

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-000370-MR

RAKIM LAMON MOBERLY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JUDGE
ACTION NO. 14-CR-00102

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, JONES, AND NICKELL, JUDGES.

NICKELL, JUDGE: Rakim Lamón Moberly appeals from a Fayette Circuit Court judgment after entering a plea of guilty conditioned on his right to appeal the denial of his motion to suppress evidence. Moberly contends the police impermissibly extended the length of a traffic stop to allow a drug-sniffing dog to

detect narcotics in his vehicle, and the stop was unjustified from the outset.

Following a careful review, we affirm.

The following facts were elicited at the suppression hearing. Very early on a December morning, Officer Roman Sorrell was driving behind Moberly and “ran the tags” on his vehicle. Although the registration sticker on Moberly’s license plate was current, Sorrell learned from the computer database that the registration tag had been canceled for failure to maintain insurance. He activated his lights and pulled the vehicle over. The time of the stop was 3:35 a.m.

Officer Sorrell introduced himself and asked for Moberly’s driver’s license, vehicle registration and insurance documents. Moberly produced a valid driver’s license but did not have the other documents. He stated the car did not belong to him but he had permission to drive it. Officer Sorrell testified Moberly was unusually nervous. There was sweat on his brow, even though it was December. He was smoking a cigarette and blowing the smoke towards the car’s interior, and kept looking away to the right. The officer took Moberly’s license back to his cruiser to fill out citations for the registration and insurance offenses. As he filled out the forms, he checked the county jail website and a separate police database of complaints and reports. He learned Moberly was charged the previous year with trafficking in marijuana and carrying a concealed deadly weapon, although the website did not indicate whether the charges resulted in convictions. According to the officer, looking up this information took no longer than five minutes. Before completing the citations, he returned to Moberly and told him what he had learned

from the databases, and asked him if he had drugs, knives or other weapons in the vehicle. Moberly said he did not, and refused to give consent to a search of the vehicle. Officer Sorrell testified during a usual traffic stop, he would have given the driver the citation at that point and let him leave.

Instead, Officer Sorrell returned to his vehicle, completed the citation and asked for a drug-detecting dog to be brought to the scene. Officer Darrell Jones arrived with a trained canine at 3:59 a.m., about twenty-four minutes after the initial stop. Officer Jones consulted with Officer Sorrell for about thirty seconds. He then explained to Moberly he was going to have the dog walk around the vehicle. Moberly stood with another officer at the front of Officer Sorrell's cruiser. The dog alerted to the odor of narcotics on the driver's side of Moberly's vehicle. The officers searched the vehicle and found cocaine and what they believed to be heroin (but was in fact methylene) in the glove compartment. They also recovered a stolen handgun from beneath the driver's seat. A towing company was notified to remove the vehicle, and Moberly was formally arrested at 4:20 a.m. The time elapsed between the initial stop and the arrest was forty-five minutes.

At the suppression hearing, Moberly argued the stop was unreasonably prolonged because Officer Sorrell did not have reasonable suspicion of criminal activity to justify detaining him beyond the time it took to issue the citations. The trial court made verbal findings of fact and concluded that the length of the stop was not unreasonable under the circumstances. Moberly entered a conditional plea

of guilty to one count of first-degree possession of a controlled substance¹ and one count of carrying a concealed deadly weapon.² He received a total sentence of two years' imprisonment. This appeal followed.

An appellate court's standard of review of the trial court's decision on a motion to suppress requires that we first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive. 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) (footnotes omitted).

Under the Fourth Amendment, the duration and scope of a traffic stop are limited. "Although an officer may detain a vehicle and its occupants in order to conduct an ordinary traffic stop, 'any subsequent detention . . . must not be excessively intrusive in that the officer's actions must be reasonably related in scope to circumstances justifying the initial interference.' *United States v. Davis*, 430 F.3d 345, 353 (6th Cir. 2005) (citation omitted)." *Turley v. Commonwealth*, 399 S.W.3d 412, 421-22 (Ky. 2013). "[A]n officer cannot detain a vehicle's occupants beyond completion of the purpose of the initial traffic stop 'unless something happened during the stop to cause the officer to have a 'reasonable and articulable suspicion that criminal activity [is] afoot.'" *Id.* at 422.

¹ Kentucky Revised Statutes (KRS) 218A.1415, a Class D felony.

² KRS 527.020, a Class A misdemeanor.

Moberly argues the duration of the traffic stop was impermissibly prolonged, first, when instead of immediately completing the citations, the officer searched through the computer and found Moberly's previous charges, and, second, when he detained Moberly to call for a drug-detecting dog. We disagree.

