

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1996-CA-002903-MR

MICHAEL L. SHILL

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE LEWIS G. PAISLEY, JUDGE  
ACTION NO. 1996-CR-000677

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ABRAMSON, BUCKINGHAM, and COMBS, Judges.

ABRAMSON, JUDGE<sup>1</sup>: Pursuant to RCr 8.09, Appellant Michael L. Shill entered a conditional guilty plea to trafficking in marijuana over eight ounces and possession of drug paraphernalia, was sentenced to a two-year prison term, and placed on conditional discharge for five years. He has appealed the trial court's denial of his motion to suppress evidence taken at the time of his arrest. Shill claims that the trial court erred when it found (1) that there was reasonable suspicion to stop his car; and (2) that his arrest for driving on a suspended license

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<sup>1</sup>This opinion was prepared and concurred in prior to the departure of Judge Abramson from the Court on November 22, 1998.

justified the search of his car. Having reviewed the evidence presented at the suppression hearing and the applicable law, we affirm.

At the suppression hearing, the following testimony was heard by the trial court. On May 19, 1996, at about 8:45 p.m., Officer Byron Smoot of the Lexington-Fayette Urban County Police Department was patrolling an area of Lexington known for its heavy drug activity. Smoot and his partner noticed Shill sitting in front of a nightclub located in a shopping center. The businesses in the center were closed at the time, no other cars or people were in the parking lot and "no loitering" signs were clearly posted. Smoot testified at the suppression hearing that when he pulled his cruiser beside Shill's vehicle Shill looked "startled" and then started his car and turned right out of the shopping center onto Georgetown Street. Smoot attempted to catch up with Shill's vehicle, but Shill was eluding Smoot. After Shill turned left on Main Street, he made what Smoot testified was a "blatant attempt to avoid" him by turning left into a gas station. Smoot made a U-turn on Main and returned to the gas station where he saw Shill turn left from the gas station heading east on Main Street. Smoot followed Shill on Main toward the downtown area to a point near the Radisson Hotel where Smoot activated his emergency blue lights to stop Shill.

Smoot testified that at the time of the stop he could have charged Shill with careless driving. After Shill told Smoot that he had no proof of insurance, Smoot conducted a computer check on Shill's driver's license and discovered that it was

suspended. Smoot then arrested Shill for driving on a suspended license. Shill told Smoot that he had been waiting in the shopping center parking lot "to buy some dope."

Pursuant to a search of the interior of Shill's car incident to the arrest, Smoot found a tool kit containing drug paraphernalia as well as a potato chip can with 45 grams of marijuana. After Smoot also found a black briefcase with a combination lock on the back floorboard, Shill refused to disclose the combination to Smoot, who then called for a drug dog. When the dog alerted on the briefcase, Smoot obtained a search warrant for the briefcase which contained 618 grams of marijuana and a pair of scales.

Shill was indicted for trafficking in over eight ounces of marijuana, possession of drug paraphernalia, operating a motor vehicle without insurance, and operating a motor vehicle while his license was suspended. He moved to suppress the drugs and drug paraphernalia found in his car. After a suppression hearing on August 7, 1996, the trial court overruled the motion to suppress. On August 16, 1996, Shill entered a conditional guilty plea under a plea agreement by which he would be sentenced to two years for trafficking, twelve months for possession of drug paraphernalia, with the remaining charges to be dismissed. On October 11, 1996, the court probated Shill's sentence for five years. This appeal followed.

In denying the suppression motion, the trial judge concluded that Smoot's stop of Shill's car was reasonable and that the seizure of evidence from Shill's car also was

reasonable. After a suppression hearing, when the trial judge's factual findings are supported by substantial evidence, they are deemed "conclusive." RCr 9.78. The defendant has the burden of showing that the trial court's ruling was clearly erroneous. Harper v. Commonwealth, Ky., 694 S.W.2d 665 (1985).

