

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-000076-MR

JACKIE LAMONT NEAL

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 14-CR-002357

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KRAMER, CHIEF JUDGE; MAZE AND STUMBO, JUDGES.

MAZE, JUDGE: On September 11, 2014, a Jefferson County grand jury returned an indictment charging Jackie Lamont Neal with five counts of first-degree robbery, and one count each of first-degree possession of a controlled substance (cocaine), and being a persistent felony offender in the first degree (PFO I). The robbery counts arose from five incidents occurring at four Jefferson County

Speedway stores on August 8, August 10, August 18, and August 31, 2014, respectively. Prior to trial, Neal moved to sever the possession count from the robbery count. The trial court denied the motion. Following a trial, the jury found Neal guilty on all counts. Thereafter, the jury fixed his sentence at a total of 17.5 years, which the trial court imposed. Neal now appeals from his conviction.

Neal first argues that the police lacked reasonable suspicion for a traffic stop of his vehicle on August 18, 2014. Consequently, he contends that any evidence flowing from that illegal stop should have been suppressed. Neal concedes that his trial counsel did not move to suppress evidence flowing from the traffic stop, but he asks this court to consider the issue on palpable error review. Under RCr¹ 10.26, a palpable error occurs when the substantial rights of a defendant are violated and a manifest injustice results. Manifest injustice requires “showing . . . [a] probability of a different result or error so fundamental as to threaten a defendant’s entitlement to due process of law.” *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006).

The parties agree about the circumstances of the stop at issue. On August 18, 2014, Louisville Metro Police Officer Tucker Raifsnider responded to a report of a robbery at the Speedway store located at the intersection of Taylorsville Road and Blowing Tree Road. The clerk reported that the robber was wearing shorts and had fled on foot in the direction of Blowing Tree Road. After taking the report, Officer Raifsnider returned to his patrol car.

¹ Kentucky Rules of Criminal Procedure.

From there, he turned onto Blowing Tree Road, a service road which primarily provides access to an apartment complex. He saw a white Ford F-150 truck in the oncoming lane heading toward Taylorsville Road. Due to the recent robbery, Officer Raifsnider activated his lights and stopped the truck. Officer Raifsnider observed that Neil, who was driving the truck, was wearing a grey work shirt, shorts, and a ball cap. After performing a cursory search of the interior of the truck and conducting a pat-down search, Officer Raifsnider released Neal.

The following day, Officer Raifsnider reviewed the surveillance video of the robbery and recognized Neal as the robber. He also observed that Neal's clothing was similar to that worn by the robber. A white Ford F-150 truck was also identified in the video from the August 8 robbery. Based on this and other information, the police obtained a search warrant for an apartment rented by Neal's fiancée. During that search, the police seized items of clothing similar to those worn by the robber. The police also searched a vehicle owned by Neal's fiancée, finding additional clothing and a package of cigarillos similar to those stolen during the August 31 robbery. Following his arrest, Neal denied any involvement in the robberies, but he admitted being in the vicinity of each of the robberies and sometimes driving a white Ford F-150 truck.

Neal argues that Officer Raifsnider had no reasonable suspicion for the traffic stop of his vehicle on August 18. Although Neal concedes that no evidence was seized during that stop, he notes that the police subsequently focused on him based upon Officer Raifsnider's identification following that stop.

Consequently, he argues that any evidence flowing from the illegal stop, including Officer Raifsnider's identification and the subsequent search warrant, should have been suppressed.

However, RCr 8.27² sets out the procedure for seeking suppression of evidence. When a defendant makes a motion to suppress evidence, the rule requires that trial court shall conduct an evidentiary hearing outside the presence of the jury and enter findings of fact resolving the essential issues raised by the motion. If the defendant never makes a motion to suppress, and the trial court has never been asked to make any findings of fact, then there simply is nothing for us to review, even for palpable error. *Galloway v. Commonwealth*, 424 S.W.3d 921, 927 (Ky. 2014). Therefore, any issue concerning the constitutionality of the traffic stop, or the suppression of evidence obtained as a result of that stop, is not properly before this Court.

Finally, Neal argues that the trial court erred by denying his motion to sever the possession of a controlled substance charge from the five robbery counts. Neal contends that the cocaine, which was found on him during a pat-down search after his arrest, had no connection to the robbery charges. He maintains that the evidence concerning the cocaine only served to unfairly prejudice him with respect to the robbery counts.

RCr 6.18 allows for the liberal joinder of offenses in separate counts of an indictment provided that the offenses are of "the same or similar character or

² Formerly RCr 9.78.

are based on the same acts or transactions connected together or constituting parts of a common scheme or plan.” *Peacher v. Commonwealth*, 391 S.W.3d 821, 836 (Ky. 2013). However, RCr 8.31 permits a trial court to grant separate trials if it appears that a defendant will be prejudiced by joinder for trial. A trial court enjoys broad discretion in regard to joinder and the decision will not be overturned absent a demonstration that this discretion was clearly abused. *Violet v. Commonwealth*, 907 S.W.2d 773, 775 (Ky. 1995). To merit relief under RCr 8.31, a defendant must prove that the joinder is so prejudicial as to be unfair or unnecessarily or unreasonably hurtful. *Ratliff v. Commonwealth*, 194 S.W.3d 258, 264 (Ky. 2006). One significant factor in determining whether joinder of offenses for trial is unduly prejudicial is whether evidence of one of the offenses would be admissible in a separate trial for the other offense. *Spencer v. Commonwealth*, 554 S.W.2d 355, 357 (Ky. 1977). Furthermore, the joinder of offenses is proper where the crimes are closely related in character, circumstances, and time. *Ratliff*, 194 S.W.3d at 264.

The Commonwealth does not contend that the cocaine was directly related to any of the robberies. However, the Commonwealth notes that the cocaine was found during the course of the police investigation of those robberies. In addition, the police found the cocaine during a pat-down search of Neal upon his arrest, and Neal was wearing the same clothes as those worn by the robber on August 18.

Furthermore, Neal does not identify any clear prejudice other than that the jury might have viewed his possession of cocaine as proof of his disposition to commit the robberies. Given the close temporal proximity between the robbery and the possession charge, the fact that the cocaine was found during the investigation of the robberies, and the lack of a substantial showing of prejudice, we agree with the Commonwealth that the trial court did not abuse its discretion by denying the motion to sever the charges.

Accordingly, we affirm the judgment of conviction by the Jefferson Circuit Court.

ALL CONCUR.

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