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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000127-MR

MARK TRAVIS — APPELLANT

v.

APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 02-CR-00078

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON, TAYLOR AND VANMETER, JUDGES.

JOHNSON, JUDGE: Mark Travis has appealed from a final judgment and sentence of the Marshall Circuit Court entered on December 23, 2002, which, following Travis's conditional guilty pleas to manufacturing methamphetamine,[1] trafficking in a controlled substance in the first degree,[2] possession of a controlled

[1] Kentucky Revised Statutes (KRS) 218A.1432.

[2] KRS 218A.1412.

substance in the first degree,[3] and possession of drug paraphernalia,[4] sentenced Travis to ten years' imprisonment in accordance with the Commonwealth's recommendations. Having concluded that the trial court did not err by denying Travis's motion to suppress evidence against him, we affirm.

On July 11, 2002, a Marshall County grand jury indicted Travis on one count of manufacturing methamphetamine, one count of trafficking in a controlled substance in the first degree, one count of possession of a controlled substance in the first degree, one count of possession of drug paraphernalia, and as being a persistent felony offender in the first degree (PFO I).[5] On July 15, 2002, Travis entered pleas of not guilty to all of the charges in his indictment.

On October 15, 2002, Travis filed a motion to suppress all of the evidence seized from the pickup truck he was driving on the night of his arrest. Travis argued that the search and seizure violated the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution. Our review of the record of the suppression hearing held on November 1, 2002, reveals the following facts, which are not in dispute.

[3] KRS 218A.1415.

[4] KRS 218A.500.

[5] KRS 532.080(3).

At approximately 3:30 a.m. on May 20, 2002, Deputy Kevin Mighell of the Marshall County Sheriff's Department observed a pickup truck parked alongside a highway in Marshall County, Kentucky. Deputy Mighell stopped his police cruiser behind the pickup truck, and approached the truck to determine why the vehicle was stopped alongside the highway. Deputy Mighell testified that as he initially approached the pickup truck, he noticed a rubber tote container in the bed of the truck, and he detected "a whiff" of what he thought was ether, which is an ingredient commonly used in the manufacture of methamphetamine.

Deputy Mighell testified that Travis, the driver of the pickup truck, and Michelle Long, his passenger, both appeared to be nervous when Deputy Mighell began to question why the vehicle had been stopped alongside the highway. After obtaining Travis's driver's license, Deputy Mighell ran the license number with dispatch. Although dispatch informed Deputy Mighell that Travis's license was valid and that he had no outstanding warrants, Deputy Mighell testified that he was told by dispatch to be alert for "a possible 218," which meant that Travis might be involved in drug activity. Deputy Mighell stated that while he was conversing with dispatch, Travis was nervously walking around the pickup truck, and that he

repeatedly opened and closed the tote container without removing any of the contents.

After receiving the information from dispatch, Deputy Mighell asked Travis for consent to search the pickup truck. Deputy Mighell testified that Travis refused to give consent, and that he began walking toward Deputy Mighell in an excited manner while "flapping his arms." Deputy Mighell stated that Travis's excited state caused him to become concerned for his own safety. As a result, Deputy Mighell handcuffed Travis and placed him near the bumper of his police cruiser. However, Deputy Mighell told Travis that he was not under arrest at that time.

Deputy Mighell further testified that he then approached Long to see if she would consent to a search of the vehicle. According to Deputy Mighell's testimony, Travis quickly approached the pickup truck, and told Long not to tell Deputy Mighell anything. Deputy Mighell then placed Travis in the back seat of his police cruiser, but once again informed Travis that he was not at that time under arrest.

After Long informed Deputy Mighell that her mother owned the pickup truck, Deputy Mighell called dispatch and requested that someone contact Brenda Bailey, Long's mother, to see if Bailey would consent to a search of the pickup truck. Officer Darin McCuiston of the Murray Police Department

responded and contacted Bailey at her home. After Officer McCuiston arrived at Bailey's home, she signed a written consent form authorizing a full search of the pickup truck.

