RENDERED: JANUARY 10, 2014; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000776-MR

JAMES WILLOUGHBY — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 11-CR-00066

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, DIXON AND MAZE, JUDGES.

MAZE, JUDGE: Appellant, James Willoughby, appeals from the Kenton Circuit Court's final judgment of conviction and sentence entered following his trial for manufacturing methamphetamine and possession of a controlled substance. Specifically, Willoughby alleges that the trial court erred in failing to suppress evidence used against him at trial, which he contends was acquired illegally.

Because the trial court's decision was based on testimony not in the record, on the limited issue of the initial stop, we reverse the denial of the motion to suppress. We, like the trial court, lack sufficient information regarding the reliability of the information upon which the officer relied in stopping Willoughby; therefore, we remand that matter to the trial court for a new evidentiary hearing and findings. Finally, finding no error as to Willoughby's other arguments, we otherwise affirm the trial court's judgment.

Background

On January 20, 2011, a Kenton County grand jury indicted Willoughby for one count of manufacturing methamphetamine, first-offense, and one count of first-degree possession of a controlled substance. The same indictment charged Willoughby's codefendant, Sheena Martin, with unlawful distribution of a methamphetamine precursor. On March 28 of the same year, Willoughby's appointed counsel filed a Motion to Suppress evidence against Willoughby. The trial court held a hearing on this motion on April 1, during which the following facts came to light.

On November 18, 2010, while on routine patrol, Officer Scott Hardcorn of the Kenton County Police Department (KCPD) encountered a 1997 Jeep Cherokee. Officer Hardcorn entered the vehicle's license plate number into his Mobile Data Terminal (MDT) which was linked to, among other databases, Kentucky's automated vehicle information system (AVIS). This database maintains title, registration, and insurance information for all vehicles, boats and

trailers registered in Kentucky. Upon entry of the vehicle's license plate number, AVIS displayed Willoughby's name and vehicle information, including the statement "verify proof of insurance."[1] Officer Hardcorn testified that he routinely stopped vehicles whose registration information shows this indication, and that "more times than not, that person has either lapsed in payment, so the insurance company canceled them or the registered owner of that vehicle canceled the insurance policy themself [*sic*]."

According to the County Clerk, several possible reasons exist for AVIS's indication that an individual's insurance requires verification: a lapse in coverage, cancellation of coverage, or a change in insurance provider of which the County Clerk or the Transportation Cabinet has not been notified. Because larger insurance companies upload their data to AVIS monthly, but smaller companies are not required to do so, valid insurance through a smaller carrier or the change from a larger carrier to a smaller carrier may cause AVIS to indicate that a driver's insurance requires verification.

Based on the indication AVIS provided regarding the vehicle in front of him, Officer Hardcorn initiated a traffic stop. Upon approaching the vehicle, Officer Hardcorn requested Willoughby's insurance card and observed a female passenger he later identified as Sheena Martin. While Willoughby searched for his

[1] As insurance information appears on an MDT, there are at least two possible indications: "yes" and "verify proof of insurance." According to Officer Hardcorn, there may be a "no" indication, but he has never seen it.

insurance card, Officer Hardcorn shone his flashlight around the car, through the tinted back window and into the backseat, where he observed an electric coffee bean grinder. After five minutes elapsed, Officer Hardcorn asked Willoughby to continue looking for his insurance card and returned to his cruiser where he called dispatch to request warrant and other information. He also contacted Sergeant Benton of KCPD and requested that he check a database of recent pseudoephedrine purchases and purchasers in Kentucky.

Approximately twenty minutes after the traffic stop began, Sergeant Benton arrived on the scene and informed Officer Hardcorn that his search of the database showed that both Willoughby and Martin had purchased pseudoephedrine earlier that day; Martin purchased only minutes before they were stopped. Upon learning this, Officer Hardcorn returned to Willoughby's vehicle and questioned him regarding pseudoephedrine purchases. Willoughby initially told the officer that he had not bought any pseudoephedrine and that he was not "into that anymore."

Officer Hardcorn asked Willoughby to exit the vehicle and informed him he was being given a warning for driving without proof of insurance.[2] According to Officer Hardcorn, he decided to issue only a warning "to build a rapport" with Willoughby in hopes of gaining information on other drug traffickers. Officer Hardcorn, with the assistance of Sergeant Benton, conducted a

[2] Though Willoughby was not able to provide proof of insurance during the traffic stop, he was legally insured at that time.

pat down of Willoughby which yielded two small bags of white powder, one of which was found tucked down his pants and between his buttocks. Officer Hardcorn then handcuffed Willoughby. Officers asked Willoughby for consent to search the vehicle[3] and placed him in the back of a police cruiser. After reading Willoughby his *Miranda*[4] rights, Officer Hardcorn repeatedly informed him that he was not under arrest.

In Willoughby's vehicle, officers found an electric coffee bean grinder, store brand cold medicine containing pseudoephedrine, and plastic tubing with white residue on it. Following these discoveries, and after field tests on the white powder found on Willoughby's person revealed it to be methamphetamine, officers formally arrested Willoughby.

Prior to trial, Willoughby sought suppression of the evidence seized from his person and from his vehicle during the traffic stop, claiming, *inter alia*, that Officer Hardcorn did not possess the requisite level of suspicion to initiate the traffic stop. At the hearing on this motion, Officer Hardcorn testified and the court viewed the in-car video of the traffic stop.[5] The Kenton County Clerk testified

[3] The Commonwealth contends, and Officer Hardcorn testified, that Willoughby consented to the search of his vehicle. However, Willoughby does not concede this fact and the video record of the traffic stop is literally silent.

[4] *Miranda v. Arizona*, 384 U.S 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[5] Unfortunately, as the Commonwealth notes in its brief, the video in the record on appeal lacks audio, despite the fact that the video contained sound when it was played at the suppression hearing. However, to the extent that the events of the traffic stop are confirmed by the video, we include them in the above facts. Those events not confirmed by the soundless video, such as statements made by Willoughby during the traffic stop, are included above to the extent that they are undisputed by the parties.

regarding AVIS and Willoughby's insurance agent testified regarding his insurance status on the date of the traffic stop.

Following the hearing and submission of memoranda, the trial court denied Willoughby's motion to suppress. In its order, the trial court stated that Officer Hardcorn "testified that in his experience, 95% of the individuals that he has stopped in order to verify insurance do not have insurance in effect." The trial court went on to conclude that Officer Hardcorn had sufficient suspicion and "certainly had the legal authority to investigate further by stopping the vehicle for investigation." The trial court refuted Willoughby's other claims, including the length of his detention, finding that "[t]he 20-minute detention of the Defendant's vehicle for investigation of the status of his insurance was not reasonable."

Following a trial, a jury convicted Willoughby of both charges and sentenced him to a total of ten years' imprisonment. Willoughby now appeals his conviction and sentence.

Standard of Review

On appeal, Willoughby alleges that the trial court erroneously denied his motion to suppress. In doing so, Willoughby makes four arguments: 1) Officer Hardcorn did not have sufficient cause to stop him based solely on AVIS's indication regarding insurance; 2) Officer Hardcorn accessed the AVIS database in contravention of Kentucky law; 3) his detention was unreasonably and unnecessarily long given the initial purpose of the stop; and 4) the warrantless search of his vehicle was unlawful.

> Our standard of review in such cases is well-established.
>
> In reviewing a trial court's ruling on a motion to suppress evidence, the reviewing court must first determine whether the trial court's findings of fact are supported by substantial evidence. If so, those findings are conclusive. The reviewing court then must conduct a *de novo* review of the trial court's application of the law to those facts.

Epps v. Commonwealth, 295 S.W.3d 807, 809 (Ky. 2009) (citations omitted).

With this standard in mind, we turn to Willoughby's arguments on appeal.

Analysis

The United States Supreme Court long ago ruled that investigatory stops, including traffic stops, must be justified by "some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *U.S. v. Cortez*, 449 U.S. 411, 417, 101 S. Ct. 690, 695, 66 L. Ed. 621 (1981) (citing to *Terry v. Ohio*, 392 U.S. 1, 16-19, 88 S. Ct. 1868, 1877-1879, 20 L. Ed. 889 (1968), *inter alia*). Since then, "[c]ourts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person … [t]erms like 'articulable reasons' and 'founded suspicion'…." *Id*. In Kentucky, "an officer conducting an investigatory stop must have a reasonable suspicion, based on objective and articulable facts, that criminal activity has occurred, is occurring, or is about to occur. *Commonwealth v. Morgan*, 248 S.W.3d 538, 540 (Ky. 2008)

(citing *Brown v. Texas*, 443 U.S. 47, 51, 99 S. Ct. 2637, 2641, 61 L. Ed. 357 (1979); *Cortez*, *supra*, at 417, 101 S. Ct. at 695; *Terry*, *supra*, at 30-31, 88 S. Ct. at 1885).

