RENDERED: JULY 18, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000959-MR

BRUCE VARVEL — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 06-CR-00397

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON AND KELLER, JUDGES; GRAVES,[1] SENIOR JUDGE.

CLAYTON, JUDGE: Bruce Varvel entered a conditional plea of guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed 162 (1970), reserving his right to appeal the trial court's denial of his motion to suppress evidence seized from the search of his vehicle. Mr. Varvel's guilty plea was to one

[1] Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

(1) count of First Degree Possession of a Controlled Substance. He was sentenced to two (2) years in prison with a conditional discharge of eighteen (18) months.

On June 2, 2006, at approximately 1:12 a.m., Deputy Tom Crabtree of the McCracken County Sheriff's Department noticed Mr. Varvel driving with a non-functioning taillight. Deputy Crabtree signaled for Mr. Varvel to pull over his vehicle. After stopping him, Deputy Crabtree explained to Mr. Varvel why he was being stopped and, subsequently, asked for both Mr. Varvel's and his passenger's operator's licenses. Deputy Crabtree also requested Mr. Varvel's proof of insurance. The licenses and the proof of insurance were given to Deputy Crabtree for his review. While Deputy Crabtree ran a check on the licenses, Mr. Varvel (with the deputy's permission) exited the vehicle and fixed his taillight. Also, while the licenses were being checked, Deputy Crabtree inquired as to where Mr. Varvel was traveling. Mr. Varvel replied that he had left a Wal-Mart store and was on his way home. The deputy, noticing that Mr. Varvel was headed in a direction opposite of his home, became suspicious and inquired further. Mr. Varvel then admitted that he was actually on his way to an adult bookstore. Testimony has indicated that at some point, either before or after Deputy Crabtree had returned the licenses, Deputy Crabtree asked for permission to search the vehicle. All testimony indicates that Mr. Varvel declined consent to the search. Mr. Varvel's passenger testified that when Mr. Varvel asked why Deputy Crabtree wanted to search the vehicle, the deputy replied "[a]fter he found dope in the vehicle he would give . . . a reason for searching." (Suppression Hearing 15:16:10-22).

Deputy Crabtree testified that he did not issue a traffic citation to Mr. Varvel for the non-illuminated brake light because "[Mr. Varvel] fixed them on the side of the road." (Suppression Hearing 15:07:40-47).

After Mr. Varvel refused consent to the deputy's proposed search of the vehicle, Deputy Crabtree, who is a certified member of the K-9 Unit, returned the licenses and proof of insurance, and at some point thereafter, circled Mr. Varvel's vehicle with his drug-detection dog. The dog signaled at Mr. Varvel's passenger door that contraband was suspected in the vehicle. Five (5) to ten (10) minutes passed from the time that Deputy Crabtree had initially pulled over Mr. Varvel until the dog sniff was initiated. Subsequent to the drug dog indicating the presence of contraband in Mr. Varvel's vehicle, Deputy Crabtree searched the vehicle and found a red bottle containing a white substance. The bottle was inside Mr. Varvel's passenger's purse. Mr. Varvel admitted that the bottle belonged to him. The white substance later field tested positive for cocaine.

On October 24, 2006, Mr. Varvel moved to suppress the evidence seized from his vehicle on June 2, 2006. As a foundation for his motion, Mr. Varvel argued that Deputy Crabtree had no reasonable suspicion to detain him, and he should have been free to leave after the initial purpose of the traffic stop was completed. After reviewing all the evidence at the suppression hearing, the trial court found that the controlled substance was obtained during the execution of a valid traffic stop and that Deputy Crabtree had reasonable, articulable suspicion that criminal activity was afoot. The trial court based that determination upon the

following facts: the dog sniff was based on Deputy Crabtree's observances that Mr. Varvel was nervous; Mr. Varvel was driving in a direction opposite from his stated destination; and that Mr. Varvel changed his previously stated travel plans. Based upon these findings, the trial court denied Mr. Varvel's motion to suppress the evidence found in his vehicle. While the trial judge made no specific finding that the original traffic stop had concluded prior to the search of the vehicle, he used the reasonable, articulable standard in making his determination. Mr. Varvel now appeals the motion to suppress the evidence seized from the search of his vehicle.

