RENDERED: May 30, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001564-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM BATH CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 01-CR-00072

GENEVA SWARTZ — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, McANULTY, and PAISLEY, Judges.

COMBS, JUDGE. The Commonwealth of Kentucky appeals from an order of the Bath Circuit Court which granted the motion of the appellee, Geneva Swartz, to suppress the use of evidence seized during a warrantless search of her motor vehicle. After reviewing the record, we conclude that the trial court erred in suppressing the evidence. Thus, we vacate and remand.

On the evening of October 29, 2001, Trooper Tony Perkins, a drug enforcement officer with the Kentucky State

Police, was patrolling in Bath County with Maggie, a dog trained to detect controlled substances. Trooper Perkins saw an unlit vehicle enter Highway 36. Although the driver subsequently turned her lights on, Trooper Perkins continued to monitor the car. He activated his blue lights to stop the vehicle after observing the driver commit two minor traffic offenses: changing lanes without signaling and turning onto a side road without giving a turn signal. Instead of stopping immediately, Swartz drove for about one-half mile before responding to the trooper's lights.

Trooper Perkins testified that he smelled alcohol as he approached the vehicle. He asked Swartz, who was the sole occupant of the vehicle, to step out of the car. He determined by her gait and her speech that she was not impaired by the effects of alcohol. Nevertheless, Trooper Perkins became suspicious that she might have drugs based upon his observation of a plastic bag sticking out of the top of her purse as well as her overall reaction to the stop. He testified that Swartz was "unusually nervous" and "very evasive." When Trooper Perkins inquired about her destination, Swartz told the officer that she was on her way to her daughter's apartment. However, she was not able to remember the number or the location of the apartment.

When Trooper Perkins asked for permission to search the vehicle, Swartz refused. Trooper Perkins then called for back-up for the purpose of having another officer watch Swartz while he walked his dog around the exterior of the car to sniff for the presence of illegal drugs. Maggie indicated that drugs were present both on the passenger's side and on the driver's side of the car. The officers then searched the car and found seven bags containing methamphetamine, drug paraphernalia, a set of scales, and $720 in cash.

Swartz was arrested and charged with first-degree trafficking in a controlled substance. She moved to suppress the evidence obtained during the search of her vehicle. In the order entered on July 1, 2002, the trial court granted the motion, concluding that Trooper Perkins did not have a reasonable suspicion to detain Swartz in a carefully reasoned and well drafted synopsis of the facts:

> It is not uncommon for most citizens -- whether innocent or guilty -- to exhibit signs of nervousness when confronted by a law enforcement officer. United States v. Wood, 106 F.3d 942 (10th Cir.1997). This Court can not find that the defendant's failure to remember her daughter[']s apartment number constitutes a basis for reasonable articulable suspicion, as opposed to nervousness on the part of the defendant.
>
> It is the opinion of this court that the arrest on October 29, 2001[,] was directly related to a four (4) month investigation by the same drug task force

that stopped the Defendant for the traffic violation on October 29, 2001. Because of their continuing involvement with the Defendant, it is assumed that this drug task force knew the make and model of the vehicle the Defendant was driving and had prior knowledge of drug trafficking by the Defendant which was the motivating factor to search her car.

Although the Defendant has been charged by this same drug task force for Trafficking in a Controlled Substance, First Degree for alleged incidents that occurred on June 29, 2001, and October 9, 2001, those cases were not presented to the Montgomery County Grand Jury until March 8, 2002. The last date of the alleged Montgomery County offenses was less than three weeks prior to the stop of the Defendant for the traffic violation on October 29, 2001, in the case at bar. This stream of activity leads this court to believe that the drug task force targeted the Defendant for the traffic violation with the ultimate goal of charging her with an additional charge of Trafficking in a Controlled Substance in Bath County, in addition to her Montgomery County charges. In essence this also constitutes a profiling.

This Court has examined the totality of the circumstances in this case, and finds that Trooper Perkins' basis for suspicions, centered upon seeing the corner of a plastic "baggie" sticking out of the defendant's purse. While it may be true that such "baggies" are used in illegal drug activity, they are also a common everyday item purchased at local grocery stores for all types of uses[;] further, he merely stated that she acted nervous and evasive during the stop without expounding on the nature of such actions. When viewing the totality of the circumstances this Court finds that Trooper Perkins did not have a reasonable articulable suspicion of criminal activity

> sufficient to detain the defendant after completion of the initial traffic stop.

On appeal, we review the factual findings of a trial court in the context of a suppression hearing under the standard of clear error. Stewart v. Commonwealth, Ky.App., 44 S.W.3d 376, 380 (2001). We review the court's legal conclusions *de novo*. Id., see also, Commonwealth v. Banks, Ky., 68 S.W.3d 347, 349 (2001), citing Ornelas v. United States, 517 U.S. 690, 691, 116 S.Ct. 1657, 1659, 134 L.Ed.2d 911 (1996).

