

RENDERED: July 8, 2005; 10:00 a.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-000741-DG

GORDON WALDRIP

APPELLANT

ON DISCRETIONARY REVIEW FROM CALLOWAY CIRCUIT COURT  
v. HONORABLE DENNIS R. FOUST, JUDGE  
ACTION NO. 04-XX-00002

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION AFFIRMING

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BEFORE: BARBER AND SCHRODER, JUDGES; AND HUDDLESTON, SENIOR  
JUDGE.<sup>1</sup>

HUDDLESTON, Senior Judge: In the early morning hours of  
December 6, 2004, Gordon Waldrip, a resident of Florida, was  
driving north on Kentucky Highway 121 in Calloway County. Just  
prior to 1:00 a.m., Kentucky State Trooper John Russell Boyd  
spotted Waldrip and began following him. Trooper Boyd decided

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<sup>1</sup> Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

to verify Waldrip's Florida license plate through the National Crime Information Center (NCIC) database. Although Waldrip's license plate number was "G38FEV", Trooper Boyd misread it as "638FEV" when he called it into dispatch. When the dispatcher ran the number "638FEV" through NCIC, it was designated as "not on file". Upon learning this, Trooper Boyd decided to stop Waldrip since he suspected that either the automobile or the license plate was stolen.

After both vehicles pulled off the highway, Trooper Boyd approached the rear of Waldrip's automobile and noticed that the license plate was not "638FEV" but "G38FEV". Upon realizing his mistake, the officer decided to apologize to Waldrip for mistakenly detaining him. When Trooper Boyd approached Waldrip, he detected a strong odor of alcohol. Suspecting that Waldrip was under the influence of alcohol, Trooper Boyd detained Waldrip to ascertain whether he had been driving under the influence. After further investigation, Trooper Boyd arrested Waldrip for driving under the influence of alcohol.

In due course, Waldrip moved Calloway District Court to suppress evidence obtained as a result of the stop. Waldrip argued that Trooper Boyd had illegally detained him, thereby, violating his rights guaranteed by the Fourth Amendment to the United States Constitution. According to Waldrip, when Trooper

Boyd realized that he had misread the license plate number, he no longer harbored any reasonable and articulable suspicion that would justify continuing an investigatory stop. At that point, the stop violated the Fourth Amendment. And, Waldrip insisted, when Trooper Boyd's suspicions were dispelled, he was required to return to his cruiser and leave without speaking to him.

At the suppression hearing, Trooper Boyd testified to the facts set forth above. Waldrip did not offer any evidence, did not dispute the facts outlined in Trooper Boyd's testimony and did not challenge the officer's credibility. After Calloway District Court denied Waldrip's motion to suppress, he appealed to Calloway Circuit Court, which affirmed the district court's decision. Waldrip's motion for discretionary review was granted by this Court.

Waldrip relies heavily on State v. Kaufman.<sup>2</sup> In Kaufman, a police officer observed that one tail-lamp of Kaufman's automobile was brighter than the other. Thinking that Kaufman's brake-lamps were defective, the officer decided to stop the vehicle. As Kaufman pulled off the highway, the officer observed him use his turn signal and his brake-lamps, both of which were working properly. The officer approached Kaufman and explained his reasons for the stop, but he then asked to see Kaufman's driver's license and interrogated Kaufman

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<sup>2</sup> 59 P.2d 1166 (Mont. 2002).

without any suspicion that either Kaufman or his passenger were or had been engaged in criminal activity. After the officer discovered methamphetamine in the automobile, Kaufman was arrested. The Montana Supreme Court held that the officer had no reasonable and articulable suspicion to detain and interrogate Kaufman once he discovered that the vehicle's tail-lamps were not defective.

Waldrip also relies on another Montana case, State v. Lacasella.<sup>3</sup> There a police officer observed Lacasella's vehicle and thought that he had detected a violation of Montana's statute requiring that a license plate be conspicuously displayed on the front and rear of every motor vehicle. Lacasella had placed a license plate in the front window of his car, but the officer mistakenly interpreted Montana's statute as requiring the plate to be displayed on the front bumper. After investigating, the officer arrested Lacasella for driving under the influence of intoxicants. On appeal from an adverse lower court decision, the Montana Supreme Court held that an officer's mistake of law could not justify an investigatory stop.

Based on Kaufman and Lacasella, Waldrip argues the stop of his automobile violated the Fourth Amendment because Trooper Boyd's mistake regarding the license plate did not constitute a reasonable and articulable suspicion justifying the

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<sup>3</sup> 60 P.3d 975 (Mont. 2002).

stop. Even if the stop was justified, Waldrip contends, once the trooper realized his mistake, he was required to return to his vehicle and leave without confronting the driver.

When reviewing suppression issues, we first evaluate the trial court's findings of fact to determine whether they are supported by substantial evidence. If so, the factual findings are conclusive.<sup>4</sup> Next, we review *de novo* the court's application of the law to the facts to determine whether its legal conclusions are correct.<sup>5</sup>

The facts in this case are not in dispute. Thus, Trooper Boyd's testimony constitutes substantial evidence which supports the lower court's findings of fact.

As to the law, Waldrip urges us to adopt the holdings found in Kaufman and Lacasella. However, these cases are distinguishable from the present case. In Lacasella, the police officer made a mistake of law. In this case, Trooper Boyd made a mistake of fact, not of law. Consequently, Lacasella does not apply.

In Kaufman, after the officer recognized his mistake, he explained to Kaufman why he initiated the stop, but, after offering the explanation, he continued to detain and interrogate Kaufman without any suspicion that the driver or his passenger

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<sup>4</sup> Ky. R. Crim. Proc. (RCr) 9.78.

<sup>5</sup> Commonwealth v. Neal, 84 S.W.3d 920, 923 (Ky.App. 2002).

were engaged in criminal activity. In this case, as in Kaufman, Trooper Boyd realized his mistake and approached Waldrip to apologize for stopping him. But, unlike Kaufman, Trooper Boyd continued to detain Waldrip only because he detected the odor of alcohol emanating from his vehicle. Once Trooper Boyd smelled alcohol, he had a reasonable and articulable suspicion, separate and distinct from his prior mistake regarding the license plate, which justified -- and in fact required -- continuation of the stop. So Kaufman is factually distinguishable and does not apply.

We disagree with the contention that once Trooper Boyd realized his mistake, he had no choice but to leave without confronting Waldrip. Instead, we agree with the United States Court of Appeals for the Tenth Circuit Court that "[a]s a matter of courtesy, [an] officer could explain to drivers in [Waldrip's] circumstances the reason for the initial detention and then allow them to continue on their way without asking them to produce their driver's license and registration."<sup>6</sup> Although Trooper Boyd realized his mistake before speaking to Waldrip, he was not prohibited from speaking to him in order to explain why he initiated the stop.

Calloway District Court correctly denied Waldrip's motion to suppress evidence obtained as a result of the stop.

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<sup>6</sup> Unites States v. McSwain, 29 F.3d 558, 562 (10<sup>th</sup> Cir. 1994).

And Calloway Circuit Court appropriately upheld the district court's decision. Consequently, the circuit court's order is affirmed.

ALL CONCUR.

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