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Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001304-MR

ROBERT C. DAVIS

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
ACTION NO. 05-CR-00124

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: ABRAMSON AND BARBER, JUDGES; EMBERTON,¹ SENIOR JUDGE.

EMBERTON, SENIOR JUDGE: Robert Davis appeals his conviction for possession of a handgun by a convicted felon for which he was sentenced to six years' imprisonment. He advances three arguments in support of his contention that his conviction must be reversed: 1) that the trial court erred in refusing to suppress evidence obtained in an improper search of his vehicle; 2) that the doctrine of collateral estoppel precludes his conviction on the possession of a handgun charge; and 3) that he

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

was entitled to directed verdict of acquittal. Finding no reversible error in any of these contentions, we affirm.

Appellant Davis was operating a motor vehicle at approximately 4:30 p.m. on September 3, 2004, when a Covington Kentucky police officer noticed that the vehicle did not have a displayed license plate as required by KRS 186.170. The officer followed the vehicle for a time and then activated his emergency lights and stopped the vehicle. As he approached the driver side window of the car, he glanced at the area where the license plate should have been displayed and again did not see a plate. According to the officer's testimony at the suppression hearing, when he asked to see appellant's driver's license and proof of insurance, appellant told the officer that his name was Andre Bohanon and that he did not have his driver's license with him. The officer returned to his cruiser to check the licensing information for Andre Bohanon and determined that Andre Bohanon's driver's license had been suspended.

The officer then arrested appellant whom he believed to be Andre Bohanon. In the course of the arrest, the officer frisked appellant and discovered a small quantity of what appeared to be marijuana. Appellant was then handcuffed, given his Miranda rights, and placed in the back of the officer's cruiser. Because the stop occurred in the middle of a narrow, dead-end, residential street with no parking spaces readily

available, appellant's vehicle and the police cruiser made the street virtually impassible. The officer therefore called in for the vehicle to be impounded.

A second officer arrived on the scene and assisted in an inventory search of the vehicle appellant had been driving. Inside a storage panel on the front passenger door, a small hand-held postal scale was discovered. An Ohio picture identification card was found beneath the driver's seat. When the first officer returned to his cruiser to compare the photo on the ID card to appellant, the appellant stated "That's me." The officer then informed appellant that he was also under arrest for violation of KRS 523.110(1), giving a police officer a false name or address.

When the officers opened the trunk of appellant's vehicle, appellant stated to the officers that they could not search the trunk. The officer informed appellant that they had authority to search the trunk as part of an inventory search and resumed the search, logging the items on the appropriate inventory forms. Items seized from the trunk of the vehicle included a bank-type bag containing two "baggies" of heroin and a digital scale; a third "baggy" of heroin lying loose in the trunk; and a loaded .32 caliber revolver.

Of particular significance to the issues raised in this appeal, the officers determined that the vehicle did indeed

have a license plate which had not been visible at the time of the stop. The vehicle appellant had been driving was a Buick Roadmaster which is equipped with a spring-loaded license plate that folds forward to access the gasoline cap. On this particular vehicle, however, the spring was missing or defective and the license did not return to its normal visible position.

Appellant was ultimately charged with trafficking in the first degree while in possession of a handgun and possession of a handgun by a convicted felon. Although appellant was acquitted of the trafficking charge, the same jury in a bifurcated proceeding subsequently convicted him of possession of a handgun by a convicted felon.

Appellant's first argument for reversal of that conviction focuses upon the refusal of the trial judge to suppress the evidence seized from the vehicle. There are two prongs to his contention that the stop was constitutionally infirm: 1) that the initial stop could not be justified on the basis of the undisputed facts; and 2) even if the initial stop was proper, the search conducted unreasonably exceeded that which was appropriate under the circumstances. We disagree.

In Commonwealth v. Banks,² the Supreme Court of Kentucky reiterated the Terry³ analysis for determining the

² 68 S.W.3d 347, 350-51 (Ky. 2001).

³ Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

propriety of a police officer's decision to stop and frisk an individual suspected of criminal activity:

However, the test for a *Terry* stop and frisk *is not* whether an officer can conclude that an individual is engaging in criminal activity, but rather whether the officer can articulate reasonable facts to suspect that criminal activity *may* be afoot and that the suspect *may* be armed and dangerous. *Terry, supra*, 392 U.S. at 30, 88 S.Ct. at 1884-1885 (emphasis added). The totality of the circumstances must be evaluated to determine the probability of criminal conduct, rather than the certainty.

The Court noted in that opinion that "a person can be stopped and questioned even if the individual is only engaging in minor criminal activity such as trespassing and loitering."⁴

In this case, we have little difficulty in concluding that the officer's testimony concerning the lack of a visible license plate as required by law is sufficient to satisfy the Terry standard and amply supports the trial judge's determination that the stop was justified. The officer had a reasonable articulable suspicion that the law requiring a visible license plate was being violated and therefore his decision to stop appellant's vehicle was entirely proper. The officer would have been justified in stopping the vehicle for expired plates and accordingly there is no doubt he could stop a

⁴ Banks, at 350.

vehicle he reasonably believed had no plate at all.⁵ The question thus becomes whether, having justifiably stopped appellant for lack of a visible license plate, the officer's ensuing actions can be viewed as exceeding the reasonable scope of that stop.

Appellant seems to argue that once the vehicle was stopped, the officer was required to immediately inspect the area where the license plate should have been to insure that it was in fact missing. Stated another way, we are asked to consider whether the officer's act of requesting appellant's name, license and proof of insurance after a legitimate traffic stop can be viewed as an unwarranted intrusion upon appellant's freedom of movement and thus violative of his Fourth Amendment protections. Clearly, it cannot.

In Pennsylvania v. Mimms,⁶ the Supreme Court considered whether an officer's request that a motorist, stopped for expired plates, get out of his vehicle constituted an impermissible intrusion into the driver's personal liberty. Balancing concerns about the officer's safety against the "incremental intrusion resulting from the request to get out of the car once the vehicle was lawfully stopped," the Court

⁵ See Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 330 (1977).

⁶ 434 U.S. at 111.

concluded that the determinative factor was the Terry court's concern for the officer:

Against this important interest [officer safety] we are asked to weigh the intrusion into the driver's personal liberty occasioned not by the initial stop of the vehicle, which was admittedly justified, but by the order to get out of the car. We think this additional intrusion can only be described as *de minimis*. The driver is being asked to expose to view very little more of his person than is already exposed. The police have already lawfully decided that the driver shall be briefly detained; the only question is whether he shall spend that period sitting in the driver's seat of his car or standing alongside it. Not only is the insistence of the police on the latter choice not a "serious intrusion upon the sanctity of the person," but it hardly rises to the level of a "'petty indignity.'" *Terry v. Ohio, supra*, 392 U.S. at 17, 88 S.Ct. at 1877. What is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety.

Viewed in the context of this rationale, we find no merit to appellant's contention that the officer had to inspect the car for the presence of a plate prior to directing questions to him. The officer testified at the suppression hearing that once he stops a car he immediately asks the driver for his license and proof of insurance as a safety measure. As in Mimms, the incremental intrusion from this request can be classified only as *de minimus*. It was appellant's act of giving the officer the name of another person who happened to have a suspended license

that set in motion the series of events that culminated in the discovery of items seized. We fully agree with the trial judge that there was nothing unreasonable or unconstitutional in the officer's action and thus it provides no basis for suppressing the items seized.

The second prong of appellant's suppression argument is that the items seized in the search of the trunk must be suppressed because the scope of the search exceeded that which could be considered to be reasonably necessary as incident to a routine traffic stop. Although appellant cites Clark v. Commonwealth⁷ and Wagner v. Commonwealth⁸ in support of his contention, we are convinced that the facts of this case distinguish it from the application of the rationale advanced in those opinions.

Both the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution guarantee the fundamental right to be free from unreasonable searches and seizures, a right protected by the general rule proscribing searches not authorized by a valid search warrant. However, in order to accommodate the exigencies of police work, a number of exceptions to the warrant requirement have evolved, including an "incident to arrest" exception which directs itself

⁷ 868 S.W.2d 101 (Ky.App. 1994).

