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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002569-MR

DANTE CORVETTE STONE — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE W. DOUGLAS KEMPER, JUDGE
ACTION NO. 05-CR-001591

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; NICKELL AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Dante Corvette Stone brings this appeal from a November 2, 2006, judgment of the Jefferson Circuit Court sentencing him to six years' imprisonment upon conviction of sundry criminal offenses. We reverse and remand.

The material facts are uncontroverted. In the evening of August 8, 2004, Louisville Metro Police Department Officers John Green and Kim Lankford were patrolling the Hunt Club Apartments in Jefferson County. These apartments were known

to be in a high crime area. Both Officers Green and Lankford were in uniform and driving marked police cruisers.

Officer Green and Officer Lankford initially observed appellant sitting in a legally parked motor vehicle in front of an apartment building. After approximately two or three minutes, the officers noticed appellant still sitting in the motor vehicle. The vehicle's engine was not running, but the brake lights were illuminated. Neither officer observed appellant in contact with anyone.

Officer Green then pulled his police cruiser directly behind appellant's motor vehicle, and Officer Lankford pulled her cruiser directly behind Green's cruiser, thus effectively blocking appellant's motor vehicle.[1] As Officer Green approached the driver's side of the vehicle, appellant opened the door and started to exit. Officer Green ordered appellant back in the vehicle, and appellant complied. Thereafter, Officer Lankford approached the passenger side of the vehicle and observed that the steering column was "popped." The officer also observed a baggie of an off-white powder substance in plain view on top of the middle console. Officer Green then ordered appellant out of the vehicle. Appellant exited the vehicle and fled from the officers on foot but was subsequently apprehended.

The Jefferson County Grand Jury indicted appellant upon one count of first-degree trafficking in a controlled substance while in possession of a firearm (Kentucky Revised Statutes (KRS) 218A.1412, KRS 218A.992), one count of first-degree fleeing police (KRS 520.095), one count of resisting arrest (KRS 520.090), two counts of carrying a concealed deadly weapon (KRS 527.020), and two counts of third-degree

[1] The record indicates that vehicles were legally parked on both sides of appellant's vehicle. Also, appellant's motor vehicle was parked in front of an apartment building; thus, his vehicle could not pull forward.

criminal mischief (KRS 512.040). Appellant filed a motion to suppress evidence arguing that Officers Green and Lankford lacked reasonable suspicion of criminal activity, thus requiring suppression of the seized evidence. Following an evidentiary hearing, the circuit court denied the motion. A jury trial ensued. The jury ultimately found appellant not guilty of first-degree trafficking in a controlled substance and third-degree criminal mischief. However, the jury returned guilty verdicts upon first-degree possession of a controlled substance with use of a firearm, first-degree fleeing police, resisting arrest, and third-degree criminal mischief. By judgment entered November 2, 2006, the circuit court sentenced appellant to a total of six years' imprisonment. This appeal follows.

Appellant argues that the circuit court erred by denying his motion to suppress evidence. Upon review of the denial of a motion to suppress, the circuit court's findings of fact are upheld if supported by substantial evidence of a probative value. Ky. R. Civ. P. (RCr) 9.78; *Talbott v. Commonwealth*, 968 S.W.2d 76 (Ky. 1998). However, we review issues of law *de novo*. *See Welch v. Com.*, 149 S.W.3d 407 (Ky. 2004). Applying the forgoing standard, we shall review appellant's specific allegations of error.

Appellant alleges that Officers Green and Lankford lacked reasonable suspicion of criminal activity to justify the investigatory stop. In particular, appellant argues:

> Mr. Stone submits that the totality of the circumstances fail to yield a particularized or reasonable articulable suspicion that he was engaged in any criminal wrongdoing. Pursuant to *Terry*, *supra*, reasonable suspicion to support an investigatory stop must be measured by what the police knew before initiating the stop, which in this case occurred when Officer Green blocked [appellant's] vehicle with his cruiser. It is undisputed that the only thing the officers observed the first time they drove by was [appellant] seated in a legally parked, not-running vehicle that was not violating any traffic

> laws, in a public place before 9:00 PM on an August evening. It is undisputed that [Officer] Green did not think about walking up to the vehicle until the second pass, two or three minutes later, when nothing had changed (except possibly that the vehicle's brake lights were illuminated) – [appellant] was seated in a legally parked, not running vehicle, in a public place on a summer evening. It is undisputed that at neither time did the officers see [appellant] have any contact with anyone. It is undisputed that once he decided to stop, [Officer] Green pulled his marked vehicle behind [appellant's] vehicle, completely blocking any exit, and thus effectuating the illegal "stop."
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> And finally, it is undisputed that [Officer] Green approached the driver side of the vehicle before [appellant] began to exit, and [appellant] complied with [Officer] Green's directive to get back in the vehicle. . . .
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> Additionally, testimony that the area in which [appellant] was observed was a high crime area is not dispositive of an articulable and reasonable suspicion of criminal activity, especially given the fact that there was no other objective factor seen by the officers. "The fact that appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct." *Brown v. Texas*, 443 U.S. 47, 52, 99 S. Ct. 2637, 2641, 61 L. Ed. 2d. 357 (1979). . . .

Appellant's Brief at 13-15.

The Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution protect an individual against unreasonable search and seizure by government officials. Under the Fourth Amendment and Section 10, police may briefly stop or seize an individual for an investigative purpose if the police possess a reasonable suspicion that the individual is involved in criminal activity. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *Fletcher v. Com.*, 182 S.W.3d 556 (Ky.App. 2005). However, the constitutional prohibition against unreasonable search and

seizure is only triggered upon a "seizure" of the individual by the government. *Fletcher*, 182 S.W.3d 556. A seizure occurs "when an individual is detained under circumstances that would induce a reasonable person to believe that he or she is not at liberty to leave." *Id.* at 559. In reviewing this case and other similar cases, this Court recognizes that the prohibition against unreasonable search and seizure is one of the most valued constitutional rights in a democratic state and must be jealously guarded by the judiciary.

In denying the motion to suppress, the circuit court concluded:

> Given the officer's testimony that the area was a high crime area along with [appellant's] behavior in immediately exiting the vehicle when the officers parked behind him, the Court finds that the police had a reasonable and articulable suspicion to make an investigatory approach/stop of [appellant]. The fact that the conduct of [appellant] may have been as consistent with innocent activity as with illegal activity did not prevent police from entertaining a reasonable suspicion that criminal activity was going to occur.

We believe the circuit court erred as a matter of law by concluding the officers possessed reasonable suspicion of criminal activity to justify appellant's seizure. To explain our reasoning, we shall initially analyze the issue of when the officers seized appellant for constitutional purposes and then the issue of whether reasonable suspicion of criminal activity existed to justify such seizure.

The undisputed facts indicated that both officers parked their police cruisers directly behind appellant's motor vehicle. With the positioning of these cruisers, appellant's motor vehicle was effectively blocked in its parking space. Shortly after the police cruisers parked behind his vehicle, appellant then attempted to exit the vehicle but was ordered to return to the vehicle by Officer Green.[2] Considering these undisputed

[2] To support its conclusion that appellant's seizure was not unreasonable, the circuit court relied upon *U.S. v. Moorefield*, 111 F.3d 10 (3d Cir. 1997). In *Moorefield*, the Court held that a police officer may order a passenger back into a legally stopped motor vehicle. The Court noted that

facts, we conclude that appellant was "seized" at this time. With his vehicle blocked by police cruisers and upon being ordered by the police back into his vehicle, we believe that a reasonable person would not feel free to leave at this point. *See Fletcher*, 182 S.W.3d 556.[3] We now turn to the issue of whether the officers possessed reasonable suspicion of criminal activity to justify appellant's seizure.

When determining whether reasonable suspicion existed, an appellate court must consider all of the officer's observations and give due regard to inferences and deductions based upon the officer's training and experience. *Baltimore v. Com.*, 119 S.W.3d 532 (Ky.App. 2003). In short, we are to review the totality of the circumstances to determine whether reasonable suspicion existed. *Id.* And, the issue of reasonable suspicion presents a mixed question of law and fact that is reviewed *de novo*. *Id.*

Herein, we held that appellant was seized when the officers parked their cruisers behind appellant's vehicle and ordered appellant to return to the vehicle. As such, we must review the totality of the circumstances existing before the seizure took place and determine if the officers possessed reasonable suspicion of criminal activity to justify the seizure. *See Baltimore*, 119 S.W.3d 532.

In the case *sub judice*, it is uncontroverted that appellant was seated in a legally parked vehicle in front of an apartment building around 8:30 p.m. According to the officer's testimony, they observed appellant in his motor vehicle parked in front of an apartment complex for a period of minutes. The vehicle's engine was not running, and

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the defendant in *Moorefield* did not contest the legality of the initial stop of his motor vehicle and that the ordering of a passenger to stay within the vehicle was reasonable where the vehicle had been legally stopped. In contrast, our case turns upon whether the initial stop or seizure of appellant was lawful. *Moorefield* is simply inapposite.

[3] Although not bound by, we also view as persuasive the reasoning of *State v. Roberts*, 293 Mont. 476, 977 P.2d 974 (1999) and *State v. Lopez*, 109 N.M. 169, 783 P.2d 479 (1989).

the brake lights were illuminated. Appellant was violating no law at that time. The apartment complex was located in a high crime area, but the officers did not observe anyone approach appellant's vehicle. The officers then decided to investigate and parked their police cruisers so as to block appellant's vehicle. Shortly thereafter, appellant attempted to exit his vehicle but was ordered to return to the vehicle.

Considering the totality of circumstances, we are of the opinion that the officers did not possess reasonable suspicion of criminal activity at the time of appellant's seizure. We are simply unable to hold that an individual merely sitting in a legally parked vehicle in front of an apartment complex in a high crime area for a few minutes is sufficient to create reasonable suspicion of criminal activity. Indeed, appellant's conduct did not deviate from that of an ordinary law abiding citizen, and there was nothing suspicious about appellant's conduct suggestive of criminal behavior. Moreover, the fact that appellant attempted to exit the vehicle shortly after being blocked by police cruisers is also insufficient to create reasonable suspicion of criminal activity. Considering that his vehicle had just been blocked by the police, we think it reasonable for an individual to exit the vehicle in an attempt to inquire of police activity. Such conduct is not only reasonable but predictable behavior.

In sum, considering the totality of the circumstances, we hold that the officers did not possess reasonable suspicion of criminal activity necessary to justify appellant's seizure. Accordingly, we conclude the circuit court erred by denying appellant's motion to suppress evidence gathered as a result of appellant's seizure.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is reversed and this cause is remanded for proceedings not inconsistent with this opinion.

ALL CONCUR.

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