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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000526-MR

CHARLES HARRIS, JR. — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE V, JUDGE
ACTION NO. 11-CR-00535

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: CAPERTON, DIXON AND STUMBO, JUDGES.

STUMBO, JUDGE: Appellant, Charles Harris, Jr., was convicted in the Campbell Circuit Court of tampering with physical evidence and sentenced to five years' imprisonment. He now appeals to this Court as a matter of right. We find that the trial court erred in denying Appellant's motion to suppress; therefore, we reverse and remand.

Appellant's conviction stems from a traffic stop that occurred on August 31, 2011, in Newport, Kentucky. While listening to his police radio, Newport Police Officer Darren Arnberg heard that another officer, Tyson, had stopped a minivan for failing to use a signal while making a left-hand turn. Officer Arnberg arrived on the scene as Officer Tyson was questioning the driver of the vehicle. Of the three occupants in the vehicle, Appellant was sitting in the rear passenger seat next to the van's sliding door. Officer Arnberg asked Appellant to open the door because he was not able to see into the vehicle. About the same time, Officer Tyson informed Officer Arnberg that he had obtained personal identifying information from the other two occupants but that Appellant denied having any sort of identification on his person. Officer Arnberg then asked Appellant to step out of the vehicle and began questioning him as to his name, where he lived and whether he had any criminal history.

Upon learning that Appellant had prior drug convictions, Officer Arnberg stated that he "went a little farther" and asked Appellant whether he was carrying any drugs or weapons. Appellant denied such and consented to a pat down search of his person, which revealed nothing. However, as Officer Arnberg was talking to Appellant he noticed that Appellant was not speaking normally and appeared to have something in his mouth. Officer Arnberg asked Appellant to open his mouth, which he did. At trial, Officer Arnberg testified that he did not see anything in Appellant's mouth. Officer Arnberg then asked Appellant to open his mouth and lift his tongue. Appellant opened his mouth, but at the same time rolled his tongue

over to the side. When Officer Arnberg then asked Appellant to lift his tongue, Appellant tipped his head back which prevented the shorter Officer Arnberg from seeing inside. After several requests to lower his chin and move his tongue, Appellant complied and Officer Arnberg observed the corner of a small clear baggie with something white inside of it. Based upon Officer Arnberg's narcotics training, he suspected that Appellant was attempting to conceal what is known as a corner baggie. Officer Arnberg directed Appellant to spit out the item, but Appellant refused to do so and then refused to open his mouth again. Officer Arnberg then placed his hand on Appellant's neck to prevent him from swallowing the baggie. A struggle ensued and when Appellant was finally subdued, he had swallowed whatever had been in his mouth. After Appellant was arrested he told Officer Arnberg that the baggie in his mouth had contained 2-3 Xanax pills.

On October 13, 2011, Appellant was indicted for tampering with physical evidence and possession of marijuana.[1] Appellant thereafter filed a motion to suppress as well as a motion to dismiss the charges. Both were denied and a jury subsequently found him guilty of tampering with physical evidence and recommended a five-year sentence. Judgment was entered accordingly and this appeal ensued. Additional facts are set forth as necessary.

Appellant first argues that the trial court erred in denying his motion to suppress his statements made to Officer Arnberg. Specifically, Appellant claims that Officer Arnberg did not have any articulable suspicion that he had drugs in his

[1] A small bag of marijuana was found near Appellant's seat in the van. However, the charge was ultimately dismissed.

mouth, but rather only an "unparticularized hunch" based upon Appellant's revelation that he had prior drug convictions. Appellant contends that Officer Arnberg's actions were not reasonably related in scope to the circumstances which justified the traffic stop in the first place. *See generally Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Because Officer Arnberg's suspicion was neither articulable nor reasonable, Appellant argues that his detention and seizure were improper and his statement that he swallowed the Xanax tablets should have been suppressed as fruit of the poisonous tree. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). We agree.

Our standard of review of a trial court's decision on a suppression motion following a hearing is twofold. First, the factual findings of the trial court are conclusive if they are supported by substantial evidence. Kentucky Rules of Criminal Procedure (RCr) 9.78; *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998); *Stewart v. Commonwealth*, 44 S.W.3d 376 (Ky. App. 2000). The second prong involves a *de novo* review to determine whether the court's decision is correct as a matter of law. *Commonwealth v. Opell*, 3 S.W.3d 747, 751 (Ky. App. 1999). Kentucky has adopted the standard of review approach articulated by the United States Supreme Court in *Ornelas v. United States*, 517 U.S. 690, 698-700, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911 (1996), wherein the Court observed:

> [A]s a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal. Having said this, we hasten to point out that a reviewing court should 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.

Furthermore, at a suppression hearing, the trial court is the sole trier of fact and the sole judge of credibility of the witnesses. If the facts are supported by substantial evidence, they are conclusive. RCr 9.78.

