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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001601-MR

RON GORDON APPELLANT

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 17-CI-00265

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, J. LAMBERT, AND THOMPSON, JUDGES.

JONES, JUDGE: Appellant, Ron Gordon, appeals an order of the Oldham Circuit Court granting the Commonwealth's petition for a writ of mandamus and directing the Oldham District Court to allow evidence obtained as a result of a traffic stop to be used at trial. Following review of the record and applicable law, we AFFIRM the circuit court's issuance of the writ.

I. BACKGROUND

On July 25, 2013, Ron's son, Blake Gordon, was approaching his home when he noticed that Ron's vehicle was parked in a parking lot across from his house. Blake and Ron did not have a good relationship. They had previously owned and operated a landscaping business together; however, when that business began failing Blake and Ron's relationship became extremely acrimonious. Following dissolution of their business, Blake and Ron ceased communicating with each other, with the exception of arguing via text message and Ron leaving notes on Blake's front door. Blake had previously attempted to get a no-trespassing order against Ron, but was unsuccessful. Accordingly, when Blake saw Ron parked outside of his house, he felt threatened. Blake called the Oldham County dispatch and reported that Ron was parked outside of his home, that Ron was a habitual drinker, and that Ron was an ex-Marine with a conceal carry permit and was normally armed.

By the time Blake circled back to his home, Ron had left. Shortly thereafter, however, Ron reappeared across the street from Blake's home. Blake called dispatch again to inform them that Ron had returned, and was advised that an officer would arrive shortly. Officer Paul Kerr arrived at Blake's residence approximately five to seven minutes later, at which point Ron had again left the parking lot. However, while Blake and Officer Kerr were talking in the front yard,

Ron drove back down the street, slowed his vehicle as he passed Blake's home, then took off in a fast manner. Officer Kerr alerted dispatch of the direction in which Ron was travelling, then began pursuing Ron in his cruiser. Officer Kerr followed Ron down Cedar Point Road, then activated his emergency equipment when Ron pulled into a subdivision. When Ron pulled into a private driveway, Officer Kerr approached Ron's vehicle at gunpoint. At that time, Officer Kerr observed the odor of alcohol coming from Ron. Another officer administered a field sobriety test and placed Ron under arrest for driving under the influence. Ron was subsequently charged with possession of an open alcoholic beverage container in a motor vehicle[1] and operating a motor vehicle under the influence of alcohol, first offense.[2]

A suppression hearing was held on November 19, 2013, at which Blake and Officer Kerr were the sole testifying witnesses. In addition to testifying about the events that took place on July 25, 2013, Blake testified that he had not had direct contact with Ron on the date of the incident and, therefore, had no actual knowledge as to whether Ron had been consuming alcohol that day or was carrying a firearm. Blake testified that because it was typical for Ron to be intoxicated daily and for Ron to carry a firearm, he had no reason to doubt that was

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[1] Kentucky Revised Statute (KRS) 189.530(2).

[2] KRS 189A.010.

the case on July 25, 2013. This belief, combined with the heated nature of his and Ron's relationship, caused Blake to feel threatened when he saw Ron parked across the street from his house. Blake testified that the day after Ron's arrest, he sought and obtained an emergency protective order against Ron. Officer Kerr testified that he had not observed Ron violate any laws prior to his pulling Ron over. However, because Blake had informed him that he felt threatened, that Ron normally was intoxicated, and that Ron normally carried a firearm, in addition to the fact that he had personally observed Ron slowly drive by Blake's house and then quickly drive away, he felt that he was justified in stopping Ron.

On January 13, 2017, the district court entered an order suppressing all evidence obtained by the Commonwealth as a result of the traffic stop. The district court found that, based on the totality of the evidence, there was not a reasonable or articulable basis for the stop. The district court concluded that just because Ron was known to drink and drive and carry a firearm in the past, the mere fact that he was present outside of Blake's home could not give rise to an inference that Ron was committing a violation of the law.

