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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001074-MR

GERRY H. MEGHOO — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 00-CR-00282

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MINTON, SCHRODER, AND TAYLOR, JUDGES.

SCHRODER, JUDGE: This is an appeal from a judgment pursuant to a conditional guilty plea convicting a truck driver of trafficking in marijuana after being stopped by a Department of Transportation Vehicle Enforcement Officer ("VEO") and his trailer being searched without a warrant. We adjudge that the VEOs had legal authority to arrest appellant for trafficking in

marijuana in this case, although it is a non-vehicle-related offense. And we also hold that the warrantless search of the trailer was a valid probable cause search under the automobile exception to the warrant requirement. Hence, we affirm.

On July 27, 2000, appellant, Gerry Meghoo, drove into the weigh station on I-65 in Hardin County. Officer Shannon Chelf of the Kentucky Department of Transportation, Division of Vehicle Enforcement, was working the weigh station and stopped the truck Meghoo was driving for a safety inspection. Upon inspecting Meghoo's duty status record (log book), Officer Chelf noticed that it was dated July 20, 2000, and contained other date discrepancies. Officer Chelf advised Meghoo that he was in violation of the law for failure to accurately maintain the log book and allowed Meghoo to make changes in the log book. The officer also noticed that Meghoo's bills of lading were handwritten, which, according to Officer Chelf, is uncommon. Officer Chelf asked Meghoo twice whether the bills of lading were some the shipper had given him or some that he had written himself. Meghoo replied both times that the shipper had given him the bills of lading. Officer Chelf additionally testified that when Meghoo attempted to correct the log book, his corrections were inconsistent with the bills of lading. Officer Chelf inquired about the inconsistencies between the log book and the bills of lading and asked Meghoo if he could produce any

receipts. As Meghoo started to give Officer Chelf some receipts, Meghoo finally admitted that he had written the bills of lading himself and that his log book was indeed incorrect.

After examining the paperwork and talking to Meghoo, Officer Chelf decided to request that Officer Steve Burke come to the scene with a canine unit. According to Officer Chelf, when he told Meghoo that a canine unit was called, Meghoo's voice began to crack and his knees got weak. Officer Burke arrived shortly thereafter with the dog. Officer Burke proceeded to walk the dog around the trailer. When the dog reached the rear doors of the trailer, it stopped and alerted to the presence of drugs. Officer Chelf then broke the plastic seal to the trailer. After breaking the seal, Officer Chelf stated to Meghoo, "I need your keys to turn the blower on,[1] and we're now gonna search the truck." Meghoo then gave the officer the keys. After Officer Chelf opened the padlock on the trailer, Officer Burke placed the dog on top of the load. The dog walked about six feet from the rear of the load, against the wall, and began digging, scratching and biting at a cardboard box. The dog ripped open the box, exposing two bales of shrink-wrapped material. At that time the officers could smell the

[1] Officer Chelf explained at the suppression hearing that vehicle enforcement officers commonly make sure a truck's fan blower is turned on before searching a truck with a canine for the safety of the dog and because it blows out all the scents that have been enclosed in the trailer so the dog can more accurately smell its contents.

strong odor of fabric softener sheets.[2] Officer Chelf then exited the trailer and arrested Meghoo. After arresting Meghoo and placing him in the custody of another officer, Officer Chelf cut into one of the bales and observed what appeared to be marijuana. A response unit was then called so that the remainder of the contents of the trailer could be searched. Approximately one hour and twenty minutes after the marijuana was originally discovered by the canine unit in the trailer, Meghoo signed a form consenting to the search of his truck. Subsequently, the trailer was moved to a storage space, completely unloaded, and searched. No more contraband was found in the subsequent search of the trailer. The material seized in the search was ultimately confirmed to be 41 pounds of marijuana.

After being arrested, Meghoo went with the VEOs to the storage space where the remainder of the trailer's contents were being searched. During this time, Lieutenant Randall Jenkins conducted an interview with Meghoo. In the interview, Meghoo admitted that he had been using several log books so he could exceed the maximum allowable work hours. He claimed that he had unwittingly picked up the marijuana during a load from Houston,

[2] Officer Chelf testified at the suppression hearing that fabric softener sheets are commonly used by drug traffickers to mask the odor of marijuana.

Texas. He stated that he had been approached to transport drugs before but had never accepted these offers.

