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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000211-MR

LLOYD P. SORRELS

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
ACTION NO. 15-CR-00239

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MAZE, STUMBO AND TAYLOR, JUDGES.

STUMBO, JUDGE: Lloyd P. Sorrels appeals from a judgment of the Muhlenberg Circuit Court based on a conditional plea of guilty following the denial of his motion to suppress evidence. Sorrels argues that the search of his vehicle following a traffic stop was unconstitutional. For the reasons set forth below, we affirm.

Sorrels directs our attention to the Findings of Fact set out in the Muhlenberg Circuit Court's Findings and Order denying his motion to suppress, and from which Sorrels now appeals. The circuit court set out the relevant facts of this action therein as follows:

1. Kentucky State Police (KSP) Trooper John McGehee was on duty on October 1, 2015, and patrolling near 189 Bypass in Greenville, Kentucky. At some time after 7:00 p.m., Trooper McGehee observed a vehicle fail to properly utilize its turn signal on two separate occasions.

2. Trooper McGehee conducted a traffic stop of the vehicle at 7:16 P.M. He commanded the driver to exit the vehicle and spoke with him at the rear of the van. The driver informed Trooper McGehee that the vehicle (a van) belonged to the passenger, whom Trooper McGehee recognized as the defendant.

3. Trooper McGehee knew of the defendant's prior contact with the criminal justice system, and was aware that he had been previously involved in violations of the Controlled Substances Act. Trooper McGehee also testified that he had been informed that people had been arrested "out of the [the defendant's] van" for drug-related offenses. Based upon the information he had received, Trooper McGehee believed that the defendant had been recently trafficking in controlled substances.

4. After speaking with the driver, Trooper McGehee went to the passenger side of the vehicle to speak with the defendant. He directed the defendant to exit the vehicle as well, and when the defendant did, Trooper McGehee observed in plain view a green pill and a cellophane baggy with what appeared to be residue on it on the passenger's side floorboard of the van.

5. KSP Trooper Jason Fortney arrived on the scene at the same time or not long after the initial traffic stop. Apparently at Trooper McGehee's request, Trooper

Fortney radioed to the Muhlenberg County Sheriff's Office canine unit, Deputy William Ward. Officer McGehee testified that Trooper Fortney contacted Deputy Ward within 6 to 7 minutes after the initial traffic stop.

6. Deputy Ward and his canine arrived on the scene at 7:40 P.M. Within a matter of minutes Deputy Ward deployed the canine, who alerted on the van within one minute. A search of the vehicle ensued, and the officers located a handgun and other pills, which were in the end identified as cholesterol medication.

Sorrels was later indicted on November 13, 2015, for one count of possession of a handgun by a convicted felon in the first degree (Kentucky Revised Statute (KRS) 527.040) and being a persistent felon in the first degree (PFO I) (KRS 532.080). Sorrels moved to suppress the evidence obtained by the police during the search of the van. As a basis for the motion, Sorrels argued that the search and seizure of the evidence was unreasonable and illegal in violation of the Fourth Amendment of the United States Constitution and Section 10 of the Kentucky Constitution.

The circuit court conducted a hearing on the motion on December 21, 2015, and entered its Findings and Order denying the motion. The court determined in relevant part that the police had a justifiable basis for the canine sniff and warrantless search of the vehicle, and the continued detention of Sorrels until the arrival of the canine unit was not unreasonable or otherwise unlawful. Sorrels subsequently accepted an agreement with the Commonwealth for a recommendation of a reduction in the charges to one count of possession of a

handgun by a convicted felon in the first degree and a sentence of ten years with dismissal of the PFO I count in exchange for his plea of guilty. The plea was conditioned on the reservation of Sorrels' right to appeal the adverse ruling on his motion to suppress. On January 27, 2016, the circuit court entered a Judgment and Final Sentencing which sentenced Sorrels to ten years in prison. This appeal followed.

The standard of review on a ruling concerning suppression is well-settled. First, we must determine whether the lower court's findings of fact are clearly erroneous. *See Commonwealth v. Bedway*, 466 S.W.3d 468, 471 (Ky. 2015) (citation omitted); *Commonwealth v. Kelly*, 180 S.W.3d 474, 476-77 (Ky. 2005). “Findings of fact are not clearly erroneous if they are supported by substantial evidence. Substantial evidence is evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men.” *Cobb v. Commonwealth*, 509 S.W.3d 705, 708 (Ky. 2017) (quoting *Commonwealth v. Jennings*, 490 S.W.3d 339, 346 (Ky. 2016)). *See also* Kentucky Rule of Criminal Procedure (RCr) 8.27 (Formerly RCr 9.78) (factual findings supported by substantial evidence are conclusive). Second, we must perform a *de novo* review to determine whether the trial court's application of the law to those facts was correct. *Davis v. Commonwealth*, 484 S.W.3d 288, 290 (Ky. 2016); *Goncalves v. Commonwealth*, 404 S.W.3d 180, 189 (Ky. 2013).

“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.” *Pitcock v. Commonwealth*, 295 S.W.3d 130, 132 (Ky. App. 2009) (citing *Commonwealth v. Whitmore*, 92 S.W.3d 76, 79 (Ky. 2002)).