In Terry v. Ohio, 392 U.S. 1, 16, 88 S. Ct. 1868, 1877, 20 L. Ed. 2d 889 (1968), the leading United States Supreme Court case on the issue of Fourth Amendment stops, the Supreme Court recognized that police officers may make an investigatory stop when specific, articulable facts and any reasonable inferences to be drawn from those facts create a reasonable suspicion that criminal activity is afoot. The standard for determining whether a person has been stopped or seized within the meaning of the Fourth Amendment is whether "in view of all of the circumstances surrounding the incident a reasonable person would have believed that he was not free to leave." United States v. Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497 (1980). A seizure occurs where the officer by force or by show of authority restrains the liberty of a citizen. Terry v. Ohio, 392 U.S. at 19 n. 16, 88 S. Ct. at 1879 n. 16, 20 L. Ed. 2d at n.16. Where no force is involved, the person must submit to the assertion of authority in order for a seizure to occur. California v. Hodari D., 499 U.S. 621, 113 L. Ed. 2d 690, 111 S. Ct. 1547 (1991). The right to make a brief investigatory stop where reasonable suspicion exists is not limited to officers on foot but also extends to vehicle stops. Delaware v. Prouse, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979); Whren v. United States, 517

U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996); Creech v. Commonwealth, Ky. App., 812 S.W.2d 162 (1991).

When Smoot flashed his blue emergency lights at Shill, he was attempting to stop and detain Shill and his vehicle. In order to stop a person or a vehicle, the officer must have observed unusual conduct which led him to conclude in light of his experience that an offense had been or was about to be committed. United States v. Hensley, 469 U.S. 221, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985). In this case, Smoot's personal observations supplied the necessary reasonable suspicion.

After Smoot first observed Shill in an otherwise deserted shopping center parking lot in an area well-known for drug activity, Shill was "startled" to see Smoot. Shill then engaged in irregular driving in an apparent effort to evade Smoot. As Smoot caught up with Shill, he turned on his blue emergency lights. The totality of the circumstances including the location of Shill's car, along with his demeanor and elusive driving, provided reasonable and articulable suspicion of criminal activity. See Simpson v. Commonwealth, Ky. App., 834 S.W.2d 686 (1992) (upholding trial court's findings justifying investigative stop). The trial court's conclusion that reasonable suspicion existed under the Fourth Amendment for Smoot to have stopped and detained Shill's vehicle was not clearly erroneous.

Shill's second argument is that the search of the interior of his car was constitutionally unreasonable because his arrest for driving on a suspended license did not justify the

search. Pursuant to the stop of Shill's vehicle, Smoot's request for proof of insurance was reasonable. When Shill was unable to produce evidence of insurance, Smoot's computer check of Shill's driver's license status revealed that his license had been suspended. Although the record does not indicate under which statute Shill's license had been revoked, both KRS 189A.100 and KRS 186.620 authorize custodial arrests when a person is driving on a suspended license. As a contemporary incident of any lawful custodial arrest, the officer automatically can search the entire passenger compartment. New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981); Brown v. Commonwealth, Ky., 890 S.W.2d 286 (1994). Smoot's authority to search Shill's vehicle incident to his arrest was not dependent upon the officer's observation of contraband in plain view. Brown v. Commonwealth, supra. In short, Smoot's search of the interior of Shill's vehicle was reasonable as a search incident to his arrest.

Taken as a whole, the evidence adduced at the suppression hearing supports the trial judge's finding that the stop was preceded by a reasonable and articulable suspicion of criminal activity and his conclusion that the search of Shill's car was reasonable and the resulting evidence therefore admissible. Shill has failed to demonstrate that the trial court's ruling was clearly erroneous.

Finding no error in the trial court's order, we affirm the trial judge's denial of Shill's motion to suppress.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jerry Anderson  
Lexington, KY

BRIEF FOR APPELLEE:

A.B. Chandler III  
Attorney General

Michael L. Harned  
Assistant Attorney General  
Frankfort, KY