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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000300-MR

COMMONWEALTH OF KENTUCKY APPELLANT

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JEAN CHENAULT LOGUE, JUDGE
ACTION NO. 12-CR-00079

CHRISTOPHER HARRIS APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, JONES AND VANMETER, JUDGES.

JONES, JUDGE: The Commonwealth appeals the Madison Circuit Court's order granting Christopher Harris's motion to suppress evidence that was seized when officers searched his automobile following a lawful traffic stop. The trial court granted Harris's motion on the basis that the Commonwealth had failed to show that the search dog the officers relied upon was reliable. Because we believe that substantial evidence supported this determination, we AFFIRM.

I. Factual and Procedural Background

On January 3, 2012, Madison County Sherriff's Deputy Todd Allen observed Harris's vehicle make a lane change from the center lane to the left lane without using a turn signal. He then observed Harris turn left from the left-hand lane of Big Hill Avenue onto the Eastern By-Pass in Richmond, Madison County, Kentucky without using his turn signal.[1] Based on the improper lane change and failure to observe the turn signal, Deputy Allen initiated a stop of Harris's vehicle.

Harris stopped his vehicle in a convenience store parking lot where Deputy Allen approached his vehicle. Initially, Harris had exited his vehicle to enter the convenience store, however, Deputy Allen asked Harris to return to his vehicle and Harris complied with that request. Deputy Allen testified that he smelled an odor of marijuana coming from Harris's vehicle when he first approached it.

Next, Deputy Allen asked Harris to produce his operator's license. When Harris failed to do so, Deputy Allen asked Harris to step out of his car. Harris then accompanied Deputy Allen to the police cruiser. Deputy Allen had Harris sit in the back of the cruiser. Deputy Allen sat in the front seat and began writing out a traffic citation.

While Harris and Deputy Allen were in the patrol car, Deputy King arrived at the scene, accompanied by his police dog, Klisar. Deputy Allen

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[1] Deputy Allen acknowledged Harris was in a marked turn only lane in which the turn was authorized by a left arrow traffic control device; there was no on-coming traffic and there was no danger presented to any on-coming or following traffic.

informed Deputy King that he thought he had detected the smell of marijuana in Harris's vehicle. Deputy King then engaged the dog in a sniff search of the outer portion of Harris's vehicle. According to Deputy King, Klisar "alerted" to the presence of narcotics at the right passenger side door of Harris's vehicle. The officers then searched Harris's vehicle. In the vehicle, they located a black backpack which contained cash, cocaine, marijuana, and hydrocodone pills. Deputy King testified these were all substances that Klisar was trained to detect.

After the search and discovery of narcotics, Harris was placed under arrest and transported to the Madison County Sheriff's Office to meet with Narcotics Detective Jasper White. Harris was subsequently charged with First Degree Trafficking in a Controlled Substance, Second Degree Trafficking in a Controlled Substance, and Trafficking in Marijuana. On March 21, 2012, the Madison County Grand Jury indicted Harris on the same charges, adding an additional charge of First Degree Possession of a Controlled Substance.

The trial court conducted a suppression hearing on August 15, 2012, at which Deputy Allen, Deputy King, and Detective Jasper White testified. On January 21, 2014, the trial court entered an order granting Harris's motion to suppress. The trial court determined that the officers lacked authority to conduct a search incident to arrest and otherwise lacked probable cause to search the vehicle on the basis that the Commonwealth failed to show that Klisar was a "well trained

narcotics-detection dog." As a result, the trial court ordered all items seized from Harris's vehicle to be suppressed. This appeal followed.[2]

II. Standard of Review

We review a trial court's decision on a motion to suppress by applying a two-step analysis. *Goncalves v. Commonwealth*, 404 S.W.3d 180, 189 (Ky. 2013). First, we must determine if the trial court's findings of fact are supported by substantial evidence. *Id.* (citing *Adcock v. Commonwealth*, 967 S.W.2d 6 (Ky. 1998); *Peyton v. Commonwealth*, 253 S.W.3d 504 (Ky. 2008)). Substantial evidence has been defined as facts of substance and relative consequence having the fitness to induce conviction in the minds of reasonable persons. *Kentucky Unemployment Ins. Com'n v. Landmark Community Newspapers of Kentucky, Inc.*, 91 S.W.3d 575, 579 (Ky. 2002). Factual findings that are supported by substantial evidence are conclusive and binding on an appellate court. *Goncalves,* 404 S.W.3d at 189; *see also* RCr[3] 9.78 ("If at any time before trial a defendant moves to suppress . . . the fruits of a search . . . the trial court shall conduct an evidentiary hearing . . . [and] shall enter into the record findings resolving the essential issues of fact[.] If supported by substantial evidence, the factual findings of the trial court shall be conclusive." If unsupported by substantial evidence, the trial court's

[2] The Commonwealth has a right to immediate appeal of a circuit court's order that suppresses evidence that is central to its case. *See Parker v. Commonwealth*, 440 S.W.3d 381, 383 (Ky. 2014).

