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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001916-MR

BRANDON J. PRATT

APPELLANT

v. APPEAL FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 03-CR-00004

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

NO. 2003-CA-001972-MR

AARON C. TAYLOR

APPELLANT

v. APPEAL FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 03-CR-00005

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GUIDUGLI AND KNOPF, JUDGES; EMBERTON, SENIOR JUDGE.¹

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

GUIDUGLI, JUDGE: In their respective cases, Brandon Pratt and Aaron C. Taylor appeal from the Grant Circuit Court's orders denying their motions to suppress evidence obtained in an automobile search. Following a traffic stop, police seized a large quantity of marijuana, drug paraphernalia and a handgun from Pratt's automobile. Both Pratt, the driver, and Taylor, the passenger, contend that police did not have a reasonable and articulable suspicion that criminal activity was afoot to further detain them. Having determined that police met the necessary standard, we affirm.

On February 12, 2003, the Grant County Grand Jury returned indictments against Pratt and Taylor, both residents of Texas, related in part to items seized from an automobile in a traffic stop two days earlier. Pratt was indicted on eight counts: 1) Trafficking in Five or More Pounds of Marijuana, First Offense, While in Possession of a Firearm,² a Class B Felony; 2) Possession of a Controlled Substance (cocaine) in the First Degree, First Offense,³ a Class D Felony; 3) Possession of Drug Paraphernalia, First Offense, While in Possession of a Firearm,⁴ a Class D Felony; 4) Promoting Contraband in the First Degree,⁵ a Class D Felony; 5) Possession of a Handgun by a

² KRS 219A.1421 and KRS 219A.992.

³ KRS 218A.1415.

⁴ KRS 218A.500, KRS 219A.510, KRS 219A.992.

⁵ KRS 420.050.

Convicted Felon,⁶ a Class C Felony; 6) Failure to Use a Seat Belt;⁷ 7) Failure to Produce Insurance Card;⁸ and 8) Improper Equipment.⁹ Taylor was indicted on charges of trafficking in marijuana and possession of drug paraphernalia, both while in possession of a firearm. Both Pratt and Taylor were appointed public defenders.

Pratt filed a motion to suppress evidence seized during the search of his vehicle, arguing that he did not consent to the search, that the contraband was not in plain view, and that the officer did not have a reasonable and articulable suspicion that he was engaged in a criminal activity. The circuit court held a suppression hearing, at which time the Commonwealth called Kentucky State Police Trooper Stacy May. Trooper May testified that he saw Pratt driving northbound on Interstate 75 in a 1993 black Chevy Suburban with a cracked windshield. Trooper May activated his emergency equipment and pulled the Suburban over after traveling close to a mile. From the passenger side, Trooper May contacted the driver, who was unable to produce a driver's license after searching his pockets. A passenger sleeping in a back seat produced a Texas ID card, which identified him as Taylor. Trooper May asked the driver to step out of the vehicle so that

⁶ KRS 527.040.

⁷ KRS 189.125.

⁸ KRS 304.39-117.

⁹ KRS 189.020.

he could explain why he was being stopped and so that he could obtain his personal information to check his driver status. Trooper May explained that he had stopped the vehicle due to the cracked windshield, which Pratt explained had just happened. Pratt provided his name and date of birth, and Trooper May ran that information as well as the license plate information.

While waiting for the information to return so that he could confirm his identity, Trooper May and Pratt had a normal conversation about basketball, and Pratt indicated that they were headed from Texas to Detroit, Michigan. During this conversation, Trooper May realized that he had forgotten to ask Pratt for proof of insurance. Pratt indicated that the insurance card was in the Suburban, and Trooper May requested the card from Taylor, who was still inside. Taylor provided an expired insurance card. Trooper May also asked Taylor about their destination, and Taylor indicated that they were headed to Toledo, Ohio.

Due to the discrepancy in their responses and for safety purposes, Trooper May asked Pratt if he was in possession of any illegal drugs, currency and weapons. At that point, Pratt began fidgeting. Trooper May stated, "[h]e'd look away from me when he'd answer me, I mean, just - me asking him about -- he went from acting totally normal talking about the basketball game to just totally tore up about any of the

activity I asked him about after that." Trooper May then asked for permission to search the vehicle, which Pratt declined. While in the process of completing the citation for improper equipment and his suspicions aroused by the nervous behavior and the discrepancy in their destination, Trooper May requested a K-9 unit. Grant County Sheriff's Officer Roger Humphrey arrived with the K-9 unit fifteen minutes later, and the dog alerted on Pratt's vehicle. Prior to the alert, Trooper May never told either Pratt or Taylor that they were not free to leave. Additionally, Trooper May admitted that did not see anything illegal in plain view.

