RENDERED: SEPTEMBER 16, 2016; 10:00 A.M.
TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2015-CA-000480-MR

JOSHUA BOWEN — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 14-CR-00161

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, D. LAMBERT AND MAZE, JUDGES.

D. LAMBERT, JUDGE: This matter is before the Court on appeal from a ruling by the Franklin Circuit Court which denied a suppression motion filed by the Appellant, Joshua Bowen. Having reviewed the record and finding no reversible error, we affirm.

## I. FACTUAL AND PROCEDURAL HISTORY

Frankfort Police Officer Michael Schneble, while on duty one night, decided to run the license plates of random vehicles he encountered to check for warrants. Bowen was among that number whose license plates were run by Schneble that night. His misfortune was compounded by the fact that an individual with a similar name had an outstanding warrant, though Bowen did not. While Schneble was running the search, Bowen's vehicle left his field of view.

Attempting to simultaneously manage driving, searching for Bowen's vehicle, and receiving information from the terminal, Schneble mistakenly believed the warrant noted for the similarly named individual was actually a warrant for Bowen's arrest. Consequently, Schneble pulled Bowen over once he located Bowen's vehicle, considering the more prudent course of action to be to secure Bowen before verifying his hastily gathered information.

Upon running Bowen's driver's license, Schneble realized his mistake. While walking from his cruiser back to Bowen's car to return Bowen's license and send him on his way, Schneble noticed a small baggie on the center hump of the rear floorboard in Bowen's vehicle. The baggie contained a white substance later revealed as cocaine. Schneble asked Bowen to step out of the vehicle, at which point Bowen shifted the car into gear and sped away. Bowen later abandoned the vehicle and attempted to flee on foot. He was apprehended

shortly thereafter. The vehicle was impounded and searched, revealing a large quantity of cocaine which had been concealed in the gas cap door.

The Grand Jury indicted Bowen on the following charges: Fleeing and Evading in the 1st Degree, Wanton Endangerment in the 1st Degree, Trafficking in a Controlled Substance in the 1st Degree (less than four grams),[1] Possession of Drug Paraphernalia, and being a Persistent Felony Offender in the 1st Degree. Bowen filed a motion to suppress the baggie, arguing the initial stop of his vehicle was not supported by probable cause or a reasonable articulable suspicion of criminal activity.

Following a hearing, the trial court issued an order denying the motion. In so ruling, the trial court relied primarily on *Herring v. U.S.*, 555 U.S. 135, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009), to stand for the proposition that negligent mistakes of fact by law enforcement officers do not require suppression of the evidence yielded by a search unless the search rises to the level of a deliberate, reckless, or grossly negligent violation of the Fourth Amendment, or the violation reflects recurring or systemic negligence.

Bowen entered a conditional guilty plea, reserving the right to the instant appeal. He was later sentenced to five years each on the fleeing and evading charge, the wanton endangerment charge, the trafficking charge, and twelve months on the misdemeanor paraphernalia charge. These sentences were to

[1] Bowen was only charged with the cocaine found in the baggie in the passenger compartment, and not the larger quantity later found during the inventory search of the entire vehicle.

run concurrently for a total sentence of five years to serve. The Commonwealth dismissed the remaining charges.

This appeal followed, wherein we are asked to determine whether the trial court appropriately denied the suppression motion.

## II. ANALYSIS

### A. STANDARD OF REVIEW

When an appellate court is tasked with reviewing a trial court's ruling on a motion to suppress evidence, the case of *Dixon v. Commonwealth*, 149 S.W.3d 426 (Ky. 2004), mandates a two-step analysis. First, this Court must examine the record to determine if substantial evidence supports the trial court's factual findings. If the findings are supported by substantial evidence, they are deemed conclusive, and the analysis then shifts to a *de novo* determination of whether the trial court properly applied the law to those facts. *Ornelas v. United States*, 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996); *Commonwealth v. Whitmore*, 92 S.W.3d 76 (Ky. 2003).

The central question to resolve in this case focuses on the trial court's application of the rule of *Herring* to the facts presented, rather than the conclusiveness of the trial court's factual findings. Therefore, we use a *de novo* standard in our review.

### B. THE TRIAL COURT APPROPRIATELY RULED THE EVIDENCE YIELDED BY THE SEARCH TO BE ADMISSIBLE

An officer's act of pulling over a vehicle and detaining its occupants "constitutes a 'seizure' under the Fourth Amendment." *Chavies v. Commonwealth*, 354 S.W.3d 103, 108 (Ky. 2011) (citing *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979)). The rule of *Terry v. Ohio*, 392 U.S.1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), requires officers to have either probable cause or a reasonable articulable suspicion of criminal activity on the part of the detainee in order to justify a brief investigatory stop. *U.S. v. Johnson*, 620 F.3d 685 (6th Cir. 2010). This rule has been extended to the detention of vehicles. *Piercy v. Commonwealth*, 303 S.W.3d 492 (Ky. App. 2010).

However, the reason for the stop is only the first half of the two-step analysis of whether an investigatory stop was a violation. Once a determination of the propriety of the stop has been made, the analysis shifts to an examination of "whether the degree of intrusion … was reasonably related in scope to the situation at hand, which is judged by examining the reasonableness of the officials' conduct given their suspicions and the surrounding circumstances." *U.S. v. Beauchamp*, 659 F.3d 560, 569 (6th Cir. 2011) (citing *U.S. v. Davis*, 430 F.3d 345 (6th Cir. 2005)).

Bowen's contention before this Court is that Schneble unlawfully detained him, and because that detention was unlawful, the incidentally discovered baggie of cocaine was "fruit of the poisonous tree" evidence under *Segura v. U.S.*, 468 U.S. 796, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984), and subject to exclusion under *Wong Sun v. U.S.*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963), and

*Baltimore v. Commonwealth*, 119 S.W.3d 532 (Ky. App. 2003). To that point, he argues that the practice of detaining drivers before verifying the information is "objectively unreasonable" under *Herring*, and notes that had Schneble verified the information prior to the stop, he would have known he had the wrong man. Bowen and the similarly named individual had vastly different descriptions: different ethnicities, heights, weights, and birthdays.

On the other hand, Schneble believed he had probable cause to arrest the individual he believed to be the occupant of the vehicle based on the outstanding warrant and, further, the degree of intrusion was minimal. Testimony revealed the root from which the detention grew: Schneble, while simultaneously juggling multiple critical tasks, clicked on the incorrect, though similar, name on the terminal, resulting in the mistaken belief that Bowen was the target of an outstanding arrest warrant. The detention was brief, only lasting a few minutes, before Schneble realized his error. The trial court held that Schneble acted in objectively reasonable reliance on an invalid warrant under *Herring*, though this Court finds that an analysis under *Herring* need not be undertaken. The stop was supported by a good faith belief that the driver of the vehicle was subject to immediate arrest, and the intrusion was minimal in light of those circumstances. The trial court would have been entirely justified in ruling the evidence admissible based on the proper *Terry* stop of the vehicle.

Assuming the stop to be improper, the trial court's analysis of the facts through the lens of *Herring* is appropriate. Schneble's errant click on the

similar name of the wrong person does not reflect recurring or systemic negligence, wantonness, recklessness, or gross negligence. It is not the type of police misconduct the exclusionary rule is designed to deter.

## III. CONCLUSION

This Court, having reviewed the record and finding no reversible error, hereby AFFIRMS the ruling of the circuit court.

ALL CONCUR.

BRIEF FOR APPELLANT:

John Gerhart Landon
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky