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TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000176-MR

ASIA BUCALO

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KEN M. HOWARD, JUDGE
ACTION NO. 09-CR-00143

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * ** * ** *

BEFORE: TAYLOR, CHIEF JUDGE; CLAYTON, JUDGE; LAMBERT,¹
SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Asia Bucalo entered a conditional plea of guilty to manufacturing methamphetamine, first-degree trafficking in a controlled substance, two counts of first-degree possession of a controlled substance,

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

possession of marijuana, and possession of drug paraphernalia. She was sentenced to twelve years imprisonment, with seven years to serve and with the remaining five years to be probated. Appellant reserved the right to appeal from the trial court's denial of her motion to suppress evidence seized at a traffic stop. Appellant argues that the search of her vehicle was unconstitutional because her stop and the seizure of her vehicle for a traffic violation were illegally extended so that a police drug dog could sniff the vehicle's exterior. Upon careful consideration, we agree with Appellant and, therefore, vacate and remand for further proceedings consistent with this opinion.

Facts and Procedural History

On April 16, 2009, the Kentucky State Police received a telephone call from employees of the Comfort Suites Hotel in Elizabethtown, Kentucky. These employees indicated that a group of individuals, including Appellant,² had been staying at the hotel for the past fifteen days. The individuals had paid for their room in cash each day and had refused maid service. Hotel management found this suspicious and told the group to leave because the hotel would no longer rent to them. The individuals reportedly indicated that they were waiting to close on a new home, but management nonetheless asked them to vacate the premises.

This information was relayed to KSP Detective Jeff Gregory and Detective Rob Green of the Elizabethtown Police Department at approximately 11:50 a.m.³ The officers went to the hotel to investigate and conduct surveillance.

² Appellant's child was also staying at the hotel.

³ Both men were part of the Hardin County Narcotics Task Force.

They observed the individuals loading items into three different vehicles, all of which had local license plates. A license plate check revealed that all three vehicles were registered to individuals with local addresses and that none of the individuals had the same last names. Detective Gregory acknowledged that he did not see anything obviously illegal being loaded into the vehicles. At approximately 12:15 p.m., Appellant left the scene in a green Honda Accord, and one of the other individuals, Nicholas Duke, left driving a white Dodge. A subsequent check of the room in which the individuals had been staying revealed nothing suspicious, and hotel employees provided the officers with no additional information.

When the vehicles left the hotel, the officers radioed for assistance from other law enforcement personnel in the area and asked for continued surveillance of the vehicles. They soon received a call from Sergeant Robert Kelly of the Elizabethtown Police Department reporting that Sergeant Kelly had observed both of the aforementioned vehicles commit traffic violations by running a red light while turning left at the intersection of U.S. Highway 62 and Commerce Drive. Sergeant Kelly signaled and pulled over Appellant's vehicle at approximately 12:40 p.m., while another officer pulled over Duke's vehicle. The traffic stops occurred at different locations.

Appellant apologized for running the red light and explained that she was in a hurry because her child needed to use a restroom. According to Sergeant Kelly, Appellant tried to walk away from the traffic stop "three or four times" to

take her son to a restroom at a nearby hotel, but he would not allow her to leave.

Appellant also told Sergeant Kelly that she had left the Comfort Suites Hotel to get a room at another hotel, which was consistent with the direction in which she was traveling.

During the traffic stop, Sergeant Kelly and Detective Gregory were advised via radio that methamphetamine paraphernalia had been found in Duke's vehicle following his consent to a search.⁴ Sergeant Kelly testified that this paraphernalia was "related directly" to Appellant because Duke had indicated that he was helping her move her things from one hotel to another. Sergeant Kelly acknowledged that no contraband could be seen in plain view in Appellant's vehicle, so he asked Appellant for consent to search her vehicle, which she refused. Sergeant Kelly testified that Appellant was issued a citation for disregarding a traffic control device but that the citation was prepared by another officer because Kelly left the scene after twenty or thirty minutes to complete some paperwork.⁵ The record does not contain a copy of a traffic citation, and no evidence was offered indicating exactly when a citation was prepared. However, it is clear that one was not written prior to Sergeant Kelly's departure.

