

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001895-MR

KENNETH CIMIOTTA

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
ACTION NO. 01-CR-00342

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

REVERSING AND REMANDING

** ** * * *

BEFORE: McANULTY AND SCHRODER, JUDGES, AND HUDDLESTON, SENIOR JUDGE.¹

SCHRODER, JUDGE. Kenneth Cimiotta appeals his convictions for trafficking in marijuana (KRS 218A.1421), possession of drug paraphernalia (KRS 218A.500), first-degree possession of a controlled substance (KRS 218A.1415), and operating a motor vehicle with alcohol concentration of or above 0.08 or while

¹ Senior Judge Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

under the influence of alcohol or other substance (KRS 189A.010), under a conditional plea for which he received a total sentence of four years, probated for five years. His conditional plea reserved the right to appeal the trial court's denial of his motion to suppress - which alleged that the police did not have reasonable suspicion to stop him, and lacked probable cause for the arrest. We agree with Cimiotta that the police detective did not have a reasonable suspicion for the stop. Therefore, we reverse and remand.

The trial court made the following findings as to the stop of Cimiotta's vehicle:

Testimony of Detective Oldham of the KSP was that police were conducting an investigation of a stolen vehicle at a trailer park off Highway 447 at 4:00 a.m. Oldham further testified that while the investigation was being conducted, the Defendant drove slowly by the area, then pulled "halfway" into a driveway, then attempted to back out of the driveway. Oldham testified that he considered this activity to be suspicious and went to investigate.

The Commonwealth argues that based on these findings, the trial court correctly found that the stop of appellant's vehicle was supported by a reasonable articulable suspicion. We disagree.

Ornelas v. United States, 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996), stands for the proposition that determinations of reasonable suspicion should be reviewed de novo by the appellate court on appeal, but at the same time,

giving due weight to the inferences drawn from the facts by the trial judge and local law enforcement officers. We agree with the Commonwealth that an officer may stop a vehicle when an officer observes unusual conduct leading him to conclude, in light of experience, that criminal activity is afoot. See Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

We believe that slowing down while driving past a police cruiser on the side of the road, and then turning into a driveway, and then starting to back out does not constitute unusual conduct from which a police officer could conclude criminal activity is afoot, for which he could stop the vehicle. Looking further into the record, Detective Oldham admitted he did not suspect Cimiotta in connection with the stolen truck and did not suspect Cimiotta of committing a traffic violation. Detective Oldham could not even tell if Cimiotta looked at the police as he passed. The driveway was a quarter of a mile past the police. Detective Oldham, on a suspicion, blocked Cimiotta's vehicle, ran a registration check and a license check with nothing amiss. Only then did he notice the license plate light was out. Only when the second officer arrived and Cimiotta refused to allow a search of his vehicle did things get out of hand. We believe the suspicion to stop the vehicle was not reasonable. Therefore, the stop violated Cimiotta's right to be free from an unreasonable search and seizure under the

Fourth Amendment to the United States Constitution, and under Section 10 of the Kentucky Constitution.

In holding there was no reasonable suspicion for stopping the vehicle, it follows that the subsequent arrest for DUI and the subsequent search of the vehicle should have been suppressed. Therefore, the second argument, that there was no probable cause for the arrest, becomes moot.

For the foregoing reasons, the judgment of the Hardin Circuit Court is reversed, and the matter remanded to permit Cimiotta to withdraw his guilty plea and for other proceedings consistent with this opinion.

ALL CONCUR.

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