RENDERED: DECEMBER 22, 2006; 10:00 A.M.

ORDERED NOT PUBLISHED BY KENTUCKY SUPREME COURT: JUNE 13, 2007 (2007-SC-0070-D)

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000852-MR

VIRGINIA KUPPER — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 03-CR-002917

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

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

JOHNSON, JUDGE: Virginia Kupper has appealed from a judgment of the Jefferson Circuit Court entered on March 29, 2005, following a jury trial convicting her of 14 counts of criminal possession of a forged instrument in the second degree,[2] 14 counts of possession of stolen mail matter,[3] four counts of fraudulent use

[1] Senior Judge Joseph R. Huddleston 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.

[2] KRS 516.060.

[3] KRS 514.150.

of a credit card,[4] and four counts of receipt of a stolen credit card.[5] Having concluded that the trial court did not err in denying Kupper's motion to suppress evidence, we affirm.

On November 5, 2003, Kupper was indicted by a Jefferson County grand jury on 14 counts of criminal possession of a forged instrument in the second degree, seven counts of fraudulent use of a credit card, 14 counts of possession of stolen mail matter, six counts of receipt of a stolen credit card, one count of theft of mail matter,[6] and ten counts of theft of identity.[7] Prior to trial, the Commonwealth dismissed two counts of fraudulent use of a credit card, two counts of receipt of a stolen credit card and all ten counts of theft of identity. The jury convicted Kupper on the counts noted above and found her not guilty on one count of theft of mail matter.

After the jury rendered its verdict, the Commonwealth and Kupper reached an agreement as to the penalty. Kupper was sentenced to five years' imprisonment for each conviction for criminal possession of a forged instrument in the second degree with the sentences to run concurrently with each other, five years' imprisonment for each conviction for fraudulent use of a credit card with the sentences to run concurrently with each

[4] KRS 434.650.

[5] KRS 434.620.

[6] KRS 514.140.

[7] KRS 514.160.

other, five years' imprisonment for each conviction for receipt of stolen credit card with the sentences to run concurrently with each other, and five years' imprisonment for each conviction for possession of stolen mail matter with the sentences to run concurrently with each other. The trial court ordered the sentences for fraudulent use of a credit card convictions and receipt of stolen credit card convictions to run concurrently with each other, but to run consecutively to the five-year sentences on the criminal possession of a forged instrument in the second degree convictions and the five-year sentences on the possession of stolen mail matter convictions for a total of 15 years' imprisonment. The Commonwealth recommended that the sentences be probated.

On March 29, 2005, the trial court entered a judgment granting probation for a period of five years. As part of the plea agreement and judgment, Kupper reserved her right to appeal the trial court's denial of her motion to suppress evidence seized by the police during a stop of her vehicle. Kupper contends in her appeal that information the police received from Charlie Cardwell did not constitute reasonable suspicion for the police to stop her vehicle.

The facts of the case regarding the stop of Kupper's vehicle by the police are not disputed. On May 1, 2003, Cardwell was in his driveway and noticed a gray vehicle pull

over at his mailbox and stop. Cardwell stated that he went to the mailbox after the vehicle pulled away, and discovered that mail his wife had placed in the mailbox was missing. Cardwell then noticed the gray vehicle slow down at a neighbor's driveway, and he noticed that the gray vehicle had a tail light out. Cardwell then went to his house, got his truck keys, and began to follow the gray vehicle.

During his pursuit of the gray vehicle, Cardwell called his wife and was given a telephone number for the Louisville Metro Police Department. Cardwell called the police dispatch and informed them that he was following a gray BMW with a tail light out, and he believed the occupant of the vehicle had stolen mail from his mailbox. Cardwell stayed on the telephone with the dispatcher relaying the location of the vehicle he was following until a Louisville Metro Police officer arrived and stopped the BMW.

Officer Brian Thompson testified that, after he stopped Kupper's vehicle, he asked Kupper for identification and informed her that Cardwell believed she had taken mail from his mailbox. Officer Thompson then stated that he spoke to Cardwell who told him he was certain Kupper had removed mail that his wife had put in their mailbox for pickup. Officer Thompson then approached Kupper again and requested permission to search her vehicle and Kupper consented. The search of the vehicle lead to

the discovery of at least 34 items giving rise to the indictment against Kupper. Officer Thompson further testified that he did not know Cardwell or Kupper, nor was there any ongoing investigation of Kupper. The only information Officer Thompson received from the dispatcher was that Cardwell was following Kupper and the location of the vehicles. Officer Thompson did not verify that mail was actually missing from Cardwell's mailbox nor did he personally observe Kupper do anything illegal prior to the stop.

