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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001628-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 09-CR-00349

YUNUS ALI — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER, NICKELL, AND STUMBO, JUDGES.

NICKELL, JUDGE: The Commonwealth of Kentucky has appealed from the August 28, 2009, order of the Kenton Circuit Court sustaining Yunus Ali's motion to suppress the evidence seized from him following a traffic stop. For the following reasons, we affirm.

On June 11, 2009, Ali was indicted by a Kenton County Grand Jury on one count of possession of a controlled substance in the first degree.[1] Ali moved the trial court to suppress "all items seized from the Defendant by any law enforcement officers, prosecutorial personnel." A hearing was held on the motion at which the arresting officers testified. The trial court granted the motion and this appeal by the Commonwealth followed.

On appeal, the Commonwealth contends the arresting officers had probable cause to conduct the search of Ali's person and thus, the trial court erred in granting suppression. We disagree.

Factual findings made by a trial court in its ruling on a motion to suppress are reviewed on appeal for clear error, while its legal conclusions are reviewed *de novo*. *Bishop v. Commonwealth*, 237 S.W.3d 567, 568-69 (Ky. App. 2007). In the case *sub judice*, the facts are clear and are not in dispute. We have reviewed the record and, finding no clear error in the trial court's factual findings, we deem the historical facts set forth by the trial court to be conclusive. *Baltimore v. Commonwealth*, 119 S.W.3d 532, 539 (Ky. App. 2003). Thus, we must focus solely on the trial court's conclusions of law, to which we owe no deference. Nevertheless, we believe the trial court was correct in suppressing the evidence.

The trial court set forth the pertinent factual background and granted the suppression motion in a well-reasoned order which we set forth in full and adopt as our own.

[1] Kentucky Revised Statutes (KRS) 218A.1415, a Class D felony.

This matter came before the Court on the Defendant's motion to suppress filed on July 31, 2009. Having heard argument on the matter and being in all ways sufficiently advised, the Court grants the motion.

On May 5, 2009, at 12:45 a.m. Officer Jeff Mangus observed a car being driven with its high beams on and the occupants not wearing their seatbelts at Nineteenth Street in Covington, Kentucky. Officer Mangus testified that he had received complaints of narcotics sales in that area. After stopping the car for traffic violations and speaking with the driver, Officer Mangus called for a K-9 unit. Specialist Mike Lusardi and his canine partner arrived at the scene while Officer Mangus was completing the written citation for the violations.

The driver and the Defendant, a passenger, were asked to step out of the car while Specialist Lusardi led his dog around the car. The dog alerted near the door beam between the front and rear passenger seats. Spec. Lusardi searched the car and found marijuana residue on the floor. After finding the residue, Spec. Lusardi searched the Defendant and found a rock of what appeared to be crack cocaine in the Defendant's shoe.

The Defendant was arrested and charged with possession of a Controlled Substance, First Degree. He challenges the stop, asserting that *United States v. Di Re*, 332 U.S. 581 (1948) holds that a passenger should not be searched unless there is probable cause, independent of that to search the car, to search him.

In the instant case, the initial encounter was prompted by Officer Mangus' observation of a traffic violation when he saw the car being driven with its high beams on and the defendant's seat belt dangling unengaged from the door post. He lawfully stopped the car and requested proof of driver's license and registration. When the driver produced a learner's permit and the Defendant produced a suspended license, Officer Mangus called for a narcotics dog, which arrived while Mangus was filling out the citation. A dog's sniff does not *per se* constitute a search under the Fourth Amendment and does not require

probable cause or reasonable suspicion. *United States v. Place*, 462 U.S. 696, 707, 103 S.Ct. 2637, 2644-45, 77 L.Ed.2d 110 (1983). A dog sniff performed on the exterior of a defendant's car "while he was lawfully seized for a traffic violation" did not rise to the level of a constitutionally cognizable infringement. *Illinois v. Caballes*, 543 U.S. 405, 409, 125 S.Ct. 834, 838, 160 L.Ed.2d 842 (2005). An otherwise lawful canine sweep that is ancillary to a legitimate traffic stop may constitute an unlawful search if the suspect is detained beyond the time necessary to complete the traffic stop. *See United States v. Jacobsen*, 466 U.S. 109, 124, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984). Mr. Ali does not challenge the length of the detention while the narcotics dog was led around the car.

The Defendant and driver were asked to step out of the car while the dog was walked around the car. The dog alerted on the door post separating the passenger front and rear seats. At that point, the car was searched and the residue found. The Defendant was searched for drugs and a rock of crack cocaine was found in his shoe. The dog's alert to the passenger car door justified the officer's warrantless search of the car.

However, occupants of a car continue to have a heightened expectation of privacy, which protects against personal searches without a warrant. *See Wyoming v. Houghton*, 526 U.S. 295, 303, 119 S.Ct. 1297, 1302, 143 L.Ed.2d 408, 416 (1999). There exists a "unique, significantly heightened protection afforded against searches of one's person." *Id*. Even a limited personal search intrudes upon cherished personal security and is an annoying, frightening, and perhaps humiliating experience. *Id*. The "traumatic consequences [like those involved in a personal search] are not to be expected when the police examine an item of personal property found in a car." *Id*. Thus, personal searches of vehicle occupants are not authorized under the automobile exception as a result of the occupant's mere presence within a vehicle, where there is probable cause to search. *United States v. Di Re*, 332 U.S. 581, 586-87, 68 S.Ct. 222, 224-25, 92 L.Ed.2d 210, 216 (1948).

> In *Morton v. Commonwealth*, 232 S.W.3d 566 (Ky. App. 2007) a drug dog's detection of drugs inside the defendant's vehicle gave police probable cause to search the defendant after he exited the car. Mr. Morton was the sole occupant of the car and the court stated in dicta that the probable cause to search would not extend to a passenger without some additional substantive nexus between the passenger and the criminal conduct. In the instant case, the finding of marijuana residue on the floor justified the search of the driver, but because there was no testimony from either officer about why they thought the Defendant had drugs on his person the warrantless search of the Defendant was not justified.
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> Accordingly, the Defendant's motion to suppress is granted.

Our review of the pertinent case law reveals the trial court correctly found the arresting officers had probable cause to search the vehicle as well as its driver. However, this probable cause did not extend to the officers' conduct of the warrantless search of Ali's person. They did not articulate any reasoning for this search other than Ali's mere presence in the vehicle. Under *Di Re* and *Morton*, such a failure is fatal to the Commonwealth's argument. The Commonwealth's reliance on *Dunn v. Commonwealth*, 199 S.W.3d 775 (Ky. App. 2006), and *Maryland v. Pringle*, 540 U.S. 366, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003), is misplaced. The evidence was properly suppressed.

For the foregoing reasons, the order of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Jack Conway
Attorney General of Kentucky

J. Hays Lawson
Assistant Attorney General
Frankfort, Kentucky

BRIEF FOR APPELLEE:

J. Brandon Pigg
Assistant Public Advocate
Frankfort, Kentucky