RENDERED: SEPTEMBER 16, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

MODIFIED: SEPTEMBER 30, 2016; 10:00 A.M.

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000920-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 14-CR-00299

JOHN E. SMITH, JR. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, JONES, AND NICKELL, JUDGES.

JONES, JUDGE: The Commonwealth of Kentucky appeals from a Franklin Circuit Court order granting John E. Smith, Jr.'s motion to suppress evidence recovered by the police during a traffic stop.

The following undisputed facts were elicited at the suppression hearing: Richard Qualls, a narcotics detective for the Franklin County Sheriff's

Office, was conducting surveillance of Smith after receiving information from multiple confidential sources that he was trafficking in cocaine. Smith was on parole after receiving a ten-year sentence for first-degree trafficking in a controlled substance. According to Detective Qualls's sources, Smith sold cocaine from a bar known as the "Brick" in downtown Frankfort, drove a Cadillac as well as a dark-colored SUV, and was employed at Sears.

Detective Qualls and Captain Ron Wyatt, also of the Franklin County Sheriff's Office, conducted surveillance of Smith beginning at approximately 3 to 4 p.m., with Deputy Chris Eaton on standby in a marked sheriff's cruiser with a K-9 unit inside. Detective Qualls was in plain clothes, driving an unmarked vehicle. Qualls observed Smith leave work at Sears in his dark-colored SUV and drive to his apartment. According to Smith, he had seen Detective Qualls before and suspected that he was being followed in connection with his involvement in drug trafficking.

Qualls continued to watch Smith, who entered his apartment, ate and then left in his Cadillac to buy gas. Smith noticed that Qualls and Deputy Eaton followed him to the gas station. Detective Qualls parked in an adjacent lot, and observed Smith meet another individual who lived in the same apartment building as Smith. Qualls saw that individual lean into the passenger side window of Smith's vehicle. Smith then drove back to his apartment where he stayed for about ten to fifteen minutes. He then left in his Cadillac and drove down the street to an intersection with a stop sign, where he turned left. Detective Qualls, who was

driving directly behind Smith, observed that he failed to use his turn signal. Detective Qualls radioed Deputy Eaton and told him that he could make a traffic stop because Smith had failed to signal. Detective Qualls testified that he could not stop Smith himself because he was in plain clothes and driving an unmarked car. He explained that attempting a traffic stop in a vehicle not equipped with emergency lights and sirens was unsafe, and would have been against the Franklin County Sheriff's policy.

Deputy Eaton pulled Smith over shortly after receiving the notification from Qualls. He introduced himself to Smith and informed him that he had been stopped for his failure to use his turn signal at the intersection. Smith replied that he thought he had used his turn signal. Deputy Eaton further introduced himself as the K-9 handler for the Franklin County Sheriff's Office. Deputy Eaton testified that he had the "standard conversation" with Smith that he has when making traffic stops. This conversation consisted of asking Smith whether he had any drugs or guns in the car and whether a search of the vehicle would reveal any contraband. Eaton stated that Smith appeared very nervous when he was asked about the presence of drugs, and that Smith told him that there were no drugs in the vehicle.

Deputy Eaton returned to his cruiser, got the dog and began to conduct a K-9 "sniff." The dog gave a strong indication of a positive alert at the driver's side door of Smith's car. Deputy Eaton asked Smith to leave the vehicle. He searched the vehicle and found approximately seven grams of cocaine wrapped

in plastic in the split bench of the driver and passenger seat. Smith was arrested. A search of his person found $4,299 in cash in his wallet.

Smith was charged with one count of first-degree trafficking in a controlled substance, second or greater offense, greater than or equal to four grams of cocaine, a class B felony. He filed a motion to suppress the evidence recovered from his car. Following a hearing, the trial court granted the motion. The Commonwealth filed a motion to alter, amend or vacate which was denied. This appeal by the Commonwealth 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) (footnotes omitted).

For its first argument, the Commonwealth asserts that Smith's status as a parolee meant that he was not entitled to the full panoply of Fourth Amendment protections. It is well-established that "the Fourth Amendment presents no impediment against a warrantless and suspicionless search of a person on parole." *Bratcher v. Commonwealth*, 424 S.W.3d 411, 415 (Ky. 2014). Although Detective Qualls testified regarding Smith's parole status, its implications for purposes of the Fourth Amendment analysis were never raised before the trial court. The trial court's order granting the motion to suppress does

not mention Smith's parole status, nor did the Commonwealth subsequently request such a finding pursuant to Kentucky Rules of Civil Procedure (CR) 52.04. "It is an unvarying rule that a question not raised or adjudicated in the court below cannot be considered when raised for the first time in this court." *Combs v. Knott County Fiscal Court*, 283 Ky. 456, 141 S.W.2d 859, 860 (Ky. 1940).

