RENDERED: SEPTEMBER 5, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000675-MR

ALLEN DUNCAN — APPELLANT

v.

APPEAL FROM CLARK CIRCUIT COURT
HONORABLE WILLIAM T. JENNINGS, JUDGE
ACTION NO. 06-CR-00174

COMMONWEALTH OF KENTUCKY — APPELLEE

AND

NO. 2007-CA-000784-MR

SAUNDRA STEPHENS — APPELLANT

v.

APPEAL FROM CLARK CIRCUIT COURT
HONORABLE WILLIAM T. JENNINGS, JUDGE
ACTION NO. 06-CR-00174 AND 06-CR-00174-0

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: ACREE AND CAPERTON, JUDGES; ROSENBLUM,[1] SPECIAL JUDGE.

CAPERTON, JUDGE: Co-defendants Allen Duncan, Jr. (Duncan) and Saundra Stephens (Stephens) bring this appeal from a March 17, 2007, judgment of the Clark Circuit Court, whereby Duncan and Stephens entered a conditional plea of guilty after their motions to suppress the evidence obtained as a result of an alleged illegal stop were overruled. After a thorough review, we vacate and remand to the trial court for specific findings consistent with this opinion.

The trial court held a suppression hearing in conformity with RCr 9.78. At the hearing, the arresting officer testified that he was on patrol on September 13, 2006, when he noticed a white Thunderbird in front of him at a stop sign. The in-cruiser video captured the entire arrest. The officer testified that the occupants were "all over the vehicle" so he decided to follow the car.[2] After the vehicle merged onto I-64 the officer pulled up beside the vehicle and observed Stephens "slumped over" against the passenger door frame. The vehicle merged left I-64 and merged onto the Mountain Parkway. After speaking with his

[1] Retired Judge Paul W. Rosenblum, sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution.

[2] We note that the officer did not testify that the occupants' movement in the vehicle created a traffic hazard, i.e. occupants changing seating positions in a moving vehicle.

supervisor,[3] the officer made a u-turn on I-64 and found the vehicle on the Mountain Parkway. The officer then stopped the vehicle.

The officer approached and asked the driver, Duncan, for his license. The officer, through investigation, discovered Duncan was driving on a suspended operators license and placed Duncan in the cruiser. The officer then asked Stephens to exit the vehicle. Upon exiting the vehicle, Stephens appeared to be intoxicated. The officer testified that at that moment he considered Stephens under arrest for public intoxication but he feared for his safety, as he was outnumbered three to one, and waited until a cruiser with a cage arrived before informing Stephens of her arrest. The officer searched the vehicle and found nothing. In the next fifty minutes the officer repeatedly asked Stephens to hand over the drugs, threatened her with arrest, and even told her that he had "four troopers on the way with a dog, and when they get here, they are going to give you a good enema."[4] At that point Stephens confessed to the officer that she had oxycontin in her pants. Afterwards, she was Mirandized.

At the hearing, the trial court stated that he would pass the motions to suppress until he reviewed the video footage from the cruiser.[5] The court later overruled the motions, finding that the officer had probable cause to make the stop

[3] The officer's statement to the supervisor was "I got behind a vehicle from Illinois, a white Thunderbird. It's a nice one, with two black guys in it and there's a girl slumped over in the passenger seat....there's a white girl slumped over in the passenger seat, I just don't like it. I think they're running drugs."

[4] Cruiser video 3:30:35; Trial video record 3/13/06 at 2:00:22.

[5] Video record 1/25/07 at 10:09.

and that the evidence was obtained as a search incident to arrest. The trial court stated it would make specific factual findings at a later date. Duncan and Stephens appeal this ruling.

An appellate court reviews a trial court's suppression ruling using a two part evaluation: the factual findings of the trial court are reviewed pursuant to the "clearly erroneous" standard, while the trial court's application of the law to the facts is subject to a *de novo* review. *Ornelas v. United States*, 517 U.S. 690, 691, 116 S.Ct. 1657, 1659, 134 L.Ed.2d 911 (1996*); Commonwealth v. Neal,* 84 S.W.3d 920, 923 (Ky.App.2002); and *Bishop v. Commonwealth*, 237 S.W.3d 567, 568-9 (Ky.App.2007). The determination that a stop was supported by reasonable articulable suspicion is reviewed *de novo*. *Ornelas* at 699. To make such a determination, this court must look at the totality of the circumstances surrounding Stephens's detention. *U.S. v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690, 695 (1981).

