

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002227-MR

PATRICK C. KIRBY

APPELLANT

v. APPEAL FROM FLEMING CIRCUIT COURT
HONORABLE JOHN W. MCNEIL, JUDGE
ACTION NO. 06-CR-00014-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: THOMPSON AND WINE, JUDGES; HENRY¹ SENIOR JUDGE.

HENRY, SENIOR JUDGE: Patrick Kirby entered a conditional guilty plea, pursuant to Kentucky Rules of Criminal Procedure (RCr) 8.09, to the charges of driving under the influence first offense, possession of drug paraphernalia, possession of a controlled substance first degree and failure to yield to a traffic control device. He was sentenced to serve one year. He filed a motion to suppress the introduction in evidence of drugs and

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

drug paraphernalia seized during a search of his car after a traffic stop. The court conducted an evidentiary hearing on the motion and, after hearing testimony, determined that the traffic stop that resulted in Kirby's arrest was allowed by the holding in *Terry v. Ohio*, 392 U.S.1 (1968) because the police officer had a reasonable and articulable suspicion of criminal activity. Kirby's conditional plea reserved the right to appeal the trial court's decision, and this appeal followed. After a review of the record, we find no error and affirm.

On February 3, 2006 at approximately 8:19 p.m., a Flemingsburg police office saw a “dark colored car” travel through an intersection without stopping for a red light. The officer was facing the oncoming vehicle. The traffic light on the officer's side of the intersection was red. He testified that the traffic light was functioning properly earlier in the evening and there were no reports of any malfunctions later in the evening. He surmised that the light was red for the vehicle traveling toward him and that the driver had failed to stop.

The officer was approximately seven hundred feet away, and uphill from the intersection. It was dark. The officer testified that he could not tell the make, color or model of the vehicle but he was able to make out what he termed “the face” of the vehicle. By that he meant he could distinguish the pattern of headlights and parking lights along with a bright reflective item in the middle of the car which he thought may have been a license plate.

The topography of the area surrounding the intersection is hilly. The officer acknowledged that he did in fact lose sight of the vehicle for “two to three seconds” as it traveled uphill toward him but that he could at all times see the glare of the headlights. Those headlights “stayed constant” as they approached him and he could see the glow from them the “entire time.” He did not observe any other vehicles coming up the hill. He did not see the glare from any headlights turn off of the street onto any side street or parking area.

When the vehicle reached his location near the top of the hilly area, he was able to identify the bright spot in the middle of the front of the vehicle as a license plate from another state. The officer followed the car for several hundred feet and then initiated a traffic stop in order to issue a citation for running the red light. Kirby was driving. He was unable to produce a valid operator's license, and he appeared to be under the influence of some substance. Looking into the vehicle with his flashlight, the officer observed two blue pills in the back floorboard which later proved to be oxycodone. A search of the inside of the vehicle yielded additional drugs and drug paraphernalia. Kirby was arrested and charged.

On behalf of Kirby's defense, a private investigator made a videotape of the scene and reenacted the movements of the suspect vehicle. This tape was produced at approximately 9:45 p.m. in June of 2006. The tape showed the scene almost ninety minutes later in the evening compared to the time of the arrest, and it was also over four

months later in the year. Sunset in June of the year 2006 was approximately 9:00 p.m. Sunset on February 3, 2006, when Kirby was arrested, was approximately 6:00 p.m.

The vehicle on the videotape stops at the traffic light and then proceeds up the hill. From the officer's vantage point, the vehicle in the videotape disappears from view for almost nine seconds. The private investigator testified that the vehicle used in the videotape was traveling about twenty-five miles per hour. There was no testimony that the headlight configuration of the vehicle used to make the videotape bore any similarity to the headlight configuration of Kirby's vehicle.

The police officer estimated that Kirby's vehicle was traveling approximately ten miles per hour faster than the videotaped vehicle. The officer testified that he did lose sight of the vehicle for approximately two to three seconds but that it was dark enough that evening that he could see the glow of the headlights the entire time. Kirby argues that the videotape should be a more reliable indication of the circumstances leading up to his arrest than the officer's testimony.

Our standard of review following a trial court's denial of a suppression motion after a hearing is to determine from a *de novo* review, whether the trial court correctly applied the law. *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). The factual findings of the trial court are conclusive if they are supported by substantial evidence. RCr 9.78; *Stewart v. Commonwealth*, 44 S.W.3d 376, 380 (Ky.App. 2000).

A police officer may stop and briefly detain a citizen without probable cause if there is a “reasonable and articulable suspicion that criminal activity is afoot.” *Terry v. Ohio*, 392 U.S. 1, 20-23, 88 S.Ct. 1868, 1878-81, 20 L.Ed.2d 889 (1968). Here, the officer had a reasonable and articulable suspicion that a vehicle traveled through a controlled intersection against the light. The question is not actually whether the officer had the right to stop a vehicle but whether he had the right to stop Kirby's vehicle. It is a question of identity.

We are obliged to give due weight to the inferences drawn from the facts by the officer and the trial court. *Stewart*, 44 S.W.3d at 380. Here, the officer had a solid basis to believe that a traffic violation had occurred. This is not a situation where the officer arbitrarily selected Kirby's vehicle to investigate. The fact that the officer admittedly lost sight of the vehicle for a few seconds does not render incredible his testimony that the vehicle he stopped was the same vehicle that ran the red light. He noted what turned out to be a license plate on the front of the vehicle. He was confident that the lighting configuration of Kirby's vehicle was like that of the vehicle that went through the red light. He had a reasonable basis to believe the light was red and the driver was required to stop. He monitored the glare of the headlights as the vehicle traveled up the hill. Under the totality of the circumstances, the officer had a reasonable suspicion to support his stop of Kirby's vehicle. *See Simpson v. Commonwealth*, 834 S.W.2d 686, 687 (Ky.App. 1992).

Rulings on the admissibility of evidence are within the sound discretion of the trial court and we will not reverse then on appeal absent a clear abuse of that discretion. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1991). There is nothing in the record to indicate that the trial court abused its discretion. There was no error and we affirm the decision of the Fleming Circuit Court.

ALL CONCUR.

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