On September 26, 2000, Meghoo was indicted for: 1) trafficking in marijuana, five pounds or more; 2) failing to properly maintain log of hours of service; and 3) possessing marijuana in a commercial vehicle. On February 27, 2003, Meghoo's jury trial began and the jury was empaneled and sworn. Because certain pretrial motions had not been ruled on, the trial judge dismissed the jurors until the next day and heard the motions. That same day, a suppression hearing was held on whether the search of Meghoo's truck and subsequent seizure of evidence therefrom was unlawful, as well as whether Meghoo's statement to police should be suppressed. The trial court ruled in favor of the Commonwealth on the issues raised in the suppression hearing. The next day, Meghoo entered a conditional guilty plea pursuant to a plea agreement with the Commonwealth. The trial court dismissed the charges of failing to properly maintain log hours and possession of marijuana in a commercial vehicle. Meghoo pled guilty to only trafficking in marijuana, five pounds or more, and was sentenced to ten years' imprisonment, with five years to serve and five years probated. This appeal by Meghoo followed.

The order accepting Meghoo's conditional guilty plea specifically stated that the plea was "conditioned upon the

Defendant's limited right to appeal the Court's pre-trial and trial rulings on Defendant's motion regarding search, seizure, and arrest of the Defendant and argument related thereto . . ." Five of the arguments raised by Meghoo on appeal – appellant's post-arrest statement to police should have been suppressed because he asked for an attorney during questioning; trial court erred in refusing to enforce the earlier plea agreement offered by the Commonwealth; the jury was not racially representative of the population of Hardin County; trial court erred in refusing to suppress certain photos and an officer's statement received shortly before trial; and the Commonwealth failed to timely disclose exculpatory evidence – were not related to the search, seizure or arrest of Meghoo. Pursuant to RCr 8.09, "[w]ith approval of the court a defendant may enter a conditional plea of guilty, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified trial or pretrial motion." Since the five arguments were outside the scope of the specified pretrial and trial rulings that could be appealed from (not related to the search, seizure or arrest of Meghoo), they were waived and cannot be the subject of our appellate review in this case.

We now turn to Meghoo's argument that the VEOs did not have the legal authority to arrest him for trafficking in marijuana. Meghoo claims that pursuant to KRS 281.765, VEOs

have limited authority to make arrests, and since trafficking in marijuana was not an offense related to motor vehicles, the VEOs in the present case did not have legal authority to arrest Meghoo for that offense.

In Howard v. Transportation Cabinet, Commonwealth of Kentucky, Ky., 878 S.W.2d 14 (1994), our Supreme Court held that VEOs have the authority under KRS 281.765 to enforce any law relating to motor vehicles. KRS 281.765 provides in pertinent part:

> Any peace officer, including sheriffs and their deputies, constables and their deputies, police officers and marshals of cities or incorporated towns, county police or patrols, and special officers appointed by any agency of the Commonwealth of Kentucky for the enforcement of its laws relating to motor vehicles and boats or boating, now existing or hereafter enacted, shall be authorized and it is hereby made the duty of each of them to enforce the provisions of this chapter and to make arrests for any violation or violations thereof, and for violations of any other law relating to motor vehicles and boating, without warrant if the offense be committed in his presence, and with warrant or summons if he does not observe the commission of the offense. (emphasis added.)

While we would agree that the offense of trafficking in marijuana (KRS 218A.1421) is not an offense related to motor vehicles, Meghoo was also charged with possession of drugs in a commercial vehicle which is a violation of a federal regulation (49 C.F.R. § 392.4) as well as state law (KRS 281.600 - enabling

the adoption of federal motor carrier safety regulations through 601 KAR 1:005, Section 2 and declaring that violations of those adopted regulations to be violations of KRS 281.600). That offense is clearly related to motor vehicles. Thus, the VEOs had the legal authority to search for controlled substances in Meghoo's truck. If the search for drugs was lawful, as we shall discuss below, the question then becomes, did the VEOs also have the legal authority to arrest for an offense not related to motor vehicles when the evidence was discovered in the course of a motor vehicle-related search? We agree with the trial court that the VEOs had such authority under KRS 431.005(5).

KRS 431.005(5) states, "A private person may make an arrest when a felony has been committed in fact and he has probable cause to believe that the person being arrested has committed it." Other jurisdictions have held that police officers also have this right to make citizen arrests under certain circumstances such as when they are acting outside their jurisdiction or not acting in their official capacity. State v. McCullar, 110 Ariz. 427, 520 P.2d 299 (1974); People v. Wolf, 635 P.2d 213 (Colo. 1981); Dodson v. State, 269 Ind. 380, 381 N.E.2d 90 (1978). Meghoo notes, however, that an exception to this rule is if the police use the power of their official position to gain evidence that a private citizen would be unable to gather. State v. Phoenix, 428 So.2d 262 (Fla. Dist. Ct. App.

