RENDERED: AUGUST 12, 2005; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001681-MR

CHRISTY C. MORGAN — APPELLANT

v.

APPEAL FROM HART CIRCUIT COURT
HONORABLE LARRY RAIKES, JUDGE
ACTION NO. 03-CR-00044

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; McANULTY, JUDGE; AND MILLER, SENIOR JUDGE.[1]

McANULTY, JUDGE: Christy Morgan appeals the denial of her motion to suppress evidence following a police stop. Following a hearing, the court denied the motion and entered findings of fact and conclusions of law. Morgan subsequently entered a conditional guilty plea pursuant to RCr 8.09 to complicity to

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

trafficking in a controlled substance in the first degree, complicity to possession of a controlled substance in the first degree, complicity to possession of drug paraphernalia, and two counts of complicity to trafficking in a controlled substance in the third degree. Morgan had been charged with acting in complicity with co-defendant Guy Evans, who was also involved in the stop. Morgan argues on appeal that the police were not justified in stopping the vehicle in which she was a passenger, and so the evidence should have been suppressed. We agree, and reverse and remand.

Review of a trial court's decision on a motion to suppress is a two-step process. First, RCr 9.78 provides that following a hearing on a suppression motion, the factual findings of the trial court shall be conclusive if supported by substantial evidence. Next, the question becomes whether the trial court correctly applied the rules of law regarding determinations of reasonable suspicion and probable cause to the established facts. Adcock v. Commonwealth, 967 S.W.2d 6 (Ky. 1998), citing Ornelas v. United States, 517 U.S. 690, 697, 116 S. Ct. 1657, 1662, 134 L. Ed. 2d 911 (1996). A reviewing court should give due weight to inferences drawn from the historical facts by resident judges and local law enforcement officers. Ornelas, 517 U.S. at 699, 116 S. Ct. at 1663.

We employ the trial court's findings of fact to describe the facts of this case:

> In the early morning hours of December 17, 2002, Sheriff Staples received an anonymous phone call from a woman who reported that her sixteen (16) year old son had just come home high on drugs. According to the son, he had been at the mobile home of Morgan all night where he had partaken of "crank" (Methamphetamine), and that Morgan, Evans and one Dale Mansfield had been cooking (manufacturing) methamphetamine all night.
>
> Sheriff Staples, along with Officer Shannon Evans,[2] then proceeded to the location of the Morgan mobile home, where they observed Evans. Evans also saw them. Staples and West first drove by the mobile home and then returned. Upon their return, they observed Evans leaving the premises in a vehicle with Morgan riding as a passenger.
>
> Based on the anonymous tip, and the fact that Staples was cognizant of both Evans' and Morgan's reputation for using and trafficking in drugs (both had prior drug related convictions known by Staples), and the fact that both Defendants were in the process of attempting to elude the police, Staples stopped the Evans vehicle.

The trial court concluded that reasonable and articulable suspicion existed to justify the investigatory stop of the vehicle by virtue of the anonymous tip, together with the knowledge of the subjects' "drug related reputation," and the

[2] The findings of fact above state the other officer's name to be Shannon Evans; however, the Uniform Citation shows that the officer's name was Shannon West. Later in the court's findings of fact, the officer is referred to as West.

finding of an attempt to elude police or at least lead them away from the mobile home.

Morgan argues the court erred in concluding that the Commonwealth established the existence of a reasonable suspicion to stop the vehicle. She further maintains that the findings were erroneous in that there was no attempt to elude the police. The Commonwealth for its part concedes that the trial court correctly held that the anonymous tip standing alone did not provide reasonable suspicion for the stop. The Commonwealth alleges the court's findings were correct as to the suspicious circumstances in this case justifying the stop: the anonymous tip, the reputation of the occupants of the vehicle, and an attempt to elude police.

Except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver are unreasonable under the Fourth Amendment. Delaware v. Prouse, 440 U.S. 648, 663, 99 S. Ct. 1391, 1401, 59 L. Ed. 2d 660 (1979); Creech v. Commonwealth, 812 S.W.2d 162, 163 (Ky.App. 1991). In evaluating the validity of an investigative stop, the reviewing court must consider the

totality of the circumstances. United States v. Cortez, 449 U.S. 411, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981).

In the recent case of Collins v. Commonwealth, 142 S.W.3d 113 (Ky. 2004), our Supreme Court determined what is required to support a stop based on an anonymous tip. In situations when the information serving as the sole basis of the officer's suspicion is provided by an anonymous informant, whose veracity, reputation, and basis of knowledge cannot be readily assessed, the appellate court is required to examine the totality of the circumstances and to determine whether the tip, *once suitably corroborated*, provides sufficient indicia of reliability to justify an investigatory stop. Id. at 115, citing Alabama v. White, 496 U.S. 325, 332, 110 S. Ct. 2412, 2417, 110 L. Ed. 2d 301, 310 (1990).

