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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001445-MR

CHARLES THOMAS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 15-CR-00866

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: MAZE, STUMBO, AND TAYLOR, JUDGES.

MAZE, JUDGE: Charles Thomas appeals from a judgment of conviction by the Fayette Circuit Court following a conditional guilty plea. He argues that the trial court erred by denying his motion to suppress evidence seized from him following a traffic stop and a later warrantless arrest. We agree with the trial court that the police officers did not extend the valid traffic stop to conduct a dog sniff of

Thomas's vehicle. Furthermore, we question whether Thomas sufficiently preserved his current challenge to probable cause supporting his subsequent arrest. Nevertheless, we find substantial evidence to support the trial court's conclusion that the officers had probable cause for the arrest. Hence, we affirm.

On September 8, 2015, a Fayette County grand jury returned an indictment charging Thomas with three counts of first-degree trafficking in a controlled substance (less than 2 grams heroin), two counts of possession of drug paraphernalia, and one count each of first-degree trafficking in a controlled substance (less than 2 grams fentanyl), first-degree possession of a controlled substance, and possession of marijuana. Subsequently, Thomas filed a motion to suppress evidence seized by police on June 8 and August 19, 2015. The trial court conducted an evidentiary hearing at which Detective Charles Johnson and Officer Adam Ray of the Lexington-Fayette Urban County Police Department testified.

Detective Johnson testified that, sometime in May 2015, he observed a black Dodge Challenger on Stuart Hall Boulevard. The vehicle was blocking traffic for nearly a minute, and he observed a person leave the vehicle and enter a house. Shortly thereafter, Detective Johnson received a report that the person who exited the vehicle had overdosed on heroin at that house. Neighbors complained that the area was a drive-through for narcotics. The person who overdosed later told Detective Johnson that he got his heroin from a black male who drives a black Challenger. Later that week, Detective Johnson saw the Challenger in the

driveway of the house on Stuart Hall Boulevard and he wrote down the license plate number. The vehicle was registered to Thomas.

On June 8, 2015, Detective Johnson and Officer Benjamin Blank were at the Howard Johnson Motel on Winchester Road investigating an unrelated case. Detective Johnson saw the same black Challenger pull into the rear parking lot of the motel. Officer Blank pulled his police cruiser behind the Challenger and called in the license plate number. After determining that the Challenger had an expired registration, Detective Johnson and Officer Blank approached the vehicle. Thomas was in the driver's seat.

As he approached the car on the passenger side, Detective Johnson saw a shotgun in the back seat of the vehicle. Detective Johnson asked Thomas to get out of the Challenger, and Thomas complied. Detective Johnson stated that he had a report of Thomas selling narcotics from his car. Thomas denied the accusations. Detective Johnson then asked Thomas if he had anything illegal on him or in the vehicle, and Thomas said no. However, Thomas refused to consent to a search of the vehicle. Detective Johnson then called in to have a drug dog brought to the scene.

The record indicates that Detective Johnson initially called for a drug dog at 3:02 pm, but no one answered that call. Detective Johnson then directly called another K9 officer to the scene. Officer Blank began the citation report for the expired registration at 3:11 pm. Detective Rob Hart and the drug dog arrived around 3:17 pm. The dog alerted on the driver's side door. Detective Johnson

directed Officer Blank to search the vehicle. A marijuana grinder was found in the back seat of the vehicle. During a pat-down search, Detective Johnson found a baggie of heroin on Thomas.

While the vehicle was being searched, Thomas became sick and threw up in the garbage. Detective Johnson saw a knotted baggie in the garbage where Thomas vomited. Detective Johnson believed that Thomas had eaten a baggie of narcotics, but he was unable to retrieve the baggie. The officers then placed Thomas under arrest. Subsequently, Detective Johnson obtained consent to search the motel room where Thomas was staying. During the search, Detective Johnson found a rifle, muscle vitamins typically used to cut heroin, and a corner baggie with residue.

After June 8, Detective Johnson had a confidential informant make three controlled buys from Thomas. Based on those buys, Detective Johnson believed he had enough information to make a probable-cause arrest. At Detective Johnson's direction, Officer Ray went to the area of Thomas's residence on August 19 to make the arrest. Officer Ray approached Thomas outside of the residence and informed him that he was under arrest. As Thomas pulled his hands out of his pockets, Officer Ray observed a small plastic baggie fall to the ground. In addition, Johnson had a large amount of cash on him when he was arrested.

Thomas first challenged the June 8 search, arguing that the police detained him for longer than was necessary to secure the scene and to write the citation for the expired registration. The trial court disagreed, finding that the drug

dog was called and alerted on the vehicle prior to the completion of the citation. Thomas also argued that the police lacked probable cause for the arrest on August 19. Again, the trial court disagreed, finding that the three controlled drug buys provided sufficient probable cause for the arrest. The court further found that Officer Ray acted promptly upon the information provided by Detective Johnson and that any delay did not affect the validity of the arrest.

After the denial of the motion to suppress, Thomas entered a conditional plea of guilty to two counts of facilitation to first-degree trafficking in a controlled substance (less than two grams heroin), and one count each of first-degree trafficking in a controlled substance (less than two grams fentanyl), and first-degree possession of a controlled substance. The other charges were dismissed. Pursuant to the Commonwealth's recommendation, the trial court sentenced Thomas to a total of two years' imprisonment which was probated for a period of three years. This appeal followed.

