No. 04-92580-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS, PLAINTIFF-APPELLEE,

v.

BILLY D. ANDERSON, DEFENDANT-APPELLANT

BRIEF OF APPELLANT BILLY D. ANDERSON

APPEAL FROM THE DISTRICT COURT OF SEDGWICK COUNTY
HONORABLE DAVID W. KENNEDY, JOHN J. KISNER, JR.,
AND JAMES D. FLEETWOOD, JUDGES
DISTRICT COURT CASE NO. 03-CR-1629

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STATEMENT OF THE CASE

Defendant Billy D. Anderson appeals from his conviction of the offenses of possession of methylenedioxymethamphetamine ("MDMA"), in violation of K.S.A. 65-4163(a), a severity level 3 non person drug felony, and no tax stamp, in violation of K.S.A. 79-5204, a severity level 10 non person felony.

STATEMENT OF ISSUES

Whether the assumption that Defendant is in violation of his parole, when no warrant has yet been issued, entitles law enforcement to continue to detain Defendant following the conclusion of a traffic stop when he otherwise should be free to go, as they fruitlessly search his person and vehicle before making any effort to contact a parole officer for an arrest and detain order.

STATEMENT OF FACTS

Apparently, police officers in Wichita, Sedgwick County, Kansas, habitually conduct pretextual traffic stops to search the vehicles and persons of customers of the East 21st Street Amoco Food Mart, particularly those wearing red, carrying a paper sack and driving a rented vehicle. (R. II, 11, 16, 24, 28, 30-32, 41, 61.) On July 30, 2003, Defendant Billy Anderson ("Defendant") went to Amoco for a snack of sardines and crackers, but ended up with convictions for possession of methylenedioxymethamphetamine ("MDMA"), in violation of K.S.A. 65-4163(a), a severity level 3 non person drug felony, and no tax stamp, in violation of K.S.A. 79-5204, a severity level 10 non person felony. (R. I, 73-75; R. II, 109.)

On that evening, Officer Brad Elmore of the Wichita Police Department was watching the Amoco from somewhere across the street in an unmarked car. (R. II, 10, 22, 35-37.) On other occasions, he had investigated drug activity at the Amoco, stopping its departing patrons on the pretext of traffic stops and arresting some after finding drugs on their person or in their vehicles. (R. II, 11-15, 24.) He had arrested Umanah Smith, a "documented Blood member" employed as a cashier at the Amoco, on possession of cocaine and possession of marijuana, but no search warrants had been executed at the Amoco for drug activity in 2003, nor had Elmore arrested Smith or any other person for dealing drugs while performing of duties as Amoco cashier. (R. II, 12, 16, 23-24.) Because Smith's car was parked at the Amoco, Elmore believed him to be the cashier but did not go inside to verify he was on duty. (R. II, 25-26.)

Elmore saw Samuel Cobos, a "documented Vato Loco Boy" he heard was involved in drug activity, go into the Amoco with the driver of a silver Chevy truck, later identified as Defendant, who was wearing red clothing – described by Elmore as "Blood" colors. (R. II, 15-17.) Elmore did not see anyone inside of the Amoco give drugs to Defendant. (R. II, 27-28.) Because the Amoco is also a convenience store, it sells things other than gas, and although sometimes people come out with sacks, Elmore found it unusual when Defendant walked out carrying one. (R. II, 26-28, 41.) Despite the fact that the overwhelming percentage of time – in excess of 99 percent – vehicles are leased for legitimate purposes, Elmore thought it suspicious that Defendant was driving a rented truck. (R. II, 31.)

After about five minutes, Defendant and Cobos got back into the truck and Elmore followed them as they drove west on 21st Street to some apartments. (R. II, 17-18.) Elmore

saw four Hispanic males gather around the truck, but he did not maintain constant observation; when he drove around again, the truck was gone, getting ready to turn east onto 21st Street. (R. II, 18.) Elmore followed the truck back to the Amoco and saw Defendant go inside for a couple of minutes before leaving with someone later identified as Cornell Golston. (R. II, 20.) Although Elmore did not see Defendant commit a crime either time he was at the Amoco, when Defendant left again, Elmore was determined to do a pretext stop of the truck to search for drugs. (R. II, 32-34.) Elmore followed the truck again, this time going east on 21st Street at 50 miles per hour, and when the truck crossed the solid yellow center line, he radioed to other officers to initiate a traffic stop. (R. II, 21-22.)

