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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001501-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 08-CR-002947

JAMES ANTHONY JAMISON — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, COMBS AND WINE, JUDGES.

ACREE, JUDGE: The Commonwealth of Kentucky appeals the Jefferson Circuit Court's decision to suppress evidence as having been obtained in violation of the Fourth Amendment when a vehicle in which Appellee, James Jamison, was a passenger was stopped by police officers. We conclude that the trial court erred in

suppressing the evidence. Accordingly, we vacate and remand for additional proceedings consistent with the opinion.

Facts and Procedure

The record reveals the following uncontradicted facts. The arresting officer, Detective Davis, had been an officer with the Louisville Metro Police since 1999. Since 2007, he had been a Housing Authority Liaison Officer responsible for working the high-crime area where the stop and arrest was made. He was specifically aware of the traffic that frequented the parking lot at Hazelwood Elementary School. Davis knew, despite the posting of a clearly visible sign prohibiting loitering and trespassing on school property, that the parking lot was used as a drop-off point for residents of a nearby apartment complex who used a break in the fence surrounding the lot as a short-cut. He knew others used the parking lot as a place to engage in drug transactions. Detective Davis, since working this neighborhood, had made "a couple hundred" arrests for possession or transactions in narcotics and other drugs.

At around 10:00 p.m. on April 24, 2008, Detective Davis and another officer were patrolling the area in an unmarked van. They stopped on a street adjoining the Hazelwood Elementary School parking lot. No school events were taking place; the schools lights were out. The officers observed a vehicle parked in the lot near the break in the fence. There were no other vehicles in the parking lot. The vehicle's headlights were off. Detective Davis knew of no lawful reason for the vehicle to be parked there at that time.

After ten-minutes of observation, a male exited one of the rear doors of the vehicle and the vehicle began moving. When it exited the parking lot, the officers followed, "ran the tags," and learned the vehicle was a rental car. The officers then stopped the vehicle approximately a quarter mile from the school.

When asked why he stopped the vehicle, Detective Davis summarized his experience, his general knowledge that the parking lot was commonly used as a location where drug transactions occurred, his specific knowledge that the persons in the vehicle had trespassed and loitered there, and his inability to conclude that there was a lawful reason for the persons driving the vehicle to engage in the activity he observed. He concluded by stating, "Everything in my career tells me that . . . the gentleman [driving the vehicle] had no legitimate reason to be there and that what he was there for was to purchase, either to purchase or sell narcotics."

As the officer approached the passenger side of the vehicle, the window rolled down; Detective Davis smelled marijuana even before he reached the window. Jamison was in the front passenger seat.

The propriety of the officers' actions thereafter is not at issue here because the circuit judge determined that the initial stop was unreasonable. Therefore, it is enough to say that illegal drugs were found and Jamison was arrested. The only issue on appeal is whether the initial stop of the vehicle was unreasonable thereby warranting suppression of the evidence later obtained.

Standard of Review

Review of the circuit court's decision to suppress the evidence presents a mixed question of law and fact. First, this Court must determine if the circuit court's findings of fact are supported by substantial evidence, in which case they are conclusive. Kentucky Rule of Criminal Procedure (RCr) 9.78. These factual findings will only be overturned if they are clearly erroneous. *Commonwealth v. Banks*, 68 S.W.3d 347, 349 (Ky. 2001). After considering the circuit court's factual findings, this Court must undertake a *de novo* review to determine if the law was properly applied. *Owens v. Commonwealth*, 291 S.W.3d 704, 707 (Ky. 2009).

Analysis

"A police officer may constitutionally conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." *Bauder v. Commonwealth*, 299 S.W.3d 588, 590-91 (Ky. 2009)(citing *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). More is required than mere "unparticularized suspicion or 'hunch.'" *Id.* at 591. And while less is required than is necessary to establish probable cause, there must be at least a minimal level of objective justification for making the stop. *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989).

In *United States v. Cortez*, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981), the Supreme Court explained the two elements in assessing evidence upon which an investigatory stop is made. First, the assessment must be based upon the totality of the circumstances. *Cortez*, 449 U.S. at 418, 101 S.Ct. at 695.

Consideration must be given to all the various objective observations, of course, but there must also be "consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions – inferences and deductions that might well elude an untrained person." *Id.* This Court has often quoted *Cortez*[1] as follows,

> The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; jurors as factfinders are permitted to do the same-and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.

Id.

Second, consideration of the totality of circumstances "must yield a particularized suspicion . . . that the particular individual being stopped is engaged in wrongdoing." *Id.* That is, in expressing his reasons for conducting an investigatory stop, "[t]he officer must be able to articulate more than an 'inchoate and unparticularized suspicion or "hunch"' of criminal activity." *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S.Ct. 673, 676 (2000) (quoting *Terry*, *supra*, at 27, 88 S.Ct. 1868).

In every assessment, there is the "imperative of recognizing that, when used by trained law enforcement officers, objective facts, meaningless to the untrained, can be combined with permissible deductions from such facts to form a legitimate

[1] This specific passage has been quoted in numerous unpublished cases from this Court, but in only one published case, *Dunn v. Commonwealth*, 689 S.W.2d 23, 28 (Ky. App. 1985).

basis for suspicion of a particular person and for action on that suspicion." *Cortez*, 449 U.S. at 419, 101 S.Ct. at 695.

