

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001011-MR

JON A. WOOLSEY

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN A. HAYDEN, JUDGE
INDICTMENT NO. 01-CR-00222

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: DYCHE AND KNOPF, JUDGES; AND HUDDLESTON, SENIOR JUDGE.¹
KNOPF, JUDGE. Jon A. Woolsey brings this appeal from a sentence of six years' imprisonment meted out to him following his conditional plea of guilty² to various offenses, including conspiracy to manufacture methamphetamine. The sole ground for his appeal is that the initial traffic stop, which resulted in

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² RCr. 8.09.

various items of incriminating evidence being found, was without sufficient reasonable suspicion. Because we conclude that the police officer lacked a reasonable and articulable basis for the stop, we vacate Woolsey's conviction and remand for further proceedings.

The trial court made the following findings of fact:

1. This case concerns an investigatory stop that took place on October 10, 2001. Officer Todd Siebert received a call from dispatch that a person had purchased possible precursors for methamphetamine at the Wal-Mart store on Highway 41 in Henderson. Officer Siebert proceeded to the store. Willie Bratcher, a loss prevention officer for Wal-Mart, met him there. Bratcher gave a description of the person, said that the [sic] he had just driven away and pointed out the car. The car, which had Indiana license plates, turned south onto Highway 41.

Officer Siebert followed the car and pulled it over in a local parking lot. He asked for the driver's license. The officer reported the driver's license to dispatch, and it came back as suspended. The driver, Jon Woolsey, was placed under arrest. A subsequent search revealed four lithium batteries on Woolsey's person. Lithium is a common ingredient in the methamphetamine manufacturing process. This search eventually led to the current felony charges.

2. Willie Bratcher testified that Woolsey first aroused his attention when he approached the battery section in Wal-Mart's electronics department. Lithium batteries are a high theft item at Wal-Mart, so Bratcher watched him closely. Woolsey paid for the batteries and left the store

immediately. Bratcher had taken training from both local and statewide law enforcement regarding methamphetamine, and several things made Bratcher suspect that the batteries were being bought for this purpose. First, Woolsey did not shop for any general items but entered, bought one item, and left. Second, he wrapped his shopping bag tight and concealed it in his palm. Third, he walked down one row of the parking lot before crossing over to his vehicle in another row. Bratcher also testified that in his experience Woolsey seemed secretive. Bratcher called the police and told them that someone had bought lithium batteries and he believes that they were being used to make methamphetamine.

3. According to the testimony, the only specific reasons that Officer Siebert had to pull over Woolsey's car were that he had purchased possible precursors to methamphetamine at Wal-Mart and that he had turned south despite having Indiana plates. However, Officer Siebert testified that according to his training and experience, these are objective indicators of a methamphetamine operation. First, there has been an [sic] noticeable correlation between Wal-Mart and the purchase of precursors. Second, Officer Siebert testified as to a recent trend, wherein methamphetamine manufacturers go to a number of stores in one or several communities. They buy a small number of items at each store, thus avoiding the purchase of a suspicious number of any one item. In Officer Siebert's mind, this was in keeping with Woolsey's turning south from Wal-Mart despite his Indiana license. There was a Dollar General [S]tore and a K-Mart further south on Highway 41.

After making these findings, the trial court concluded that Officer Siebert had a reasonable and articulable suspicion which justified stopping Woolsey's vehicle. The court

specifically pointed to the report from the Wal-Mart security employee, who stated his opinion that Woolsey's behavior was consistent with a person who is purchasing precursors to methamphetamine. The court also noted that Woolsey's actions in turning south onto Highway 41 after leaving Wal-Mart was consistent with the recent trend among methamphetamine manufacturers. "The fact that Woolsey's actions were just as consistent with innocent behavior as with criminal activity did not prevent Officer Siebert from arriving at a reasonable and articulable suspicion."³ Following this ruling, Woolsey entered a conditional guilty plea to amended charges of conspiracy to manufacture methamphetamine, theft by unlawful taking under \$300.00, carrying a concealed deadly weapon, escape in the third degree, and operating a motor vehicle on a suspended license. This appeal followed.

