

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001195-MR

LAMONT HOUSTON BROWN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
ACTION NO. 02-CR-01151

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: COMBS, Chief Judge; TACKETT and VANMETER, Judges.

COMBS, CHIEF JUDGE. Lamont Houston Brown has appealed from a final judgment and sentence of the Fayette Circuit Court entered on May 15, 2003, which followed his conditional guilty pleas to charges of trafficking in a controlled substance in the first degree, tampering with physical evidence, and being a persistent felony offender in the first degree (PFO I). The Court sentenced Brown to ten-years' imprisonment. As we conclude that the trial court erred in denying Brown's motion to suppress evidence, we reverse and remand.

On November 5, 2002, Brown was indicted by a Fayette County grand jury on one count of trafficking in a controlled substance in the first degree (cocaine), one count of tampering with physical evidence, and on one count of being a PFO I. On February 21, 2003, Brown filed a motion to suppress all the physical evidence that had been seized from his person on the date of his arrest and to suppress the incriminating statements that he had made at that time. Brown claimed that the investigative stop initiated by police was undertaken without reasonable, articulable suspicion in violation of the provisions of the Fourth Amendment to the United States Constitution. We have reviewed the record of the suppression hearing which was held on March 18, 2003, and which concluded on March 27, 2003. We will summarize the relevant information from the hearing.

On September 12, 2002, Detective Keith Ford of the Lexington Police Department received a tip from an anonymous informant, a female whom he dubbed Lady X. Lady X reported that Brown had just left his house to make cocaine deliveries. Detective Ford had talked with Lady X several times over the course of a six-month period, and he had attempted to verify some of her information regarding Brown and his activities. She described Brown's physical appearance, his address, and his vehicle. Additionally, Lady X had indicated the time of day and the general area of town where Brown could be found dealing in

narcotics. Brown was known to Detective Ford as a narcotics dealer.

Acting on the tip of September 12, Detective Ford -- along with Detective Edward Hart -- set out to observe the area of town described by the tipster. Upon their arrival in the vicinity, the detectives observed a car matching the description of Brown's vehicle. The driver appeared to be Brown. The detectives observed the vehicle pull behind a restaurant. When the detectives next saw the vehicle, it was parked in a well-lighted, public area near an employee entrance to the restaurant. Brown was seated inside the car, and the police observed a restaurant employee leaning into the car window. They could not see any other activity. When the restaurant employee noticed the police cars approaching, he began backing away from Brown's vehicle.

The detectives then left their vehicles and began to approach Brown's car. Detective Ford indicated that Brown reached into his right pocket, retrieved something, then put it into his mouth. Detective Hart indicated that narcotics dealers commonly attempt to dispose of illegal narcotics by ingesting them. Ford ordered Brown to spit out the suspected contraband. Brown refused and had to be forcibly removed from the vehicle. Additional officers soon arrived, and Brown received emergency medical treatment at the scene for suspected oral ingestion of

cocaine. He was then transported to a local hospital. Brown made numerous incriminating statements during the course of the medical treatment.

On November 14, 2002, Brown appeared before the court and entered pleas of "not guilty" to the charges in his indictment. On February 21, 2003, he filed a motion to suppress, arguing that the stop and search violated his constitutional rights. Following a suppression hearing, the trial court observed that the case presented "a close call." Nonetheless, it entered an order denying Brown's motion to suppress.

A few days after the suppression hearing, Brown accepted the Commonwealth's plea offer and entered conditional guilty pleas to the charges, preserving his right to appeal the denial of the motion to suppress. In exchange for Brown's conditional guilty pleas, the Commonwealth agreed to recommend a sentence of five-years' imprisonment on his conviction of the possession of a controlled substance in the first-degree, enhanced to ten-years' imprisonment pursuant to his PFO I conviction. Following the Commonwealth's recommendation, the trial court sentenced Brown to a total sentence of ten-years' imprisonment. This appeal followed.

Brown argues that the officers lacked reasonable, articulable suspicion that he was -- or was about to be --

engaged in criminal activity as a condition precedent to justifying the initial stop at the restaurant. See Terry v. Ohio, 391 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Brown contends that the detectives stopped him solely on the basis of the anonymous tip, that the nature of the information provided by the tipster was insufficient to justify the stop, that the police failed to investigate and corroborate the information, and that the information provided by the tipster was not sufficiently predictive of specific criminal activity.

The standard of review for an appeal of an order denying suppression is whether the factual findings of the trial court were "clearly erroneous." Commonwealth v. Banks, Ky., 68 S.W.3d 347, 349 (2001). However, the presence or absence of reasonable suspicion is a matter of law to be determined on appeal under a *de novo* standard of review. Kotila v. Commonwealth, Ky., 114 S.W.3d 226 (2003).

Police officers may briefly detain an individual on the street -- even though there is no probable cause to arrest him -- if there is a reasonable suspicion that criminal activity is afoot. Terry, supra. However, officers do not violate either the state or federal Constitutions by approaching an individual on the street, asking him to identify himself, and "putting questions to him if the person is willing to listen." Florida v. Royer, 460 U.S. 491, 497, 75 L.Ed.2d 229, 236, 103

S.Ct. 1319 (1983); Baker v. Commonwealth, Ky., 5 S.W.3d 142 (1999).