I. Reasonableness of the Initial Traffic Stop

Though we have no doubt that individuals are stopped every day on the sole basis of verifying their insurance coverage, this case presents what we believe to be an issue of first impression in this Commonwealth: Does an indication from AVIS, or other similar database, that an individual's insurance "requires verification" provide law enforcement with a reasonable and objective suspicion sufficient to conduct an investigatory traffic stop? The only state and federal jurisdictions that have taken up this issue with any consistency are within the 10th Circuit. We look first to those holdings for possible guidance.

A. Precedent From Other Jurisdictions

In companion cases rendered by the Texas Court of Appeals in 2010, officers stopped two vehicles in separate traffic stops on a highway known in the area as a common route for drug trafficking. *See Contraras v. State*, 309 S.W.3d 168 (Tex. App. 2010), and *Gonzalez-Gilando v. State*, 306 S.W.3d 893 (Tex App. 2010). Reasons officers cited for the traffic stops included the incongruity of the values of the vehicles and age of their occupants, as well as the nervous and evasive body language of the occupants (avoiding eye contact and driving below the speed limit). In both cases, when officers entered the vehicles' license

information into their MDTs, the insurance information was listed as "unavailable." Nothing else in the vehicles' information indicated anything out of the ordinary. Officers' subsequent stop of the vehicles yielded evidence of drug activity. On appeal, the state Court of Appeals considered whether the "unavailable" indications constituted sufficient suspicion to justify the traffic stops.

In both cases, the court's analysis centered on the reliability of such an indication; and in both cases, the court concluded that an indication of "unavailable," without more, "did not give rise to a reasonable suspicion that appellant[s were] engaged, had engaged, or [were] about to engage in criminal conduct." *Contraras*, 309 S.W.3d at 171 (citing *Gonzalez-Gilando*, 306 S.W.3d at 895). In *Contraras*, this was despite the fact that the state's insurance database was required to meet a "95% match rate." In *Gonzalez-Gilando*, the court ultimately concluded that an indication of "unavailable" "was hardly suggestive of anything other than the unknown." 306 S.W.3d at 896.

The 10th Circuit Court of Appeals has twice taken up the same issue. In *United States v. Cortez-Galaviz*, 495 F.3d 1203 (10th Cir. 2007), the Court found that an indication of insurance information "not found" was sufficient grounds to stop an individual later found to be engaged in illegal conduct. Specifically, the Court stated that such an indication "contained no information suggesting that the owner . . . had insured it." *Cortez-Galaviz*, 495 F.3d at 1206. "[T]he 'not found' response . . . did not as definitively indicate criminal activity as a 'no' response, but neither did it equate to an exculpatory 'yes'…." *Id*.

By contrast, the same court recently held that, where an officer relies only on a database's "no return"[6] of registration information, the reliability of that database is key to determining whether the officer had sufficient grounds to conduct a traffic stop. *United States v. Esquivel-Rios*, 725 F.3d 1231, 1238 (10th Cir. 2013). The Court pointed out that, in *Cortez-Galaviz*, it had placed the onus of establishing the database's lack of reliability on the defendant. Nevertheless, the Court decided that a trial court must consider, and hear proof regarding, "how (un)reliable the database is" before determining whether sufficient suspicion existed. *Id*. Accordingly, the Court remanded the case to the trial court for further proof and reconsideration of suppression in light of that proof.

B. Reliability of the AVIS Database

The decisions to which we cite above, as well as our own consideration of the broader Fourth Amendment question presented in this case, reveal a direct and imperative link between AVIS's ability (or inability) to accurately indicate illegal conduct and the existence of a reasonable and objective suspicion of such conduct. In the present case, the Kenton County Clerk testified at the suppression hearing that an indication from AVIS of "verify proof of insurance" could appear for several reasons, including circumstances under which the vehicle is legally insured. She provided no information as to how often AVIS

[6] The testimony provided to the trial court in that case, which concerned Colorado's vehicle registration database, provided little, if any, information regarding the database's reliability and the exact meaning of its various indications. The undeveloped record left the Court to conclude that a "no return" could be caused either by "unlawful conduct by the driver . . . [or] some sort of bureaucratic bumbling…." *Esquivel-Rios*, 725 F.3d at 1237.

displays inaccurate information or how often an indication that a person's proof of insurance requires verification is actually attributable to illegal conduct. To this, Officer Hardcorn was only able to add that, in his experience, "more times than not," such individuals were driving without insurance.

