

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001053-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 02-CR-01242

MICHAEL KELLY

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: COMBS, DYCHE, AND KNOPF, JUDGES.

DYCHE, JUDGE. On October 10, 2002, dispatch in Lexington received a call from two unnamed Waffle House employees that they suspected a recent patron of their restaurant to be under the influence and about to drive. They described his car as a red, older model Camaro with Tennessee tags. Dispatch broadcast an "attempt to locate," and Officer Hilton Hastings responded. When he arrived at the Waffle House, the employees were standing outside, pointing in the direction of Pure Gold, an adult club

across the road. The Camaro was spotted, and the officer followed it from Pure Gold to the nearby Days Inn, where it stopped. Hastings approached the vehicle and asked the driver, Michael Kelly, to step out. Kelly passed the preliminary breath test but failed several field sobriety tests. He gave the officer consent to search his person; the officer found a large quantity of Oxycontin pills, \$2,800 in cash, and another pill bottle. A search of the vehicle revealed more pills (Methadone, Percocet, Xanax, and Viagra) and a gun.

Kelly was indicted on three counts of trafficking in a controlled substance (Schedules II and IV) and one count of driving under the influence. He moved to dismiss the indictment, arguing that the initial stop was unlawful. Following an evidentiary hearing, the Fayette Circuit Court granted Michael Kelly's motion to dismiss. The Commonwealth of Kentucky appeals the order granting Kelly's motion, arguing that the trial court used an improper standard in analyzing the propriety of the stop, and that it thus erred in suppressing the evidence and dismissing Kelly's indictment. We affirm.

The officer candidly testified that he did not elicit any information from the Waffle House employees (nor had they given any details to dispatch) regarding any foundation for their belief that Kelly was intoxicated. Nor did that officer observe Kelly driving in a suspect fashion. He merely stopped

appellant based on the "attempt to locate" issued by dispatch without further corroboration. "The information must be viewed based on the personal observation and independent investigation of the police that would tend to corroborate significant, but not necessarily all, of the facts supplied by the informant." Stewart v. Commonwealth, Ky., 44 S.W.3d 376, 380 (2000). Here the evidence contained no reasonable and articulable reasons for the stop. Terry v. Ohio, 392 U.S. 1 (1968). The fruits of the search were properly suppressed, and the indictment against Kelly was properly dismissed.

The order of the Fayette Circuit Court is affirmed.

KNOPF, JUDGE, CONCURS.

COMBS, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

COMBS, JUDGE, DISSENTING: I respectfully dissent.

The police in this case received what should not be characterized as the typical anonymous tip incapable of being checked out for reliability, motive, or verification as to its contents. Two employees of a restaurant called in a "concerned citizens" warning to police that a drunken driver might be at large as a menace to the public. After furnishing clearly "predictive information," they personally met the police outside the restaurant when they arrived on the scene. They then directly identified the car that they had described in the Attempt to Locate (ATL) report.

Thus, before ever approaching the suspect on their own, the police had the requisite reasonable suspicion to make a valid Terry stop. Indeed, at this point, public policy dictates that they had a duty to follow up on the information that they had received by now as much by way of interview rather than as resulting from a truly anonymous tip. In distinguishing between the standard of reasonable suspicion to justify a Terry stop versus the higher standard of probable cause required for an arrest, the Commonwealth aptly cites Alabama v. White, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d. 301 (1990) as follows:

Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than required to show probable cause. *Adams v. Williams* [407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d. 612 (1972)] demonstrates as much. We there assumed that the unverified tip from the known informant might not have been reliable enough to establish probable cause, but nevertheless found it sufficiently reliable to justify a Terry stop. *White*, U.S. at 330, S.Ct. at 2416.

This Court addressed the circumstances under which the reliability of a phone-in, anonymous tipster could be deemed an adequate basis for a Terry stop in Stewart v. Commonwealth,

Ky.App., 44 S.W.3d. 376 (2000). In upholding the validity of the stop, we held as follows:

The information included several specific details and predictive information that under the totality of the circumstances, the anonymous tip, as corroborated, exhibited sufficient indicia of reliability to satisfy the lesser reasonable suspicion standard to justify an investigatory stop. Id. at 382.

Under Stewart, the police in this case surely had the requisite suspicion for an investigatory stop of Kelly.

After approaching Kelly, the police then administered field sobriety tests to him, which he failed. This failure satisfied the requirement of "personal observation and independent investigation of the police" as additional corroboration of the facts furnished by the Waffle House employees. Stewart, supra, at 380. From reasonable suspicion to conduct the stop, the police properly progressed to probable cause to arrest.

Consequently, I would hold that the police executed a proper Terry stop and that the subsequently discovered evidence flowing from that stop was admissible.

BRIEF FOR APPELLANT:

Albert B. Chandler III
Attorney General of Kentucky

Lettricea Jefferson-Webb
Special Assistant Attorney
General
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Robin L. Webb
Grayson, Kentucky