After receiving the radio call regarding the items found in Duke's vehicle, Detective Gregory went to the scene of Appellant's traffic stop. Either

⁴ Sergeant Kelly's testimony is difficult to make out on this point, but it appears that the paraphernalia consisted of pipes used to smoke methamphetamine.

⁵ Sergeant Kelly indicated that this officer arrived on the scene within five to seven minutes. The officer did not testify at the suppression hearing.

before arriving or soon thereafter, he requested a police K-9 unit to respond to the scene for purposes of conducting an exterior “sniff” search of Appellant’s vehicle. According to Detective Gregory, he and the K-9 unit arrived on the scene at approximately the same time – “sometime shortly after 1:00” – but he acknowledged that he had to wait for the unit to arrive. The K-9 unit officer, KSP Trooper Seth Payne, testified that he arrived within ten minutes of the request for assistance, but he did not know the exact time that the request was made.

After the drug dog, Barry, was given time to obtain relief, Trooper Payne performed an exterior “sweep” of Appellant’s vehicle, but the dog did not alert on anything suspicious. Trooper Payne then used the dog to “detail out” the vehicle. This required Trooper Payne to pinpoint specific areas of the vehicle which the dog then sniffed for drugs. When the dog was directed toward the driver-side door of Appellant’s vehicle, it “alerted” by scratching at the door. Trooper Payne testified that this “alert” indicated that Barry had detected a narcotics odor. Trooper Payne then reported to the other officers on the scene that the dog had alerted to drugs in the area of the driver-side door. Trooper Payne did not indicate when the canine investigation began or how long it lasted, but he took a “wild guess” that he was on the scene for an hour or less.

Solely upon the foregoing, the police searched the vehicle and discovered marijuana, ecstasy, hallucinogenic mushrooms, methamphetamine, and what appeared to be the remnants of a one-pot methamphetamine lab. All tolled,

the traffic stop lasted 105 minutes from the initial stop (12:40 p.m.) until a citation for the drug offenses was issued and Appellant was arrested (2:25 p.m.).

Appellant filed a motion to suppress the evidence seized from her vehicle on the grounds that she was unlawfully detained for an unreasonable amount of time and that the resulting search of the vehicle was, therefore, unconstitutional. However, following a hearing the trial court denied the motion.

The court explained its decision as follows:

The Defendant's motion to suppress fails because the dog sniff occurred within the detention time for the traffic stop or within a reasonable extension. Sgt Kelly testified that the normal detention time to write a traffic violation was 15 to 20 minutes. However, this traffic stop was longer than normal due to the Defendant's request to allow her child to use the restroom in an adjacent restaurant. Trooper Payne testified that he arrived at the traffic stop within 10 to 15 minutes.

The court then added an alternative decisional basis:

Even if the dog sniff was initiated after the lawful purpose of the traffic stop was complete, it is still lawful because Detective Gregory had "reasonable, articulable suspicion that criminal activity was afoot" based on the totality of the circumstances which include: 1) the information from hotel management that the Defendant was a "local" individual staying at the hotel for a period of 15 days paying cash and refusing maid service; 2) the Defendant said she was traveling to another hotel at the same interchange; and 3) that methamphetamine paraphernalia was located in a Co-Defendant's vehicle that was observed being loaded at the hotel which the Defendant just left and the information that the Co-Defendant said he was helping the Defendant move from one hotel to another.

Following the adverse suppression ruling, Appellant entered a guilty plea to the charges conditioned on her right to appeal from the trial court's denial of her motion to suppress. This appeal followed.

Standard of Review

On appeal, Appellant raises the same grounds for suppression that she presented below, *i.e.*, that the police unreasonably extended the scope and duration of the traffic stop beyond its initial purpose and without reasonable suspicion. As a result, she contends, the resulting dog sniff and search of her vehicle violated the Fourth Amendment and any evidence produced from that search should be suppressed.