In its order, the trial court properly recognized the significant role AVIS's reliability plays in determining the reasonableness of Officer Hardcorn's suspicions. However, we are troubled by the trial court's statement that Officer Hardcorn's testimony attributed a 95% accuracy rate to AVIS. Had this been the case, ours might be a simpler decision. However, Officer Hardcorn never said, or even intimated, this fact. Hence, there is a lack of substantial evidence supporting the trial court's only finding regarding the crucial question of AVIS's reliability.

Like the Court in *Esquivel-Rios*, we are confronted with the question: what level of reliability must a database reach to induce a reasonable and objective suspicion and thereby pass constitutional muster? 95 percent? 75 percent? 51 percent? Is "more times than not" sufficient? We simply do not know enough to answer these questions. Like the Court in *Esquivel-Rios*, the lack of information in the record tending to answer this pivotal question compels us to remand the issue to the trial court for further proof concerning AVIS's reliability. While we could elect to make a sweeping decision as to the reasonableness of officers' reliance on the AVIS database, we are unwilling, without more information, to render a judgment which would profoundly affect both the individual's right to be left alone and law enforcement's ability to enforce the law.

Instead, on remand, the trial court shall hear and consider further evidence concerning AVIS, including, but not limited to: what the various indications provided by AVIS mean, both in theory and in practice; whether the database's "match rate" can be definitively determined; and how (in)frequently an indication of "verify proof of insurance" indicates that a vehicle is uninsured. We, like the few courts who have taken up this issue, refuse to announce a threshold value or percentage which, once crossed, would bestow "reasonable and objective" status upon an officer's suspicions. Instead, we leave to the sound, and soon-to-be more informed, judgment of the trial court the determination of whether, under these facts, AVIS was sufficiently accurate and reliable so as to raise an objectively reasonable suspicion of criminal conduct.

II. Legality of Access to AVIS

Willoughby next argues that Officer Hardcorn accessed AVIS in contravention of Kentucky law. He points specifically to Kentucky Revised Statutes (KRS) 186A.040, which provides, in part,

> (b) Notwithstanding any other provision of law, information obtained by the [Department of Vehicle Registration] … shall not be disclosed, used, sold, accessed, utilized in any manner, or released by the department to any person, corporation, or state and local agency, except in response to a specific individual request for the information authorized pursuant to the federal Driver's Privacy Protection Act …. The department shall institute measures to ensure that only authorized persons are permitted to access the information for the purposes specified by this section.

KRS 186A.040(3)(b) (internal citation omitted). Willoughby contends that the KCPD and Officer Hardcorn were prohibited by the statute from accessing his insurance information. We disagree.

The Driver's Privacy Protection Act (hereinafter "the Act"), to which KRS 186A.040 alludes, prevents the unauthorized disclosure of certain personal information. 18 United States Code (U.S.C.) § 2721, *et seq*. The Act defines "personal information" as that which "identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status." 18 U.S.C. § 2725(3). The statute, as well as its use and definition of "personal information," lead us to conclude that, though certain information which appeared on Officer Hardcorn's screen may fit this description, the indication regarding Willoughby's insurance status was expressly excluded.

More persuasively, Officer Hardcorn was not a person from whom the Act intended such information to be withheld. The Act provides that such information may be disclosed "[f]or use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions." 18 U.S.C. § 2721(b)(1). KCPD is such an agency. Consequently,

we are satisfied that Officer Hardcorn's access to AVIS complied with both state and federal law.

III. Length of the Traffic Stop

Willoughby also asserts that his detention was unreasonably and unnecessarily long in duration for purposes of verifying his insurance. However, given the circumstances and the manner in which Officer Hardcorn conducted the stop, we find the duration of the stop to be reasonable.

A person is detained for purposes of the Fourth Amendment when his vehicle is stopped and the person operating the vehicle reasonably believes he is not free to terminate the encounter between himself and the officer. *See Epps v. Commonwealth*, 295 S.W.3d at 809 (citing to *Brendlin v. California*, 551 U.S. 249, 255, 127 S.Ct. 2400, 2406, 168 L.Ed.2d 132 (2007) (internal quotations omitted)). Hence, seizure of an individual during a traffic stop must comply with certain constitutional assurances, including that the person will be seized "no longer than is necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319, 1325, 75 L.Ed.2d 229 (1983).

