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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-002065-MR

EUGENE FISHBACK

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 14-CR-00612

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, KRAMER AND STUMBO, JUDGES.

STUMBO, JUDGE: Appellant appeals the trial court's denial of his motion to suppress evidence obtained after a traffic stop. We find no error and affirm.

On May 6, 2014, at approximately 11:30 p.m., Officer Samuel Clements initiated a traffic stop of a vehicle which made an illegal turn and was unregistered. The driver was Willie Perry, the front passenger was Aaron Smith, and the rear passenger on the driver's side was Appellant. When Officer Clements

approached the car, he had difficulty seeing into the vehicle due to tinted windows. He requested that the driver and rear passenger roll their windows down, which they did. After this, Officer Clements observed a handgun on the front seat center console. Officer Clements then called for backup. Officer Young arrived 30 seconds later and Officer Tyree arrived shortly after that.

Officer Clements then asked the three men to exit the vehicle. Once removed from the vehicle, Officer Clements conducted a pat down of Perry and Appellant and Officer Young conducted a pat down of Smith. No other weapons were found. Officer Clements then had all three men sit on the curb between the vehicle and the officer's cruiser. Officer Clements then removed the firearm from the vehicle and Smith claimed ownership of it. Smith was not prohibited from owning or possessing this firearm and no charges arose from it.

At this point, Officer Tyree observed another gun through the back open window. This weapon was located halfway under the rear of the driver's seat. Officer Clements then removed this gun from the vehicle and Appellant stated it was his. Officer Clements then ran the information of the three men through police channels. The information returned stated that Appellant had an active Emergency Protection Order/Domestic Violence Order (EPO/DVO) and was prohibited from carrying a firearm. Appellant was then placed under arrest. In a search incident to arrest, Officer Clements found crack cocaine and \$380 in Appellant's pocket. Appellant was arrested for carrying a concealed weapon, violating an EPO/DVO, and trafficking in a controlled substance.

Prior to trial on these charges, Appellant moved to suppress the weapon and the drugs by arguing that the officers unreasonably removed him from the vehicle and any evidence found after that was fruit of the poisonous tree. A hearing was held where Officer Clements and passenger Smith testified. The trial court orally ruled that the traffic stop was justified, the removal of the vehicle's occupants was reasonable for officer safety, and the seizure of the second gun was justified for officer safety reasons and because it was in plain view. The court denied the motion to suppress. Appellant then entered a conditional guilty plea and reserved the right to appeal the suppression issue. 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).

Appellant argues on appeal that the traffic stop, search, and duration of the stop were all unlawful; therefore, the firearm and drugs should be suppressed. As a passenger in the car, Appellant has standing to challenge the legality of the traffic stop. *Brendlin v. California*, 551 U.S. 249, 259, 127 S.Ct. 2400, 2408, 168 L.Ed.2d 132 (2007). Here, there is no question that the traffic stop for an illegal turn and an unregistered car was justified. Appellant makes no argument regarding

this. Appellant claims that the traffic stop became illegal once Officer Clements removed the three men from the car and unjustifiably prolonged the traffic stop.

Police officers are allowed to routinely remove drivers and passengers from their automobiles until the traffic stop is completed. *Maryland v. Wilson*, 519 U.S. 408, 117 S. Ct. 882, 137 L. Ed. 2d 41 (1997). In this case, when the three men were ordered to exit the vehicle, there was at least one visible gun present; therefore, the added issue of officer safety justified Appellant's removal from the vehicle. *Id.*

As to the duration of the stop, Appellant claims that it was longer than necessary. This issue was not preserved for our review. An appellate court is "limited to the review of those issues that were raised and ruled on by the trial court." *Commonwealth v. Maricle*, 15 S.W.3d 376, 380 (Ky. 2000) (citation omitted). Here, defense counsel made no argument regarding the duration of the stop. Indeed, no specific timeline of events was discussed during the suppression hearing and no evidence was presented as to how long the traffic stop lasted.

Arguendo, police officers can make unrelated investigations during the traffic stop so long as these investigations do not unreasonably lengthen the roadside detention. *Rodriguez v. United States*, 135 S.Ct. 1609, 1614-15, 191 L.Ed.2d 492 (2015). Even though the timeline of events which occurred during the traffic stop was not discussed at the hearing, the testimony presented suggested things progressed quickly. Here, two firearms were found in the vehicle. It was

reasonable for Officer Clements to discover the ownership of the weapons and determine if they were lawfully possessed. We find no error.

Finally, Appellant's argument that the search of the vehicle which recovered the second weapon was unlawful will not be reviewed by us. While Appellant can contest the legality of the underlying traffic stop, he does not have standing to contest the search of the vehicle. *Rakas v. Illinois*, 439 U.S. 128, 133-34, 99 S.Ct. 421, 425, 58 L.Ed.2d 387 (1978); *Commonwealth v. Fox*, 48 S.W.3d 24, 28 (Ky. 2001). Only Perry, as the owner of the vehicle, would be able to contest the search.

For these reasons, we affirm the trial court's denial of Appellant's motion to suppress.

ALL CONCUR.

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