[3] Kentucky Rules of Criminal Procedure.

factual findings are deemed clearly erroneous. *Commonwealth v. Banks*, 68 S.W.3d 347, 349 (Ky. 2001).

After this analysis, we then conduct a *de novo* review of the trial court's application of the law to the established facts to determine whether its ruling was correct as a matter of law. *Id.* *De novo* review affords no deference to the trial court's application of the law to the established facts. *Id.* With this standard in mind, we turn to the parties' arguments.

III. Analysis

The Fourth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, prohibits unreasonable searches and seizures. "Warrantless searches are 'per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions.'" *Commonwealth v. Ousley*, 393 S.W.3d 15, 23 (Ky. 2013) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (footnote omitted)).

As long as an officer "has probable cause to believe a civil traffic violation has occurred, [he] may stop [the] vehicle regardless of his or her subjective motivation in doing so." *Wilson,* 37 S.W.3d at 749. *Commonwealth v. Bucalo*, 422 S.W.3d 253, 258 (Ky. 2013), *reh'g denied* (Mar. 20, 2014). Deputy Allen testified that he witnessed Harris commit several traffic violations before he stopped him.[4] Accordingly, we have no trouble concluding that the initial stop of

[4] Pursuant to Kentucky Revised Statute (KRS) 189.380, "[a] person shall not turn a vehicle or move right or left upon a roadway ... without giving an appropriate signal...."

Harris's vehicle was lawful. *See also, Ward v. Commonwealth*, 345 S.W.3d 249, 252 (Ky. App. 2011); *Garcia v. Commonwealth*, 185 S.W.3d 658 662 (Ky. App. 2006).

This does not mean, however, that the ensuing events were legally conducted. The Fourth Amendment curtails what officers may do even after a lawful traffic stop. *See Illinois v. Caballes,* 543 U.S. 405, 407, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005). "[O]nce the purpose of the traffic stop is accomplished, the additional detention of a suspect is no longer justified by probable cause. The traffic stop essentially becomes a *Terry* stop, which requires law enforcement agents to possess a reasonable and articulable suspicion that criminal activity is afoot." *Commonwealth v. Bucalo*, 422 S.W.3d 253, 259 (Ky. 2013) (citing *Terry v. Ohio*, 392 U.S. 1, 29, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). Thus, the search of Harris's vehicle could be constitutionally permissible only if the officers had probable cause to believe that Harris's vehicle contained illegal drugs. *Morton v. Commonwealth*, 232 S.W.3d 566, 569 (Ky. App. 2007) ("The automobile exception [] permits an officer to search a legitimately stopped automobile where probable cause exists that contraband or evidence of a crime may be in the vehicle."); *Dunn v. Commonwealth*, 199 S.W.3d 775, 777 (Ky. App. 2006); *Clark v. Commonwealth,* 868 S.W.2d 101, 106 (Ky. App. 1993) (citing *United States v. Ross,* 456 U.S. 798, 800–01, 102 S.Ct. 2157, 2159–61, 72 L.Ed.2d 572, 578 (1982)).

The trial court found that the officers lacked probable cause to search Harris's vehicle because Klisar was not shown to be a reliable and trustworthy police dog in this instance.[5] Finding no other exception, the trial court ordered the evidence seized during the search suppressed.

"A positive canine alert, signifying the presence of drugs inside a vehicle, provides law enforcement with the authority to search the driver for drugs." *Morton v. Commonwealth*, 232 S.W.3d 566, 570 (Ky. App. 2007). When challenged as part of a motion to suppress, the Commonwealth must show that the dog is trained and reliable. The Supreme Court set forth the framework as follows:

> The question—similar to every inquiry into probable cause—is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. A sniff is up to snuff when it meets that test.

Florida v. Harris, ___ U.S. ___, 133 S.Ct. 1050, 1058, 185 L.Ed.2d 61 (2013).

The trial court concluded that the officers could not rely on Klisar to establish probable cause because he was not a well-trained and reliable narcotics detection dog. The trial court made this determination based on the officers' testimony that Klisar's certification expired on September 9, 2011, approximately four months before Harris was pulled over; there was no evidence that Klisar has received any training since his last certification in September of 2009; and Klisar,

[5] The trial court first concluded that the Commonwealth could not meet the “search incident to arrest” exception to the warrant requirement because Harris was not under arrest at the time of the search. The Commonwealth has not challenged this conclusion on appeal.

who was initially trained in May of 2008 had not be recertified because he was scheduled to be retired due to age.

