

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000663-DG

RODERICK A. TEJEDA

APPELLANT

ON DISCRETIONARY REVIEW FROM LAUREL CIRCUIT COURT
v. HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 07-XX-00004

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KELLER, MOORE AND TAYLOR, JUDGES.

MOORE, JUDGE: This is an appeal by Roderick A. Tejada of an Opinion entered by the Laurel Circuit Court reversing and remanding a case that was dismissed by the Laurel District Court. We granted discretionary review. On appeal, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On November 20, 2006, Kentucky Vehicle Enforcement was notified of an accident on I-75. Officer Toby Curry worked the accident scene and had

earlier received a complaint of a white Ford Mustang driving at a high rate of speed and cutting in and out of traffic. While assisting with the accident, Officer Curry observed a white Ford Mustang, matching the description from the earlier complaint, maneuvering around road debris and eventually stalling. Officer Curry then witnessed a semi-tractor trailer pushing the vehicle onto the shoulder of I-75 where the car came to a stop. Officer Curry asked Officer Bert Foster to assist the vehicle. Officer Foster did so. The driver, Tejada, explained that his car had run out of gas. Officer Foster agreed to call a wrecker for Tejada and returned to working the accident.

Officer Foster informed Officer Curry that he thought he had detected the smell of alcohol on Tejada's breath. Officer Curry later approached Tejada's vehicle and smelled an odor of alcohol on Tejada. He administered several field sobriety tests which Tejada was either unable to complete or "failed". Tejada admitted in his testimony before the district court that when Officer Foster first approached him, he was drinking and that he continued to do so. But, he denies drinking prior to his car running out of gas. Tejada was placed under arrest for Improper Parking and Driving Under the Influence.

Tejada's case was first brought before the Laurel District Court on charges of Driving Under the Influence and Improper Parking. Tejada filed a motion to "suppress any and all evidence regarding any and all statements made to any police officers prior to his arrest" and to dismiss the complaint.

The district court found that Tejeda was not in actual physical control of an operable vehicle; therefore, he could not be convicted under KRS¹ 189A.010 for Driving Under the Influence. The district court dismissed that charge. Also, because “KRS 189.450 clearly states that the prohibition in that statute does not apply when a vehicle has become disabled in the right-of-way to such an extent that it is impossible to avoid parking on the shoulder of the road,” the district court dismissed the charge of Improper Parking. Consequently, all charges before the district court were dismissed.

The Commonwealth appealed the district court’s dismissal to the Laurel Circuit Court. The circuit court reversed, finding that the issue of whether Tejeda was operating the vehicle while under the influence before it ran out of gas was a factual issue for a jury to decide and remanded. Thereafter, Tejeda filed a motion for discretionary review to the Court of Appeals. We granted the motion.

Tejeda argues that the district court’s findings of fact were supported by substantial evidence and were not erroneous, therefore, the circuit court erred when it applied its own findings of fact. Tejeda also asserts that the circuit court’s *de novo* application of the law was clearly erroneous.

The Commonwealth asserts that the circuit court rightfully considered all of the facts. Additionally, the Commonwealth claims that the district court’s dismissal was erroneous as determined by the circuit court because Tejeda was in

¹ Kentucky Revised Statutes.

physical control and was operating a motor vehicle in contravention of KRS 189A.010.

II. STANDARD OF REVIEW

“Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” CR² 52.01; *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). A factual finding is not clearly erroneous if it is supported by substantial evidence. *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Substantial evidence is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people. *Id.* We, of course, review issues of law *de novo*.

III. ANALYSIS

The issue before the Court is whether or not probable cause existed to make an investigatory “stop” of Tejada’s vehicle. In order for a police officer to make an investigatory stop, he must have reasonable suspicion that a person has committed or is committing a crime. *Collins v. Commonwealth*, 142 S.W.3d 113, 115 (Ky. 2004); see also *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). To determine whether reasonable suspicion exists, we examine the facts under the totality of the circumstances. *Taylor v. Commonwealth*, 987 S.W. 2d 302, 305 (Ky. 1998). In determining probable cause when there is a question of whether the defendant was driving, factors to be considered are: “(1) whether or

² Kentucky Rule of Civil Procedure.

not the person in the vehicle was asleep or awake; (2) whether or not the motor was running; (3) the location of the vehicle and all the circumstances bearing on how the vehicle arrived at the location; and (4) the intent of the person behind the wheel.” *Wells v. Commonwealth*, 709 S.W. 2d 847, 849 (Ky. App. 1986).

However, this Court has determined that the *Wells* factors are not exclusive and that probable cause is “a fluid concept – turning on the assessment of probabilities in particular factual contexts.” *White v. Commonwealth*, 132 S.W.3d 877, 883 (Ky. App. 2003).

In *White*, probable cause was found to arrest the defendant for driving under the influence where no one saw the defendant operating the vehicle and the vehicle was found unoccupied and inoperable in a roadway. *Id.* Despite the defendant’s never admitting to driving the vehicle or to consuming alcohol, the Court found probable cause where the defendant walked to a nearby home to call someone to pick him up and his statement that his wife would be upset to learn that he had misplaced his truck. *Id.*

In this case, the Kentucky Vehicle Enforcement had received a complaint that a driver of a white Ford Mustang was driving erratically in the vicinity of the accident on I-75. Tejedá’s vehicle matched the description and was in the reported area. Officer Curry was aware of the earlier complaint and witnessed the vehicle being pushed onto the shoulder by a semi-tractor trailer. He asked Officer Foster to check on the situation. When Officer Foster approached the vehicle, he thought he smelled alcohol on Tejedá. Although the timing of

Tejeda's consumption of alcohol is disputed, Tejeda freely admitted to consuming alcohol while inside the vehicle and at the time when Officer Foster first approached him.

Similar to *White*, the Officers in this case were not aware of the timing of the alcohol consumption, and that is certainly a debatable question. However, given (1) the earlier complaint of a vehicle matching Tejeda's driving erratically; (2) Officer Curry witnessing Tejeda's vehicle being pushed to the side of a road by a semi-tractor trailer; (3) Officer Foster's belief that he smelled alcohol on Tejeda's breath when he first approached him; (4) Officer Curry's detection of alcohol on Tejeda's breath; and (5) considering the totality of the circumstances, there existed reasonable suspicion of criminal activity necessary to justify the questioning of Tejeda, administering sobriety tests to him, and the subsequent arrest. Thus, we agree with the circuit court that probable cause existed for the officers to believe that Tejeda had operated the vehicle while under the influence. It will be up to a jury to determine whether or not it believes the evidence shows beyond a reasonable doubt that Tejeda was operating a motor vehicle while under the influence before it became inoperable.

IV. CONCLUSION

For the foregoing reasons, we affirm the circuit court and remand to the district court for further proceedings in accordance with this opinion.

ALL CONCUR.

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