The Commonwealth has not requested palpable error review pursuant to Kentucky Rules of Criminal Procedure (RCr) 10.26. "Absent extreme circumstances amounting to a substantial miscarriage of justice, an appellate court will not engage in palpable error review pursuant to RCr 10.26 unless such a request is made and briefed by the appellant." *Shepherd v. Commonwealth*, 251 S.W.3d 309, 316 (Ky. 2008). Because such extreme circumstances are not present in this case, we will proceed to address the Commonwealth's remaining arguments.

"Stopping an automobile and detaining its occupants constitute a seizure under the Fourth Amendment. Traffic stops are similar to *Terry* stops and must be supported by articulable reasonable suspicion of criminal activity. The level of articulable suspicion necessary to justify a stop is considerably less than proof of wrongdoing by preponderance of the evidence." *Chavies v. Commonwealth*, 354 S.W.3d 103, 108 (Ky. 2011) (internal quotations, brackets and footnotes omitted).

As grounds for granting the motion to suppress, the trial court ruled that Detective Qualls's observation of a traffic violation (Smith's unsignaled turn) was insufficient to justify the stop by Deputy Eaton, because a traffic violation is

not "criminal activity" and because the traffic violation did not occur in the presence of the officer who made the traffic stop. The trial court held that, in order to satisfy the requirements of the Fourth Amendment, the officer making the stop must personally witness the traffic violation, whereas the stop in this case was based on hearsay only.

The Commonwealth argues that law enforcement officers may conduct a traffic stop based solely upon the occurrence of a traffic violation that need not rise to the level of a criminal offense. We agree. "The occurrence of a traffic violation is recognized as sufficient justification to warrant a stop of a motor vehicle." *Garcia v. Commonwealth*, 185 S.W.3d 658, 661-62 (Ky. App. 2006). 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." *Commonwealth v. Bucalo*, 422 S.W.3d 253, 257-58 (Ky. 2013) (quoting *Wilson v. Commonwealth*, 37 S.W.3d 745, 749 (Ky. 2001)). "'*Terry* stops' of automobiles are permitted upon suspicion that a misdemeanor traffic violation has been committed, and the [United States Supreme Court] has held that both the driver and the passenger may be ordered out of the car while the traffic citation is processed." *Kotila v. Commonwealth*, 114 S.W.3d 226, 233 (Ky. 2003) abrogated on other grounds by *Matheney v. Commonwealth*, 191 S.W.3d 599 (Ky. 2006).

The stop in this case was based on Detective Qualls's report to Deputy Eaton that Smith had failed to signal a left turn. Failure to signal is a traffic

violation pursuant to KRS 189.380, which states that "[a] person shall not turn a vehicle or move right or left upon a roadway . . . without giving an appropriate signal . . . [.]" Failure to signal a lane change provides probable cause to initiate a traffic stop. *Commonwealth v. Fowler*, 409 S.W.3d 355, 360 (Ky. App. 2012).

The issue therefore is whether Deputy Eaton was entitled to rely solely on the report from Detective Qualls, or whether the trial court was correct that Qualls's report was insufficient to justify the stop. In reaching this conclusion, the trial court relied on *Cowan v. Commonwealth*, 215 S.W.2d 989, 991 (Ky. 1948), a case in which the defendant was arrested for the offense of reckless driving. The police arrived at the scene after the reckless driving had taken place and found Cowan standing beside his vehicle. The only proof that reckless driving had occurred at all was the presence of some skid marks on the road nearby. There was nothing to connect Cowan to the skid marks, nor had anyone witnessed the reckless driving. The appeals court held that this evidence was insufficient to justify Cowan's arrest. By contrast, Detective Qualls personally witnessed Smith's commission of the traffic violation, and reported it to a fellow officer, who executed a traffic stop immediately.

Police officers are permitted to, and regularly do, rely on hearsay in the form of tips from informants, some of whom are anonymous, to justify traffic stops.

> In order to perform an investigatory stop of an automobile, there must exist a reasonable and articulable suspicion that a violation of the law is occurring.

> *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S.Ct. 1391, 1401, 59 L.Ed.2d 660, 673 (1979). Complications arise when . . . the information serving as the sole basis of the officer's suspicion is provided by an anonymous informant, whose veracity, reputation, and basis of knowledge cannot be readily assessed. In situations such as these, we are required to examine the totality of the circumstances, and to determine whether the tip, once suitably corroborated, provides sufficient indicia of reliability to justify an investigatory stop. *Alabama v. White*, 496 U.S. 325, 332, 110 S.Ct. 2412, 2417, 110 L.Ed.2d 301, 310 (1990).

