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# Commonwealth of Kentucky

# Court of Appeals

NO. 2015-CA-001698-MR

DAMION MONTRECE LANE — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 15-CR-00152

COMMONWEALTH OF KENTUCKY — APPELLEE

## OPINION
## REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, COMBS, AND MAZE, JUDGES.

CLAYTON, JUDGE: Damion Montrece Lane ran a stop sign while driving his automobile and was stopped for the traffic violation. Officer Tim Merrick and his K9 unit were on scene. Officer Joshua Strauch also arrived on scene as the stop occurred and provided backup. It was late in the evening in Hopkinsville, Kentucky, and they were in a high-crime area. Both officers exited their vehicles

and approached Lane's vehicle. They observed Lane looking back at them and fumbling around in the car while they approached. Officer Merrick approached the driver's side and Officer Strauch approached the passenger's side. Only Lane was in the vehicle. Fearing officer safety, Officer Strauch had Lane exit the vehicle. Officer Straugh placed handcuffs on Lane and moved him to the hood of one of the cruisers. He then performed a safety pat down on Lane. Nothing was found on Lane's person.

While that was occurring, Officer Merrick ran his K9 unit, Bowie, around the vehicle. Bowie alerted on the vehicle's driver's side. The officers searched the vehicle and found no evidence of contraband. One of the officers then conducted a more thorough search of Lane's person and located a small packet of a white, powder-like substance in his right watch pocket.

Lane ultimately entered a conditional guilty plea to one count of first-degree, first-offense possession of a controlled substance (cocaine), one count of tampering with physical evidence, and one count of disregarding a stop sign. He received concurrent sentences of imprisonment for three years, imprisonment for five years, and a twenty-dollar fine, respectively. His sentences were probated provided he serve 90 days in home incarceration. He now appeals the denial of his motion to suppress the evidence discovered during the traffic stop.

Lane claims his rights to be free from unreasonable searches and seizures under the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution were violated. Suppression motions are

governed by Kentucky Rules of Criminal Procedure ("RCr") 8.27. That rule has been interpreted to provide appellate review of a trial court's factual findings under the clearly erroneous standard, which allows the factual findings to be conclusive if they are supported by substantial evidence. *Davis v. Commonwealth*, 484 S.W.3d 288, 290 (Ky. 2016) (citing *Simpson v. Commonwealth*, 474 S.W.3d 544, 547 (Ky. 2015)). The trial court's legal conclusions are reviewed *de novo*. *Id*.

The trial court's docket sheet reflects its factual findings as follows:

> Officer Merritt – Canine officer
> 2/27/15 observed driver fail to stop @ stop sign @
> McHenry Lane moving around, looking backward @
> officer "fumbling"
> Made driver's side approach
> One officer on each side. Proceeded to get him out of car
> (for safety?) Got dog out for free air sniff
> Strauch mentioned waistband?
> Lots of movement frequently prompts [illegible] it from
> vehicle Moving around Bowie stats available
> No video Officer safety advanced by cuffing
> Dog didn't advance
> \- - - - - - - - -
> STRAUCH
> 2/27/2015
> Saw [Defendant] watching from Merritt; reaching in
> waist area Concern for safety. Pulled [Defendant] out;
> unproductive pat down; dog sniff
> [Defendant] tried to reach [right] pocket even during
> cuffing
> Combination of watching officer, reaching is a concern.
> Search of person = after dog hits
> Night, high crime/drug area
> [Defendant] very nervous

(Trial Record, 52). The trial court then made the following conclusions:

> Motion to suppress denied.
> Stop was justified for traffic violation.

> Defendant[’]s movements in car raised concerns for
> officer safety & justified removal from car.
> Dog sniff was instantaneous (1st officer was dog handler)
> & further search of [Defendant’s] person justified by
> canine’s alert
> Evidence found in [Defendant’s] person (in pocket he
> had “protruding” (my words) or reaching for) is
> admissible

(Trial Record, 51).

