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Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000497-MR

GEORGE OLMEDA APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE W.A. KITCHEN, III, JUDGE
ACTION NO. 18-CR-00488

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS AND LAMBERT, JUDGES; AND BUCKINGHAM,[1] SPECIAL JUDGE.

LAMBERT, JUDGE: George Olmeda appeals from the McCracken Circuit Court's final judgment and sentence of imprisonment, entered March 14, 2019, following the denial of Olmeda's motion to suppress evidence. We affirm.

[1] Retired Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

Shortly before midnight on May 26, 2018, George Olmeda was driving his Chevrolet S-10 truck in Paducah when he was pulled over by Deputy Bobby Cook of the McCracken County Sheriff's Office. Deputy Cook stopped Olmeda for vehicle equipment violations, as Olmeda's truck did not have working brake lights, working taillights, or an illuminated license plate. Olmeda could not produce a driver's license upon Deputy Cook's request. At some point during the stop, the deputy learned Olmeda's license had been suspended. Deputy Cook believed he could smell alcohol coming from the vehicle, and he also thought Olmeda's pupils were dilated. Believing Olmeda may be driving under the influence of alcohol (DUI), Deputy Cook called dispatch to request the assistance of a unit trained to detect blood alcohol concentration.

Officer Kevin Collins of the Paducah Police Department arrived approximately ten minutes later, and Deputy Sheriff Ronnie Giles arrived shortly after Officer Collins. Officer Collins conducted pre-exit tests on Olmeda and did not find any evidence of alcohol impairment. The deputies conferred with Officer Collins, and the three discussed Olmeda's suspended license. Deputy Giles informed Officer Collins of Olmeda's dilated pupils. Officer Collins had previously overlooked that observation but confirmed it by looking at Olmeda's eyes. At that point, Officer Collins believed it was possible that Olmeda was under the influence of drugs rather than alcohol.

Deputy Giles removed Olmeda from the vehicle and asked Officer Collins to call for a K-9 unit. After doing so, Officer Collins began conducting field sobriety tests on Olmeda. Officer Collins had not finished the tests when the K-9 unit arrived and conducted a sniff search around Olmeda's truck. The dog alerted to the presence of drugs in the vehicle. Upon searching Olmeda's truck, the officers discovered small amounts of marijuana and cocaine in the center console, as well as drug paraphernalia. Deputy Giles then placed Olmeda under arrest and transported him to the jail at approximately 1:12 a.m.

The McCracken County grand jury indicted Olmeda for possession of marijuana,[2] first-degree possession of a controlled substance (cocaine),[3] and possession of drug paraphernalia.[4] Olmeda moved the trial court to suppress evidence found during the warrantless search of his vehicle, asserting the length of his roadside detention was unconstitutionally excessive. The trial court conducted a hearing on the motion, in which the deputies and Officer Collins gave testimony consistent with the foregoing narrative. Olmeda also testified, asserting he was not under the influence and he did not consent to a search of his truck. However,

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[2] Kentucky Revised Statute (KRS) 218A.1422, a Class B misdemeanor punishable by a maximum term of incarceration up to forty-five days.

[3] KRS 218A.1415, a Class D felony punishable by up to three years' imprisonment.

[4] KRS 218A.500(2), a Class A misdemeanor.

Olmeda admitted he was driving on an invalid driver's license. He also admitted the drug dog arrived toward the end of his field sobriety tests.

In its subsequent written order, the trial court found Olmeda's eyes were not dilated, based on the officers' body camera recordings, and "there may have been no justification for conducting field sobriety tests[.]" Record (R.) at 69. Nonetheless, the trial court found "this stop was not unreasonably extended because it was determined during the stop that [Olmeda] would not be free to operate the vehicle due to his suspended license." *Id.* The trial court explained that, "[e]ven if [Olmeda] had been allowed to leave on foot, the vehicle would still have been available for the K-9 to conduct the open air search. Therefore, he was not unreasonably detained." *Id.* Based on these findings, the trial court ultimately denied Olmeda's motion to suppress evidence resulting from the search of his truck. Olmeda was subsequently found guilty at his jury trial on all counts of the indictment, and he was sentenced to two years' imprisonment. This appeal followed.