On May 1, 2017, the Commonwealth filed a petition for writ of mandamus in the Oldham Circuit Court. In its accompanying memorandum, the Commonwealth contended that while the district court had been acting within its jurisdiction, it had acted erroneously in concluding that Officer Kerr's stop of Ron

was unconstitutional. The Commonwealth argued that Officer Kerr's stop of Ron was not an investigatory stop, but a stop made under his community caretaking function. Accordingly, whether Officer Kerr had a reasonable suspicion that criminal activity was afoot at the time he stopped Ron was irrelevant. The Commonwealth argued that Officer Kerr had been reasonable in stopping Ron, as Officer Kerr had legitimate concerns for Blake's safety based on the information he had at the time of the stop. Additionally, the Commonwealth argued that the district court had erred in applying the exclusionary rule. The Commonwealth contended that the brief stop of Ron did not outweigh the substantial social costs of allowing a drunk driver, armed with a deadly weapon, to go free.

In response, Ron contended that the Commonwealth's petition had failed to set forth the mandatory prerequisites for a writ of mandamus or prohibition. Alternatively, Ron argued that the district court had correctly determined that Officer Kerr's stopping him was unconstitutional. Ron contended that the Commonwealth's argument that Officer Kerr had authority to stop Ron under his community caretaking function was not properly before the circuit court, as the Commonwealth had not made that argument before the district court. In any event, Ron argued that the community caretaking function was not applicable to his situation. Ron contended that for the community caretaking function to apply,

the Commonwealth must show that he was in need of assistance at the time that he was stopped, which it had not done.

On September 6, 2017, the circuit court entered an order granting the Commonwealth's petition for a writ of prohibition/mandamus. After finding that the Commonwealth had met all threshold requirements for consideration of a writ, the circuit court concluded that Officer Kerr's stop of Ron was constitutional under the community caretaking function.

This appeal followed.

II. Standard of Review

Appeals of a writ action are reviewed under a three-part analysis. *Appalachian Racing, LLC. v. Commonwealth*, 504 S.W.3d 1, 4 (Ky. 2016). Factual findings are reviewed for clear error and legal conclusions are reviewed *de novo*. *Id.* "But ultimately, the decision whether or not to issue a writ of prohibition is a question of judicial discretion. So review of a court's decision to issue a writ is conducted under the abuse-of-discretion standard." *Id.* at 3.

III. Analysis

"Relief by way of prohibition or mandamus is an extraordinary remedy and we have always been cautious and conservative both in entertaining petitions for and in granting such relief." *Bender v. Eaton*, 343 S.W.2d 799, 800 (Ky. 1961). There are two general classes under which relief by way of a writ may

be granted: (1) where a court is acting without jurisdiction or beyond its jurisdiction and (2) where a court is acting erroneously within its jurisdiction. *Id.* "When, as here, the petitioner alleges that the trial court is acting erroneously, though within its jurisdiction, a writ will only be granted when two threshold requirements are satisfied: there exists no adequate remedy by appeal or otherwise; and the petitioner will suffer great and irreparable harm." *Commonwealth v. Peters*, 353 S.W.3d 592, 595 (Ky. 2011) (citing *Hoskins v. Maricle*, 150 S.W.3d 1, 18 (Ky. 2004)).

In the instant case, the Commonwealth established that it satisfied the threshold requirements. Following the district court's order suppressing the evidence against Ron, the Commonwealth could either elect to proceed to trial without sufficient evidence to successfully prosecute Ron or seek interlocutory review of the suppression order. Had the Commonwealth elected to take the first path, it would be constitutionally prohibited from seeking review of the suppression order upon Ron's acquittal. KY. CONST. § 115 ("[T]he Commonwealth may not appeal from a judgment of acquittal in a criminal case . . . ."). "KRS 23A.080, the statute addressing appeals from district to circuit court, makes no provision for interlocutory appeals." *Commonwealth v. Williams*, 995 S.W.2d 400, 402 (Ky. App. 1999). Accordingly, the Commonwealth's only available avenue for relief from the suppression order was to seek a writ of mandamus or prohibition

