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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000776-MR

EVAN ARMSTRONG — APPELLANT

v.

APPEAL FROM LIVINGSTON CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL, III, JUDGE
ACTION NO. 09-CR-00039

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, MOORE, AND STUMBO, JUDGES.

CAPERTON, JUDGE: Evan Armstrong appeals from the denial of his motion to suppress the evidence and the corresponding conditional guilty plea to possession of a controlled substance, first degree, first offense, trafficking in marijuana, over eight ounces but less than five pounds, first offense, and possession of drug paraphernalia, first offense, entered January 20, 2010. After a thorough review of

the parties' arguments, the record, and the applicable law, we affirm the Livingston Circuit Court's denial of Armstrong's motion to suppress.

The facts of this appeal were testified to at a suppression hearing held on November 4, 2009. On February 17, 2009, Armstrong was traveling on Interstate-24 when Trooper Williams executed a stop of his vehicle. Trooper Williams testified that he stopped Armstrong due to his out-of-state dealer tags, the clothing hanging up in the car, and the absence of an FTC (Federal Trade Commission) sticker which indicated to him that the car was being wrongfully used for personal use in violation of KRS 186.070 and 601 KAR 9:220(3). Trooper Williams was able to verify that the car was owned by an out-of-state used car dealership and confirmed with the dealership that Armstrong had permission to use the car.

During this time, Armstrong appeared nervous and informed Trooper Williams that he was returning from a wedding. Thereafter, Trooper Williams issued Armstrong a "courtesy notice" for the violation of using the dealer vehicle for personal purposes and returned Armstrong's documents to him.[1] Trooper Williams testified that he told Armstrong he was "good to go" and then asked Armstrong if he could "have a minute of your time." Armstrong acquiesced and upon being questioned about narcotics informed Trooper Williams that he had a marijuana pipe in his car. Trooper Williams then requested a canine unit, which

[1] We note that there was conflicting evidence as to when Armstrong locked his keys inside his car; however, such a fact does not seem to be particularly relevant to the ultimate issues on appeal, namely, whether the stop was constitutional and whether the discussion thereafter constituted a consensual encounter.

alerted on the passenger door and the trunk. Upon search of the vehicle the officers discovered a vacuum-sealed bag containing slightly over one pound of marijuana and an ounce of cocaine from a shaving kit in the car. After hearing the facts of the case, the trial court denied Armstrong's motion to suppress. It is from this order entered December 14, 2009, that Armstrong now appeals.

On appeal, Armstrong presents two arguments, namely that the search of the vehicle was illegal because (1) the Trooper lacked probable cause and/or reasonable suspicion to execute a stop of Armstrong's vehicle, and (2) the Trooper did not have reasonable suspicion to detain Armstrong once the traffic stop was completed. In response, the Commonwealth argues that, (1) the Trooper's stop of Armstrong's vehicle was valid; and (2) Armstrong engaged in a consensual encounter with the Trooper after the initial stop was completed. In light of the parties' arguments we believe that the issues may be succinctly stated as, (1) whether the stop was lawful and (2) whether the discussion after the completion of the traffic stop between Armstrong and Trooper Williams constituted a consensual encounter. With this in mind, we now turn to our applicable standard of review.

In review of the trial court's decision on a motion to suppress, this Court must first determine whether the trial court's findings of fact are clearly erroneous. Under this standard, if the findings of fact are supported by substantial evidence, then they are conclusive. RCr 9.78; *Lynn v. Commonwealth,* 257 S.W.3d 596, 598 (Ky.App. 2008). "Based on those findings of fact, we must then conduct a *de novo* review of the trial court's application of the law to those facts to

determine whether its decision is correct as a matter of law." *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky.App. 2002) (citing *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998); *Commonwealth v. Opell*, 3 S.W.3d 747, 751 (Ky.App. 1999)). Thus, the factual findings of the trial court in regard to the suppression motion are reviewed under the clearly erroneous standard and "the ultimate legal question of whether there was reasonable suspicion to stop or probable cause to search is reviewed *de novo*." *Commonwealth v. Banks,* 68 S.W.3d 347, 349 (Ky. 2001).

At a suppression hearing the trial court acts as the finder of fact. As such, it has the sole responsibility to weigh the evidence before it and judge the credibility of all witnesses. *Dunn v. Commonwealth*, 286 Ky. 695, 151 S.W.2d 763, 764-765 (1941). The trial court has the duty to weigh the probative value of the evidence and has the discretion to choose which testimony it finds most convincing. *Commonwealth, Dept. of Highways v. Dehart,* 465 S.W.2d 720, 722 (Ky. 1971). The trial court is free to believe all of a witness's testimony, part of a witness's testimony or none of it. *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996); *see also Gillispie v. Commonwealth*, 212 Ky. 472, 279 S.W. 671, 672 (1926). With this standard in mind we turn to the parties' arguments.

Turning now to the first issue, namely, whether the stop was lawful, we note:

> In order to justify an investigatory stop of an automobile, the police must have a reasonable articulable suspicion that the persons in the vehicle are, or are about to become

> involved in criminal activity. *United States v. Cortez*, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981*); Commonwealth v. Hagan*, Ky., 464 S.W.2d 261 (1971). In order to determine whether there was a reasonable articulable suspicion, the reviewing appellate court must weigh the totality of the circumstances. *See Alabama v. White*, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990).

Taylor v. Commonwealth, 987 S.W.2d 302, 305 (Ky. 1998).

