

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000073-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 07-CR-00525

REBECCA DEE OUTLAND

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; STUMBO, JUDGE; GUIDUGLI,¹ SENIOR JUDGE.

STUMBO, JUDGE: The Commonwealth of Kentucky appeals from Findings of Fact, Conclusions of Law and Order Suppressing Evidence of the McCracken Circuit Court sustaining the motion of Rebecca Outland to suppress the introduction of evidence obtained during a traffic stop. It argues that the circuit

¹ Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

court erred in concluding that the police did not have reasonable suspicion sufficient to detain Outland, and that her observed nervous behavior alone did not create reasonable suspicion. For the reasons stated below, we reverse the order on appeal and remand the matter for trial.

On July 21, 2007, Outland's vehicle was stopped by the McCracken County sheriff's office after the vehicle was observed speeding and failing to signal a turn. At the time of the traffic stop, Outland was the subject of a drug investigation and was being observed as part of that investigation. After Outland was stopped, she was given a courtesy warning ticket. According to the record, it took approximately 10 - 15 minutes for this to occur. After the ticket was issued, she was asked to step out of the vehicle. Outland complied, and according to the record was cooperative and agreed to talk. During the course of the stop, two additional police units arrived at the scene. Testimony was later adduced that the entire stop lasted between 15 and 30 minutes.

While Outland was standing outside her vehicle, she was asked if she would consent to a search of her vehicle. She appears to have responded affirmatively, with the caveat that she did not want to do it if it would take too long. After consent was given, a search was conducted whereupon the deputies found a marijuana roach in the vehicle, and methamphetamine, marijuana and a methamphetamine pipe on her person. Outland was later indicted by the McCracken County grand jury on one count each of possession of methamphetamine, possession of marijuana and possession of drug paraphernalia.

Outland subsequently filed a motion to suppress the evidence obtained during the search of her vehicle and of her person. As a basis for the motion, she argued that she was unlawfully detained after the traffic stop was concluded; i.e., that she should not have been detained after the basis for the stop - the traffic violations - was resolved by the issuance of the warning ticket. A hearing on the motion was conducted on November 28, 2007, where Detective Matt Carter testified that after the warning ticket was issued, Outland was no longer being detained and was free to leave. Carter, however, never told Outland that she was free to go, and Outland later stated that after the ticket was issued she still did not feel free to leave. A passenger in the vehicle, Tera Smith, testified that she regarded as a command Detective Carter's statement to Outland asking her to exit the vehicle.

The corpus of Outland's argument was that she was improperly detained after the ticket was issued because there was no reasonable suspicion to justify the detention. The Commonwealth maintained that there was probable cause for the traffic stop (i.e., the observation of the vehicle speeding and failing to signal a turn), and that it was otherwise permissible to request Outland's consent to search after the ticket had been issued.

After considering the testimony and memoranda, the circuit court rendered its Findings of Fact, Conclusions of Law and Order Suppressing Evidence on December 28, 2007. It found in relevant part that Outland was properly stopped for the moving violation; that the stop and citation lasted

approximately 10 minutes; that during the course of the stop, two other police units arrived, including a K-9 unit; and, that there were no reasonable grounds to detain Outland after she was issued the ticket. The court went on to conclude that though Detective Carter's suspicion allegedly arose from Outland's nervous behavior, nervousness or restlessness alone does not create reasonable suspicion. The court did not address whether Outland had given consent, nor whether the purported unlawful detention had the effect of rendering Outland's consent involuntary. It sustained Outland's motion to suppress the evidence obtained during the search, and this appeal followed.

The Commonwealth now argues that the circuit court erred in sustaining Outland's motion to suppress. While noting that the court did not address the effect of Outland's consent, the focus of its argument is that the court improperly concluded that Outland was unlawfully detained after the ticket was issued. It points to the brief time between the conclusion of the stop - i.e., the point at which the ticket was issued - and the giving of consent, and further notes that no evidence exists nor argument was made that the consent was not voluntary. The Commonwealth contends that the purported detention was not unreasonable for a traffic stop, and that the totality of the circumstances does not support a finding of unlawful detention. It analogizes the post-ticket questioning of Outland to the legitimate practice of "knock and talk" as recognized by this Court and others, and maintains that it is not unlawful or otherwise improper to ask a person if he or she will consent to a search. In sum, the Commonwealth contends that the suppression

order was not supported by the facts and the law, and should be reversed. Outland has not filed a responsive brief.

