

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001547-MR

BRIAN D. BROWN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 08-CR-01173

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: TAYLOR, CHIEF JUDGE; DIXON, JUDGE; HENRY,¹ SENIOR JUDGE.

DIXON, JUDGE: In May 2009, Appellant, Brian D. Brown, entered a conditional guilty plea in the Fayette Circuit Court to possession of a controlled substance. He

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute 21.580.

was sentenced to one year imprisonment, probated for a period of five years.

Pursuant to the plea agreement, Appellant now appeals the denial of his suppression motion. Finding no error, we affirm.

On August 1, 2008, Lexington Police Officer Dawn Dunn stopped a rental car driven by Ira Joseph Robinson after Robinson made a left-hand turn without giving a turn signal. Appellant was a passenger in the vehicle. Apparently Robinson only had a learner's permit and Appellant was asked for his driver's license and the vehicle's rental agreement. Officer Dunn returned to her vehicle to run a check on "Channel One" -- the police radio. However, because the channel was busy with other inquiries, Officer Dunn ran a search on Robinson and Appellant through the county jail's website and discovered that both men had prior narcotics charges and Robinson also had several firearms charges.

While still waiting for the Channel One to become available, Officer Dunn requested a canine unit based upon the information she had received from the jail website. Within a few minutes, Officer Dunn was able to get through on Channel One and learned that Robinson had an outstanding warrant. As she was confirming the information, Officer Stiltner arrived with his narcotics-detection dog.

After Officer Dunn reapproached the vehicle and informed Robinson that he was under arrest due to the outstanding warrant, Officer Stiltner's dog had a positive hit on the vehicle. A subsequent search of the interior of the vehicle revealed no contraband or weapons. However, when the officers opened the trunk,

the drug dog “lunged” at the vehicle. Officers thereafter discovered two bags of suspected cocaine wrapped in a shirt hidden in the spare tire compartment. Based upon the discovery of drugs, Appellant was also arrested.

In September 2008, Appellant was indicted by a Fayette County Grand Jury for first-degree trafficking in a controlled substance and for being a second-degree persistent felony offender. Appellant thereafter filed a motion to suppress all evidence and statements, arguing that he was seized “unlawfully, without probable cause or reasonable suspicion” in violation of his federal and state constitutional rights. The trial court conducted a hearing on November 13, 2008, after which it denied Appellant’s suppression motion.

Appellant thereafter entered a conditional guilty plea to an amended charge of first-degree possession of a controlled substance. The PFO II charge was dismissed. This appeal ensued.

In this Court, Appellant first argues that the trial court erred in finding that Officer Dunn had a reasonable and articulable suspicion that Robinson had committed a traffic offense that justified the stop. Further, Appellant maintains that even if the initial stop was warranted, the scope and duration of such exceeded that allowed by law and was unconstitutional. As a result, Appellant contends that any contraband seized as a result of the unlawful detention was “fruit of the poisonous tree” and should have been suppressed. *See Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). We disagree.

Our standard of review of a trial court's decision on a suppression motion following a hearing is twofold. First, the factual findings of the court are conclusive if they are supported by substantial evidence. RCr 9.78; *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998); *Stewart v. Commonwealth*, 44 S.W.3d 376 (Ky. App. 2000). The second prong involves a *de novo* review to determine whether the court's decision is correct as a matter of law. *Commonwealth v. Opell*, 3 S.W.3d 747, 751 (Ky. App. 1999). Kentucky has adopted the standard of review approach articulated by the United States Supreme Court in *Ornelas v. United States*, 517 U.S. 690, 698-700, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911 (1996), wherein the Court observed:

[A]s a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal. Having said this, we hasten to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.

Furthermore, at a suppression hearing, the trial court is the sole trier of fact and the sole judge of credibility of the witnesses. If the facts are supported by substantial evidence, they are conclusive. RCr 9.78.

Appellant first argues that Officer Dunn improperly stopped the vehicle as no traffic infraction occurred. As he did in the lower court, Appellant maintains that the intersection in question did not require a traffic signal because no turn was involved. We disagree.

