

RENDERED: MAY 20, 2011; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2010-CA-000252-MR

ACERS DWAYNE GILL

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE KIMBERLY N. BUNNELL, JUDGE  
ACTION NO. 09-CR-00590

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, LAMBERT AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Acers Dwayne Gill appeals the judgment of conviction of the Fayette Circuit Court following his conditional guilty plea to possession of a controlled substance in the first degree; attempted tampering with physical evidence; fleeing or evading in the second degree; and being a persistent felony offender in the second degree. For the reasons stated herein, we affirm.

On March 3, 2009, Detective Josh Masterson observed a black, four-door Toyota car with tinted windows on Winchester Road in Lexington. A few minutes earlier, Detective Masterson received an attempt-to-locate alert for a shooting suspect in the Winburn-Hollow Creek area. The alert contained a description of the shooting suspect as a light-skinned black male with curly hair wearing a hooded sweatshirt and driving a black, four-door Toyota car. When Detective Masterson observed the car, ten to fifteen minutes had passed from the time of the shooting, which occurred a ten-minute drive from his location.

Detective Masterson then drove up beside the Toyota and looked at the driver whom he believed matched the description of the suspect. He then attempted to maneuver behind the car to run its license plate to determine the address and identity of the car's owner. However, although there was no other traffic, the driver began changing lanes multiple times in what Detective Masterson believed was an attempt to prevent police from getting behind him. The check of the plate revealed that the car belonged to a woman named Octavia Taylor.

Subsequently, Detective Masterson received another attempt-to-locate alert in which the suspect car was described as a Toyota Tercel. He radioed in for confirmation on the car's model but no verification was issued. Despite the fact that Detective Masterson's suspect was driving a Camry, he continued following him onto I-75 because of his evasive driving. Detective Masterson then noticed that the driver was traveling twenty miles per hour below the speed limit, which he believed was indicative of driving under the influence.

At this point, Detective Masterson decided to initiate a traffic stop but waited to pull over the driver at a safer location. When the driver exited onto Man O' War Boulevard, Detective Masterson activated his emergency lights to stop the driver who accelerated at a high rate of speed and ran a stop sign. As he continued following, Detective Masterson observed the driver discard a plastic baggie from his car, which the detective suspected was crack cocaine. Eventually, Gill was pulled over for erratic driving and being the suspect in the shooting. The discarded baggie was later found and its contents tested positive for the presence of cocaine.

On April 20, 2009, Gill was indicted by a Fayette County grand jury for first-degree possession of a controlled substance; tampering with physical evidence; first-degree fleeing or evading police; and being a persistent felony offender in the second degree. Gill later filed a motion to suppress wherein he contended that police did not have reasonable suspicion to stop his vehicle.

At the suppression hearing, Detective Masterson and Gill testified regarding the events leading up to Gill's arrest. Gill testified that he had braided hair, not curly hair, on the night of his arrest, which was confirmed by his mug shot. He then testified that Detective Masterson's testimony regarding his driving was inaccurate. He testified that he always drove the speed limit and did not drive the route as stated by the detective. Gill further testified that he did not see the detective behind him and that there was traffic around him at the time in question.

He further testified that he drove fifty to fifty-five miles per hour on I-75 because he believed the speed limit there was sixty miles per hour. He then

testified that he was driving to the residence of Octavia Taylor who lived in a nearby apartment building. After the hearing and the submission of the parties' briefs, the trial court issued an order denying Gill's motion to suppress. While noting that another man had subsequently been arrested for the shooting, the trial court wrote the following:

Based upon Detective Masterson receiving information regarding the [Attempt-to-Locate Alert], Detective Masterson confirming a match of the vehicle description and Detective Masterson confirming a match of the physical description of the suspect, the Court finds that the officer had a reasonable and articulable suspicion to justify the stop of the defendant's vehicle as required in *Creech v. Commonwealth*, Ky.App., 812 S.W.2d 162 (1991). The fact that the officer was incorrect regarding the Defendant's hair does not diminish the reasonable and articulable suspicion to justify the stop.