RCr 9.78 sets out the procedure for conducting suppression hearings and establishes the standard of appellate review of the determination of the trial court. Our standard of review of a circuit court's decision on a suppression motion following a hearing is twofold: First, the factual findings of the court are conclusive if they are supported by substantial evidence; and second, this Court conducts a *de novo* review to

³ *Citing Simpson v. Commonwealth*, Ky. App., 834 S.W.2d 686 (1992).

determine whether the trial court's decision is correct as a matter of law.⁴ Although the trial court's factual findings in this case are not seriously in dispute, we conclude that the trial court clearly erred in its legal conclusions from those facts.

To justify a stop under Terry v. Ohio,⁵ the officer must be able to articulate more than a mere "inchoate and unparticularized suspicion or 'hunch'" of criminal activity.⁶ Rather, a warrantless stop and search of a vehicle is permissible if the officer has a "reasonable and articulable suspicion" of criminal activity.⁷ The objective justification for the officer's actions must be measured in light of the totality of the circumstances.⁸ When considering the totality of the circumstances, a reviewing court should take care not to view the factors upon which police officers rely to create reasonable suspicion in isolation. Courts must consider all of

⁴ Adcock v. Commonwealth, Ky., 967 S.W.2d 6, 8 (1998).

⁵ 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968).

⁶ Id. at 27, 20 L. Ed. 2d at 909.

⁷ Creech v. Commonwealth, Ky. App., 812 S.W.2d 162, 163 (1991).

⁸ See United States v. Sokolow, 490 U.S. 1, 104 L. Ed. 2d 1, 109 S. Ct. 1581 (1989); Eldred v. Commonwealth, Ky., 906 S.W.2d 694 (1994).

the officer's observations, and give due weight to inferences and deductions drawn by trained law enforcement officers.⁹

Although our consideration of a police officer's justification for a Terry stop should be deferential, this case aptly demonstrates the often elusive distinction between a mere hunch and reasonable suspicion. As the trial court correctly observed, the fact that certain conduct may be construed as consistent with innocent behavior does not mean that this conduct may not form the basis for reasonable suspicion.¹⁰ However, the relevant inquiry in making a determination of reasonable suspicion is not whether particular conduct is "innocent" or "guilty", but the degree of suspicion that attaches to particular types of non-criminal conduct.¹¹

Even when taken as a whole, Woolsey's actions did not give rise to a "particularized and objective basis" for suspecting him of wrongdoing.¹² At most, he fit a portion of a profile of a person who is purchasing precursors for

⁹ United States v. Arvizu, 534 U.S. 266, 272-75, 151 L. Ed. 2d 740, 749-51, 122 S. Ct. 744 (2002). See also United States v. Martin, 289 F.3d 392, 398 (6th Cir., 2002).

¹⁰ Simpson, 834 S.W.2d at 686 citing United States v. Gomez, 776 F.2d 542, 548 (5th Cir., 1985).

¹¹ Illinois v. Gates, 462 U.S. 213, 543, n. 13, 76 L. Ed. 2d 527, 552, 103 S.Ct. 2317 (1983). See also United States v. Sokolow, 409 U.S. 1, 104 L. Ed. 2d 1, 109 S. Ct. 1581 (1989).

¹² Arvizu, 574 U.S. 273, 151 L. Ed. 2d at 749 (Citing United States v. Cortez, 449 U.S. 411, 417-18, 66 L. Ed. 2d 621, 628-29, 101 S. Ct 690 (1981)).

methamphetamine manufacture. However, he purchased only one precursor - lithium batteries - and not in a significant quantity. Furthermore, Officer Seibert testified that he did not know what items Woolsey had purchased. Wal-Mart's loss-prevention officer merely advised him that Woolsey had purchased precursors to methamphetamine. Woolsey's other conduct of making only a single purchase, holding the bag close to his palm, returning to his vehicle by an indirect route, and turning south toward additional shopping areas after leaving Wal-Mart, are not objectively suspicious behaviors. As Woolsey points out in his brief, "[i]f spending \$10.00 to buy four lithium batteries raises such suspicion then every person who purchases drain cleaner or salt or sinus medication or any other legal, common product that could be used for nefarious means could be stopped and searched."

Therefore, while Officer Seibert's hunch turned out to be correct, the reasonableness of his suspicion must be judged based on his knowledge at the time he made the stop. We conclude that Officer Seibert did not have a reasonable and articulable suspicion to justify the stop and search of Woolsey's vehicle. Consequently, we hold that the trial court erred in denying his motion to suppress the evidence seized as a result of the improper traffic stop.

Accordingly, the judgment of conviction by the Henderson Circuit Court is vacated, and this matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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