We agree with the trial court that this case indeed is a close call. Significantly, after the first suppression hearing of March 18, 2003, in which only Detective Ford testified, the trial court determined his corroboration of the information supplied by the tipster to be essentially inadequate, tending to be equally consistent with innocence as with guilt. Therefore, the court ordered a second suppression hearing on March 27, 2003, in order to hear the testimony of Sergeant Hart.

Sergeant Hart's testimony also failed to supply requisite police corroboration of the tipster's allegations. His recall of the case was poor. He could not remember whether or not he had seen a fourteen-year-old girl in the vehicle prior to approaching it. Nor could he testify that he had even seen a photo of Brown prior to going out to search for his black vehicle.

Detective Brown had already testified that September 12, 2002, was essentially a slow day and that he and the detectives whom he recruited to search for Brown had had "down time" that day. They conducted a general sweep of a broad area of town in search of the black vehicle. When they discovered it, they did so fortuitously rather than by design in travelling

to a specific geographic location. As a matter of fact, they drove at random in search of "a black vehicle" throughout the areas of Hollow Creek, Green Acres, and Lasalle. The Huddle House, where once again they happened strictly by chance upon Brown's vehicle, was never designated by Lady X as the situs of the alleged drug deal.

The use of anonymous tipsters by the police is an area of Fourth Amendment analysis that has recently become the subject of much scrutiny and examination. Florida v. J.L., 529 U.S. 266, 120 S.Ct. 1357, 146 L.Ed.2d 254 (2000), rejected rather specific information furnished by an anonymous tipster as a legitimate basis for a police stop in the absence of separate and reasonable corroboration or investigation by the police. According to the tipster in Florida v. J.L., a young black male clad in a plaid shirt was to be found at an identified bus stop; he would be carrying a gun. The police went to the bus stop, found the young man in plaid standing with two other young black males, searched him, found the gun, and arrested him. All of the specifics of the tip checked out. Nonetheless, the Supreme Court found a Fourth Amendment violation underlying the stop and held that the evidence accordingly should have been suppressed because of lack of police surveillance, independent police corroboration, or separate police investigative effort. In essence, but for the fortuity that the tip turned out to be a

lucky windfall to the police who had invested none of their own investigative effort or talent, the conduct of the defendant would not have appeared to have been illegal at all.

The reasoning of the Court in Florida v. J.L. could have been crafted around the particular factual scenario of the case before us:

In the instant case, the officers' suspicion that J.L. was carrying a weapon arose not from any observations of their own but solely from a call made from an unknown location by an unknown caller. Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated ... "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity." *Alabama v White*, 496 US, at 329, 110 L Ed 2d 301, 110 S Ct 2412. As we have recognized, however, there are situations in which an anonymous tip, suitably corroborated, exhibits "sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop." *Id.*, at 327, 110 L Ed 2d 301, 110 S Ct 2412.

* * * *

The tip in the instant case lacked the moderate indicia of reliability present in *White* and essential to the Court's decision in that case. The anonymous call concerning J.L. provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility. That the allegation about the gun turned out to be correct does not suggest that the officers, prior to the frisks, had reasonable basis for suspecting J.L. of engaging in unlawful conduct. The reasonableness of official suspicion must be measured by what the officers knew before

they conducted their search. All the police had to go on in this case was the bare report of an unknown, unaccountable informant... (Emphases added.)

The information furnished by the tipster in this case was much less predictive or detailed than that deemed deficient in Florida v. J.L. The police never really investigated Brown's activities during the six-month course of anonymous phone calls other than to verify his address and the fact that a black car was in the driveway. They never followed him anywhere in the vicinity alleged to be his drug territory. They were not certain as to his physical appearance. On the day of the arrest, they went out to cruise and comb the neighborhoods named without any specific location in mind far short of the certain bus stop designated by the tipster in Florida v. J.L. They have, in short, failed the totality-of-the-circumstances test.

The mere fact that they "lucked into" finding cocaine under these facts cannot justify the search and seizure after the fact under any Fourth Amendment analysis. Again, to reiterate Florida v. J.L., "The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search." Id. In this case, they knew nothing on their own other than the uncorroborated word of Lady X. The information upon which they acted could have -- and should have -- been presented to a judge as the basis for a warrant under

these facts. No exigent circumstances could be demonstrated over the six-month period of intermittent calls, and that time-frame surely allowed adequate opportunity for them to obtain a search warrant and to conduct proper surveillance.

Having concluded that the stop at its very threshold was constitutionally deficient, we hold that all evidence flowing from that search is, therefore, tainted and inadmissible. We need not address the issue of the statements made during the medical treatment of Mr. Brown.

We hold that the trial court erred in failing to grant Brown's motion to suppress. Therefore, we reverse and remand this case for proceedings consistent with this opinion.

TACKET, JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

Donald P. Cetrulo
Lexington, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

Todd D. Ferguson
Assistant Attorney General
Frankfort, Kentucky

ORAL ARGUMENT FOR APPELLEE:

Todd D. Ferguson
Frankfort, Kentucky