

RENDERED: NOVEMBER 26, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

**(DISCRETIONARY REVIEW DENIED AND OPINION ORDERED NOT
PUBLISHED BY SUPREME COURT OCTOBER 21, 2009
(FILE NO. 2008-SC-0943-D))**

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001787-MR

LAMONT MOORE

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 06-CR-00443

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** *

BEFORE: KELLER AND WINE, JUDGES; LAMBERT,¹ SENIOR JUDGE.

KELLER, JUDGE: Lamont Moore appeals from the Final Judgment and Sentence of Probation entered by the McCracken Circuit Court pursuant to a guilty plea

¹ Senior Judge Joseph E. Lambert, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

conditioned on Moore's right to appeal the circuit court's denial of his motion to suppress. We reverse and remand.

FACTUAL BACKGROUND

On June 30, 2006, the McCracken County Sheriff's Department set up a roadblock on Cairo Road in Paducah. Early in the morning on July 1, 2006, Moore was a passenger in a car driven by Erica Monique Jackson (Jackson), when Jackson was stopped at the roadblock. Jackson, who did not have a driver's license, was eventually picked up by a third party, leaving Moore with the car.

At some point in time, Officer Eric Fields (Fields) of the Tennessee Valley Authority (TVA) approached the passenger side of the car and began a conversation with Moore. Officer Fields asked Moore where they had been and where they were going. Moore responded that they were going to get food. Officer Fields noticed that Moore smelled of alcohol and that he acted nervous and evasive. Accordingly, Officer Fields asked Moore to get out of the car. Officer Fields then asked Moore if he had any weapons, and Moore responded that he had a pocket knife. Based upon this response, Officer Fields performed a *Terry*² pat-down search and felt baggies in Moore's right front pocket. Officer Fields removed the baggies from Moore's pocket, and subsequent testing revealed that the baggies contained marijuana, crack cocaine, and ecstasy. A search of the vehicle uncovered additional baggies of marijuana. Deputy Elton Ray Smith

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

(Smith) of the McCracken County Sheriff's Department (the sheriff's department) then arrested Moore on charges of trafficking.

The grand jury indicted Moore with First-Degree Possession of a Controlled Substance, Cocaine, First Offense; First-Degree Possession of a Controlled Substance, Ecstasy; and Possession of Marijuana.

Moore initially filed a series of *pro se* motions to suppress, arguing it was not a crime for him to be a passenger in a car while smelling like alcohol. Therefore, the stop, search, seizure, and arrest were unlawful. The court denied Moore's motions. Through counsel, Moore filed a third motion to suppress, this time arguing that the arrest was made following an illegal roadblock, that he was illegally seized by a TVA officer, and that there was no reasonable suspicion supporting Officer Fields' request for Moore to get out of the car.

The circuit court held a suppression hearing on March 9, 2007. Kentucky State Police (KSP) Sergeant Louis Dodd initially testified that the roadblock was a joint venture, but he could not provide any specifics regarding the roadblock as it was not part of a KSP operation. When asked whether the officers at the scene followed the policy of KSP or the sheriff's department's, Sergeant Dodd answered that "we follow our own policy, I can't really speak to the McCracken County, our officers follow our policy." He was unaware of any sheriff's department policy regarding the roadblock nor was he familiar with TVA Officer Fields. Sergeant Dodd further testified that if there were multiple officers "maybe different agency's policies" would come into play. He commented that if

he witnessed a sheriff's department officer and "he's doing his thing, I leave him to do it his way."

Deputy Smith from the sheriff's department testified the sheriff's department set up the roadblock, and he was the officer in charge. When questioned whether or not the roadblock was coordinated with KSP, he testified that all an officer was required to do to participate in the roadblock was to notify dispatch. He produced no written sheriff's department policy regarding the roadblock. However, he noted that each car that passed through the checkpoint was stopped.

According to Deputy Smith, Jackson's car was stopped at 2:00 a.m. and Moore was arrested at 3:24 a.m. Deputy Smith attributed the time delay to the need to complete an investigation and to complete the necessary paperwork. Furthermore, Deputy Smith testified that it was acceptable for TVA officers to assist with roadblocks, despite the fact that the roadblock was not on TVA owned or operated property. He testified that he had dealt with the driver of the appellant's vehicle, but had no suspicion of criminal activity on the part of Moore.

Officer Fields testified that he was present at the roadblock because of a request for additional manpower. He went on to concede on the stand that he was not aware of the sheriff's department's policy regarding the roadblock, but that he had been asked to participate by Deputy Smith. Officer Fields testified that, while the roadblock did not take place on TVA property, he was authorized to act by the requesting agency, as any other peace officer would be.

Officer Fields stated that he approached the passenger side of the car and noted that Moore smelled of alcohol and appeared reluctant to answer questions. At that point, Officer Fields asked Moore to get out of the car, asked Moore about weapons, and, when Moore indicated he had a pocket knife, Officer Fields performed a pat-down search of Moore. As a result of his search, Officer Fields recovered the pocket knife as well as baggies containing illegal drugs.

Following the hearing, Moore filed a memorandum in support of his motion to suppress, arguing that Officer Fields, as a TVA officer, did not have authority to search or seize him, making the search unreasonable. Moore also argued that the length of time between the stop of the vehicle and his arrest was unreasonable. The Commonwealth filed a response, arguing that the roadblock was proper; that Officer Fields did not arrest Moore; that Officer Fields was acting as a private citizen assisting law enforcement officers; and that Officer Fields' observations of Moore provided reasonable suspicion to remove Moore from the car.

