RENDERED: SEPTEMBER 27, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-1478-MR

DAVID MICHAEL JAMESON — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 11-CR-00593

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, DIXON, AND STUMBO, JUDGES.

CAPERTON, JUDGE: David Michael Jameson appeals from the trial court's denial of his motion to suppress the evidence obtained from a vehicle stop due to an outdated, yet still active, police issued attempt to locate ("ATL") said vehicle. The trial court having concluded that the exclusionary rule would not suppress the evidence obtained from the stop, Jameson entered a conditional guilty plea to illegal possession of a controlled substance in the first degree, illegal possession of

a controlled substance in the second degree, illegal possession of a controlled substance in the third degree, and driving under the influence, first offense. He received a one-year sentence and now appeals the denial of the motion to suppress.

On April 9, 2012, Jameson called 911 to report that he had just been robbed at gunpoint in the parking lot of the Red Roof Inn and that his rental car had been stolen by the assailants. Once the car was reported stolen, the Lexington-Fayette County Division of Police issued an Attempt to Locate ("ATL") for the vehicle. The ATL was broadcast over the police radio several times. Later that night, the vehicle was recovered at the Red Roof Inn. Dispatch failed to cancel the ATL and this failure gives rise to the issue on appeal, discussed *infra*.

Officer David Burks was working on the night of April 9, 2012, and he heard the ATL on the radio several times that evening. Four days later on April 13, 2011, Officer Burks heard over the radio that officers on an unrelated call had seen Jameson's car which was the subject of the still-active ATL. Officer Burks saw the vehicle drive past him and initiated a "felony stop" on the vehicle, based solely on the active ATL. Officer Burks believed that the occupants of the vehicle might be the same as those that robbed Jameson at gunpoint; thus, Jameson was removed from the vehicle at gunpoint and then handcuffed. After learning why he was handcuffed, Jameson repeatedly asserted that the vehicle was his and that it had been recovered four days ago at the Red Roof Inn.

A frisk for weapons was conducted on Jameson and a baggie containing oxycodone pills was seen hanging out of Jameson's pocket. According

to Officer Burks, Jameson had slurred speech and glazed-over eyes and admitted that he had taken an oxycodone pill thirty minutes before being stopped. Jameson was arrested but was never given a field sobriety test.

Officer Burks later found out that the ATL should have been canceled as Jameson's car had been recovered four days earlier. Officer Burks confirmed that the ATL was still active when he stopped Jameson. The ATL was the only justification for the stop.

Jameson was indicted by the Fayette County Grand Jury on May 17, 2011, on charges of illegal possession of a controlled substance in the first degree, promoting contraband, illegal possession of a controlled substance in the second degree, illegal possession of a controlled substance in the third degree, and driving under the influence. Jameson filed a motion to suppress on October 12, 2011. After a hearing, the trial court denied the motion to suppress with an order entered on January 25, 2012. Jameson entered a conditional guilty plea to all charges except promoting contraband and was subsequently sentenced to one year of imprisonment. It is from the denial of his motion to suppress that Jameson now appeals.

On appeal, Jameson presents one argument, namely, the trial court erred when it denied Jameson's motion to suppress. The Commonwealth disagrees and argues that the application of the exclusionary rule was not called for in this case of clerical error, and the trial court properly applied good faith principles in

denying the motion to suppress. With these arguments in mind we turn to our appellate 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. Kentucky Rules of Criminal Procedure (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)). This Court has held that we will review *de novo* the issue of whether the court's decision is correct as a matter of law. *Stewart v. Commonwealth*, 44 S.W.3d 376, 380 (Ky. App. 2000).

Below, the trial court concluded that the stop of Jameson was improper as the sole basis of the stop was the ATL, which should have been cancelled days prior because the vehicle had been located and recovered. The trial court relied upon the collective knowledge concept in reaching this decision. We agree with the trial court that the collective knowledge concept was applicable *sub judice*. In *Commonwealth v. Vaughn*, 117 S.W.3d 109 (Ky. App. 2003), this Court discussed the collective knowledge concept pertaining to a canceled warrant:

We agree with the widely used concept that law enforcement officers can be held to the collective knowledge of other officers. Additionally, courts generally concur that the " 'collective knowledge' rule cannot function solely permissively, to validate conduct otherwise unwarranted; the rule also operates prohibitively, by imposing on law enforcement the responsibility to disseminate only accurate information." *People v. Ramirez*, 34 Cal.3d 541, 194 Cal.Rptr. 454, 668 P.2d 761, 764–765 (1983). *See also, Ott v. State*, 325 Md. 206, 600 A.2d 111, (1992); *State v. White*, 660 So.2d 664 (Fla.1995).