Subsequent to being told that Bailey had consented to a search of the pickup truck, Deputy Mighell conducted a search of the truck and the rubber tote container located in the bed of the truck. Inside the rubber tote container, Deputy Mighell found several items which are commonly used in the manufacture of methamphetamine,[6] as well as methamphetamine residue. Travis and Long were then placed under arrest.[7]

After hearing the evidence presented at the suppression hearing, the trial court denied Travis's motion to suppress, finding that Bailey had given valid consent to search the pickup truck. Following the denial of his motion to suppress, Travis elected to accept the Commonwealth's plea offer, and entered conditional guilty pleas to manufacturing methamphetamine, trafficking in a controlled substance in the first degree, possession of a controlled substance in the first degree, and possession of drug paraphernalia, while preserving his right to appeal the denial of his motion to suppress. In

[6] Deputy Mighell's search of the pickup truck revealed plastic tubing, several glass jars containing methamphetamine residue, baggies, coffee filters, digital scales, anhydrous ammonia, hydrochloric acid, pill residue, and various other chemicals used in the manufacture of methamphetamine.

[7] Although Long was named as a co-defendant in Travis's indictment, the disposition of her case is not clear from the record.

exchange for Travis's conditional guilty pleas, the Commonwealth agreed to recommend that the PFO I charge be dismissed and that Travis be sentenced to ten years' imprisonment on his conviction for manufacturing methamphetamine, five years' imprisonment on his conviction for trafficking in a controlled substance in the first degree, five years' imprisonment on his conviction for possession of a controlled substance in the first degree, and 12 months in jail on his conviction for possession of drug paraphernalia. All sentences were ordered to run concurrently for a total sentence of ten years' imprisonment. On December 23, 2002, the trial court followed the Commonwealth's recommendations and sentenced Travis to a total sentence of ten years' imprisonment. This appeal followed.

Travis raises four arguments in support of his claim that the trial court erred by denying his motion to suppress evidence. First, Travis argues that Deputy Mighell lacked the requisite reasonable, articulable suspicion to justify the initial encounter alongside the highway, i.e., Travis claims that Deputy Mighell violated his constitutional rights by stopping to inquire as to why the pickup truck was parked alongside the highway. We disagree.

In Cady v. Dombrowski,[8] the United States Supreme Court recognized that state and local police officials routinely perform "community caretaking functions" unrelated to the investigation of possible criminal activity:

> Because of the extensive regulation of motor vehicles and traffic, and also because of the frequency with which a vehicle can become disabled or involved in an accident on public highways, the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office. Some such contacts will occur because the officer may believe the operator has violated a criminal statute, but many more will not be of that nature. Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.

Several of our sister states have held that police officers, in performing this "community caretaking function," are justified in making certain investigatory stops in the absence of any reasonable, articulable suspicion that criminal activity is afoot.[9] For example, in State v. Pinkham,[10] the

[8] 413 U.S. 433, 441, 93 S.Ct. 2523, 2528, 37 L.Ed.2d 706 (1973).

[9] See Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)(holding that a police officer is justified in making a brief investigatory stop if he has reasonable, articulable suspicion that criminal activity is afoot, even though that suspicion falls short of probable cause).

[10] 565 A.2d 318, 319 (Me. 1989).

Supreme Court of Maine stated:

> If we were to insist upon suspicion of activity amounting to a criminal or civil infraction to meet the Terry [ ] standard, we would be overlooking the police officer's legitimate role as a public servant to assist those in distress and to maintain and foster public safety.[11]

Under the facts of the case sub judice, this "community caretaking function" is precisely what prompted Deputy Mighell to pull up behind the pickup truck parked alongside the highway. Deputy Mighell testified that, because it was around 3:30 a.m., he wanted to stop and determine whether the occupants of the truck were in need of assistance. It cannot be seriously disputed that part of a police officer's duties includes the duty to render aid to motorists who are in need of assistance. Accordingly, we hold that Deputy Mighell was justified in pulling up behind the parked pickup truck, regardless of the fact that he may have lacked, prior to his

[11] See also, e.g., Commonwealth v. Evans, 764 N.E.2d 841, 844 (Mass. 2002)(holding that trooper was justified in pulling up behind a vehicle in the breakdown lane to determine if the occupants needed assistance); State v. Harrison, 533 P.2d 1143, 1144 (Ariz. 1975)(recognizing that as part of the police officer's public safety duties, the officer was justified in stopping a vehicle where the left rear tire was "bouncing" off the road); State v. Marcello, 599 A.2d 357, 358 (Vt. 1991)(holding that police officer was justified in making a "public interest stop" in response to another motorist's claim that the driver "needed help"); Crauthers v. State, 727 P.2d 9, 11 (Alaska.Ct.App. 1986)(stating that trooper was justified in initiating stop in response to motorist's request for assistance); In re Clayton, 748 P.2d 401, 402 (Idaho 1988)(holding that police officer was justified in investigating a situation where he observed a parked vehicle with its motor running, its lights on, and the driver slumped over the steering wheel); and State v. Ellenbecker, 464 N.W.2d 427, 429 (Wis.Ct.App. 1990)(stating that where police officer observed a car with its hood up and jumper cables lying on the ground, the officer was justified in stopping as part of his community caretaking function).

pulling up behind the vehicle, reasonable, articulable suspicion that criminal activity was afoot.