1982). Meghoo argues that because the VEOs in his case were using their official authority to search his truck, they could not make a citizen's arrest under KRS 431.005(5) based on the evidence found in that search. We disagree.

This was not a case where the police were acting outside their jurisdiction or not acting in their official capacity. As discussed above, the VEOs had the legal authority to search the truck, and they found the marijuana pursuant to this search. At the point that they found the marijuana, they only had the authority via their official position to arrest Meghoo for any motor-vehicle-related offenses. But, in our view, the VEOs were not required to turn a blind eye to the marijuana and any other felony that its possession comprised. We believe that once they lawfully discovered the marijuana, the VEOs had the authority to make a citizen's arrest for any non-motor-vehicle-related felony offense surrounding the marijuana. We see the situation as analogous to the plain view doctrine, which has been held to be applicable to searches conducted under the authority of KRS 431.005. Caine v. Commonwealth, Ky., 491 S.W.2d 824 (1973), cert. denied, 414 U.S. 876, 94 S. Ct. 80, 38 L. Ed. 2d 121 (1973). If VEOs act within their legal authority in conducting a search and come upon evidence of a non-motor-vehicle-related felony in plain view in the course of that

search, they may use their citizen's arrest authority to arrest the defendant for that felony.

Next, we turn to Meghoo's argument that the VEOs' warrantless search of his truck exceeded the scope of the regulatory search authorized by law. The Commonwealth maintains that Meghoo consented to the search by giving Officer Chelf the key to open the trailer and by signing the consent to search form.

All searches without a warrant are unreasonable unless the search falls under one of the exceptions to the warrant requirement. Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). Consent has been held to be an exception to the warrant requirement. United States v. Watson, 423 U.S. 411, 96 S. Ct. 820, 46 L. Ed. 2d 598 (1976). "The question of voluntariness [of the consent] turns on a careful scrutiny of all the surrounding circumstances in a specific case." Cook v. Commonwealth, Ky., 826 S.W.2d 329, 331 (1992). Whether a consent to search was voluntarily given is a question of fact to be determined by a preponderance of the evidence. Talbott v. Commonwealth, Ky., 968 S.W.2d 76 (1998).

Contrary to the Commonwealth's assertion, the trial court in this case did not find that Meghoo consented to the search. The court made his findings verbally on the record immediately after the suppression hearing. Relative to the

consent issue, the court stopped short of making a conclusive finding that there was no valid consent to the search, but pointed to the various shortcomings in the Commonwealth's consent argument. The court ultimately found that the search was lawful as a valid regulatory search. Assuming the court essentially found that Meghoo did not voluntarily consent to the search, we believe that finding was supported by a preponderance of the evidence.

As for the consent form, it was clearly signed after the initial search of the trailer which yielded the marijuana. Hence, it has no bearing in this case. Commonwealth v. Elliott, Ky. App., 714 S.W.2d 494 (1986).

The Commonwealth also argues that Meghoo gave his consent to the search by giving Officer Chelf the keys to the truck and trailer. The question of the voluntariness of consent to search is to be determined by an objective evaluation of police conduct and not by the defendant's subjective perception of reality. Farmer v. Commonwealth, Ky. App., 6 S.W.3d 144 (1999). Factors to be considered in assessing the voluntariness of consent include: "(1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation; (4) the defendant's awareness of his right to refuse consent; (5) the defendant's education and intelligence;

and (6) the defendant's belief that no incriminating evidence will be found." Baltimore v. Commonwealth, Ky. App., 119 S.W.3d 532, 540 n.34 (2003) (citing United States v. Portillo-Aguirre, 311 F.3d 647, 658-59 (5th Cir. 2002)).

Officer Chelf testified at the suppression hearing that he obtained the keys from Meghoo in response to the following statement, "I need your keys to turn the blower on, and we're now gonna search the truck." Officer Chelf also stated that during the search of the truck, Meghoo was sitting on the curb and was not free to leave, although he could not remember whether he had told Meghoo he had to stay there. At the time of the search, three VEOs were present, as well as the canine unit, which Meghoo knew was there to sniff for drugs. There was no evidence that Meghoo was aware that he could refuse consent; he was not read his rights until sometime after the search and consequent arrest. Most importantly, it is undisputed that Officer Chelf broke the seal on the truck before getting the keys from Meghoo.

In view of all the surrounding circumstances, we do not believe that Meghoo's handing the truck keys over to Officer Chelf constituted voluntary consent to the search. Officer Chelf admittedly did not ask Meghoo if he could search the trailer or if he could have the keys, but rather directed Meghoo to give him the keys after the officer had already broken the

seal to the trailer. Meghoo knew the dog and the VEOs were there to search the trailer, and he likely knew that he was not free to leave the scene. We believe that Meghoo had to feel that he had no choice but to give Officer the Chelf the keys.

