

Supreme Court of Kentucky

No. 2012-SC-123-DG

(Court of Appeals No. 2010-CA-176)

Pursuant to
Court order

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SUPREME COURT
APPELLANT

COMMONWEALTH OF KENTUCKY

Appeal from Hardin Circuit Court on Discretionary Review

v.

Hon. Ken M. Howard, Judge

Indictment No. 2009-CR-143

ASIA F. BUCALO

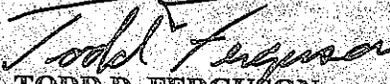
APPELLEE

Brief for the Commonwealth

Submitted by,

JACK CONWAY

Attorney General of Kentucky



TODD D. FERGUSON

Assistant Attorney General

Office of Criminal Appeals

Office of the Attorney General

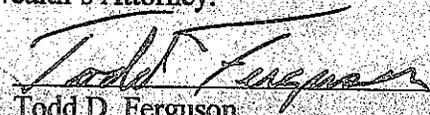
1024 Capital Center Drive

Frankfort, Kentucky 40601

(502) 696-5342

CERTIFICATE OF SERVICE

I certify, this 10th day of January, 2013, that the record on appeal was not checked out from this Court and that a copy of the Brief for the Commonwealth has been: mailed to Hon. Ken M. Howard, Chief Judge, Hardin Circuit Court, Justice Center, 120 E. Dixie Avenue, Elizabethtown, Kentucky 42701 and Hon. Erin Hoffman Yang, Department of Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601, Counsel for Appellee; and served via e-mail on Hon. Shane Young, Hardin Commonwealth's Attorney.



Todd D. Ferguson

Assistant Attorney General

INTRODUCTION

This appeal concerns Ms. Bucalo's conviction, pursuant to a conditional guilty plea, of Manufacturing Methamphetamine, Trafficking in a Controlled Substance in the First Degree, two counts of Possession of Controlled Substance in the First Degree, Possession of Drug Paraphernalia, and Possession of Marijuana. On appeal, the Court of Appeals held that the trial court wrongly denied Ms. Bucalo's motion to suppress. The case is now before this Court on grant of discretionary review.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth welcomes oral argument if this Court believes it will assist in the decision-making process.

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COUNTERSTATEMENT OF THE CASE

On April 16, 2009, at around 11:50 a.m., Detective Gregory, of the Kentucky State Police, received a call concerning a report from employees of an Elizabethtown hotel that three people had been staying in a room for the last 15 days, paying cash and refusing maid service. (Tape; 8/18/09; 16:21:45.) The employees reported that the occupants stated they were waiting to close on a house. (Tape; 8/18/09; 16:21:45.) The hotel employees found these circumstances suspicious. (Tape; 8/18/09; 16:21:45.) The hotel employees reported that they would no longer rent the room to the occupants. (Tape; 8/18/09; 16:21:45.)

Detective Gregory proceeded to the hotel, along with another officer, and they spotted the vehicle they had been told about. (Tape; 8/18/09; 16:24:40.) The vehicle was parked with two other vehicles, and all three were being loaded by the occupants of the room. (Tape; 8/18/09; 16:24:40.) Detective Gregory used the license plate numbers to check on ownership, and found it strange that all three vehicles were registered locally, with local addresses. (Tape; 8/18/09; 16:24:40.)

Two of the cars left at around 12:15 p.m.. (Tape; 8/18/09; 16:27:05.) Ms. Bucalo was driving a green Honda and it was accompanied by a white Dodge (driven by Mr. Duke). (Tape; 8/18/09; 16:27:05.) The officers contacted Elizabethtown Police Department officers to follow the cars. (Tape; 8/18/09; 16:28:30.) Detective Gregory quickly spoke with the hotel employees and checked the vacated room, but found nothing suspicious. (Tape; 8/18/09; 16:28:30.)

