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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001632-MR

ROY LEE LYNEM APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 16-CR-00828

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; JOHNSON[1] AND KRAMER, JUDGES.

CLAYTON, CHIEF JUDGE: Roy Lynem appeals from a Fayette Circuit Court judgment after pleading guilty to possession of a controlled substance in the first degree, tampering with physical evidence and fleeing/evading police in the second

[1] Judge Robert G. Johnson concurred in this opinion prior to the expiration of his term of office. Release of the opinion was delayed by administrative handling.

degree. Lynem entered the plea conditioned on his right to appeal the circuit court's denial of his motion to suppress evidence.

The following evidence was elicited at the suppression hearing: Officer Todd Hart and Recruit Officer Head were on patrol in Lexington when they stopped at a Speedway to purchase fuel and drinks. Lynem was also at the Speedway. Officer Hart testified that he did not specifically remember seeing Lynem at the service station and did not know if Officer Head saw Lynem. He assumed they followed Lynem out of the Speedway because his vehicle was in front of theirs when they left and proceeded down New Circle Road.

After following Lynem for a short distance, Officer Head checked Lynem's license plate number in the Automated Vehicle Information System (AVIS). According to Hart, part of the training of recruit officers like Head consisted of teaching them to check random license plates. In regard to Lynem's plate, AVIS indicated "verify proof of insurance." Hart testified that when a stop is made due to an AVIS alert, he generally finds the vehicle is not insured. He acknowledged that he had encountered false positives but that the system has a 90 to 95 percent accuracy rate. The officers followed Lynem briefly and then, when he turned onto Eastland Parkway, activated their lights to initiate a traffic stop. Lynem did not pull over immediately but proceeded at the speed limit for another three to four blocks. He then turned onto Martha Court, where he stopped, jumped

out of his car and ran away. The officers separated to pursue him. Officer Head eventually caught Lynem, who told the officers he fled because he did not have a license. The police did not find any contraband in a search of his vehicle but when they retraced his path, they found a rock of crack cocaine. Later, they obtained video from a security camera on a nearby building that showed Lynem throwing an object away as he ran by. Lynem denied any knowledge of the cocaine.

Lynem was taken to the Fayette County Detention Center. Michael McLaughlin, who was being booked at the same time for failure to pay child support, testified he overheard Officers Hart and Head talking and laughing with the deputy sheriff. According to McLaughlin, Officer Hart stated he had seen Lynem in the Speedway, did not like how he looked and knew he would run if they followed him. Lynem has a distinctive appearance: he is African-American with facial tattoos, gold teeth and long cornrows that are dyed blond.

Lynem filed a motion to suppress the evidence recovered by the police, arguing that they lacked reasonable suspicion to justify the traffic stop.

Following the suppression hearing, which was continued for additional briefing on issues raised by two unpublished opinions of this Court, *Willoughby v. Commonwealth*, 2012-CA-000776-MR, 2014 WL 92253 (Ky. App. Jan. 10, 2014) ("*Willoughby I*") and *Willoughby v. Commonwealth*, 2015-CA-000466-MR, 2017 WL 1290645 (Ky. App. Apr. 7, 2017), *disc. review denied* (Ky.

Oct. 25, 2017) ("*Willoughby II*"), the trial court denied the motion to suppress. Lynem entered a conditional guilty plea to amended charges. He received a total sentence of two years and was placed on probation for three years. This appeal followed.

Our standard when reviewing a suppression ruling is twofold: "we first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive. Based on those findings of fact, we must then conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law." *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky. App. 2002) (footnotes omitted).

The Fourth Amendment to the United States Constitution secures our freedom from "unreasonable searches and seizures." *See also* KY. CONST. § 10. "A police officer may constitutionally conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." *Bauder v. Commonwealth*, 299 S.W.3d 588, 590-91 (Ky. 2009) (citing *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). Traffic stops are similar to *Terry* stops and therefore must also be supported by reasonable, articulable suspicion, which is defined as "considerably less than proof of

wrongdoing by preponderance of the evidence." *Chavies v. Commonwealth*, 354 S.W.3d 103, 108 (Ky. 2011) (citations omitted).

Lynem argues that the traffic stop was pretextual based on McLaughlin's testimony regarding the officers' motives for pulling him over. He contends that the officers sought a reason to stop him simply because they did not like the way he looked. Relying on dicta in *Willoughby II*, he contends that before officers are permitted to check a license plate in the AVIS system, they must possess a reasonable suspicion of wrongdoing.

In order to address Lynem's argument in context, we set forth a brief summary of *Willoughby I* and *Willoughby II*. In *Willoughby I*, a panel of this Court questioned whether the information provided to police officers by AVIS was sufficiently accurate and reliable to create a reasonable suspicion to justify a traffic stop. The case was remanded for the trial court to make findings regarding the accuracy and reliability of the AVIS system.

On remand, the Commonwealth offered testimony from two representatives of the Kentucky Department of Transportation who explained that

> on the 15th of each month, all automobile insurance carriers submit a list, by vehicle identification numbers (VIN) of all covered vehicles. The Department then compares that list to a list of all registered vehicles. If no insurance is indicated for that vehicle when the insurance carriers file their lists in the following month, that vehicle is placed on a watch list and put into AVIS. The Department then sends a letter to the registered owner

> warning that their registration could be cancelled. If no response is received, the registration for that vehicle will be cancelled. Approximately 20,000 warning letters are sent each month, with about 3,000 or 4,000 registrations cancelled for lack of proof of insurance.

