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Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-001452-MR

WILLIAM MILES CLARK

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 10-CR-01263

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, LAMBERT, AND STUMBO, JUDGES.

CLAYTON, JUDGE: William Miles Clark appeals a judgment of the Fayette Circuit Court following his conditional plea to one count of prohibited use of an electronic communication system to procure a minor to engage in a sex offense. Clark entered his conditional guilty plea by reserving the issues herein, and he

argues that the trial court erred in when it partially denied his motion to suppress.

We affirm.

On August 2, 2010, a detective with the Crimes Against Children section of the Lexington Police Department used an undercover profile of a fourteen year-old girl to interact with Clark in an online computer chat room. As the conversation continued over several hours, Clark asked where the profile lived, said he wanted to meet her, and expressed a desire to have sexual intercourse with her. In response, the profile indicated that “she” lived in a neighborhood next to the Lakeside Golf Course.

While the conversation ensued, other Lexington police set up surveillance in the parking lots of the golf course. Clark told the profile that he was driving a blue Lexus. The police observed a car, a gray Ford Focus, which did not match the car identified by Clark, but was seen driving around the designated meeting spot. In addition, even though the vehicles did not match, the Focus was driving in a manner consistent with the “directions” given by the profile. The Focus drove in the golf course parking lot, from one parking lot to another, and also into the profile’s supposed neighborhood. A police officer observed the Focus drive between the two parking lots and park at least six times plus enter into the profile’s “neighborhood” at least twice. At one point, Clark was observed going into the public restroom at the golf course. Not only was his vehicle the only one in the front lot, he was also the only person there. Meanwhile, Clark and the

profile were instant messaging back and forth to find a meeting place at the golf course.

Then, after some time, Clark left the golf course and drove toward Richmond Road. Then, a police officer pulled him over, and coincidentally, the “chatting” between Clark and the profile ceased. When the officer approached Clark’s driver’s side door, he saw in plain view, two laptop computers, an air card, and a power cord used to power laptops from a car cigarette lighter. The officer asked Clark to get out of the vehicle and answer some questions. After several minutes, he put handcuffs on him, placed him in the back of his police vehicle and indicated that Clark’s car was to be towed. Moreover, the police officer informed Clark that he was being lawfully detained. Clark was not read his rights at any time during this encounter.

The police officer took him to police headquarters where he was interviewed. Following the initial questioning, he was informed that he was free to leave. Nevertheless, he continued speaking with the police officer and admitted that he had been chatting with the profile. The police officer then read him his rights. Next, the detective, who posed as the fourteen year-old girl, began asking Clark questions. According to Clark, the statements he had made prior to being given his *Miranda* rights were referenced throughout the police interview. When the detective finished the interview, Clark was arrested and charged with the prohibited use of electronic communication system to procure a minor/peace officer to engage in a sex offense. Later, a search warrant was executed to explore

Clark's vehicle. Among the seized items were the two laptop computers that had been in his car when he was pulled over.

On October 4, 2010, Clark was indicted for one count of prohibited use of an electronic communication system to procure a minor to engage in a sexual offense. The police citation states that the crime occurred on or about August 2, 2010, that Clark used a computer to access a chat room and arranged to meet with an undercover police officer posing as a fourteen-year old girl to engage in sexual intercourse. Clark was arraigned on the charge on October 15, 2010, and entered a plea of not guilty.

Clark filed a motion to suppress all the evidence that was seized from his car. Further, the motion requested that all statements made by him to police after he was stopped be suppressed. On January 31 and February 2, 2011, the trial court conducted an evidentiary hearing on the motion. At the conclusion of the hearing, the trial court ordered that the parties file briefs and reply briefs.

On March 22, 2011, the trial court entered its order, which partially granted the motion to suppress. The court ordered that Clark's pre-*Miranda* statements made at the golf course and at the police station be suppressed. Specifically, with regard to whether the statements made after the *Miranda* warnings, the trial court found that the questioning, which occurred before and after the *Miranda* warning, was not differentiated, and therefore, unconstitutional. Based on this analysis, the trial court also granted the motion to suppress the statements made after the *Miranda* warnings.

