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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000477-MR

CHAD EVERETT BOLIN — APPELLANT

v.

APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE KAREN LYNN WILSON, JUDGE
ACTION NO. 17-CR-00452

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, JONES, AND L. THOMPSON, JUDGES.

JONES, JUDGE: Appellant, Chad Bolin, pleaded guilty to first-degree possession of a controlled substance, possession of a firearm by a convicted felon, possession of drug paraphernalia, operating a motor vehicle on a suspended license, failure to maintain insurance, and driving under the influence. He appeals from the Henderson Circuit Court's judgment of conviction and sentence, which was

entered following Bolin's conditional plea of guilty.[1] Bolin argues the trial court improperly denied his motion to suppress the evidence seized from the vehicle he was driving at the time he was stopped by law enforcement. Following review of the record and applicable law, we affirm the Henderson Circuit Court.

I. BACKGROUND

On August 29, 2017, Trooper Joseph Hensley of the Kentucky State Police pulled over a vehicle for expired registration. Bolin was driving the vehicle; the owner was in the passenger seat. During the stop, Trooper Hensley observed Bolin sweating profusely, shaking, and talking very quickly. He was also drinking from two bottles, one Mountain Dew, and one tea, in quick succession. Bolin said he was "extremely hot and thirsty." Trooper Hensley ran the Social Security number Bolin provided him through dispatch and discovered Bolin had a suspended driver's license and unrelated warrants for his arrest.

Based on his observations of Bolin, Trooper Hensley also believed Bolin might have been driving the vehicle under the influence of drugs. He asked Bolin to step out of the vehicle to perform field sobriety tests. Bolin successfully completed the first test; however, Trooper Hensley noticed Bolin's pupils were

[1] Pursuant to Kentucky Rules of Criminal Procedure ("RCr") 8.09, "[w]ith the 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."

dilated, and his eyelids were "droopy." Trooper Hensley decided more tests were in order. Bolin showed no signs of intoxication on a second test but failed the final three tests. At this point, Trooper Hensley placed Bolin under arrest for driving under the influence and on the outstanding warrants. Trooper Hensley then asked Bolin whether he had recently used any drugs. Bolin responded by admitting that he had used methamphetamine prior to operating the vehicle. Trooper Hensley then asked Bolin if there was methamphetamine in the vehicle, to which Bolin replied there may be.

Following this exchange, Trooper Hensley contacted dispatch to send out the Henderson Police Department K-9 Unit. When the K-9 Unit arrived, the canine hit on the front driver's seat. The vehicle was then searched. Officers discovered methamphetamine, drug paraphernalia, and a loaded firearm in the vehicle.

Bolin was indicted on charges of first-degree possession of a controlled substance, possession of a firearm by a convicted felon, possession of drug paraphernalia, operating a motor vehicle on a suspended license, failure to maintain insurance, and operating a motor vehicle under the influence. On January 31, 2018, Bolin moved to suppress the evidence obtained during the traffic stop. The trial court conducted a suppression hearing on February 13, 2018. Trooper

Hensley was the only witness.[2] He testified it was his custom to give *Miranda*[3] warnings, but he could not remember whether he had done so in this case.[4] He further testified he had specialized "ARIDE"[5] training allowing him to observe, identify, and articulate the signs of impairment related to drugs and/or alcohol. Based on Bolin's demeanor and his physical characteristics during their initial interactions related to the traffic stop, Trooper Hensley believed Bolin had been operating the vehicle while under the influence of drugs.

The trial court sustained Bolin's motion to suppress in part and denied it in part. It determined that Bolin's statements to Trooper Hensley had to be suppressed because he made the statements in response to questioning while in custody, but without having first been given the mandatory *Miranda* warnings. The trial court, however, did not suppress the evidence from the search of the vehicle Bolin was driving. The trial court determined that even without the statements, there was probable cause for Trooper Hensley to believe the vehicle

[2] Bolin was not brought over from the detention center because there was some miscommunication with the transporting officer. The trial judge offered to wait until he could be transported, but his counsel elected to proceed without him.

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

[4] Trooper Hensley was also cross-examined about his testimony at the preliminary hearing. Trooper Hensley said he remembered testifying but did not specifically remember his testimony. The trial judge took judicial notice of the hearing, but it was not included with the record.