"When reviewing a trial court's denial of a motion to suppress, we utilize a clear error standard of review for factual findings and a *de novo* standard of review for conclusions of law." *Greer v. Commonwealth*, 514 S.W.3d 566, 568 (Ky. App. 2017) (quoting *Jackson v. Commonwealth*, 187 S.W.3d 300, 305 (Ky. 2006)). "A police officer is authorized to conduct a traffic stop when he or she

reasonably believes that a traffic violation has occurred." *Commonwealth v. Lane*, 553 S.W.3d 203, 205 (Ky. 2018) (citing *Commonwealth v. Bucalo*, 422 S.W.3d 253, 258 (Ky. 2013)). However, "[a]n 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." *Commonwealth v. Smith*, 542 S.W.3d 276, 282 (Ky. 2018) (quoting *Turley v. Commonwealth*, 399 S.W.3d 412, 421 (Ky. 2013)).

For his sole issue on appeal, Olmeda argues the trial court erroneously denied his motion to suppress. He asserts police had no grounds to detain him until the K-9 unit could arrive and conduct its sniff search, citing in support *Davis v. Commonwealth*, 484 S.W.3d 288 (Ky. 2016). In *Davis*, the Kentucky Supreme Court followed the United States Supreme Court's decision in *Rodriguez v. United States*, 575 U.S. 348, 135 S. Ct. 1609, 191 L. Ed. 2d 492 (2015), and held "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.

This is a close question, in that the facts *sub judice* bear some similarity to those in *Davis*, and the Kentucky Supreme Court determined the evidence should have been suppressed in that case. In *Davis*, Officer McCoy

implemented a traffic stop of Davis, the appellant, in order to "stop a careless driver in order to verify his sobriety (or lack thereof)." *Id*. at 291. When Davis passed his sobriety tests, Officer McCoy suspected he may have been under the influence of drugs rather than alcohol. *Id*. at 294. The officer used his canine partner, Chico, to implement a sniff search, which resulted in the discovery of methamphetamine on Davis and within the vehicle. *Id*. at 291. The Kentucky Supreme Court held suppression was warranted because, after Davis passed his sobriety tests, there was

> no evidence suggest[ing] that Appellant's speech, demeanor, or behavior otherwise exhibited any characteristics associated with drug or alcohol intoxication from which an officer might reasonably believe further investigation was necessary. Moreover, a sniff search of the vehicle by Chico could not possibly serve the purpose of the traffic stop by showing whether Appellant was driving under the influence of any substance. The only reason for the sniff search was to discover illegal drugs in Appellant's car, which adds nothing to indicate if the driver is under the influence and is clearly beyond the purpose of the original DUI stop. The evidence unequivocally established, and the Commonwealth agrees, that McCoy had concluded his field sobriety investigation. It is obvious that his purpose then shifted to a new and different purpose. With no articulable suspicion to authorize an extended detention to search for drugs, McCoy prolonged the seizure and conducted the search in violation of *Rodriguez* and Appellant's Fourth Amendment protections.

Id. at 294.

In addition, the *Davis* court also held that the evidence was not subject to the inevitable discovery rule, which would "permit admission of evidence unlawfully obtained upon proof by a preponderance of the evidence that the same evidence would have been inevitably discovered by lawful means." *Id.* at 294-95 (quoting *Hughes v. Commonwealth*, 87 S.W.3d 850, 853 (Ky. 2002)); *see Nix v. Williams*, 467 U.S. 431, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984). The Commonwealth suggested Officer McCoy could have arrested Davis for reckless driving and the open container of alcohol in his vehicle, after which contraband on Davis would have been inevitably discovered in a search incident to arrest, and the contraband in the vehicle would have been inevitably discovered in an inventory search or by way of a search warrant. *Davis*, 484 S.W.3d at 295. Our Supreme Court disagreed with the inevitable discovery argument, holding it was "equally likely that McCoy would have disposed of the minor offenses with a citation, or simply released the motorist with a warning. The discovery of the evidence as suggested by the Commonwealth was not inevitable." *Id.*