Motions to suppress evidence are governed by Kentucky Rules of Criminal Procedure (RCr) 9.78. That rule provides that a court presented with a motion to suppress “shall conduct an evidentiary hearing outside the presence of the jury and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling.” In reviewing a trial court's ruling on a motion to suppress, we “must first determine whether the trial court's findings of fact are supported by substantial evidence. If so, those findings are conclusive.” *Epps v. Commonwealth*, 295 S.W.3d 807, 809 (Ky. 2009); RCr 9.78. We must then conduct a *de novo* review to determine if the trial court correctly applied the law to those facts and reached a decision that is correct as a matter of law. *Ornelas v. United States*, 517 U.S. 690, 696-97, 116 S. Ct. 1657, 1661-62, 134 L.Ed.2d 911

(1996); *Owens v. Commonwealth*, 291 S.W.3d 704, 707 (Ky. 2009). In conducting our review, we “take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.” *Ornelas*, 517 U.S. at 699, 116 S. Ct. at 1663.

We further emphasize that “[i]t is fundamental that all searches without a warrant are unreasonable unless it can be shown that they come within one of the exceptions to the rule that a search must be made pursuant to a valid warrant.” *Cook v. Commonwealth*, 826 S.W.2d 329, 331 (Ky. 1992); *see also Owens*, 291 S.W.3d at 707. One such recognized exception is the so-called “automobile exception,” which permits an officer to search a legitimately-stopped automobile where there is probable cause that contraband or evidence of a crime may be in the vehicle. *Morton v. Commonwealth*, 232 S.W.3d 566, 569 (Ky. App. 2007). The Commonwealth has the burden of proving that a warrantless search was justifiable under this exception. *Gray v. Commonwealth*, 28 S.W.3d 316, 318 (Ky. App. 2000).

Analysis

As a preliminary matter, we observe that the initial stop of Appellant’s vehicle was lawful and supported by probable cause because an officer witnessed her commit a traffic violation. *Ward v. Commonwealth*, 345 S.W.3d 249, 252 (Ky. App. 2011); *Garcia v. Commonwealth*, 185 S.W.3d 658, 662 (Ky. App. 2006).

“[A]n officer who has probable cause to believe a civil traffic violation has

occurred may stop a vehicle regardless of his or her subjective motivation in doing so.” *Wilson v. Commonwealth*, 37 S.W.3d 745, 749 (Ky. 2001); *see also Lloyd v. Commonwealth*, 324 S.W.3d 384, 392 (Ky. 2010). Thus, while it seems fairly obvious that Appellant was pulled over by Sergeant Kelly to engage in a drug investigation,⁶ his subjective motivation does not invalidate the traffic stop as long as it was made validly and conducted within the bounds of the law. *See Wilson*, 37 S.W.3d at 749.

It is also true that the “the use of a well-trained narcotics-detection dog – one that ‘does not expose noncontraband items that otherwise would remain hidden from public view’ – during a lawful traffic stop, generally does not implicate legitimate privacy interests.” *Illinois v. Caballes*, 543 U.S. 405, 409, 125 S. Ct. 834, 838, 160 L.Ed.2d 842 (2005), *quoting United States v. Place*, 462 U.S. 696, 707, 103 S. Ct. 2637, 2644, 77 L.Ed.2d 110 (1983). This is because a “sniff” by a drug dog “discloses only the presence or absence of narcotics, a contraband item.” *Place*, 462 U.S. at 707, 103 S. Ct. at 2644. Accordingly, “[a] dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.” *Caballes*, 543 U.S. at 410, 125 S. Ct. at 838.

That dog sniffs are not *per se* unconstitutional, however, does not end the inquiry since an individual can prevail on a motion to suppress “if he can show that the detention itself was otherwise unreasonable.” *Epps*, 295 S.W.3d at 810.

⁶ Indeed, at some point during the stop, Sergeant Kelly told Appellant that police were conducting a narcotics investigation.

“[A] seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution.” *Caballes*, 543 U.S. at 407, 125 S. Ct. at 837. For example, “[a] seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.” *Id.* Thus, where a dog sniff occurs “during an unreasonably prolonged traffic stop,” the resulting discovery of contraband is considered the product of an unconstitutional seizure. *See id.*, 543 U.S. at 407-08, 125 S. Ct. at 837; *see also Epps*, 295 S.W.3d at 810-11.

