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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-002634-MR

JAMES SPANOS, JR.

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 04-CR-00281

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: JOHNSON, KNOPF, AND VANMETER, JUDGES.

VANMETER, JUDGE: James Spanos, Jr. appeals from the Kenton Circuit Court's judgment and order sentencing him to serve twelve years in prison pursuant to a conditional guilty plea to charges of possession of a handgun by a convicted felon and second-degree persistent felony offender (PFO). For the following reasons, we reverse and remand.

On March 11, 2004, the following exchange occurred via telephone with a Covington police dispatcher:

Dispatcher: Covington 911.

Caller: Hey, there is a guy walking down Fifth Street going towards, uh, like—I'm on Russell and Fifth—he's going the opposite direction of traffic. He's walking down the street and a gun just fell out, picked it up, put it back in his shirt, and kept on going.

Dispatcher: A handgun?

Caller: It was a handgun, Mark? Yeah.

Dispatcher: Male, white? Male, black?

Caller: Male, white. Purple hat, you said? Like a maroon coat on, maroon-colored. Right now he's like at the Howard BP.

Dispatcher: Okay, you say male, white, purple hat and maroon coat?

Caller: No, he's got a maroon—it's like a maroonish-colored coat, not the hat. Does he have a hat on? No.

Dispatcher: Okay, and he put it in his shirt pocket?

Caller: He wrapped it back up like, um, in his coat, like when he pulled it in with his arms.

Dispatcher: Okay, in his coat pocket?

Caller: I don't know if it's in a pocket. It just looks like he wrapped it up in his jacket that he has on.

Dispatcher: Okay, I'll get someone down
 there.

Caller: Okay, thanks.

Dispatcher: Bye.

Caller: Bye.

A radio dispatch call was issued which described the suspect as a white male with dirty jeans who was carrying a gun wrapped in a jacket, and which further gave his direction of travel.¹ In response to the call, an unidentified police officer stopped and then released an unidentified pedestrian.² Five to seven minutes after the call, Officer Matt Hugenberg and his trainee spotted Spanos, whom they identified as matching the suspect's description, approximately seven blocks from the location described in the call. Hugenberg and his trainee exited their cruiser with their guns drawn on Spanos. After Spanos placed his jacket on the ground, was handcuffed, and was told why he had been stopped, he admitted that a gun was concealed in his jacket.

Spanos was indicted on charges of possession of a handgun by a convicted felon and first-degree PFO. He subsequently moved to suppress the evidence of the gun obtained

¹ At the suppression hearing, the defense counsel emphasized that Spanos was wearing black sweat pants at the time of his arrest, and that the caller did not mention Spanos's long hair and goatee.

² Defense counsel stated at the suppression hearing that she believed this person was taken to the location of the call (Getty law firm) and was found not to be the suspect.

from his jacket, alleging it to be the fruit of an unlawful search and seizure. During the suppression hearing the Commonwealth introduced Officer Hugenberg's testimony, and Spanos introduced the 911 tape. After the court orally overruled the suppression motion, Spanos pled guilty³ to possession of a handgun by a convicted felon⁴ and second-degree PFO⁵, and he was sentenced to twelve years' imprisonment. This appeal followed.

Spanos maintains on appeal that the circuit court erred in overruling his suppression motion, because the police did not have the requisite reasonable, articulable suspicion to stop him. We agree.

An investigatory stop must be supported by an officer's reasonable, articulable suspicion that a violation of the law is occurring.⁶ To determine "whether a set of facts is sufficient to generate reasonable suspicion, we must look at the totality of the circumstances in each case."⁷ The United States Supreme Court has stated that "an informant's 'veracity,'

³ Both Spanos's motion to enter a guilty plea and the court's judgment and sentence indicate that Spanos pled guilty, as opposed to entering a conditional plea. However, the issue has not been raised on appeal, and the parties seem to agree that Spanos entered a conditional guilty plea.

⁴ KRS 527.040.

⁵ KRS 532.080(2).

⁶ *Commonwealth v. Kelly*, 180 S.W.3d 474, 476 (Ky. 2005).

⁷ *Id.* at 477 (citing *Alabama v. White*, 496 U.S. 325, 330, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990)).

'reliability,' and 'basis of knowledge' are all highly relevant in determining the value of his report."⁸ Moreover, in *Florida v. J.L.*⁹ the United States Supreme Court held that an anonymous tip that a person is carrying a gun is, without more, insufficient to justify a police officer's stop and frisk of that person.

Here, the circuit court distinguished the stop of Spanos from the stop in *J.L.*, holding that even though the caller's name was unknown prior to Spanos's stop, the tip was not anonymous. The court reasoned that the police knew from where the call came, and that the call otherwise had indicia of trustworthiness.

In reviewing the circuit court's order overruling Spanos's suppression motion, "we defer to the trial court's factual findings unless they are clearly erroneous and we review *de novo* the trial court's application of the law to the facts found."¹⁰ Thus, we turn to the anonymity of the tip in the matter now before us. The record shows that the caller described her location (Russell and Fifth Streets) but identified neither herself nor the "Mark" with whom she appeared

⁸ *Id.* (citing *Illinois v. Gates*, 462 U.S. 213, 230, 103 S.Ct. 2317, 2328, 76 L.Ed.2d 527 (1983)).

⁹ 529 U.S. 266, 268, 120 S.Ct. 1375, 1377, 146 L.Ed.2d 254 (2000).

¹⁰ *Kelly*, 180 S.W.3d at 476-77 (citing *Welch v. Commonwealth*, 149 S.W.3d 407, 409 (Ky. 2004)).

to be conferring. Officer Hugenberg testified at the suppression hearing that a Covington police officer visited Mark at some point to get a more accurate description of the suspect than the one given over the telephone.¹¹ Although the Commonwealth stated that Mark's full name and address were in the police file, we must evaluate the circumstances at the time of the stop to decide if the officer had reasonable suspicion for his action.¹² Absent proof that the officer knew more about the unidentified informant at the time of Spanos's arrest than what was provided in the recorded phone call, we believe that the outcome of this case is controlled by *J.L.* As a result, the trial court erred by failing to grant Spanos's suppression motion.

The judgment and order of the Kenton Circuit Court are reversed and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

¹¹ It is unclear whether Mark was located pursuant to a phone trace or the location given by the caller, but the circuit court seemed to believe that it was pursuant to caller identification.

¹² See *Adams v. Williams*, 407 U.S. 143, 149, 92 S.Ct. 1921, 1925, 32 L.Ed.2d 612 (1972).

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