We now must address whether the warrantless search of Meghoo's truck was lawful in the absence of his consent. On appellate review of a decision on a suppression motion, the lower court's findings of fact are conclusive if supported by substantial evidence and conclusions of law are reviewed *de novo*. Stewart v. Commonwealth, Ky. App., 44 S.W.3d 376 (2000). The facts in this case relative to the search are essentially undisputed. The trial court ruled that, under the facts, the warrantless search was a valid regulatory search pursuant to the administrative search exception enunciated in New York v. Burger, 482 U.S. 691, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987). The Burger Court recognized an exception to the warrant requirement for inspections of closely or pervasively regulated businesses.

> Under the Burger doctrine, such inspections must satisfy three criteria in order to pass Fourth Amendment muster. First, there must be a "substantial government interest that informs the regulatory scheme pursuant to which the inspection is made." [Burger], at 702, 107 S. Ct. 2636. Second, inspections must be necessary to advance the regulatory agenda. Id. Finally, the inspection program must provide constitutionally adequate safeguards to ensure both the

> certainty and regularity of its application. Id. at 703, 107 S. Ct. 2636. This last criterion looks to notice as to the scope of the search as well as limitations on the discretion afforded to inspecting officers.

United States v. Maldonado, 356 F.3d 130, 135 (1st Cir. 2004).

The Sixth Circuit in United State v. Dominguez-Prieto, 923 F.2d 464 (6th Cir. 1991), cert. denied, 500 U.S. 936, 111 S. Ct. 2063, 114 L. Ed. 2d 468 (1991), has held that commercial trucking is a pervasively regulated industry for purposes of the administrative search exception. In Kentucky, commercial trucking is regulated pursuant to KRS 281.600 which provides in pertinent part:

> The Department of Vehicle Regulation shall exercise all administrative functions of the state in relation to motor transportation as defined in this chapter, and shall apply, as far as practicable, the administrative and judicial interpretations of the Federal Motor Carrier Act. It shall have the right to regulate motor carriers as provided in this chapter, and to that end may establish reasonable requirements with respect to continuous and adequate service of transportation, systems of accounts, records and reports, preservation of records, and safety of operation and equipment. . . . [I]t shall have the power to promulgate administrative regulations as it may deem necessary to carry out the provisions of this chapter. The department shall have the authority to promulgate regulations regarding safety requirements for motor vehicles and the method of operation, including the adoption of any of the federal motor carrier safety regulations and any motor vehicle operating contrary to safety

> regulations shall be in violation of this section.

601 KAR 1:005, Section 2 adopts 49 C.F.R. §§ 40, 382-383, 385, and 390-397 of the federal motor carrier safety regulations. These regulations relate to, among other things, commercial driver's license standards, qualifications of drivers, hours of service, transportation of hazardous materials, controlled substances, alcohol use, inspection, repair, and maintenance.

Thus, we move on to the three-prong Burger criteria. In our view, Kentucky has a substantial interest in regulating commercial trucking to ensure traveler safety, protect roadways, and restrict what kinds of materials are coming into the state. As to the second prong, we believe that warrantless inspections are necessary to further the regulation of the commercial trucking industry in Kentucky. As the Court stated in Maldonado, 356 F.3d at 135-136:

> Because the industry is so mobile, surprise is an important component of an efficacious inspection regime. See United States v. Biswell, 406 U.S. 311, 316, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972) (stating that "if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential"); [United States v.] V-1 Oil Co., 63 F.3d [909] at 912 [(9th Cir. 1995)](similar). Fairly measured, the interest justifying warrantless searches in the interstate trucking industry are even greater than those present in Burger (which involved the

> regulation of junkyards) because of the speed with which commercial vehicles move from place to place. And finally, because violations of the regulatory scheme often are not apparent to a patrolling officer, inspections are sometimes the only way in which violations can be discovered. (citation omitted.)

Meghoo argues that the Commonwealth fails under the third prong of the Burger analysis, that the statutory scheme must provide notice as to the scope of the search and limitations on the discretion of the inspecting officers. We would note that this argument appears to be unpreserved by Meghoo as we do not see that it was raised below. RCr 10.12. In any event, it has been held that the regulations themselves provide adequate notice to commercial drivers that warrantless inspections may be conducted on state roadways at any time, especially in view of 49 C.F.R. § 390.3(e)(2) (adopted by Kentucky at 601 KAR 1:005, Section 2(5)) which requires commercial drivers to be familiar with the applicable regulations. Maldonado, 356 F.3d at 136.

