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Commonwealth v. Everly

COMMONWEALTH OF PENNSYLVANIA v. TERRY W. EVERLY, JR., Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Criminal Action No. 599 of 2002

Pa. R. Crim. P. 581(a), (h) - Suppression of Evidence; Plain View Exception; Plain View Exception - Use of a Flashlight

1. The Defendant may make a motion to this Court to suppress any evidence alleged to have been illegally obtained.
2. Once the Defendant has raised the issue of illegality under Rule 581, the Commonwealth has the burden to show that the evidence seized was not obtained in violation of the Defendant's rights.
3. The Commonwealth must establish that the evidence has an incriminating character which is immediately apparent, the officer is located in a place where the evidence can be plainly seen and the officer has a right of lawful access to the evidence itself. *Commonwealth v. Graham*, 721 A.2d 1075 (Pa. 1998).
4. Officer Creager observed a marijuana seed and a marijuana bud, both having incriminating character that is immediately apparent and can be linked to criminal activity.
5. Officer Creager's years of experience in the field of identifying illegal drugs and drug paraphernalia and his observance of what he believed to be a marijuana seed and marijuana bud establish the incriminating character of the evidence seized was immediately apparent.
6. The shining of a flashlight into the defendant's vehicle by an officer when the officer had the legal right to stand next to defendant's vehicle during a routine traffic stop does not negate the applicability of the Plain View Exception.

Appearances:

Nancy H. Meyers, Esq., *Assistant District Attorney*

Deborah K. Hoff, Esq., *Assistant Public Defender*

OPINION

Walker, P.J., November 13, 2002

Factual Summary

Defendant Terry Everly was stopped by Officer Creager for an inoperable headlamp and illegal window tinting. While Officer Creager was issuing a warning to the defendant, two other police officers on the scene first observed, through the use of a flashlight, a marijuana seed and a marijuana bud on the front passenger seat. These two police officers alerted Officer Creager who then shined his flashlight into the car. Officer Creager, based upon his experience, confirmed the two officers' suspicions. The defendant took sole responsibility for the marijuana in the car.

The defendant filed his omnibus motion and asked this court to suppress the evidence seized by

Officer Creager. A hearing on this matter was held on October 1, 2002. At the conclusion of the evidence the court asked both parties to submit a memorandum supporting their respective positions and cite to authority for their propositions.

The defendant presents that the search of his vehicle was illegal and that all evidence obtained as a result of that search should be suppressed. The defendant argues that the search cannot be justified as a search incident to a lawful arrest because such a search would be based upon the search of an arrested person in order to remove weapons, or for evidence on the defendant's person or within his control. The defendant next argues that the search cannot be justified under the plain view exception to the warrant requirement because the incriminating nature of the evidence seized was not immediately apparent, Officer Creager was not lawfully located in a place where the evidence could have been plainly seen and Officer Creager did not have right of access to the evidence seized.

The Commonwealth responds that the search was incident to a lawful arrest because the testimony showed that Officer Creager readily identified the seed and the bud found on the front seat as marijuana. Also, the testimony indicated that Officer Creager had training and experience in the field on how to identify different types of drugs and drug paraphernalia. The Commonwealth also argues that the items seized were in plain view because the officers observed the marijuana seed and the marijuana bud on the front seat.

The court has reviewed the record, the defendant's omnibus pre-trial motion, the hearing on the motion, the defendant's letter in support of his motion, and the Commonwealth's letter in opposition to the defendant's motion and the applicable law.

This opinion and order results from such review.

Discussion

This court holds that the marijuana seed and the marijuana bud were legally seized and will not be suppressed. As such, the defendant's motion for suppression of the marijuana seed and the marijuana bud is denied.

Under Rule 581 of the Pennsylvania Rules of Criminal Procedure, the defendant may make a motion to this court to suppress any evidence alleged to have been illegally obtained. Pa. R. Crim. P. 581(a). In the instant case, the defendant argues that the evidence obtained by Officer Creager should be suppressed because the search of the vehicle violated his Fourth Amendment and Article I §8 rights against unreasonable searches and seizures. Once the defendant has raised the issue of illegality under Rule 581, the Commonwealth has the burden to show that the evidence seized was not obtained in violation of the defendant's rights. Pa. R. Crim. P. 581(h).

In his brief, the defendant argues two things. First, the defendant argues that the search cannot be justified as a search incident to a lawful arrest because the defendant was not arrested and out of reach of the vehicle. Second, the defendant argues that the search cannot be justified under the plain view exception to the warrant requirement because the incriminating nature of the evidence seized was not immediately apparent. Because this court holds that the Commonwealth has established that the search of the vehicle falls under the plain view exception to the warrant requirement, this court will not address the defendant's first argument.

