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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002065-MR

BILLY HOOKER — APPELLANT

v.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE JOHN KNOX MILLS, JUDGE
ACTION NO. 09-CR-00052

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, MOORE, AND VANMETER, JUDGES.

VANMETER, JUDGE: Billy Hooker appeals from the judgment and sentence entered by the Knox Circuit Court following his conviction by a jury of fleeing or evading police in the first degree and disregarding a stop sign. For the following reasons, we affirm.

During the early morning hours of April 18, 2009, Officers Winston Tye and Jake Knuckles were sitting in their cruisers at an intersection in Knox

County when they heard and saw a motorbike driving toward them. The motorbike came to a stop in the middle of the road, approximately 75 to 100 feet away from the officers, and the driver attempted to turn the motorbike around in the opposite direction. The officers grew suspicious and Officer Tye approached the motorbike in his cruiser to investigate.

As Officer Tye pulled up beside the motorbike, he recognized Hooker as the driver. Officer Tye had his window down and ordered Hooker to stop. Officer Tye started to put his cruiser in park to get out; when he did, Hooker took off and drove around him toward Officer Knuckles. As the motorbike sped past Officer Knuckles' cruiser, about four feet away from it, Officer Knuckles noticed that the driver was not wearing a helmet and recognized Hooker as the driver. Officer Knuckles then activated his lights and siren and both officers pursued Hooker through town.

During the pursuit, the officers observed Hooker drive onto a sidewalk, almost wrecking, and disregard a stop sign without slowing down. Hooker turned into a driveway between a church and his mother's house, at which point Hooker's brother ran off the front porch of the house in front of Officer Knuckles' cruiser, yelling and cursing at him. Hooker's brother then chased Officer Tye's cruiser down the street, yelling at him. The officers were unable to locate Hooker to effectuate an arrest that morning; however, Hooker was eventually apprehended.

The morning of trial, Hooker moved to suppress any evidence stemming from the officers' attempt to stop him, on the basis that the officers lacked

reasonable and articulable suspicion for the stop. The trial court conducted a hearing on the motion and Officer Tye testified that he became suspicious after Hooker attempted to turn the motorbike around upon seeing the officers. The trial court denied Hooker's motion to suppress.

The case proceeded to trial and a jury convicted Hooker of fleeing or evading police in the first degree and disregarding a stop sign. Upon conclusion of the guilt/innocence phase of the trial, the Commonwealth and Hooker reached a plea agreement on the sentencing phase, which the trial court accepted. The court then sentenced Hooker to five years' imprisonment on the charge of first-degree fleeing or evading police, which was enhanced to fifteen years by virtue of Hooker's status as first-degree PFO.[1] As part of the plea agreement, Hooker reserved his right to appeal the first-degree fleeing or evading police conviction. This appeal followed.

First, Hooker argues the trial court erred by denying his motion to suppress evidence as the fruit of an illegal stop since the police officers lacked reasonable and articulable suspicion to stop the motorbike. Since we find that no actual stop occurred, any evidence of illegal conduct on behalf of Hooker during the chase should not have been suppressed.

We review a trial court's denial of a motion to suppress first to determine whether the trial court's factual findings are clearly erroneous and then *de novo* to determine whether the trial court's decision is correct as a matter of law. *Henry v. Commonwealth*, 275 S.W.3d 194, 197 (Ky. 2008).

[1] Hooker was also fined $100, to be paid within six months of his release from incarceration.

In this case, the trial court found that the officers had reasonable and articulable suspicion for stopping Hooker. However, as the Commonwealth emphasizes on appeal, whether the officers had reasonable and articulable suspicion is irrelevant since no actual stop of Hooker occurred. As noted by the Kentucky Supreme Court:

> A seizure occurs when an officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen. A seizure does not occur, however, if in response to a show of authority, the subject does not yield. In that event, the seizure occurs only when the police physically subdue the subject.
>
> Here, it is undisputed that when the officer turned on his lights, [the defendant] failed to yield to his authority. Instead, he led police on a high-speed chase, which included driving in the wrong lane of traffic. [The defendant's] seizure only occurred when the police physically apprehended him following the chase. Thus, the police officer's justification for initially attempting to stop [the defendant] is immaterial[.]

Taylor v. Commonwealth, 125 S.W.3d 216, 219-20 (Ky. 2003) (internal citations omitted).

The same rationale applies here. Officer Tye's justification for attempting to stop Hooker is immaterial since no stop actually occurred.[2] Indeed, the record reflects that the chase did not result in Hooker's immediate apprehension and Hooker concedes on appeal that the "stop" was actually an "attempt to stop." Thus, any evidence against Hooker emanating from the attempted stop and

[2] The fact that the trial court's decision to deny the motion to suppress was based upon different reasoning does not alter our result since well-settled is the rule that an appellate court may affirm a lower court for any reason supported by the record. *See McCloud v. Commonwealth*, 286 S.W.3d 780, 786 n.19 (Ky. 2009).

subsequent chase, including Officer Tye's testimony, was not the fruit of an unreasonable seizure. Accordingly, the trial court did not err by denying Hooker's motion to suppress such evidence.

Next, Hooker contends the trial court erred by denying his motion for a directed verdict on the charge of first-degree fleeing or evading police. Specifically, he claims that insufficient evidence existed for the jury to find that he created a substantial risk of serious physical injury or death to any person or property as a result of his flight from police. We disagree.