Although the Appellant does not contest the initial stopping of the vehicle, we note that it is well established that "[i]n order to justify an investigatory stop of an automobile, the police must have a reasonable[,] articulable suspicion that the persons in the vehicle are, or are about to become involved in criminal activity." *Taylor v. Commonwealth*, 987 S.W.2d 302, 305 (Ky. 1998). In this case, Deputy Crabtree observed Mr. Varvel driving with non-functioning taillights, thus, the stop was justified. We also note "that all searches without a warrant are unreasonable unless it can be shown that they come within one of the exceptions to the rule that a search must be made pursuant to a valid warrant." *Cook v. Commonwealth*, 826 S.W.2d 329, 331 (Ky. 1992) *interpreting Coolidge v. New Hampshire,* 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). There is an "automobile exception which permits an officer to search a legitimately stopped automobile where probable cause exists that contraband or evidence of a crime

may be in the vehicle." *Morton v. Commonwealth*, 232 S.W.3d 566, 569 (Ky. App. 2007). Since the legitimacy of the traffic stop has been determined, we must determine whether or not the subsequent search of Mr. Varvel's vehicle was valid and not violative of his rights.

Mr. Varvel's primary contention is that he should have been released once the purpose of the initial traffic stop was complete, as there was a lack of probable cause to further detain him. Although there is no Kentucky case law directly on point, the Sixth Circuit Court of Appeals has noted that "once the purpose of the traffic stop is completed, a motorist cannot be further detained unless something that occurred during the stop caused the officer to have a reasonable, articulable suspicion that criminal activity was afoot." *United States v. Smith*, 263 F.3d 571, 588 (6th Cir. 2001) *quoting United States v. Hill*, 195 F.3d 258, 264 (6th Cir. 1999), *cert. denied*, 528 U.S. 1176, 120 S. Ct 1207, 145 L. Ed 2d 1110 (2000).

The Commonwealth argues that Deputy Crabtree did not need reasonable, articulable suspicion to detain Mr. Varvel for the dog sniff because the short detention of the dog sniff did not unreasonably expand the scope of the lawful detention. The Commonwealth cites *Johnson v. Commonwealth*, 179 S.W.3d 882 (Ky. App. 2005) in support of its argument. The facts in *Johnson*, however, are distinguishable from the facts presented in the current case. In *Johnson,* while one officer was writing the traffic citation, another officer was walking around the motorist's vehicle with a drug-detection dog. *Id.* at 885. In

Mr. Varvel's case, Deputy Crabtree had already completed the initial purpose of the stop before he began the dog sniff. The deputy admits he was not going to issue Mr. Varvel a traffic citation because he had corrected the problem which gave rise to the initial traffic stop. After Deputy Crabtree had given Mr. Varvel back his license, he had fulfilled the lawful purpose of the routine traffic stop.

We do not hold, however, that once an officer tenders a license back to the driver of a vehicle the lawful purpose of a traffic stop is complete. We simply find that under the current set of facts, it is apparent that Deputy Crabtree had resolved the initial purpose of the stop when he tendered the licenses back to Mr. Varvel. The *Johnson* Court notes that "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Id.* at 884. In *Johnson*, the dog sniff prolonged the detainment of the motorist, but it was not to an unreasonable extent. *Id*. The determining factor in whether or not an officer needs reasonable, articulable suspicion that criminal activity is afoot in order to perform a dog-sniff hinges on whether or not the dog sniff was initiated before or after the lawful purpose of the traffic stop was complete. If a dog sniff initiates before the lawful purpose of a traffic stop is complete, then it is lawful as long as the dog sniff does not make the length of the traffic stop unreasonable. *Id*. The United States Supreme Court has ruled that "conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed respondent's constitutionally protected interest in

privacy." *Illinois v. Caballes*, 543 U.S. 405, 408, 125 S. Ct. 834, 160 L. Ed 2d 842 (2005).

On the other hand, if a law enforcement officer has completed his or her lawful purpose of a traffic stop, then that officer would need "a reasonable, articulable suspicion that criminal activity was afoot," *United States v. Smith*, 263 F.3d 571, 588 (6th Cir. 2001), to further detain a motorist for a dog sniff. Since it is apparent from Deputy Crabtree's testimony that he had fulfilled the lawful purpose of the traffic stop when he handed back the licenses, Deputy Crabtree did indeed need reasonable, articulable suspicion that criminal activity was afoot to lawfully detain Mr. Varvel further and conduct the dog sniff. We must now determine whether or not he had reasonable, articulable suspicion that criminal activity was afoot.

> On appellate review of a trial court's denial of a motion to suppress, we must apply the two-step process . . . . First, we review the trial court's findings of fact under the substantial evidence standard. Under this standard, an appellate court will not disturb a trial court's findings of fact if they are supported by substantial evidence. Substantial evidence has been defined as facts of substance and relative consequence having the fitness to induce conviction in the minds of reasonable persons.
>
> After this analysis, we then conduct a *de novo* review of the trial court's application of the law to the established facts to determine whether its ruling was correct as a matter of law.

