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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000247-MR

AMANDA FOLEY — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 14-CI-04458

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, COMBS AND MAZE, JUDGES.

CLAYTON, JUDGE: After the Fayette District Court granted Amanda Foley's motion to suppress evidence recovered during a traffic stop of her vehicle, the Fayette Circuit Court granted the Commonwealth's petition for a writ of prohibition. It is from this grant of the writ that Foley now appeals.

The following facts were elicited at the district court suppression hearing: Officer Charles Davis of the Lexington Division of Police, who was the only witness, testified that he was working in the early morning hours, assisting at a traffic stop on the outer loop of New Circle Road. At about 2 a.m., he heard the sound of flat tires driving, with the rims striking the asphalt. He observed Foley's car, with two flat tires on the driver's side, keeping up with traffic in the left lane. The posted speed limit on New Circle Road is 45 miles per hour.

On cross-examination, Officer Davis described the traffic at the time as light. He did not stay behind Foley for very long, possibly ten seconds, before pulling her over. She was not speeding, was able to stay in her lane, and maintain the speed of traffic. Her car was not swerving, she did not have trouble controlling the vehicle, no sparks were coming from her tires, and Davis did not smell burning rubber. She pulled over immediately without difficulty. Officer Davis could see the tires were still on the wheels. Foley was subsequently arrested for operating a motor vehicle while under the influence of alcohol; no license in possession; no insurance; and possession of an open alcohol container in a motor vehicle.

At the suppression hearing, Foley argued that the officer did not have a reasonable, articulable suspicion of criminal activity to justify pulling her over. The district court agreed, and granted the suppression motion in reliance on *Garcia v. Commonwealth*, 185 S.W.3d 658, 664 (Ky. App. 2006), a case in which a panel of this Court held that a cracked windshield did not create a reasonable, articulable

suspicion of criminal activity to justify pulling over a motorist. The district court explained its reasoning as follows:

> Officer Davis stopped the vehicle because it was moving with two flat tires on the driver's side. A police officer may stop a moving vehicle if he has a reasonable, articulable suspicion of criminal activity. He may also make a stop if the vehicle represents a safety hazard. KRS [Kentucky Revised Statutes]189.020 states: "Every vehicle when on a highway shall be so equipped as to make a minimum of noise, smoke or other nuisance, to protect the rights of other traffic, and to promote the public safety." While driving on flat tires is harmful to the tires and rims, the testimony does not show that the practice is dangerous to other motorists.

The Commonwealth filed a petition for a writ of prohibition. The circuit court granted the writ, stating in part as follows:

> Upon further review of the record, this Court finds that while *Garcia* is compelling in the analysis of the facts, it is not controlling. The officer clearly testified that he was outside of his vehicle on New Circle Road when his attention was brought to the Foley vehicle due to the sound of rims of a flat tire coming in contact with the roadway. The officer observed the Foley vehicle in the outer lane traveling with the flow of traffic, at least 45 m.p.h. He immediately got in his vehicle and got behind the Foley vehicle. He observed that the vehicle never slowed nor attempt[ed] to pull over to address the flat tires.
>
> This Court finds that two flat tires being driven at 45 m.p.h., with no attempt to stop or slow down, falls clearly under KRS 189.020 in that it is a nuisance that impacted the rights of others and that a traffic stop was necessary to promote the public safety.
>
> Two flat, not just low, tires are in no way comparable to a slightly cracked windshield. While it is speculative at best to judge the public safety of a cracked windshield

> and whether it may shatter in the near future, the risk associated with operating a motor vehicle at 45 mph with two flat tires requires the police to intervene.
>
> While the function of community caretaking was not argued in the lower court, this Court finds that *Poe v. Commonwealth*, 169 S.W.3d 54 (Ky. App. 2005), is also a sufficient basis to support the stop by the police.
>
> This appeal by Foley followed.

A writ may be granted when the inferior court is (1) acting without jurisdiction or (2) acting erroneously within its jurisdiction. *Commonwealth v. Peters*, 353 S.W.3d 592, 595 (Ky. 2011). When, as in this case, the district court is alleged to have acted erroneously within its jurisdiction, "a writ will only be granted when two threshold requirements are satisfied: there exists no adequate remedy by appeal or otherwise; and the petitioner will suffer great and irreparable harm." *Id*. (citing *Hoskins v. Maricle*, 150 S.W.3d 1, 18 (Ky. 2004)). Because the suppression of the evidence effectively disposed of the Commonwealth's case against Foley with no remedy by appeal, these threshold requirements were met for the issuance of a writ.