Predictive components, i.e. statements predicting the future behavior of the subject of the tip, are "especially important to the reliability of an anonymous tip because they provide the police with a means by which to test the knowledge of the tipster." Id., citing White, 496 U.S. at 332, 110 S. Ct. at 2417, 110 L. Ed. 2d at 310; and Florida v. J.L., 529 U.S. 266, 274, 120 S. Ct. 1375, 1379, 146 L. Ed. 2d 254, 260 (2000). An anonymous description of a person, even though accurate, does not carry sufficient indicia of reliability to justify an investigative stop, but it may when coupled with independent

observations by police of suspicious conduct. Collins, 142 S.W.3d at 116.

Thus, we examine the totality of the circumstances for corroboration of the tip. In this case, the anonymous tip provided nothing from which to conclude that the information given by the caller was based in fact. Nothing was known of the caller's veracity or reliability. Furthermore, the information clearly was not based on the personal experience of the caller, but allegedly from information told to her and in no way verified before being passed to police. The officer in this case had no means by which to test whether anything stated by the anonymous informant was true. Nothing in the tip was predictive of future behavior by the suspects.

In addition, this tip was not verified by the officer subsequently observing any illegal activity. The officer made no effort at investigation. The sole "corroboration" by police was the officer's knowledge that the subjects of the tip had been arrested before on the same type of charges of which they were accused by the caller. However, the suspects' past criminal record failed to corroborate the specifics of the tip given by the anonymous caller, and knowledge of previous arrests or convictions was not predictive of future activity.

The Commonwealth believes the "attempt to elude" added to the reasonable suspicion. Morgan argues that there was not

substantial evidence to support the fact finding of an attempt to elude. The findings indicated that Evans and Morgan drove away from the mobile home after the police had already passed by the mobile home. The officers had not stopped at or near the mobile home, nor had they signaled in any way their desire to question the occupants. Evans had no knowledge of the anonymous tip to police or that he was of interest to police. The facts were just as consistent with a belief that the occupants of the mobile home were preparing to leave when the officers drove by. We believe the attempt to elude was in the nature of a "hunch." To justify a stop, the officer must be able to articulate more than a mere "inchoate and unparticularized suspicion or 'hunch'" of criminal activity. Terry v. Ohio, 392 U.S. 1, 27, 88 S. Ct. 1868, 20 L. Ed. 2d 889, 909 (1968). The act of pulling out of one's home appears to be evasive only when viewed in light of the uncorroborated anonymous phone call. Thus, it did not itself corroborate illegal activity.

Under the tests cited in Collins, the stop was not based on reasonable suspicion. The unverified anonymous hearsay tip was not "suitably corroborated" by police investigation or by predictive information later confirmed. The defendants' past criminal record did not corroborate the specifics of the tip provided by the caller. The defendants' action of pulling out of the driveway after observing police drive past did not serve

to corroborate the tip that defendants had been manufacturing methamphetamine. In addition, the police learned nothing so as to verify the tip.

As a result, we conclude there was no reasonable suspicion to support the stop in this case. We reverse the order denying the motion to suppress. Given this conclusion, we find it unnecessary to review Morgan's claim that the trial court erred in denying her motion to withdraw her guilty plea. We remand for further proceedings consistent with this opinion.

MILLER, JUDGE, CONCURS.

COMBS, CHIEF JUDGE, DISSENTS AND FILES SEPARATE OPINION.

COMBS, CHIEF JUDGE, DISSENTING: I would respectfully dissent as I am persuaded that the totality of the circumstances sufficiently justified the stop in this case. Illinois v. Wardlow, 528 U.S. 119, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000) has unequivocally held that police are entitled to initiate a stop upon determining that flight or an attempt to elude has occurred. That element alone would have legitimized the stop in this case. Coupled with the information about drug activity and the unsavory record of the suspects, the fact of evasion served to provide an adequate foundation for the requisite probable cause.

It is not our proper prerogative or function to second-guess the testimony of the police as to the attempt to elude. We would be assuming the untenable position of substituting our judgment for that of the police as witnesses and that of the judge and jury in evaluating their testimony.

Accordingly, I would affirm.

BRIEF FOR APPELLANT:

Samuel N. Potter
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Michael L. Harned
Assistant Attorney General
Frankfort, Kentucky