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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001960-MR

KEVIN DONATHAN — APPELLANT

v.

APPEAL FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 03-CR-00057

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: Under *Terry v Ohio*,[1] a warrantless stop of an automobile is permissible if an officer has a "reasonable and articulable suspicion" of criminal activity. We are asked to decided whether a police officer's observation of a late night purchase of an item commonly used in the manufacture of methamphetamine, together with the purchaser's actions when leaving the store, justified a subsequent stop of the automobile. We hold that under the circumstances of this case

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

the stop was permitted. Therefore, we affirm the decision of the circuit court.

On April 16, 2003, at approximately 11:00 p.m., off-duty agent Roger Humphrey, of the Northern Kentucky Drug Strike Force, saw Henry K. Lawson purchase a full case of starter fluid. Due the quantity of the purchase, the time of night, Humphrey's extensive training in methamphetamine manufacture, and what he believed to be Lawson's nervous appearance in the check-out line, Humphrey continued to watch Lawson. Upon leaving the Wal-Mart, Lawson crossed the parking lot to his car, located at the far end of the parking lot, approximately 200 to 300 yards from the store entrance, even though closer parking spaces were available. Three individuals, including appellant Kevin R. Donathan, greeted Lawson at the car with an exchange of high-fives. All four individuals got into the car and drove out of the parking lot.

At this point, Williamstown Police Chief Bobby Webb, who was also off-duty who and had taken Humphrey to the Wal-Mart, requested that an on-duty officer stop the vehicle for further investigation. Deputy John Inman of the Grant County Sheriff's Department stopped the vehicle. Humphrey then arrived on the scene and questioned Lawson, the vehicle's driver, about the large quantity of starter fluid he had purchased. Lawson told the officers that he needed the fluid for a backhoe in

Ohio, and he refused Humphrey's request for permission to search the vehicle. Humphrey then used his flashlight to look into the vehicle, where he saw heavy-duty rubber and latex gloves, several lithium batteries, and an empty cardboard container labeled starter fluid. Lawson told the officers he was taking the backseat passengers home to Ohio, but when Humphrey questioned them the passengers said they were from Indiana. Humphrey then conducted a search of the vehicle and uncovered several other items typical of methamphetamine manufacturing, including pseudoephedrine tablets, drain cleaner, rubber tubing, stainless steel valves, additional latex gloves, lithium batteries, and starter fluid.

Donathan was charged with manufacture of methamphetamine first offense, a Class B felony, which was later amended to unlawful possession of methamphetamine precursor, first offense, a Class D felony. Donathan moved to suppress the evidence seized in the search of the car, arguing that the stop was not based on a reasonable suspicion and the search of the vehicle was conducted without probable cause. Following a hearing, the circuit court entered findings of fact and denied the motion. Donathan entered a conditional guilty plea to the unlawful possession of a methamphetamine precursor, first offense. This appeal followed.

Donathan raises three issues on appeal: that no

probable cause existed to arrest him, that no reasonable articulable suspicion existed to stop the car, and that no probable cause existed to search the car. Donathan's first and third arguments may be summarily dismissed. As noted by the Commonwealth, Donathan's claim that the arrest was illegal was not raised in the trial court. As such, this issue was not preserved for appeal. *West v. Commonwealth*, Ky., 780 S.W.2d 600, 602 (1989). With respect to Donathan's argument that no probable cause existed to search the car, a passenger in a vehicle has no standing to challenge the search of that vehicle. *Commonwealth v. Fox*, Ky., 48 S.W.3d 24, 28 (2001) (citing *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978)).

Thus we turn to Donathan's argument that no reasonable, articulable suspicion existed to stop the car. An appellate court has two tasks when reviewing a circuit court's decision on a motion to suppress evidence. First, the appellate court must determine if there is substantial evidence to support the factual findings of the circuit court. The factual findings are conclusive if supported by substantial evidence. Second, the reviewing court must conduct a *de novo* review to determine whether the trial court's decision is correct as a matter of law. *Adcock v. Commonwealth*, Ky., 967 S.W.2d 6, 8 (1998). Here, a thorough review of the record shows that substantial

evidence supported the circuit court's findings.[2] Further, upon review of the legal conclusions, we affirm the circuit court's denial of the motion to suppress the evidence obtained as a result of the stop.