Traffic stops are considered brief investigatory stops under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and, as such, require a reasonable and articulable suspicion of criminal activity. *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). Pursuant to KRS 189.380, “[a] person shall not turn a vehicle or move right or left upon a roadway . . . without giving an appropriate signal” At the suppression hearing, Officer Dunn testified that she observed Robinson’s vehicle make a left-hand turn without giving a signal, thus engaging in conduct that constituted a traffic violation under KRS 189.380. Officer Dunn’s personal observation of the violation gave her the right to initiate the stop. *Whren v. United States*, 517 U.S. 806, 819, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996); *Garcia v. Commonwealth*, 185 S.W3d 658, 662 (Ky. App. 2006) (“The occurrence of a traffic violation is recognized as sufficient justification to warrant a stop of a motor vehicle.”).

Appellant persists in characterizing the vehicle’s movement as continuing straight through the intersection rather than turning. However, the trial court made extensive findings of fact on this issue:

[T]he court finds that Officer Dunn did in fact have reasonable suspicion that a traffic violation had occurred under these circumstances. I fully recognize [defense counsel’s] argument that to proceed ahead in a direct way on a street doesn’t involve turn signals. But to me, the circumstances of this case – looking at the totality of the circumstances – that’s a different animal. Maple is a continuation of the name to sure, but it is a turn, you veer 45 degrees to the left. I mean that’s just what it is. And it’s not just a straight line going down an intersection, going down a street, and you come to a traffic light or a

stop sign and just continue straight on. That's not what we got here.

Clearly, based upon the evidence presented by the Commonwealth, including the testimony of Officer Dunn as well as a street map of the area, the trial court made a finding of fact that Robinson made a 45 degree left-hand turn without a signal. Because such was a violation of applicable traffic statutes, Officer Dunn had a reasonable and articulable suspicion of criminal activity that justified the traffic stop.

Nor do we find any merit in Appellant's claim that Officer Dunn's testimony should have been discounted because she initially made a mistake as to the location of the intersection where Robinson was stopped. Officer Dunn explained during her testimony that she had simply made a mistake when filing out her initial report by listing the incorrect cross-street. There is absolutely no evidence in the record that Officer Dunn's mistake was anything other than that. There is certainly no indication of intentional wrongdoing. In commenting on the error, the trial court noted,

I found Officer Dunn's testimony to be credible. You know, why she wrote down the different street, cross-street, and all that type of thing – is certainly subject to cross. But I did not find that that damaged her credibility to the point that I did not rely upon her testimony.

It is well-settled that the weight and credibility of a witness is within the sole province of the fact-finder. *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983); *see also Pitcock v. Commonwealth*, 295 S.W.3d 130, 132 (Ky. App. 2009) (“At a

suppression hearing, the ability to assess the credibility of witnesses and to draw reasonable inferences from the testimony is vested in the discretion of the trial court.”). We conclude that the trial court herein was in the best position to assess the credibility of the witnesses and evidence presented during the suppression hearing and that its findings are supported by substantial evidence. RCr 9.78.

Appellant next argues that even if the initial traffic stop was justified, the ensuing detention that followed was unconstitutional. Specifically, Appellant contends that Officer Dunn lacked a reasonable suspicion that either Robinson or Appellant were trafficking in drugs and that the extended detention and use of the narcotics-detection dog exceeded the scope of the intrusion permitted by *Terry*. Again, we disagree.

