

RENDERED: AUGUST 26, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-001336-MR

WANDA ROBERTS

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 10-CR-00024

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: TAYLOR, CHIEF JUDGE; CAPERTON AND WINE, JUDGES.

TAYLOR, JUDGE: Wanda Roberts brings this appeal from a June 18, 2010, judgment of the Campbell Circuit Court upon a conditional plea of guilty and a sentence of one-year imprisonment. We affirm.

Officer Nicholas Love, an officer of the Highland Heights Southgate Police Authority, observed a motor vehicle traveling east on Mook Road in

Wilder, Kentucky. After passing an access road to Canterbury Apartments, the motor vehicle stopped on Moock Road and traveled backward from about five to thirty feet. At such point, the vehicle turned into the access road to Canterbury Apartments.

Officer Love then effectuated a traffic stop for careless driving pursuant to Kentucky Revised Statutes (KRS) 189.290. Upon approaching the vehicle, Officer Love discovered that the driver was Roberts. Roberts produced a valid driver's license and vehicle registration. Officer Love testified that he asked Roberts for permission to search the vehicle, and she consented. Roberts denied consenting to the search.

Upon Roberts exiting the vehicle, Officer Love testified that he requested permission to search Roberts' person, and she agreed. Roberts again denied agreeing to such search. Upon searching Roberts, Office Love found no contraband. Thereafter, Officer Love opened the driver door to the vehicle and spotted marijuana seeds in the side pocket of the door. Officer Love then testified that Roberts withdrew her consent to search the motor vehicle. Officer Love located Robert's purse. Inside the purse, Officer Love seized pills, which were later determined to be Aderol and Hydrocodone. Roberts was then transported to the Campbell County Jail, and a search of her person produced a clear plastic baggy containing marijuana. Roberts admitted to not possessing prescriptions for the prescription drugs.

Roberts was indicted upon the offenses of first-degree promoting contraband (KRS 520.050), second-degree possession of a controlled substance (KRS 218A.1416) and with being a second-degree persistent felony offender (KRS 532.080). Roberts filed a motion to suppress and argued that Officer Love lacked probable cause or reasonable suspicion necessary to effectuate a stop of her motor vehicle. Following a suppression hearing, the circuit court denied the motion.

Subsequently, the Commonwealth and Roberts entered into a plea agreement. Pursuant thereto, Roberts entered a conditional guilty plea to first-degree promoting contraband and second-degree possession of a controlled substance. Roberts was eventually sentenced to a total of one-year imprisonment but reserved for appellate review the circuit court's denial of her motion to suppress. This appeal follows.

Roberts argues that the stop of her motor vehicle was without probable cause and constituted an unconstitutional seizure violative of the Fourth Amendment of the United States Constitution. She also asserts that the search of her person and vehicle was undertaken without her consent and also violated the Fourth Amendment of the United States Constitution.

Upon the denial of a motion to suppress, we review the circuit court's findings of fact under the clearly erroneous standard and issues of law *de novo*. Kentucky Rules of Criminal Procedure (RCr) 9.78. The circuit court's findings of fact are upheld if supported by substantial evidence of a probative value. *Talbott v. Com.*, 968 S.W.2d 76 (Ky. 1998).

The circuit court concluded that the initial stop of Roberts' vehicle was constitutionally justified as Officer Love possessed probable cause to believe that a traffic violation had occurred citing to KRS 189.290(1).¹ Also, the circuit court held that the searches of Roberts' person and vehicle were constitutionally justified as Roberts gave consent for both searches. In so concluding, the circuit court found the testimony of Officer Love credible.

Upon review of the evidence adduced at the hearing and applicable law, we conclude that the circuit court's findings of fact were supported by substantial evidence of a probative value and that the circuit court properly applied the law herein. We view the circuit court's opinion as accurately setting forth the law as applied in this case and adopt it herein:

Under the Fourth Amendment, all warrantless searches and seizures are presumed to be unreasonable and unlawful unless the Commonwealth can show by a preponderance of the evidence that the search and seizure falls within one of the exceptions to the warrant requirement. *Cook v. Commonwealth*, 826 S.W.2d 329, 331-32 (Ky. 1992). However, the temporary detention of a motorist upon probable cause to believe she has committed a traffic violation does not violate the Fourth Amendment's prohibition against unreasonable seizures. *Whren v. United States*, 517 U.S. 806 (1996). Such a temporary detention during a traffic stop, even if only for a brief period and for an intended purpose, constitutes a seizure under the Fourth Amendment. *Id.*

¹ KRS 189.290(1) provides:

The operator of any vehicle upon a highway shall operate the vehicle in a careful manner, with regard for the safety and convenience of pedestrians and other vehicles upon the highway.

at 809-10. Consequently, an automobile stop is subject to the constitutional imperative that it not be unreasonable under the circumstances. *Id.* at 810. Generally, the decision to stop an automobile is reasonable where the police officer has probable cause to believe a traffic violation has occurred. *Id.* Therefore, an officer who has probable cause to believe a traffic violation has occurred may stop a vehicle regardless of his subjective motivation in doing so. *Wilson v. Commonwealth*, 37 S.W.3d 745, 749 (Ky. 2001).

