

RENDERED: JULY 10, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2019-CA-000253-MR
AND
NO. 2019-CA-000288-MR

CARLOS MOORE

APPELLANT

v. APPEALS FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NOS. 16-CR-00834 AND 18-CR-00903

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING APPEAL NO. 2019-CA-000253-MR
AND AFFIRMING APPEAL NO. 2019-CA-000288-MR

** ** * * *

BEFORE: COMBS, DIXON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Carlos Moore brings Appeal No. 2019-CA-000253-MR from a February 4, 2019, order of the Kenton Circuit Court revoking Moore's probation and imposing a ten-year sentence of imprisonment and brings Appeal No. 2019-CA-000288-MR from a final judgment and sentence of imprisonment upon a jury

trial, also entered in the Kenton Circuit Court on February 4, 2019, adjudicating him guilty of possession of a handgun by a convicted felon and sentencing him to seven-years' imprisonment. We vacate and remand Appeal No. 2019-CA-000253-MR and affirm Appeal No. 2019-CA-000288-MR.

In September of 2016, Moore was indicted by a Kenton County Grand Jury upon one count of assault in the second degree and criminal mischief in the first degree (Action No. 16-CR-00834). Moore ultimately pleaded guilty to both charges. By Final Judgment entered November 21, 2017, Moore was sentenced to ten-years' imprisonment, probated for a period of five years.

While on probation, Moore was arrested in 2018. The incident leading to Moore's arrest occurred at the residence of Moore's friend, Chad Owen, located in Ludlow, Kentucky.¹ While Moore was visiting Owen at his residence, Owen and his ex-wife engaged in a domestic dispute. This led to the ex-wife going to a neighbor's house to call police. Owen and Moore both left the house in their respective vehicles before police arrived.

Before Moore reached the end of the street, his vehicle was stopped by a police officer responding to the domestic disturbance call. Officer Jeff Hord had received information that there were three individuals present where the domestic disturbance occurred: (1) Owen, a white male that Officer Hord was

¹ The address of Chad Owen's residence in Ludlow, Kentucky, was 217 Park Avenue.

familiar with; (2) Owen's ex-wife who reported the incident; and (3) an unnamed black male (Moore). And, it was reported that Owen and Moore each left the residence in separate vehicles. Moore was reportedly driving a silver automobile.

Officer Hord observed a black male (Moore) driving in the immediate vicinity of the residence in a silver Hyundai. Officer Hord then initiated a stop of Moore's vehicle as Hord suspected Moore might be the other male reported in the domestic call at the residence. Moore admitted he had been at the residence and after questioning by Officer Hord, he consented to a search of his vehicle. A gun was recovered from Moore's vehicle during the search, and Moore was charged with carrying a concealed deadly weapon and possession of a firearm by a convicted felon. The Commonwealth subsequently moved to revoke Moore's probation based upon the new criminal charges.

On July 19, 2018, Moore was indicted upon one count of possession of a handgun by a convicted felon (Action No. 18-CR-00903). By order entered December 7, 2018, the trial court denied Moore's motion to suppress evidence seized from the search of Moore's car. Following a trial by jury on December 11, 2018, Moore was found guilty of the indicted charge. By Final Judgment entered February 4, 2019, the trial court sentenced Moore to seven-years' imprisonment. The seven-year sentence of imprisonment was ordered to run consecutive to any sentence imposed in Action No. 16-CR-00834.

Also, on February 4, 2019, the trial court entered an order revoking Moore's probation (Action No. 16-CR-00834) and imposing the previously probated ten-year sentence of imprisonment. These appeals follow.

Appeal No. 2019-CA-000253-MR

Moore contends the trial court erred by revoking his probation. In particular, Moore asserts the trial court failed to make the mandatory findings required by Kentucky Revised Statutes (KRS) 439.3106 before revoking his probation. The Commonwealth admits the trial court failed to make the requisite findings but posits the error is harmless as the trial court's intention was obvious, and the record supports revocation. Moore acknowledges this issue was not properly preserved for appellate review and requests review under the palpable error standard of Kentucky Rules of Criminal Procedure (RCr) 10.26.

The palpable error standard is set forth in RCr 10.26 and essentially provides that although insufficiently raised or preserved, an error may be reviewed and relief granted if appellant's substantial rights were affected and a manifest injustice resulted. *Kiper v. Commonwealth*, 399 S.W.3d 736, 747 (Ky. 2012). Our review shall proceed accordingly.