Our review of the record reveals that the officer never articulated any violation of law to provide grounds to stop the vehicle. The officer did state that there was a lot of movement in the vehicle and that he feared for Stephen's safety because she appeared to be "passed out." While perhaps a close call by the trial court, based on the arguments of counsel we must conclude that the reasons articulated by the officer to stop the vehicle fail to supply the requisite reasonable articulable suspicion of criminal activity required by *Delaware v. Prouse,* 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979).

The Commonwealth argues that the stop was legal based on the community caretaking function articulated in *Cady v. Dombrowski,* 413 U.S. 433, 441, 93. S.Ct. 2523 (1973). Our court addressed the applicability of the community caretaking function in *Poe v. Commonwealth,* 169 S.W.3d 54 (Ky.App.2005). In *Poe* the officer pulled over a motorist who appeared to be lost. When questioned by the officer, Poe admitted to having recently smoked marijuana. In assessing whether the community caretaking function should apply, our Court stated:

> All courts that have considered the community caretaking function have required, at a minimum, that the officer's actions must be measured by a standard of reasonableness. One court described this determination as "balancing the public need and interest furthered by the police conduct against the degree and nature of the intrusion upon the privacy of the citizen." *State v. Ellenbecker*, 159 Wis.2d 91, 96, 464 N.W.2d 427, 429 (Wis.App.1990).... As others have noted, for the community caretaking function to apply there must be some specific and articulable facts that would lead the officer to reasonably believe the citizen is in need of assistance. Quoting *State v*. Jestice, 861 A.2d 1060, 1064 (Vt. 2004).

Poe at 58. The court in *Poe* noted that if Poe had requested assistance the entire issue would be moot. Like *Poe*, the reasons articulated by the officer in the case *sub judice* do not satisfy the stringent standards required by the community caretaking function exception. We note that it is not unusual for vehicles to have a sleeping passenger. Absent some indication of distress from the passenger, allowing the officer to stop a vehicle with a sleeping passenger is questionably an infringement upon our Constitutional rights. Therefore, a stop of a vehicle based

solely upon observing a sleeping passenger would not fall within the community caretaking function exception. For the stop of the vehicle to have been proper, the officer must have had specific and reasonable facts leading to a reasonable belief that a citizen is in need of assistance. See *Poe.*

While the officer noticed a lot of "suspicious" movement in the car, this may not be enough to support the stop. The United States Supreme Court did recognize in *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S.Ct. 673, 676 (2000), that "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion." The cases cited us clearly focus on the evasive nature of a suspect's behavior and not just their nervous demeanor. *See U.S. v. Brignoni-Ponce*, 422 U.S. 873, 885, 95 S.Ct. 2574, 2582, (1975) (stating that "obvious attempts to evade officers can support a reasonable suspicion"); *Florida v. Rodriguez*, 469 U.S. 1, 6, 105 S.Ct. 308, 311, (1984) (noting that the suspect's "strange movements in his attempt to evade the officers aroused further justifiable suspicion"); *U.S. v. Sokolow*, 490 U .S. 1, 8, 109 S.Ct. 1581, 1586, (1989) (stating that "taking an evasive path through an airport" may be "highly probative" of criminal activity).

The trial court stated it would issue specific findings in overruling the motions to suppress; the record before us lacks the trial courts intended specific findings of fact. *See Hebert v. Commonwealth,* 566 S.W.2d 798 (Ky.App. 1978); *Lee v. Commonwealth*, 547 S.W.2d 792 (Ky.App. 1977).

Therefore, we vacate the opinion of the trial court and remand to the trial court for entry of findings of fact in support of its decision to overrule the motions to suppress.

ALL CONCUR.

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