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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000405-MR

GLEN LEE BOWERSMITH

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
ACTION NO. 03-CR-00491

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GUIDUGLI, KNOPF, AND McANULTY, JUDGES.

McANULTY, JUDGE: Glen Lee Bowersmith appeals his conviction in the Hardin Circuit Court for possession of a controlled substance in the first degree, for which he received a sentence of five years in prison. On appeal, he challenges the trial court's denial of his pretrial motion to suppress evidence. In addition, he argues that the Commonwealth introduced incorrect and prejudicial evidence that he was on probation at the time of the present offense. We affirm.

The trial court held a hearing on the motion to suppress. Officer Slack of the Radcliff Police Department testified that on the date of the offense the dispatcher informed him that an anonymous 911 call reported that a person in a black Lincoln was traveling south on US 31W and possibly driving while intoxicated. The caller gave the approximate location of the vehicle and its license plate number. Officer Slack left headquarters to follow up on the tip. He located the vehicle in the area of US 31W and Elm Road. The vehicle was coming toward him, so Officer Slack turned around and followed it. He stopped the vehicle after observing it slightly cross the yellow line into the median.

Officer Slack approached the stopped vehicle and immediately detected an odor of marijuana. He asked appellant, the operator of the vehicle, for his driver's license, vehicle registration, and proof of insurance. Appellant provided these items, and the officer noticed that the proof of insurance had expired. Officer Slack asked appellant to step out of the vehicle for the purpose of determining if he was intoxicated. He noticed that appellant had a knife attached to his pocket or belt. He asked appellant to remove the knife, and appellant placed it inside a pouch on the driver's side door. Officer Slack testified that he asked appellant if he could search the vehicle and appellant consented.

During the search, Officer Slack observed a mostly smoked marijuana cigarette in the ashtray and a marijuana seed on the floorboard of the passenger side of the vehicle. Appellant was arrested because of the discovery of marijuana in the vehicle. A search of appellant uncovered a brown glass vial in which .0248 gram of methamphetamine was contained in a plastic bag.

Following a hearing on the motion to suppress, the trial court entered an order denying the motion. The court's order stated in full:

This case is before the Court on Defendant's motion to suppress based on a challenge as to whether the police officer had an articulable suspicion which justified making the stop. In the suppression hearing, the officer says that the dispatcher had a 911 call with a complaint on a specific black vehicle, giving the plate number, as a possible DUI. The officer testified that he located the motor vehicle and then observed the vehicle drifting into the median as it drove down the road. According to the police officer, he made the stop based on the fact that he observed the vehicle driving erratically.

Based on that testimony, it appears to this Court that the police officer did have an articulable suspicion to make the stop, and the motion to suppress is hereby OVERRULED.

If supported by substantial evidence, the factual findings of the trial court are deemed conclusive. RCr 9.78.

Appellant first claims that the anonymous tip coupled with the officer's observations did not provide reasonable suspicion of unlawful conduct in order to authorize the traffic stop. Appellant contends that the constitutionality of the traffic stop turns on whether the anonymous tip sufficed to provide "reasonable suspicion." In order to properly stop a vehicle, officers must have a reasonable and articulable suspicion of criminal activity. Creech v. Commonwealth, 812 S.W.2d 162, 163 (Ky. App. 1991), citing Reid v. Georgia, 448 U.S. 438, 440, 100 S. Ct. 2752, 2754, 65 L. Ed. 2d 890 (1980). Appellant argues that the reasonableness of the stop was dependent on the reliability and/or the basis of knowledge of the informant, neither of which was known as this was an anonymous call. He also asserts that the tip contained no predictive information by which the police could verify that the person giving the tip had "inside" knowledge of what was alleged to be illegal activity.

We reject the idea that we must find that the tip alone provided reasonable suspicion, because Officer Slack obtained independent evidence of wrongdoing in his personal observation that appellant was driving erratically. Thus, the cases that appellant cites, which required additional information about the informant or predictive information when the tip was the sole basis for the stop, are distinguishable.

Collins v. Commonwealth, 142 S.W.3d 113 (Ky. 2004), on which appellant relies, is distinguishable from this case because therein the tip was the only basis for the stop; it was uncorroborated and the tipster unverified. The Kentucky Supreme Court stated in Collins that the officer had not noted anything suspicious in that case about the defendant, the vehicle or the defendant's driving. Id. at 116. Additionally, the Court faulted the lack of a predictive component in the tip in that case. Id. at 116-117.

This is in distinct contrast to the impaired driving in the case at bar. The officer did not stop Bowersmith's vehicle based solely on the call to 911. In this case, the suggestion of impaired driving was confirmed by the deputy's observation that appellant's vehicle crossed into the median. Furthermore, the tip provided a fact which would predict future behavior - that of suspected drunken driving.

Additionally, appellant challenges the officer's claim that he observed appellant cross the yellow line into the median by arguing that the officer did not allege a traffic violation until he testified at the suppression hearing. Appellant notes that fact is absent from the officer's initial report. We do not find it critical that the officer did not state that he observed appellant cross the line into the median in his report filed within the Radcliff Police Department. The officer

testified to that fact in the suppression hearing. The trial court found that testimony credible despite appellant's cross-examination of the officer at the hearing as to that omission from the report. There was substantial evidence to support the trial court's finding and so we regard it as conclusive of this question.

Next, appellant argues that once the officer determined that appellant was not impaired while driving, he was obligated to terminate the traffic stop. Appellant cites the statement in Florida v. Royer, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983), that "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." We disagree with appellant's conclusions that this standard should have limited the officer's actions in this case.

The initial stop of appellant was justified by reasonable suspicion produced by the 911 call and the officer's observation that appellant drove into the median of the road. Then when the officer spoke to appellant in the vehicle he detected the odor of marijuana which led to the accompanying reasonable suspicion that illegal drug activity was afoot. As such, continuation of the stop was permissible in order to investigate the reasonable suspicion of illegal drug activity. Kotila v. Commonwealth, 114 S.W.3d 226, 233 (Ky. 2003). Thus,

the officer was not illegally detaining appellant further when he requested permission to search the vehicle, as the added detention was supported by reasonable suspicion.

Third, appellant argues that the odor of marijuana from the vehicle did not provide probable cause to arrest him. He argues that the smell of burnt marijuana could have lingered from a previous occupant of the vehicle, and that the officer concluded that appellant was not impaired. The Commonwealth responds that appellant did not raise this issue below. Furthermore, the Commonwealth notes appellant was not arrested on the basis of the odor of marijuana, but because marijuana was present in the vehicle and accessible to him. We do not find that appellant has preserved this argument, as required by RCr 9.22, because we do not find where it was raised below. Appellant has not provided citation to the record to show that it was preserved, as required by CR 76.12(4)(c)(v). In order for an error to be considered for appellate review it must be precisely preserved and identified in the lower court. Carrier v. Commonwealth, 142 S.W.3d 670, 676-677 (Ky. 2004). Thus, we do not consider this claim.

Finally, appellant argues that a probation officer testified that he was on probation at the time of the present offense, but that the record shows that this testimony was incorrect. Appellant again makes no reference to the record to

show whether the claim of error was preserved as required by CR 76.12(4)(c)(v). In addition, appellant makes no claim as to the relief he is seeking from this allegation of error. Appellant has not shown that this issue was ever considered by the trial court, and so we decline to review it. RCr 9.22; CR 76.12(4)(c)(v).

For all the foregoing reasons, we affirm the conviction of Robert Bowersmith for possession of a controlled substance (methamphetamine).

ALL CONCUR.

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