

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-000159-MR

JIMMY L. EPPS

APPELLANT

v. APPEAL FROM MONTGOMERY CIRCUIT COURT  
HONORABLE BETH LEWIS MAZE, JUDGE  
ACTION NO. 05-CR-00086

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: THOMPSON AND WINE, JUDGES; KNOPF,<sup>1</sup> SENIOR JUDGE.

THOMPSON, JUDGE: Jimmy L. Epps entered a conditional plea of guilty to the charge of trafficking in a controlled substance, first-degree, and was sentenced to seven years' imprisonment. He appeals from the circuit court's denial of his motion to suppress evidence seized as a result of an allegedly illegal search. The issue presented is whether Epps was unlawfully detained while the officers conducted a dog sniff search of the vehicle in which he was a passenger. We hold that his detention was lawful and,

<sup>1</sup> 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.

therefore, that the search of the vehicle and Epps' person was valid under the United States Constitution and the Kentucky Constitution.

At the suppression hearing, Officer Chris Burgess testified that on May 16, 2005, he observed a white Oldsmobile Cutlass make an improper turn. He followed the vehicle and noticed that it did not have an illuminated license plate. Upon stopping the vehicle, he asked its operator, Greg Kelly, for his insurance and registration for the vehicle neither of which was in his possession. Among the four passengers in the vehicle was Jimmy Epps who was riding in the back seat behind the front passenger seat of the vehicle and who Officer Burgess recognized because he had been previously arrested. Upon checking the vehicle's registration, it was determined to be registered to a used car lot.

Officer Burgess requested but was denied consent to search the vehicle. He then contacted Officer Shannon Taylor to come to the scene with the narcotics detection dog. When Officer Taylor and the dog arrived at the scene approximately fifteen minutes later, Officer Burgess was issuing Kelly the traffic citation.

Officer Taylor requested that the occupants exit the vehicle and each was patted down for weapons. The officer then walked the dog around the exterior of the vehicle and the dog alerted that there were narcotics present in the vehicle. Officer Taylor entered the vehicle with the dog which alerted on the front passenger seat head rest where a crack pipe was discovered.

During a second pat down search of Epps he admitted that he was in possession of cocaine and, when he shook his leg, two bags of cocaine fell to the ground. Epps was then placed under arrest. The total time that elapsed between the time of the initial stop and the arrest was approximately one hour and thirty minutes.

The standard of review of a trial court's ruling on a motion to suppress is as follows:

An appellate court's standard of review of the trial court's decision on a motion to suppress requires that we first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive. Based on those findings of fact, we must then conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law. *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky.App. 2002) (internal citations omitted).

We review the trial court's finding of fact only for clear error and due weight must be given to inferences drawn from those facts by the trial court and the local law enforcement officers. *Stewart v. Commonwealth*, 44 S.W.3d 376, 380 (Ky.App. 2000).

An investigatory stop of a vehicle is permissible if the law enforcement officers have a reasonable suspicion supported by specific and articulable facts that its occupant has committed or is about to commit an offense. *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); *Collins v. Commonwealth*, 142 S.W.3d 113 (Ky. 2004). An officer's actions following a stop that is justified at its inception, however, must be reasonably related in scope to the circumstances giving rise to the initial stop. *Terry v. Ohio*, 392 U.S.1, 88 S.Ct. 1868, 29 L.Ed.2d 889 (1968). Epps does

not dispute that Officer Burgess, after seeing Kelly make an illegal turn and that the vehicle was improperly equipped, had legal justification to stop the vehicle. He argues that the stop was prolonged beyond the time necessary to issue the citation and, therefore, the subsequent search of his person was unlawful.