Additionally, in determining whether the requisite reasonable and articulable suspicion exists, we must examine the totality of the circumstances to see whether the officer had a particularized and objective basis for the suspicion. *Commonwealth v. Marr*, 250 S.W.3d 624, 627 (Ky. 2008). However, the subjective intentions of the officer are irrelevant to judicial determinations of reasonableness. *Commonwealth v. Kelly*, 180 S.W.3d 474, 479 (Ky. 2005)(citing *Wilson v. Commonwealth*, 37 S.W.3d 745, 749 (Ky. 2001), and *Whren v. United States,* 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996)).

Central to the case *sub judice,* KRS 186.070(1)(f) states:

> A vehicle bearing a dealer plate, except when the vehicle is being transported to a dealer's place of business from a manufacturer, shall have, in the case of a new motor vehicle, a “monroney” sticker attached to the vehicle, or, in the case of a used motor vehicle, a Federal Trade Commission buyer's guide sticker attached to the vehicle.

KRS 186.070(1)(f).

Based on this statute and his interpretation thereof, Trooper Williams initiated the stop of Armstrong for misuse of a dealer tag and for the absence of the

FTC sticker. Armstrong argues that KRS 186.070 does not provide a basis for restrictions on the use of out-of-state dealer's tags outside the state where they are issued, and thus the statute cannot provide a basis for the stop. However, insofar as the stop could have been based on either of two reasons, we choose to affirm on the grounds that the apparent lack of an FTC sticker provided grounds for the traffic stop and find it unnecessary to address Armstrong's argument that KRS 186.070 does not apply to dealer tags issued outside the Commonwealth of Kentucky.

Armstrong also argues that there was no individualized basis for probable cause that Armstrong had committed a traffic violation given the clothing in his car[2] and the out-of-state dealer tags, in conjunction with the officer's admission that he stops the vast majority of vehicles with out-of-state dealer tags. We think that this argument is without merit as the subjective intentions of the officer are irrelevant. *See Kelly, supra.* Again, the apparent absence of the required FTC sticker provided Trooper Williams with an objective basis for suspicion of criminal activity which then justified the traffic stop.

We now turn to the second issue on appeal, namely, whether the discussion after completion of the traffic stop between Armstrong and Trooper Williams constituted a consensual encounter. As previously discussed, after issuing Armstrong a warning and returning his documents to him, said he was

[2] We note that no discussion on what type of clothing and how positioned in the car was presented to this Court. Such information may be properly considered in the totality of the circumstances as to whether there was a reasonable articulable suspicion.

"good to go" and then Trooper Williams asked to have a moment of his time. The two then engaged in a series of questions and answers in which it was revealed that Armstrong had a marijuana pipe in his car. Armstrong argues that his continued questioning and detention after the stop was completed was impermissible, because at that time there were no additional grounds to provide reasonable suspicion to justify further detention. Armstrong also contends that no reasonable person would have felt free to leave. The Commonwealth argues in response that upon completion of the stop, the questioning of Armstrong by Trooper Williams was a consensual encounter and that Armstrong could have stopped the questioning and left at any time.

In the case *sub judice* the traffic stop ended when Trooper Williams handed Armstrong his warning citation and returned his documents. *See United States v. Richardson,* 385 F.3d 625, 630 (6th Cir. 2004) ("The traffic stop concluded when Officer Fisher handed Collier the citation and shook his hand."); and *United States v. Ramirez,* 476 F.3d 1231, 1238 (11th Cir. 2007) (The defendant's documents had been returned to him, suggesting that the stop was over and he was free to leave.) The question then becomes whether the questioning of Armstrong was a consensual encounter or an improper seizure.

In *Strange v. Commonwealth*, 269 S.W.3d 847, 850 (Ky. 2008), the Kentucky Supreme Court noted:

> We held in *Commonwealth v. Banks*, 68 S.W.3d 347, 350 (Ky. 2001), that "[p]olice officers are free to approach anyone in public areas for any reason," and that

> "[o]fficers are entitled to the same freedom of movement that the rest of society enjoys." *Id.* No "Terry " stop occurs when police officers engage a person on the street in conversation by asking questions. *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983).

Strange at 850. Indeed "a seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free to disregard the police and go about his business . . . ." *Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 2386, 115 L. Ed. 2d 389 (1991)(internal citations omitted). In order for the encounter to be a seizure, the police officers must "by means of physical force or show of authority, in some way restrain the liberty of a citizen . . . ." *Strange v. Commonwealth*, 269 S.W.3d 847, 851 (Ky. 2008).

In the case *sub judice* there is no indication that Trooper Williams exercised any show of authority or used physical force on Armstrong. Instead, Trooper Williams inquired whether Armstrong would answer a few questions to which Armstrong obliged. This is unlike the situation in *Strange, supra,* wherein the officer requested the defendant to walk away from the van and over to the police cruiser. Nor do we believe this to be a similar situation to *United States v. Buchanon,* 72 F.3d 1217, 1224 (6th Cir. 1995), wherein multiple officers swiftly converged upon the scene, asked the defendants to move away from the vehicle, and instituted a canine search. Instead, we believe that this situation is more akin to *United States v. Meikle*, 407 F.3d 670 (4th Cir. 2005), wherein the Fourth Circuit held that after Meikle was given his citation, his license and registration

were returned, the officer shook Meikle's hand, then a consensual encounter occurred when Meikle answered questions posed by the officer after the officer asked if he could speak with him. Thus, the questioning of Armstrong by Trooper Williams was not a seizure, but instead a consensual encounter. Accordingly, the trial court did not err in denying Armstrong's motion to suppress.

Finding no error, we affirm.

ALL CONCUR.

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