Neither party disputes the factual findings. They are supported by substantial evidence, as the officers each testified at the evidentiary hearing in conformity therewith. Thus, they are conclusive, and we next review the legal conclusions *de novo*.

Lane argues the trial court’s legal conclusions are erroneous because Lane claims the K9 walk-around of the vehicle impermissibly extended the duration of the stop and was neither related to the traffic offense nor based on probable cause or reasonable articulable suspicion. We agree.

During a traffic stop, officers may “conduct certain unrelated checks” such as “checking the driver’s license, determining whether there are outstanding warrants against the driver, and inspecting the automobile’s registration and proof of insurance.” *Rodriguez v. U.S.*, 135 S.Ct. 1609, 1615, 191 L.Ed.2d 492 (2015). These are “ordinary inquiries incident to [the traffic] stop.” *Id.* (quoting *Illinois v. Caballes*, 543 U.S. 405, 408, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005)).

“A dog sniff, by contrast, is a measure aimed at ‘detect[ing] evidence of ordinary criminal wrongdoing.’” *Rodriguez*, 135 S.Ct. at 1615, 191 L.Ed.2d

492 (quoting *Indianapolis v. Edmond*, 531 U.S. 32, 40-41, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000)). A dog sniff does not have "the same close connection to roadway safety as the ordinary inquiries," thus it "is not fairly characterized as part of the officer's traffic mission." *Id.* Because a dog sniff is not part of the ordinary inquiries, its inclusion in the traffic stop procedures cannot extend the time period for the stop, or, if it does, the dog sniff must have a causal relationship to the stop. As the Kentucky Supreme Court phrased the inquiry, "The 'key question' is *not* whether the duration of Appellant's roadside detention was unreasonable; rather, it is whether the sniff search was related to *the purpose* for which Appellant was stopped[.]" *Davis*, 484 S.W.3d at 294 (emphasis in original).

In the absence of probable cause or a reasonable articulable suspicion of drug-related activity, prolonging a traffic stop "beyond its original purpose is unreasonable and unjustified; there is no '*de minimis* exception' to the rule that a traffic stop cannot be prolonged for reasons unrelated to the purpose of the stop." *Id.* (quoting *Rodriguez*, 135 S.Ct. 1609, 191 L.Ed.2d 492). "The critical question, then, is not whether the dog sniff occurs before or after the officer issues a ticket . . . but whether conducting the sniff 'prolongs' – *i.e.*, adds time to – 'the stop[.]'" *Rodriguez*, 135 S.Ct. at 1616, 191 L.Ed.2d 492.

Accordingly, if a dog sniff occurs during a traffic stop, it passes constitutional muster in one of three ways: it is related to the offense for which the person was stopped; it does not extend at all the time it takes to complete the traffic stop; or, it is premised on probable cause or a reasonable articulable suspicion of

drug-related activity. *See, e.g., Commonwealth v. Bucalo*, 422 S.W.3d 253 (Ky. 2013).

In the instant case, Lane was stopped because he allegedly failed to yield at a stop sign. Running the drug dog around the vehicle was in no way related to the purpose for which Lane was stopped. Thus, the first prong fails.

The second prong also fails because running the drug dog prolonged the traffic stop for at least some period of time. Officer Merrick could have been attending to the "ordinary inquiries" – *i.e.*, running Lane's license and registration – or he could have been writing the traffic violation ticket during the time that he was having K9 Bowie sniff the vehicle. *See Rodriguez*, 135 S.Ct. at 1616, 191 L.Ed.2d 492 ("If an officer can complete traffic-based inquiries expeditiously, then that is the amount of 'time reasonably required to complete [the stop's] mission.'") (quoting *Caballes*, 543 U.S. at 407, 125 S.Ct. 834). Indeed, the Commonwealth's argument that "the sniff did not prolong the stop at all because it only took a few seconds[,]" Appellee's Brf. at 7, demonstrates the *de minimis* principle was violated. It does not matter that the sniff took a few seconds or a few minutes – that the dog sniff prolonged the traffic stop any amount of time violated Lane's constitutional rights. Accordingly, as the sniff was not related to the offense for which Lane was stopped, and it impermissibly prolonged the traffic stop, it was only permissible if there was probable cause or a reasonable articulable suspicion of drug-related activity.