KRS 439.3106 is entitled Sanctions Supervised Individuals Are Subject To, and provides, in relevant part:

Supervised individuals shall be subject to:

Violation revocation proceedings and possible incarceration for failure to comply with the conditions of supervision when such failure constitutes a significant risk to prior victims of the supervised individual or the community at large, and cannot be appropriately managed in the community

The Kentucky Supreme Court addressed application of KRS 439.3106 in *Commonwealth v. Andrews*, 448 S.W.3d 773 (Ky. 2014). Therein, the Supreme Court concluded that KRS 439.3106 sets forth “new criteria” a trial court must consider in a probation revocation proceeding. *Id.* at 777-78. Specifically, the *Andrews* Court held that a trial court is mandated by KRS 439.3106(1) to determine “whether a probationer’s failure to abide by a condition of supervision constitutes a significant risk to prior victims or the community at large, and whether the probationer cannot be managed in the community before probation may be revoked.” *Andrews*, 448 S.W.3d at 780. And, a trial court is required to make express findings pursuant to both criteria of KRS 439.3106 and the failure to make the express findings has been deemed palpable error. *Burnett v. Commonwealth*, 538 S.W.3d 322, 324-25 (Ky. App. 2017).

In the case *sub judice*, it is clear the trial court did not make the requisite express findings in its February 4, 2019, order revoking Moore’s probation pursuant to the criteria established in KRS 439.3106. Therefore, the trial court failed to comply with KRS 439.3106 and this failure constitutes palpable error. *See Burnett*, 538 S.W.3d 322. We thus vacate the February 4, 2019, order

revoking probation and remand for the trial court to hold a hearing and thereafter make express findings of fact as to whether Moore's failure to abide by a condition of supervision constitutes a significant risk to prior victims or the community at large, and determine if Moore cannot be appropriately managed in the community as a result thereof. KRS 439.3106. *See Andrews*, 448 S.W.3d at 778-79.

Appeal No. 2019-CA-000288-MR

In this appeal, Moore argues that the trial court erred by denying his motion to suppress evidence prior to trial. Specifically, Moore asserts the trial court erred by denying his “motion to suppress evidence, observations, and statements from the search of [his] car.” Moore’s Brief at 4. Moore does not dispute the trial court’s findings of fact upon this issue; rather, he asserts the court’s conclusions of law are erroneous. In reviewing a trial court’s denial of a motion to suppress, we review the court’s application of law to the facts *de novo*. *Greer v. Commonwealth*, 514 S.W.3d 566, 568 (Ky. App. 2017).

It is well-established that a police officer may make an investigatory stop if he possesses reasonable suspicion that criminal activity is afoot. *Terry v. Ohio*, 392 U.S. 1, 30 (1968). And, the stop of an automobile and resulting detention of the driver is not unreasonable if there exists a reasonable articulable suspicion that the driver has committed a violation of the law. *Id.* In determining

whether reasonable suspicion of criminal activity existed to justify the stop, we must look to the totality of the circumstances. *Id.*

In the case *sub judice*, Officer Hord had a reasonable articulable suspicion that Moore was involved in a reported domestic disturbance at 217 Park Avenue in Ludlow, Kentucky. Officer Hord had received information that Owen left the scene of the disturbance in his vehicle, and a black male left the scene in a silver automobile. Officer Hord was familiar with Owen and knew him to be a white male who drove a Ford Mustang. When Officer Hord arrived, he only spotted one vehicle leaving the area of 217 Park Avenue. The vehicle was a silver Hyundai driven by a black male, Moore. Officer Hord initiated a stop of the vehicle as he suspected the driver to be leaving the scene of the reported domestic disturbance. Considering the totality of the circumstances, we believe Officer Hord possessed the requisite reasonable articulable suspicion of criminal activity to justify the investigatory stop of Moore's vehicle.

Moore next contends the stop of his vehicle was impermissibly extended beyond the scope of investigating whether he was involved in the domestic disturbance at 217 Park Avenue in Ludlow, Kentucky. Specifically, Moore asserts that Officer Hord impermissibly extended "the stop and asked for [Moore's] driver's license." Moore's Brief at 5. If not for the impermissible extension, Moore argues the gun would not have been seized from the backseat of

his vehicle. The Commonwealth responds that this issue was not raised before the trial court. However, in Moore's reply brief, he requests review pursuant to RCr 10.26 for palpable error. As noted, to constitute palpable error, the substantial rights of the defendant must be affected resulting in manifest injustice. RCr 10.26; *Kiper*, 399 S.W.3d at 747.

