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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-001071-MR

ARTHUR HENRY WIMBERLY — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 04-CR-00480

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL, THOMPSON, AND VANMETER, JUDGES.

THOMPSON, JUDGE: Arthur Henry Wimberly appeals his conviction in the Christian Circuit Court for trafficking in a controlled substance, first degree; tampering with physical evidence; and being a persistent felony offender in the second degree. For the reasons set forth herein, we affirm.

On February 13, 2004, Hopkinsville Police Officer Michael Seis observed a vehicle driven by Wimberly disregard a stop sign at the intersection of Perry and East 18th Street. After observing the traffic violation, Seis initiated a traffic stop of

Wimberly's vehicle. Seis approached Wimberly, informed him why he had been stopped, asked him a series of questions, obtained his drivers' license, and then proceeded back to his cruiser to write Wimberly a warning. As he walked back to his cruiser, Seis radioed Officer Schneider, a narcotics K-9 handler, to assist him with the traffic stop.

Upon arriving, Schneider proceeded to Wimberly's vehicle along with another arriving officer. While Seis remained in his cruiser writing a warning, Schneider requested Wimberly to exit his vehicle. Wimberly then exited his vehicle, and Schneider performed a pat-down for his safety. After Schneider began asking Wimberly questions, he noticed that Wimberly's voice was muffled as if something was in his mouth.

After looking closely, Schneider observed a cellophane baggie in Wimberly's mouth. He then ordered him to spit the baggie out of his mouth. Wimberly responded by closing his mouth. Based on his prior experience and training, Schneider believed that Wimberly was preparing to swallow the foreign object so he grabbed Wimberly's upper throat to prevent him from swallowing the object.

Seis testified that he was still in his cruiser preparing the warning when he observed Schneider ordering Wimberly to discharge the cellophane baggie. Shortly thereafter, Seis assisted the other two officers in trying to obtain the cellophane baggie. Eventually, Wimberly spit out a cellophane baggie containing 26 pieces of crack cocaine.

On August 20, 2004, a Christian County grand jury indicted Wimberly for trafficking in a controlled substance, first degree, first offense; and tampering with physical evidence. Subsequently, his charges were consolidated with a charge of being a persistent felony offender in the second degree.

Wimberly then filed a motion to suppress evidence of the illegal drugs seized during his traffic. During the suppression hearing, Wimberly never contended that the total length of time of his detention was an issue.

Following the suppression hearing, the trial court denied Wimberly's motion. Subsequently, after a jury trial, Wimberly was found guilty on all counts and was sentenced to fifteen (15) years' imprisonment. This appeal follows.

Wimberly contends that the seizure of evidence from his mouth was in violation of the Fourth Amendment because he was detained beyond the time reasonably required to complete the initial traffic stop. Specifically, when Seis decided to only issue him a written warning, Wimberly contends that police were not permitted to investigate any other matter beyond the scope of the justification for his initial stop. We disagree.

Police may stop a driver when they observe him or her disregarding a stop sign. *Wilson v. Commonwealth*, 37 S.W.3d 745, 749 (Ky. 2001). Notwithstanding this right to stop, law enforcement's subsequent "actions must be reasonably related in scope to the circumstances that gave credence to the initial stop." *Johnson v. Commonwealth*, 179 S.W.3d 882, 884 (Ky.App. 2005).

Thus, "[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." *Illinois v. Caballes*, 543 U.S. 405, 407, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005). Essentially, the investigatory detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. *Johnson*, 179 S.W.3d at 884.

After examining the record, we conclude that the seizure of illegal drug evidence from Wimberly's mouth was not conducted in violation of his constitutional rights. Officer Seis pursued his duties in a diligent and reasonable manner. After obtaining Wimberly's information, he radioed another officer for assistance. As Seis wrote the warning, the other officer arrived, began speaking with Wimberly, and observed possible contraband in his mouth. Thus, the purpose of the initial stop had not been completed prior to the discovery of the baggie and, thus, any additional time beyond this discovery was reasonable.

Contrary to Wimberly's contention, Schneider had an absolute right to require him to exit his vehicle while Seis continued to prepare the written warning. *Pennsylvania v. Mimms*, 434 U.S. 106, 111, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977). The mere convenience to remain in one's vehicle cannot prevail when balanced against legitimate concerns for the officer's safety. *Id*.

After Wimberly exited his vehicle, Schneider began to ask Wimberly questions regarding his destination and future plans. Despite Wimberly's contentions, Schneider's actions did not impermissibly exceed the scope of the circumstances of the initial stop. *Ohio v. Robinette*, 519 U.S. 33, 38-39, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996) (police are permitted to ask questions about other activities during a lawful detention).

When Wimberly began answering questions, Schneider observed a cellophane baggie in his mouth and believed that it was contraband based on his experience as a narcotics officer. Under the "plain view" exception, Schneider was permitted to seize the object because he was lawfully located in a place from which the

object could be plainly seen, had a lawful right of access to the baggie, and the baggie's incriminating character was "immediately apparent." *Commonwealth v. Hatcher*, 199 S.W.3d 124, 126 (Ky. 2006).

Moreover, although Wimberly does not specifically contend that no exigency existed requiring an immediate, warrantless search of his mouth, we conclude that Schneider's search of Wimberly's mouth was supported by an exigent circumstance. When police have probable cause to believe contraband is present, they can conduct a warrantless search to secure that evidence to prevent its possible destruction. *Williams v. Commonwealth*, 147 S.W.3d 1, 8 (Ky. 2004).

Here, after Schneider observed contraband, he ordered Wimberly to spit out the contraband to which Wimberly responded by closing his mouth. Believing that Wimberly was possibly attempting to destroy felony evidence, Schneider grabbed Wimberly's throat to prevent him from swallowing the baggie. Thus, Schneider's actions were supported by an exigent circumstance.

Moreover, "[a] warrantless search preceding arrest is reasonable under the Fourth Amendment so long as probable cause to arrest existed before the search, and the arrest and search were substantially contemporaneous." *Id*. Thus, Wimberly's search, which was substantially contemporaneous with his arrest, was proper.

Wimberly also contends that the trial court abused its discretion when it failed to reduce his appeal bond. Given our affirmation of Wimberly's conviction, this contention is moot. Kentucky Rules of Criminal Procedure Rule 4.54 (2)(d) provides that "[b]ail shall terminate on the effective date of an appellate decision affirming the

conviction." Thus, regardless of our addressing of the issue, Wimberly would receive no relief.

For the foregoing reasons, the judgment of the Christian Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Arthur Henry Wimberly, *Pro Se*
Lexington, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

David W. Barr
Assistant Attorney General
Frankfort, Kentucky