[5] Advanced Roadside Impaired Driving Enforcement.

contained evidence related to the offense of arrest, DUI, inside the vehicle. Alternatively, the trial court determined Bolin lacked "standing" to object to the search because the vehicle's owner was a passenger and did not object to its search.

Thereafter, Bolin entered a guilty plea conditioned on his right to appeal the trial court's denial of his motion to suppress introduction of the evidence seized from the vehicle. This appeal followed.

II. STANDARD OF REVIEW

"The standard of review of a pretrial motion to suppress is twofold." *Whitlow v. Commonwealth*, 575 S.W.3d 663, 668 (Ky. 2019).

> First, we review the trial court's findings of fact under a clearly erroneous standard. Under this standard, the trial court's findings of fact will be conclusive if they are supported by substantial evidence. We then conduct a *de novo* review of the trial court's application of the law to the facts to determine whether its decision is correct as a matter of law.

Id. (quoting *Simpson v. Commonwealth*, 474 S.W.3d 544, 547 (Ky. 2015)).

III. ANALYSIS

The Fourth Amendment of the United States Constitution, as applied to the states under the Fourteenth Amendment, and Section 10 of the Kentucky

Constitution provide safeguards against unreasonable searches and seizures.[6] "The basic purpose of [the Fourth] Amendment, as recognized in countless decisions of [the United States Supreme Court] is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. The Fourth Amendment thus gives concrete expression to a right of the people which 'is basic to a free society.'" *Singleton v. Commonwealth*, 364 S.W.3d 97, 101 (Ky. 2012) (quoting *Wolf v. Colorado*, 338 U.S. 25, 27, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949), *overruled on other grounds by Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961)). Fourth Amendment jurisprudence is premised on "the basic rule that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" *Arizona v. Gant*, 556 U.S. 332, 338, 129 S.Ct. 1710, 1716, 173 L.Ed.2d 485 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (footnote omitted)). "One such exception is the automobile exception which permits an officer to search a legitimately stopped vehicle where probable cause exists that contraband or evidence of a crime may be in the vehicle." *Morton*

[6] Section 10 of the Kentucky Constitution "provides no greater protection than does the federal Fourth Amendment." *Artis v. Commonwealth*, 360 S.W.3d 771, 774 (Ky. App. 2012) (quoting *LaFollette v. Commonwealth*, 915 S.W.2d 747, 748 (Ky. 1996), *abrogated on other grounds by Kyllo v. United States*, 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001)).

v. Commonwealth, 232 S.W.3d 566, 569 (Ky. App. 2007). Additionally, in some instances, law enforcement may lawfully search a vehicle without a warrant incident to an occupant's recent arrest. This right, however, is not unlimited. "[P]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Owens v. Commonwealth*, 291 S.W.3d 704, 708 (Ky. 2009) (quoting *Gant*, 556 U.S. at 351, 129 S.Ct. at 1723). With these principles in mind, we now turn to the parties' arguments relative to the search of the vehicle that occurred in this case.

Bolin asserts that the trial court erred when it denied his motion to suppress the evidence seized from the vehicle he was driving immediately prior to his arrest. Bolin maintains that because the trial court suppressed his statement to the arresting officer regarding his use of methamphetamine, the trial court should have likewise suppressed the evidence seized from the vehicle he was driving as fruits of the poisonous tree. The Commonwealth counters that even though the trial court decided the ultimate issue, this Court should affirm on the basis that Bolin did not have a reasonable expectation of privacy in the automobile at issue

because his passenger, who was present, owned the vehicle and did not object to the search.[7]

"[P]roperty rights are not the sole measure of Fourth Amendment violations." *Carpenter v. United States*, __ U.S. __, 138 S.Ct. 2206, 2213, 201 L.Ed.2d 507 (2018) (quoting *Soldal v. Cook County*, 506 U.S. 56, 64, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992)). Instead of focusing on property ownership or the lack thereof, we engage in a multi-step analysis predicated on the expectation of privacy from governmental intrusion. "When an individual 'seeks to preserve something as private,' and his expectation of privacy is 'one that society is prepared to recognize as reasonable,' we have held that official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause." *Id.* (quoting *Smith v. Maryland*, 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979)).

