

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001775-MR

SCOTT A. SMITH

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NO. 02-CR-00329

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, DYCHE, AND GUIDUGLI, JUDGES.

BUCKINGHAM, JUDGE: Scott A. Smith appeals from a judgment of the Boone Circuit Court wherein he was convicted of a drug trafficking offense and was sentenced to twelve years in prison. Smith entered a conditional guilty plea to the drug trafficking charge, and in this appeal he challenges the circuit court's ruling on his motion to suppress evidence. We affirm.

On June 19, 2002, Deputy Greg Faulkner of the Boone County Sheriff's Department was operating his vehicle in the northbound lanes of Interstate 71 in Boone County. Deputy

Faulkner testified that he had been assigned to assist Kentucky Vehicle Enforcement's "Interdiction Team," which had been assigned to prevent crimes (particularly the transportation of drugs) occurring on Kentucky highways.

Smith was traveling southbound on Interstate 71, and Deputy Faulkner testified that he observed the Ford Explorer driven by Smith pass by him in the opposite lane well in excess of the 65 mph speed limit. Deputy Faulkner stated that he estimated the speed of the Smith vehicle at 82 mph based on his visual observation. Deputy Faulkner then crossed the median and quickly pulled the Smith vehicle over to the side of the road.

Deputy Faulkner testified that while talking with Smith he detected the odor of marijuana coming from the Smith vehicle. He then called Kentucky Vehicle Enforcement Officer Pete Wilson and requested that a drug detection dog be brought to the scene. Officer Wilson responded within a few minutes, and the dog was taken to the Smith vehicle where it responded in a manner indicating the presence of illegal drugs.

The officers searched the Smith vehicle and found a large rock of crack cocaine and individual packages of a white, powdery substance, later determined to be cocaine. The cocaine was found in the center console of the vehicle between the two front seats. Despite the claim by Deputy Faulkner that he detected the odor of marijuana, none was found.

Smith was indicted on a charge of first-degree trafficking in a controlled substance, second offense, and with being a first-degree persistent felony offender.¹ He moved to suppress the evidence, and a suppression hearing was held pursuant to RCr² 9.78. The circuit court entered a written order denying the motion, and Smith later entered into a plea agreement with the Commonwealth. Pursuant to that agreement, Smith entered a conditional guilty plea to the trafficking charge, and the PFO charge was dismissed. The court later sentenced Smith to twelve years in prison pursuant to the agreement. This appeal by Smith followed.

Our standard of review of the court's ruling on Smith's motion to suppress requires that we first determine whether the court's fact-findings were supported by substantial evidence. See Commonwealth v. Neal, 84 S.W.3d 920, 923 (Ky. App. 2002). Based on the fact-findings, we will then review the circuit court's application of the law to the facts in a de novo manner in order to determine whether its decision was correct as a matter of law. Id.

Smith's first argument is that Deputy Faulkner did not have probable cause to stop him. He argues that no Kentucky case has ever held that visual observation of speed alone is

¹ Deputy Faulkner gave Smith only a warning citation for speeding.

² Kentucky Rules of Criminal Procedure.

sufficient to warrant a traffic stop for the offense of speeding. In Wilson v. Commonwealth, 37 S.W.3d 745 (Ky. 2001), the Kentucky Supreme Court held that "an officer who has probable cause to believe a civil traffic violation has occurred may stop a vehicle regardless of his or her subjective motivation in doing so." Id. at 749. Based on his visual observation, Deputy Faulkner concluded that the Smith vehicle was exceeding the speed limit. Therefore, he had probable cause to make the stop.

Smith's second argument is that Deputy Faulkner did not have probable cause to search the vehicle. As we have noted, Deputy Faulkner testified that he detected the odor of marijuana coming from within the vehicle. The odor of marijuana was confirmed by Officer Wilson and by the female passenger in the Smith vehicle.

This court has recognized that a warrantless search of an automobile is valid where the officer acted lawfully in stopping the vehicle and where he smelled marijuana smoke coming from it. See Cooper v. Commonwealth, 577 S.W.2d 34, 37 (Ky. App. 1979), overruled on other grounds by Mash v. Commonwealth, 769 S.W.2d 42 (Ky. 1989).³ Also in Commonwealth v. Hagan, 464 S.W.2d 261 (Ky. 1971), the court stated:

³ Smith urges us to overrule Cooper to the extent it implies that an officer's uncorroborated assertion that he smelled marijuana is sufficient cause for a warrantless search of the vehicle. We decline to do so.

If at the time the officer approaches the automobile he does not see fit to immediately place the occupants under arrest, but at that time through what he observes or information previously obtained reasonably believes the automobile contains contraband, he may search the automobile without a warrant and without an arrest.

Id. at 264. In short, we conclude that the smell of marijuana from the vehicle by Deputy Faulkner, which was confirmed by Officer Wilson, the female passenger, and the dog, gave the officers the right to search the vehicle without a warrant in an effort to locate illegal drugs.

The judgment of the Boone Circuit Court is affirmed.

ALL CONCUR.

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