The cars in question were later stopped for traffic violations: they both ran the

same red light. (Tape; 8/18/09; 16:29:00.) Detective Gregory eventually went to the site of the traffic stops. (Tape; 8/18/09; 16:29:30.) Detective Gregory contacted a K-9 unit on the way to the site. (Tape; 8/18/09; 16:30:35.) The K-9 unit arrived shortly after 1:00 p.m., about the same time that Detective Gregory arrived. (Tape; 8/18/09; 16:50:46.) Detective Gregory stated that Ms. Bucalo was free to leave at that point, she wasn't being detained. (Tape; 8/18/09; 16:52:49.) The K-9 unit did a sweep around the outside of the car and alerted; Detective Gregory then proceeded to search the car. (Tape; 8/18/09; 16:31:15.) At some point, Ms. Bucalo was allowed to walk into the hotel with her child so he could use the restroom. (Tape; 8/18/09; 17:32:28.)

Sgt. Kelly, of the Elizabethtown Police Department, was one of the officers asked to follow the Honda and truck as they left the hotel. (Tape; 8/18/09; 16:56:43.) Sgt. Kelly watched both vehicles run the same red light. (Tape; 8/18/09; 16:56:43.) Sgt. Kelly stopped Ms. Bucalo in the Honda (they pulled into a hotel parking lot), and another officer stopped the truck. (Tape; 8/18/09; 16:58:20.) Sgt. Kelly told Ms. Bucalo that she ran a red light and Ms. Bucalo said she was in a hurry because her minor son needed to use the bathroom. (Tape; 8/18/09; 16:59:20.) Sgt. Kelly ran a driver's license check and Ms. Bucalo several times asked if she could take her son into the hotel to the bathroom. (Tape; 8/18/09; 16:59:20.) Ms. Bucalo told Sgt. Kelly that she was moving from one hotel to another. (Tape; 8/18/09; 17:00:18.) Sgt. Kelly told her that they were conducting a narcotics investigation. (Tape; 8/18/09; 17:00:18.) Officer Brackett radioed Sgt. Kelly that drug paraphernalia had been found in the truck and that it was related to Ms. Bucalo. (Tape; 8/18/09; 17:00:18.) The drug paraphernalia was related to Ms. Bucalo because the

other vehicle was being used to move her stuff from one hotel to another. (Tape; 8/18/09; 17:05:42.) Ms. Bucalo refused to consent to the search of the Honda. (Tape; 8/18/09; 17:01:05.) Sgt. Kelly stated that it usually takes 15 to 20 minutes to write a traffic ticket. (Tape; 8/18/09; 17:02:30.)

Trooper Payne, a Kentucky State Police K-9 unit, was called to the scene of the traffic stops by Detective Gregory. (Tape; 8/18/09; 17:12:35.) Trooper Payne stated that it took less than 10 minutes for him to get to the scene after he got the call. (Tape; 8/18/09; 17:28:40.) Trooper Payne's dog alerted to the driver side door. (Tape; 8/18/09; 17:14:55.)

Ms. Bucalo waived her right to indictment and was charged by information, on April 28, 2009, with Manufacturing Methamphetamine, First Degree Trafficking in a Controlled Substance, two counts of First Degree Possession of a Controlled Substance, Possession of Drug Paraphernalia, and Possession of Marijuana. (Transcript of Record, hereinafter TR, 3, 6.) On June 15, 2009, Ms. Bucalo filed a motion to suppress. (TR 34.) An evidentiary hearing was held, at which the above evidence was presented. The parties then filed briefs on the matter. (TR 51, 57.) On August 28, 2009, the trial court overruled movant's motion to suppress. (TR 61-68.)

Ms. Bucalo then entered a conditional guilty plea pursuant to a plea agreement with the Commonwealth. (TR 76, 78, 80.) The parties entered an agreed order preserving the suppression issue for appeal. (TR 82.) On January 12, 2010, Ms. Bucalo was convicted of Manufacturing Methamphetamine, Trafficking in a Controlled Substance in the First Degree, two counts of Possession of a Controlled Substance in the

First Degree, Possession of Drug Paraphernalia, and Possession of Marijuana and was sentenced to twelve (12) years imprisonment, with seven years to serve, followed by five years probated. (TR 85.)