Travis next argues that he was unlawfully "seized" when Deputy Mighell asked for his driver's license for purposes of checking his identity. According to Travis, Deputy Mighell exceeded the scope of his purpose for initially pulling up behind the pickup truck, i.e., to determine if they were in need of assistance. Once again, we disagree.

As a general rule under Terry and its progeny, a police officer must have reasonable, articulable suspicion that an individual is engaged, or has been engaged in criminal activity before the officer is entitled to detain that individual and to ask for identification.[12] Among other things, an individual's "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion."[13] Whether a police officer has reasonable, articulable suspicion is determined by utilizing

[12] Brown v. Texas, 443 U.S. 47, 53, 99 S.Ct. 2637, 2641, 61 L.Ed.2d 357 (1979)(holding that a Texas statute could not be used to prosecute the defendant for failing to identify himself where the officers who stopped the defendant "lacked any reasonable suspicion to believe appellant was engaged or had engaged in criminal conduct"). See also Delaware v. Prouse, 440 U.S. 648, 663, 99 S.Ct. 1391, 1401, 59 L.Ed.2d 660 (1979)(holding that "except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment").

[13] Illinois v. Wardlow, 528 U.S. 119, 124, 120 S.Ct. 673, 676, 145 L.Ed.2d 570 (2000).

a totality of the circumstances approach.[14] In Baltimore v. Commonwealth,[15] this Court recently stated:

> In determining the totality of the circumstances, a reviewing court should not view the factors relied upon by the police officer(s) to create reasonable suspicion in isolation but must consider all of the officer(s) observations and give due regard to inferences and deductions drawn by them from their experience and training.

Assuming, arguendo, that Deputy Mighell "seized" Travis by asking for his driver's license soon after he approached the pickup truck, we hold that Deputy Mighell had reasonable, articulable suspicion which justified this brief detainment.

Deputy Mighell, who has been certified by the Drug Enforcement Agency in the detection of methamphetamine labs, stated that it was around 3:30 a.m. when he noticed the pickup truck parked alongside the highway. He further testified that upon approaching the truck, he noticed a rubber tote container and the smell of what he believed to be ether, which is a commonly used ingredient in the manufacture of methamphetamine. In addition, Deputy Mighell stated that although Travis initially informed him that he was experiencing transmission

[14] See, e.g., United States v. Cortez, 449 U.S. 411, 417-18, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981).

[15] Ky.App., 119 S.W.3d 532, 539 (2003).

problems, Travis seemed anxious to leave the scene after Deputy Mighell's arrival.

Therefore, based upon the totality of the circumstances, we hold that Deputy Mighell was justified in requesting that Travis produce his driver's license. This brief detainment "was reasonably related in scope to the justification" for checking Travis's identity.[16] Travis's nervous, evasive behavior, coupled with the time of night and the smell of what Deputy Mighell thought was ether coming from the tote container, justified Deputy Mighell's effort to confirm Travis's identity. Accordingly, since Deputy Mighell had reasonable, articulable suspicion that Travis might be engaged in criminal activity, he did not violate Travis's constitutional rights by asking for his driver's license.

Next, Travis argues that his constitutional rights were violated when Deputy Mighell placed him in handcuffs without probable cause that Travis "ha[d] committe[d], [was] committing, or [was] about to commit an offense." We find Travis's argument to be unpersuasive.

In Michigan v. Long,[17] the United States Supreme Court discussed its holding in Terry as it relates to a police officer's safety concerns:

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[16] Id. at 538.

[17] 463 U.S. 1032, 1046-47, 103 S.Ct. 3469, 3479, 77 L.Ed.2d 1201 (1983).

> Examining the reasonableness of the officer's conduct in Terry, we held that there is "'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.'" Although the conduct of the officer in Terry involved a "severe, though brief, intrusion upon cherished personal security," we found that the conduct was reasonable when we weighed the interest of the individual against the legitimate interest in "crime prevention and detection," and the "need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they lack probable cause for an arrest." When the officer has a reasonable belief "that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm" [citations omitted] [footnote omitted].

