RENDERED: OCTOBER 8, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002352-MR

ROBERT LEON WILLIAMS — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
ACTION NO. 06-CR-00162

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND THOMPSON, JUDGES; HARRIS,[1] SENIOR JUDGE.

HARRIS, SENIOR JUDGE: Following his conditional plea of guilty[2] to tampering with physical evidence, possession of marijuana, operating a motor

[1] Senior Judge William R. Harris 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.

[2] Kentucky Rules of Criminal Procedure (RCr) 8.09.

vehicle under the influence of alcohol (DUI), being a second-degree persistent felony offender, and imposition of a five-year prison sentence, Robert Leon Williams appeals from the order of the Hardin Circuit Court which denied his motion to suppress evidence found by police officers in the vicinity of his DUI arrest. After a careful review of the record, the law, and the briefs, we affirm.

On November 6, 2005, while on patrol Radcliff Police Officer Branson McLeod noticed a vehicle stopped on a road. Officer McLeod stopped to investigate, and activated his in-cruiser video camera which recorded the subsequent events. Since he had not received information about the stopped car on his police radio, Officer McLeod assumed that the vehicle had not been stopped there long. From running the license plate number, Officer McLeod learned that the vehicle was registered to Williams. He then exited his patrol car for further investigation and found that the car was empty. Williams was standing outside the car on the driver's door side. Joy Young was standing outside the car on the passenger's side. The two admitted that they had been to a club, but claimed they had exited the car and were having an argument when Officer McLeod arrived.

The officer observed that the car's motor was not running but the key was in the ignition. He wanted to speak to Young privately so he asked Williams to return to the car. Williams walked to the car and sat in the driver's seat. Officer McLeod gave Williams a portable breathalyzer test (PBT) and a sobriety test. He failed both tests and was arrested for DUI. The officer then asked Williams if he

would like for Young to drive his car home. Williams replied that he did not want Young to have the keys but that she could sit in the car until someone arrived to drive her home.

While booking Williams on the DUI Charge, Officer McLeod watched the in-car video, which shows that while McLeod was talking to Young Williams reached into his front pocket and tossed an object into a nearby field. McLeod and two other officers went to the field and found a small bag of marijuana in the location where Williams had tossed the object.

Williams was subsequently indicted by the Hardin County Grand Jury. His motion to suppress was heard in Hardin Circuit Court on January 17, 2007, and denied. On that same date, Williams entered his conditional guilty plea in accordance with RCr 8.09. The judgment and order imposing sentence entered on March 7, 2007, recited that Williams was "reserving the right to appeal the denial of suppression, heard before Hon. Janet P. Coleman on January 17, 2007."[3]

Our review of a trial court's ruling on a motion to suppress is a two-step analysis.

> First, factual findings of the court involving historical facts are conclusive if they are not clearly erroneous and are supported by substantial evidence. Second, the ultimate issue of the existence of reasonable suspicion or probable cause is a mixed question of law and fact subject to de novo review. In conducting this analysis, the reviewing court must give due weight to inferences

[3] We quote this language because in his brief Williams makes some mention of a motion to dismiss the DUI charge which was also heard on January 17, 2007. We are not considering the trial court's ruling on that motion because it has not been reserved for appeal in accordance with RCr 8.09.

> drawn from the facts by the trial court and law enforcement officers and to the circuit court's findings on the officer's credibility.

Baltimore v. Commonwealth, 119 S.W.3d 532, 539 (Ky. App. 2003).

It is well settled that a trial court does not have authority to dismiss an indictment based upon a lack of probable cause or insufficient evidence. *Commonwealth v. Bishop*, 245 S.W.3d 733, 735 (Ky. 2008). A trial court may, however, suppress evidence discovered from an arrest that lacked probable cause. *Wilson v. Commonwealth*, 37 S.W.3d 745, 748 (Ky. 2001).

"Probable cause must exist and be known by the arresting officer at the time of the arrest." *Commonwealth v. White*, 132 S.W.3d 877, 883 (Ky. App. 2004). Therefore, Officer McLeod must have had a reasonable belief, in light of the circumstances, that there was a "fair probability" that Williams operated the motor vehicle while under the influence of alcohol. *Id.*; *see also Eldred v. Commonwealth*, 906 S.W.2d 694, 705 (Ky. 1994).

Relying on the factors contained in *Wells v. Commonwealth*, 709 S.W.2d 847 (Ky. App. 1986), Williams argues that the Commonwealth could not prove that Williams was actually in control of the car. Those factors include: (1) whether the person in the vehicle was asleep or awake; (2) whether the vehicle's motor was running; (3) the location of the vehicle and the circumstances surrounding how the vehicle arrived at the location; and (4) the intent of the person behind the wheel. *Id.* at 849. Williams' strict reliance on these factors is misplaced.

The factors established in *Wells* are not exclusive. Instead, the factors are merely suggestive and exhibit the need for a totality of the circumstances analysis. *See Harris v. Commonwealth*, 709 S.W.2d 846, 847 (Ky. App. 1986). As this Court wrote in *White*, 132 S.W.3d at 883, "[p]robable cause is a 'fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules" (internal citations omitted). Applying this fluid concept we can deduce from the facts, surrounding circumstances, and suggested *Wells* factors that there was a "fair probability" that Williams operated the vehicle.

Based upon a lack of reports and the location of the vehicle, Officer McLeod concluded that the car had been parked in the roadway for a short period of time. The car was registered to Williams, who was near the driver's door when Officer McLeod arrived. After Williams failed the PBT and sobriety tests, Williams did not want Young to drive the car. When told to get in the car, Williams sat in the driver's seat. While this evidence may not amount to proof of DUI beyond a reasonable doubt, it certainly establishes a reasonable inference that Williams drove the car while intoxicated.

There was substantial evidence to support the trial court's factual determination, and the trial court correctly applied the law to the facts.

Accordingly, we affirm the Hardin Circuit Court's denial of Williams' suppression motion.

ALL CONCUR.

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