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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001004-MR

DEON CRUMES — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NO. 04-CR-001051

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MINTON AND VANMETER, JUDGES; ROSENBLUM, SENIOR JUDGE.[1]

VANMETER, JUDGE: Deon Crumes appeals from a judgment entered by the Jefferson Circuit Court after a jury found him guilty of first-degree trafficking in a controlled substance. For the reasons stated hereafter, we affirm.

During the daylight hours of November 26, 2003, Louisville Police Detective Banks was dispatched to the 400 block of North 25th Street, a residential area, in response to an anonymous tip that there was a "black male outside selling

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

drugs." Banks, who had patrolled this general area in an unmarked Dodge Durango for approximately eleven months, testified to his belief that his vehicle was well recognized by local residents as being a police vehicle. Banks further testified that this was a "pretty high narcotics area."

Upon arriving at the location, Banks saw a pickup truck occupied by a white male driver and by a black male passenger, who was later identified as Crumes. Banks testified that he saw no other individuals in the area. As he drove by, Banks saw Crumes "start to slouch down"[2] in his seat. Banks radioed his partner, Detective Shawn Hayes, who pulled up behind the truck in his unmarked Chevrolet Impala and turned on his emergency police lights. When the truck began to move slowly down the street, as if it was "just rolling," Hayes followed and turned on his siren. The truck stopped after it turned into an alley. Both Crumes and the driver then exited the truck. After receiving the driver's consent, Hayes searched the truck and found 9.31 grams of a substance, later confirmed to be crack cocaine, hidden inside an air vent in the dashboard to the right of the radio.

Before trial, Crumes filed a motion to suppress the evidence gathered from the stop, arguing that the stop was

[2] Although Banks physically demonstrated this motion for the court, the demonstration was not recorded by the courtroom camera, leaving us with only his verbal description.

illegal. After Banks testified as described above, the trial court denied the motion. At trial, Banks again testified to, and Hayes corroborated, the events described above. The driver testified that the incident occurred after he left a nearby apartment to get drugs from another location. A car occupied by Crumes came up beside him, and Crumes leaned out and stated "I've got the fire," which the driver understood to mean that Crumes had crack cocaine. The driver said that he told Crumes that he already had some and that Crumes was too late, but he offered to give Crumes a ride in exchange for a small amount of the drug. Further, there was evidence at trial that a typical user would carry between one and two-tenths of a gram of crack cocaine, that "fire" was a street term for "real good drugs," that drug dealers may exchange drugs for transportation, and that the recovered amount of crack cocaine fell within a range that typically would be carried by a dealer. The jury found Crumes guilty of trafficking in a controlled substance, and the trial court sentenced him in accordance with the jury's recommendation of ten years. This appeal followed.

Crumes first argues that the trial court erred in refusing to grant his motion to suppress evidence because the investigative stop of the truck was illegal under the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution. RCr 9.78 requires us to review the

trial court's findings of fact, which are conclusive unless clearly erroneous,[3] and then to review the trial court's findings of law *de novo*.

The trial court's findings of fact are not disputed on appeal. Moreover, the trial court found as a matter of law that based on 1) the "information" possessed by the police officers; 2) Banks' "knowledge that his car was known in the community even though it was an unmarked car"; and 3) Crumes' furtive movements, that there had been a sufficiently articulable and reasonable suspicion of criminal activity to justify the investigative stop. The trial court judge also indicated that she considered the vehicle's movement, after Hayes turned on his emergency lights, to be an additional factor.

In *Delaware v. Prouse*, the United States Supreme Court held that an investigative stop of a vehicle would violate the Fourth Amendment unless there was "at least [an] articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law[.]"[4] This statement embraced the spirit of *Terry v. Ohio*[5] and was adopted by the Kentucky Supreme Court in *Creech v.*

[3] *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998).

[4] 440 U.S. 648, 663, 99 S.Ct. 1391, 1401, 59 L.Ed.2d 660 (1979).

[5] 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Commonwealth, which stated that "[i]n order for the stop of Creech's vehicle to have been proper . . . the officers must have had an articulable and reasonable suspicion of criminal activity."[6] In evaluating the validity of an investigative stop, we must consider the totality of the circumstances.[7]

The United States Supreme Court recently addressed the issue of anonymous tips in *Florida v. J.L.*[8] There, the Court held that an anonymous tip that an individual wearing a plaid shirt at a particular bus stop was carrying a gun, without more, did not bear the moderate indicia of reliability required to justify an initial search and seizure.[9] Here, as the anonymous tip relayed no more, and perhaps less, information than the tip in *J.L.*, it also failed to provide justification in and of itself. We agree with the trial court that the anonymous tip, in and of itself, or even when combined with the observation of Crumes slouching, was insufficient to justify the *Terry* stop.