The use of a narcotics-detection dog during a lawful traffic stop generally does not violate legitimate privacy interests. *See United States v. Place*, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983). “[A] canine sniff by a well-trained narcotics-detection dog [is treated as] 'sui generis' because it 'discloses only the presence or absence of narcotics, a contraband item.' ” *Illinois v. Caballes*, 543 U.S. 405, 409, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005) (*quoting United States v. Place*, 462 U.S. at 707). Though dog “sniffs” are not considered searches that would implicate Appellant's Fourth Amendment rights, because he was detained his claim can still succeed if he can show that the detention itself was otherwise unreasonable. *See Epps v. Commonwealth*, 295 S.W.3d 807 (Ky. 2009). “A seizure that is justified solely by the interest in issuing a . . . ticket to the driver can

become unlawful if it is prolonged beyond the time reasonably required to complete that mission." *Caballes*, 543 U.S. at 407, 125 S.Ct. 834.

In *Johnson v. Commonwealth*, 179 S.W.3d 882 (Ky. App. 2005), the defendant was stopped for failing to use a turn signal. The officer also observed that the defendant's license plate was not illuminated and the registration tags were expired. Although the defendant provided the officer with a driver's license and proof of insurance, he refused to consent to a search of the vehicle. The officer then returned to his patrol car to prepare a citation for the expired registration and also requested a canine unit. Before the paperwork was completed, the canine unit arrived at the scene. The evidence established that the narcotics-detection dog arrived and defendant was asked to step out of his car between five to seven minutes of the initial traffic stop, and the entire detention took only fifteen minutes.

On appeal, the defendant challenged "the scope and duration of the detention that allowed for the dog sniff." However, a panel of this Court rejected that argument, agreeing instead with the trial court's conclusion "that the brief period of detention lasted no longer than was necessary to achieve the purpose of the stop." *Id.* Consistent with *Caballes*, the Court explained:

We have examined the record and find nothing to indicate that the duration of Johnson's detention was so prolonged as to be unjustified. Officer Roush appears to have pursued his investigation in a diligent and reasonable manner. He made a radio transmission to dispatch, awaited information, then contacted the canine unit. His encounter with Johnson was focused and immediate, and he set out directly to complete the paperwork involved in issuing a citation. The purpose of

the initial stop had not been completed before the canine unit arrived at the scene, and the dog sniff did not prolong the stop to any unreasonable extent. The dog sniff occurred while Johnson was being lawfully detained by Roush. After the dog alerted to the presence of narcotics, the officers undoubtedly had probable cause to search the vehicle. Consequently, the trial court did not err by denying Johnson's motion to suppress the evidence recovered from his car.

Johnson, 179 S.W.3d at 885-86.

With respect to the duration of the stop herein, the trial court found:

The court will make a finding that the initial traffic stop occurred at 2358 which is two minutes before midnight on August 1, 2008. Officer Dunn remained in her cruiser awaiting Channel One information and even before she got out of her vehicle to go back to the car to conduct any other investigation or whatever she needed to do, the canine unit had already arrived. Officer Dunn testified and there's no dispute in any testimony. The court will make a finding the canine unit arrived approximately 15 minutes after the initial traffic stop while Officer Dunn was still in her cruiser

Furthermore, the trial court found that the narcotics-detection dog had a "positive hit" on the vehicle after Robinson was arrested but before the officers had the opportunity to conduct a search incident to arrest. Certainly, we agree with the trial court that once the dog "hit," a search of the vehicle in its entirety, including the trunk, was justified.

We are of the opinion that Appellant failed to demonstrate that the duration of his detention was so prolonged as to be unjustified. Officer Dunn acted in a diligent and reasonable manner. As in *Johnson*, the purpose of the initial stop had not been completed before the canine unit arrived at the scene, and the

narcotics-detection dog did not prolong the stop to any unreasonable extent. Further, the dog's positive hit occurred while Appellant was being lawfully detained. After the dog alerted to the presence of narcotics, the officers undoubtedly had probable cause to search the vehicle. Consequently, the trial court did not err by denying Appellant's motion to suppress the evidence recovered from the vehicle.

Finally, Appellant argues that the Commonwealth failed to present any evidence that the narcotics-detection dog was properly trained or reliable in drug detection. However, this issue was not raised in the trial court and will not be addressed herein. RCr 9.22.

The judgment and sentence of the Fayette Circuit Court are affirmed.

ALL CONCUR.

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