On appeal, Ms. Bucalo argued that while the traffic stop was okay, the police lacked reasonable suspicion to extend the stop, and the use of the K-9 unit came too late to be reasonable. The Commonwealth countered that, considering the totality of the circumstances, the trial court correctly found that Detective Gregory developed a reasonable suspicion that criminal activity might be afoot which was sufficient to hold movant until the drug dog could be summoned and that the time frame of the stop was not unreasonable. The Court of Appeals, determining the facts to be generally as set forth above (Opinion pp. 2-7), held that:

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 the 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 expand 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.

(Opinion pp. 14-15.)

Additional facts shall be developed, as needed, and the Argument section of this brief.

ARGUMENT

I.

THE TRIAL COURT PROPERLY DENIED MS. BUCALO'S MOTION TO SUPPRESS. POLICE OFFICERS, BASED UPON THEIR EXPERIENCE AND EXPERTISE, ARE ENTITLED TO DEFERENCE ON THEIR 'IN THE MOMENT' DETERMINATIONS AS TO WHETHER THERE IS SUFFICIENT REASONABLE SUSPICION TO PROLONG A TRAFFIC STOP FOR FURTHER INVESTIGATION.

This issue is preserved by way of Ms. Bucalo's motion to suppress and conditional plea, the parties' arguments before the Court of Appeals, and this Court's grant of discretionary review. The Commonwealth asked this Court for discretionary

review to explore the deference to be afforded decisions police officers make 'in the heat of the moment' as they try to determine whether to further investigate in a particular case.

Under RCr 9.78, the trial court's findings of fact are conclusive if supported by substantial evidence. Dixon v. Commonwealth, 149 S.W.3d 426, 433 (Ky., 2004); Licklitter v. Commonwealth, 142 S.W.3d 65, 69 (Ky., 2004); Simpson v. Commonwealth, 834 S.W.2d 686 (Ky.App., 1992). And, although review of the determination of reasonable suspicion or probable cause is *de novo*, the United States Supreme Court has stated,

We therefore hold that as 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.

A trial judge views the facts of a particular case in light of the distinctive features and events of the community; likewise, a police officer views the facts through the lens of his police experience and expertise. The background facts provide a context for the historical facts, and when seen together yield inferences that deserve deference. For example, what may not amount to reasonable suspicion at a motel located alongside a transcontinental highway at the height of the summer tourist season may rise to that level in December in Milwaukee. That city is unlikely to have been an overnight stop selected at the last minute by a traveler coming from California to points east. The 85-mile width of Lake Michigan blocks any further eastward progress. And while the city's salubrious summer climate and seasonal attractions bring many tourists at that time of year, the same is not true in December. Milwaukee's average daily high temperature in that month is 31 degrees and its average daily low is 17 degrees; the percentage of possible sunshine

is only 38 percent. It is a reasonable inference that a Californian stopping in Milwaukee in December is either there to transact business or to visit family or friends. The background facts, though rarely the subject of explicit findings, inform the judge's assessment of the historical facts.

In a similar vein, our cases have recognized that a police officer may draw inferences based on his own experience in deciding whether probable cause exists. See, e.g., *United States v. Ortiz*, 422 U.S. 891, 897, 95 S.Ct. 2585, 2589, 45 L.Ed.2d 623 (1975). To a layman the sort of loose panel below the back seat armrest in the automobile involved in this case may suggest only wear and tear, but to Officer Luedke, who had searched roughly 2,000 cars for narcotics, it suggested that drugs may be secreted inside the panel. An appeals court should give due weight to a trial court's finding that the officer was credible and the inference was reasonable.

Ornelas v. United States, 517 U.S. 690, 116 S.Ct. 1657, 1663, 134 L.Ed. 2d 911 (1996).

Cf., *Commonwealth v. Banks*, 68 S.W.2d 347 (Ky., 2001).