The circuit court denied Moore's motion to suppress, finding that the roadblock was properly conducted, the vehicle was lawfully stopped, and the search of Moore was legal based on the inevitable discovery exception. The circuit court also noted that time is only a factor to be considered in determining whether a roadblock is intrusive. Following the denial of his motion to suppress, Moore accepted the Commonwealth's offer on a guilty plea,³ conditioned on his right to

³ As a part of the plea agreement, the Commonwealth agreed to dismiss the cocaine possession charge.

appeal the suppression ruling. The circuit court accepted his plea and sentenced Moore to a total of five years' imprisonment, but withheld imposition of the sentence pending completion of a two-year period of probation. This appeal followed.

On appeal, Moore argues that the roadblock procedures did not pass constitutional muster, that Officer Fields did not have reasonable suspicion to remove him from the car and conduct a pat-down search, and that Officer Fields did not have jurisdiction to detain him. Moore also asserts that the cumulative effect of these irregularities mandates a reversal. In its brief, the Commonwealth maintains that Moore failed to establish that the roadblock procedures were unconstitutional, that Officer Fields had a reasonable suspicion to order him from the car and frisk him for weapons, and that Moore was properly arrested by a deputy of the sheriff's department.

STANDARD OF REVIEW

In appeals addressing the denial of a motion to suppress following an evidentiary hearing, our standard of review is two-fold. Our first determination is whether the findings of fact are supported by substantial evidence. If so, those findings are conclusive. Rules of Criminal Procedure (RCr) 9.78; *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998). If not, they must be overturned as clearly erroneous. *Farmer v. Commonwealth*, 169 S.W.3d 50, 53 (Ky. App. 2005). Second, the reviewing court must perform a *de novo* review of the factual findings to determine whether the lower court's decision is correct as a matter of law.

Ornelas v. United States, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); *Commonwealth v. Banks*, 68 S.W.3d 347, 349 (Ky. 2001); *Stewart v. Commonwealth*, 44 S.W.3d 376, 380 (Ky. App. 2000). Because we find the roadblock to have been conducted in an unconstitutional manner, we will address only that issue as the remaining questions are thereby moot.

ANALYSIS

In *Commonwealth v. Bothman*, 941 S.W.2d 479, 481 (Ky. App. 1996), this Court recognized several factors important to the determination of whether a roadblock violates the constitution.

In general, a [roadblock] must be established in such a manner as to avoid the “unconstrained discretion” inherent in random stops, and must be reasonably calculated to protect public safety. Other factors to be considered are whether the [roadblock] was conducted pursuant to a systematic plan, and whether only some vehicles were stopped or all vehicles were stopped. Moreover, other jurisdictions have similarly held that a police [roadblock] will pass constitutional muster without strict compliance with the law enforcement agency’s internal guidelines as long as supervisory control is exercised over the establishment and operation of the [roadblock], and as long as the officers do not exercise unfettered discretion in stopping members of the general public. [Citations omitted.]

More recently, the Supreme Court of Kentucky “suggest[ed] several non-exclusive factors courts may consider in determining the reasonableness of a particular roadblock.” *Commonwealth v. Buchanan*, 122 S.W.3d 565, 570 (Ky. 2003). Those factors include: (1) “that decisions regarding the location, time, and procedures governing a particular roadblock should be determined by those law

enforcement officials in a supervisory position, rather than by the officers who are out in the field[,]”; (2) that those officers working the roadblock comply with procedures that have been established by superior officers “so that each motorist is dealt with in exactly the same manner[,]”; (3) that “the nature of the roadblock should be readily apparent to approaching motorists[,]”; and (4) the length of a stop. *Id.* at 571.

As previously noted, the circuit court relied on the testimony of Deputy Smith that he followed departmental procedures when he obtained prior authorization to place the roadblock in an approved location. The court noted that Deputy Smith was assigned to be in charge of the roadblock and was at the scene the entire time. The circuit court found that the roadblock was properly conducted because “McCracken County Sheriff’s Deputy Ray Smith, the officer in charge of the roadblock, obtained prior permission and an approved location for the roadblock as required by departmental policy.” Based on our review, the record does not further support the circuit court’s findings, nor do we agree that the findings support the conclusion that the roadblock was constitutionally sound.

The ultimate question of whether the facts of this case satisfy the *Buchanon* standard is a mixed question of fact and law, which is subject to our independent review. We note at the outset that the record shows no written policy or even a coherent verbal policy regarding how the citizens stopped that evening were to be treated. There is inadequate evidence of any systematic scheme designed to prevent unconstrained discretion by the officers. Indeed, Officer

Fields was not only from a different jurisdiction, he was unaware of any agency internal guidelines set forth by the sheriff's department in McCracken County. The supervisory control exercised over the operation of the roadblock did not restrict other KSP officers present, nor did it confine the TVA officer. Moore was not the driver of the vehicle, but a passenger; therefore, the implication is that the TVA Officer was looking for evidence of ordinary criminal activity rather than looking to prevent the immediate danger posed by otherwise impaired drivers. Thus we hold this is in contravention of Moore's Fourth Amendment rights as condemned under *Buchanon, supra*.

The exclusionary rule mandates that the evidence collected and consequently derived from constitutional violations may not be used at trial as it is considered "fruit of the poisonous tree". *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Because the stop of the car Moore was a passenger in was unlawful, all evidence flowing from that stop should have been suppressed. The trial court erred in denying the suppression motion; accordingly, we remand this case for further proceedings not inconsistent with this opinion.

CONCLUSION

For the foregoing reasons, the judgment of the McCracken Circuit Court is reversed.

ALL CONCUR.

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