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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000254-MR

RICKEY ALLEN RHOTON — APPELLANT

v.

APPEAL FROM BATH CIRCUIT COURT
HONORABLE WILLIAM EVANS LANE, JUDGE
ACTION NO. 17-CR-00002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

DIXON, JUDGE: Rickey Allen Rhoton entered a conditional guilty plea to charges of first-degree possession of controlled substance, possession of controlled substance not in original container, and possession of drug paraphernalia. Rhoton was sentenced to two years' imprisonment, probated for three years. He now

appeals the Bath Circuit Court's denial of his motion to suppress evidence. Finding no error, we affirm.

On the afternoon of October 1, 2016, Kentucky State Police Trooper Joseph Zalone was on routine patrol in the Peasticks community of Bath County. Trooper Zalone knew that part of the county was a high-crime area for drug trafficking and illegal possession of narcotics. Trooper Zalone executed a traffic stop of a vehicle driven by Rickey Rhoton because his passenger was not wearing a seatbelt. When Trooper Zalone approached Rhoton's window, he observed a small, screw-top metal canister, approximately two inches long by one-and-a-half inches wide, in the center console. Trooper Zalone was familiar with this type of canister because, in his police experience, more often than not, the canisters were used to conceal illegally possessed narcotics, like oxycodone or Percocet. Upon seeing the container, Trooper Zalone asked Rhoton if he had any drugs in the car, and Rhoton responded in the negative. Rhoton declined Trooper Zalone's request to search the vehicle, and the officer returned to his cruiser. As he prepared the citation for the seatbelt violation, Trooper Zalone radioed for assistance from a K-9 officer. Owingsville Police Officer Bud Lyons and his drug dog arrived 25 minutes after the initial traffic stop. At that time, Trooper Zalone was running a record check on Rhoton's passenger because of an unrelated active arrest warrant. Trooper Zalone assisted Officer Lyons in removing the occupants from the vehicle,

and the dog alerted to the driver's door and driver's seat. Trooper Zalone found a partially zipped pouch between the driver's seat and center console. He could see the orange-capped tips of two syringes partially sticking out of the pouch. Upon further inspection of the pouch, Trooper Zalone found additional syringes and plastic paper containing crushed and melted pills. The metal canister in the console was empty. Rhoton accepted ownership of the bag and admitted that the pills were oxycodone. Rhoton was arrested and subsequently indicted for first-degree possession of controlled substance, possession of controlled substance not in original container, and possession of drug paraphernalia. Rhoton moved the trial court to suppress the evidence seized during the traffic stop, and an evidentiary hearing was held on June 8, 2017. The court denied the suppression motion, finding that Trooper Zalone's observation of the metal canister, along with the stop occurring in a high-drug activity area, provided reasonable articulable suspicion of ongoing criminal activity sufficient to prolong the traffic stop. Thereafter, Rhoton entered a conditional guilty plea to the charges, and this appeal followed.

The trial court's findings of fact following a suppression hearing are conclusive, if supported by substantial evidence. *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky. App. 2002). We then review *de novo* the court's application of the law to the facts of the case. *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky.

1998) (quoting *Ornelas v. United States*, 517 U.S. 690, 697, 116 S.Ct. 1657, 1662, 134 L.Ed.2d 911 (1996)).

The Fourth Amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" U.S. CONST. amend. IV. However, in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the United States Supreme Court held that a brief investigatory stop of a person by police does not automatically give rise to a Fourth Amendment violation. In determining the reasonableness of a *Terry* investigatory stop, this Court has stated, "[w]here probable cause is lacking, the forceable encounter or stop of a citizen by a police officer must arise from a reasonable articulable suspicion that criminal activity is afoot." *Docksteader v. Commonwealth*, 802 S.W.2d 149, 150 (Ky. App. 1991) (citing *Terry*, 392 U.S. at 22, 88 S.Ct. at 1880). "An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *United States v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981); *Taylor v. Commonwealth*, 987 S.W.2d 302, 305 (Ky. 1998). A reviewing court must bear in mind the totality of the circumstances when determining whether the officer had a reasonable suspicion. *Terry*, 392 U.S. at 19, 88 S.Ct. at 1878.

A traffic stop is considered a seizure under the Constitution. *Rodriguez v. United States*, ___U.S.___, 135 S.Ct. 1609, 1614, 191 L.Ed.2d 492 (2015). "Like a *Terry* stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop and attend to related safety concerns[.]" *Id*. (citations omitted). "Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." *Id*. Where a drug-sniffing dog is utilized during a traffic stop, the seizure is unconstitutional if "conducting the sniff 'prolongs'—*i.e.*, adds time to—'the stop[.]'" *Id*., 135 S.Ct. at 1616. In *Davis v. Commonwealth*, 484 S.W.3d 288, 294 (Ky. 2016), the Kentucky Supreme Court, applying *Rodriguez*, held that "*any* prolonging of the stop beyond its original purpose is unreasonable and unjustified; there is no '*de minimis* exception' to the rule that a traffic stop cannot be prolonged for reasons unrelated to the purpose of the stop." As a result, where a dog sniff prolongs a traffic stop, "[t]he question is whether the officer had a reasonable articulable suspicion of other ongoing illegal activity when he prolonged the stop for the time needed to retrieve the dog and conduct the sniff search." *Moberly v. Commonwealth*, 551 S.W.3d 26, 31 (Ky. 2018).