For the plain view exception to apply, the Commonwealth, during the hearing, must establish that the evidence has an incriminating character which is immediately apparent, the officer is lawfully located in a place where the evidence can be plainly seen and the officer has a lawful right of access to the evidence itself. Commonwealth v. Graham, 721 A.2d 1075 (Pa. 1998).

The defendant argues that the incriminating nature of the evidence seized was not immediately apparent. That may be true for some people. Officer Creager, on the other hand, testified that he had years of experience in the field of identifying illegal drugs and drug paraphernalia. Obviously, Officer Creager would be able to identify a marijuana seed and marijuana bud. This court believes that Officer Creager had identified the incriminating nature of the marijuana seed and marijuana bud before seizing them. The two other officers had already identified that they saw something suspicious. They got the attention of Officer Creager. It is at this point when Officer Creager shined his flashlight into the vehicle to get a better look. In fact, testimony at the suppression hearing established that Officer Creager immediately identified the marijuana seed and the marijuana bud on the front seat after shining the flashlight into the defendant's vehicle. It is also important to note that the use of the flashlight does not preclude the applicability of the plain view exception. See Commonwealth v. Merkt, 600 A.2d 1297, 411 Pa. Super. 127 (Pa. Super. Ct. 1992). As a result, the defendant's argument that the incriminating nature of the evidence was not immediately apparent does not hold water.

Second, the Commonwealth must establish that the officer is lawfully located in a place where the object can be plainly seen. The defendant presents that the officer looked into the defendant's opened passenger window. For this reason, the defendant believes that the second prong of the plain view doctrine is lacking.

This court does not share that same belief. Officer Creager observed the marijuana seed and marijuana bud through the use of a flashlight, and then opened the door to seize them. The Superior Court has held that when an officer observed, including with a flashlight, the incriminating nature of the object before entering the vehicle, the officer did not conduct a general search, but instead the officer seized what he observed in plain view. Commonwealth v. Merkt, 600 A.2d 1297, 411 Pa. Super. 127 (Pa. Super. Ct. 1992). That's exactly what happened here. Officer Creager observed both the marijuana seed and the marijuana bud, then seized these two objects from inside the vehicle. Consequently, the defendant's argument is misplaced.

Finally, the Commonwealth must establish that the officer had the right of access to where the object was located. The defendant presents that the officer did not have right of access to the defendant's vehicle. The defendant argues that the officer violated his expectation of privacy by retrieving objects that could not be considered weapons or in the control of the defendant. The defendant cites Commonwealth v. Houston, 689 A.2d 935 (Pa. Super. Ct. 1997) (where the court found that the officer had seized the defendant's jacket and found a plastic bag in the jacket pocket in violation of the defendant's rights). For this reason, the defendant argues that the third prong of the plain view doctrine is lacking.

Once again, the defendant has come up with the wrong conclusion. Under the third prong, the Commonwealth must establish that the officer had probable cause to believe that the observed object is linked to criminal activity. As far as this court knows, possession of marijuana is considered a criminal activity. The testimony indicates that Officer Creager had enough experience to know when he was looking at a marijuana seed and a marijuana bud. The record also indicates that the officer had every right to stand next to the defendant's vehicle during a routine traffic stop. The defendant does not question the legality of the traffic stop.

The defendant's reliance on Houston is misplaced. The officer in Houston grabbed the jacket in the back seat of the defendant's car and then found the incriminating bag. The jacket is not incriminating in nature and cannot be linked to criminal activity. Here, Officer Creager observed a marijuana seed and a marijuana bud, both have incriminating character that is immediately apparent and can be linked to criminal activity. By the same token, this court believes that if the marijuana seed and the marijuana bud were found in the car outside the view of the officers, then this court would have come up with a different conclusion. But, the way it stands now, both the marijuana seed and the marijuana bud were in plain view, and as a result, the defendant's argument that the officer did not have right of access to the defendant's vehicle has no basis.

For the above reasons, the court holds that the Commonwealth has established that the evidence observed and seized by Officer Creager did not violate the defendant's rights under the Fourth Amendment and Article I §8 of the Pennsylvania Constitution because the marijuana seed and the marijuana bud were in plain view of Officer Creager.

Conclusion

After reviewing the record, the defendant's omnibus pre-trial motion, the hearing on the motion, the defendant's letter in support of his motion, and the Commonwealth's letter in opposition to the defendant's motion and the applicable law, the defendant's motion to suppress the search of the defendant's vehicle and all of the evidence seized from that search is denied for the reasons stated above.

ORDER OF COURT

November 13, 2002, after reviewing the record, the hearing on the motion, the defendant's letter in support of his motion, and the Commonwealth's letter in opposition to the defendant's motion and the applicable law, the defendant's motion to suppress the search of the defendant's vehicle and all of the evidence seized from that search, the court hereby denies the defendant's omnibus pre-trial motion.