

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001381-MR

TOMMY HENSLEY

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE LEONARD L. KOPOWSKI, JUDGE
ACTION NO. 02-CR-00509

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, SCHRODER, AND VANMETER, JUDGES.

BARBER, JUDGE: Appellant, Tommy Jeff Hensley (Hensley), was indicted on the charges of possession of a controlled substance in the first degree and persistent felony offender in the first degree. Defense counsel requested suppression of the evidence claiming that the stop of Hensley's vehicle was in violation of law. The trial court denied the motion to suppress. We affirm the ruling of the Campbell Circuit Court.

On the date Hensley's car was stopped, the arresting officer was parked beside the road at 5:30 a.m. The officer

noted Hensley stopping his vehicle 15 yards before the intersection. One of the three passengers left the vehicle briefly, and then returned to it. The passenger walked away from the car again, before returning to it a second time. The passenger left the vehicle again, and walked away. After a brief interval the car drove around the corner and parked. The officer followed the vehicle, and noted it circling the block before coming back to pick up the passenger up again. The officer believed that the passenger was trying to buy drugs or break into other vehicles, and stopped Hensley's car for that reason.

Hensley asserts that there were no specific and articulable facts warranting the traffic stop of his vehicle, as required by Terry v. Ohio, 392 U.S. 1 (1968). He argues that the stop was an improper detainment stop for a generalized criminal inquiry in violation of United States v. Ward, 488 F.2d 162 (9th Cir. 1973). A canine search of the vehicle failed to detect contraband, but when a manual search was performed, the officer found a baggie containing white powder on the sun visor on the driver's side. The substance in the baggie was later determined to be cocaine.

The question of whether a reasonable and articulable suspicion existed sufficient to warrant a search is a question of fact which must be determined based on the facts and

circumstances of each particular case. Dockstader v. Commonwealth, Ky. App., 82 S.W.2d 199, 200 (1983). Citing Creech v. Commonwealth, Ky. App., 812 S.W.2d 162 (1991), the trial court held that the time of day, the unusual behavior of the passenger, and the neighborhood in which the behavior took place all gave rise to a reasonable and articulable suspicion supporting a stop of the vehicle. We affirm the trial court's ruling.

Hensley contends that the consent to search his car was invalid as he had been seized in violation of the Fourth Amendment prior to being asked for such consent. United States v. Blanco, 844 F.2d 344 (6th Cir. 1988). An officer may reasonably make a brief stop of an individual acting in a suspicious manner. Deberry v. Commonwealth, Ky., 500 S.W.2d 64 (1973). The record shows that Hensley consented to the search of his vehicle after it was stopped by the officer. The Commonwealth asserts that Hensley was not in the custody of the officer at the time he consented to the search, and that the search was voluntary for this reason. Hensley claims that he had been improperly seized prior to the request to search the car. Hensley was not arrested until after cocaine was found in the vehicle. There is no claim that the officer made any threats against Hensley, or otherwise acted as if Hensley was under arrest prior to requesting permission to search the car.

The record does not support a finding that the request to search was unlawful.

Hensley argues that the trial court's denial of his motion to suppress constitutes reversible error. Appellate review of a trial court's denial of a motion to suppress must determine "whether the trial court's findings of fact are supported by substantial evidence." Commonwealth v. Neal, Ky. App., 84 S.W.3d 920, 923 (2002). The court must then determine whether the trial court's decision is correct as a matter of law. Id. The defendant has the burden of showing that the trial court's decision was clearly erroneous. Hughes v. Commonwealth, Ky., 87 S.W.3d 850 (2002). Hensley's argument is that the stop was illegal, and that therefore all evidence obtained in the consensual search of the vehicle was improperly admitted. There is no error in the court's ruling regarding the stop of the vehicle. We affirm the ruling on the motion to suppress.

ALL CONCUR.

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