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# Commonwealth Of Kentucky

# Court of Appeals

NO. 2001-CA-002723-MR

JESSICA MARLANA HAMILTON — APPELLANT

v.

APPEAL FROM FULTON CIRCUIT COURT
HONORABLE WILLIAM LEWIS SHADOAN, JUDGE
ACTION NO. 01-CR-00030

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: BAKER, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. This is an appeal from an order denying appellant's motion to suppress alleging a lack of probable cause to stop the vehicle in which appellant was riding. Because we believe that the police had reasonable grounds to conduct an investigatory stop of the vehicle, the motion to suppress was properly denied. Hence, we affirm.

On April 10, 2001, at around 9:00 p.m., Officer John Ward of the Fulton Police Department observed a car parked in

the parking lot of the Fulton City Park. The car was the only car in the lot, had its lights on, and was backed into a parking space in the back of the lot. Ward testified that at the time, there was no activity going on in the park and there was no one else in the park. Ward explained that the car drew his suspicion because the police had experienced previous problems in that park with people parking and drinking. He stated that he was additionally concerned that the occupants of the car might damage park equipment. Hence, Officer Ward pulled into the lot and approached the car to see what was going on. As he pulled into the lot, the car immediately pulled out of the space and started to leave the park. The officer stated that he was sure the occupants of the car saw his car when he pulled in. Ward further testified that, although his car is unmarked, it is very well known to people in the area as a police car because it otherwise looks like a police car. In fact, he stated that people in the area have a nickname for his car.

As the car pulled out of the lot, Ward began to follow it. It was at this point that Ward noticed that the car had out of town tags, from Marshall County. When the car reached the entrance to the park, it turned right down a dead-end street, instead of turning left, which leads out of the park. Officer Ward continued to follow the car down the dead-end street until the car pulled into a driveway. Because Officer Ward knew the

owners of the home in question and knew that they did not own a car like the one that had pulled in, Ward pulled into the driveway behind the vehicle in question and turned on his lights.

As Officer Ward got out of his car and approached the vehicle, he noticed the smell of alcohol. When he got to the window of the car, he recognized the driver and one of the passengers as being from Fulton, and he knew that the driver was not eighteen and that the passenger was not twenty-one. Further, Ward stated that he knew that both individuals knew him and knew his car. Officer Ward also observed open beer bottles between the legs of the back seat passenger and front seat passenger, appellant, Jessica Marlana Hamilton. Thus, he asked them to exit the car. As Ward was talking to appellant and the other passenger, he looked back in the car and noticed in plain view a blunt, a hollowed out cigar filled with marijuana, on the car's console. Ward stated that he knew it was a blunt because he could see the marijuana sticking out of it. Based on these observations, Ward arrested Hamilton for possession of alcohol by a minor, possession of marijuana, and unlawful transaction with a minor in the second degree. Hamilton was thereafter indicted on all three offenses.

Subsequently, Hamilton filed a motion to suppress

all the evidence seized from the car in the stop made by Officer Ward. After a full evidentiary hearing, the trial court denied the motion, adjudging there was reasonable suspicion to conduct an investigatory stop of the vehicle. Following the denial of the suppression motion, Hamilton entered a conditional plea of guilty to all three charges for which she was indicted, reserving the right to appeal the denial of her suppression motion. Hamilton was sentenced to twelve months in jail on the possession of marijuana charge and five years in prison on the second-degree unlawful transaction with a minor charge, probated for five years. She was also fined $50 for possession of alcohol and $1,000 for unlawful transaction with a minor, second degree. This appeal by Hamilton followed.

Hamilton argues that because Officer Ward did not have probable cause to believe that a traffic violation occurred, the stop of the car was not justified. Hamilton cites cases holding that so long as an officer has probable cause to believe that a traffic violation has occurred or was occurring, the resulting stop is not unlawful. United States v. Johnson, 242 F.3d 707 (6th Cir. 2001), cert. denied, 534 U.S. 863, 122 S. Ct. 145, 151 L. Ed. 2d 96 (2001); United States v. Freeman, 209 F.3d 464 (6th Cir. 2000). However, in the instant case, the officer does not contend that he stopped the subject car because of a traffic violation.

In Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), it was held that an officer may conduct an investigatory stop of a person if he has a reasonable articulable suspicion that the person is involved in or is about to become involved in criminal activity. See also Taylor v. Commonwealth, Ky., 987 S.W.2d 302 (1998). "In order to determine whether there was a reasonable articulable suspicion, the reviewing court must weigh the totality of the circumstances." Id. at 305, citing Alabama v. White, 496 U.S. 325, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990). In analyzing these situations, officers are allowed to draw on their own experience and specialized training. United States v. Arvizu, 534 U.S. 266, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002). In some cases, factors that alone would be consistent with innocence can, in combination, serve as the basis for a reasonable suspicion that criminal activity is afoot. United States v. Sokolow, 490 U.S. 1, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989). See also Simpson v. Commonwealth, Ky. App., 834 S.W.2d 686 (1992).

In the present case, the car in question was parked in a parking lot after dark in a park in which there was no other activity at the time. Also relevant was Officer Ward's testimony that there had been previous problems in this park with parking and drinking in cars. When Officer Ward pulled

into the parking lot, the car immediately pulled out of its space and began leaving the park. Given Ward's testimony that he was sure that the occupants of the car had to have seen his car pull in and that his car was known to many in the area as a police car, it was reasonable for him to conclude that the car was attempting to evade him. Evasive behavior has been held to be a pertinent factor in determining reasonable suspicion. Illinois v. Wardlow, 528 U.S. 119, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000). Finally, the car turned down a dead-end street and pulled into a residential driveway in which the officer knew the car did not belong. Under these circumstances, we believe it was reasonable for the officer to suspect that the occupants of the car may have been engaged in some illegal activity.

The facts of this case are similar to those in Creech v. Commonwealth, Ky. App., 812 S.W.2d 162 (1991), wherein an officer observed a car parked in the corner of a bar's parking lot late at night with two people inside leaning toward each other. When the officer turned into the lot, the car immediately started to leave. The officer stopped the vehicle and pursuant to an observation of drug paraphernalia in plain view, searched the car and found cocaine. In adjudging that the initial stop was lawful, the Court stated, "it would be reasonable to suspect, considering the totality of the circumstances, that [the occupants] could have been involved

with a stolen vehicle or certainly could have been engaging in some criminal activity at the time and place [the officer] observed them." Id. at 164. See also United States v. Dawdy, 46 F.3d 1427 (8th Cir. 1995), cert. denied, 516 U.S. 872, 116 S. Ct. 195, 133 L. Ed. 2d 130 (1995), and United States v. Briggman, 931 F.2d 705 (11th Cir. 1991), cert. denied, 502 U.S. 938, 112 S. Ct. 370, 116 L. Ed. 2d 322 (1991), (where the Courts upheld investigatory stops under similar circumstances.)

Hamilton's second argument is that, pursuant to RCr 8.09, she was improperly required to serve jail time despite the fact that she entered a conditional guilty plea. From our reading of RCr 8.09, there is nothing in the rule precluding a court from requiring that the defendant begin serving his or her sentence while the reserved issue is on appeal. Likewise, we are unaware of any other authority so stating.

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

ALL CONCUR.

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