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Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000881-MR

JA'NET R. TAYLOR — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 99-CR-002998

COMMONWEALTH OF KENTUCKY — APPELLEE

AND

NO. 2002-CA-000884-MR

ERIC L. CATO — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 99-CR-002998

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART
AND
REVERSING IN PART AND REMANDING
** ** ** ** **

BEFORE: EMBERTON, Chief Judge; BARBER and COMBS, Judges.

COMBS, JUDGE: These appeals arise from the denial by the Jefferson Circuit Court of motions filed by Eric L. Cato and Ja-Net R. Taylor to suppress evidence against them. Following the denial of their motions, Cato and Taylor entered conditional pleas of guilty to the charged offenses. Their appeals were designated to be heard together. We affirm in part and reverse in part and remand.

On the evening of May 28, 1999, Officer Doug Sweeney of the Louisville Police Department observed a maroon Pontiac driven by Taylor enter a Walgreen's parking lot. Cato was seated in the front passenger seat of the automobile. The Pontiac approached and stopped near another occupied vehicle. Next, Sweeney observed what he believed was an illegal drug transaction among the occupants of the vehicles. Officers Scott Irish and Kevin Thompson, waiting nearby, where advised by Sweeney to pursue the Pontiac. Officers Irish and Thompson were following immediately behind the Pontiac when the car turned suddenly to the left (without signaling) and turned suddenly again to the left (also without signaling) into a residential driveway.

The officers initiated a routine traffic stop. When Irish and Thompson approached the car, they observed a marijuana "blunt" in plain view in the interior of the Pontiac. Taylor and Cato were arrested as they exited the vehicle, and quantities of crack cocaine were retrieved from the vehicle. The officers then conducted a protective sweep of the interior of the residence.

No evidence was seized. However, following the issuance of a search warrant, the residence was more carefully inspected. This subsequent search revealed items of drug paraphernalia, additional amounts of crack cocaine, and $430 in cash.

In December 1999, multi-count indictments charged Taylor and Cato with trafficking in cocaine, possession of marijuana, and possession of drug paraphernalia. Taylor was charged individually with failing to give a proper traffic signal. At the pretrial suppression hearing, Taylor and Cato asserted several challenges as to the conduct of the police: (1) the legality of the traffic stop and the resulting seizures of evidence from the vehicle, (2) the legitimacy of the officers= protective sweep of the residence, and (3) the legality of the subsequent search of the residence pursuant to the warrant.

In denying the suppression motion, the trial court observed with respect to the traffic stop that "[e]ven a pretextual traffic stop is permitted" and "the Defendants have developed no credible evidence that officers' observations of traffic violations were not true." Opinion and Order at 2-3. The court concluded that "[t]he marijuana blunt in plain view justified the arrest of the Defendants and the subsequent search of the Pontiac." Id. No evidence was seized in connection with the officers' sweep of the residence; and no information from that sweep was used in obtaining the warrant. Therefore, the trial court declined to comment on its constitutional

implications. Finally, the trial court concluded that the subsequent search of the residence pursuant to the warrant was proper. The appellants= guilty pleas followed.

The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Temporary detention of individuals during the stop of an automobile by the police C even if only for a brief period C constitutes a "seizure" of "persons" within the meaning of this provision. Delaware v. Prouse, 440 U.S. 648 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977). An automobile stop is clearly subject to the constitutional imperative that it not be unreasonable or arbitrary. As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred. See Prouse, supra.

Regardless of the officers' subjective motivation to stop the vehicle, it is clear that they had probable cause to believe that the traffic code had been violated in this case.[1] KRS 189.380 provides as follows:

> (1) A person shall not turn a vehicle or move right or left upon a roadway until the movement can be made with reasonable safety nor without giving an appropriate signal in the manner herein provided.
> (2) A signal indicating the intention to turn right or left shall be given

[1]Taylor=s argument for suppression fails to take into account that the disputed stop of the vehicle was premised on the traffic violation.

> continuously for not less than the one hundred (100) feet traveled by the motor vehicle before the turn.