⁸ 581 S.W.2d 352 (Ky. 1979).

at concerns for the safety of the arresting officer as well as at the prompt discovery and preservation of evidence.⁹ The question of the propriety of a search and the reasonable parameters thereof are generally to be determined from the particular facts of each case.¹⁰

The Clark court invalidated an automobile search which followed an arrest for minor traffic violations, notwithstanding the holding in New York v. Belton¹¹ where the court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." In explaining its apparent deviation from the holding in Belton, the court expressed concern that the search was not genuinely incident to the arrest since Clark had been searched and placed in the squad car and approximately forty minutes had elapsed from the time of arrest. These circumstances convinced the Clark court that the safety and evidentiary rationales for the "incident to arrest" exception had become so attenuated as to make the exception inapplicable.

Therefore, we are convinced that in a typical arrest situation such as in the case before us, we must adhere to the

⁹ Clark, supra; United States v. Robinson, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973).

¹⁰ Estep v. Commonwealth, 663 S.W.2d 213 (Ky. 1984).

¹¹ 453 U.S. 454, 460, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981).

Belton rule that a warrantless search of an arrestee and his vehicle is to be upheld provided the arrest is proper and the scope of the search does not exceed that which is necessary to protect society's interest in the safety of police officers (and third persons) and in the preservation of evidence. It is clear that in this case, those criteria have been satisfied.

Unlike the arrest in Clark, there is no question that arrest is typical for someone suspected of driving on a suspended license. The search in this case immediately followed appellant's arrest and led to the discovery of scales of the type routinely used in drug trafficking, as well as the fact that appellant had given the officer false information as to his identity. Those factors, coupled with the legitimate concern that appellant's vehicle was blocking a narrow residential street with no readily available parking places, remove this case from the rationale set out in Clark. The discovery of items in the passenger compartment that gave the officers probable cause to believe evidence of other crimes may be secreted in the vehicle, likewise gave them authority to search the trunk:

Police who have a legitimate reason to stop an automobile and who have probable cause to believe that the objects of the search are concealed somewhere within the vehicle may conduct a warrantless search of the vehicle and all the compartments and

containers thereof as well as the contents thereof that are not in plain view.¹²

That authority, as well as the authority to conduct a reasonable inventory search, removes any Fourth Amendments concerns. The trial judge did not err in refusing to suppress the items seized in that search.

Next, appellant argues that the doctrine of collateral estoppel precludes his conviction for possession of a handgun by a convicted felon. It is his position that acquittal on the charge of trafficking while in possession of a firearm is also conclusive of the possession of a handgun charge.¹³ We disagree.

In Gregory v. Commonwealth,¹⁴ the Court provided the following definition of the doctrine of collateral estoppel:

Collateral estoppel, or issue preclusion, is part of the concept of res judicata and serves to prevent parties from relitigating issues necessarily determined in a prior proceeding.

The flaw in appellant's collateral estoppel argument is that the question of whether he was guilty of being a convicted felon in possession of a handgun was not necessarily determined in the proceeding that acquitted him of the trafficking charge. In order to prevent the jury from being tainted by the knowledge of

¹² Estep, 663 at 215.

¹³ Although appellant admits in his brief that this error is unpreserved, we have elected to dispose of it as a matter of judicial economy.

¹⁴ 610 S.W.2d 598, 600 (Ky. 1980).

appellant's status as a convicted felon, the trial judge bifurcated the possession of the handgun charge from the trafficking charge. Despite the fact that both charges involve a common element, possession of a handgun, the cited offenses are directed at entirely distinct violations of the law. Clearly, a person could be guilty of trafficking while in possession of a handgun without being a convicted felon in possession of a handgun, just as a convicted felon in possession of a handgun may not be guilty of trafficking in controlled substances. Thus, the doctrine of collateral estoppel simply has no application to this case since there was no relitigation on the charge of being a convicted felon in possession of a handgun.

Finally, appellant asserts that he was entitled to a directed verdict of acquittal. On the basis of the undisputed evidence, as well as our resolution of the other issues on appeal, that argument is without merit.¹⁵

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

ALL CONCUR.

¹⁵ Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991).

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