Donathan argues that there was no reasonable articulable suspicion of criminal activity to validate a stop of the vehicle. As previously noted, under *Terry v. Ohio*, a law enforcement officer may make a brief, investigatory stop based on a reasonable, articulable suspicion that criminal activity may be afoot. 392 U.S. at 30, 88 S.Ct. at 1884. *See also Kotila v. Commonwealth*, Ky., 114 S.W.3d 226, 232-33 (2003). This standard applies to automobile stops and investigations. *E.g., Taylor v. Commonwealth*, Ky., 987 S.W.2d 302, 305 (1998) (holding that "[i]n order to justify an investigatory stop of an automobile, the police must have a reasonable articulable suspicion that the persons in the vehicle are, or are about to become involved in criminal activity"). The objective justification for the officer's actions must be measured in light of the totality of the circumstances. *See United States v. Sokolow*, 490 U.S. 1, 8, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1

[2] Donathan is correct that two findings of the trial court were not supported by the evidence, i.e., its findings that starter fluid is a methamphetamine precursor and that Humphrey thought it unusual that Lawson had parked so far away since it was cold that night. Neither misstatement of fact, however, mandates reversal. While starter fluid is not a precursor, *see Commonwealth v. Hayward*, Ky., 49 S.W.3d 674, 676 (2001) and KRS 218A.1437(1), Humphrey testified that starter fluid is used in methamphetamine manufacture. The statement about the temperature likewise is not relevant since Humphrey testified about other observations that drew his attention to Lawson.

(1989); *Baker v. Commonwealth*, Ky., 5 S.W.3d 142, 145 (1999). A reviewing court is not to view the factors relied upon by the officer in isolation, but it must consider all of the officer's observations and it must give due weight to the inferences and deductions drawn by a trained law enforcement officer. *United States v. Arvizu*, 534 U.S. 266, 272-75, 122 S.Ct. 744, 750-51, 151 L.Ed.2d 740, 749-51 (2002); *see also United States v. Martin*, 289 F.3d 392, 398 (6th Cir. 2002). The court's determination is to be based upon common sense judgments and inferences about human behavior, as understood by those versed in the field of law enforcement. *United States v. Cortez*, 449 U.S. 411, 418, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981).

Humphrey, who had specialized training in identifying methamphetamine precursors and investigating clandestine laboratories, objectively observed a late night purchase of a case of starter fluid, a car parked 200 to 300 yards from the entrance to the store in a sparsely occupied lot, and a "high-five" greeting by other car occupants. Humprey's subjective interpretations of his observations were that Lawson appeared nervous in making an otherwise innocuous purchase in a nearly empty Wal-Mart, and that the enthusiastic greeting by the other car occupants seemed inappropriate. The Supreme Court in *Illinois v. Wardlow*, 528 U.S. 119, 125-26, 120 S.Ct. 673, 677, 145 L.Ed.2d 570 (2000), noted that

> even in Terry, the conduct justifying the stop was ambiguous and susceptible of an innocent explanation. The officer observed two individuals pacing back and forth in front of a store, peering into the window and periodically conferring. 392 U.S., at 5-6, 88 S.Ct. 1868. All of this conduct was by itself lawful, but it also suggested that the individuals were casing the store for a planned robbery. *Terry* recognized that the officers could detain the individuals to resolve the ambiguity. *Id.,* at 30, 88 S.Ct. 1868.
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> In allowing such detentions, *Terry* accepts the risk that officers may stop innocent people. Indeed, the Fourth Amendment accepts that risk in connection with more drastic police action; persons arrested and detained on probable cause to believe they have committed a crime may turn out to be innocent. The *Terry* stop is a far more minimal intrusion, simply allowing the officer to briefly investigate further. If the officer does not learn facts rising to the level of probable cause, the individual must be allowed to go on his way.

Certainly, no single one of Humphey's observations would give rise to a reasonable, articulable suspicion of wrongdoing or would be inconsistent with innocent behavior. Together, however, and keeping in mind that the standard for "reasonable, articulable suspicion of wrongdoing" is much less stringent than "probable cause," *Kotila*, 114 S.W.3d at 232, Humphrey's observations gave rise to a suspicion that methamphetamine production was about to occur. As such, the police were permitted to make the stop to investigate further. That stop ultimately led to the search of the vehicle and the

arrest of Donathan. The court did not err in finding that a reasonable articulable suspicion existed to validate the officers' stop of the vehicle, and by denying the motion to suppress.

The judgment of the Grant Circuit Court is affirmed.

ALL CONCUR.

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