[7]The Commonwealth couches its argument in terms of whether Bolin had "standing" to object to the search that yielded the evidence at issue. Our Supreme Court recently reminded "the bench and bar that a 'standing' analysis is improper under Fourth Amendment substantive law." *Warick v. Commonwealth*, __ S.W.3d __, No. 2018-SC-000229-DG, 2019 WL 4072774, at *3 (Ky. Aug. 29, 2019). The logic is that all criminal defendants subjected to a search or seizure by law enforcement officials technically have "standing" to bring a Fourth Amendment challenge. Whether such a claim is successful is a different matter. That determination requires consideration of the substance of the claim. *Rawlings v. Commonwealth*, 581 S.W.2d 348, 349 (Ky. 1979), *aff'd sub nom.*, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980). The first step in the analysis is to determine whether the person has a legitimate expectation of privacy in the place searched. *Rakas v. Illinois*, 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387 (1978). Accordingly, hereinafter we will evaluate the Commonwealth's standing argument in terms of whether Bolin had a legitimate expectation of privacy in the vehicle he was driving, which was owned by his passenger.

We must now consider whether Bolin had a legitimate expectation of privacy in the vehicle he was driving where the vehicle's owner was riding with him as a passenger. To date, Kentucky's appellate courts have not weighed in on this exact issue.[8] But, we are not left without any guidance; the United States Supreme Court and our own appellate courts have considered other scenarios that assist in our analysis of the issue before us. We are also guided by decisions that are on point from several lower federal courts and other states' appellate courts.

We begin with *Rakas*, a 1978 opinion by the United States Supreme Court. The issue in *Rakas* was whether passengers in a vehicle that they did not own had a reasonable expectation of privacy in the vehicle's interior. The Court noted that the passengers' legitimate and permissive presence in the car was "not determinative of whether they had a legitimate expectation of privacy in the particular areas of the automobile searched." *Rakas*, 439 U.S. at 148, 99 S.Ct. at 433. The Court focused more on the total nature of the passengers' presence than merely on the fact that their presence was permissive. At all relevant times, the passengers shared their occupancy with the vehicle's owner. Their occupancy was brief and never exclusive. They did not exercise complete dominion and control

[8] "[W]e leave for another day the question of whether someone driving another person's vehicle may properly contest a search of that vehicle when there is no direct evidence that the arrestee-driver had or lacked the vehicle owner's permission to drive the vehicle." *McCloud v. Commonwealth*, 286 S.W.3d 780, 786 (Ky. 2009).

over the vehicle and had no reasonable belief they could exclude others from it. After considering these factors in combination with one another, the Court held that the passengers could not demonstrate a violation of their Fourth Amendment rights with respect to law enforcement's search of the vehicle's interior compartment and trunk.

Applying *Rakas*, Kentucky courts have held that non-possessory vehicle passengers do not have a legitimate expectation of privacy in the vehicle's trunk or interior compartment. As such, they cannot object to a search of those areas. *See Commonwealth v. Fox*, 48 S.W.3d 24, 28 (Ky. 2001) ("Peters, as a passenger, did not have standing to object to the search of the vehicle."); *Lindsey v. Commonwealth*, 306 S.W.3d 522, 527 (Ky. App. 2009) ("[I]t remains the law that a passenger does not have standing to challenge the *search* of a car in which he is riding unless he has some property interest in the car.").

The analysis changes somewhat when the vehicle's owner is not present at the time of the search. Courts have held that a non-owner driver may be able to demonstrate a reasonable expectation of privacy if the owner has relinquished control to the driver such that it can be said that the driver exercises complete dominion and control over the vehicle in the owner's absence. In *United States v. Portillo*, 633 F.2d 1313 (9th Cir. 1980), the Ninth Circuit held that a non-owner driver had a reasonable expectation of privacy where he established that he

had "permission to use his friend's automobile and the keys to the ignition and the trunk, with which he could exclude all others, save his friend, the owner." *Id.* at 1317.