In our view, the statutory/regulatory scheme in Kentucky puts commercial drivers on notice that warrantless inspections may be conducted to check for possible regulatory violations. As stated earlier, KRS 281.765 gives the VEOs authority to enforce all laws relating to motor vehicles, and enforcement of commercial trucking regulations would be

impossible without unannounced inspections. We would also note that although KRS 281.765 does not specifically mention inspections, KRS 281.755 does. KRS 281.755 provides:

> The commissioner and representatives of the Department of State Police may at any time or place make an inspection of any motor vehicle operating under the provisions of this chapter. They may enter into and upon any such motor vehicle for the purpose of ascertaining whether or not any provision of this chapter or any order or rule or regulation of the department relating to such motor vehicles has been violated. Willful refusal to stop any such motor vehicle, when ordered to do so by any representative of the department, or to permit the representative to enter into or upon the motor vehicle for the purpose of inspection, shall be sufficient ground for the revocation or suspension of the certificate or permit of the motor carrier.

We acknowledge, as Meghoo is quick to point out, that the VEOs in Kentucky are no longer under the authority of the Department of State Police. See Howard, 878 S.W.2d 14. Nevertheless, we still believe the statute puts commercial drivers on notice that they are subject to inspections "at any time or place" to check for regulatory violations.

The next question before us is whether the search at issue in the present case exceeded the scope of the administrative search exception as Meghoo insists. The initial stop/inspection in this case was unquestionably permissible. Officer Chelf approached Meghoo's truck at the weigh station and

simply asked to see his log book, which Meghoo was required by 49 C.F.R. § 395.8 (adopted in Kentucky at 601 KAR 1:005, Section 2 (9)) to keep current, and bills of lading. A VEO's request of a commercial truck driver to produce these kinds of documents is part of the permissible regulation inspection process. See Maldonado, 356 F.3d at 134. As for whether the initial permissible regulatory stop/inspection extended to the search of the trailer, i.e. whether VEOs can conduct warrantless searches of a truck's trailer as part of the regulatory inspection process, we adjudge that we need not reach this issue because, in this case, the VEOs had probable cause to search the trailer under the automobile exception to the warrant requirement.

When Officer Chelf examined Meghoo's log book, he noticed it was not current and contained discrepancies. Further, the bills of lading were handwritten, which Officer Chelf testified was unusual. After Officer Chelf allowed him to update and correct his log book, it was then inconsistent with the bills of lading. Only when pressed and asked to produce his receipts did Meghoo finally admit that he had written the bills of lading himself, which contradicted his earlier statement to Officer Chelf that the shipper had completed the bills of lading. At that point, Officer Chelf testified that he knew something was amiss and decided to call for the canine unit. According to Officer Chelf, when he told Meghoo that a canine

unit would be called to the scene, Meghoo got very nervous, his voice began to crack, and his knees got weak. After the dog alerted to the presence of drugs at the rear door of the trailer, Officer Chelf initiated the search of the trailer.

The automobile exception to the warrant requirement "allows officers to search a legitimately stopped automobile where probable cause exists that contraband or evidence of a crime is in the vehicle." Clark v. Commonwealth, Ky. App., 868 S.W.2d 101, 106 (1993). "Probable cause exists when the totality of the circumstances then known to the investigating officer creates a fair probability that contraband or evidence of crime is contained in the automobile." Id. at 107 (citing Illinois v. Gates, 462 U.S. 213, 229-31, 103 S. Ct. 2317, 2327-29, 76 L. Ed. 2d 527, 543 (1983)). "[W]here probable cause justifies the search of a lawfully stopped vehicle, it also justifies the search of every part of the vehicle and its compartments and contents that may conceal the object of the search." Estep v. Commonwealth, Ky., 663 S.W.2d 213, 215 (1983), (citing United States v. Ross, 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982)).

From our review of the totality of the circumstances in this case – the inaccurate log book, handwritten bills of lading, discrepancies between the log book and bills of lading, lying about the bills of lading, Meghoo's nervousness, and the

alert to the presence of drugs in the trailer by the dog[3] – the VEOs had sufficient probable cause to conduct a search of the trailer. Accordingly, the search of the trailer was lawful.

For the reasons stated above, the judgment of the Hardin Circuit Court is affirmed.

ALL CONCUR.

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[3] Officer Chelf also testified that Meghoo's route from Houston to New Jersey was a factor he considered in determining there was probable cause to search the trailer for contraband. However, he did not testify why such a route would indicate that he was carrying contraband.