

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001591-MR

EVA WHEELER

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KEN M. HOWARD, JUDGE
ACTION NO. 08-CR-00554

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; STUMBO, JUDGE; SHAKE,¹ SENIOR JUDGE.

STUMBO, JUDGE: Eva Wheeler appeals from an order of the Hardin Circuit Court denying her motion to suppress evidence obtained during a traffic stop and subsequent search of a house. The Commonwealth argues that the trial court

¹ Senior Judge Ann O'Malley Shake, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580

properly found that consent had been obtained prior to the searches and requests we affirm the order. We find no error and affirm.

On August 21, 2008, Detective Chris Thompson of the Greater Hardin County Narcotics Task Force received a call that a clerk from Walgreens had reported a suspicious purchase of Sudafed, an ingredient of methamphetamine. The name of the man who purchased the Sudafed was Andy Mann. The clerk also provided a description of Mann. Thompson was in the vicinity and drove to the Walgreens where he witnessed Mann exit the Walgreens and get into a vehicle occupied by four other people. Thompson did a license plate check and determined that the vehicle belonged to Michael Martinez, who was driving the vehicle. The license plate check also revealed that Martinez was under investigation for manufacturing methamphetamine. When the vehicle left the parking lot, Thompson followed it.

Thompson observed the vehicle make an illegal u-turn against a red light and drive back toward the Walgreens. Because Thompson was in an unmarked police vehicle, he requested a marked vehicle perform a traffic stop due to the u-turn. Once the traffic stop had occurred and Thompson arrived on the scene, he requested that the occupants exit the vehicle. He then questioned Mann about the purchase. Mann told Thompson that he made the purchase for Martinez and Wheeler so they could use it to manufacture methamphetamine.

Thompson then questioned Martinez, during which Martinez consented to a search of the vehicle. During the search, Thompson found the

unopened box of Sudafed. Martinez was on probation at the time, so Thompson called Martinez's probation officer, Steve Whitely. When Whitely arrived, he talked with Martinez and asked if he had anything in his house that "should not be there." Whitely then asked if they could go to Martinez's house and search it. Martinez gave his consent to search his house.

Thompson, Whitely, and Martinez proceeded to Martinez's residence, stopping along the way to get gas and a written consent to search form. Martinez then signed the search form. During this time, the remaining occupants of Martinez's vehicle were taken to the Elizabethtown Police Department to give their statements. Once at Martinez's residence, Thompson and Whitely found equipment and chemicals used for the purpose of manufacturing methamphetamine. All occupants of the vehicle were eventually arrested.

Wheeler was indicted for complicity to commit the manufacturing of methamphetamine and being a second-degree persistent felony offender. Wheeler entered a plea of not guilty. She later moved to suppress the evidence found as a result of the traffic stop, claiming the police acted unlawfully during the course of the stop and in searching Martinez's vehicle and residence. Specifically, she sought to suppress the Sudafed found in the vehicle, the statements of the other passengers, and the evidence discovered during the search of the residence.

A suppression hearing was held. Only three witnesses testified, Thompson, Whitely, and Officer Matt McMillan. McMillan was only at the scene for a few seconds, so his testimony was short and unrevealing. Thompson and

Whitely then testified to the events surrounding the stop and searches as described above. No other witnesses were called and the hearing ended.

Prior to the court ruling on the suppression issue, Wheeler entered a conditional guilty plea to complicity to commit manufacturing in methamphetamine. The persistent felony offender charge was dismissed. Wheeler reserved the right to appeal the ruling if her suppression motion was denied and to withdraw the plea if it was granted. Following the plea, Wheeler made additional motions to consider additional evidence on the suppression matter.

The trial court eventually entered an order denying the motion to suppress finding that Martinez had voluntarily consented to the search of his vehicle and residence. The court also allowed Wheeler to introduce a hand-written note from Martinez into evidence, but denied the entry of any other evidence. This appeal followed.

An appellate court's standard of review of the trial court's decision on a motion to suppress requires that we first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive. Based on those findings of fact, we must then conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law.

Commonwealth v. Neal, 84 S.W.3d 920, 923 (Ky. App. 2002). We find that the trial court did not err in denying Wheeler's motion to suppress.

The traffic stop itself was lawful for two reasons. First, it was brought about by Martinez's unlawful u-turn. Second, Detective Thompson had a

reasonable, articulable suspicion that the people in the vehicle were, or were about to become involved in criminal activity.² *Taylor v. Commonwealth*, 987 S.W.2d 302, 305 (Ky. 1998). At the time of the stop, there had been no violation of Wheeler’s Fourth Amendment right to be free from illegal searches and seizures.

However, this case revolves around the issue of consent, namely Martinez’s consent to search his vehicle and residence. Warrantless searches are reasonable and do not violate the Fourth Amendment if consent to search is granted. *Cook v. Commonwealth*, 826 S.W.2d 329, 331 (Ky. 1992). Wheeler, however, argues that the consent to search was not voluntary and obtained by coercion.

[W]hen the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied.

Schneckloth v. Bustamonte, 412 U.S. 218, 248, 93 S.Ct. 2041, 2059 36 L.Ed.2d 854 (1973). “The question of voluntariness turns on a careful scrutiny of all the surrounding circumstances in a specific case.” *Id.* “Whether consent is the result of express or implied coercion is a question of fact and thus, we must defer to the trial court’s finding if it is supported by substantial evidence.” *Krause v. Commonwealth*, 206 S.W.3d 922, 924 (Ky. 2006) (citations omitted). We find that Martinez’s consent was voluntary.

² The Walgreens clerk called about a suspicious Sudafed purchase, the vehicle at issue was being driven by Martinez who was already under investigation for manufacturing methamphetamine, and the vehicle made an illegal u-turn to travel back toward Walgreens.

During the suppression hearing, the only witnesses were those called on by the Commonwealth. Thompson and Whitely both testified that Martinez voluntarily consented to the searches. No evidence indicated that the officers used coercive tactics. Little evidence was introduced regarding the length of the traffic stop, how much time passed before consent was given, or even a detailed explanation as to what was said during the stop (other than why the Sudafed was purchased and that the officers were granted consent to search the vehicle and residence). A hand-written note from Martinez was allowed into evidence after the suppression hearing stating that he did not consent to the searches; however, the note was not subject to cross-examination. The trial court evidently found the testimony of the two officers more credible than Martinez's note. Finally, nine days after the hearing, the defense tried to introduce a police dashboard video recording of the stop. While the video could have produced more details as to what took place during the stop, the trial court, exercising its discretion, declined to reopen the evidence and allow this video to be entered.

Based on the testimony at the hearing, there was substantial evidence that the verbal and written consents to search were voluntarily given to Thompson and Whitely. Because the consents to search were found to be voluntary, there was no Fourth Amendment violation and no reason to suppress the evidence.

Finally, Wheeler argues that any evidence gained from the questioning of the other occupants of the vehicle should be suppressed. We disagree. As stated above, Detective Thompson had a reasonable suspicion that

criminal activity was afoot. Because of this, he was justified in asking the occupants of the vehicle some questions. *Terry v. Ohio*, 392 U.S. 1, 23, 88 S.Ct. 1868, 1881, 20 L.Ed.2d 889 (1968).

Based on the above, we affirm the order of the trial court denying the motion to suppress.

ALL CONCUR.

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