But the portion of Clark's suppression motion related to his purported request for counsel was denied by the trial court. The trial court determined that he had not made an unambiguous and unequivocal invocation of his right to counsel. Finally, the trial court considered the motion request to suppress all evidence obtained through the search warrant since some statements in the affidavit had been suppressed. Clark argued that the seized evidence should be suppressed as fruit of the poisonous tree. While the trial court agreed that improper statements had been relied upon for the issuance of the search warrant, it found that even without the use of the suppressed statements, the warrant had enough independent evidence to support a finding of probable cause. Hence, the trial court denied the part of the motion to suppress evidence obtained via the search warrant.

Clark entered a conditional guilty plea on May 6, 2011, and was sentenced on July 22, 2011. The trial court sentenced him to one year in prison with the execution of the sentence probated for five years. In his conditional guilty plea, Clark reserved the right to appeal the issues raised in the motion to suppress. This appeal follows.

On appeal, Clark makes the case that improper statements were relied upon in the issuance of the search warrant, and consequently, all evidence obtained through the search warrant should be suppressed as fruit of the poisonous tree. Further, Clark maintains that all questioning should have ceased upon Clark's invocation of his right to counsel. The Commonwealth counters that the trial court properly denied Clark's motion to suppress evidence obtained via the search

warrant because of the independent source doctrine and that any error resulting from the trial court's denial of Clark's motion to suppress based on his invocation of the right to counsel is moot.

Our standard of review of a trial court's denial of a motion to suppress is two-fold as set out in *Ornelas v. U.S.*, 517 U.S. 690, 116 S.Ct. 1657, 134 L. Ed. 2d 911 (1996), and adopted by Kentucky in *Adcock v. Commonwealth*, 967 S.W.2d 6 (Ky. 1998). First, we determine whether the "findings of fact are supported by substantial evidence[.]" *Id.* at 8. If the findings are supported by substantial evidence, they are conclusive and will not be disturbed. *Commonwealth v. Harrelson*, 14 S.W.3d 541, 549 (Ky. 2000). Secondly, we conduct a de novo review of the trial court's application of the law to the established facts to determine whether its ruling was correct as a matter of law. *Adcock*, 967 S.W.2d at 8. Under de novo review, we afford no deference to the trial court's application of the law to the established facts. *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998).

First, we address the efficacy of the search warrant. As noted above, the trial court found that the police officers acted unconstitutionally and suppressed his statements made before and after the *Miranda* warnings. Therefore, because the affidavit for the search warrant contained some of these statements, Clark propounds that the evidence obtained via the warrant should also be suppressed because it is fruit of the poisonous tree. The trial court, however, pointed out that under *Hayes v. Commonwealth*, 320 S.W.3d 93 (Ky. 2010), in order to suppress

the evidence procured as a result of the search warrant “the defendant is required to show that: (1) the affidavit contains intentionally or recklessly false statements, and (2) the affidavit, purged of its falsities, would not be sufficient to support a finding of probable cause.” *Id.* at 101.

The trial court, after reviewing the affidavit, without the excluded statements, concluded that there was sufficient evidence to support a finding of probable cause. Clark disputes this interpretation and states that without the tainted statements, insufficient evidence exists for probable cause. Our review shows that the trial court purposely and meticulously reviewed the affidavit. We do not disagree with her ultimate evaluation. For example, the affidavit described an internet chat between an undercover police officer and a subject with a yahoo messenger I.D., “masterjforpet”; the subject was repeatedly told that the “profile” was a girl under the age of fourteen; the conversation was sexually explicit and included information that the subject was looking for a “hook-up,” which he explained meant a desire for sexual intercourse; the subject suggested the Lakeside Golf Course as a meeting place; a Ford Focus was seen driving around the golf course parking lots and into the profile’s alleged neighborhood at the directions of the profile/undercover officer; and, the conversation ceased as soon as Clark was stopped. In addition, in Clark’s car were cellular phones, lap top computers, and a GPS. We, too, have reviewed the affidavit and believe that the trial court did not abuse its discretion in making the finding that probable cause existed in the affidavit without using the suppressed statements.

