RENDERED: FEBRUARY 17, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002584-MR

MICHAEL H. STOGNER APPELLANT

v.

APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 04-CR-00104

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; McANULTY, JUDGE; PAISLEY, SENIOR JUDGE.[1]

McANULTY, JUDGE: Appellant Michael Stogner entered a conditional guilty plea following the denial of his motion to suppress evidence obtained in a search of his vehicle. Stogner pled guilty to manufacturing methamphetamine, possession of a controlled substance in the first degree, possession of anhydrous ammonia in an unapproved container for the purpose of

[1] Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

manufacturing methamphetamine, possession of drug paraphernalia, and possession of marijuana. On appeal, he argues that the officer had no reasonable suspicion to stop his car and the results of a search of the vehicle were inadmissible as “fruit of the poisonous tree.” We affirm.

At a suppression hearing, the officer described the encounter with Stogner and his co-defendant. He stated that he observed the vehicle driven by Stogner pull into the gated entrance of a restricted area, turn around and pull to the side of the road. He stated that he pulled into the same area at an angle with his headlights on the vehicle, but did not activate his safety lights. He observed the passenger in the vehicle move both hands as if hiding something by the passenger door. He stated that he approached the vehicle and told the occupants to keep their hands up where he could see them. They complied with this command. He asked them if they had any weapons and Stogner replied that he had a pocket knife. When he emptied his pocket, the officer saw that Stogner carried four lithium batteries in addition to the knife.

Shining his flashlight into the vehicle, the officer observed additional items which may be used in the manufacture of methamphetamine in the back of the vehicle. He also smelled ether, a chemical which is commonly involved in the methamphetamine manufacturing process. When Stogner would not

consent to a search of the vehicle, the officer called for a back up police unit and went to obtain a search warrant. The vehicle was subsequently searched and additional items used in the manufacture of methamphetamine were found, as well as marijuana and drug paraphernalia.

The court below denied the motion to suppress and entered findings of fact. The court found that the trooper did not make a stop of the vehicle occupied by Stogner and his passenger, Walker. The court found that he "encountered the vehicle stopped near a restricted area." Additionally, the court held that the officer "had the right, if not the duty, to investigate their circumstances to see if they needed help." The court found that upon his approach the officer discovered items associated with the manufacture of methamphetamine inside the vehicle both by plain sight and by smell. Finally, the court determined that after permission to search was refused, the warrant was founded on a good and sufficient affidavit, and that even without the warrant the trooper probably had reasonable suspicion to search the vehicle at that point.

With regard to the factual findings of the trial court, "clearly erroneous" is the standard of review for an appeal of an order denying suppression; however, the ultimate legal question of whether there was reasonable suspicion to stop or probable cause to search is reviewed *de novo*. Commonwealth

v. Banks, 68 S.W.3d 347 (Ky. 2001), citing Ornelas v. United States, 517 U.S. 690, 691, 116 S. Ct. 1657, 1659, 134 L. Ed. 2d 911 (1996). The question of whether there is "a reasonable and articulable suspicion" is a question of fact to be determined in each situation from the totality of the circumstances. Simpson v. Commonwealth, 834 S.W.2d 686, 687 (Ky. App. 1992).

Stogner continues to insist that the officer stopped the car. He acknowledges, however, that the car was parked on the side of the road when approached by the officer. We thus perceive no basis for his argument that the officer pulled the car over for no valid reason when it was already on the side of the road. More realistic is Stogner's assertion that when the officer approached Stogner's vehicle, it was a traffic stop because when the officer pulled up, they did not feel free to leave.

The rule with regard to seizures is that whenever a police officer accosts a person and restrains his freedom to walk away, he has seized that person within the meaning of the Fourth Amendment. Terry v. Ohio, 392 U.S. 1, 17, 88 S. Ct. 1868, 1877, 20 L. Ed. 2d 889 (1968). According to established principles, "a person has been 'seized' within the meaning of the Fourth Amendment . . . 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, 64 L. Ed. 2d 497 (1980). To constitute a seizure, there must be either the application of physical force, however slight, or submission to an officer's show of authority to restrain the subject's liberty. Baker v. Commonwealth, 5 S.W.3d 142, 145 (Ky. 1999), citing California v. Hodari D., 499 U.S. 621, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991). Officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place. Florida v. Royer, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983); Baker, 5 S.W.3d at 145.

We conclude that the officer's approach of the vehicle by the side of the road was not a stop or seizure. When he pulled in by the already stopped vehicle, the officer did not activate his lights or siren. In addition, he testified that he did not block Stogner's vehicle from moving and that he parked 50-75 feet from the front of Stogner's car. The officer's activities fall far short of any "physical force or a show of authority" which would tend to establish a seizure, such as "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."

Mendenhall, 446 U.S. at 552, 554, citing Terry, 392 U.S. at 19, fn. 16 (1968).

We believe that lights and sirens are such shows of authority and they were absent in this instance. Certainly, an officer following a vehicle for approximately a half mile, as the officer testified he did, could not be considered a show of authority. We conclude that a reasonable person would not conclude that he would have been prevented from leaving from the officer's mere approach of the car as occurred in this case.

Stogner does not challenge the officer's actions in ordering Stogner and the passenger to put their hands up where he could see them or the search for weapons. At that point in time, no reasonable person would have felt free to walk away. Although it was not raised as an issue, for point of clarity we observe that the passenger's furtive movements justified the limited intrusion of the seizure and pat down search of Stogner and his passenger. The officer was justified in ensuring that the persons he was dealing with did not have weapons. See Docksteader v. Commonwealth, 802 S.W.2d 149 (Ky. App. 1991)(question with pat down search is not whether officer suspects a crime, but whether person of reasonable caution might suspect presence of a weapon). The purpose of a limited protective search is not that of uncovering evidence of a crime but to allow the officer to investigate the circumstances

without fear of violence. Commonwealth v. Whitmore, 92 S.W.3d 76 (Ky. 2002).

Finally, Stogner argues that the officer did not have probable cause for a search warrant. Specifically, his argument on this point is that the officer did not validly see items associated with the manufacture of methamphetamine in plain view because he was not lawfully in a position to see them. For a plain sight exception to the warrant requirement to be upheld, the police officer must have a lawful right to be in the place where the observation was made. Commonwealth v. Elliott, 714 S.W.2d 494 (Ky. App. 1986). We have already concluded that the officer was justified in approaching the vehicle. From there, he shined his flashlight in the vehicle and saw the items in plain sight. Stogner's argument on this issue seems to be founded only upon his opinion that his vehicle was pulled over by the police. As this is not our conclusion, we find no basis to believe the officer was unlawfully beside Stogner's car. Thus, we find no error.

For all the foregoing reasons, we affirm the trial court's denial of the motion to suppress evidence. We affirm Stogner's conviction in the Muhlenberg Circuit Court.

ALL CONCUR.

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