The focus in cases like *Portillo* is on the exclusivity of control. When the owner is not present, the driver exercises both navigational and possessory control of the vehicle. The ability to unilaterally admit or exclude others creates an expectation of privacy, even if the expectation is not permanent in nature. When the owner of the vehicle is present, however, courts have been far less willing to hold that the non-owner driver has a legitimate expectation of privacy. In *United States v. Jefferson*, 925 F.2d 1242 (10th Cir. 1991), Jefferson, his brother, and Tillis were driving in Tillis' car when the car was pulled over and searched. Drugs were found, and Jefferson was charged with possession. Jefferson argued that the drugs should be suppressed, since the officer did not have probable cause to search the vehicle and since Jefferson was driving the car when it was stopped. The Tenth Circuit Court of Appeals concluded that because Tillis, who was present in the car, did not transfer a possessory interest in the vehicle to Jefferson, Jefferson did not have a reasonable expectation of privacy sufficient to allow him to contest the search. *Id.* at 1251.[9]

[9] *See also McKee v. State*, 112 Nev. 642, 645, 917 P.2d 940, 942 (1996) ("McKee was driving a car while the owner (Lovely) was riding as a passenger. Since Lovely did not give up possession

Having surveyed the case law, we hold that whether the non-owner driver of a vehicle has a reasonable expectation of privacy with respect to the vehicle's compartments and interior hinges on whether the owner has relinquished both possession of and control over the vehicle to the non-owner such that the non-owner driver formed a subjective expectation of privacy that society is prepared to accept as reasonable. This is a fact intensive inquiry and one that the defendant bears the burden of proving as exemplified by *United States v. Lochan*, 674 F.2d 960 (1st Cir. 1982). In *Lochan*, the court analyzed the various factors that are important to the analysis as follows:

> Appellant relies upon the facts that he was driving the Camaro when it was stopped, that he had the vehicle's registration in his pocket, and that he had been on a trip several hundred miles from home. The fact that Lochan was driving, presumably with Fraser's consent, is one factor to be considered, as is the fact of the long trip, which would engender a slightly greater privacy expectation than would a short trip. Possession of the vehicle registration indicates control, but this is diluted by the owner's presence. These facts are far outweighed by several others. Appellant did not own the car, nor was there evidence that he had used the car on other occasions. There was no evidence as to the responsibility or control appellant had over the automobile other than the fact that he was driving it when stopped. According to the evidence, he had no luggage or other personal

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of the vehicle to McKee, McKee did not have a reasonable expectation of privacy in the vehicle."); *People v. Flowers*, 111 Ill.App.3d 348, 353, 444 N.E.2d 242, 246 (1982).

> belongings stored in the trunk or behind the seat, which might have produced a privacy expectation in those storage areas. Appellant also did not show that he had a subjective expectation of privacy in the Camaro. In addition, appellant never claimed any interest in the hashish seized. Appellant failed to meet his burden of proof of a privacy expectation. . . . The facts in this case are so overwhelmingly against appellant, [] that we are on certain ground in reviewing the transcript of the suppression hearing. The only witnesses at the hearing were trooper Cram and agent Cunniff. Appellant had ample opportunity to present more evidence[.]

Id. at 965.

In this case, the owner/passenger relinquished some control over the vehicle to Bolin insomuch as she allowed Bolin to exercise navigational command of the vehicle. Even that control was limited, however, because the owner/passenger remained present. Most importantly, however, Bolin made no showing that the owner relinquished any possessory control or interest to him that would create either a subjective or objective expectation of privacy. Bolin did not show that he had driven the vehicle on prior occasions, that the trip was prolonged, or that he was regularly allowed to store personal items in the vehicle's compartments. At all times, the owner/passenger remained present. As the

vehicle's owner, the passenger had the right to decide whether to admit entry to another person.[10]

Bolin offered no evidence showing that he had exclusive control of the car or that his control of the steering wheel and occupancy of the driver's seat were anything more than a temporary agreement to limited command of the vehicle that at all times was subject to the whims of the owner/passenger. Bolin could have presented additional evidence at the hearing. Instead, he relied solely on the fact that he was driving the vehicle. This fact, standing alone, is not sufficient. The only difference between this case and *Rakas* is the fact that Bolin was in the driver's seat as opposed to the passenger's seat. Based on the facts of record, we agree with the Commonwealth and the trial court that Bolin did not have a reasonable and legitimate expectation of privacy with respect to the interior of the vehicle. As such, he cannot demonstrate a violation of his Fourth Amendment rights with respect to the search.

