

RENDERED: MAY 26, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court Of Appeals

NO. 2005-CA-001124-DG

PERRY LANHAM

APPELLANT

ON DISCRETIONARY REVIEW FROM TRIMBLE CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 04-XX-00001
APPEAL FROM TRIMBLE DISTRICT COURT
HONORABLE DIANA WHEELER, JUDGE
ACTION NO. 04-T-00379

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, KNOPF, AND MINTON, JUDGES.

KNOPF, JUDGE: Perry Lanham was charged in Trimble District Court with driving under the influence, first offense,¹ and having an obstructed windshield.² Prior to trial, Lanham moved the district court to suppress all evidence obtained following a police traffic stop of his vehicle. Following an evidentiary

¹ KRS 189A.010.

² KRS 189.110, a violation.

hearing, the district court concluded that the police officers had a reasonable suspicion to justify the stop. The matter then proceeded to trial, after which the jury convicted Lanham of both offenses. Thereupon, Lanham appealed to the Trimble Circuit Court. The circuit court set aside Lanham's conviction for a violation of KRS 189.110, but upheld the district court's ruling on Lanham's motion to suppress and his conviction for DUI. Lanham then moved for discretionary review, which this Court granted on August 11, 2005. We agree with the circuit court that the officers had articulated a reasonable basis for the stop even discounting the alleged windshield violation. Hence, we affirm.

Lanham argues that the district court erred in denying his motion to suppress evidence obtained as a result of a police stop of his vehicle on July 3, 2004. RCr 9.78 sets out the procedure for conducting suppression hearings and establishes the standard of appellate review of the determination of the trial court. Our standard of review of a trial court's decision on a suppression motion following a hearing is twofold: First, the factual findings of the court are conclusive if they are supported by substantial evidence; and second, this Court

conducts a *de novo* review to determine whether the trial court's decision is correct as a matter of law.³

At the suppression hearing, Sergeant Randy McCarty and Trooper Jonathan Biven of the Kentucky State Police testified about the events surrounding the stop of Lanham's vehicle and his subsequent arrest. Around 6:30 p.m. on July 3, 2004, Sergeant McCarty and Trooper Biven observed a red Chevy pickup truck approach their cruiser on Coopers Bottoms Road in Trimble County. Sergeant McCarty and Trooper Biven both noticed that the windshield of the truck was cracked. They both testified that the windshield view appeared obstructed, but at the hearing neither could describe exactly how it was obstructed. Sergeant McCarty also testified that the driver's face was flushed and his eyes were bloodshot. Based upon these observations, the officers pulled the truck over.

After stopping the vehicle, the officers again noted that the driver, Lanham, had bloodshot eyes, and they also noted that Lanham smelled strongly of alcohol. In addition, Lanham failed the balance test. Consequently, the officers arrested Lanham for driving under the influence. A subsequent breathalyzer test showed Lanham's blood-alcohol level at .211.

Lanham also testified at the suppression hearing, and he introduced three photographs depicting the condition of the

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

windshield at the time of his arrest. The photos show a single horizontal crack across the windshield at about eye level. Lanham testified that the crack did not obstruct his view through the windshield. He also admitted that he had been drinking earlier in the day.

The district court concluded that the officers had a reasonable suspicion to stop Lanham based upon the cracked windshield and their observations of Lanham's appearance. On appeal, the circuit court disagreed that the cracked windshield constituted a violation of KRS 189.110. That statute, the court noted, is primarily concerned with other types of windshield visibility obstructions, such as sun screening and window tinting. The circuit court found that KRS 189.020 could apply to a cracked windshield. But to constitute a violation of that statute, the court held that the crack must unreasonably diminish the viewing ability of the driver or otherwise pose a threat to public safety. The circuit court concluded that the crack across Lanham's windshield did not afford a reasonable basis for the traffic stop. Nevertheless, the circuit court concluded that the officers' observations of Lanham prior to the stop gave them a reasonable basis to believe that he was intoxicated.

The Commonwealth has not appealed the circuit court's finding that the cracked windshield on Lanham's truck provided an

insufficient basis for the traffic stop. Lanham argues that the officers' observations of his bloodshot eyes and reddened face were too ambiguous to support a reasonable inference that he was intoxicated. Such conditions are equally consistent with being tired, having a sunburn or even having spent a lot of time in bright sunlight. Lanham asserts that the officers' interpretation that he was intoxicated was merely an unsupported hunch which was not based on any other supporting evidence.

An officer with probable cause to believe that a traffic violation has occurred may stop the suspected vehicle.⁴ But to justify a stop under Terry v. Ohio,⁵ the officer must be able to articulate more than a mere "inchoate and unparticularized suspicion or 'hunch'" of criminal activity.⁶ Rather, a warrantless stop of a vehicle is permissible if the officer has an "articulable and reasonable suspicion" of criminal activity.⁷ The objective justification for the officer's actions must be measured in light of the totality of the circumstances.⁸ When considering the totality of the circumstances, a reviewing

⁴ Wilson v. Commonwealth, 37 S.W.3d 745 (Ky. 2001); Delaware v. Prouse, 440 U.S. 648, 663, 99 S.Ct. 1391, 1401, 59 L. Ed. 2d 660, 673 (1979).

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

⁶ Id. at 27, 88 S. Ct. at 1883.

⁷ Creech v. Commonwealth, 812 S.W.2d 162, 163 (Ky.App. 1991).

⁸ See United States 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).

court should take care not to view the factors upon which police officers rely to create reasonable suspicion in isolation.

Courts must consider all of the officer's observations, and give due weight to inferences and deductions drawn by trained law enforcement officers.⁹

Although our consideration of a police officer's justification for a Terry stop should be deferential, the distinction between a mere hunch and reasonable suspicion is often elusive. The fact that certain conduct may be construed as consistent with innocent behavior does not mean that this conduct may not form the basis for reasonable suspicion.¹⁰ However, the relevant inquiry in making a determination of reasonable suspicion is not whether particular conduct is "innocent" or "guilty", but the degree of suspicion that attaches to particular types of non-criminal conduct.¹¹

We agree with Lanham that bloodshot eyes and a flushed face could indicate things other than intoxication. But when viewed in light of the totality of the circumstances and considering the minimal level of police intrusion involved in

⁹ United States v. Arvizu, 534 U.S. 266, 272-75, 122 S. Ct. 744, 750, 151 L. Ed. 2d 740, (2002). See also United States v. Martin, 289 F.3d 392, 398 (6th Cir., 2002).

¹⁰ Simpson v. Commonwealth, 834 S.W.2d 686, 688 (Ky.App. 1992), citing United States v. Gomez, 776 F.2d 542, 548 (5th Cir., 1985).

¹¹ Illinois v. Gates, 462 U.S. 213, 243, n. 13, 103 S.Ct. 2317, 2334, 76 L. Ed. 2d 527 (1983). See also United States v. Sokolow, 409 U.S. 1, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989).

this type of traffic stop,¹² we agree with the circuit court that the officers articulated a specific and reasonable basis to justify the stop. First, while the cracked windshield did not constitute a violation of either KRS 189.110 or 189.020, it legitimately attracted the officers' attention to Lanham's truck. While their attention was focused, they were able to clearly see Lanham's face. Both officers testified that Lanham appeared "obviously intoxicated", citing Lanham's flushed face and bloodshot eyes as indicators of intoxication. Consequently, the district court properly denied Lanham's motion to suppress evidence seized following that stop.

Accordingly, the judgment of conviction by the Trimble District Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Perry R. Arnold
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¹² Baker v. Commonwealth, 5 S.W.3d 142, 145 (Ky. 1999).