Collins v. Commonwealth, 142 S.W.3d 113, 115 (Ky. 2004).

The United States Supreme Court has "firmly rejected the argument 'that reasonable cause for a[n investigative stop] can only be based on the officer's personal observation, rather than on information supplied by another person.'" *Navarette v. California*, 134 S. Ct. 1683, 1688, 188 L. Ed. 2d 680 (2014) (quoting *Adams v. Williams*, 407 U.S. 143, 147, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972). In this case, the veracity, reputation and basis of knowledge of the informant were easily verifiable because he was an identified police officer.

Alternatively, the stop was justified pursuant to the "collective knowledge rule," under which Detective Qualls's observation of the traffic violation could be imputed to Deputy Eaton. In *Commonwealth v. Vaughn*, the Court of Appeals agreed "with the widely used concept that law enforcement officers can be held to the collective knowledge of other officers[,]" although it cautioned that "the rule cannot function solely permissively, to validate conduct otherwise unwarranted; the rule also operates prohibitively, by imposing on law

enforcement the responsibility to disseminate only accurate information." 117 S.W.3d 109, 111 (Ky. App. 2003).

The next question is whether Officer Eaton exceeded the permissible scope of the investigatory stop. The trial court ruled that the questioning of Smith on drug issues unrelated to the traffic stop, and the sniff by the drug dog, were outside the scope of a valid traffic stop, in reliance on *Turley v. Commonwealth*, 399 S.W.3d 412, 421-22 (Ky. 2013). In its subsequent order denying the Commonwealth's motion to alter, amend or vacate, the trial court relied on *Rodriguez v. United States*, 135 S. Ct. 1609, 1616-17, 191 L. Ed. 2d 492 (2015), an opinion which refined traffic stop jurisprudence but was decided on April 21, 2015, after the entry of the initial order granting the motion to suppress. The Commonwealth argues that, to the extent that *Rodriguez* changed the state of the law, it cannot be applied retroactively to justify suppression. *See Davis v. United States*, 564 U.S. 229, 131 S. Ct. 2419, 2429, 180 L. Ed. 2d 285 (2011) ("Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule.").

We need not address whether *Rodriguez* changed the law to such an extent that its retroactive application is barred, because we agree with the trial court that, under *Turley*, the drug sniff exceeded the scope of the traffic stop. In *Turley*, the Court explained as follows

> Although an officer may detain a vehicle and its occupants in order to conduct an ordinary traffic stop, "any subsequent detention ... must not be excessively

> intrusive in that the officer's actions must be reasonably related in scope to circumstances justifying the initial interference." *United States v. Davis*, 430 F.3d 345, 353 (6th Cir.2005) (citation omitted).

Turley v. Commonwealth, 399 S.W.3d 412, 421-22 (Ky. 2013).

After asking Smith about the presence of contraband in the car, Deputy Eaton immediately retrieved the dog to perform a drug sniff. He did not perform any of the routine matters associated with a traffic stop; indeed, he did not even write a citation for Smith's failure to signal until after the search of the vehicle was complete.

The facts are distinguishable from those of *Illinois v. Caballes*, 543 U.S. 405, 409, 125 S. Ct. 834, 838, 160 L. Ed. 2d 842 (2005), in which the United States Supreme Court ruled that a drug sniff during a traffic stop was not unlawful. In *Caballes*, a state trooper pulled over the defendant for speeding. While he was writing out the ticket, another trooper, who had heard him radio the stop, arrived and performed a canine drug sniff around the car. The troopers discovered narcotics in the trunk. The Court observed that the initial seizure of the defendant had been based on probable cause and that the seizure had not been prolonged beyond the time reasonably necessary to prepare the warning citation. *Johnson v. Commonwealth*, 179 S.W.3d 882, 885 (Ky. App. 2005). In Smith's case, by contrast, the drug sniff unreasonably prolonged the stop because it was performed before the citation was even written.

The Commonwealth argues that the police did have a reasonable suspicion of criminal activity to justify the drug sniff, based on their knowledge of Smith's record and his purported drug-dealing activities. But these suspicions did not justify the initial traffic stop, which was based on Smith's failure to signal. "[A]n officer cannot detain a vehicle's occupants beyond completion of the purpose of the initial traffic stop 'unless something happened during the stop to cause the officer to have a 'reasonable and articulable suspicion that criminal activity [is] afoot.'" *Turley*, 399 S.W.3d at 422. The fact that Smith appeared nervous when questioned about the presence of drugs in the car was insufficient evidence to prolong the stop in order to perform the canine drug sniff.

The order granting the motion to suppress is affirmed.

ALL CONCUR.

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