In the present matter, the trial court was mindful of the similarity of this case to *Davis*. However, the court found *Davis* to be distinguishable in one aspect which we deem critical—the officers would not have allowed Olmeda to operate his vehicle due to his suspended license. This is significant because "[t]he Supreme Court opined that the 'ordinary inquiries incident to the traffic stop' that

do not impermissibly extend a stop include 'checking the driver's license [and] determining whether there are outstanding warrants against the driver.'" *Hernandez v. Boles*, 949 F.3d 251, 256 (6th Cir. 2020) (quoting *Rodriguez*, 575 U.S. at 355, 135 S. Ct. at 1615). "[S]ummoning a drug dog to sniff a stopped car is permissible as long as it does not 'improperly extend the length of the stop[.]'" *Id.* (quoting *United States v. Bell*, 555 F.3d 535, 542 (6th Cir. 2009)).

Here, the length of the *vehicle's* stop was ultimately governed by the fact that Olmeda, even if he were only issued a citation for his offenses, could not legally drive away due to his suspended license. As a result, regardless of whether Olmeda was present, Olmeda's truck would certainly have remained at the scene long enough for the K-9 unit to arrive. The Commonwealth points to a federal case, *United States v. Vargas*, 848 F.3d 971, 974-75 (11th Cir. 2017), which held there was no violation of *Rodriguez* when police prevented unlicensed individuals from driving a vehicle. Recently, the Tenth Circuit applied *Vargas* in the same context, stating,

> efforts aimed at preventing unlicensed drivers "from driving off without a license is lawful enforcement of the law, not unlawful detention. What prolonged the stop was not [law enforcement's] desire to search the vehicle but the fact that [the] occupants of it could not lawfully drive it away."

United States v. Gurule, 935 F.3d 878, 884-85 (10th Cir. 2019) (quoting *Vargas*, 848 F.3d at 974-75). *See also United States v. Bah*, 794 F.3d 617, 624-25 (6th Cir.

2015) (finding police conducted valid inventory search of towed and impounded vehicle when neither driver nor passenger had a valid driver's license, preventing vehicle from being driven). The reasoning in *Vargas* and *Gurule* is persuasive under the particular set of facts in this case.

Finally, although the trial court did not use the term "inevitable discovery" in describing why the sniff search was lawful, its rationale is the same:

> The K-9 unit arrived during the time in which [Olmeda] most likely would have been waiting for a ride had he not been required to perform the field sobriety tests. Even if [Olmeda] had been allowed to leave on foot, the vehicle would still have been available for the K-9 to conduct the open air search.

R. at 69. Again, Olmeda's suspended license provides the basis for distinguishing this case from *Davis*. In *Davis*, our Supreme Court held inevitable discovery did not apply because it was "equally likely" Officer McCoy could have let the appellant go with a citation or a warning. However, as illustrated in *Vargas* and *Gurule*, Olmeda's lack of a valid license prevented him from driving the vehicle away from the scene. Therefore, the K-9 unit's discovery of the contraband within Olmeda's truck was inevitable, regardless of whether the investigation into Olmeda's sobriety was appropriate. Inevitable discovery applies because "police were not 'in a better position than they would have been absent the error[.]'" *Johnson v. Commonwealth*, 522 S.W.3d 207, 211 (Ky. App. 2017) (quoting

Commonwealth v. Elliott, 714 S.W.2d 494, 496 (Ky. App. 1986) (citing *Nix*, 467 U.S. at 443, 104 S. Ct. 2501)).

For the foregoing reasons, we affirm the McCracken Circuit Court's denial of Olmeda's motion to suppress and the subsequent judgment.

ALL CONCUR.

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