Willoughby cites to several cases which address the duration of traffic stops. He first cites to *Illinois v. Caballes*, which held,

> a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution. A seizure that is justified solely by the interest in issuing a warning ticket to the driver can

> become unlawful if it is prolonged beyond the time reasonably required to complete that mission.

543 U.S. 405, 407, 125 S.Ct. 834, 837, 160 L.Ed.2d 842 (2005). Nevertheless, the *Caballes* Court found the ten-minute traffic stop and subsequent drug dog sweep to be "entirely justified." *Id*. at 408, 125 S.Ct. at 837. Similarly, in *Johnson v. Commonwealth*, 179 S.W.3d 882 (Ky. App. 2005), this Court addressed a similar situation to that in *Caballes*. In *Johnson*, the officer asked the suspect to step out of his car and initiated a drug dog search within seven minutes after the initial stop for a traffic violation. As this Court noted, "[a]fter the dog alerted to the presence of narcotics, the officers undoubtedly had probable cause to search the vehicle." *Johnson*, 179 S.W.3d. at 885-86.

Willoughby also points to a Kentucky case, *Epps v. Commonwealth*, *supra*, in which a vehicle was stopped for failure to illuminate its license plate. The stop escalated based on the driver's known history of drug-related activity and the officer's observation that the driver seemed impaired. When the driver refused to grant officers consent to search the vehicle, officers brought a drug dog to the scene. The process of transporting the drug dog and searching the vehicle took thirty to forty minutes. All told, the officer detained the driver and the passengers for ninety minutes before formally arresting him. Our Supreme Court found this to be excessive and unconstitutional.

Willoughby complains that, like in *Epps*, Officer Hardcorn did not have reasonable suspicion to detain him longer than necessary to issue a warning

or a citation based on the initially suspected offense of driving without insurance. Willoughby argues that Officer Hardcorn detained him for twenty minutes with no more reason than his knowledge of a past encounter with him and the observation of a coffee bean grinder in the back seat. He contends these were insufficient to permit further detention. We disagree.

By Willoughby's own admission, within the first twenty minutes of Willoughby's detention, Officer Hardcorn observed the occupants of the vehicle; he observed a coffee bean grinder in the back seat of the vehicle; and he made inquiries on Willoughby and Martin, one of which informed him that both had purchased pseudoephedrine that very day. Immediately following this twenty-minute timeframe, Officer Hardcorn's questioning of Willoughby regarding recent pseudoephedrine purchases yielded an answer which the officer knew was a lie.

Given Officer Hardcorn's knowledge of all of these facts, we find that it was entirely reasonable for Officer Hardcorn to detain Willoughby for between twenty and thirty minutes before detaining him further and giving him a warning for failing to show proof of insurance. During that time, Officer Hardcorn rapidly became aware of a number of facts which together gave rise to a reasonable suspicion which justified further detention of Willoughby. As in *Johnson*, the purpose of the stop – to cite or warn Willoughby for failure to provide proof of insurance – had not been completed before these additional facts came to light. Therefore, upon the discovery of these facts, additional suspicion arose which justified additional detention.

More importantly, also like *Johnson*, we find that Officer Hardcorn's decision to conduct a "focused and immediate" investigation based on this additional information "did not prolong the stop to any unreasonable extent." *Johnson*, *supra*, at 886. After conversing with Willoughby, after recognizing Willoughby from a previous encounter, after observing the coffee bean grinder in plain view – all of which took only five minutes – Officer Hardcorn returned to his vehicle, while Willoughby looked for his proof of insurance, and immediately set about gathering additional information, a process which took approximately fifteen additional minutes and yielded further, reasonable suspicion that criminal activity was afoot. This was not unreasonable.

IV. The Warrantless Search of Willoughby's Vehicle

Willoughby's final argument pertains to the search of his vehicle which followed his detention and the search of his person. He argues that officers conducted a warrantless and unreasonable search of his vehicle. Once again, we disagree.