In the case before us, the trial court concluded that "[t]he activity in the school parking lot prior to the traffic stop is not sufficient to justify a subsequent investigatory stop 400 yards from the school"[2] and, consequently found the arresting officer lacked a reasonable, articulable suspicion to stop the vehicle. We cannot agree with this conclusion.

The facts were that a vehicle occupied by Jamison was parked for at least ten minutes with headlights off where trespassing and loitering were prohibited.[3] Kentucky Revised Statute (KRS) 511.080(1); KRS 525.090(1)(c). These violations were committed in the officers' presence and would have justified an arrest. KRS 431.005(1)("A peace officer may make an arrest . . . (d) Without a warrant when a misdemeanor, as defined in KRS 431.060, has been committed in his presence; or (e) Without a warrant when a violation of KRS . . . 511.080 . . . ."). These very same violations, "being minor criminal activity, alone provide sufficient reasonable suspicion for an officer to stop and question a subject." *Gray v. Commonwealth*, 150 S.W.3d 71, 74 (Ky. App. 2004)(citing *Simpson v. Commonwealth*, 834 S.W.2d 686, 688 (1992)). Detective Davis' knowledge of the

[2] There was no evidence that the officers ever lost visual contact with the vehicle despite traveling this distance.

[3] Some question was raised during the suppression hearing about whether one can loiter while in an automobile. The Sixth Circuit appears to presume an affirmative answer. *U.S. v. Young*, 580 F.3d 373, 375 (6th Cir. 2009) ("police officers . . . observed Young asleep in a car in a public parking lot known for numerous shootings and other criminal activity. Based on the high-crime area, the hour of the night, and Young's unlawful loitering in a city parking lot, one of the officers decided to approach the car to question Young."). We conceive of no justification for reaching a negative answer.

area, including the parking lot, and the criminal activity that takes place there, justified the investigatory stop.

Jamison attempts to focus our attention on the possibility that the vehicle he occupied was there for a proper purpose – *i.e.*, dropping off a resident of the nearby apartment complex. However, the facts more readily lead to a contrary inference. Even if the person who exited the vehicle in the parking lot was a local resident, it does not lessen the illegal nature of the trespass or loitering.

Furthermore, even "wholly lawful conduct might justify the suspicion that criminal activity was afoot." *Reid v. Georgia*, 448 U.S. 438, 441, 100 S.Ct. 2752, 2754, 65 L.Ed.2d 890 (1980) (*per curiam*). The mere fact that the suspicious conduct may only involve entirely legal acts does not "deprive the police from the ability to entertain a reasonable suspicion that criminal activity had, in fact, occurred." *Simpson*, 834 S.W.2d at 688; *Baltimore v. Commonwealth,* 119 S.W.3d 532, 541 (Ky. App. 2003). ("[A] determination of reasonable suspicion need not rule out the possibility of innocent conduct.").

The United States Supreme Court recently reiterated that the trial court is obligated to take into account all relevant facts, including conduct that might appear to be entirely innocuous, in determining whether the police officer had a reasonable suspicion to believe that criminal activity recently occurred or was about to occur. *United States v. Arvizu*, 534 U.S. 266, 273-74, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002); *see also Terry*, 392 U.S. at 22-23, 88 S.Ct. at 1880-81 (the petitioner's conduct of walking back and forth along the street, looking in a store

window, and conferring with his companion may, by itself, appear innocent, but taken together the conduct "warranted further investigation"); *United States v. Sokolow*, 490 U.S. 1, 9, 109 S.Ct. 1581, 1586, 104 L.Ed.2d 1 (1989) (finding that while particular acts by themselves were "quite consistent with innocent travel" collectively the conduct amounted to reasonable suspicion). We agree with the Commonwealth that the trial court appears to have given too little consideration to the officer's experience in interpreting the significance of his observation of facts that "might well elude an untrained person." *Arvizu*, 534 U.S. at 273-74; *see also Ornelas*, 517 U.S. 690, 699, 116 S.Ct. 1657 (1996) ("[A] police officer views the facts through the lens of his police experience and expertise. The background facts provide a context for the historical facts, and when seen together yield inferences that deserve deference.").

Considering the totality of the circumstances, we find that the officer had a reasonable suspicion that criminal activity was afoot thereby justifying the investigatory stop, and we further find that the officer was fully capable of articulating that suspicion during the suppression hearing.

Conclusion

For the foregoing reasons, the decision of the circuit court is reversed and remanded for additional proceedings in accordance with this opinion.

WINE, JUDGE, CONCURS.

COMBS, JUDGE, CONCURS IN RESULT BY SEPARATE OPINION.

COMBS, JUDGE, CONCURRING: This case presented a very close call in my opinion. After long study, I have concurred with the result reached by the majority opinion. However, I do so while noting forcefully the *caveat* that this Fourth Amendment case was highly fact specific and required much deliberation before this panel could reach consensus.

The trial judge paid scrupulous deference to the mandates of the Fourth Amendment protecting us from the intolerable consequences of unreasonable search or seizure. Although we have disagreed with his decision in this particular case, I fervently hope that this reversal will not be read as *carte blanche* by the police for future purposes. The result could easily have been different, and the law in every such case turns on facts unique to it.

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