Kupper contends that the information Officer Thompson received was not sufficient to form a reasonable suspicion that Kupper was engaged in illegal activity at the time he stopped her vehicle. Thus, she argues that the stop and subsequent search were unreasonable and the trial court erred by refusing to suppress the evidence obtained as a result of the illegal stop.

In determining the reasonableness of a police officer's actions in making an investigatory stop, the trial court must consider whether the facts available to the officer at the time establish that the officer had "reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity [emphasis original]."[8] The

[8] United States v. Hensley, 469 U.S. 221, 227, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985) (quoting United States v. Place, 462 U.S. 696, 702, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983)). See also United States v. Cortez, 449 U.S. 411, 417-18, 101 S.Ct. 690, 66 L.Ed.2d 621, 628-29 (1981); and Docksteader v. Commonwealth, 802 S.W.2d 149, 150 (Ky.App. 1991).

propriety of a traffic stop must be considered based upon the totality of the circumstances as they existed at the time including various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of criminals. From this information, a trained officer may draw inferences and make deductions that might not occur to an untrained person. This process does not deal with hard certainties, but with probabilities. In the end, there must be a particularized and objective basis for suspecting the particular individual being stopped is, or is about to be, engaged in criminal activity or is wanted for past criminal conduct.[9] "[T]he relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts."[10]

Our standard of review in reviewing a trial court's decision on a motion to suppress evidence is well-established in that we must "first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive.[11] Based on those findings of fact, we

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[9] Hensley, 469 U.S. at 227; Cortez, 449 U.S. at 417-18.

[10] United States v. Sokolow, 490 U.S. 1, 10, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989) (quoting Illinois v. Gates, 462 U.S. 213, 243-44, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)).

[11] Kentucky Rules of Criminal Procedure (RCr) 9.78.

must then conduct a de novo review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law."[12]

As noted, there is no dispute regarding the facts leading to the stop by Officer Thompson. Rather, Kupper contends that the facts do not constitute reasonable suspicion sufficient to justify the stop. Specifically, Kupper contends that the information provided by Cardwell to the police lacked any indication that it was reliable, was not verified or corroborated by the police prior to the stop of Kupper's vehicle, and did not provide any predictive information. As such, Kupper contends that the information "lacked sufficient indicia of reliability to justify the investigatory stop . . . ."[13]

Kupper relies upon Collins as support for her contention that the stop was unreasonable. In Collins, an unidentified person called 911 complaining that the driver of a white Chevrolet was seen throwing liquid from a bottle toward another vehicle at a gas station. The caller identified the liquid as alcohol and indicated that it appeared the two drivers were in a dispute. The driver of the Chevrolet then left the

[12] Commonwealth v. Neal, 84 S.W.3d 920, 923 (Ky.App. 2002) (citing Adcock v. Commonwealth, 967 S.W.2d 6, 8 (Ky. 1998); and Commonwealth v. Opell, 3 S.W.3d 747, 751 (Ky.App. 1999)).

[13] Collins v. Commonwealth, 142 S.W.3d 113, 116 (Ky. 2004).

gas station and went south on Interstate 75. The caller provided the license plate number of the Chevrolet and it was located by a state trooper on the interstate. The trooper testified that he followed the vehicle for about two miles and did not observe any unusual behavior or erratic driving. The trooper then stopped the vehicle and noted the smell of alcohol on the driver and performed a field sobriety test. Collins was thereafter arrested for DUI.[14]

Our Supreme Court held that the stop was unreasonable as the tip did not reveal that the tipster had either witnessed or could predict any illegal activity which the trooper could corroborate or verify. Additionally, the trooper did not observe anything suspicious about Collins while following his vehicle to indicate that he was violating the law. In regard to the reliability of the tip, our Supreme Court stated as follows:

> [t]hough accurate in its substance, the tip consisted entirely of information available to any casual observer on the street, giving the police no method of verifying that the tipster could be relied upon. The tip neither recounted nor predicted any specific illegal conduct. Moreover, the investigating officer did not independently observe any illegal activity or suspicious behavior. We do not believe that reasonable suspicion can be predicated upon an unidentified person's accurate description of another vehicle and driver, coupled with the bare assertion that the driver had

[14] Collins, 142 S.W.3d at 115.