"It is well-established that warrantless searches of an individual's person are *per se* unreasonable, but for a few specifically well-delineated exceptions."[7] *Frazier v. Commonwealth*, 406 S.W.3d 448, 457 (Ky. 2013) (citing to *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576

[7] Because we are without the audio of the traffic stop, we are unable to verify whether Willoughby actually consented to the search of his vehicle, which would clearly serve as an exception to the warrant requirement. Though there is testimony that Willoughby did consent, and while we highly doubt a search would have ensued had he not, because we are without this crucial portion of the record, we do not hinge our decision regarding the reasonableness of the search upon the question of consent.

(1967)). One such exception is the search incident to arrest, which allows an officer to conduct a warrantless post-arrest search of an arrestee's person as well as all areas within the arrestee's immediate control. *Id.* at 457-58 (citing to *Chimel v. California,* 395 U.S. 752, 763, 89 S.Ct. 2034, 2040, 23 L.Ed.2d 685 (1969)). This exception is derived from "interests in officer safety and evidence preservation that are typically implicated in arrest situations." *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) (citation omitted).

Willoughby relies heavily upon the United States Supreme Court's 2009 decision in *Arizona v. Gant* for his argument that the search incident to arrest exception to the warrant requirement did not apply in the present case. In *Gant*, the Supreme Court clarified that this exception "authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." 556 U.S at 343, 129 S.Ct at 1719. However, the Court went on to hold that, though prior precedent did not provide for it, "circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Id* (internal quotations and citation omitted). The Court in *Gant* also reaffirmed its decision in *United States v. Ross*, 456 U.S 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1981), which held that if probable cause exists that the vehicle contains evidence

of criminal activity, officers may search any area of the vehicle in which that evidence might possibly be found.

Willoughby also points to the Kentucky Supreme Court's decision in *Rose v. Commonwealth*, 322 S.W.3d 76 (Ky. 2010), which took the decision in *Gant* into consideration. However, *Rose* acknowledges *Gant*'s provision for the reasonable belief that a vehicle contains evidence pertinent to the crime of arrest. Willoughby responds to this by stating that, at the time his vehicle was searched, he was not under arrest. This argument is unpersuasive.

"The test [of when an arrest has been effected] is whether, considering the surrounding circumstances, a reasonable person would have believed he or she was free to leave." *Commonwealth v. Lucas*, 195 S.W.3d 403, 405 (Ky. 2006). Indeed, Officer Hardcorn testified at the suppression hearing that at the time the vehicle was searched, he repeatedly told Willoughby he was not under arrest. The stated reason for this was that belief that if Willoughby did not know he was under arrest, he might provide useful information regarding other drug activity. However, Willoughby was handcuffed, placed in the back of the police cruiser and read his *Miranda* rights prior to the search of his vehicle. This constitutes substantial evidence that a reasonable person in Willoughby's position was not free to leave. In other words, regardless of Officer Hardcorn's repeated assurances, Willoughby was under arrest.

Even assuming *arguendo* that the "search incident to arrest" exception does not apply, the Commonwealth is correct in asserting that another well-

established exception does. Officers may search a vehicle without a warrant "when there is probable cause to believe [the] automobile contains evidence of criminal activity and the automobile is readily mobile." *Chavies v. Commonwealth*, 354 S.W.3d 103, 110-11 (Ky. 2011) (citing to *Pennsylvania v. Labron*, 518 U.S. 938, 940, 116 S.Ct. 2485, 2487, 135 L.Ed.2d 1031 (1996)). Known as the "automobile exception" to the warrant requirement, this rule permits a warrantless search even when the vehicle's owners or occupants have been detained. *Id*. (citing to *Ross*, *supra*; *Florida v. Meyers*, 466 U.S. 380, 104 S.Ct. 1852, 80 L.Ed.2d 381 (1984)).

The very fact that Willoughby's vehicle was readily mobile, combined with Officer Hardcorn's observation of the vehicle's interior and his knowledge that its occupants had recently purchased pseudoephedrine, implicates the automobile exception in the present case. Therefore, we find that the officers' search of Willoughby's vehicle, though warrantless, was reasonable pursuant to at least one exception to the Fourth Amendment's warrant requirement.

Conclusion

Because the record provided insufficient information regarding the reliability of AVIS, the trial court was without substantial evidence to support its finding on that crucial issue. Therefore, we remand that matter to the trial court for additional evidence and findings as to whether the database's indication was sufficient to justify the traffic stop. If the trial court answers the latter question in the negative, the trial court shall vacate Willoughby's conviction and sentence

because they would then be based on evidence procured pursuant to an unlawful stop.

On all other matters, the judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

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