We would note that the validity of the traffic stop is not at issue herein. Had it been challenged, it is settled that proof of a traffic violation would have been sufficient to justify Officer Tyson's initial stop of the vehicle. Furthermore, "an officer has the authority to order a passenger to exit a vehicle pending completion of a minor traffic stop." *Owens v. Commonwealth*, 291 S.W.3d 704, 708 (Ky. 2009). As the record herein establishes that Officer Arnberg was authorized to ask Appellant to get out of the minivan, the next inquiry focuses on Officer's Arnberg's subsequent actions. In *Baltimore v. Commonwealth*, 119 S.W.3d 532, 537-38 (Ky. App. 2003), a panel of this Court observed:

> There are three types of interaction between police and citizens: consensual encounters, temporary detentions generally referred to as *Terry* stops, and arrests. The protection against search and seizure provided by the Fourth Amendment to the United States Constitution applies only to the latter two types. Generally, under the Fourth Amendment, an official seizure of a person must be supported by probable cause, even if no formal arrest of the person is made. However, there are various narrow exceptions based on the extent and type of intrusion of personal liberty and the government interest involved. In the seminal case of *Terry v. Ohio*, the Supreme Court held that a brief investigative stop, detention and frisk for weapons short of a traditional arrest based on reasonable suspicion does not violate the Fourth Amendment. Terry recognized

> that as an initial matter, there must be a "seizure" before the protections of the Fourth Amendment requiring the lesser standard of reasonable suspicion are triggered. A police officer may approach a person, identify himself as a police officer and ask a few questions without implicating the Fourth Amendment. A "seizure" occurs when the police detain an individual under circumstances where a reasonable person would feel that he or she is not at liberty to leave. Where a seizure has occurred, "if police have a reasonable suspicion grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony," then they may make a *Terry* stop to investigate that suspicion. Evaluation of the legitimacy of an investigative stop involves a two-part analysis. First, whether there is a proper basis for the stop based on the police officer's awareness of specific and articulable facts giving rise to reasonable suspicion. Second, whether the degree of intrusion was reasonably related in scope to the justification for the stop. (Citations omitted).

We are of the opinion that Appellant's initial interaction with Officer Arnberg did not implicate the Fourth Amendment. Officer Arnberg was justified in approaching Appellant to ask him a few questions, after which Appellant consented to the pat down search of his person. It was only during the course of that consensual encounter that Officer Arnberg became aware that Appellant may have been concealing something in his mouth.

> 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." Thus, an 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.' If he does,

> "the subsequent discovery of contraband is the product of an unconstitutional seizure." [Citations omitted].

Turley v. Commonwealth, 399 S.W.3d 412, 421-422 (Ky. 2013).

Here, Appellant was removed from the vehicle to ascertain his identity and ensure he was not a danger to the officers. Appellant answered Officer Arnberg's questions, even admitting he had a prior drug arrest. Once Appellant made this admission, Officer Arnberg expanded the scope of the initial traffic stop. The prior record of a suspect, standing alone, will not justify a *Terry* stop. *Collier v. Commonwealth*, 713 S.W.2d 827, 828 (Ky. App. 1986). There was no allegation that the Appellant was thought to be armed, nor were there any grounds to support such an allegation; however, Appellant consented to a pat down search. This search produced no weapons or contraband. Officer Arnberg testified that he had a hunch Appellant was hiding something in his mouth and asked Appellant to open his mouth. Appellant did so and Officer Arnberg did not see anything illegal. At this time, Appellant's detention should have ended. *See United States v. Sokolow*, 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989) (a hunch does not provide reasonable suspicion for detention via a *Terry* stop). We find that anything that occurred after this point violated the Fourth Amendment. Appellant's statement that he swallowed Xanax tablets was fruit of the poisonous tree and should have been suppressed.

Appellant makes other arguments on appeal, but they are moot in light of our holding on the motion to suppress. Based on the foregoing, we reverse the

judgment of the trial court and find that the motion to suppress should have been granted.

CAPERTON, JUDGE, CONCURS.

DIXON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

DIXON, JUDGE, DISSENTING: I respectfully dissent from the majority opinion reversing the circuit court's denial of Appellant's motion to suppress evidence obtained during a traffic stop. While the majority notes Appellant's consent to a pat down search, they determine that Officer Arnberg's "hunch" is insufficient to warrant further detention for additional investigation. I believe the majority has ignored Officer Arnberg's sworn testimony that he investigated further because of Appellant's unclear speech. Arnberg testified that as he spoke with Appellant he could tell that Appellant had something in his mouth. He further testified that in his experience it is not uncommon for people to hide things in their mouths, as was in fact the case here. His suspicion grew as a result of Appellant's evasive actions to prevent Arnberg from seeing what was in Appellant's mouth. This evidence reveals far more evidence than the "unparticularized hunch" Appellant claims. Therefore, I would affirm the Campbell Circuit Court.

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