

RENDERED: JULY 29, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001204-MR

CHRISTY C. MORGAN

APPELLANT

v. APPEAL FROM HART CIRCUIT COURT
HONORABLE CHARLES SIMMS, III, JUDGE
ACTION NO. 03-CR-00143

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, BUCKINGHAM, AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Christy C. Morgan has appealed from the judgment of conviction and sentence entered by the Hart Circuit Court on June 15, 2004, following her conditional plea of guilty to the charge of possession of a controlled substance in the first degree (methamphetamine).¹ Having concluded that the trial court's findings of fact in support of its order denying Morgan's motion to suppress evidence are supported by

¹ Kentucky Revised Statutes (KRS) 218A.1415.

substantial evidence and that its application of the law to those facts is correct as a matter of law, we affirm.

On October 8, 2003, at approximately 1:00 a.m., Officer Ron Lafferty of the Horse Cave Police Department was informed by Officer Gerald Cox of the Cave City Police Department that Morgan's vehicle had been observed parked behind a funeral home next to the Scottish Inn where Morgan had been arrested earlier that year on drug charges. Officer Cox suspected that Morgan may have parked her vehicle at the funeral home instead of the motel parking lot because of her arrest for previous drug activity at the motel.

Officer Lafferty on October 11, 2003, personally observed Morgan's vehicle in Horse Cave. When he attempted to follow Morgan to observe her driving, she successfully avoided him by taking what he believed to be evasive action. On October 16, 2003, Officer Lafferty was informed by Officer Kevin Webb of the Cave City Police Department that Morgan was a suspect in the theft of generic Sudafed pills from a BP station in Cave City.

On October 17, 2003, the day Morgan was arrested on the charge at issue in this case, Officer Lafferty once again attempted to follow Morgan's vehicle in Horse Cave. Morgan took what Officer Lafferty believed to be evasive action; and he notified Officer Alan Shirley of the Horse Cave Police Department that he believed Morgan, and a male passenger in

Morgan's vehicle, were attempting to avoid him and "acting suspicious." He requested assistance from Officer Shirley.

Shortly thereafter, the officers noticed Morgan's vehicle turn into a convenience store parking lot, and they followed it into the parking lot. The male passenger, who was identified as Dale Mansfield, was now driving and Morgan was in the passenger seat. After Morgan's vehicle stopped in the convenience store parking lot, another male got into the back seat.

Morgan and Mansfield got out of Morgan's vehicle and walked toward the entrance to the store. Officer Shirley approached Mansfield and Officer Lafferty approached Morgan. When Officer Lafferty asked Morgan for her driver's license, she responded that she needed to go to the restroom. Officer Lafferty insisted that she remain with him and produce her driver's license. While the officers ran a check of Morgan's and Mansfield's driver's license, Officer Lafferty asked Morgan for consent to search her purse, which she gave. The records search revealed that Morgan had a valid driver's license, but Mansfield had a suspended license. After they learned that Mansfield's driver's license was suspended, Officer Lafferty stopped his search of Morgan's purse to assist Officer Shirley in arresting Mansfield for operating a motor vehicle on a suspended license. Morgan was told to get back into her car.

The officers observed Mansfield reach into his pocket and throw a metal object across the road. Mansfield claimed the thrown object was "just marijuana". A search incident to the arrest of Mansfield revealed a pair of brass knuckles. Mansfield was charged with driving on a suspended license, tampering with physical evidence, and carrying a concealed deadly weapon and was placed in Officer Shirley's vehicle.

While Officer Shirley was arresting Mansfield, he observed Morgan reach for something, as she sat in the passenger seat of her vehicle. Morgan and the passenger in the backseat, Kenneth Downey, were told to exit the vehicle. Officer Lafferty conducted a pat down search of Downey and a large plastic bag of white powder was observed in his left jacket pocket. Officer Lafferty removed the bag and asked Downey what was in the bag, and he admitted it was crushed Sudafed. Downey was arrested for possession of a controlled substance in the first degree, possession of drug paraphernalia, and possession of a methamphetamine precursor.

While Officer Lafferty was arresting Downey, he noticed Morgan toss something toward the front of the vehicle. Officer Lafferty retrieved the item, which was a black phone book. He opened the book and discovered, in a compartment inside the book cover, a small bag containing a white powdery substance and two pieces of aluminum foil. Morgan denied any

knowledge of the phone book, but Officer Lafferty arrested her for possession of a controlled substance in the first degree.

On December 1, 2003, a Hart County grand jury indicted Morgan for possession of a controlled substance in the first degree, and for having no insurance.² On January 6, 2004, Morgan filed a motion to suppress the evidence seized at the time of her arrest. She alleged that the officers did not have reasonable and articulable suspicion of criminal activity to justify detaining her at the convenience store prior to her arrest.

An evidentiary hearing was held on March 16, 2004, and Officer Lafferty was the only witness. At the conclusion of the hearing, the trial court denied Morgan's motion to suppress the evidence.³ On March 29, 2004, Morgan entered a conditional guilty plea pursuant to CR⁴ 8.09, reserving her right to appeal the denial of her motion to suppress evidence.⁵ On June 15, 2004, the trial court entered the "Final Judgment of Conviction", convicting Morgan of one count of possession of a

² KRS 304.33-080.

³ An order denying the motion to suppress was not entered until April 14, 2004.

⁴ Kentucky Rules of Civil Procedure.

