

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002506-MR

RODERICK LEE STEWART

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 05-CR-01588

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: KELLER, LAMBERT, AND STUMBO, JUDGES.

STUMBO, JUDGE: Roderick Lee Stewart appeals from a judgment reflecting a guilty plea on one count each of trafficking in cocaine and marijuana possession. Stewart contends that a traffic stop for a motor vehicle violation was unnecessarily prolonged by the police officer for the improper purpose of giving another officer time to bring his drug-sniffing dog to the scene. He also argues that the dog's positive reaction to the drug odor coming from his vehicle did not constitute probable cause sufficient to justify a search of the vehicle's interior. For the reasons stated below, we affirm the judgment on appeal.

On November 11, 2005, Lexington Police Officer Scott Givens observed a motor vehicle driving through a high crime area of Lexington, Kentucky. Officer Givens noticed that loud music was emanating from the vehicle in violation of a noise ordinance, and he pulled the vehicle over. When Officer Givens approached the vehicle on foot, he noted that the driver, Roderick Lee Stewart, was trembling and nervous.

After speaking with Stewart, Officer Givens returned to his vehicle and radioed for Officer Grayhouse - a canine officer - to come to the scene. At some point, Officer Cobb arrived and directed Stewart to exit his vehicle. Officer Givens then checked Stewart's name and personal information on Givens' computer, and proceeded to write a citation for the noise violation. While Givens was writing the ticket, Officer Grayhouse arrived on the scene. According to the record, Grayhouse arrived approximately 5 to 8 minutes after being summoned by Givens.

Officer Grayhouse then walked his drug-sniffing dog around the exterior of Stewart's vehicle, which took less than one minute. Grayhouse observed that the dog alerted to the odor of drugs. Based on the dog's reaction, the officers searched the interior of Stewart's vehicle and found one Ziploc-type bag containing 15.3 grams of cocaine, and two other bags containing marijuana. Stewart was arrested.

On December 12, 2005, Stewart was indicted by the Fayette County grand jury on one count each of trafficking in marijuana (less than 8 ounces) and trafficking in a controlled substance (cocaine). On January 31, 2006, Stewart filed a motion to suppress the evidence discovered in his vehicle. In support of the motion, he maintained that the

evidence was obtained as a result of an illegal search. Specifically, he argued that the vehicle stop was improper and that Officer Givens unnecessarily prolonged the stop to allow the canine officer to arrive.

Upon considering the arguments, the Fayette Circuit Court rendered an order denying the motion to suppress. The court found that Officer Givens properly stopped Stewart's vehicle as a result of the noise violation, and that the duration of the stop - approximately 13 minutes - was reasonable under the circumstances.

Stewart later entered a plea of guilty on one count of first-degree trafficking in a controlled substance, and one count of possession of marijuana. The plea was conditioned on the reservation of Stewart's right to appeal the order denying his motion to suppress. Stewart was sentenced to five years in prison on the trafficking count and twelve months for marijuana possession, to be served concurrently for a total sentence of five years in prison. This appeal followed.

Stewart now argues that the circuit court committed reversible error in denying his motion to suppress the evidence obtained in the vehicle search. He maintains that the Lexington Police officers unnecessarily prolonged the vehicle stop for the improper purpose of giving the canine officer additional time to respond to the scene. While acknowledging that the police had a legitimate basis for the traffic stop, he argues that he may not be detained without cause for the sole purpose of giving the canine officer time to arrive. He also notes that although he was driving through a high crime

area and may have appeared nervous when stopped, neither of these factors are violations of the law and they do not form a basis for the detention.

Stewart also argues that the drug dog's positive reaction indicating the presence of a drug odor did not give rise to probable cause supporting a vehicle search. He maintains that the drug odor only indicated that drugs may have been present in the vehicle at some time in the past, and did not constitute probable cause to believe that drugs were still in the vehicle at the time of the vehicle stop. Since the officers had no reason to believe that drugs were still in the vehicle, he claims that probable cause was lacking and that the circuit court erred in failing to so rule.

We find no error with the circuit court's conclusion that the officers did not improperly delay the vehicle stop, nor its conclusion that the drug dog alerting to the odor of drugs provided probable cause to search the vehicle. *Johnson v. Commonwealth*, 179 S.W.3d 882 (Ky.App. 2005) is factually very similar to the instant matter, and is dispositive of both claims of error. As in the matter at bar, the *Johnson* defendant moved to suppress evidence obtained in a vehicle search upon claiming that the officers improperly delayed the vehicle stop for the purpose of giving a canine officer additional time to reach the scene. In examining the claim of error, a panel of the Court of Appeals sustained the trial court's finding that the brief period of detention lasted no longer than was necessary to achieve the purpose of the stop. This finding was based on evidence adduced from the Commonwealth at the suppression hearing which detailed the actions of the officers after the vehicle was stopped. The trial court in *Johnson* found that the

investigating officers pulled a vehicle over for traffic violations in a high crime area, whereupon an officer spoke with the driver and then began writing a citation for improper registration. While the officer was carrying out these duties, the canine officer arrived. The court noted that it took the canine officer approximately five to seven minutes to arrive, and it found no basis for concluding that the vehicle stop was unnecessarily delayed.

In the matter at bar, Stewart acknowledges that the initial vehicle stop was proper. Much like the *Johnson* facts, Officer Givens first spoke with Stewart and then issued a citation based on Stewart's violation of the noise ordinance. Stewart attempts to distinguish the instant facts from those of *Johnson* by noting that Officer Givens improperly delayed the vehicle stop by entering Stewart's personal information into a computer to look for outstanding warrants. The record indicates, however, that the time it took for Officer Givens to look at the computer was minimal, and further that Officer Grayhouse arrived at the scene between five and eight minutes after he was first contacted by Givens. This is very similar to the five-to-seven-minute time frame noted in *Johnson*, wherein a panel of this Court found the duration of the vehicle stop to be reasonable. We find no basis for distinguishing *Johnson*, nor for concluding that the Fayette Circuit Court erred on this issue.

As for Stewart's claim that the drug dog alerting to the odor of drugs did not create probable cause sufficient to justify the vehicle search, the *Johnson* court stated with clarity the long-standing notion that a drug dog alert does constitute probable cause.

“After the dog alerted to the presence of narcotics, the officers undoubtedly had probable cause to search the vehicle.” *Id.* at 886. Probable cause for a search requires something more than a bare suspicion but less than what is needed to support a conviction.

Commonwealth v. Baldwin, 199 S.W.3d 765 (Ky.App. 2006). That is to say, the alert is not held out as proof of criminal wrongdoing, but rather is a rational basis upon which an officer’s suspicion of criminal wrongdoing may be formed.

As the United States Supreme Court has remarked, probable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would “warrant a man of reasonable caution in the belief,” that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false.

Williams v. Commonwealth, 147 S.W.3d 1 (Ky. 2004).

So while Stewart is correct that the alert does not prove the presence of illegal drugs, no such proof is required to justify the search. The alert given by Officer Grayhouse’s dog constituted probable cause sufficient to justify the vehicle search, and the Fayette Circuit Court properly so found.

For the foregoing reasons, we affirm the order and judgment of the Fayette Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gene Lewter
Lexington, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Robert E. Prather
Assistant Attorney General
Frankfort, Kentucky