The facts in the case are not in dispute. Swartz concedes that Trooper Perkins had probable cause to stop her vehicle. In light of the diminished expectation of privacy in a motor vehicle, a motorist legally stopped has become vulnerable to "probable-cause searches" of his vehicle pursuant to the automobile exception to the warrant requirement. Clark v. Commonwealth, Ky., 868 S.W.2d 101, 106-107 (1993); Estep v. Commonwealth, Ky., 663 S.W.2d 213, 215 (1983). In short, as the law has evolved in this area, our expectations of privacy in an automobile have become enormously eroded. Thus, once Maggie indicated the presence of drugs in the vehicle, Officer Perkins was entitled to search the interior without a warrant. Id.; see also, Raglin v. Commonwealth, Ky., 812 S.W.2d 494 (1991). Our only task is to determine whether the trial court erred as a matter of law in concluding that Trooper Perkins lacked the

requisite reasonable suspicion to justify his detention of Swartz for the time required for him to walk his trained drug dog around her car.

The Commonwealth argues that under the totality of circumstances in this case, Trooper Perkins had an objectively reasonable suspicion to detain Swartz. It also contends that the trial court erred in considering the trooper's subjective motives in determining whether he acted pursuant to a reasonable suspicion in detaining Swartz. Alternatively, the Commonwealth maintains that a dog sniff is not a search as contemplated either by the Fourth Amendment to the United States Constitution or by Section Ten of the Kentucky Constitution. Consequently, it argues that if there is probable cause to stop a vehicle initially, an officer is not required to articulate additional facts to illustrate his reasonable suspicion of criminal activity in order to expand the scope of the stop for purposes of a canine sweep of the area.

Swartz argues that the initial legal stop of her vehicle was transformed into an illegal detention for the purpose of conducting a drug investigation. She argues that the trial court correctly concluded that there was no justification for her detention to allow the canine reconnaissance.

Under the federal and Kentucky constitutions, an investigatory stop of a vehicle is permissible if the stop is

supported by reasonable suspicion. Ornelas v. United States, supra; Creech v. Commonwealth, Ky.App., 812 S.W.2d 162, 163 (1991). Reasonable suspicion is a less stringent standard than probable cause. United States v. Sokolow, 490 U.S. 1, 7, 1009 S.Ct. 1581, 104 L.Ed.2d 1 (1989). Whether a police officer has reasonable suspicion must be determined by examining the totality of the circumstances. Terry, supra at 20-23, 88 S.Ct. at 1878-81. The Supreme Court has recently reiterated that in considering the evidence under reasonable-suspicion standard, a trial court must consider all the relevant factors —- even factors that might appear to be entirely innocuous. United States v. Arvizu, 534 U.S. 266, 277-78, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002). The Supreme Court stressed that police officers are entitled:

> to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that "might well elude an untrained person."

Id., quoting United States v. Cortez, 449 U.S. 411, 417-418, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981).

We agree that it is a close call as to whether Trooper Perkins had a reasonable, articulable suspicion that criminal activity was afoot so as to justify extending the traffic stop. Nevertheless, we agree with the Commonwealth that under the current state of the law, the trooper enjoyed considerable

latitude in forming his belief that he had reasonable suspicion. We note with interest that the court was apparently persuaded that Swartz was the target of an on-going police investigation involving drug trafficking. Despite the possibility or even probability that profiling may have been the real incentive of the police, the law now dictates that the subjective motives of an officer are not germane to search and seizure inquiries. See, Whren v. United States, 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996), and Wilson v. Commonwealth, Ky., 37 S.W.3d 745 (2001). The parameters of such reasoning are admittedly sobering; but such are the repercussions of the greatly expanded scope of the automobile exception to the warrant requirement of the Fourth Amendment.

Considering the totality of the circumstances and according due weight to the inferences drawn by Trooper Perkins, we are compelled to hold that the officer had a reasonable suspicion that Swartz might be engaged in illegal activity. Therefore, he was justified in detaining her for the purpose of allowing his dog to sniff the exterior of her car. Additionally, if Trooper Perkins were indeed aware of Swartz's previous involvement with drug trafficking, that knowledge would bolster his heightened suspicion that the baggie in her purse was likely to contain illegal drugs. See, Collier v. Commonwealth, Ky.App., 713 S.W.2d 827, 828 (1986). The

circumstances surrounding the stop include: the location of the stop (an area known to law enforcement officers as one where significant amounts of drug trafficking occurs); Swartz's failure to stop immediately after Trooper Perkins activated his blue lights; her extreme nervousness; her inability to give either the address or physical location of where she said she was going; and the presence of a plastic baggie in her purse (known to Trooper Perkins to be a frequent packaging material for drugs). While none of these factors alone would have supported an inference that Swartz was engaged in criminal activity, they create a basis for reasonable suspicion when evaluated in conjunction with one another.

Finally, the Commonwealth points to several cases from other jurisdictions holding that a dog sniff is not a search as contemplated by the constitutional prohibitions against unreasonable searches and seizures. Because we have concluded that Trooper Perkins did have a reasonable suspicion to justify the dog sniff, we need not elaborate upon those cases – especially since the Commonwealth did not raise this alternative basis in the trial court for justifying the search. As it has not been properly preserved for our review, we decline to address this argument.

The order of the Bath Circuit Court is vacated, and this case is remanded for additional proceedings as indicated by this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Albert B. Chandler III
Attorney General of Kentucky

Carlton S. Shier, IV
Assistant Attorney General
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Linda Roberts Horsman
Frankfort, Kentucky