Upon consideration of a motion for a directed verdict,

> the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.
>
> On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991) (citation omitted); *accord Banks v. Commonwealth*, 313 S.W.3d 567, 570 (Ky. 2010).

Here, the jury was instructed in accordance with KRS[3] 520.095, which provides, in relevant part:

[3] Kentucky Revised Statutes.

> (1) A person is guilty of fleeing or evading police in the first degree:
>
> > (a) When, while operating a motor vehicle with intent to elude or flee, the person knowingly or wantonly disobeys a direction to stop his or her motor vehicle, given by a person recognized to be a police officer, and at least one (1) of the following conditions exist:
>
> . . . .
>
> > (4) By fleeing or eluding, the person is the cause, or creates substantial risk, of serious physical injury or death to any person or property[.]

Hooker contends that no people or cars were on the road or sidewalk that morning and no property was damaged; thus, his actions did not create a substantial risk of serious physical injury or death to any person or property. In effect, he maintains that because no one was in harm's way, no substantial risk of harm existed. He further posits that there lurks the hypothetical risk of someone walking in front of a vehicle and suffering serious physical injury or death any time anyone drives a vehicle anywhere. He directs us to the case of *Bell v. Commonwealth*, 122 S.W.3d 490 (Ky. 2003), for the notion that "not every hypothetical scenario of 'what might have happened' represents a substantial risk." *Id.* at 497.

The Court in *Bell* established that a risk must be "ample" or "considerable" in order to rise to the level of being substantial and will turn on the unique circumstances of each case. *Id.* In other words, "the issue of whether a defendant's conduct creates a substantial risk of death or serious physical injury

'depends upon proof' and reasonable inferences that can be drawn from the evidence." *Id.* (citation omitted). In *Bell*, the defendant fled on foot from police and was apprehended after a short chase, during which the defendant discarded a handgun that had been concealed on his person. The Commonwealth argued a substantial risk of harm was created since (1) the defendant's handgun could have accidentally discharged while the defendant was fleeing – either while in the defendant's possession, or when it fell or was discarded to the ground and (2) either the defendant or the officer might have instigated an armed confrontation. *Id.* at 498.

The Court held that "neither the evidence presented nor the Commonwealth's 'scenarios,' which the Commonwealth suggests are reasonable inferences from the evidence, were sufficient to support a finding that [the defendant's] flight created a 'substantial risk of serious physical injury or death[.]'" *Bell*, 122 S.W.3d at 498. The Court noted:

> the Commonwealth's naked assertion that [the defendant's] possession and/or discarding of the handgun during his flight from [the officer] created a risk that the handgun would accidentally fire and kill or seriously physically injure someone falls squarely in the category of insubstantial and purely theoretical risks.
>
> Nor did the evidence in this case permit a finding that [the defendant's] flight created a substantial risk of armed confrontation. Given that [the officer] never drew his weapon and [the defendant] never brandished his handgun nor pointed it in [the officer's] direction, no "shoot-out" occurred and the Commonwealth's proposed "scenario" of how [the defendant] created a substantial risk of one rests upon its assumption that either [the

> defendant] and [the officer] or both might possibly have acted differently than they actually did.

Id.

The Kentucky Supreme Court also addressed the issue of risk of substantial harm in *Lawson v. Commonwealth*, 85 S.W.3d 571 (Ky. 2002). In *Lawson*, the defendant exceeded the speed of 125 mph in his vehicle while evading police, disregarded traffic signals, sped through intersections, weaved through traffic, and swerved to avoid a police blockade, causing his vehicle to crash into the guard rail, become airborne and land in the median. *Id.* at 573. The Court held that the defendant was not entitled to an instruction on the lesser-included offense of fleeing or evading police in the second degree, finding "the evidence in this case overwhelming and . . . no jury could reasonably have believed that [the defendant] fled or evaded police but did not create a substantial risk of death or serious physical injury to any person." *Id.* at 576.

We find the circumstances of this case more analogous to that of *Lawson* than *Bell*. Here, no actual injury to any person or property occurred; thus we are only presented with the question of whether Hooker's flight from the police created a *substantial risk* of injury.[4] At trial, evidence was presented to show that Hooker operated a motor vehicle, eluded the police by taking off on his motorbike

[4] While commentators of KRS 520.095 have found the language "serious physical injury or death . . . to property" to be "curious" and "largely incoherent in light of the KRS 500.080(15) definition of 'serious physical injury'" (physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ), inclusion of the term "property" in the jury instructions in this case is not dispositive of our resolution of the issue before us and thus we will not attempt to interpret or define this portion of the statute. *See Bell*, 122 S.W.3d at 494 n.6 (quoting *Lawson*, 85 S.W. 3d at 576 n.9).

after being directed to stop, drove onto a sidewalk almost wrecking the motorbike, and disregarded a stop sign while driving through town. Despite Hooker's argument that no people or property were present that morning so no substantial risk of harm existed, our review of the record reveals that Hooker's actions created more than a "hypothetical" risk that serious physical injury to persons or property might have occurred and that the evidence was sufficient to induce a reasonable juror to believe beyond a reasonable doubt that Hooker was guilty of first-degree fleeing or evading police.

The judgment and sentence of the Knox Circuit Court is affirmed.

ALL CONCUR

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