From the foregoing constitutional authority, the legal issue is whether the traffic stop in this case was “unreasonably prolonged.” After careful consideration – and acknowledging that the question is a close one – we conclude that it was. At the outset, the delay, whether intentional or not, in writing a citation for Appellant’s traffic violation presents an immediate basis for concern. Sergeant Kelly testified that he normally needed fifteen to twenty minutes to write a ticket for a traffic violation, but he acknowledged that he had not written one before leaving the scene twenty to thirty minutes after initiating the stop. Instead, he left that task to another officer. Moreover, while Sergeant Kelly testified that a traffic citation was actually written, the record does not contain a copy of a citation or disclose when one might have been prepared. As such, Appellant characterizes the traffic stop as an “artificially protracted situation,” and it is impossible to disagree with this characterization.

However, the trial court found that the dog sniff had occurred “within the detention time for the traffic stop or within a reasonable extension” and attributed the initial traffic stop being “longer than normal” due to “the Defendant’s request to allow her child to use the restroom in an adjacent restaurant.” However, this finding is doubtful. Sergeant Kelly admitted that Appellant made multiple requests to take her son to the restroom but her requests were denied each time. Detective Gregory testified that Appellant was finally allowed to take her son to the restroom, but he did not indicate when this occurred. However, his testimony clearly suggests that the restroom visit did not occur until after he had arrived on the scene. Consequently, we conclude that the evidence does not support the trial court’s finding that the restroom request caused the delay.

In the alternative, the trial court found that “[e]ven if the dog sniff was initiated after the lawful purpose of the traffic stop was complete,” an extension of the scope and duration of the traffic stop was merited because police had a “reasonable, articulable suspicion that criminal activity was afoot[.]” The court based this conclusion on the following evidence:

- 1) the information from hotel management that the Defendant was a ‘local’ individual staying at the hotel for a period of 15 days paying cash and refusing maid service; 2) the Defendant said she was traveling to another hotel at the same interchange; and 3) that methamphetamine paraphernalia was located in a Co-Defendant’s vehicle that was observed being loaded at the hotel which the Defendant just left and the information that the Co-Defendant said he was helping the Defendant move from one hotel to another.

“It is well settled that an investigative stop of an automobile is constitutional as long as law enforcement officials have a reasonable suspicion – supported by specific and articulable facts – that the occupant of the vehicle has committed, is committing, or is about to commit an offense.” *Johnson v. Commonwealth*, 179 S.W.3d 882, 884 (Ky. App. 2005). Whether the particular facts known to law enforcement officials amount to an objective and particularized basis for a reasonable suspicion of criminal activity is determined in light of the totality of the circumstances. *United States v. Sokolow*, 490 U.S. 1, 8, 109 S. Ct. 1581, 1585, 104 L.Ed.2d 1 (1989).

“If, during a traffic stop, an officer develops a reasonable, articulable suspicion that a vehicle is carrying contraband, he has ‘justification for a greater intrusion unrelated to the traffic offense.’ ” *United States v. Bloomfield*, 40 F.3d 910, 918 (8th Cir. 1994), *quoting United States v. Cummins*, 920 F.2d 498, 502 (8th Cir. 1990) (Footnote omitted). In other words, while “an investigative detention must ordinarily last no longer than is necessary to effectuate the purpose of the stop, a detention initiated for one investigative purpose may disclose suspicious circumstances that justify expanding the investigation to other possible crimes.” *State v. Brumfield*, 42 P.3d 706, 709 (Idaho Ct. App. 2001) (Internal citation omitted). Ultimately, “the legality of a continued detention following a stop for a traffic violation is a question of reasonableness.” *Garcia*, 185 S.W.3d at 667.

While the facts relied upon by the trial court may have established some basis for further investigation by police, they did not provide a sufficient

basis for a reasonable suspicion of criminal activity that merited an extension of Appellant's traffic stop beyond the time needed for its legitimate purpose. While hotel employees were "suspicious" of the fact that Appellant and the other individuals paid for their room in cash and refused maid service, no criminal activity was observed and police found no indicia of criminal activity when they searched the room. There is no suspicion associated with payment for a hotel room in cash, or refusal of hotel maid service. And the police observed nothing unusual or illegal about the items being loaded from the hotel room into the vehicles.