Here, we find there was no reasonable articulable suspicion of drug-related activity justifying the dog sniff. *See Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The Commonwealth argues reasonable articulable suspicion of drug-related activity existed because the officers testified that Lane might have been fumbling with drugs as they were approaching the vehicle. Furthermore, the officers were in a "high-crime neighborhood" and had a "hunch" or bad feeling about Lane.

While a "high crime area" factors into the contextual considerations of a reasonable articulable suspicion analysis, *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000), it alone is not sufficient to create reasonable articulable suspicion. Likewise, "nervousness alone is insufficient to give rise to reasonable suspicion, [though] it is an important factor in the analysis." *Adkins v. Commonwealth*, 96 S.W.3d 779, 788 (Ky. 2003) (citing *United States v. Mcrae*, 81 F.3d 1528, 1534 n.4 (10th Cir. 1996)). Nervousness rising to the level of reasonable suspicion typically includes evasive behaviors. *Cf. U.S. v. Brignoni-Ponce*, 422 U.S. 873, 885, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975) (noting nervous behavior that rises to the level of reasonable articulable suspicion includes "obvious attempts to evade officers . . ."); *Florida v. Rodriguez*, 469 U.S. 1, 6, 105 S.Ct. 308, 83 L.Ed.2d 165 (1984) ("Respondent's strange movements in his attempt to evade the officers aroused further justifiable suspicion . . ."); *U.S. v. Sokolow*, 490 U.S. 1, 8, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989) ("suspect took an evasive or erratic path through an airport . . ."). An officer's "inchoate and

unparticularized suspicion or 'hunch,'" *Terry*, 392 U.S. at 27, is also not of sufficient weight to create reasonable articulable suspicion. An officer may, however, make "specific reasonable inferences" that are "draw[n] from the facts in light of his experience." *Id*. We do not review any factor singly, but instead consider the totality of the circumstances. *Commonwealth v. Marr*, 250 S.W.3d 624, 628 (Ky. 2008) (citing *Baker v. Commonwealth*, 5 S.W.3d 142, 145 (Ky. 1999)).

Here, any suspicion about drug activity from Lane fumbling in the car as the officers were approaching the vehicle was simply a hunch or unparticularized suspicion, not a reasonable inference drawn from the facts in light of the officer's experience. None of the factors individually constituted a reasonable articulable suspicion of criminal activity: not the high-crime area nor Lane's nervous fumbling nor the officer's hunch. And none of the factors combined constituted a reasonable articulable suspicion of criminal activity. Lane was not being evasive in his nervous fumbling. He did not get out of his car and flee, and he did not attempt to drive off.

In fact, Lane's first pat-down was a safety pat-down for weapons. The officers testified that they were concerned about their safety due to Lane's fidgeting and looking back when the officers were approaching. That reasonable articulable suspicion of officer safety is justified given the facts. However, the Commonwealth now attempts to *ex post facto* convert the original hunch that Lane might pose a safety threat into a new hunch that Lane might have possessed drugs.

If we follow this logic – that nervousness plus a high-crime area equals *something* must be going on – we could justify myriad searches and seizures of Lane. The moving target of articulated suspicion, though, demonstrates that there was no reasonable articulable suspicion of criminal drug activity warranting the dog sniff.

In summary, none of the *Rodriguez* or *Davis* factors was satisfied. The dog sniff was not related to the traffic stop, the dog sniff prolonged the traffic stop, and there was no reasonable articulable suspicion of criminal activity that justified running the drug dog around the vehicle. The search violated Lane's constitutional right to be free from unreasonable searches and seizures, and the resulting seizure was "fruit of the poisonous tree" that should have been suppressed. *Wilson v. Commonwealth*, 37 S.W.3d 745, 748 (Ky. 2001).

Accordingly, we reverse and remand the judgment and sentence for further proceedings consistent with this opinion.

ALL CONCUR.

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