We thus turn to consideration of the truck's movement and the timing of the seizure. In *California v. Hodari D.*, the United States Supreme Court held that in order for there to be a seizure, there must be "*either* physical force . . . *or,* where

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[6] 812 S.W.2d 162, 163 (Ky.App. 1991).

[7] *U.S. v. Sokolow*, 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989); *Eldred v. Commonwealth*, 906 S.W.2d 694 (Ky. 1994).

[8] 529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000).

[9] 529 U.S. at 271, 120 S.Ct. at 1379.

that is absent, *submission* to the assertion of authority."[10] The Kentucky Supreme Court followed *Hodari* when holding in *Taylor v. Commonwealth*[11] that a defendant, who was pulled over by the police but then resumed driving and led the police in a high-speed chase, was not "seized" until he was physically apprehended. Following these authorities, we must conclude that Crumes was not seized until the vehicle came to its complete and final stop after moving from its original position and turning into the alley. Contrary to Crumes' argument, a different result is not compelled by *Poe v. Commonwealth,*[12] in which the stop of a vehicle specifically turned not on whether there was "any reasonable and articulable suspicion of criminal activity," but instead only on whether the stop "qualifie[d] under the community caretaking function."[13]

The question now before us, therefore, is whether the combination of the anonymous tip, Crumes' physical actions, and the movement of the truck constitute the basis for an articulable and reasonable suspicion of criminal activity. As stated in *Collins v. Commonwealth*:

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[10] 499 U.S. 621, 626, 111 S.Ct. 1547, 1551, 113 L.Ed.2d 690 (1991).

[11] 125 S.W.3d 216 (Ky. 2003).

[12] 169 S.W.3d 54 (Ky.App. 2005).

[13] *Id.* at 56-57.

> Anonymous descriptions of a person in a certain vehicle or location, though accurate, do not carry sufficient indicia of reliability to justify an investigative stop; however, *when coupled with independent observations by police of suspicious conduct, such tips do carry the requisite reliability.*[14]

(Emphasis added.)

Although the stop was not based on overwhelming evidence of criminal activity and although, as Crumes argues, the facts when viewed separately may not support the stop, we are satisfied that the totality of the circumstances provides the basis for an "articulable and reasonable belief" of criminal activity. The record shows that based on an anonymous tip, Banks responded to an area known for drug activity. As he passed by the truck in which Crumes was seated, Crumes began to slouch into his seat. It was not unreasonable for Banks to suspect that Crumes' slouching movement was an attempt to hide from a passerby. Further, while the rolling of the truck after another officer pulled up behind it and activated his emergency lights may not have constituted an attempt to flee, the action certainly could be viewed as an attempt to avoid the police. Although the individual actions could be considered innocent if viewed separately, when they were viewed together with the anonymous tip they were sufficiently suspicious to create an

[14] 142 S.W.3d 113, 116 (Ky. 2004).

articulable and reasonable suspicion which justified the stop of Crumes' vehicle.

Finally, Crumes argues that the trial court erred by failing to admonish the jury or grant a new trial based on the Commonwealth's comments during closing argument. Crumes argues that the Commonwealth engaged in improper argument by referring to Crumes as a "drug dealer." Crumes further argues that the Commonwealth's presentation of "uncontradicted facts" shifted the burden of proof and constituted a comment on Crumes' decision not to testify. We disagree.

When reviewing a question of prosecutorial misconduct in closing argument, "we must determine whether the conduct was of such an 'egregious' nature as to deny the accused his constitutional right of due process of law."[15] In this, we must "focus on the overall fairness of the trial, and not the culpability of the prosecutor."[16]

Here, in closing argument, the Commonwealth began,

> Mr. Crumes is a drug dealer and the Commonwealth of Kentucky is asking you to put him out of business today. The facts in this case are . . . .

[15] *Slaughter v. Commonwealth*, 744 S.W.2d 407, 411 (Ky. 1987), citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).

[16] *Slaughter,* 744 S.W.2d at 411-12, citing *Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982).