Morton v. Commonwealth, 232 S.W.3d 566, 568-69 (Ky. App. 2007) (Internal citations omitted).

To determine whether the trial court's ruling was correct in applying the law to the established facts, we review *de novo*. *Id*. *"De novo* review affords no deference to the trial court's application of the law to the established facts." *Id.* at 569.

The trial court concluded Deputy Crabtree's dog sniff was proper on the basis of three findings of facts: (1) Mr. Varvel appeared nervous, (2) Mr. Varvel was driving in a direction opposite of his stated destination, and (3) Mr. Varvel changed his previously stated travel plans. "In order to determine whether there was a reasonable[,] articulable suspicion, the reviewing appellate court must weigh the totality of the circumstances." *Taylor v. Commonwealth*, 987 S.W.2d 302, 305 (Ky. 1998).

The first issue is Mr. Varvel's nervousness. Although "nervousness is generally included as one of several grounds for finding reasonable suspicion . . . [,]" *United States v. Mesa*, 62 F.3d 159, 162 (6th Cir. 1995), "it is an unreliable indicator, especially in the context of a traffic stop." *United States v. Richardson*, 385 F.3d 625, 630 (6th Cir. 2004). Some courts have found it to be quite common for most drivers to become nervous during a routine traffic stop. *See Mesa*, 62 F.3d at 159; *Richardson*, 385 F.3d at 630; *Smith*, 263 F.3d at 571. In fact, one court found that "[m]any citizens become nervous during a traffic stop, even when they have nothing to hide or fear." *Richardson*, 385 F.3d at 630-31. "It is certainly not uncommon for most citizens – whether innocent or guilty – to exhibit

signs of nervousness when confronted by a law enforcement officer." *Smith*, 263 F.3d at 591-92.

In Mr. Varvel's case, the Commonwealth did not proffer any evidence or testimony during the suppression hearing to establish why Deputy Crabtree sensed Mr. Varvel was nervous. Furthermore, there is no evidence in the remainder of the record that speaks to Deputy Crabtree's observance of Mr. Varvel being nervous. In *Mesa*, 62 F.3d at 162, the Appellate Court dismissed an issue altogether from the totality of circumstances analysis because of the trial court's "clearly erroneous" finding of fact. Since there is no evidence, testimony, or anything in the record that indicates Deputy Crabtree observed Mr. Varvel's nervousness, we cannot view that issue in the totality of the circumstances analysis because there is not enough evidence to substantiate the trial court's finding in that regard.

Thus, we are only left with the issue of the discrepancy in Mr. Varvel's travel plans. The facts of this case illustrate that when Mr. Varvel was initially questioned on his travel, he replied that he was coming from Wal-Mart and on his way home. The deputy noticed that Mr. Varvel was actually travelling in a direction opposite of his home. Mr. Varvel, noticing that he was caught telling a false truth, explained to the deputy that he was actually going to an adult bookstore. This type of discrepancy in travel plans is not one that should generate suspicion in the mind of a reasonable police officer. It can easily be seen why Mr. Varvel withheld the truth about his destination. Given that Mr. Varvel could have

been embarrassed about his destination, this Court finds it to be a normal reaction to want to avoid telling the officer.

The Sixth (6th) and Tenth (10th) Circuits have found that "inconsistencies in information given to an officer during a traffic stop may give rise to reasonable suspicion of criminal activity," *Smith*, 263 F.3d at 592, but "some factors may be 'outrightly dismissed,' because they are 'so innocent or susceptible to varying interpretations as to be innocuous.'" *Id*. at 593 *quoting United States v. Wood,* 106 F.3d 942, 946 (10th Cir.1997).

We find that the totality of circumstances presented by the facts in this case did not meet the necessary prerequisites to enable Deputy Crabtree to lawfully detain Mr. Varvel further after the initial purpose of the stop was fulfilled. In this decision, we join in the analysis of the totality of circumstances test of the 6th Circuit as stated below:

> It is possible for factors, although insufficient individually, to add up to a reasonable suspicion - that is the nature of the totality of the circumstances test. But we think it impossible for a combination of wholly innocent factors to combine into a suspicious conglomeration unless there are concrete reasons for such an interpretation.

Smith, 263 F.3d at 594 *quoting Karnes v. Skrutski,* 62 F.3d 485, 496 (3rd Cir. 1995).

CONCLUSION

For the foregoing reasons, we order that the evidence gathered from Bruce Varvel's car be suppressed as fruit of the poisonous tree and for this case to be remanded for proceedings consistent with this opinion.

ALL CONCUR.

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