

RENDERED: SEPTEMBER 3, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-001971-MR

HENRY KELLY LAWSON

APPELLANT

v.

APPEAL FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
INDICTMENT NO. 03-CR-00056

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: JOHNSON, KNOPF, AND SCHRODER, JUDGES.

KNOPF, JUDGE: On May 7, 2003, a Grant County Grand Jury indicted Henry K. Lawson on one count of manufacturing methamphetamine, first offense.¹ Thereafter, he filed a motion to suppress evidence seized from his vehicle after it was stopped by the police. The trial court held a suppression hearing on June 25, 2003, and denied the motion to suppress by written order entered

¹ KRS 218A.1432 and 534.030.

June 27, 2003. Subsequently, the trial court entered written findings of fact supporting its denial of the motion.

Thereafter, Lawson entered a conditional guilty plea to an amended charge of possession of a methamphetamine precursor.²

The trial court sentenced Lawson to three and one-half years' imprisonment, in accord with the Commonwealth's recommendation.

This appeal followed. Finding no reversible error, we affirm.

RCr 9.78 sets out the procedure for conducting suppression hearings and establishes the standard of appellate review of the determination of the trial court. Our standard of review of a circuit court's decision on a suppression motion following a hearing is twofold: First, the factual findings of the court are conclusive if they are supported by substantial evidence; and second, this Court conducts a *de novo* review to determine whether the trial court's decision is correct as a matter of law.³

At the suppression hearing, Grant County Deputy Roger Humphrey testified about the events surrounding the stop and search of Lawson's vehicle. On April 16, 2003, at approximately 11:00 p.m., Humphrey and Williamstown Police Chief Bobby Webb stopped by the Wal-Mart store in Dry Ridge. Humphrey and Webb

² KRS 218A.1437 and 534.030.

³ Adcock v. Commonwealth, Ky., 967 S.W.2d 6, 8 (1998).

are also agents with the Northern Kentucky Drug Strike Force. They were both off-duty at the time. While in the check-out line, Agent Humphrey noticed an individual, later identified as Lawson carrying a full case of starting fluid. Agent Humphrey testified that this attracted his attention because starting fluid is used in methamphetamine manufacturing and because Lawson appeared to be nervous.

Agent Humphrey then left the store, instructed Chief Webb to contact another officer to assist them, and waited for Lawson to exit the store. Agent Humphrey and Chief Webb observed Lawson leave the store and walk to a red Chevrolet Chevette with Ohio license plates, some two to three hundred yards away from the store. The parking lot was nearly empty at the time and no other vehicles were near the Chevette. Agent Humphrey observed three other individuals in the car. Upon reaching the Chevette, Lawson placed the starting fluid in the hatchback of the car and then "high-fived" the three other people. The car then left the parking lot and turned west onto Kentucky Highway 22.

Based on these observations, Agent Humphrey asked Deputy Inman, who had arrived on the scene, to follow the Chevette. Agent Humphrey and Chief Webb followed in their vehicle. The Chevette turned into the parking lot of the Dry Ridge Motor Inn, where Deputy Inman turned on his lights and directed Lawson to stop.

Agent Humphrey then approached the Chevette with Deputy Inman. Agent Humphrey told Lawson that he had observed Lawson purchasing a full case of starting fluid, and that this behavior was suspicious based on the time of the purchase, the amount of fluid which Lawson had purchased, and that large amounts of starting fluid are commonly used in the manufacture of methamphetamine. Lawson explained that he needed the starting fluid for a backhoe which he used for work in Ohio. Agent Humphrey asked Lawson for permission to search the Chevette, but Lawson refused to give permission.

Agent Humphrey then walked around the Chevette and looked in its windows. In addition to the starting fluid, he observed packs of lithium batteries, heavy duty latex gloves and latex gloves. Agent Humphrey testified that all of these items are used in the process for manufacturing methamphetamine. In addition, Agent Humphrey testified that the passengers in the vehicle gave conflicting stories as to their destination.

Based upon their suspicions aroused by these circumstances, the officers conducted a search of the vehicle. Upon searching the trunk of the Chevette, the police found more latex gloves, starting fluid, and lithium batteries. In addition, they found 2,000 pseudoephedrine tablets, drain cleaner, rubber tubing, stainless steel valves, and a .22 caliber rifle with ammunition. Agent Humphrey testified that all of

these items (except the firearm) are used in the methamphetamine manufacturing process. All four occupants of the vehicle were then arrested.

Lawson first takes issue with several of the trial court's findings. He first argues that the trial court erred in finding that starting fluid is a methamphetamine precursor. He correctly points out that a precursor is a chemical that preceded a compound or was transformed into another compound,⁴ and a methamphetamine precursor is a drug product or combination of drug products containing ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers.⁵ Thus, by definition, starting fluid is not a methamphetamine precursor. Lawson also points out that the trial court erroneously stated in its findings that Agent Humphrey testified that he found it suspicious that Lawson had parked so far away from the Wal-Mart due to the time of night and the cold weather. Agent Humphrey did not testify regarding the temperature on April 16, 2003, but only stated that, while the parking lot was nearly empty, Lawson had parked some two to three hundred yards away from the store.

⁴ Commonwealth v. Hayward, Ky., 49 S.W.3d 674, 676 (2001).

⁵ KRS 218A.1437(1).