Although he concedes that Defendant had never come up in connection with suspected drug activity at the Amoco, Officer Eddy Padron agrees that "once [Elmore] followed them around from Amoco to 21st and Waco and back to Amoco, it's pretty suspicious. So you did try to find a violation to stop 'em." (R. II, 60-61, 81.) So, at about 10:34 p.m., Padron initiated a traffic stop of the truck to look for drugs on the pretext of a traffic violation, speeding 50 miles per hour in a 35 miles per hour zone. (R. II, 45, 50, 61, 91.) Officer Daniel McFarren, along with Officer Cates, arrived on Padron's heels as the vehicles were coming to a stop. (R. II, 104-06.) McFarren approached the passenger side of Defendant's truck and saw Anderson and Golston eating some crackers and sardines or some food that they just got at the store. (R. II, 109.) Padron walked up to the driver side of Defendant's truck, told him why he was stopped, asked for identification from both Defendant and Golston, returned to his vehicle and ran both men through SPIDER. (R. II, 46-47, 62, 64-65.) While waiting on a response, he wrote out a citation for Defendant. (R.

II, 66, 72.) Within about five minutes – although it might have been as long as twenty – Padron determined that there were no wants or warrants for either Defendant or Golston and Defendant's drivers license came back as valid, and he completed the citation. (R. II, 73-74, 110.) Moreover, no order to arrest and detain Defendant had been issued as of July 30, 2003. (R. II, 9.) SPIDER also advised that both were "documented gang members" and that Defendant was under supervised release. (R. II, 47.) During this time frame, Padron and McFarren made the decision to get a drug dog to search Defendant's truck because McFarren had stopped Defendant one or two weeks before "because narcotics wanted them to stop him", and Defendant denied consent to search; another time previously, McFarren had stopped Defendant but did not find any narcotics or illegal drugs. (R. II, 48-49, 76-77, 107-08.)

Sometime around 11:09 p.m. – some 35 minutes after initiation of the pretextual traffic stop of Defendant's truck – Officer Faustino Naldoza arrived with Officer Easter to relieve McFarren and Cates. (R. II, 93, 113, 117.) Apparently all four officers were still present – as well as a fifth, Officer Poe – when Padron returned to the truck, asked Defendant to step out and, for officer safety only because "I know gang members usually carry guns for their protection," patted him down. (R. II, 50, 83-84, 93, 118.) Finding nothing, Padron handed Defendant a citation and his and Golston's identification, but instead of letting Defendant go, Padron asks for consent to search the truck; when Defendant declines, Padron tells him that he will need to wait for a drug dog to arrive. (R. II, 51, 78-81, 84-85, 111-12.)

Only after the decision is made to call the drug dog does Padron remove Golston from the truck and pat him down. (R. II, 52, 85-86, 112, 119.) Golston has marijuana in one shoe, some pills in the other, and about $1,300. (R. II, 52-53, 87.)

The drug dog is led around the truck and supposedly alerts; Naldoza, however, does not recall seeing it whimper, or sit down, or scratch, or bark, or turn its head, or whatever it might have been trained to do when it detects drugs. (R. II, 53-54, 122-23.) A search of the truck revealed nothing of evidentiary value. (R. II, 54, 123.)

Apparently as a last resort, the officers decide to contact the Kansas Department of Corrections ("KDOC") to try and obtain an arrest and detain order to violate Defendant's parole. (R. II, 123.) Naldoza tried to contact the on-duty parole officer, but after 10 to 15 minutes with no response, Padron called Richard Sackhoff, a KDOC special enforcement officer. (R. II, 4, 54, 55, 94.) Sackhoff verified Defendant was on parole and issued an oral arrest and detain order for a parole violation, leaving the written order inside the front door of his house for an officer to retrieve later. (R. II, 5, 56-57.) Sackhoff issued the arrest and detain order based upon what he was told by Padron. (R. II, 5.) Padron assumed that because Defendant was on parole, he was prohibited from associating or being in contact with gang members. (R. II, 95-96.) The prosecution failed to introduce any evidence that this was in fact a special condition of Defendant's parole. At about 11:48 p.m. – over one hour after initiation of the traffic stop – the decision was made to place Defendant into custody for violation of parole. (R. II, 96.) The written order to arrest and detain was not executed until July 31, 2003, and none existed prior to that date. (R. II, 7-9.)

Despite not being in receipt of any written order to arrest and detain Defendant, the officers attempted to arrest him. (R. II, 95.) Anderson ran but was quickly apprehended. (R. II, 57.) A plastic bag of blue pills was found in Defendant's shoe along with a similar bag nearby. (R. II, 58.)

