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NOT TO BE PUBLISHED

DISCRETIONARY REVIEW GRANTED BY KENTUCKY SUPREME COURT:
NOVEMBER 24, 2007
(2007-SC-0085-D)

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001203-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM TODD CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 05-CR-00004

JOHN DAVID GILBERT

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: ABRAMSON AND GUIDUGLI,¹ JUDGES; BUCKINGHAM,² SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: The Commonwealth appeals from an order of the Todd Circuit Court granting John David Gilbert's motion to suppress evidence that the Commonwealth intended to

¹ Judge Daniel T. Guidugli concurred in this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

² Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

use in its criminal prosecution of him. The issue is whether the evidence must be suppressed because the officer who had stopped Gilbert's vehicle for a traffic violation continued to detain him for several minutes after the time it would have taken to write a traffic ticket so as to await the arrival of a narcotics-detection dog (K-9 unit). In accordance with Illinois v. Caballes, 543 U.S. 405, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005), we affirm.

Elkton Police Officer Rodney Moberly observed Gilbert's pickup truck leave a residence in Elkton at approximately 11:52 p.m. on January 9, 2005. The residence had been under observation by the Elkton Police Department due to citizens' reports of suspicious activity. Although they had yet to confirm it, the officers suspected drug activity.

Officer Moberly noticed that the brake lights on Gilbert's truck were not working, so he initiated a traffic stop. After making the stop, the officer also noticed that the license plate on the truck was damaged and somewhat obscured. As the officer approached Gilbert's truck, he immediately recognized Gilbert and recalled that he had previously arrested him on drug charges.

Claiming that the window on the driver's door on his truck did not work, Gilbert opened the door to respond to the officer. Upon confronting Gilbert, the officer noticed that

Gilbert's eyes were bloodshot and that there were empty beer cans in the back of the truck. Gilbert admitted to the officer that he had been drinking the day before, but he denied drinking or using any drugs on that date. The officer then administered two sobriety tests to Gilbert, and he passed them both.

Officer Moberly then asked Gilbert for consent to search his truck. Gilbert ultimately denied the request, and the officer directed Gilbert back in his truck and radioed a request for a K-9 unit. The only unit available was one utilized by the Guthrie Police Department, which was located approximately 15 miles away. The officers estimated that it would take 15-20 minutes for the dog to arrive.

Approximately 12-14 minutes after Gilbert returned to his truck, a second Elkton police officer, John Lancaster, approached the truck to explain the delay and to press Gilbert on his refusal to allow a consensual search. As Gilbert opened the door, the officer noticed that the door panel was missing. During the course of the discussion, the officer happened to look into a cavity in the door and saw the handle of a handgun. Knowing that Gilbert was a convicted felon, the officers arrested Gilbert for possession of a handgun by a convicted felon.

Shortly after arresting Gilbert, the K-9 unit arrived. After the dog alerted the officers to the presence of drugs in

the truck, the officers conducted a search. As a result of the search, the officers seized a set of scales, a piece of burnt tin, marijuana, and methamphetamine. The evidence led a Todd County grand jury to indict Gilbert on various drug and firearm offenses and for being a first-degree persistent felony offender.

Gilbert moved the court to suppress the evidence, and the court conducted a suppression hearing. See Kentucky Rule of Criminal Procedure (RCr) 9.78. The court heard testimony from the two officers, and it viewed the video tape, which consisted of two recordings from two police cruiser cameras.

On May 6, 2005, the court entered an order granting Gilbert's suppression motion. The court found that Gilbert was detained approximately 12 to 14 minutes after the sobriety tests and that the detention was several minutes longer than it would have taken the officers to issue a traffic citation to Gilbert and allow him to leave.³ The court also found that there was a considerable discussion between Officer Lancaster and Gilbert before the handgun was discovered. Thus, the court rejected the Commonwealth's argument that Gilbert was detained no longer than the time required to write him a citation or warning as well as the argument that the handgun would likely have been discovered

³ The evidence was that it would have taken the officers approximately five minutes to issue a citation or warning to Gilbert for inoperable brake lights.

at any rate when the officer delivered Gilbert a citation or warning ticket. This appeal by the Commonwealth followed.

RCr 9.78 states in part that the fact findings of a trial court in a suppression hearing shall be conclusive if supported by substantial evidence. In determining the substantial nature of the evidence, the court must look to the totality of the circumstances. Taylor v. Commonwealth, 987 S.W.2d 302 (Ky. 1998). These decisions are subject to *de novo* review by appellate courts. Commonwealth v. Opell, 3 S.W.3d 747 (Ky.App. 1999).

The Caballes case, relied upon by the circuit court, addresses this issue. Under similar but somewhat distinguishable facts, the U.S. Supreme Court held that evidence seized as a result of the use of a narcotics-detection dog following a traffic stop was properly allowed where the stop was not extended beyond the time necessary to issue a warning ticket and to conduct ordinary inquiries incident to the stop. 543 U.S. at 409. However, the Court specifically stated that “[a] seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.” Id. at 407.

The Commonwealth argues that the circuit court’s decision was not supported by substantial evidence. It asserts

that the officers were justified in detaining Gilbert for an additional length of time because they knew he was a convicted felon, had been convicted of drug offenses, had recently left a residence where suspicious activity had been occurring, and had denied the request for a consent search of his truck. In fact, the officers testified that they called for a K-9 unit because of Gilbert's prior record and because they had just observed him leaving a residence where drug activity was suspected. We disagree.

In Simpson v. Commonwealth, 834 S.W.2d 686 (Ky.App. 1992), this court held that a person's presence in a high crime area is a relevant factor upon which an officer can determine whether a person's activities are suspicious. Id. at 688. See also U.S. v. Sprinkle, 106 F.3d 613, 617 (4th Cir. 1997). In Collier v. Commonwealth, 713 S.W.2d 827 (Ky.App. 1986), this court held that a suspect's prior record, standing alone, is not sufficient to justify a stop. Id. at 828. However, we noted that if other articulable factors are present, a suspect's prior record is a legitimate factor that may be considered in determining whether a stop was justified. Id.

In this case, there is no evidence that Gilbert was in a high crime area. Rather, he had been to a residence where drug activity had been suspected but not confirmed. Further, the fact of Gilbert's prior record is not supported by other

articulable factors so as to allow it to be considered a justification for Gilbert being further detained. Thus, the court properly suppressed the evidence pursuant to Caballes because the officers detained Gilbert beyond the time reasonably required to issue him a traffic citation or warning and release him. See Caballes, 543 U.S. at 407.

Finally, we reject the Commonwealth's reliance on U.S. v. Orsolini, 300 F.3d 724 (6th Cir. 2002). In that case the court held that, under the totality of the circumstances, a period of approximately one hour and thirty-five minutes waiting for a K-9 unit to arrive was not an unreasonable length of time to detain the suspect following a traffic stop. The facts in that case support that court's ruling and are quite different from those herein.

The order of the Todd Circuit Court is affirmed.

ALL CONCUR.

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