It is well-established that in the context of a *Terry* stop, an "officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions." *Kavanaugh v. Commonwealth*, 427 S.W.3d 178, 180 (Ky. 2014) (citation omitted); *see also Terry*, 392 U.S. at 30. And, "an officer is constitutionally permitted to request identification" of a *Terry* detainee. *Kavanaugh*, 427 S.W.3d at 181.

In this case, as Officer Hord turned onto Park Avenue he observed a silver automobile driven by a black male leaving the vicinity of the residence where the domestic disturbance had been reported. Officer Hord stopped the vehicle as he suspected Moore was involved with the reported incident. Upon being stopped, Moore immediately confirmed to Officer Hord that he had just left 217 Park Avenue but claimed he was not involved in the domestic dispute. Officer Hord requested Moore's driver's license and Moore acquiesced. Officer Hord then returned to his police car and confirmed Moore's identity. In the process thereof, dispatch informed Officer Hord that an Emergency Protective Order (EPO) needed

to be served upon Moore. The EPO identified Moore as armed and dangerous. It is clear from these facts that Officer Hord was merely confirming the identity of Moore when he requested his driver's license. Again, we emphasize a police officer may request identification of a detainee. *Id.* at 181. And, this is what Officer Hord did in this case. Additionally, Officer Hord ran the driver's license and expeditiously returned it to Moore. Consequently, we are of the opinion that Officer Hord did not impermissibly extend the investigatory stop.

Moore also contends the trial court erred by allowing the Commonwealth to play a recording from Officer Hord's body cam at trial. Moore particularly asserts the trial court should not have allowed the Commonwealth to play the portion of Officer Nord's body cam footage which mentions that a petition for an EPO had been taken against Moore but had not been served. Moore argued that introduction of this evidence was in contravention of Kentucky Rules of Evidence (KRE) 404(b).

Relevant evidence is generally admissible under KRE 402. Relevant evidence is defined in KRE 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." And, KRE 404(b) particularly addresses the admissibility of evidence of other crimes, wrongs, or acts and provides, in relevant part, as follows:

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:

(1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or

(2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

Under KRE 404(b), evidence of other crimes, wrongs, or acts is generally inadmissible to demonstrate “a defendant's propensity to commit crimes in order to show that he or she committed the charged crime.” Robert G. Lawson, *THE KENTUCKY EVIDENCE LAW HANDBOOK* § 2.30(1)(a) (5th ed. 2013). However, evidence of other crimes, wrongs, or acts is admissible to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]” KRE 404(b)(1). It is also admissible if the evidence is so inextricably intertwined with other essential evidence that separation of the two could not occur without serious adverse effect on the offering party. KRE 404(b)(2). And, the trial court’s ruling upon the admissibility or exclusion of evidence is reviewed for abuse of discretion. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000).

In the case *sub judice*, after learning that Moore had an outstanding EPO, Officer Hord proceeded to inform Moore thereof, request that Moore exit his vehicle, and pat down Moore for weapons. It was at this time Officer Hord requested permission from Moore to search his vehicle for weapons. Moore gave Officer Hord consent to search the vehicle thus resulting in the seizure of the handgun in the backseat hidden from plain view. The video evidence was admissible as it was so inextricably intertwined with the discovery of the weapon in Moore's vehicle that separation of the two could not be accomplished without prejudice to the offering party. *See Kerr v. Commonwealth*, 400 S.W.3d 250, 261 (Ky. 2013). Even if admission of the video evidence were erroneous, we cannot conclude that there is a substantial possibility the result of the proceeding would have been different. *See Wiley v. Commonwealth*, 348 S.W.3d 570, 579 (Ky. 2010). Therefore, we are of the opinion that the trial court's admission of the body cam footage did not rise to reversible error. We thus affirm the final judgment entered February 4, 2019.

In summation, for the reasons stated, we vacate and remand the order of the Kenton Circuit Court for proceedings consistent with this Opinion in Appeal No. 2019-CA-000253-MR and affirm the final judgment and sentence of imprisonment upon jury trial also of the Kenton Circuit Court in Appeal No. 2019-CA-000288-MR.

ALL CONCUR.

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