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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000037-MR

WILLIE I. BROWN — APPELLANT

v.

APPEAL FROM CLARK CIRCUIT COURT
HONORABLE JULIA HYLTON ADAMS, JUDGE
ACTION NO. 03-CR-00058

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: SCHRODER, TAYLOR, AND VANMETER, JUDGES.

SCHRODER, JUDGE: Willie I. Brown appeals his conviction of trafficking in marijuana, first-degree trafficking in cocaine while in possession of a handgun, and possession of drug paraphernalia, pursuant to a conditional guilty plea reserving the right to appeal the trial court's denial of his motion to suppress. We agree with the trial court that the police officer's asking Brown a few questions, after telling him he was

free to go after a traffic stop, did not constitute an illegal detention. Hence, we affirm.

The sole witness at the October 16, 2003, suppression hearing was Officer Robert Dale, a K-9 officer with Kentucky Vehicle Enforcement. Dale testified that, on April 29, 2003, he observed a minivan (driven by Brown) passing other vehicles on I-64, and, using his radar, determined the vehicle was traveling at a speed of 78 mph. Dale initiated a traffic stop, informed Brown he had been pulled over for speeding, and asked him to step out of the van to the rear of the vehicle. Brown was cooperative, and produced a valid drivers license and a valid rental agreement for the minivan. Because Brown was traveling less than 15 mph over the speed limit, Dale wrote Brown a "courtesy" (or warning) ticket. Dale handed Brown the ticket, his drivers license, and rental agreement, and told him he was free to go. As Brown walked back towards the minivan, Dale asked, "Mr. Brown, is it okay if I ask you a couple of questions?". Brown agreed, and walked back over to Dale. Dale then asked questions including whether Brown had any alcohol, weapons, marijuana, or drugs in the vehicle. Brown admitted he had a small amount of marijuana in the vehicle, but that it was just for his personal use, and also admitted there was a handgun in the vehicle. Dale informed Brown that he now had probable cause to search the vehicle, and Brown subsequently signed a

consent form. The search of the van revealed marijuana, cocaine, drug paraphernalia, and a handgun.

On cross-examination, Dale admitted that he had already decided to search Brown's vehicle, and had called for backup, prior to engaging Brown in the conversation about weapons, drugs, etc. He admitted that although he had concluded the traffic stop, and had told Brown he was free to leave, if Brown had actually tried to leave at that point, he would not have let him go. Dale testified that he would have detained him and run the K-9, because he had developed reasonable suspicion during the traffic stop. Dale testified his reasonable suspicion was based on the following "indicators" – that Brown appeared nervous, was crossing and uncrossing his arms, was wringing his hands, looked up and down the highway and into the fields, that Brown was too helpful, and that Brown stretched "tremendously" (which Dale referred to as the "felony stretch") and stretched too many times (explaining that a "normal" person who has been driving for an extended period of time will only stretch once or twice, but that Brown stretched continually.)

The trial court found that Brown's admission that he had marijuana in the vehicle gave Dale probable cause to search. The court found that the "question and answer" discussion which followed the issuance of the courtesy ticket did not occur in a custodial setting, nor was it overbearing or coercive. The

court therefore, denied the motion to suppress. The trial court did acknowledge that, rather than choosing to stay and answer Officer Dale's questions,

> [i]f Mr. Brown had said "No, sir, I've got to get on down the road and got in the car and driven off, and if they'd stopped him after that, we'd be back here and we'd be hearing this, and indeed, if those were the circumstances, we'd be suppressing any evidence that was recovered because citizens do have certain rights driving up and down the interstate whether they stretch or look to the left or right or close their arms over their chests . . .

On October 24, 2003, Brown entered a conditional guilty plea to trafficking in marijuana, first-degree trafficking in cocaine while in possession of a handgun, and possession of drug paraphernalia, reserving the right to appeal the trial court's denial of his motion to suppress. Brown was sentenced to a total of ten years' imprisonment. This appeal followed.