At the conclusion of the testimony, the circuit court denied the motion to suppress after allowing the parties to make arguments. The circuit court later entered the following Findings and Order:

Motion to Suppress having been made by the Defendant, a hearing having been held, and the Court being sufficiently advised makes the following Findings and Order:

FINDINGS

1. On February 10, 2003, Tpr. Stacey May of the Kentucky State Police was patrolling I-75 in Grant County when he observed a black Chevrolet Suburban with Texas license plates traveling northbound.

2. Tpr. May observed that the Suburban had a cracked windshield. Based on his observation of this equipment violation,

Tpr. May initiated a traffic stop of the vehicle.

3. After stopping the Suburban, Tpr. May approached the vehicle and asked the driver, later identified as [Pratt], for his driver's license. [Pratt] was unable to produce a driver's license or valid insurance card. Tpr. May then asked the passenger, Aaron Taylor, for his driver's license. Taylor produced a Texas I.D. card.

4. Tpr. May then asked [Pratt] to exit the vehicle and explained to him why he had been pulled over. Tpr. May also asked [Pratt] for his personal information so he could run a license check. While waiting for the information to come back, [Pratt] and Tpr. May went back to Tpr. May's cruiser. [Pratt] asked if he could sit in the back to get off the road and out of the cold. Tpr. May allowed him to do so. While waiting for the information to come back, Tpr. May and [Pratt] engaged in small talk. Tpr. May asked [Pratt] where he was going. [Pratt] advised that he was going to Detroit, Michigan.

5. Tpr. May asked [Pratt] if he had his vehicle registration, and [Pratt] advised him it was in the Suburban. Tpr. May then went to the Suburban to get the information from Taylor. Tpr. May asked Taylor where they were going, and Taylor advised that he and [Pratt] were going to Toledo, Ohio.

6. Tpr. May, suspicious from the two different stories, return to his cruiser. Tpr. May then asked [Pratt] if he had any contraband in his vehicle. [Pratt] answered that he did not, and Tpr. May observed that [Pratt] became nervous when answering. Tpr. May then asked if he could search [Pratt's] vehicle. [Pratt] refused consent.

7. While waiting for confirmation of [Pratt's] identity and his driver's license

being valid, Tpr. May asked for the assistance of a nearby K-9 unit. Tpr. May was suspicious that criminal activity was afoot because of the change in [Pratt's] behavior and the different stories he had received from [Pratt] and Taylor as to where they were going. Shortly thereafter, the K-9 unit arrived and alerted to the Suburban. During the ensuing search of the Suburban the police found a black bag containing two marijuana scales, a handgun, and over 30 pounds of marijuana.

8. The stop took approximately fifteen minutes from start to finish.

ORDER

On the basis of the foregoing Findings, the Court ORDERS AND ADJUDGES that [Pratt's] Motion to Suppress shall be, and it is DENIED.

In late May, attorney Kenneth E. Rylee, Jr., entered an appearance on behalf of Pratt and moved to continue the trial scheduled for June 13, 2003. A few days later, he entered a similar motion in Taylor's case, and also filed a joint counsel waiver in each case. Attorney Rylee then filed a renewed motion to suppress in Pratt's case and a motion to suppress in Taylor's case, asserting in both motions that there was no warrant, no probable cause, no exigent circumstances and no indication of criminal activity to support the search of the Suburban. In response, the Commonwealth argued that a suppression hearing had already been held in Pratt's case and that Taylor, as the passenger, did not have standing to contest the search of the

vehicle. At a suppression hearing, Trooper May again testified that his suspicions were aroused by Pratt's nervousness and fidgeting, by his failure to produce a driver's license, and by the divergent stories regarding their destination while separated. At the conclusion of the hearing, the circuit court stated that there was no reason to change his earlier ruling. A written order denying the motion to suppress was entered on June 27, 2003.