Defendant filed a written motion to suppress which was denied by the trial court. (R. I, 24-33, 55.) Defendant was found guilty by the court through a bench trial on stipulated facts, specifically preserving his right to appeal from the denial of the motion to suppress. (R. I, 56-62; R. III, 1-9.) Defendant timely filed his Notice of Appeal. (R. I, 76.)

STANDARD OF REVIEW

Where the facts material to a decision on a motion to suppress evidence are not in dispute, the question whether to suppress is a question of law subject to unlimited review. *State v. Boyd*, 275 Kan. 271, 273, 64 P.3d 419 (2003). Appellate courts do not re-weigh the evidence, but determine whether the factual underpinnings of the trial court's decision are supported by substantial competent evidence; only the ultimate legal conclusion drawn from those facts is reviewed de novo. *State v. Alvidrez,* 271 Kan. 143, 145, 20 P.3d 1264 (2001). Ultimately, the burden is on the State to show that a claimed illegal search was lawful. *Boyd*, 275 Kan. at 273. *See also State v. Tonroy*, 32 Kan.App.2d 920, 92 P.3d 1116 (2004).

ARGUMENT

Because a parol violation is a civil infraction, not a crime, where no warrant had yet been issued, law enforcement was not entitled to continue to detain Defendant following the conclusion of a traffic stop when he otherwise should have been free to go, as they fruitlessly searched his person and vehicle before making any effort to contact a parole officer for an arrest and detain order; the trial court erred in concluding otherwise, the evidence obtained from a search of Defendant should have been suppressed, and Defendant must be granted a new trial.

In announcing its ruling from the bench, the trial court concluded that once SPIDER responded that there were no wants or warrants for Defendant or Golston, the traffic stop had ended; that the initial scope of the traffic stop was not exceeded; that after Padron found out that Defendant was on parole, he had the requisite reasonable suspicion to believe Defendant was in violation of his parole for being in contact with Golston and Cobos; and that the fact that there was no arrest and detain order in existence at the time of the stop did not prevent the officers who made the traffic stop and who had the suspicion from relying on it to hold Defendant until such an order existed, to arrest him and then search him, even though officers did not begin to contact a parole officer to get an arrest and detain order until after a search of the truck discovered no drugs. (R. II, 129-32.) Although the trial court did make certain findings of fact regarding the suspected drug activity at the Amoco (R. II, 127-29), it did not conclude that those facts provided any reasonable suspicion to detain Defendant or any probable cause to search him or his truck.

As a threshold matter, Defendant submits that the trial court's decision is not supported by substantial competent evidence: Padron merely assumed that because Defendant was on parole, he was prohibited from associating or being in contact with gang

members, and the prosecution failed to present Defendant's parole officer or otherwise introduce any evidence that this was in fact a special condition of his parole. Without introduction of this evidence, the trial court cannot conclude that the officers could detain Defendant on this basis.

The Fourth Amendment protects people from unreasonable searches and seizures of their persons, houses, papers and effects, protecting property as well as privacy. U.S. CONST. amend. IV; *Soldal v. Cook County, Ill.*, 506 U.S. 56, 62, 113 S.Ct. 538, 544, 121 L.Ed.2d 450 (1992). It applies to the states through the Due Process Clause of the Fourteenth Amendment. U.S. CONST. amend. XIV; *Wolf v. Colorado*, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949); *State v. Smith*, 243 Kan. 715, 717, 763 P.2d 632, 634 (1988). Moreover, Section 15 of the Bill of Rights to the Kansas Constitution is identical in scope and prohibits the same governmental conduct. *State v. Kimberlin*, 267 Kan. 659, 664, 984 P.2d 141, 144-45 (1999). Searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable, subject only to a few specifically established and well-delineated exceptions. *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 97 S.Ct. 619, 50 L.Ed.2d 530 (1977); *State v. Platten*, 225 Kan. 764, 769, 594 P.2d 201, 205 (1979).

The stopping of a vehicle by a law enforcement officer always constitutes a seizure. *State v. McClain*, 258 Kan. 176, 179-80, 899 P.2d 993, 996 (1995). An officer who observes a traffic violation may enforce the traffic laws by stopping the offending vehicle and briefly detaining its occupants. *State v. Schmitter*, 23 Kan.App.2d 547, 551, 933 P.2d 762, 767 (1997). And an officer may stop a vehicle so long as he observes a traffic violation, regardless of his ulterior motives. *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769,

1774, 135 L.Ed.2d 89 (1996); *State v. Canaan*, 265 Kan. 835, 841, 964 P.2d 681, 688 (1998). Here, Defendant was stopped for two traffic violations: speeding and crossing the center line. Rarely, however, do officers seemingly admit to such a persistent, calculated and blatant pattern of pretextual stops with the sole goal of obtaining searches of drivers and their vehicles – and without concern for the requisite individual particularized suspicion.