On appeal, Brown contends that his consent to search was invalid because it was obtained during an illegal detention - that his further detention after the purpose of the traffic stop was completed was unlawful, as Dale had no reasonable articulable suspicion that Brown was engaged in criminal activity. Our standard of review of a trial court's ruling on a suppression motion is twofold. First, we must determine whether the trial court's findings of fact are supported by substantial

evidence. If so, we must then determine whether the trial court violated the rule of law in applying it to the established facts. RCr 9.78; Adcock v. Commonwealth, 967 S.W.2d 6, 8 (Ky. 1998). The facts of this case are not in dispute, hence, our review becomes whether the trial court correctly applied the rule of law.

The recent case of Commonwealth v. Erickson, 132 S.W.3d 884 (Ky.App. 2004), involved a very similar set of facts. In Erickson, the appellee, Erickson, was stopped for a minor traffic violation (the rear license plate was not illuminated). Erickson produced valid driving documents, a computer check was run, and the identification of the passengers was checked. As everything appeared to be in order, the officer gave Erickson a verbal warning, and returned all the documents to him and the passengers. The officer then began "chit-chatting" with Erickson about the wheels on his car. While engaged in this discussion, the officer asked if Erickson minded if he looked inside the car. Erickson said, "Sure, go ahead. Take a look in the car." A search of the vehicle uncovered methamphetamine. As in the present case, Erickson moved to suppress the evidence on grounds that his consent was invalid as it was obtained in the course of an unlawful detention without reasonable suspicion in violation of United States v. Mesa, 62 F.3d. 159 (6th Cir.

1995). The trial court granted Erickson's motion to suppress. This court reversed.

The appellee in Erickson, as does Brown in the present case, argued that per United States v. Mesa, an officer may not detain a vehicle or its occupants once the purpose of the initial traffic stop is completed "unless something that occurred during the traffic stop generated the necessary reasonable suspicion to justify a further detention". Mesa, at 162. However, in Erickson, this Court recognized that in the wake of Ohio v. Robninette, 519 U.S. 33, 117 S. Ct. 417, 136 L. Ed. 2d 347 (1996), "Mesa has evolved from a bright-line, *per se* rule to a highly limited fact-specific case." Erickson, at 889. Robinette held that continued detention, in the absence of reasonable suspicion, following a traffic stop is not *per se* illegal, rather, the test is one of reasonableness.

> Questions that hold potential for detecting crime, yet create little or no inconvenience, do not turn reasonable detention into unreasonable detention. They do not signal or facilitate oppressive police tactics that may burden the public – for all suspects (even the guilty ones) may protect themselves fully by declining to answer.

United States v. Burton, 334 F.3d 514, 518 (6th Cir. 2003)(citation omitted) (emphasis added). Erickson, citing Robinette and Burton, held that the additional conversation after the traffic stop was completed was not an illegal

detention, and therefore the consent (which the court concluded was voluntary) was valid. The same would apply to the present case. Officer Dale told Brown he could leave, and then asked a few more questions. As the trial court correctly found, Brown did not have to answer, but he did so voluntarily,[1] and his answer is what got him into trouble.[2] Brown's admission that he had marijuana in the van gave Dale probable cause to search the vehicle. United States v. Harris, 403 U.S. 573, 583, 91 S. Ct. 2075, 29 L. Ed. 2d 723 (1971).

Brown attempts to distinguish his case from Erickson, on grounds that per Dale's own testimony (that despite telling Brown he was free to go, he would have detained him if he had tried to leave), he was not free to leave after the traffic stop, and that such detention was not lawful in the absence of articulable facts justifying a reasonable suspicion. "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." United States v. Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497 (1980). The subjective intention of the law enforcement

[1] Brown does not challenge the voluntariness of his answers on appeal.
[2] We agree with the trial court that the facts articulated by Officer Dale (that Brown was stretching, looking up and down the road, being too helpful, etc.) are clearly insufficient to justify a reasonable suspicion of criminal activity to detain Brown.

officer is irrelevant except insofar as it is conveyed to the individual. Mendenhall, 446 U.S. at 555, n.6. Dale told Brown he was free to leave. Brown did not present any evidence at the suppression hearing that he knew or even believed that he was not free to leave.

For the foregoing reasons, the judgment of the Clark Circuit Court is affirmed.

ALL CONCUR.

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