Justice Harlan (concurring in result) stated in *Sibron v. New York*, 392 U.S. 40, 78, 88 S.Ct. 1889, 1910 (1968),

While 'probable cause' to arrest or search has always depended on the existence of hard evidence that would persuade a 'reasonable man,' in judging on-the-street encounters it seems to me proper to take into account the police officer's trained instinctive judgment operating on a multitude of small gestures and actions impossible to reconstruct. Thus the statement by an officer that 'he looked like a burglar to me' adds little to an affidavit filed with a magistrate in an effort to obtain a warrant. When the question is whether it was reasonable to take limited but forcible steps in a situation requiring immediate action, however, such a statement looms larger. A court is of course entitled to disbelieve the officer (who is subject to cross-examination), but when it believes him and when there are some articulable supporting facts, it is entitled to

find action taken under fire to be reasonable.

In United States v. Cortez, 449 U.S. 411, 417-418, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981), the Court held officers can 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.

Ms. Bucalo's argument is that while the traffic stop was okay, the police lacked reasonable suspicion to extend the stop, and the use of the K-9 unit came too late to be reasonable. Following an evidentiary hearing, the trial court held:

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. 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 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.

(TR 67-68.) This seems exactly the kind of case that the Ornelas Court was talking about when it discussed giving due deference to the inferences a police officer draws from the

circumstances before him, based upon his training, expertise, and experience. Ornelas, *supra*, 116 S.Ct. at 1663.

The test for a Terry stop is not “whether an officer can conclude that an individual is engaging in criminal activity, but rather whether the officer can articulate reasonable facts to suspect that criminal activity *may* be afoot” Commonwealth v. Banks, *supra*, 68 S.W.3d at 350. And “the level of articulable suspicion necessary to justify a stop is considerably less than proof of wrong-doing by preponderance of the evidence.” *Id.*, at 351. “Although each factor giving rise to reasonable suspicion may appear innocent when viewed by itself, ‘a combination of factors may warrant further investigation when viewed together.’” United States v. Fuse, 391 F.3d 924, 929 (8th Cir., 2004), quoting United States v. Linkous, F.3d 716, 720 (8th Cir., 2002). *Cf.*, United States v. Arvizu, 534 U.S. 266, 274, 122 S.Ct. 744, 751, 151 L.Ed.2d 740 (2002); Hampton v. Commonwealth, 231 S.W.3d 740, 747 (Ky., 2007); Baltimore v. Commonwealth, 119 S.W.3d 532, 541 (Ky. App., 2003).

In United States v. Sharpe, the U.S. Supreme Court stated,

In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant. A court making this assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second guessing.

470 U.S. 675, 105 S.Ct. 1568, 84 L.Ed.2d 605, 615-16 (1985)(citations omitted).

In United States v. Bloomfield, the Eighth Circuit addressed a traffic stop that developed into more and found that the police acted entirely properly. 40 F.3d 910, 915-19 (8th Cir., 1994). In Bloomfield the police made a traffic stop, developed reasonable suspicion that other criminal activity was underway, called for a drug dog which arrived about an hour after the initial stop, and searched the vehicle after the drug dog indicated drugs were present. *Id.* The Eighth Circuit had no problem with the traffic stop, reasoned that the officer's observations after the traffic stop caused him to develop a reasonable suspicion, found that the summoning of the drug dog was a reasonable means of investigation and was not unduly lengthy, and held that when the drug dog indicated that drugs were present that provided probable cause for a search. *Id.* The Bloomfield Court stated:

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.] Cummins, 920 F.2d [498,] 502 [(8th Cir. 1993)]. We assess the factors on which an officer based his claim of reasonable suspicion as a totality and in light of the officer's experience.

Id., at 918. Bloomfield is similar to the case at bar and this Court should follow the same reasoning. *Cf.*, United States v. Sanchez, 417 F.3d 971, 975-76 (8th Cir., 2005); United States v. Owens, 167 F.3d 739, 747-49 (1st Cir., 1999); United States v. Soto-Cervantes, 138 F.3d 1319, 1322-24 (10th Cir., 1998). *Compare*, Halvorsen v. Baird, 146 F.3d 680, 684-85 (9th Cir., 1998); Baltimore v. Commonwealth, *supra*.

