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TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000849-MR

JACOB HENSON

APPELLANT

V. APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE LARRY MILLER, JUDGE
INDICTMENT NO. 03-CR-00040

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: MINTON AND SCHRODER, JUDGES; EMBERTON, SENIOR JUDGE.¹

MINTON, JUDGE: Jacob Henson appeals from a judgment of conviction following his conditional plea of guilty² to two drug possession charges and a charge of flagrant non-support in which he reserved the right to appeal the circuit court's denial of his motion to suppress the evidence. Henson claims an anonymous

¹ Senior Judge Thomas D. Emberton 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 Kentucky Rules of Criminal Procedure (RCr) 8.09.

tip given to the police indicating that he was in possession of drugs did not provide the officers with probable cause to stop the vehicle in which he was a passenger. Because we conclude that the circuit court used the proper standard—that of reasonable suspicion—and did not err in denying the motion, we affirm.

The grand jury indicted Henson on charges of first-degree possession of a controlled substance (cocaine) and possession of drug paraphernalia. The charges were based upon events occurring on February 27, 2003. On that day, Officer Larry Turner of the Jackson Police Department received an anonymous tip that Greg Haddix was driving a black Pontiac Grand Am; that Henson was his passenger; and that Henson had drugs in his possession.³ Officer Turner, who knew both Haddix and Henson, was dispatched to check on the anonymous tip. He spotted the described vehicle, pulled up next to it, and recognized Henson sitting in the passenger seat.⁴ Officer Turner told Henson to step out of the car and asked him if he had any contraband or drugs. Henson told the officer that he did not. Officer Turner then asked Henson to empty his pockets and Henson complied. Henson pulled out a small case holding a plastic bag

³ The caller did not inform Officer Turner how he knew that Henson had the drugs or how he knew where the car was located.

⁴ Haddix was not in the car.

that contained a white substance. Henson admitted that the substance was cocaine. He also removed hypodermic needles from his pocket that appeared to be used. Henson was arrested for possession of a controlled substance first degree and possession of drug paraphernalia.

Henson filed a motion to suppress the evidence alleging that it was the product of an illegal search and seizure. The trial court denied Henson's motion to suppress the evidence using a totality of the circumstances test. The trial court relied on the facts that Officer Turner knew Haddix and Henson, was familiar with the black Pontiac Grand Am that Haddix drove, found the car parked on the street, and recognized Henson inside the car. The trial court held that Officer Turner corroborated significant information supplied by the anonymous informant and found the requisite indicia of reliability to stop the vehicle.

Henson entered a conditional guilty plea to the two possession charges under which he reserved the right to appeal the circuit court's denial of his motion to suppress. Ultimately, Henson was sentenced to three years' imprisonment for first-degree possession of a controlled substance and twelve months for possession of drug paraphernalia. Henson's sentence for flagrant non-support ran concurrently with those two sentences, and all three were probated for a period of five years. This appeal followed.

Henson brings the same arguments before this Court as he did before the circuit court. Namely, Henson alleges that the search and seizure that occurred on February 27, 2003, lacked sufficient probable cause.

Our standard of review following a suppression hearing is two-fold. First, we must determine whether the trial court's findings of fact are supported by substantial evidence.⁵ We then review *de novo* its legal conclusions in applying the protections of the Fourth Amendment.⁶ Since the parties are not in dispute over any factual matters, we only need to determine whether the circuit court properly applied the law to the factual events.

In Stewart v. Commonwealth, our Court addressed a fact pattern very similar to the facts in the instant case.⁷ In Stewart, the Cadiz Police Department received an anonymous tip that Stewart and a female companion, Barbara Grubbs, had just purchased cocaine and were on their way to Cadiz. The caller provided the full names of the two individuals, said they were traveling in Grubbs's vehicle from the direction of Hopkinsville, and said Stewart would have cocaine in his mouth. Officers of the Cadiz Police Department spotted Grubbs's vehicle

⁵ RCr 9.78; Commonwealth v. Erickson, 132 S.W.3d 884, 886 (Ky.App. 2004) (*citing* Commonwealth v. Banks, 68 S.W.3d 347 (Ky. 2001)).

⁶ Erickson at 886 (adopting the standard of review articulated by the United States Supreme Court in Ornelas v. United States, 517 U.S. 690, 691, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996)).

⁷ 44 S.W.3d 376 (Ky.App. 2000).

traveling from the direction of Hopkinsville into Cadiz. After Grubbs parked her vehicle and Stewart got out, the police officers approached Stewart. One officer informed Stewart that the police had received a tip that he was possibly carrying cocaine. When asked by officers what he had in his waistband, Stewart pulled out what he described as a pill bottle.⁸ When asked to open his mouth, Stewart complied; but before the officer could retrieve an object he believed to be cocaine stuck to the roof of Stewart's mouth, Stewart swallowed the object. Stewart later admitted to the police that the object was, in fact, cocaine; and he was arrested on several drug charges. A laboratory test revealed that the pill bottle Stewart gave to the officers contained samples of cocaine and marijuana.

Stewart entered a conditional plea of guilty for three drug possession counts under which he reserved the right to appeal the circuit court's denial of his motion to suppress. On appeal, Stewart argued that the circuit court erred in denying his motion to suppress and that the search was conducted without reasonable suspicion or probable cause. We disagreed and held, among other things, that the officers' corroboration of significant facts supplied by the anonymous caller provided sufficient indicia to satisfy the reasonable suspicion standard

⁸ Stewart initially denied one officer's request to search him. *Id.* at 378.

and, thus, the stop was justified. We also held that Stewart's action in handing over his pill bottle fell within the consent to search exception to the search warrant requirement.