Besides arguing that sufficient probable cause did not exist under the affidavit, Clark also maintains that the trial court used an incorrect standard to ascertain the validity of the search warrant. Rather than determining whether the information was false, this case involves, according to Clark, a different analysis because constitutional rights were violated. Apparently, Clark cloaks this argument under the suggestion that the information in the affidavit was obtained not by false information but by coercion. Clark proffers that the fruit of the poisonous tree doctrine presents a legal question, and therefore, necessitates de novo review. We disagree with his interpretation of the required review. As explained above, on appeal, if substantial evidence supports the trial court's factual findings, those findings are conclusive. *Sublett v. Commonwealth*, 203 S.W.3d 701 (Ky. 2006). But next, an appellate court must conduct a de novo review about whether the trial court's decision was correct as a matter of law as applied to those facts. *Adcock*, 967 S.W.2d at 6. Therefore, while we have decided that the trial court had substantial evidence to support the search warrant, we will now review whether the appropriate legal theory was used.

Clark suggests that the correct analysis lies with the fruit of the poisonous tree and cites *Welch v. Commonwealth*, 149 S.W.3d 407 (Ky. 2004) to support this contention. In *Welch*, the defendant was subject to a custodial interrogation by a counselor and made incriminating statements. Subsequently, the Court held that not only should the incriminating statements be suppressed but also that all evidence derived from those statements should be suppressed as well. In

the instant case, *Welch* is inapposite because ultimately the evidence used for the search warrant was not based on Clark's incriminating statements. In fact, his incriminating statements were excluded.

The Commonwealth counters that the evidence from the search warrant was appropriately used herein because it was derived from source independent of the excluded statements in the affidavit. The independent source doctrine is an exception to the exclusionary rule. *Wilson v. Commonwealth*, 37 S.W.3d 745, 748 (Ky. 2001). As explained in *Wilson*:

[t]he exclusionary rule, based upon the Fourth Amendment's prohibition against unreasonable searches and seizures, provides that evidence obtained through an illegal search is not admissible against an accused." Thus, evidence cannot be admitted against an accused if the evidence is derivative of the original illegality, i.e., is "tainted" or is the proverbial "fruit of the poisonous tree."

Id. (footnotes omitted). But the Court reasoned in *Wilson* that "[e]vidence [does not have to] be excluded if the connection between the illegal conduct and the . . . seizure of the evidence . . . has been obtained by means 'sufficiently distinguishable' from the initial illegality so that the evidence is 'purged of the primary taint.'" *Id.* (footnotes omitted). Contrary to Clark's assertion that the confession was the key to the issuance of the search warrant, we concur with the trial court's legal analysis that evidence from an independent source was the primary basis for the issuance of the search warrant.

Consequently, if the police discover evidence from an “independent source,” unrelated to their illegal conduct, the evidence can be admitted against a defendant despite his invocation of the exclusionary rule. *Id.* In sum, the exclusionary rule has no application if the evidence comes from a source that is independent from the illegality, since the evidence’s taint of illegality is purged. *Id.* Applying the law to the instant case, we conclude that the independent source rule is applicable and that the trial court properly applied the law to the facts pertinent to the search warrant.

Clark’s next major argument involves his invocation for counsel. Although Clark agrees that his testimony at the suppression hearing regarding a request for counsel did not reach the level of a clear, unequivocal assertion of the right to counsel, he maintains that he had requested counsel earlier in the process and that request was unequivocal. Clark describes that while being handcuffed, he asked the officer about contacting an attorney but was interrupted and told that he would be given an opportunity to do so later. Clark, then, declares, without any legal reference, that the proper remedy in such a case is the suppression of all statements.

Initially, we respond to Clark’s introduction of a second request for counsel, which apparently was not presented to the trial court during the suppression hearing as it is not referenced to the trial record. Clark’s attempt to now offer new evidence is problematic. This Court is not a trial court, and as such, we do not review new evidence. Notwithstanding this factor, we observe that the

trial court, when it denied this part of Clark's motion to suppress did grant the portion of Clark's suppression motion that requested the exclusion of all statements made by him to the police. Therefore, because the same remedy would have been available had the police officer violated Clark's right to counsel, this issue is moot. The trial court did not abuse its discretion on this issue.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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