> engaged in what might be considered offensive – though not criminal – conduct.[15]

Unlike Collins, however, the case before us does not involve a stop based upon an anonymous tip but rather a stop based upon information from an identified complainant. Our Supreme Court has held that "such tips are entitled to a greater 'presumption of reliability' as opposed to the tips of unknown 'anonymous' informants . . . ."[16] A greater presumption of reliability is justified because identifiable informants can be subject to criminal liability themselves "if it is discovered that the tip is unfounded or fabricated . . . ."[17]

In Kelly, two persons, who identified themselves as Waffle House employees, called the Lexington police and reported that a patron they suspected of being intoxicated was about to drive away from the restaurant. They advised the police of their location and described the suspect as well as his vehicle. A Lexington police officer went to the Waffle House location and saw two persons outside the restaurant who were pointing him in the direction of a night club across the street. The officer spotted the vehicle that had been described and followed it to a hotel where the officer conducted an investigatory stop. The

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[15] Collins, 142 S.W.3d at 117.

[16] Commonwealth v. Kelly, 180 S.W.3d 474, 477 (Ky. 2005) (citing Florida v. J.L., 529 U.S. 266, 276, 120 S.Ct. 1375, 1381, 146 L.Ed.2d 254 (2000)(Kennedy, J., concurring)).

[17] Id.

officer did not personally observe any criminal or suspicious conduct on the part of Kelly.[18]

After stopping Kelly's vehicle, the officer noted a strong smell of alcohol and conducted several field sobriety tests which Kelly failed. A search of Kelly's person and vehicle revealed numerous Oxycontin pills, $2,800 in cash, and a gun. The trial court found that the stop was unlawful and granted Kelly's motion to suppress the evidence.[19] Our Supreme Court reversed the trial court's decision on the basis that the tip was provided by identifiable informants and was thus entitled to the greater presumption of reliability than an anonymous tip. Further, the Court held that the tip in question was entitled to an "even greater deference than it normally might be accorded due to its status as a 'citizen informant' tip."[20] "What distinguishes a 'citizen informant' tip from other types of tips is the fact that such tipsters are almost always bystanders or eyewitness-victims of the alleged criminal activity."[21]

We conclude that the tip and information provided to the police by Cardwell constitutes the same type of "citizen

[18] Kelly, 180 S.W.3d at 476.

[19] Id.

[20] Id. at 477 (citing Illinois v. Gates, 462 U.S. 213, 233, 103 S.Ct. 2317, 2330, 76 L.Ed.2d 527 (1983) (stating that "rigorous scrutiny of the basis of [a citizen informant's] knowledge [is] unnecessary")).

[21] Kelly, 180 S.W.3d at 478 (citing United States v. Pasquarille, 20 F.3d 682, 689 (6th Cir. 1994)).

informant" tip and is entitled to the greater presumption of reliability found in Kelly.[22] Cardwell provided information to the police that he observed Kupper's vehicle stop at his mailbox and that mail was missing after the vehicle pulled away. Cardwell described the vehicle he had seen and then began to follow the vehicle advising the police dispatch of his location. Once Officer Thompson stopped Kupper, he advised her that Cardwell believed she had taken mail from his mailbox and requested her identification. Officer Thompson then talked face-to-face with Cardwell before requesting consent to search Kupper's vehicle. Based upon the totality of the circumstances, we conclude that the information Cardwell provided Officer Thompson was sufficient to establish reasonable suspicion to support an investigatory stop of Kupper's vehicle. After she was stopped, Kupper consented to the search of her vehicle which produced the evidence giving rise to her indictment and the trial court properly denied Kupper's motion to suppress.

Based upon the foregoing, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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[22] We note that the tipsters in Kelly did not identify themselves beyond being employees of Waffle House yet our Supreme Court found there was a strong presumption that they could be located if it were determined the tip was false or made for purposes of harassment. In this case Cardwell advised the police of his identity and continually advised them of his location while following Kupper. Additionally, he was present at the scene of the stop of Kupper's vehicle by Officer Thompson and spoke with the officer face-to-face.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

Franklin P. Jewell
Louisville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Kristin N. Logan
Assistant Attorney General
Frankfort, Kentucky

ORAL ARGUMENT FOR APPELLEE:

Kristin N. Logan
Assistant Attorney General
Frankfort, Kentucky