Our analysis in Stewart adopted the United States Supreme Court's holding in Alabama v. White.⁹ In White, the Court held that even when an anonymous tip is insufficient to establish probable cause for an arrest or search warrant, if the information carries a sufficient "indicia of reliability," it supports a forcible investigatory stop.¹⁰

In Stewart, we also discussed the two main factors pertaining to anonymous tips. First, in investigating information provided by an anonymous tipster, police officers are required to combine "personal observation and independent investigation . . . to corroborate significant, but not necessarily all, of the facts supplied by the informant."¹¹ Second, an informant's tip must pertain to future acts of third parties that are not easily predicted.¹² The informant in Stewart provided the police with Stewart's destination and time of arrival, along with the names of both Stewart and his companion, which we considered to be futuristic and predictive

⁹ 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990) (see Terry v. Ohio 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)).

¹⁰ *Id.* at 328.

¹¹ Stewart at 380.

¹² *Id.* at 381.

information. The officers combined the information supplied by the informant with independent investigation and corroboration in locating Stewart and Grubbs. Considering the totality of the circumstances in Stewart, we upheld the lower court's order denying Stewart's motion to suppress because the information provided by the anonymous caller "included several specific details and predictive information that under the totality of the circumstances," the tip, "as corroborated, exhibited sufficient indicia of reliability to satisfy the lesser reasonable suspicion standard to justify an investigatory stop."¹³

In addition to addressing an anonymous tip, Stewart also addressed the consent to search exception to the search warrant requirement. Because Stewart voluntarily handed the police the pill bottle hidden in his waistband after the officers questioned him about it, we found no evidence of coercion on the part of the officers that would change the voluntary nature of the search. We held that the seizure clearly fell within the consent to search exception to the warrant requirement and was constitutionally proper.¹⁴

The facts of the present case are nearly indistinguishable from the facts in Stewart; therefore, we believe our analysis in Stewart is similarly applicable. When

¹³ *Id.* at 382.

¹⁴ *Id.*

Officer Turner received the anonymous tip that Henson was a passenger in Haddix's automobile and that he had drugs in his possession, Officer Turner investigated the whereabouts of Haddix and Henson. The informant gave the Jackson Police Department the make, model, and color of the car that Haddix and Henson were driving. The caller did not give Officer Turner the location or destination of the car; but because Officer Turner knew both men, he was able to locate and identify them. Officer Turner, through personal observation and independent investigation, found Henson sitting in the passenger seat of Haddix's vehicle. Officer Turner corroborated the facts given to him by the tipster, namely, the description of the car and the existence of Henson in the passenger seat. The details provided by the informant were very specific and contained predictive information that few would be aware of—namely, that Henson had drugs in his possession. A sufficient indicia of reliability existed in that the officers were able to corroborate a significant amount of the tipster's information, locate Henson, and seize the drugs in his possession.

Examining all the circumstances of this case, we conclude that Henson voluntarily consented to the search by Officer Turner. In addition to the small case holding the bag of cocaine, Henson voluntarily removed hypodermic needles from his pocket and placed them in the full view of the officer. The

circuit court record shows no indication of coercion or implied threat on the part of Officer Turner that would indicate an unjustified intrusion upon Henson's rights.¹⁵

Officer Turner verified a substantial portion of the information supplied by the anonymous informant by personal observation and investigation.¹⁶ There was sufficient corroboration of the facts to create a reasonable suspicion that Henson was in possession of drugs. Under the totality of the circumstances, the anonymous tip, as corroborated, exhibited sufficient indicia of reliability to satisfy the reasonable suspicion standard and justify the investigatory stop. In addition to the sufficiency of corroboration by Officer Turner, Henson's consent to the search by Officer Turner supports the circuit court's decision to deny the motion to suppress.

For the reasons stated above, the Breathitt Circuit Court's judgment is affirmed.

EMBERTON, SENIOR JUDGE, CONCURS.

SCHRODER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

SCHRODER, JUDGE, DISSENTING. The anonymous tip was that Greg Haddix was driving a black Pontiac Grand Am and that Jacob Henson was his passenger. The anonymous informant added that Henson had drugs. I agree with the majority when they

¹⁵ See Schneckloth v. Bustamonte, 412 U.S. 218, 228, 93 S.Ct. 2041, 2048, 36 L.Ed.2d 854 (1973).

¹⁶ See Stewart at 381.

conclude the test was "reasonable suspicion," not "probable cause," for the stop. However, I agree with the appellant that the above facts do not give rise to a "reasonable suspicion" that Henson possessed drugs or was doing anything illegal. The significant facts supplied by the anonymous caller (other than Henson had drugs) is perfectly legal activity. I would have dispatched a cruiser also but only for observation. When no suspicious activity was observed, the search was not based on a reasonable suspicion but on an anonymous tip which itself carries no "indicia of reliability." I would have suppressed the fruits of the improper search and seizure.

I also do not believe Henson voluntarily consented to the search by the police officer. When instructed to empty his pockets, Henson complied, as he should have. If he refused, the officer would have forced the issue. I think the better procedure was taken by Henson, comply and argue to suppress. This was not a voluntary consent to search. Again, I would have suppressed.

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