Cato does not dispute the officers' testimony that Taylor failed to activate the Pontiac's turn signal. Instead, he argues that the code was not in fact violated since no other vehicles were affected by Taylor's failure to signal. We disagree. Officers Irish and Thompson testified that they were startled by the Pontiac=s sudden turns and that Officer Irish was required to apply his brake quickly -- presumably to avoid a collision. There was no evidence presented to indicate that Taylor=s brake lights alerted the officers to the vehicle=s sudden turns. The officers were aware of the requirements of the traffic code, observed the open traffic violation, and promptly and properly enforced the law.

Cato also intimates that the officers used their obligation to enforce provisions of the traffic code as a subterfuge. He asks us to carefully scrutinize the officers= testimony as to the subjective purpose of the initial stop. He requested oral argument in this case by contending that Ait is important to determine the limits of enforcement of traffic laws as means by which police stop targeted vehicles which they otherwise have no legitimate cause to stop.@ However, the United States Supreme Court has noted its "unwillingness to entertain Fourth Amendment challenges based on the actual motivations of individual police officers" and has held unanimously that

"subjective intentions play no role in ordinary, probable cause Fourth Amendment analysis." Whren v. United States, 517 U.S. 806, 813, 135 L.Ed.2d 89, 116 S.Ct. 1769 (1996).

In Whren, the petitioners contended that police attempts to use a valid basis of action against citizens as a pretext for pursuing other investigatory agendas should be prohibited. The Supreme Court rejected that argument. A[O]nly an undiscerning reader would [argue] that ulterior motives can invalidate police conduct that is justifiable on the basis of probable cause to believe that a violation of law has occurred.@ 517 U.S. at 811, 135 L.Ed. 2d 89 at 96. AIn United States v. Robinson, we held that a traffic-violation arrest (of the sort here) would not be rendered invalid by the fact that it was >a mere pretext for a narcotics search.=@ 517 U.S. at 812, 135 L.Ed.2d at 97. (Citation omitted). While Cato indicates that the federal courts have begun "to comment on the potential for abuse of the seeming free rein given police by Whren," the Supreme Court has recently reaffirmed C without reservation or limitation C the rationale and holding of Whren. See Arkansas v. Sullivan, 532 U.S. 769, 149 L.Ed.2d 994, 121 S.Ct. 1876 (2001).

In this case, the trial court found that the officers had probable cause to believe that Taylor had violated the traffic code. That finding is supported by substantial evidence. Thus, they had probable cause under the Fourth Amendment to make

the traffic stop -- thereby rendering admissible the evidence discovered following the initial stop. The trial court did not err by denying the motion to suppress evidence seized from the vehicle.

No evidence was seized as a result of the officers' initial warrantless search of the house C allegedly a Aprotective sweep.@ Therefore, in the absence of any evidence derived from this source, neither Cato nor Taylor can mount a Fourth-Amendment challenge. Cato also contends that the officers' initial presence inside the residence constituted criminal trespass. That issue is not before us and has no bearing on the suppression matter arising under the Fourth Amendment.

Finally, Cato and Taylor contend that the court should have suppressed the items seized from the residence during the second search for which a warrant had been obtained. We agree. Relying on this court's holding in Guth v. Commonwealth, Ky. App., 29 S.W.3d 809 (2000), they argue that the affidavit submitted for the search warrant was fatally deficient since it failed to allege any connection between the location of the drug transaction and the residence. Without addressing this argument directly in its brief, the Commonwealth nevertheless argues that the affidavit stated facts sufficient to establish probable cause for the search of the residence.

In Guth, supra, we held that an affidavit submitted for a search warrant must allege some connection between the place

where the illegal transaction took pace and the residence to be searched. Without such a nexus, the affidavit was quite simply insufficient according to Guth. The Guth court held that probable cause to search a residence could not be found or inferred where observations of drug trafficking occurring in one location did not indicate any reason to believe that relevant evidence might be found in a residence some distance away. The facts before us reveal no departure or distinction from our reasoning and holding in Guth. Consequently, we are compelled to reverse the trial court=s order denying the motion to suppress the evidence retrieved from the search of the residence.

We affirm the judgment and sentence of the trial court as it relates to charges relative to evidence seized from the vehicle. We reverse the judgment and sentence of the trial court with respect to the charges related to the evidence recovered from the residence and accordingly remand this matter for proceedings consistent with this opinion.

ALL CONCUR.

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