Approximately one month later, both Pratt and Taylor moved to enter conditional guilty pleas. The circuit court accepted their guilty pleas and entered final judgments in both cases on August 29, 2003. Pratt received concurrent sentences for a total of ten years, a \$1000 fine and court costs. Taylor was sentenced to eight years and a \$1000 fine on an amended charge of trafficking and to twelve months and a \$500 fine on an amended charge of possession of drug paraphernalia. As with Pratt, Taylor's sentences and fines were ordered to run concurrently. These appeals, now consolidated, followed.

On appeal, Pratt contends that although the initial traffic stop was proper and that probable cause existed for the search once the dog alerted, there was not a reasonable or articulable suspicion sufficient to extend the traffic stop into an investigatory stop. Furthermore, Pratt asserts that he was unreasonably and intentionally detained for at least fifteen

minutes while the officer was waiting for the K-9 unit to arrive. He argues that he and Taylor did not actually give conflicting stories as to their destination as both cities are on I-75, and that it is not unusual for citizens to be nervous when stopped by police. In his appeal, Taylor argues, similarly, that Trooper May did not possess the necessary reasonable and articulable suspicion to transfer the traffic stop into an investigatory stop and that Trooper May unreasonably detained him. The Commonwealth argues that the circuit court's findings are supported by substantial evidence and are therefore conclusive, and that their detention was reasonable under the circumstances.

In reviewing the denial of a motion to suppress following a hearing, this Court must first determine whether the findings of fact are supported by substantial evidence. If so, those findings are conclusive.¹⁰ We must then perform a de novo review of those factual findings to determine whether the circuit court's decision is correct as a matter of law.¹¹

In the matter at bar, the circuit court's findings of fact were supported by substantial evidence of record, and are therefore conclusive. We note that paragraph 5 of the April 23, 2003, order references Pratt's vehicle registration rather than

¹⁰ RCr 9.78; Adcock v. Commonwealth, Ky., 967 S.W.2d 6, 8 (1998).

¹¹ Ornelas v. United States, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); Commonwealth v. Banks, Ky., 68 S.W.3d 347, 349 (2001); Stewart v. Commonwealth, Ky., 44 S.W.3d 367, 380 (2000).

proof of insurance, but this minor difference does not affect the validity of the findings as a whole. Also, the circuit court indicates in paragraph 8 that the stop itself took fifteen minutes. The record unquestionably establishes that the time that elapsed from the initial stop until the arrests was more than fifteen minutes based upon Trooper May's testimony that it took fifteen minutes for the K-9 unit to arrive. We presume that the circuit court was referring to the length of the investigatory portion of the stop and did not include the time that had already elapsed in the traffic stop portion. Because the findings of fact are supported by substantial evidence, we shall review the circuit court's decision to deny the motion to suppress de novo.

In Terry v. Ohio,¹² the United States Supreme Court tested police conduct under the Fourth Amendment's proscription against unreasonable searches and seizures that it defined as "necessarily swift action predicated upon the on-the-spot observations of the officer on the beat" which would not be subject to the warrant procedure. An officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."¹³ The Terry Court's final holding allows an officer to protect his safety by undertaking a limited search of

¹² 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968).

¹³ Terry, 392 U.S. at 20-21, 20 L.Ed.2d at 905-06, 88 S.Ct. at 1880.

a person's outer clothing when observations lead him to reasonably decide that criminal activity may be afoot.¹⁴ The 8th Circuit Court of Appeals later addressed this standard in United States v. Bloomfield,¹⁵ as related to traffic stops:

If, during a traffic stop, an officer develops a reasonable, articulable suspicion that a vehicle is carrying contraband, he has "justification for a greater intrusion unrelated to the traffic offense." [] [United States v. Cummins, 920 F.2d [498,] 502 [(8th Cir. 1993)]. We assess the factors on which an officer based his claim of reasonable suspicion as a totality and in light of the officer's experience.

In United States v. Sharpe,¹⁶ the United States Supreme Court addressed the difference between a de facto arrest and an investigative stop, noting that there is not a rigid time limit on Terry stops, but the shortness of the invasion of a person's Fourth Amendment interests is a factor to consider when deciding whether a seizure is justifiable due to presence of a reasonable suspicion.¹⁷ As to the determination regarding whether a detention is too long, a court should consider, "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant," and "[a] court making this assessment should take care to consider

¹⁴ Terry, 392 U.S. at 30-31, 20 L.Ed.2d at 911, 88 S.Ct. at 1884-85.