Willoughby II at *3. One of the witnesses from the Department of Transportation

> acknowledged that errors do occur which will indicate no proof of insurance when there is a policy. For example, the insurance company may make a mistake in listing the VIN of a given vehicle, or the County Clerk may err in transmitting the VIN to the Transportation Department. Thus, when the AVIS indication to "verify proof of insurance" appears on the officer's MDT [Mobile Data Terminal], the particular vehicle may not be insured, or it may actually be insured but not shown as such due to an error or due to a change in insurance carriers.

Id. at *4.

According to the Department of Transportation witnesses, "[t]here are no statistics available to show how often a vehicle is actually uninsured when AVIS displays the 'verify proof of insurance coverage' message." One of them testified "that AVIS has a 98% 'match rate' but it appears that merely reflects the fact that, on any given day, AVIS will report that 98% of all registered vehicles have proof of insurance on file. It does not tell us how many of the 2% of vehicles are insured or uninsured." *Id*.

Upon considering the evidence, the trial court reasoned that "since each month there are 3,000 to 4,000 registrations cancelled for lack of proof of insurance, and on any given day as many as 20,000 vehicles with no proof of

insurance on file in Frankfort, it would be reasonable to suspect that a vehicle being checked does not have insurance when AVIS displays 'verify proof of insurance.'" *Id*.

The trial court concluded that the AVIS system provides information to the police "which is far beyond a tip or hunch. It is based upon objective data collected by the Department of Transportation. While the AVIS system does not guarantee in every case that the indication of 'verify proof of insurance' is conclusive that the vehicle in question does not have insurance, it certainly provides an objective, articulable basis for suspecting that the vehicle may be uninsured." *Id*.

Willoughby filed an appeal challenging these findings and conclusions of the trial court.

In *Willoughby II*, the Court of Appeals held that the trial court's findings of fact were supported by substantial evidence and that the trial court correctly applied the law to those facts. The Court agreed that the police officer who pulled over a vehicle based on an AVIS notification to verify insurance had a "reasonable, particularized and objective basis" to conduct an investigatory stop. *Id*. at *5. Of particular significance to Lynem's case, however, is the following dicta included at the end of the opinion:

> More troubling to this Court is an issue that we are not at liberty to adjudicate. We are bound by the law of the

> case to uphold what was determined in the previous appeal. Therefore, we are restricted solely to a review of the viability and reliability of AVIS in relation to the reasonable suspicion of a police officer to justify a stop. We have decided that issue in accord with the specific directive of another panel of this Court in its remand to the trial court.
>
> However, at the threshold of invoking access to AVIS are the issues of why and when and under what circumstances may a police officer choose a license plate to run through the AVIS System. Is it sufficient to do it at random? Or based on a mere hunch? The insidious danger of using AVIS as a "rod and reel" in an evidentiary "fishing expedition"—in violation of Fourth Amendment principles—becomes readily apparent. Potentially any citizen—insured or uninsured, guilty or innocent—is put at immediate risk of being subjected "at random or on a hunch" to a traffic stop, which then morphs into a legitimate investigatory stop. This logic is the very reverse of the spirit of the Fourth Amendment. Thus, we must question the criteria (if indeed they exist) upon which an officer bases a decision at its inception to initiate an AVIS search.
>
> This is an issue for another case and another day. But its specter lingers over a motoring citizenry as an omnipresent possibility of intrusion into that ever shrinking zone of a legitimate expectation of privacy.

Id. at *6.

Since the rendering of *Willoughby II*, the Kentucky Supreme Court held that a police officer need not have a reasonable suspicion of wrongdoing before checking a motorist's license plate in the AVIS system. *Traft v. Commonwealth*, 539 S.W.3d 647, 649-50 (Ky. 2018). The Supreme Court based

this decision on its determination that there is no reasonable expectation of privacy in a license plate, which is displayed on the exterior of a vehicle which is driven on a public street where it may be observed by police officers who are also legitimately present:

> It is well settled that "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection." *Katz*, 389 U.S. at 351, 88 S.Ct. 507. Furthermore, "objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure . . . ." *Harris v. United States*, 390 U.S. 234, 236, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968). We agree with the Sixth Circuit, which held:
>
> > No argument can be made that a motorist seeks to keep the information on his license plate private. The very purpose of a license plate number, like that of a Vehicle Identification Number, is to provide identifying information to law enforcement officials and others. . . .
>
> *United States v. Ellison*, 462 F.3d 557, 561 (6th Cir. 2006).

Traft v. Commonwealth, 539 S.W.3d at 649-50.

In light of *Traft*, the police officers' ostensible or actual motives in checking Lynem's license plate number in the AVIS system are immaterial.

Lynem attempts to distinguish the facts of his case from *Traft*. In *Traft*, the police officer's car was equipped with a camera that automatically read and checked license plates. It informed the officer that an oncoming vehicle's

registered owner had an outstanding warrant for failure to appear in court. The police officer initiated a traffic stop and discovered that the driver was driving under the influence. Traft argued that the officer had no way of knowing if the driver of the vehicle was the subject of the warrant and characterized the officer as a "snooping deputy" harassing a law-abiding citizen. *Traft*, 539 S.W.3d at 651. The Kentucky Supreme Court disagreed, characterizing the officer's actions as carrying out his sworn duty and abiding by the terms of a court-issued warrant. *Id*.

Similarly, the officers in Lynem's case were enforcing Kentucky law which provides that failure to maintain insurance carries a criminal penalty. *See* KRS 304.99-060 (l)-(2). Lynem argues that the officers in his case were indeed snooping deputies who were "out to get him" because they did not like the way he looked. But if AVIS had not alerted the officers to verify Lynem's automobile registration, they would not have had reasonable suspicion and could not have lawfully initiated a traffic stop based solely on their alleged animus towards him.

For the foregoing reasons, the trial court did not err in denying Lynem's motion to suppress and consequently its judgment is affirmed.

ALL CONCUR.

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