Appellate review of a trial court's rulings on a motion to suppress is two-fold. *Anderson v. Commonwealth*, 352 S.W.3d 577, 583 (Ky. 2011), citing *Commonwealth v. Whitmore*, 92 S.W.3d 76 (Ky. 2002), and RCr¹ 9.78. "First, the factual findings of the trial court are conclusive if supported by substantial evidence." *Id.* "Second, if the findings are supported by substantial evidence, the appellate court conducts a *de novo* review to determine whether the trial court's

¹ Kentucky Rules of Criminal Procedure.

ruling is correct as a matter of law.” *Id.* See also *Bishop v. Commonwealth*, 237 S.W.3d 567, 568-69 (Ky. App. 2007).

With respect to the traffic stop on June 8, Thomas relies heavily on the recent opinion of the Kentucky Supreme Court in *Davis v. Commonwealth*, 484 S.W.3d 288 (Ky. 2016).² In *Davis*, the Court noted that, generally, a police officer may stop a vehicle as long as he or she has probable cause to believe that a civil traffic violation has occurred, regardless of the officer’s subjective motivation in doing so. *Id.* at 291, citing *Wilson v. Commonwealth*, 37 S.W.3d 745, 749 (Ky. 2001). See also *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). However, the Court went on to hold that a police officer may not extend a traffic stop beyond its original purpose for the sole purpose of conducting a sniff search—not even for a *de minimis* period of time. *Davis*, 484 S.W.3d at 293, citing *Rodriguez v. United States*, ---U.S.---, 135 S. Ct. 1609, 1616, 191 L. Ed. 2d 492 (2015).

In *Davis*, the officer had concluded his investigation of matters relating to the purpose of the stop when he had the dog conduct the sniff of the vehicle. While the dog sniff only took two or three extra minutes, it nonetheless prolonged the stop. Because the sniff search was not related to the purpose for which Davis was stopped, and the officer did not have a reasonable and articulable suspicion to search for drugs, the extended time which the officer took to conduct

² Thomas also relies on *Lane v. Commonwealth*, No. 2015-CA-001698-MR, 2016 WL 6543573 (Ky. App. Nov 4, 2016). But since the Kentucky Supreme Court granted discretionary review in that case, the Court of Appeals opinion cannot be cited. CR 76.28(4)

the sniff search violated the Fourth Amendment's proscription against unreasonable seizures. *Id.* at 294.

Similarly, Thomas argues Detective Johnson and Officer Blank extended the traffic stop beyond the time needed to issue a citation for expired registration. The trial court, however, found otherwise. Thomas concedes that the initial stop for expired registration was valid. The court specifically found that the drug dog arrived on the scene and alerted on the vehicle prior to the completion of the citation. Furthermore, there was no indication that the dog sniff extended the time needed to complete the citation. The trial court's finding on this matter was supported by the testimony of Detective Johnson and times listed on the citation. Therefore, we find no basis to disturb the trial court's conclusion.

Thomas next argues that the Officer Ray lacked probable cause for the arrest on August 19. After the traffic stop, Detective Johnson arranged for a confidential informant to make three controlled buys, on July 21, 23, and 28, respectively. The buys were audio-taped and observed by the police. On cross-examination, Detective Johnson testified that an individual known as "Trey" made a delivery of the drugs to the confidential informant. Detective Johnson stated that the informant advised him that Trey worked for Thomas. In addition, Detective Thomas testified that he had seen Trey and Thomas together.

On appeal, Thomas argues that there was no credible evidence supporting the connection between Trey and Thomas, and as a result, there was no probable cause to arrest Thomas for trafficking. The Commonwealth points out

that Thomas did not raise this precise issue to the trial court. In his memorandum to the trial court on the motion to suppress, Thomas maintained that Officer Ray lacked probable cause because he was relying on information provided by Detective Johnson. He also suggested that information supporting probable cause was stale due to the nearly one-month delay between the controlled buys and the arrest.

Thomas responds that his trial counsel raised this issue during his cross-examination of Detective Johnson. But while the point was briefly raised, counsel did not follow up the argument in the post-hearing memorandum. To the extent that this issue was never presented to the trial court, Thomas cannot raise it for the first time on appeal. *Bowling v. Commonwealth*, 80 S.W.3d 405, 419 (Ky. 2002).

Nevertheless, Thomas requests that we review the issue under the palpable error rule of RCr 10.26. We find no error, palpable or otherwise. An officer may make an arrest without a warrant when he or she has probable cause to believe that the person being arrested has committed a felony. KRS³ 431.005(1)(c).

[T]he phrase “probable cause” is incapable of precise definition or quantification into percentages because the standard deals with probabilities and depends on the totality of the circumstances. . . . [T]o determine whether an officer had probable cause to arrest, [the court must examine] the events leading to the arrest and the decision of the officer as to whether these facts, viewed from the

³ Kentucky Revised Statutes.

standpoint of an objectively reasonable police officer amounts to probable cause.

Commonwealth v. Fields, 194 S.W.3d 255, 257 (Ky. 2006), citing *Maryland v. Pringle*, 540 U.S. 366, 372, 124 S. Ct. 795, 800–01, 157 L. Ed. 2d 769 (2003).

While Detective Johnson did not observe Thomas personally deliver the drugs to the confidential informant, he had reliable information that Trey worked for Thomas. In addition, he personally observed Trey with Thomas near the time of the transactions. Under the circumstances, Detective Johnson reached a reasonable conclusion that Trey was acting under Thomas's direction and in furtherance of Thomas's trafficking activity. Finally, Detective Johnson provided all of this information to Officer Ray prior to the arrest. Consequently, there was substantial evidence to support the trial court's conclusion finding probable cause for the arrest.

Accordingly, we affirm the judgment of conviction by the Fayette Circuit Court.

ALL CONCUR.

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