

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001139-MR

DEMETRIUS HENRY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 04-CR-01227

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: ABRAMSON AND VANMETER, JUDGES; KNOPF,¹ SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Appellant Demetrius Henry entered a conditional guilty plea to first degree trafficking in a controlled substance, second degree evading police, and second degree persistent felony offender. He received a total of ten years' imprisonment. On appeal, Henry challenges the trial court's denial of his motions to suppress evidence taken from

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

his person following a traffic stop. Finding no error, we affirm.

On September 2, 2004, Officer Matthew Greathouse and other officers were conducting a plain clothes surveillance operation of a Lexington home that was suspected of being a location for drug trafficking. While observing the home, Officer Greathouse saw a black Cadillac drive by with the stereo playing at a high volume. After Officer Greathouse lost sight of the vehicle, it was observed pulling into the driveway of a nearby residence by another officer. Officer Greathouse stated to the other officers that he intended to pull the Cadillac over for violating a local noise ordinance. Approximately five minutes later, the Cadillac left the residence and was followed by Officer Greathouse in an unmarked vehicle. Officer Greathouse waited for another marked vehicle to accompany him before he initiated the stop.

Immediately after Officer Greathouse activated the police lights in his cruiser, the Cadillac came to an abrupt stop in the middle of the road and made a sudden right turn onto an adjacent street. Officer Greathouse perceived this action to be an attempt to elude the stop, but he was finally able to bring the car to a halt. Henry was driving the Cadillac along with three passengers. He was unable to produce any identification, but stated that his name was "Demetrius

Searight" and that he was twenty years old with a birth-date of July 20, 1982. When Officer Greathouse mentioned that Henry's stated age and date of birth did not add up, Henry began acting nervously. Officer Greathouse then asked Henry to exit the vehicle and patted him down for weapons. Although he did not find any weapons, Officer Greathouse visibly observed bulges in each of Henry's front pockets. After Henry denied having drugs in his pockets, Officer Greathouse requested Henry's permission to search him. Henry responded by stating, "[g]o ahead, I don't have anything on me." Officer Greathouse retrieved approximately fifty grams of crack cocaine and over \$300.00 in cash from Henry's pockets. As Henry was being arrested, he managed to break free from Officer Greathouse and ran in handcuffs for a short distance before being apprehended. Additional cocaine and marijuana were then discovered having fallen from Henry's person.

Henry brought two suppression motions challenging the legality of the initial traffic stop and his consent to the search of his pockets. At the first suppression hearing on the legality of the stop, Officer Greathouse testified on behalf of the Commonwealth, and Henry, his mother, and his girlfriend testified on behalf of the defense. The defense testimony attempted to contradict Officer Greathouse's statement that he heard the stereo playing at a high volume by offering widely

varying statements describing a stereo malfunction that would prevent it from achieving the level of volume stated by Officer Greathouse. Following the suppression hearing, counsel agreed to inspect the vehicle and report back to the court because of the conflicting testimony. However, the vehicle had been released from the impound lot to Henry's mother, the registered owner of the car. Although the parties were able to inspect the vehicle at Henry's mother's residence, the stereo was completely inoperable at this point in time. Finding that the testimony of Henry, his mother, and girlfriend were too inconsistent to be reliable, the trial court found that Officer Greathouse's credibility and testimony were sufficient to establish a reasonable basis to initiate a traffic stop.

Henry argues that the trial court should have drawn an adverse inference against the Commonwealth because of its failure to safeguard the vehicle. He cites no authority for this proposition, but instead relies by analogy on the "missing evidence" line of cases. Sanborn v. Commonwealth, 754 S.W.2d 534 (Ky. 1988); Tamme v. Commonwealth, 759 S.W.2d 51 (Ky. 1988); Tinsley v. Jackson, 771 S.W.2d 331 (Ky. 1989).

In Estep v. Commonwealth, 64 S.W.3d 805 (Ky. 2002), the Kentucky Supreme Court articulated the governing principles in the missing evidence analysis. A missing evidence instruction is given to the jury to cure any Due Process violation

attributable to the loss or destruction of exculpatory evidence by a less onerous remedy than the suppression of relevant evidence or dismissal. Id. at 810. The failure to preserve missing evidence only implicates the Due Process Clause when the failure to preserve is intentional and the potentially exculpatory nature of the evidence was apparent at the time it was lost. Id. These principles do not preclude a defendant from commenting on or arguing inferences from the Commonwealth's failure to preserve any evidence. Id. However, there must be a showing of bad faith on the part of the Commonwealth in order for a defendant to be entitled to an instruction that the jury may draw an adverse inference from the failure to preserve evidence. Id.

We find that the "missing evidence" cases are inapplicable to the present situation. First, these cases deal with the entitlement to a jury instruction on missing evidence rather than a suppression hearing. Second, the evidence of the stereo volume is not material to either guilt or punishment, so cannot be exculpatory as defined by Brady v. Maryland, 373 U.S. 83, 87 (1963). Finally, there was no evidence of bad faith on the part of the Commonwealth. The police simply returned the vehicle to its registered owner, Henry's mother. Henry was permitted to argue inferences from the absent evidence, but the

trial court was certainly not required to draw an adverse inference against the Commonwealth.

Henry next argues that regardless of the missing evidence, the initial traffic stop was unreasonable. Specifically, he argues that the stop was unreasonable because Officer Greathouse did not pull Henry over when the alleged noise violation occurred. We note that the timing of the stop was not challenged below. Nevertheless, we find that the stop was reasonable based on the evidence presented to the trial court.

A police officer must have an articulable and reasonable suspicion of criminal activity in order to stop a vehicle. Creech v. Commonwealth, 812 S.W.2d 162, 163 (Ky.App. 1991). In this case, Officer Greathouse heard the car pass by with the stereo playing at a high volume. The car passed out of his sight, but was viewed by other officers. Officer Greathouse immediately informed the other officers of his intention to stop the car for the noise violation. After the car had stopped at a residence, it was followed by police immediately upon departure. Although there was no testimony regarding the level of music coming from Henry's vehicle at the time he was being followed, Officer Greathouse initiated a stop. At the time Officer Greathouse turned on his emergency equipment, Henry stopped abruptly and turned away in an attempt to elude the officers.

Under the totality of the circumstances, we find that there was a reasonable suspicion of criminal activity.

Finally, Henry argues that the trial court erred by denying his second suppression motion challenging his consent to the search of his pockets. Henry claims he did not consent and that his testimony should have been given more weight by the trial court. We disagree.

A trial court's findings of fact with regard to an order denying a motion to suppress will not be disturbed on appeal unless they are clearly erroneous. Commonwealth v. Banks, 68 S.W.3d 347, 349 (Ky. 2001). Officer Greathouse testified that he received consent to search Henry's pockets. This testimony was corroborated by another officer who was present at the scene. Henry testified that Officer Greathouse did not ask his permission to search, but instead simply reached into his pockets and pulled out their contents. Our review of the record indicates that there was substantial evidence supporting the trial court's finding of consent. Therefore, the finding of consent was not clearly erroneous.

Accordingly, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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