The Court of Appeals was particularly concerned with the officers using the drug paraphernalia found in the truck of Nicholas Duke, respondent's room-mate and traveling

companion, as a factor in imputing reasonable suspicion that criminal activity might be afoot to respondent. The Court of Appeals stated, “[Respondent’s] only link to Duke’s drug paraphernalia was that Duke told police he was helping [Respondent] move to another hotel.” (Opinion p. 14.) However, this overlooks the fact that respondent and Duke, local residents, had been living in the same hotel room for the previous 15 days, and that the officers had observed Duke and respondent load their vehicles with the contents of the hotel room. Many courts have stated that a factor in determining reasonable suspicion can be the fact that more than one car is traveling in tandem/together. United States v. Sharpe, 470 U.S. 675, 105 S.Ct. 1568, 1574 f.n. 3, 84 L.Ed.2d 605 (1985); United States v. French, 974 F.2d 687, 691-94 (6th Cir, 1992); United States v. Zamudio-Carillo, 499 F.3d 1206, 1209-10 (10th Cir., 2007); People v. Rodriguez-Chavez, 938 N.E.2d 6232 (Ill. App., 2010). Cf., United States v. Williams, 271 F.3d 1262, 1269 (10th Cir., 2001). In fact, several courts have allowed the reasonable suspicion determination to factor in what was observed in the other car. United States v. Owens, 101 F.3d 559, 561-62 (8th Cir., 1996); United States v. Bender, 588 F.2d 200, 202 (5th Cir., 1979); State v. Perry, 303 S.W.3d 150 (Mo. App., 2010).

This Court recently held, in a similar situation, that a reasonable suspicion determination could factor in:

“[Appellant] was part of a distinct group of nine people loitering in front of a vacant house. Police observed two or more members of the group smoking marijuana, and one person admitted to police that he possessed a bag of marijuana. When police approached, they quickly discovered two handguns on two different people. So the officers had reasonable, articulable suspicion of drug use

and the potentially dangerous presence of concealed deadly weapons justifying an investigatory stop of all the persons in this group.”

Williams v. Commonwealth, 364 S.W.3d 65, 70 (Ky., 2011).

Further, an officer’s mistake of fact may still support the reasonable suspicion necessary for a Terry stop. United States v. Salinas-Cano, 959 F.2d 861, 865 (10th Cir., 1992). Here, Officer Brackett radioed Sgt. Kelly that drug paraphernalia had been found in Duke’s truck and that it was related to Ms. Bucalo. (Tape; 8/18/09; 17:00:18.) The drug paraphernalia was related to Ms. Bucalo because the other vehicle was being used to move her stuff from one hotel to another. (Tape; 8/18/09; 17:05:42.) The officers’ belief that they had drug paraphernalia, albeit found in the other vehicle, related to Ms. Bucalo, even if mistaken, should support the officers’ reasonable suspicion to hold Ms. Bucalo for a short period while they worked to confirm or dispel their suspicions.

Considering the totality of the circumstances the trial court found that Detective Gregory developed a reasonable suspicion that criminal activity might be afoot which was sufficient to hold Ms. Bucalo until the drug dog could be summoned and that the time frame of the stop was not unreasonable. This decision of the trial court should be upheld.

CONCLUSION

Based upon the foregoing, the Commonwealth respectfully urges this Court to reverse the opinion of the Kentucky Court of Appeals and affirm the judgment of the Hardin Circuit Court.

Respectfully submitted,

JACK CONWAY

Attorney General of Kentucky

A handwritten signature in black ink that reads "Todd Ferguson". The signature is written in a cursive style with a horizontal line above the first name.

TODD D. FERGUSON

Assistant Attorney General

Office of Criminal Appeals

Office of the Attorney General

1024 Capital Center Drive

Frankfort, Kentucky 40601-8204

(502)696-5342

Counsel for the Commonwealth

Appendix

- 1) Opinion Vacating and Remanding,
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- 2) Order Denying Motion to Suppress,
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- 3) Judgment and Order imposing Sentence,
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