Several federal appellate courts have held that when an officer's safety is at issue, placing a suspect in handcuffs and/or in the back of a police cruiser does not necessarily exceed the bounds of a Terry stop. For example, in Houston v. Clark County Sheriff Deputy John Does 1-5,[18] the United States Court of Appeals for the Sixth Circuit stated:

> An investigative Terry stop may indeed ripen into an arrest through the passage of time or the use of force. When this occurs, the continued detention of suspects must be

[18] 174 F.3d 809, 814-15 (6th Cir. 1999).

> based upon probable cause. Although there is no bright line that distinguishes an investigative stop from a de facto arrest, the length and manner of an investigative stop should be reasonably related to the basis for the initial intrusion [citations omitted].
>
> Specifically, when police officers reasonably fear that suspects are armed and dangerous, they may order the suspects out of a car and may draw their weapons when those steps are "reasonably necessary for the protection of the officers." Further, detention in a police cruiser does not automatically transform a Terry stop into an arrest. Nor does the use of handcuffs exceed the bounds of a Terry stop, so long as the circumstances warrant that precaution [citations omitted].[19]

In the case sub judice, Deputy Mighell was informed by dispatch that there was a possibility that Travis was involved in drug activity. Deputy Mighell further stated that he observed Travis acting suspiciously around the rubber tote container, where Deputy Mighell previously thought he had detected the odor of ether. Further, Deputy Mighell testified that after asking Travis if he could search the pickup truck, Travis became excited and began walking toward Deputy Mighell while "flapping his arms."

[19] See also United States v. Gil, 204 F.3d 1347, 1351 (11th Cir. 2000)(holding that under a Terry stop analysis, it was reasonable under the circumstances to handcuff the defendant and place her in the police cruiser); United States v. Glenna, 878 F.2d 967, 972-73 (7th Cir. 1989)(holding that under the circumstances, placing the defendant in handcuffs did not transform the seizure into a full-blown arrest requiring probable cause); and United States v. Acosta-Colon, 157 F.3d 9, 18 (1st Cir. 1998)(noting that "the use of handcuffs in the course of an investigatory stop does not automatically convert the encounter into a de facto arrest").

Therefore, taking into account the totality of these circumstances, including the fact that Deputy Mighell was confronting two individuals by himself at around 3:30 a.m., we hold that it was reasonable for Deputy Mighell to handcuff Travis and to place him in the back of his police cruiser. Accordingly, Travis was not subjected to an unconstitutional arrest.

Finally, Travis claims that the consent form signed by Bailey, which authorized the search of the pickup truck, was invalid. Travis offers two arguments in support of this claim. First, Travis attempts to liken his situation to that of a landlord/tenant relationship, where it is generally held that a landlord does not normally have the authority to consent to a search of a tenant's residence.[20] We reject this argument. Unlike a typical landlord/tenant relationship, in which a landlord usually lacks common authority over a tenant's private living quarters, and thereby lacks either actual or apparent authority to consent to a search of those areas,[21] Travis has failed to point to any evidence whatsoever indicating that Deputy Mighell should have realized that Bailey lacked the

[20] See Chapman v. United States, 365 U.S. 610, 616-17, 81 S.Ct. 776, 779-80, 5 L.Ed.2d 828 (1961)(holding that the Fourth Amendment would be reduced to a "nullity" if the security of a tenant's residence were left to the discretion of the landlord).

[21] United States v. Jenkins, 92 F.3d 430, 437 (6th Cir. 1996)(noting that "an officer usually cannot assume that a landlord has authority to consent to search of property used by a tenant . . .").

authority to consent to a search of her pickup truck. Travis has not argued that his permissive use of the truck somehow divested Bailey of the common authority to consent to a search. Therefore, Travis's argument on this issue is without merit.

Second, Travis claims that the consent form signed by Bailey did not authorize a search of the rubber tote container located in the bed of the pickup truck. We disagree. A copy of the type of consent form signed by Bailey, which has been made a part of the record on appeal,[22] reads in pertinent part as follows:

> I further authorize said officers to remove from my . . . motor vehicle[ ] whatever documents, or items of property whatsoever which they deem pertinent to their investigation[.]

Clearly, the language in this consent form authorized Deputy Mighell to search the rubberized tote container located in the bed of the pickup truck. Accordingly, Travis's argument to the contrary is without merit.

Based on the foregoing, the judgment of the Marshall Circuit Court is affirmed.

VANMETER, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

[22] Bailey testified at the suppression hearing and admitted that the blank consent form, which is a part of the record on this appeal, was identical to the consent form she signed on the night in question.

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