The Commonwealth and appellee cite a number of cases from other jurisdictions which have dealt with the issue of an arrest and search based on a satisfied or otherwise canceled warrant. The courts focused on such variables as the amount of time which had elapsed since the warrant was valid, the existence of other probable cause for an arrest or a search, and police assessments of the error rates of the records they rely on. *See Annotation, Arrest Based on Outdated Records*, 45 A.L.R.4th 550, § 2, 1986 WL 361579 (1986). From those factors, and the range of facts, those courts arrived at varying conclusions as to whether the evidence of the search had to be suppressed.

One rule distilled from this varied precedent was stated by Professor LaFave in his Search and Seizure treatise. He suggests that the subsequent arrest need only be invalidated when the arresting officer acts pursuant to information in the law enforcement records which remains improperly in the system through the fault of the police or some other government official acting in a law enforcement capacity with the police. Professor LaFave states that the point is not that probable cause is lacking, but "the point is that the police may not rely upon incorrect or incomplete information when they (or perhaps some other government official) are at fault in permitting the records to remain uncorrected." LaFave, 2 Search and Seizure sec. 3.5(d), at 636 (1978), (2003).

On this issue, the courts addressing the question agree that the prosecution must be required to develop evidence on whether the police properly met their duty to keep their information updated and accurate. The burden

> of proof is properly placed on the prosecution to show that the information was cleared from the system in a timely manner. *Ott v. State*, 600 A.2d at 119.

Vaughn at 111.

While *Vaughn* discussed the application of the collective knowledge concept in an expired warrant context we believe that the collective knowledge concept, also known as the "fellow officer" rule is made applicable *sub judice* by *United States v. Hensley*, 469 U.S. 221, 229, 105 S. Ct. 675, 681, 83 L. Ed. 2d 604 (1985). *See also United States v. Lyons,* 687 F.3d 754, 765-66 (6th Cir. 2012) ("It is well-established that an officer may conduct a stop based on information obtained by fellow officers." (Citing to *United States v. Barnes*, 910 F.2d 1342, 1344 (6th Cir.1990), and *Hensley, supra*).

In *Hensley,* the issue presented to the Court was whether a stop of a person by officers of one police department in reliance on a flyer issued by another department indicating that the person was wanted for investigation of a felony was constitutional. *Hensley* at 469 U.S. 221, 229, 105 S. Ct. 675, 681. The Court held that such a stop was permissible given that the issuing officer or department possessed reasonable suspicion to justify the stop:

> Assuming the police make a *Terry* stop in objective reliance on a flyer or bulletin, we hold that the evidence uncovered in the course of the stop is admissible if the police who *issued* the flyer or bulletin possessed a reasonable suspicion justifying a stop, *United States v. Robinson, supra*, and if the stop that in fact occurred was

> not significantly more intrusive than would have been permitted the issuing department.

Hensley at 469 U.S. 221, 233, 105 S. Ct. 675, 682.

Thus, the focus of the inquiry is not on what the arresting officer thought but instead what the issuing officer/department knew. Therefore, discussion of whether Officer Burkes had acted in good faith to stop Jameson is moot.[1] As the trial court stated, the ATL should have been removed prior to the stop of Jameson because the *same* department that issued the ATL was the same one to recover the vehicle days prior to Jameson's stop. The Commonwealth carried the burden of proof that police properly met their duty to keep their information updated and accurate. *See Vaughn* at 111. *Vaughn* further discussed the question of the timeliness:

> However, we presume that this process is not instantaneous. In *Commonwealth v. Riley*, 284 Pa.Super. 280, 425 A.2d 813 (1981), the Pennsylvania Superior Court deemed a much longer period to raise no inference of wrongdoing by police: "Certainly, police misconduct cannot be inferred when the outstanding arrest warrant and juvenile detainer were satisfied only four days before the NCIC check." *Id*. at 816. Although, in this case the warrant list was local, rather than the NCIC national computer, we concur that some time must be allowed to accomplish the update.
>
> Examining cases of this type from other jurisdictions, we find that courts routinely hold the police will not be considered at fault when the records are not current by a matter of a few days. *Commonwealth v.*

[1] We note that the good faith exception to exclusion is generally applicable in a warrant scenario that is later found to be invalid. It has also been applied in the context of a change in established law. *See Illinois v. Krull*, 480 U.S. 340, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987). Moreover, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest. *Hensley* at 469 U.S. 221, 230-31, 105 S. Ct. 675, 681.