The trial court held the officer did have a reasonable suspicion of criminal activity to justify checking the website and databases, based on his observations Moberly was very nervous, sweating even though it was winter, was blowing smoke from his cigarette into the passenger's seat of the car and looking to his right. We agree this behavior justified the officer's further investigation, even though these behaviors individually would not necessarily create a reasonable suspicion. "[T]he fact that the appellant's activity may have been as consistent with innocent activity as with illegal activity did not deprive the police from the ability to entertain a reasonable suspicion that criminal activity had, in fact, occurred." *Simpson v. Commonwealth*, 834 S.W.2d 686, 688 (Ky. App. 1992).

Although each of these behaviors might by itself be innocently explained,

Terry [v. *Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)] . . . precludes this sort of divide-and-conquer analysis. The officer in *Terry* observed the petitioner and his companions repeatedly walk back and forth, look into a store window, and confer with one another. Although each of the series of acts was 'perhaps innocent in itself,' we held that, taken together, they 'warranted further investigation.' 392 U.S. at 22, 88 S.Ct. 1868. See also [*U.S. v.*] *Sokolow*, [490 U.S. 1, 9, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989)] (holding that factors which by themselves were 'quite consistent with innocent travel' collectively amounted to reasonable suspicion).

United States v. Arvizu, 534 U.S. 266, 274-75, 122 S. Ct. 744, 751, 151 L. Ed. 2d 740 (2002).

Moberly argues the facts of his case are analogous to those in *Strange v. Commonwealth*, 269 S.W.3d 847 (Ky. 2008), and *Commonwealth v. Sanders*, 332 S.W.3d 739 (Ky. App. 2011), cases in which our appellate courts held the facts did not justify a stop by the police. In *Strange*, police officers observed the defendant out late at night in a high-crime area, standing near a pay phone that had sometimes been used in drug transactions. When he saw the police officers, the defendant walked over to a van parked nearby and conversed with the driver. 269 S.W.3d at 849-51. In *Sanders*, the defendant was out late at night in a neighborhood known for drug activity and had been seen following someone. 332 S.W.3d at 741. *Strange* and *Sanders* are of limited applicability, however, because they concern the sufficiency of evidence required to support an initial seizure by the police. Moberly did not contend in the court below that the initial traffic stop for failure to maintain insurance was unjustified. The officer's subsequent decision to run Moberly's name through a database and website was reasonable under the circumstances. It added very little time to the stop and was justified by the officer's observations of Moberly's suspicious behavior.

The facts of this case are also readily distinguishable from those of *Rodriguez v. United States*, ___ U.S. ___, 135 S.Ct. 1609, 1616-17, 191 L.Ed.2d 492 (2015), a recent United States Supreme Court case which held a routine traffic stop may not be extended to include a dog sniff in the absence of reasonable suspicion.

In *Rodriguez*, the motorist was pulled over for veering onto the shoulder, but did not exhibit any other suspicious behavior. The police officer completed filling out a citation, handed it back, but thereafter detained the motorist for a dog sniff. The Supreme Court held the detention was impermissible because it exceeded the scope of the stop. “A seizure justified only by a police-observed traffic violation, therefore, ‘become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission’ of issuing a ticket for the violation.” *Rodriguez*, 135 S.Ct. at 1612 (citing *Illinois v. Caballes*, 543 U.S. 405, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005)).

By contrast, Moberly’s behavior while the officer made his routine inquiries was sufficiently suspicious to justify the officer expanding the scope of the stop to include the minimal intrusion of running his name through the databases. Furthermore, once the officer learned Moberly had been recently charged with drug and firearm offenses, he was entitled to detain him briefly while awaiting the arrival of the canine. Based on the totality of the circumstances, the stop in this case was justified beyond the time reasonably required to issue the citation.

Moberly’s second argument concerns the validity of the initial stop of the vehicle. He concedes the issue was not preserved, but contends because the trial court made express findings and conclusions of law that the initial stop was reasonable, it may be reviewed on appeal. However, the arguments he makes on appeal, mainly concerning the reliability of Kentucky’s automated vehicle information system, were never presented to the trial court. “It is an unvarying

rule that a question not raised or adjudicated in the court below cannot be considered when raised for the first time in this court.” *Combs v. Knott County Fiscal Court*, 283 Ky. 456, 141 S.W.2d 859, 860 (Ky. App. 1940). Moberly has not requested palpable error review pursuant to Kentucky Rules of Criminal Procedure (RCr) 10.26. “Absent extreme circumstances amounting to a substantial miscarriage of justice, an appellate court will not engage in palpable error review pursuant to RCr 10.26 unless such a request is made and briefed by the appellant.” *Shepherd v. Commonwealth*, 251 S.W.3d 309, 316 (Ky. 2008). Because such extreme circumstances are not present in this case, we decline to review this argument.

For the foregoing reasons, the circuit court did not err in denying the motion to suppress, and consequently its final judgment is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Brandon Neil Jewell
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

James Havey
Assistant Attorney General
Frankfort, Kentucky