In *Illinois v. Caballes*, 543 U.S. 405, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005), the court addressed the use of a narcotics detection dog within the context of the Fourth Amendment. In doing so, it held that the use of a well-trained narcotics detection dog during a lawful traffic stop does not implicate legitimate privacy interests. A dog sniff of the exterior of a lawfully seized vehicle “does not rise to the level of a constitutionally cognizable infringement.” *Id.* 543 at 409, 125 S.Ct. at 838. However, an initial legal stop can violate the Fourth Amendment if its “manner of execution” unreasonably infringes interest protected by the Constitution. *United States v. Jacobsen*, 466 U.S. 109, 124, 104 S.Ct. 1652, 1662, 80 L.Ed.2d 85 (1984). “A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.” *Caballes*, 543 at 407, 125 S.Ct. at 837.

Epps relies on *People v. Cox*, 202 Ill.2d 462, 782 N.E.2d 275, 276 (Ill. 2002), where the Illinois court held that because there was no reasonable suspicion that the driver of a vehicle stopped for having no rear registration light was in possession of contraband, the continued detainment of the driver pending the arrival of a canine unit

was an unlawful extension of the stop. The scope of the traffic stop, the court concluded, was unlawfully extended to a drug investigation. *Id.*, at 469, 782 N.E.2d at 286.

*Cox* was decided prior to the Supreme Court's decision in *Caballes* which limited *Cox* to its specific facts. Emphasizing that its decision was premised on the assumption that the officer conducting the dog sniff had no information that might have triggered even a modicum of suspicion of illegal contraband, the court concluded that if conducted in a reasonable manner, the dog sniff “would not change the character of a traffic stop that is lawful at its inception.” *Caballes*, 543 U.S. at 407, 125 S.Ct. at 837.

Since *Caballes* this court rendered its decision in *Johnson v. Commonwealth*, 179 S.W.3d 882 (Ky.App. 2005), which is factually indistinguishable from the present case. In *Johnson*, the officer observed a vehicle make a right-turn without giving a proper signal and noticed that the vehicle's license plate was not properly illuminated. After confirming with dispatch that the vehicle's registration had expired, the officer exited his patrol car and approached the stopped car. The driver of the car refused a search of the vehicle. The officer returned to his patrol car to prepare a citation and requested a canine unit. Upon arrival of the canine unit, the officer exited the patrol car and asked Johnson to exit the vehicle. The dog alerted immediately to the driver's side door and, once inside the vehicle, to the cushion of a child's safety seat where marijuana was found. The time between the stop and the arrest was approximately fifteen minutes.

We rejected Johnson's argument that the duration of the stop was so prolonged as to be unjustified.

The purpose of the initial stop had not been completed before the canine unit arrived at the scene, and the dog sniff did not prolong the stop to any unreasonable extent. The dog sniff occurred while Johnson was being lawfully detained by Roush. After the dog alerted to the presence of narcotics, the officers undoubtedly had probable cause to search the vehicle. Consequently, the trial court did not err by denying Johnson's motion to suppress the evidence recovered from his car. *Id.* at 885- 86.

There are no facts in the present case which require a result other than that reached in *Johnson*.

Officer Burgess stopped the vehicle after he observed the driver commit a traffic violation. He then discovered that the driver had no insurance and that the car was registered to a used car lot. Moreover, Officer Burgess recognized a passenger in the vehicle who appeared to be impaired and who he believed had been previously arrested for drug-related charges. Officer Burgess was still in the process of writing the citation, the initial purpose of the stop and, as in *Johnson*, only fifteen minutes elapsed between the initial stop and the arrival of the canine unit.

The search of the vehicle and ultimately of Epps were based on probable cause. A “positive indication by a properly-trained dog is sufficient to establish probable cause for the presence of a controlled substance.” *U.S. v. Diaz*, 25 F.3d. 392. 393-94 (6th. Cir. 1994); *Johnson*, 179 S.W.3d at 886. The stop and subsequent search of the

vehicle and search of Epps were reasonable and justified under the United States Constitution and the Kentucky Constitution.

We hold that the trial court properly denied Epps' motion to suppress and affirm the judgment of the Montgomery Circuit Court.

ALL CONCUR.

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