with the circuit court. *Tipton v. Commonwealth*, 770 S.W.2d 239, 241 (Ky. App. 1989), *abrogated in part on other grounds by Hoskins v. Maricle*, 150 S.W.3d 1 (Ky. 2004). Further, if the district court was indeed erroneous in suppressing the evidence against Ron, the Commonwealth would suffer irreparable injury. "The 'great injustice' and 'harm' afforded the Commonwealth by proceeding to trial without crucial evidence cannot be undone." *Commonwealth v. Bell*, 365 S.W.3d 216, 223 (Ky. App. 2012).

Ron's sole argument on appeal is that the circuit court erred in concluding that Officer Kerr's stop and seizure of him was justified under the community caretaking function.[3] Ron contends that the circuit court failed to balance the need and interest furthered by Officer Kerr stopping him against the degree and nature of the intrusion upon his privacy. He argues that there was no testimony given at the suppression hearing establishing that he was in need of assistance or establishing that Blake's feeling threatened by his presence was well-founded. Accordingly, Ron argues that the public need in this case was slight, while the intrusion upon his privacy was significant.

[3] Ron additionally maintains his argument that the circuit court should not have considered the Commonwealth's community caretaking function argument because the Commonwealth did not make that argument during the suppression hearing. This argument confuses writ petitions with appeals. Writs are original actions filed in an appellate court. Kentucky Rules of Civil Procedure (CR) 81; CR 76.36. Accordingly, the Commonwealth was free to raise new arguments in its writ petition.

The community caretaking function of police officers was first recognized by the Untied State Supreme Court in *Cady v. Dombrowski*, 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973), to justify the warrantless search of a vehicle that had been removed from an accident scene. In finding that the search did not violate constitutional principles, the Court stated as follows:

> Because of the extensive regulation of motor vehicles and traffic, and also because of the frequency with which a vehicle can become disabled or involved in an accident on public highways, the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office. Some such contacts will occur because the officer may believe the operator has violated a criminal statute, but many more will not be of that nature. Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.

Id. 413 U.S. at 441, 93 S. Ct. at 2528.

In *Poe v. Commonwealth*, 169 S.W.3d 54 (Ky. App. 2004), the first and only published Kentucky case discussing the application of the community caretaking function to stops and seizures, an officer stopped Poe after observing him driving up and down the same streets around 1:30 a.m. The officer did not observe any criminal activity, but made a courtesy stop to possibly offer Poe directions. Upon effectuating the traffic stop, the officer observed that Poe had

bloodshot eyes, a carefree attitude, and was not wearing a seatbelt. Poe admitted to the officer that he had been smoking marijuana. Poe was then arrested and charged. The district court denied Poe's motion to suppress and the circuit court affirmed. The Kentucky Supreme Court granted discretionary review. *Id.*

The *Poe* Court concluded that the community caretaking function can apply to traffic stops; however, for a stop to be upheld under the community caretaking function the officer's stop must be "based on specific and articulable facts that lead to a reasonable conclusion that the individual requires assistance or [that the stop] is necessary for the public's safety." *Id.* at 57 (citing *State v. Marcello*, 157 Vt. 657, 658, 599 A.2d 357, 358 (1991)). Further, the stop must be objectively reasonable under the circumstances. *Id.* at 59. The *Poe* Court noted that the determination of reasonable could be described as "balancing the public need and interest furthered by the police conduct against the degree and nature of the intrusion upon the privacy of the citizen." *Id.* at 58 (quoting *State v. Ellenbecker*, 159 Wis.2d 91, 96, 464 N.W.2d 427, 429 (Wis. App. 1990), *rev den.*, 468 N.W.2d 28 (Wis. 1991)). The Court ultimately concluded that the community caretaking function did not provide justification for the stop based on the facts of Poe's case. Since the rendition of *Poe*, this Court has held that the community

caretaking function justified stops of citizens without reasonable suspicion that criminal activity was afoot.[4]