Before the prosecutor could finish pronouncing the word "undisputed," Crumes' counsel objected to the characterization of Crumes as a "drug dealer." The objection was overruled. The prosecutor continued:

> The facts in this case are undisputed. That means the facts that have already been testified to and that you have heard — those are the only facts that you can consider when you go to the jury room. The facts are undisputed. There is no factual basis that contradicts anything I am about to tell you here. The facts in this case are not in controversy. You have heard the only witnesses in this case.

Crumes' objection to the Commonwealth's recitation of the facts was overruled. The prosecutor then verbalized several "uncontradicted" facts, and apparently described "facts" in a visual presentation that was not made available to us on appeal. At one point the prosecutor pointed towards Crumes and stated, "He is a drug dealer." Crumes' objection to this statement was overruled.

First, Crumes argues that he was prejudiced by the Commonwealth's alleged improper characterization of him as a drug dealer. Crumes argues that the Commonwealth's statements, including that Crumes was "his [the driver's] dealer," that Crumes "approached a drug addict," and that dealers "get their addicts hooked and they go back and they go back and they go back to keep their business thriving," constituted palpable

error by introducing inadmissible evidence that Crumes had sold drugs to the driver on previous occasions. Several of the alleged errors were preserved for appeal while others were not. In any event, however, the Commonwealth's characterizations of Crumes as a "drug dealer" or as the driver's "drug dealer" do not entitle Crumes to relief on appeal, given the fact that Crumes was being tried for trafficking in a controlled substance. KRS 218A.010(34) defines "traffic" as "to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance." As the evidence against Crumes indicated that he possessed 9.31 grams of crack cocaine which he attempted to sell to the driver, the prosecutor's characterization of Crumes as a "drug dealer," or even as the driver's "drug dealer," was simply a reasonable inference from the evidence.

Next, we are not persuaded by Crumes' assertion that the trial court erred by failing to sustain his objection to the Commonwealth's characterization of its own statements as "facts." The Kentucky Supreme Court has stated that "[g]reat leeway is allowed to *both* counsel in a closing argument. It is just that - *an argument.*"[17] Having carefully reviewed the

[17] *Slaughter,* 744 S.W.2d at 412.

closing arguments, we are not persuaded that the Commonwealth's statements were so egregious[18] as to justify a new trial.

Finally, Crumes is not entitled to relief on the ground that the Commonwealth's statements concerning the "uncontradicted facts" shifted the burden of proof to Crumes and commented on the exercise of a Fifth Amendment right not to testify or introduce evidence. To the extent that this argument was not preserved for appeal, we are asked to find that these statements amounted to palpable error under RCr 10.26. We will grant reversal under RCr 10.26 only if the substantial rights of a party have been affected, resulting in manifest injustice. This review requires us to examine the case as a whole, and to grant reversal only if a "substantial possibility exists that the result would have been different[.]"[19]

Here, the Commonwealth's statements are similar to those used in *Weaver v. Commonwealth*, in which the Commonwealth stated in closing argument:

> Keep in mind the only evidence in this case, the only evidence in this case -- let me come by that one more time. The only evidence in this case as to whether Billy Payne did or did not buy two rocks of cocaine from John Weaver for $30 is that he did, because Billy Payne said it. And there is no evidence presented to you that he did

[18] *Id.* at 411.

[19] *Partin v. Commonwealth*, 918 S.W.2d 219, 224 (Ky. 1996), citing *Jackson v. Commonwealth*, 717 S.W.2d 511 (Ky.App. 1986).

> not. . . . The uncontroverted facts of this case. Undisputed.[20]

The Kentucky Supreme Court rejected the argument that these statements amounted to an unconstitutional comment on the defendant's failure to testify, stating:

> The remarks address the Appellant's failure to refute Payne's testimony by any means. "A prosecutor may properly comment on the defendant's failure to introduce witnesses on a defensive matter." *Slaughter v. Commonwealth*, Ky., 744 S.W.2d 407, 413 (1987). The prosecutor's comments did not exceed the latitude normally allowed to counsel in closing argument. *Id*. at 412.[21]

Here, the Commonwealth's comments were substantially similar to those upheld in *Weaver*. Our review of the evidence shows that the jurors were properly instructed that they could not infer guilt from Crumes' silence. They were also told to find Crumes guilty only if they believed the evidence proved his guilt beyond a reasonable doubt. Given the record as a whole, including the evidence and the instructions given to the jury, we cannot say that Crumes' substantial rights were prejudiced by the statements.

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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[20] 955 S.W.2d 722, 727 (Ky. 1997)

[21] *Id.* at 728.

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