Mayfield argues he was not read his *Miranda*[3] rights prior to being under a custodial interrogation. From our review, the circuit court did not address the Fifth Amendment arguments made by Mayfield. *See* RCr[4] 8.20(2) ("When factual issues are involved in deciding a motion, the court shall state its essential findings on the record."). Mayfield failed to preserve for appeal the circuit court's failure to address the Fifth Amendment issues. CR[5] 52.02. Therefore, we decline to undergo an analysis regarding Mayfield's Fifth Amendment argument.

CONCLUSION

Based on the foregoing analysis, we affirm the Fayette Circuit Court's order denying Mayfield's motion to suppress.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Adam Meyer
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

James P. Judge
Assistant Attorney General
Frankfort, Kentucky

[3] *Miranda* refers to the United States Supreme Court case, *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[4] Kentucky Rules of Criminal Procedure.

[5] Kentucky Rules of Civil Procedure.