In determining that the community caretaking function applied in the instant case, the circuit court made the following findings of fact:

> [Ron] and [Blake] were estranged due to an acrimonious business relationship; [Blake] knew [Ron] to drink frequently and to carry a gun on his person; [Ron] was a skilled marksman during his time in the military; [Blake] observed [Ron] outside of his home on three occasions on July 25, 2013[,] when he had no reason to be there; [Blake] expressed being fearful of [Ron's] presence; [Ron] never approached his son or otherwise entered his property; [and] Officer Kerr did not observe [Ron] drive in an unsafe manner or otherwise violate any traffic laws.

R. 143-44.

These findings are supported by the testimony given at the suppression hearing. While the circuit court did not explicitly state that it was conducting a balancing test, its order indicates that it balanced the above-cited facts and concluded that the public need effectuated by Officer Kerr stopping Ron was greater than the intrusion upon Ron's privacy interests. We agree with that conclusion.

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[4] *See Foley v. Commonwealth*, No. 2015-CA-000247-MR, 2016 WL 5485409 (Ky. App. Sept. 30, 2016), *discretionary rev. denied, ordered not to be published*, No. 2016-SC-000599-D (Ky. Aug. 16, 2017); *Wood v. Commonwealth*, No. 2009-CA-001301-MR, 2010 WL 3927699 (Ky. App. Oct. 8, 2010), *discretionary rev. denied*, No. 2010-SC-000726-D (Ky. Oct. 19, 2011).

Police officers have an essential role as public servants to "assist those in distress and to maintain and foster public safety." *State v. Pinkham*, 565 A.2d 318 (Me. 1989). Officer Kerr was fulfilling that duty when he stopped Ron to ascertain why he had been continually parking in front of and driving by Blake's house. In contrast to the situation presented in *Poe*, Officer Kerr had specific and articulable facts leading him to believe that his assistance was necessary. Given Ron and Blake's past tumultuous relationship, the fact that Ron kept appearing outside of Blake's home with no reason to be there, and Blake's belief that it was more likely than not that Ron was intoxicated and equipped with a firearm, it was objectively reasonable for Officer Kerr to give weight to Blake's statement that he felt threatened by Ron and to conclude that his assistance was needed.

In contrast, the threat of intrusion to Ron's privacy was slight. Typically, traffic stops are brief and uneventful. They do, however, "interfere with freedom of movement, [cause] inconvenien[ce], and consume time." *Delaware v. Prouse*, 440 U.S. 648, 657, 99 S. Ct. 1391, 1398, 59 L. Ed. 2d 660 (1979). Depending on the individual, a traffic stop "may create substantial anxiety." *Id.* Thus, if Officer Kerr had no reason to stop Ron other than a belief—based on Ron's typical behavior—that he might be intoxicated, the intrusion on Ron's privacy would outweigh the interest furthered by stopping him and the stop would be unconstitutional. *Howard v. Commonwealth*, 558 S.W.2d 643 (Ky. App. 1977).

Here, however, Officer Kerr had reason to believe that Ron posed a serious threat to Blake. Officer Kerr's intervention diminished the likelihood of a possibly violent confrontation between the two. Perhaps Officer Kerr could have accomplished this in a different way—for example, by standing guard outside of Blake's residence for the remainder of the evening—however, that does not make his decision to stop Ron in an attempt to diffuse the situation unreasonable.

IV. CONCLUSION

Based on the foregoing, we affirm the circuit court's order granting the Commonwealth's writ petition.

LAMBERT, J., JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Robert A. Riley LaGrange, Kentucky	John K. Carter LaGrange, Kentucky