RENDERED: DECEMBER 1, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000814-MR

MARVIN MCATEE — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
INDICTMENT NO. 03-CR-001797

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON AND TAYLOR, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Marvin McAtee appeals from a judgment of the Jefferson Circuit Court wherein he was convicted and sentenced to fifteen years in prison for the crime of possession of a handgun by a convicted felon and for being a persistent felony offender in the first degree. He argues that the handgun charge should be reversed on constitutional grounds, that the stop and search was not justified by the circumstances, and that

[1] Senior Judge David C. Buckingham sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

reversible error occurred in the admission of certain testimony. We disagree and thus affirm.

The facts leading to McAtee's arrest are as follows: In the early morning hours of May 17, 2003, the Louisville Metro Police Department received a phone call concerning shots being fired from a white Chevrolet in the area of 34th and Vermont Streets. An investigation following the call revealed nothing. A second call was received a short time later (both calls were anonymous), and the caller stated that a car fitting the previously given description was in the parking lot of Vermont Liquors, a location near the intersection of 34th and Vermont Streets.

When the police arrived, they found McAtee behind the wheel of a white Chevrolet Malibu. The officers, with guns drawn, ordered McAtee and his passenger out of the vehicle. After explaining the purpose of their investigation, the officers asked for permission from McAtee to search the vehicle. McAtee gave his consent to search to the officers, explaining that the vehicle did not belong to him. During the search, the officers recovered two loaded handguns, spent shell casings, and a box of ammunition.

Both McAtee and his passenger were charged with carrying concealed weapons. A later report made to the police by Quanta Spinks, who claimed that McAtee had shot at him,

resulted in the additional charge of first-degree wanton endangerment. The concealed weapon charge was amended to possession of a handgun by a convicted felon, and the PFO charge was added.

Prior to trial, McAtee successfully moved the court to grant him separate trials on the handgun charge and the wanton endangerment charge. The Commonwealth elected to try the handgun charge first, and the jury found McAtee guilty and set his sentence at ten years in prison. The jury thereafter enhanced the sentence to fifteen years in prison after finding that McAtee was a first-degree persistent felony offender. This appeal followed.

McAtee's first argument on appeal concerns the constitutionality of the handgun statute, Kentucky Revised Statute (KRS) 527.040. This issue has been decided adversely to McAtee's position by the Kentucky Supreme Court in the recent case of *Posey v. Commonwealth*, 185 S.W.3d 170 (Ky. 2006). We are bound by that opinion (SCR 1.030(8)(a)) and thus reject McAtee's argument without further discussion. *See Wright v. Dolgencorp., Inc.*, 161 S.W.3d 341, 344 (Ky.App. 2004).

McAtee next argues that the trial court erred in denying his motion to suppress. His specific claim is that "[t]he tip provided by the anonymous caller lacked sufficient indicia of reliability to justify the investigatory stop" and

that the caller provided "descriptive, rather than predictive, information."

McAtee aptly states the appellate standard of review of a motion to suppress. *See Kentucky Rule of Criminal Procedure (RCr) 9.78; and Stewart v. Commonwealth*, 44 S.W.3d 376, 380 (Ky.App. 2000). Because we perceive no disagreement with the factual determinations made by the court, we move forward to a *de novo* review of whether the court's decision is correct as a matter of law. *See Stewart, supra*.

> In order to perform an investigatory stop of an automobile, there must exist a reasonable and articulable suspicion that a violation of the law is occurring. Complications arise when, as here, 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. In situations such as these, we are 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.

Collins v. Commonwealth, 142 S.W.3d 113, 115 (Ky. 2004)(citations omitted). The circumstances in this case include two calls identifying a white Chevrolet in a certain neighborhood in Louisville. The first call indicated that criminal behavior had occurred (shots were fired from the vehicle), and the second call gave the specific location of the

vehicle (the Vermont Liquors parking lot). Acting on that information, the police located McAtee behind the wheel of a white Chevrolet Malibu in the middle of the night (4:00 a.m.) in the parking lot of a liquor store in close proximity to the earlier described intersection in a residential neighborhood. The totality of those circumstances supports the trial court's finding of a "reasonable and articulable suspicion" of criminal activity.

After the police patted down McAtee and his companion, permission was given to perform a search of the vehicle. There is no question regarding the voluntariness of the permission for the vehicle search. In short, the trial court properly denied the motion to suppress.

The third and final issue in this appeal concerns the testimony alluding to the wanton endangerment charge. As stated previously, the handgun charge and the wanton endangerment charge were to be tried separately. McAtee filed a motion *in limine* to prevent any evidence of the shooting from being presented during his trial on the handgun charge. The trial court denied the motion after the Commonwealth argued that the evidence of the two charges was "inextricably intertwined." *See Kentucky Rule of Evidence (KRE) 404(b)(2).*

First, it was necessary for the Commonwealth to introduce evidence to show why the officers stopped the vehicle

and ordered the occupants to exit it. The fact that the officers were investigating a shooting incident was thus admissible.

More importantly, evidence that McAtee had been involved in the shooting incident became relevant and admissible because of the defense he raised. McAtee testified that he was not in the vehicle when it arrived at the store but that he was already there because he had been cleaning the parking lot to make extra money on weekends. He also testified that he had gotten into the vehicle to share some liquor with an acquaintance, LeByron Lumpkins, and that he had no knowledge of the gun under the seat.

McAtee's ex-girlfriend, Ronnesha Flippins, testified that she had rented the vehicle and had driven it to the liquor store with Lumpkins as her passenger. She further testified that she was inside the store and was afraid to come outside while the officers were there because she had been drinking and she knew there was a gun under the seat. Flippins also testified that she had loaned the vehicle to her cousin earlier that day and that she assumed the gun belonged to him.

The nature of the charge, possession of a handgun by a convicted felon, required the Commonwealth to prove that McAtee had possession of the handgun. *See* KRS 527.040. Because McAtee denied possession and knowledge of the handgun, the Commonwealth

called Spinks to testify that McAtee had shot into the vehicle that he was driving. This eyewitness testimony was elicited to prove that McAtee had possession of the handgun and to rebut McAtee's testimony that he had no knowledge of it. *See* KRE 404(b)(1). In short, we conclude that the court did not err in allowing testimony that McAtee had shot the handgun earlier in the evening.

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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