Even though Bolin did not have a reasonable expectation of privacy in the vehicle's interior, this does not mean that his Fourth Amendment rights were not implicated. Two different interests are a stake: a seizure and a search. All occupants of a car have the right to contest their unlawful seizure that is

[10] "One who owns and possesses a car, like one who owns and possesses a house, almost always has a reasonable expectation of privacy in it." *Byrd v. United States*, __ U.S. __, 138 S.Ct. 1518, 1527, 200 L.Ed.2d 805 (2018).

independent of their property interest. Although a defendant may lack the requisite possessory or ownership interest in a vehicle to directly challenge a search of that vehicle, the defendant may nonetheless contest the lawfulness of his own detention and seek to suppress evidence found in the vehicle as the fruit of the illegal detention. *Epps v. Commonwealth*, 295 S.W.3d 807, 811 (Ky. 2009), *overruled on other grounds by Davis v. Commonwealth*, 484 S.W.3d 288 (Ky. 2016). Additionally, a detention that is lawful at the onset can evolve into one that is illegal if the officer unreasonably prolongs the stop. *See, e.g.*, *Davis*, 484 S.W.3d at 293 ("[A] police officer may not extend a traffic stop beyond its original purpose for the sole purpose of conducting a sniff search—not even for a *de minimis* period of time.").

Trooper Hensley testified that he stopped the vehicle Bolin was driving because it had an expired registration tag. Thus, there was a legitimate reason for the initial stop. As part of the stop, Trooper Hensley spoke with Bolin and took his information to check for any outstanding warrants. "[O]ne of the routine tasks associated with a proper traffic stop [is] a check for any outstanding warrants that may be pending against the driver." *Moberly v. Commonwealth*, 551 S.W.3d 26, 30 (Ky. 2018) (citing *Rodriguez v. United States*, __ U.S. __, 135 S.Ct. 1609, 1615, 191 L.Ed.2d 492 (2015)). Trooper Hensley's check revealed that Bolin had a suspended driver's license and unrelated warrants for his arrest.

Additionally, based on Bolin's behavior, Trooper Hensley suspected that Bolin was under the influence of drugs. Trooper Hensley offered specific facts that gave rise to his suspicions: Bolin's complaints of extreme thirst, his drinking from two different containers, his sweating, his shaking, and his quick speech. These facts provided Trooper Hensley with a valid reason to extend/prolong the stop to conduct field sobriety tests. Bolin failed three out of the five tests administered by Trooper Hensley. Additionally, during the tests Trooper Hensley observed that Bolin had dilated pupils and droopy eyelids, additional evidence of intoxication. At this point, Trooper Hensley had cause to place Bolin under arrest for DUI. Even without cause to arrest for DUI, there was cause to arrest based on the outstanding warrants. After Bolin was placed under arrest, Trooper Hensley called for the K-9 Unit. It is unclear exactly when this call was made, before or after the statement. Even without Bolin's statement, Trooper Hensley would have had reason to call for a K-9 Unit based on his conclusion that Bolin was under the influence of illegal substances. And, the K-9 Unit did not prolong the stop because the stop had already morphed into an arrest by that time.

The search occurred after Bolin's arrest. Even though we hold that Bolin did not possess the required privacy interest in the vehicle's interior to contest the search, we cannot disagree with the trial court's analysis that the search itself was valid as a search incident to arrest. Additionally, because the suppressed

statements did not lead to Bolin's arrest, the arrest itself was valid. "Presumably, the drugs [and other contraband] in the car also would have been discovered either by an inventory search or a search pursuant to a warrant," implicating the doctrine of inevitable discovery. *Davis*, 484 S.W.3d at 295; *see also Hughes v. Commonwealth*, 87 S.W.3d 850, 853 n.1 (Ky. 2002) (noting that even though the trial court did not directly consider the applicability of the inevitable discovery doctrine, the Court could consider it where doing so required only the recognition of "the existence of an indisputable fact").

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the Henderson Circuit Court.

ALL CONCUR.

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