The Commonwealth challenges the trial court's findings as to Klisar's training and reliability. It relies on Deputy King's testimony regarding Klisar's initial training, general reliability, and King's ability to recognize when Klisar is giving a false alert. The Commonwealth maintains that the trial court was overly focused on Klisar's lapsed certification such that it failed to assess the totality of the circumstances surrounding his positive alert. We disagree.

The evidence in this case was not so one-sided as to compel a finding in the Commonwealth's favor.[6] The testimony failed to show that Klisar had received any formal training since his initial certification in May of 2008. Because of his age, the Department chose not to take Klisar through the recertification process when his certification expired in September of 2011. And, Klisar had given false alerts in the past.

Given this testimony, we believe the trial court made a permissible, factual determination based on the totality of the circumstances that Klisar was not a well-trained canine at the time of the search. We believe that the evidence

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[6] The Commonwealth attempts to analogize this case to *Florida v. Harris*, *supra*. There the Court held that the Florida court erred when it determined the alert was not reliable because the dog was not certified. The Court chastised the state court for having a "check-list" of requirements, including certification, instead of evaluating reliability based on a totality of the circumstances. The Court ultimately held that the absence of a dog's certification should not foreclose a finding of probable cause to search, if dog has recently and successfully completed a training program that evaluated his proficiency in locating drugs. Here, however, there was no showing that Klisar had received any training since his initial certification in May of 2008. This is in sharp contrast to the canine in the *Florida v. Harris* who had completed two prior certifications and maintained his proficiency through weekly training exercises.

substantially supported the trial court's findings and conclusions. Regardless of whether we would have reached the same conclusions, we must respect the ones made by the trial court. It is not our prerogative to reverse factual findings that are supported by substantial evidence. *See Pitcock v. Commonwealth*, 295 S.W.3d 130, 132 (Ky. App. 2009) ("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.").

After concluding that Klisar's positive alert was not reliable enough to supply the officers with probable cause to search Harris's vehicle, the trial court ordered all evidence seized from the search to be suppressed. The Commonwealth argues this was in error because the trial court should have made a finding as to whether Deputy Allen's detection of a marijuana odor at the time of the initial stop justified the later search. The trial court's order is completely silent on this issue. The trial court's order is silent regarding Deputy Allen's detection of a marijuana smell. However, we are unable to review this issue because the Commonwealth did not move the trial court for additional findings foreclosing any further review of this issue. *See Rawls v. Commonwealth*, 434 S.W.3d 48, 61 (Ky. 2014).

III. Conclusion

Accordingly, the order of the Madison Circuit Court granting suppression of the evidence is AFFIRMED.

CLAYTON, JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

VANMETER, JUDGE, DISSENTING: I respectfully dissent. My reading of the trial court's order is that, in finding a lack of probable cause to search the vehicle, the court relied exclusively on the fact that the dog's certification had expired, at the end of September 2011, slightly over three months prior to the incident in question. The trial court stated "[a]s the dog sniff occurred on January 3, 2012, well past the date Klisar's certification had lapsed and since no further accredited training had been undertaken, the Court is unable to find that Klisar, at the time of the search, was a 'well-trained' narcotics detection dog.'"

In *Florida v. Harris*, ___ U.S. ___, 133 S. Ct. 1050, 185 L. Ed. 2d 61 (2013), the Supreme Court discussed extensively when police reliance on a narcotics dog alert established probable cause, emphasizing the necessity of relying upon a flexible, common-sense standard:

> A police officer has probable cause to conduct a search when "the facts available to [him] would 'warrant a [person] of reasonable caution in the belief' " that contraband or evidence of a crime is present. *Texas v. Brown*, 460 U.S. 730, 742, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983) (plurality opinion) (quoting *Carroll v. United States,* 267 U.S. 132, 162, 45 S.Ct. 280, 69 L.Ed. 543 (1925)); see *Safford Unified School Dist. # 1 v. Redding*, 557 U.S. 364, 370–371, 129 S.Ct. 2633, 174 L.Ed.2d 354 (2009). The test for probable cause is not reducible to "precise definition or quantification." *Maryland v. Pringle*, 540 U.S. 366, 371, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003). "Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence ... have no place in the [probable-cause] decision." *Gates*, 462 U.S., at 235, 103 S.Ct. 2317. All we have required is the kind of "fair probability" on

which “reasonable and prudent [people,] not legal technicians, act.” *Id*., at 238, 231, 103 S.Ct. 2317 (internal quotation marks omitted).