Moreover, the testifying officers failed to identify anything suspicious about Appellant's behavior after she was pulled over, and no contraband or drug paraphernalia was seen in plain view in her vehicle. Indeed, the only substantive evidence of criminal activity uncovered prior to the search of Appellant's vehicle was the drug paraphernalia found in the car of Nicholas Duke. Appellant's only link to Duke's drug paraphernalia was that Duke told police he was helping Appellant move to another hotel. Certainly, this revelation did not constitute an intervening and independent basis to extend and prolong the traffic stop since there was no indication that the paraphernalia belonged to Appellant or was otherwise substantively and directly connected to her. Even when we view these facts from the "totality of the circumstances," we are unable to conclude that the Commonwealth demonstrated a reasonable, articulable suspicion that Appellant was engaged in drug-related activity. Certainly there was nothing to justify the substantial additional detention beyond the time needed to complete the initial

traffic stop citation. To conclude otherwise would require a piling on of inferences too attenuated to pass constitutional muster.

Much of the delay was associated with the K-9 unit. The drug dog and Trooper Payne did not arrive on the scene until at least twenty minutes had elapsed, and the Commonwealth provided no evidence indicating when the dog sniff actually began. The Commonwealth also produced no evidence establishing how long the sniff took beyond Trooper Payne's "wild guess" that he was on the scene for an hour or less. It is clear, though, that the dog did not immediately "alert" on any narcotics in its initial "sweep" and had to be guided by Trooper Payne through a subsequent "detailing out" process. This undoubtedly extended the length of time in which Appellant was detained, and she was not arrested until 105 minutes after the initial stop.

The stop of a private passenger vehicle similarly prolonged awaiting a drug dog was found unconstitutional by the Supreme Court of Kentucky in *Epps*, *supra*. There, fifteen minutes elapsed from the initial stop until the drug dog arrived. It then took thirty to forty minutes to complete the dog sniff. An officer testified that he was working on the driver's citation while he waited for the drug dog to arrive, but it was not actually given to the driver until after the dog had arrived and searched the exterior and interior of the vehicle, nearly an hour after the initial stop. The entire incident from the initial stop until the arrest of the defendant took ninety minutes. *Epps*, 295 S.W.3d at 811. The Supreme Court held that because police unreasonably prolonged the duration of the vehicle stop in

this case by detaining the defendant for ninety minutes, the seizure became unlawful:

Simply put, the scope and duration of the stop in this case – fifteen minutes before the narcotics-detection dog arrived, thirty to forty more minutes for the dog to search the car, one hour before the driver was given a citation, and 90 minutes of total detention before the Appellant-passenger was arrested – exceeded that allowed for a mere traffic offense. The stop, therefore, was unreasonable and “so prolonged as to be unjustified.” *Johnson*, 179 S.W.3d at 884.

Id. at 813.

There is no meaningful distinction between *Epps* and this case. Here, the drug dog did not arrive on the scene until at least twenty minutes after the stop was initiated, and Trooper Payne testified that he was on the scene for approximately an hour, although the record does not indicate how long the sniff actually took. Moreover, there was an obvious delay in giving Appellant a citation for the traffic offense, and the record does not reflect when this was actually done.⁷ Consequently, per *Epps*, we are compelled to conclude that the scope and duration of Appellant’s detention exceeded that allowed for a mere traffic offense and was “so prolonged as to be unjustified.” *Johnson*, 179 S.W.3d at 884.

Conclusion

⁷ We are compelled to note that these gaps in the record make this case perhaps more troublesome than *Epps* because the record contains little evidence showing precisely how long the sniff-and-search process actually took. If the Commonwealth wishes to meet its burden of showing that a stop and sniff is constitutionally compliant, better evidence in this regard is undoubtedly required. In its absence, as here, failure of the record to be reasonably persuasive in this regard is chargeable to the Commonwealth.

Because the police officers in this case unreasonably prolonged the duration of the stop of Appellant's vehicle by detaining her beyond the time needed to complete a citation for a traffic violation, the seizure became unlawful. The officers lacked reasonable suspicion to prolong the stop for purposes of conducting a drug dog sniff because there was insufficient evidence that Appellant was engaged in drug-related activity. Since the evidence recovered from Appellant was the product of an unconstitutional seizure, it should have been suppressed.

Accordingly, for the foregoing reasons, Appellant's conditional guilty plea and the judgment of the Hardin Circuit Court are vacated, and the case is remanded to the trial court for further proceedings consistent with this opinion.

ALL CONCUR.

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