

RENDERED: JANUARY 22, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000751-MR

HARRIS MOORE

APPELLANT

v.

APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 07-CR-00154

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, TAYLOR, AND WINE, JUDGES.

CLAYTON, JUDGE: Harris Moore appeals the March 31, 2008, judgment of the Rowan Circuit Court sentencing him to two years of imprisonment for his conditional guilty plea to trafficking in a controlled substance within 1,000 yards of a school; second degree trafficking in a controlled substance, first offense; possession of marijuana; and, possession of drug paraphernalia, first offense.

Specifically, Moore appeals the trial court's denial of his motion to suppress the results of an investigatory stop that led to his arrest. Finding no error, we affirm.

On February 15, 2008, Moore pled guilty to the above-cited charges. Subsequently, on March 26, 2008, the Rowan Circuit Court sentenced Moore to concurrent two-year sentences and a concurrent sentence of twelve months. Even though the docket sheet and the Commonwealth's offer show that the plea was conditional upon Moore's right to appeal, the judgment itself does not so reflect. On the record, however, the trial court noted that the plea was conditional and that Moore may withdraw the condition based upon the sentence entered.

The conviction was based on an incident that occurred on May 29, 2007, in an area known for drug trafficking. Officer Ben Castle was on routine patrol in Morehead, Kentucky, when he saw Moore and another individual, Kenny Eldridge in a parking lot making a hand-to-hand exchange. Officer Castle was aware of Eldridge's reputation for involvement in drugs. Although Officer Castle stated that he did not see the contraband swapped, he could tell that the parties had exchanged something for money. Additionally, the police officer explained that the two men appeared nervous upon seeing a police officer. After Eldridge left, Officer Castle also testified that he saw another person approach Moore's vehicle and leave.

Then, based on his observations but without any traffic violations, Officer Castle stopped Moore's vehicle and asked him for consent to search. Moore gave consent, and upon searching, the officer found hydrocodone pills and

marijuana. Moore told the officer that he had sold drugs to Eldridge, and his girlfriend, who was also in the vehicle, made a similar statement.

Subsequently, Moore was indicted for trafficking in a controlled substance within 1,000 yards of a school; second degree trafficking in a controlled substance, first offense; possession of marijuana; and, possession of drug paraphernalia, first offense. He filed a motion to suppress based on his belief that Officer Castle lacked sufficient articulable facts to create the reasonable suspicion, which would permit stopping Moore. Following the trial court's denial of the motion, Moore entered a conditional plea to all charges.

Moore moved for suppression of the vehicle search arguing that the police officer did not have sufficient reasonable suspicion to make a *Terry*¹ stop. The trial court held a suppression hearing on December 5, 2007. Thereafter, the trial court entered a written order on January 29, 2008, concluding that the police officer had reasonable suspicion based on the totality of the circumstances to make a *Terry* stop. Moore appeals from this order.

Moore argues that the trial court erred in denying the motion to suppress because no reasonable suspicion existed to stop the vehicle that he was driving. The Commonwealth counters that, in the case at hand, Officer Castle was on patrol in an area that is known to be a high drug area wherein he observed two individuals (Moore and Eldridge) behave suspiciously. Then, Officer Castle parked his police vehicle approximately thirty yards away and continued to

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

observe the situation and observed them exchange something for cash. After this exchange, Officer Castle witnessed another party approach Moore's vehicle for a short time and leave. Thus, based on the totality of the circumstances, the Commonwealth maintains that these factors provided a reasonable and articulable suspicion that a criminal act had occurred, which permitted the investigatory traffic stop.

Our standard of review on a motion to suppress is two-fold. While we accept those findings of fact which are supported by substantial evidence, *Simpson v. Com.*, 834 S.W.2d 686, 687 (Ky. App. 1992), our review is *de novo* with regard to the legal application of pertinent constitutional principles to the facts as found. *Com. v. Banks*, 68 S.W.3d 347, 349 (Ky. 2001), *citing Ornelas v. United States*, 517 U.S. 690, 691, 116 S.Ct. 1657, 1659, 134 L.Ed.2d 911 (1996). At a suppression hearing, the ability to assess the credibility of witnesses and to draw reasonable inferences from the testimony is vested in the discretion of the trial court. *Com. v. Whitmore*, 92 S.W.3d 76, 79 (Ky. 2002).

Kentucky jurisprudence provides guidance to appellate courts in reviewing the trial court's assessment of whether to suppress evidence. First, the law is well established that an investigatory traffic stop is constitutionally justified if the facts and totality of the circumstances of the stop show the existence of a reasonable and articulable suspicion that the suspect is engaged in unlawful activity. *Boyle v. Com.*, 245 S.W.3d 219, 220 (Ky. App. 2007). Further, this standard, reasonable and articulable suspicion, is a significantly lower standard

than the probable cause standard. *Id.* To make this determination we are guided by the language in *Greene v. Com.*, 244 S.W.3d 128, 133-134 (Ky. App. 2008):

The objective justification for the officer's actions must be measured in light of the totality of the circumstances. When considering the totality of the circumstances, a reviewing court should take care not to view the factors upon which police officers rely to create reasonable suspicion in isolation. Courts must consider all of the officers' observations, and give due weight to the inferences and deductions drawn by trained law enforcement officers. (Citations omitted).

Turning to the present case, clearly, the mere fact that a defendant is present in a high traffic area is an insufficient reason to justify a traffic stop. But in determining whether a set of facts is sufficient to generate reasonable suspicion, it may be a factor for consideration in reviewing the totality of circumstances.

Simpson, 834 S.W.2d 686. In analyzing the case at hand, Officer Castle relied on several facts. One factor was the location of the vehicle in an area known for high drug activity. In addition, Officer Castle, who had been trained in dealing with these drug cases, saw Moore exchange something for cash with Eldridge, knew Eldridge's reputation for drug activity, noticed another person approach Moore's vehicle and depart shortly thereafter, and discerned the parties' uncomfortable reaction to a police vehicle driving by them. We are not persuaded by Moore's argument that Officer Castle's observation that the parties were nervous makes the stop itself invalid. Officer Castle did not rely only or even primarily on this observation but employed it to examine the totality of the circumstances. Hence, we concur with the trial court's decision that based on the totality of the

circumstances, Officer Castle had a reasonable suspicion that a crime had occurred prior to stopping Moore's vehicle. Therefore, this investigatory stop was permissible.

For the above reasons, we hold that the Rowan Circuit Court was correct in its finding that a reasonable and articulable suspicion existed which warranted the stop of Moore's vehicle, and that the motion to suppress was properly denied. Accordingly, the March 31, 2008, judgment of the Rowan Circuit Court is affirmed.

ALL CONCUR.

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