¹⁵ 40 F.3d 901, 918 (8th Cir. 1994).

¹⁶ 470 U.S. 675, 84 L.Ed.2d 605, 105 S.Ct. 1568 (1985).

¹⁷ Sharpe, 470 U.S. at 685, 84 L.Ed.2d at 615, 105 S.Ct. at 1575.

whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing."¹⁸ The United States Supreme Court has also identified "nervous, evasive behavior" as "a pertinent factor in determining reasonable suspicion."¹⁹

The courts in Kentucky have also addressed this issue. In Simpson v. Commonwealth,²⁰ this Court addressed whether police had a legitimate reason to stop and question Simpson while he was standing on a street corner. The Court applied the Terry standard, in which "a police officer can subject anyone to an investigatory stop *if* he is able to point to some specific and articulable fact which, together with rational inferences from those facts, support 'a reasonable and articulable suspicion' that the person in question is engaged in illegal activity."²¹ The Simpson Court also noted that, "the question of whether there is 'a reasonable and articulable suspicion' is a question of fact which must be determined in each situation from the totality of the circumstances."²² Police saw Simpson walking back and forth on a sidewalk and into a parking lot displaying a large sign prohibiting trespassing and loitering, and saw him in

¹⁸ Sharpe, 470 U.S. at 686, 84 L.Ed.2d at 616, 105 S.Ct. at 1575. See also Bloomfield, 40 F.3d at 916-17.

¹⁹ Illinois v. Wardlow, 528 U.S. 119, 124, 145 L.Ed.2d 570, 577, 120 S.Ct. 673, 676 (2000).

²⁰ Ky.App., 834 S.W.2d 686 (1992).

²¹ Id. at 687.

²² Id.

the same location fifteen minutes later. Based upon the totality of the circumstances, the Court held that the police at that point were justified in approaching Simpson, asking him what he was doing, and requesting identification.

In Commonwealth v. Banks,²³ the Supreme Court of Kentucky upheld a stop and frisk by police, holding that police had a reasonable suspicion to believe that criminal activity may be afoot. Banks was observed in a high crime area on the property of an apartment complex that prohibited trespassing, and police did not recognize him as a resident of the complex. He appeared startled when approached, and attempted to evade the officers. When he removed his hands from his pockets, a bulge remained. Under these circumstances, the officers were justified in stopping and frisking Banks.²⁴

In the present matter, we agree with the circuit court that under the circumstances presented, Trooper May had a reasonable and articulable suspicion that criminal activity was afoot. First, Pratt could not produce any proof of identification, including a driver's license. Second, Pratt and Taylor provided different destination locations when asked by Trooper May. We recognize that both Toledo, Ohio and Detroit, Michigan are along the same route on I-75. But in light of the

²³ Ky., 68 S.W.3d 347 (2001).

²⁴ Id. at 350. See also Kotila v. Commonwealth, Ky., 114 S.W.3d 226, 232 (2003).

fact that Pratt and Taylor were traveling from Texas, this discrepancy is particularly damaging. Third, added to this is Pratt's nervousness when asked about illegal drugs and guns, while he had previously been acting normally while discussing sports with Trooper May. When combined, these factors together provided Trooper May with a sufficiently reasonable suspicion to transform the unquestionably valid traffic stop into an investigatory stop.

Pratt also contends that Trooper May intentionally delayed the issuance of the traffic violation in order to allow the K-9 unit time to arrive. Pratt relies upon the Sixth Circuit Court of Appeals' decision in United States v. Townsend,²⁵ which upheld a district court's determination that the officers unreasonably delayed the issuance of a citation to allow the K-9 unit to arrive when they did not have reasonable suspicion to detain the occupants of a car. We agree with the Commonwealth that the holding in Townsend is not applicable in the present case. The district court in Townsend did not find the officers' claimed reasons for their suspicions credible, while in the present case, there is no indication that Trooper May's testimony regarding his suspicions was anything but credible. Even if Trooper May had delayed the completion of the citation for the fifteen minutes it took for the K-9 unit to

²⁵ 305 F.3d 537 (6th Cir., 2002).

arrive, the delay itself would not work to invalidate the stop because Trooper May already had a credible and reasonable suspicion of criminal activity based upon his earlier observations.

For the foregoing reasons, the judgments of the Grant Circuit Court are affirmed.

ALL CONCUR.

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