In evaluating whether the State has met this practical and common-sensical standard, we have consistently looked to the totality of the circumstances. *See, e.g., Pringle*, 540 U.S., at 371, 124 S.Ct. 795; *Gates*, 462 U.S., at 232, 103 S.Ct. 2317; *Brinegar v. United States*, 338 U.S. 160, 176, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949). We have rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach. In *Gates*, for example, we abandoned our old test for assessing the reliability of informants' tips because it had devolved into a “complex superstructure of evidentiary and analytical rules,” any one of which, if not complied with, would derail a finding of probable cause. 462 U.S., at 235, 103 S.Ct. 2317. We lamented the development of a list of “inflexible, independent requirements applicable in every case.” *Id*., at 230, n. 6, 103 S.Ct. 2317. Probable cause, we emphasized, is “a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.” *Id*., at 232, 103 S.Ct. 2317.3

The Florida Supreme Court flouted this established approach to determining probable cause. To assess the reliability of a drug-detection dog, the court created a strict evidentiary checklist, whose every item the State must tick off. Most prominently, an alert cannot establish probable cause under the Florida court's decision unless the State introduces comprehensive documentation of the dog's prior “hits” and “misses” in the field. (One wonders how the court would apply its test to a rookie dog.) No matter how much other proof the State offers of the dog's reliability, the absent field performance records will preclude a finding of probable cause. That is the antithesis of a totality-of-the-circumstances analysis. It is, indeed, the very thing we criticized in *Gates* when we overhauled our method for assessing the trustworthiness of an informant's tip. A gap as to any one matter, we explained, should not sink the

State's case; rather, that “deficiency ... may be compensated for, in determining the overall reliability of a tip, by a strong showing as to ... other indicia of reliability.” *Id*., at 233, 103 S.Ct. 2317. So too here, a finding of a drug-detection dog's reliability cannot depend on the State's satisfaction of multiple, independent evidentiary requirements. No more for dogs than for human informants is such an inflexible checklist the way to prove reliability, and thus establish probable cause.

Making matters worse, the decision below treats records of a dog's field performance as the gold standard in evidence, when in most cases they have relatively limited import. Errors may abound in such records. If a dog on patrol fails to alert to a car containing drugs, the mistake usually will go undetected because the officer will not initiate a search. Field data thus may not capture a dog's false negatives. Conversely (and more relevant here), if the dog alerts to a car in which the officer finds no narcotics, the dog may not have made a mistake at all. The dog may have detected substances that were too well hidden or present in quantities too small for the officer to locate. Or the dog may have smelled the residual odor of drugs previously in the vehicle or on the driver's person. Field data thus may markedly overstate a dog's real false positives. By contrast, those inaccuracies—in either direction—do not taint records of a dog's performance in standard training and certification settings. There, the designers of an assessment know where drugs are hidden and where they are not—and so where a dog should alert and where he should not. The better measure of a dog's reliability thus comes away from the field, in controlled testing environments.

For that reason, evidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert. If a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search. The same is true, even in the absence of formal certification, if the

dog has recently and successfully completed a training program that evaluated his proficiency in locating drugs. After all, law enforcement units have their own strong incentive to use effective training and certification programs, because only accurate drug-detection dogs enable officers to locate contraband without incurring unnecessary risks or wasting limited time and resources.

A defendant, however, must have an opportunity to challenge such evidence of a dog's reliability, whether by cross-examining the testifying officer or by introducing his own fact or expert witnesses. The defendant, for example, may contest the adequacy of a certification or training program, perhaps asserting that its standards are too lax or its methods faulty. So too, the defendant may examine how the dog (or handler) performed in the assessments made in those settings. Indeed, evidence of the dog's (or handler's) history in the field, although susceptible to the kind of misinterpretation we have discussed, may sometimes be relevant, as the Solicitor General acknowledged at oral argument. See Tr. of Oral Arg. 23–24 ("[T]he defendant can ask the handler, if the handler is on the stand, about field performance, and then the court can give that answer whatever weight is appropriate"). And even assuming a dog is generally reliable, circumstances surrounding a particular alert may undermine the case for probable cause—if, say, the officer cued the dog (consciously or not), or if the team was working under unfamiliar conditions.

In short, a probable-cause hearing focusing on a dog's alert should proceed much like any other. The court should allow the parties to make their best case, consistent with the usual rules of criminal procedure. And the court should then evaluate the proffered evidence to decide what all the circumstances demonstrate. If the State has produced proof from controlled settings that a dog performs reliably in detecting drugs, and the defendant has not contested that showing, then the court should find probable cause. If, in contrast, the defendant has challenged the State's case (by disputing the reliability of the dog overall or of a

> particular alert), then the court should weigh the competing evidence. In all events, the court should not prescribe, as the Florida Supreme Court did, an inflexible set of evidentiary requirements. **The question—similar to every inquiry into probable cause—is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime.** A sniff is up to snuff when it meets that test.

133 S. Ct. at 1055-58 (emphasis added).

I would vacate the Madison Circuit's order and remand this matter to that court for a determination of "what all the circumstances demonstrate," *id*., 133 S.Ct. at 1058, in making the probable cause determination.

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