However, neither of these factual misstatements is relevant to this appeal. Although starting fluid is not a precursor, Agent Humphrey testified that it is used in the methamphetamine manufacturing process. Likewise, the trial court's misstatement about the weather, while not supported by the record, is not relevant because Agent Humphrey testified to other circumstances surrounding Lawson's purchase of the starting fluid that attracted his attention.⁶

Indeed, the central question in this case is whether Lawson's purchase of the starting fluid, along with the other evidence, was sufficient to support a reasonable suspicion that Lawson was engaged in criminal activity. To justify a stop under Terry v. Ohio,⁷ the officer must be able to articulate more than a mere "inchoate and unparticularized suspicion or 'hunch'" of criminal activity.⁸ Rather, a warrantless stop of a vehicle is permissible if the officer has an "articulable and reasonable suspicion" of criminal activity.⁹ The objective justification for the officer's actions must be measured in light of the

⁶ The other alleged factual misstatements by the trial court in its findings are not actually misstatements of evidence in the record. Rather, the trial court made interpretations of Agent Humphrey's testimony with which Lawson now disagrees.

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

⁸ Id. at 27, 20 L. Ed. 2d at 909.

⁹ Creech v. Commonwealth, Ky. App., 812 S.W.2d 162, 163 (1991).

totality of the circumstances.¹⁰ When considering the totality of the circumstances, a reviewing court should take care not to view the factors upon which police officers rely to create reasonable suspicion in isolation. Courts must consider all of the officer's observations, and give due weight to inferences and deductions drawn by trained law enforcement officers.¹¹

Although our consideration of a police officer's justification for a Terry stop should be deferential, the distinction between a mere hunch and reasonable suspicion is often elusive. The fact that certain conduct may be construed as consistent with innocent behavior does not mean that this conduct may not form the basis for reasonable suspicion.¹² The relevant inquiry in making a determination of reasonable suspicion is not whether particular conduct is "innocent" or "guilty", but the degree of suspicion that attaches to particular types of non-criminal conduct.¹³

¹⁰ See United States v. Sokolow, 490 U.S. 1, 104 L. Ed. 2d 1, 109 S. Ct. 1581 (1989); Eldred v. Commonwealth, Ky., 906 S.W.2d 694 (1994).

¹¹ United States v. Arvizu, 534 U.S. 266, 272-75, 151 L. Ed. 2d 740, 749-51, 122 S. Ct. 744 (2002). See also United States v. Martin, 289 F.3d 392, 398 (6th Cir., 2002).

¹² Simpson, 834 S.W.2d at 686 *citing* United States v. Gomez, 776 F.2d 542, 548 (5th Cir., 1985).

¹³ Illinois v. Gates, 462 U.S. 213, 543, n. 13, 76 L. Ed. 2d 527, 552, 103 S.Ct. 2317 (1983). See also United States v. Sokolow, 409 U.S. 1, 104 L. Ed. 2d 1, 109 S. Ct. 1581 (1989).

When viewed as a whole, Lawson's actions on the night of April 16, 2003, gave rise to a "particularized and objective basis" for suspecting him of wrongdoing.¹⁴ Agent Humphrey testified that Lawson purchased a large quantity of starting fluid late at night. By itself, this behavior is not suspicious. However, Lawson's nervousness as he made the purchase is a relevant factor in determining reasonable suspicion.¹⁵ It is also relevant that Lawson parked some distance away from the store even though it was late at night and the parking lot was nearly empty, and that his passengers gave him "high-fives" upon his return to the car with the starting fluid. While none of these circumstances, when viewed alone, would give rise to a reasonable suspicion of criminal activity, when viewed together and in light of Agent Humphrey's knowledge of methamphetamine manufacturing, these facts give rise to a reasonable suspicion justifying the stop of Lawson's vehicle.

Lawson also argues that the search of his vehicle was invalid because there was no probable cause to believe that his vehicle contained contraband. Generally, the police may not

¹⁴ Arvizu, 574 U.S. 273, 151 L. Ed. 2d at 749 (*citing United States v. Cortez*, 449 U.S. 411, 417-18, 66 L. Ed. 2d 621, 628-29, 101 S. Ct. 690 (1981)).

¹⁵ Illinois v. Wardlow, 528 U.S. 119, 124, 145 L.Ed.2d 570, 577, 120 S.Ct. 673, 676 (2000).

search an individual without a warrant unless it can be shown that the search falls within one of the recognized exceptions to the rule.¹⁶ The automobile exception allows officers to search a legitimately stopped automobile where probable cause exists that contraband or evidence of a crime is in the vehicle.¹⁷ It is insufficient to look at circumstances in retrospect and find probable cause. Rather, probable cause must exist and be known to the investigating officer at the time he commences the search.¹⁸ "Probable cause exists when the totality of the circumstances then known to the investigating officer creates a fair probability that contraband or evidence of crime is contained in the automobile."¹⁹

In addition to the facts and circumstances observed by Agent Humphrey prior to the stop, Agent Humphrey testified to additional facts which gave rise to probable cause supporting a search of Lawson's automobile. As previously noted, Agent Humphrey saw lithium batteries, starter fluid, heavy-duty rubber gloves, and latex gloves inside the automobile, and in plain

¹⁶ Cook v. Commonwealth, Ky., 826 S.W.2d 329 (1992)(*citing* Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971)).

¹⁷ Clark v. Commonwealth, Ky. App., 868 S.W.2d 101 (1993).

¹⁸ Sampson v. Commonwealth, Ky., 609 S.W.2d 355, 358 (1980).

¹⁹ Clark at 106-107.

view. While innocuous on their own, the presence of these items together may indicate that they are being used for methamphetamine manufacturing. Furthermore, the passengers in the vehicle gave inconsistent explanations regarding their destinations. The totality of the circumstances known to the Agent Humphrey at the time he commenced the search was sufficient to create a fair probability that evidence of a crime was contained in Lawson's car. Thus, the search was permissible under the automobile exception to the warrant requirement, and the trial court properly denied Lawson's motion to suppress evidence seized as a result of that search.

Accordingly, the judgment of conviction by the Grant Circuit Court is affirmed.

ALL CONCUR.

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