We have closely examined the record and the law, and must conclude that the circuit court erred in sustaining Outland's motion to suppress the evidence obtained during the search of her vehicle and person. In a matter remarkably similar to the one at bar, a panel of this Court previously held that when consent is given during detention not justified by reasonable suspicion, the sole question for purposes of the Fourth Amendment is the voluntariness of the consent and not the lawfulness of the detention. *Commonwealth v. Erickson*, 132 S.W.3d 884 (Ky. App. 2004). In *Erickson*, as in the matter at bar, a vehicle was stopped in McCracken County, Kentucky, after a sheriff's deputy observed the vehicle committing a traffic violation. A conversation described as cordial ensued, after which the driver was issued a verbal warning. After the driver's documents had been returned to him and the warning was issued, the deputy continued to talk to the driver for a few minutes and eventually asked for consent to search the vehicle. The driver complied, whereupon drugs were found in the vehicle.

The McCracken County grand jury indicted Erickson on drug possession and trafficking charges, and he subsequently filed a motion to suppress the evidence obtained during the search. Like Outland, he argued that the purpose of the traffic stop was completed at such time the warning was issued, and any detention thereafter was necessarily unlawful. Pointing to *U.S. v. Mesa*, 62 F.3d 159 (6th Cir. 1995), Erickson claimed that the alleged unconstitutional detention

should bar the Commonwealth from introducing any evidence obtained during that period of detention.

The McCracken Circuit Court was persuaded by this argument and sustained Erickson's motion to suppress. On appeal, a panel of this Court determined that the dispositive inquiry for purposes of the Fourth Amendment was not whether the detention was supported by reasonable suspicion, but rather whether the consent was voluntary. Relying on *United States v. Burton*, 334 F.3d 514, 518 (6th Cir. 2003), we stated that,

In harmony with the argument advanced by the Commonwealth throughout this litigation, *Burton* holds that where a motorist is initially stopped for a valid purpose and subsequently gives consent to a search of his vehicle, the voluntariness of his consent is the only issue to consider for purposes of the Fourth Amendment - and not whether the continued detention was justified by reasonable suspicion. [Citation omitted]. Accordingly, we are compelled to agree with the Commonwealth that the McCracken Circuit Court erred in suppressing the evidence absent a specific finding that Erickson's consent was not voluntary after engaging in an analysis of all of the circumstances surrounding his encounter with Deputy Archer.²

Erickson at 889.

In the matter at bar, the Commonwealth claims that the period of interaction between Outland and the sheriff's deputies and detective did not constitute detention. While this argument is not persuasive, it is also not relevant for purposes of applying *Erickson*. The period of detention followed what was clearly a lawful period of detention (the traffic stop), and the presence of three

² For a complete summary of the development of this rule, see *Erickson, supra*.

police units and a K-9 unit would reasonably cause Outland to believe that she was not free to leave. As noted in *Erickson*, however, the constitutionality - or lack of constitutionality - of this detention has no bearing on whether the evidence obtained from Outland's vehicle and person must be suppressed. The sole issue is whether Outland's consent was voluntary, even if that consent was made during a period of unlawful detention.

Again, just as in *Erickson*, the McCracken Circuit Court made no findings of fact or conclusions of law as to whether Outland's consent was voluntary. And just as in *Erickson*, Outland's motion to suppress centered on the constitutionality of the detention and not the voluntariness of the consent. The consent issue was not raised below nor adjudicated in the order on appeal. Since the involuntariness of the consent would be the sole basis for suppressing the evidence arising therefrom, and because the circuit court did not find that Outland's consent was not voluntary, the order suppressing the evidence was in error. Outland apparently consented to the search, and nothing in the record leads to a different conclusion. According to *Erickson*, this resolves Outland's motion to suppress in favor of the Commonwealth.

For the foregoing reasons, we reverse the order of the McCracken Circuit Court sustaining Outland's motion to suppress, and remand the matter for trial.

COMBS, CHIEF JUDGE, CONCURS.

GUIDUGLI, SENIOR JUDGE, DISSENTS.

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