⁵ The record includes the "Commonwealth's Offer on a Plea of Guilty" dated March 29, 2004, which was signed by Morgan and her attorney.

controlled substance in the first degree, and sentencing her to prison for one year.⁶ This appeal followed.

Morgan contends the trial court erred in denying her motion to suppress the evidence because the information gathered by the officers prior to her being detained at the convenience store was insufficient to support the reasonable and articulable suspicion of criminal activity required to justify an investigatory stop under Terry v. Ohio.⁷ We disagree.

Our standard of review in reviewing a trial court's decision on a motion to suppress evidence is well-established. We must "first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive."⁸ Based on those findings of fact, we must then conduct a de novo review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law."⁹ In Ornelas v. United States,¹⁰ the Supreme Court of the United States "recognized that police may draw inferences of illegal activity from facts that may appear

⁶ The charge for not having insurance was dismissed.

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

⁸ Kentucky Rules of Criminal Procedure (RCr) 9.78.

⁹ Commonwealth v. Neal, 84 S.W.3d 920, 923 (Ky.App. 2002) (citing Adcock v. Commonwealth, 967 S.W.2d 6, 8 (Ky. 1998); and Commonwealth v. Opell, 3 S.W.3d 747, 751 (Ky.App. 1999)).

¹⁰ 517 U.S. 690, 699, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911, 920 (1996).

innocent to a lay person and that a reviewing court should give due weight to the assessment by the trial court of the credibility of the officer and the reasonableness of the inferences."¹¹ The presence or absence of reasonable suspicion is a question of law to be determined on appeal under a de novo standard of review.¹²

The protections to be free from unreasonable search and seizure as guaranteed by the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution are not violated by a police officer merely approaching an individual in a public place, by asking him to identify himself, and "by putting questions to him if the person is willing to listen[.]"¹³ If there is a reasonable and articulable suspicion that criminal activity is afoot,¹⁴ a police officer may briefly detain an individual in a public place, even though there is no probable cause to arrest him. "[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

¹¹ Commonwealth v. Whitmore, 92 S.W.3d 76, 79 (Ky. 2002).

¹² Kotila v. Commonwealth, 114 S.W.3d 226, 232 (Ky. 2003) (citing Ornelas, 517 U.S. at 698-99; and Commonwealth v. Banks, 68 S.W.3d 347, 349 (Ky. 2001)).

¹³ Florida v. Royer, 460 U.S. 491, 497, 103 S.Ct 1319, 75 L.Ed.2d 229 (1983); Baker v. Commonwealth, 5 S.W.3d 142, 145 (Ky. 1999).

¹⁴ Terry, 392 U.S. at 21.

articulable suspicion' that the person in question is engaged in illegal activity" [emphasis original].¹⁵

In concluding that Officer Lafferty had reasonable and articulable suspicion of criminal activity to justify his detention of Morgan, the trial court relied upon the totality of circumstances and the reasonable inferences and deductions drawn by the police officer. The facts relied upon by the trial court included Morgan's prior criminal history involving drugs; an officer's observation earlier that month of her vehicle being parked during the early morning hours in the funeral home parking lot next door to the Scottish Inn where she had previously been arrested for drug activity; Morgan's being a suspect in a recent theft of a methamphetamine precursor in a nearby city; Morgan's evasive actions in driving her vehicle; and that Morgan was no longer driving her vehicle when it turned into the convenience store parking lot.

We recognized that most of these actions are as consistent with legal activities as illegal ones, but that is not the test.¹⁶ For an investigatory stop to be constitutional,

¹⁵ Simpson v. Commonwealth, 834 S.W.2d 686, 687 (Ky.App. 1992) (citing Terry, 392 U.S. at 21).

¹⁶ Baker v. Commonwealth, 5 S.W.3d 142, 146 (Ky. 1999) (stating that "[a]llthough Appellant's conduct prior to the seizure may have been as consistent with innocent activity as with criminal activity, that fact in and of itself did not preclude Officer Richmond from entertaining a reasonable suspicion that criminal activity could have been occurring once Appellant failed to comply with the request to remove his hands from his pockets").

it "must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity."¹⁷ There is no requirement that the person actually be engaged in criminal activity at the time of the investigatory stop or before that time. The analysis of whether a particular investigatory stop is constitutionally permissible "proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions - inferences and deductions that might well elude an untrained person."¹⁸

In Creech v. Commonwealth,¹⁹ this Court noted that among the grounds for a constitutional detention of a citizen by a police officer is "some articulable suspicion that the motorist is unlicensed or that the vehicle or an occupant is subject to seizure for violation of some law."²⁰ In the case before us, Officer Lafferty certainly had reasonable suspicion, although it in fact was wrong, that Morgan was operating a motor vehicle on a suspended license since she had evaded him and

¹⁷ United States v. Cortez, 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981).

¹⁸ Cortez, 449 U.S. at 418.

¹⁹ 812 S.W.2d 162, 163-64 (Ky.App. 1991).

²⁰ Id. (citing Delaware v. Prouse, 440 U.S. 648, 663, 99 S.Ct. 1391, 1401, 59 L.Ed.2d 660 (1979)).

switched drivers. Thus, based on the information Officer Lafferty gathered about Morgan and his inferences and deductions, there was sufficient evidence to support the trial court's factual findings; and the trial court's application of the law concerning an investigatory stop to those facts in denying Morgan's motion to suppress evidence was correct.

Based on the foregoing reasons, the judgment of the Hart Circuit Court is affirmed.

ALL CONCUR.

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