“With controverted evidence, the trial court is the sole trier of facts and the exclusive judge of the credibility of the witnesses and of the weight to be given their testimony.” *Henson v. Commonwealth*, 20 S.W.3d 466, 470 (Ky. 1999). “In conducting our review, our proper role is to review findings of fact only for clear error while giving due deference to the inferences drawn from those facts by the trial judge.” *Perkins v. Commonwealth*, 237 S.W.3d 215, 218 (Ky. App. 2007) (citations omitted).

Sorrels argues that the circuit court erred in denying his motion to suppress the evidence obtained by the police when they detained him, searched the van, and seized the handgun. First, Sorrels contends that the police did not have sufficient reasonable articulable suspicion to detain him as part of the traffic stop.

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. Thus, an 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 v. Commonwealth, 399 S.W.3d 412, 421 (Ky. 2013) (internal quotations, footnote, and citations omitted). The circuit court held that Trooper McGehee had reasonable articulable suspicion because he recognized Sorrels from earlier

encounters, he was aware that Sorrels had a drug-related criminal history, and he had information that Sorrels' van had been used during illegal transactions. Sorrels contends these facts lack credibility because Trooper McGehee was not fully examined as to the source of his information; however, the defense had sufficient opportunity to fully examine Trooper McGehee at the suppression hearing. Sorrels failed to raise this issue in the circuit court, thereby waiving this issue. The law is clear that an appellate court will not consider an argument unless it has been raised before the circuit court, and that court has been given an opportunity to consider the merits of the argument. *Henderson v. Commonwealth*, 438 S.W.3d 335, 343-44 (Ky. 2014) (A party may not present a different theory to the appellate court than that presented to the trial court.); *Jones v. Commonwealth*, 239 S.W.3d 575, 577-78 (Ky. App. 2007) (involving suppression hearing); *Shelton v. Commonwealth*, 992 S.W.2d 849, 852 (Ky. App. 1998). Thus, this issue was not properly preserved.

Moreover, Trooper McGehee's detention of Sorrels and request that he exit the van was proper. In *Arizona v. Johnson*, 555 U.S. 323, 331, 129 S.Ct. 781, 786, 172 L.Ed.2d 694 (2009), the United States Supreme Court held that ““an officer making a traffic stop may order passengers to get out of the car pending completion of the stop.”” (Quoting *Maryland v. Wilson*, 519 U.S. 408, 415, 117 S.Ct. 882, 886, 137 L.Ed.2d 41 (1997)). See also *Owens v. Commonwealth*, 291 S.W.3d 704, 708 (Ky. 2009). “An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the

encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.” *Johnson*, 555 U.S. at 333, 129 S.Ct. at 788 (citation omitted). In this case, Trooper McGehee asked Sorrels to exit the van before the purpose of the stop had been completed, i.e., by the completion of a citation for the driver for the traffic offense and driving without insurance.

In addition, Sorrels’ argument that the seizure was improper because Trooper McGehee had opened the passenger side door of the van is unpersuasive. Sorrels’ reliance on *Mundy v. Commonwealth*, 342 S.W.3d 878 (Ky. App. 2011), is misplaced because that case is distinguishable in that it involved the application of the emergency exception unrelated to a valid stop for a traffic violation and the policeman’s act of opening the vehicle’s door to gain access to the occupant inside, rather than merely facilitation of the exit of the occupant, which Trooper McGehee had authority to request.

Sorrels’ argument that the search of the van was illegal because the canine sniff was improper, citing *Rodriguez v. United States*, 135 S.Ct. 1609, 191 L.Ed.2d 492 (2015), and *Davis v. Commonwealth*, 484 S.W.3d 288 (Ky. 2016), lacks merit. In *Rodriguez*, the Supreme Court held that a police officer may not extend a traffic stop beyond its original purpose for the sole purpose of conducting a sniff search—not even for a *de minimis* period of time. *Davis* held similar. Sorrels maintains that there was no additional information obtained during the stop to justify extending the duration of the stop in order to conduct the canine sniff.

However, after Sorrels exited the van, Trooper McGehee saw in plain view a cellophane baggy with what appeared to be “residue” on it and a green pill that he believed could be an illegal narcotic. While Sorrels argues that the testimony indicates that the green pill was a legal cholesterol pill and that Trooper McGehee was aware of that fact prior to the canine unit being called, the evidence at the hearing is conflicting on that issue. Moreover, Trooper McGehee testified that based on his prior experience, the cellophane baggy with the residue was consistent with illegal drug activity.

The circuit court held that the discovery of those items was sufficient to raise the level of inquiry from that justified by reasonable suspicion to an investigation of criminal activity supporting a canine sniff; therefore, the twenty-four minute extension of the traffic stop was not unreasonable. The circuit court’s credibility determinations are conclusive and deference to its fact finding role support the court’s conclusion that the canine sniff and subsequent search of the van, which led to the recovery of the handgun, was not unconstitutional. We conclude that the circuit court did not err in denying the motion to suppress.

For the foregoing reasons, we affirm the order of the Muhlenburg Circuit Court.

ALL CONCUR.

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