Even if the alleged traffic violation were legitimate, Padron's detention of Defendant exceeded the scope permitted by the traffic stop:

> A law enforcement officer conducting a routine traffic stop may request a driver's license and vehicle registration, run a computer check, and issue a citation. When the driver has produced a valid license and proof that he or she is entitled to operate the car, the driver must be allowed to proceed on his or her way, without being subject to further delay by the officer for additional questioning.

State v. Mitchell, 265 Kan. 238, 245, 960 P.2d 200, 205 (1998). The officer also may request proof of insurance. *City of Norton v. Stewart*, 31 Kan.App.2d 645, 70 P.3d 707 (2003). Padron initiated the stop of Defendant's truck at 10:34 p.m., then took five to twenty minutes to determine that there were no wants or warrants for either Defendant or Golston, validate Defendant's drivers license, and complete the citation. Yet Padron waited until 35 minutes after the stop before returning to Defendant's truck and handing him the citation.

At this point, Padron could continue to detain Defendant only if he had reasonable suspicion of illegal transactions in drugs or of another serious crime. *Mitchell, id.*; *see also Schmitter, supra; State v. DeMarco*, 263 Kan. 727, 952 P.2d 1276 (1998). Padron's "suspicion," if any, was based on Elmore's: Defendant wore red, was seen with Cobos, and drove a rented vehicle from the Amoco to 21st and Waco and back to the Amoco. As a

matter of law, these facts do not meet the minimum level of objective factors justifying reasonable suspicion necessary for further detention and Defendant should have been free to go.

The trial court erred when it determined otherwise – that Padron could continue to detain Defendant because by then Padron had reasonable suspicion to believe Defendant was in violation of his parole. Criminal statutes are to be strictly construed in favor of the accused and that statutory language must be given its plain and ordinary meaning. *State v. Hall*, 27 Kan.App.2d 313, 318, 3 P.3d 582, 585 (2000). Continued detention under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and K.S.A. 22-2402, however, requires reasonable and articulable suspicion that the individual stopped has committed, is committing, or is about to commit a *crime*. A crime is an act or omission defined by law and for which, upon conviction, a sentence of death, imprisonment and/or fine is authorized; crimes are classified as felonies, misdemeanors, traffic infractions and cigarette or tobacco infractions. K.S.A. 21-3105. Because violating the conditions of one's parole is not classified as a criminal offense under the Kansas Criminal Code, K.S.A. 21-3101 *et seq.*, a parole violation is not a felony or a misdemeanor, but a civil infraction. *State v. Sullivan*, 17 Kan.App.2d 771, 773, 844 P.2d 741, 743 (1993). Moreover, no *additional* sentence can be imposed upon a defendant for violating his parole. Where, as here, no written warrant exists prior to initiation of the traffic stop, guessing that a person might be in violation of his parole cannot, as a matter of law, support a *Terry* detention. In addition, strict construction of K.S.A. 75-5217(a) does not allow for an *oral* order to arrest and detain – that order must be *in writing* and in effect prior to arrest. Because Padron was not in possession of a written

arrest and detain order setting forth that the released inmate, in the judgment of the parole officer, has violated the conditions of the inmate's release, as K.S.A. 75-5217(a) requires, Defendant disputes that substantial compliance is sufficient and that he could be lawfully arrested, as the trial court found. (R. II, 134.)

Even if a guess that a person might be in violation of his parole could support continued detention, it cannot under the facts presented here because – analogous to *Mitchell* – the time and scope of Defendant's detention exceeds that reasonable for law enforcement to contact a parole officer and obtain an order to arrest and detain. Padron made no attempt, and thus exhibited no intention, to arrest Defendant for a parole violation prior to patting Defendant down and demanding to search Defendant's truck. As the trial court noted, officers only began this process after they were unable to discover drugs or contraband in Defendant's possession. Once a traffic stop has become an unlawful detention, evidence thereafter discovered is not admissible based on the inevitable discovery exception. *State v. Schneider*, 32 Kan.App.2d 258, 80 P.3d 1184 (2003).

CONCLUSION

For the foregoing reasons, the Court of Appeals must reverse and remand with instructions to the trial court to suppress the evidence obtained from an illegal search of Defendant's person and grant him a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that this ____ day of January, 2005, five (5) true and correct copies of the above and foregoing were mailed, by U.S. Mail, postage pre-paid, to:

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