> *Riley*, 425 A.2d at 816 (four days); *In re R.E.G.*, 602 A.2d 146, 149 (D.C.1992)(three days, not reasonable to require instant update); *Harvey v. State*, 266 Ga. 671, 469 S.E.2d 176 (1996) (four days). But *cf., Ott v. State*, 600 A.2d at 117–119 (four days too long; failure to update places citizens at risk, police must show delay reasonable) and *State v. White*, 660 So.2d at 667–68 (four days; failure to update was police negligence which should be deterred).

Vaughn at 111-12.

We conclude that, in light of *Vaughn,* the knowledge that the ATL should have been removed is imparted to Officer Burkes as the collective knowledge concept applies prohibitively. Thus, Officer Burkes is charged with the knowledge that the ATL was withdrawn and, therefore, he would have had no reasonable suspicion to justify the stop of Jameson. Absent such reasonable suspicion, the stop of Jameson was unconstitutional.

Consequently, the evidence gathered as a result of the stop may be susceptible to suppression by application of the exclusionary rule. We likewise agree with the trial court that four days is an unreasonable delay in which to update information and, thus, the police department is at fault for the failure to update its system. Accordingly, a constitutional violation did occur. However, the second part of the analysis is whether or not the exclusionary rule acts to exclude the fruits derived from the violation, discussed *infra*.

The Commonwealth argues that the trial court was correct that the exclusionary rule should not apply *sub judice*. We agree. The United States

Supreme Court has made clear that the exclusion is not always proper and is a separate question from a constitutional violation:

> Although *Whiteley* clearly retains relevance in determining whether police officers have violated the Fourth Amendment, *see Hensley, supra,* 469 U.S., at 230–231, 105 S.Ct., at 681–682, its precedential value regarding application of the exclusionary rule is dubious. In *Whiteley*, the Court treated identification of a Fourth Amendment violation as synonymous with application of the exclusionary rule to evidence secured incident to that violation. 401 U.S., at 568–569, 91 S.Ct., at 1037–38. Subsequent case law has rejected this reflexive application of the exclusionary rule. *Cf. Illinois v. Krull*, 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987); *Sheppard, supra; United States v. Leon,* 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984); *United States v. Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). These later cases have emphasized that the issue of exclusion is separate from whether the Fourth Amendment has been violated, *see e.g., Leon, supra*, 468 U.S., at 906, 104 S.Ct., at 3411–3412, and exclusion is appropriate only if the remedial objectives of the rule are thought most efficaciously served, *see Calandra, supra,* 414 U.S., at 348, 94 S.Ct., at 620.

Arizona v. Evans, 514 U.S. 1, 13-14, 115 S. Ct. 1185, 1192-93, 131 L. Ed. 2d 34 (1995).

Recently, the United States Supreme Court in *Herring v. United States,* 555 U.S. 135, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009), addressed the exclusionary rule in the context of police error:

> The exclusionary rule was crafted to curb police rather than judicial misconduct; court employees were unlikely to try to subvert the Fourth Amendment; and "most important, there [was] no basis for believing that application of the exclusionary rule in [those] circumstances" would have any significant effect in

> deterring the errors. *Id.*, at 15, 115 S.Ct. 1185. *Evans* left unresolved "whether the evidence should be suppressed if police personnel were responsible for the error," an issue not argued by the State in that case, *id*., at 16, n. 5, 115 S.Ct. 1185, but one that we now confront.
>
> The extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct. As we said in *Leon,* "an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus" of applying the exclusionary rule. 468 U.S., at 911, 104 S.Ct. 3405. Similarly, in *Krull* we elaborated that "evidence should be suppressed 'only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.' " 480 U.S., at 348–349, 107 S.Ct. 1160 (quoting *United States v. Peltier*, 422 U.S. 531, 542, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975))….
>
> To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.

Herring at 555 U.S. 135, 142-44, 129 S. Ct. 695, 701-02 (internal footnotes omitted).

We agree with the trial court that exclusion of the evidence *sub judice* is unwarranted given that the evidence presented at the suppression hearing was that the evidence was a result of a singular mistake and was not deliberate, reckless, grossly negligent, or a recurring or systemic negligence. The purpose of the exclusionary rule, deterrence, would be minimally served by suppression here. Thus, we affirm the trial court's denial of the motion to suppress.

In light of the aforementioned, we affirm.

DIXON, JUDGE, CONCURS IN RESULT ONLY.

STUMBO, JUDGE, DISSENTS AND WILL NOT FILE SEPARATE OPINION.

BRIEFS FOR APPELLANT:

Jason D. Hart
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Ken W. Riggs
Assistant Attorney General
Frankfort, Kentucky