Rhoton concedes that Trooper Zalone properly initiated a traffic stop because of the seatbelt violation.[1] The Commonwealth concedes the dog sniff prolonged the duration of the stop beyond the time necessary for Trooper Zalone to write the seatbelt citation.[2] Accordingly, the issue presented is whether Trooper Zalone "had a reasonable articulable suspicion of other ongoing illegal activity when he prolonged the stop" for the dog to sniff Rhoton's vehicle. *Id*. Rhoton contends his presence in an area known for drug activity, coupled with Trooper Zalone's observation of the metal canister, did not create a reasonable articulable suspicion that he was engaging in criminal activity.

"In determining whether the requisite reasonable and articulable suspicion exists, the reviewing court must examine the totality of the circumstances to see whether the officer had a particularized and objective basis for the suspicion." *Commonwealth v. Marr*, 250 S.W.3d 624, 627 (Ky. 2008). A court cannot evaluate the factors relied on by the officer in isolation; rather, the court is obligated to consider the entirety of the officer's "observations and give due regard to inferences and deductions drawn by [him] from [his] experience and training." *Baltimore v. Commonwealth*, 119 S.W.3d 532, 539 (Ky. App. 2003).

[1] The record reflects Rhoton received a separate traffic citation for the seatbelt violation, and he paid the $25.00 fine.

[2] Trooper Zalone testified that it took him 10 to 15 minutes to complete the seatbelt citation, and the K-9 unit did not arrive until 25 minutes into the stop. The Commonwealth conceded this point at the conclusion of the suppression hearing.

Trooper Zalone testified that the area of Bath County where he was patrolling is known for high-drug activity, including trafficking in and unlawful possession of narcotics. Trooper Zalone also explained his familiarity with the type of metal canister he observed in the console of Rhoton's vehicle. In his training and experience as a police officer, he had seen that type of canister used to conceal illegal narcotics on numerous occasions, noting more times than not, the canister contained contraband, usually pills. Trooper Zalone also testified that he was unsure of a legitimate purpose for which the container could be used, noting that it was small enough to hang off a keychain.

Rhoton contends there are countless legitimate uses for the small metal canister, including storing earplugs or a portion of a loved one's ashes. He further points out that his presence in a known high-crime area, "standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime." *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S.Ct. 673, 676, 145 L.Ed.2d 570 (2000). However, the Court in *Wardlow* also stated, "officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation." *Id*. Furthermore, "[o]fficers may draw on their own experience and specialized training to make inferences from, and deductions about, the cumulative

information available to them that might well elude an untrained person." *Bauder v. Commonwealth*, 299 S.W.3d 588, 592 (Ky. 2009).

Here, Trooper Zalone, based upon his training and experience, reasonably believed that the metal canister, coupled with Rhoton's location in an area known for high-drug activity, indicated that Rhoton had illegal drugs in his possession. Under the totality of the circumstances, we conclude that Trooper Zalone had a reasonable articulable suspicion that Rhoton was engaging in criminal activity, which justified prolonging the traffic stop for the dog sniff. The trial court properly denied Rhoton's motion to suppress the evidence.

For the reasons stated herein, the judgment of the Bath Circuit Court is affirmed.

LAMBERT, JUDGE, CONCURS.

CLAYTON, CHIEF JUDGE, DISSENTS WITH SEPARATE OPINION.

CLAYTON, CHIEF JUDGE, DISSENTING: Respectfully, I dissent. The dog sniff unreasonably prolonged the stop. As noted by the majority, the Kentucky Supreme Court in *Davis* stated that "*any* prolonging of the stop beyond its original purpose is unreasonable and unjustified; there is no '*de minimis* exception' to the rule that a traffic stop cannot be prolonged for reasons unrelated to the purpose of the stop." *Davis*, 484 S.W.3d at 294 (emphasis in original). The

Supreme Court further explained that "[t]he 'key question' is *not* whether the duration of Appellant's roadside detention was unreasonable; rather, it is whether the sniff search was related to *the purpose* for which Appellant was stopped." *Id.* (emphasis in original). According to the officer, the task tied to the traffic stop, which was ticketing the passenger for not wearing a seatbelt, should have been completed within ten to fifteen minutes. The delay and the dog sniff were unrelated to the traffic stop's purpose.

Further, considering the totality of the circumstances, nothing occurred during the stop that rose to a reasonable and articulable suspicion of illegal activity. As the majority has noted, an officer must have a "particularized and objective basis" for the suspicion. In this case, no other facts supported a conclusion that the particular canister in Rhoton's car contained narcotics or that it was indicative of other criminal activity. *Marr*, 250 S.W.3d at 627. Therefore, I would reverse and remand the decision of the trial court denying the motion to suppress.

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