In this case, Officer Love testified that he stopped the Defendant's vehicle without a warrant on the grounds that she committed the traffic violation referred to as careless driving. He eventually cited the Defendant for the traffic violation. Pursuant to KRS § 189.290(1), the operator of any vehicle upon a highway shall operate the vehicle in a careful manner, with regard for the safety and convenience of pedestrians and other vehicles upon the highway.

The Defendant admits that she was driving her vehicle around 11:00 p.m., and that the entrance to the road onto which she wanted to turn was dark. The Defendant admits that she missed the road and then stopped her vehicle, put the vehicle into reverse, passed the entrance of the road going in the wrong direction and turned onto the road. A dispute exists as to whether the Defendant backed up thirty (30) feet or five (5) feet on the road. This Court finds Officer Love's testimony to be more credible.

The Defendant argues that her actions did not constitute careless driving, because the road was free of traffic and she looked before putting her car in reverse. The Court disagrees. According to Officer Love, Moock Road is heavily traveled. Driving one's vehicle the wrong way for approximately thirty (30) feet on a heavily-traveled road, late at night, in a poorly-lighted area, is not driving in a careful manner, with regard for the safety and convenience of pedestrians and other vehicles. Although there

apparently was no traffic at the time of the Defendant's actions, the Defendant could not have anticipated when another vehicle or a pedestrian may have crossed her path. Further, other drivers and pedestrians would not anticipate a vehicle traveling backwards in the wrong direction on the road.

This Court does not believe the Commonwealth is required to prove the careless driving violation. Rather, an officer must only have probable cause to believe that a traffic violation has occurred in order to stop a suspected vehicle. *Wilson*, 37 S.W.3d at 749. Wherefore, this Court finds that Officer Love had probable cause to believe that a traffic violation had occurred and was justified in initiating the traffic stop.

Next, the Defendant argues that Officer Love had no right to search her person or her vehicle without a warrant. Consent is an exception to the warrant requirement. *Cook*, 826 S.W.2d at 331. The Commonwealth must show by a preponderance of the evidence that consent was freely and voluntarily obtained without any threat, or express or implied coercion. *Id.* The question of voluntariness turns on a careful scrutiny of all the surrounding circumstances in a specific case. *Id.* The question is to be determined by an objective evaluation of police conduct, not by the defendant's subjective view of reality. *Id.* at 331-32.

Asking a detained motorist whether she would consent to a search of her vehicle does not necessarily make the stop unreasonable in scope or duration. *Ohio v. Robinette*, 519 U.S. 33, 39 (U.S. 199) [sic]. In *Commonwealth v. Erickson*, 132 S.W.3d 884 (Ky. Ct. App. 2004), the Court of Appeals discussed and relied on *Robinette* and *United States v. Burton*, 334 F.3d 514 (6th Cir. 2003). The Court recognized that a prolonged detention and request to search a defendant's vehicle following a traffic stop may be reasonable despite the absence of a reasonable suspicion of

separate criminal activity or the subjective intentions of the officer. *Erickson*, 132 S.W.3d at 887.

Questions that hold potential for detecting crime, but create little or no inconvenience, do not turn reasonable detention into unreasonable detention, they do not signal oppressive police tactics and they do not forcibly invade any privacy interest. *Id.* at 888. All suspects may fully protect themselves by declining to answer. *Id.* Moreover, where a motorist is initially stopped for a valid purpose and subsequently gives consent to a search of her vehicle, the voluntariness of her consent is the only issue to consider for Fourth Amendment purposes, not whether the continued detention was justified by reasonable suspicion. *Id.*

Having conducted a legitimate traffic stop of the Defendant's vehicle, Officer Love was warranted in requesting permission to search the Defendant's person or vehicle. The Defendant disputes that she gave the officer consent. Again, this Court finds her testimony to be less credible than that of Officer Love. Officer Love testified that he asked the Defendant for consent to search her vehicle and she agreed, and then he asked her for consent to search her person and she agreed. He returned the money he found in the Defendant's pocket, which was the only item he found on her person. Officer Love testified that approximately five minutes elapsed from the time of the stop to obtaining consent. This Court finds that the prolonged detention and request to search were reasonable.

Under *Erickson* and the case law to which it refers, the voluntariness of Defendant's consent is the only issue to consider for Fourth Amendment purposes. There is nothing in the record to suggest that Officer Love obtained the Defendant's consent to search through any threat, or coercion. Considering all of the surrounding circumstances of the stop and objectively evaluating Officer Love's conduct, it appears that the Defendant voluntarily gave consent to search her vehicle and her person.

Officer Love freely admits that the Defendant later revoked her consent. Before that revocation occurred, Officer Love began the search and observed marijuana seeds in the pocket on the driver's side door. As a result of his personal observation of the marijuana seeds, Officer Love had probable cause to continue searching the vehicle.

In sum, we hold that the circuit court properly denied Roberts' motion to suppress.

For the foregoing reasons, the judgment of the Campbell Circuit Court is affirmed.

ALL CONCUR.

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