> Whether to grant or deny a writ of prohibition is within the sound discretion of the court with which the petition is filed. Thus, this decision is ultimately reviewed by an appellate court for abuse of discretion. However, if the basis for the grant or denial involves a question of law, the appellate court reviews this conclusion *de novo*. If the court with which the petition is filed bases its ruling on a factual determination, this finding of fact is reviewed for clear error.

Id. (internal citations omitted).

Foley argues that the circuit court improperly usurped the fact-finding function of the district court by substituting its own belief that driving on two flat tires at 45 miles per hour was a nuisance or a traffic violation requiring police intervention. She contends that no evidence, such as testimony from a tire expert, was presented to support the circuit court's belief that Foley was a danger to herself or to others.

But the facts of this case -- that Foley was driving on two completely flat tires at 45 miles per hour on a road with other traffic -- are not in dispute. Officer Davis's testimony was unchallenged. Although he did not provide a specific motive for stopping Foley, "[a]n officer's subjective explanation for stopping or detaining a driver does not control Fourth Amendment analysis. Courts are required to 'make an objective assessment of the officer's actions' when determining if a stop was reasonable." *Poe v. Commonwealth*, 169 S.W.3d 54, 59 (Ky. Ct. App. 2005) (citing *State v. Rinehart*, 617 N.W.2d 842, 845 (S.D.2000) (Sabers, J. dissenting) (quoting *United States v. Cummins*, 920 F.2d 498, 501 (8th Cir.1990) (citing *Scott v. United States*, 436 U.S. 128, 136, 98 S.Ct. 1717, 1723, 56 L.Ed.2d 168, 177 (1978))).

Thus, what is in dispute here is the application of the law to these undisputed facts, and that is an issue which we review *de novo*. Two possible legal bases exist for justifying the stop: as a potential traffic violation under KRS 189.020 or under the community caretaking exception to the Fourth Amendment proscription against unreasonable seizures.

As the district court noted, Kentucky Revised Statutes (KRS) 189.020 requires a vehicle to be equipped so as "to protect the rights of other traffic, and to promote the public safety." In *Garcia*, a police officer pulled over a motorist with a cracked windshield. 185 S.W.3d at 661. Although no expert testimony was offered in that case, a panel of this Court held that a cracked windshield that unreasonably impairs the vision of a driver increases the risk and likelihood of an accident, thereby presenting a significant threat to public safety and the rights of other traffic. *Id*. at 664. The Court emphasized, however, "that a cracked windshield is a violation of KRS 189.020 only if it is of sufficient severity to unreasonably reduce the driver's visibility." *Id*. Because Garcia's windshield displayed only hairline cracks, the Court ruled it did not violate the statute and, therefore, did not justify a stop by the police.

Similarly, driving on a flat tire or tires may not always constitute a violation of KRS 189.020, for instance, if a driver is proceeding slowly to a service station or to an area where it is safe to pull off the road. Driving in the left lane at full speed on two completely flat tires, with the rims striking the asphalt, is a factual scenario that does present a significant threat to public safety and to the safety of the driver, and suggests recklessness on the part of the driver. Under the circumstances of this case, a stop by the police was justified.

It was also justified under the community caretaking function, which was first articulated by the United States Supreme Court in *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973). *Poe*, 169 S.W.3d at 57.

Under the community caretaking function, a police officer may pull over a vehicle without having witnessed a traffic violation or any other criminal activity. The *Dombrowski* Court explained its rationale as follows:

> Because of the extensive regulation of motor vehicles and traffic, and also because of the frequency with which a vehicle can become disabled or involved in an accident on public highways, the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office. Some such contacts will occur because the officer may believe the operator has violated a criminal statute, but many more will not be of that nature. Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.

Id., 413 U.S. at 441, 93 S.Ct. at 2528.

In order for the community caretaking function to apply, the officer's stop must be "based on specific and articulable facts that lead to a reasonable conclusion that the individual requires assistance or is necessary for the public's safety." *Poe,* 169 S.W.3d at 57. "Court approval of any reason related to 'public need' for stopping and detaining a citizen based on the subjective beliefs of police officers is constitutionally insufficient." *Id*. at 59. Thus, testimony from Officer Davis regarding his subjective reasons for the stop was not required; rather, the inquiry is whether specific and articulable facts support a reasonable conclusion that Foley required assistance. In *Poe*, the Kentucky Supreme Court held that an officer's belief that a motorist might need directions was not a valid basis for a

stop, but expressly listed a flat tire as a sign that a motorist might require assistance. *Id.* at 57. Even though Officer Davis did not expressly testify that he believed Foley to require assistance, her behavior in driving in the left lane at full speed suggests that she was not aware that her tires were flat and potentially dangerous. The stop was therefore justified under the community caretaking function.

Because Officer Davis's action in stopping Foley was objectively reasonable as a matter of law, the circuit court's order granting the writ is affirmed.

ALL CONCUR.

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