The fact that the officer did not immediately initiate his emergency equipment does not diminish the reasonable and articulable suspicion to justify the stop. In fact, by following the Defendant, the officer became more suspicious of the driver due to his driving behavior.

Following the trial court's denial of his suppression motion, Gill entered a conditional guilty plea to possession of a controlled substance in the first degree; attempted tampering with physical evidence; and being a persistent felony offender in the second degree. Gill was sentenced to one year's imprisonment for his possession conviction, which was enhanced to five years based on the PFO-II. After the entry of Gill's conditional guilty plea, he was granted probation.

Gill argues that the trial court's factual findings were not supported by substantial evidence because they included a fact not contained in the

record. The trial court's findings of fact provided that the attempt-to-locate alert and Detective Masterson's description of the Toyota depicted the vehicle as an older model car. However, Gill contends that there was no evidence in the record depicting the vehicle as an older model car. Thus, he contends that the trial court's findings must be reversed because they are unsupported by substantial evidence.

Our standard of review of a trial court's ruling on a motion to suppress requires that we first decide if the trial court's findings of fact are supported by substantial evidence. *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky.App. 2002). If supported by substantial evidence, the trial court's factual findings are conclusive and will not be disturbed by an appellate court. *Roberson v. Commonwealth*, 185 S.W.3d 634, 637 (Ky. 2006). A *de novo* review of the trial court's application of the law is then conducted to determine whether it correctly applied the law. *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998).

Despite the lone unsupported factual finding, the remainder of the trial court's findings of fact are supported by substantial evidence in the record. As a reviewing court, we must afford deference to the factual findings of the trial court. *Lindsey v. Commonwealth*, 306 S.W.3d 522, 526 (Ky.App. 2009). Therefore, except for the reference to the older model car, we conclude that the trial court's factual findings are conclusive. Thus, we will review the remaining factual findings and determine whether they support the trial court's application of law. *Strange v. Commonwealth*, 269 S.W.3d 847, 850 (Ky. 2008).

Gill contends that the trial court erred by finding that police had reasonable suspicion to stop his vehicle. He contends that Detective Masterson relied on a police alert that constituted an anonymous tip, which was unsupported by any showing of reliability. Citing *Florida v. J.L.*, 529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000), Gill contends that the prosecution was required to present evidence that the basis of the police alert was supported by reliable information. However, he argues that there was no evidence offered to validate the police alert. Therefore, he contends that the drug evidence against him must be suppressed.

“Both the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution guarantee the fundamental right to be free from unreasonable searches and seizures, a right protected by the general rule proscribing searches not authorized by a valid search warrant.” *Commonwealth v. Wood*, 14 S.W.3d 557, 558 (Ky.App. 1999). Notwithstanding, police may execute a warrantless stop of a vehicle if they have reasonable suspicion that crime is afoot. *Greene v. Commonwealth*, 244 S.W.3d 128, 133 (Ky.App. 2008).

Before a citizen can assert that evidence was improperly seized from his person, he must be restrained by police by means of physical force or show of authority. *Taylor v. Commonwealth*, 125 S.W.3d 216, 219-20 (Ky. 2003). “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.” *Id.* In this case, either intentionally or because he did not observe them, Gill did not yield when Detective Masterson initiated his emergency

lights to execute a traffic stop. Here, Gill was not seized by police, because he was not subdued by police at the time he discarded the drugs. *Id.* Regardless of the validity of the attempted stop, Gill's discarding of the drugs while not under the control of police cannot implicate his constitutional rights. *Id.* Accordingly, the trial court correctly denied Gill's motion to suppress the evidence against him.

For the foregoing reasons, we affirm the Fayette Circuit Court's judgment of conviction based on Gill's conditional guilty plea.

ALL CONCUR.

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