

RENDERED: AUGUST 25, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001928-MR

SCOTT PAENG WITT

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 04-CR-01014

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: ABRAMSON AND BARBER, JUDGES; EMBERTON,¹ SENIOR JUDGE.

BARBER, JUDGE: Appellant, Scott Paeng Witt, appeals from a conditional guilty plea to the charges of trafficking in cocaine and of being a persistent felony offender in the second degree. We affirm the trial court's denial of the motion to suppress.

Witt was indicted on one count of trafficking in cocaine, a Class C felony, one count of trafficking in

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.

marijuana, a Class D felony, and one count of being a persistent felony offender in the second degree. Witt was also charged with several misdemeanors, including operating a motor vehicle on a suspended license.

Witt filed a motion to suppress all evidence, including statements made, asserting that the evidence was improperly seized. The motion was overruled by the trial court. Witt then entered a conditional guilty plea.

At the suppression hearing the Commonwealth called the two officers charged with investigating this incident. Detective Matt Evans testified that he had received information from a trusted informant that an individual was selling cocaine out of a room at a local motel. Detective Evans testified that the police had prior dealings with the individual named. Detective Evans used the confidential informant to attempt to purchase cocaine from the man in the motel room. Detective Evans' testimony was based on what the confidential informant allegedly told him as there was no audio or photographic recording of the meeting.

The informant reported that the man at the motel told the confidential informant that he would have to call his supplier to bring cocaine to the motel. The confidential informant did not see or hear such a call being made, but forty minutes later Witt arrived at the motel. Witt took a blue

Nautica bag from his trunk and went into the motel room. The confidential informant had to leave the room for a time. After Witt left the room, the confidential informant returned to the room and purchased cocaine from the man.

No recording of the drug seller's statement to that effect or of any telephone call was offered, even though the confidential informant was wearing a "wire" to tape record the transaction between him and the drug seller. Detective Evans neglected to provide any copy of the taped transaction. Witt claims that the mere fact that he visited the motel room did not make it reasonable to suspect him of providing cocaine to the drug seller. The record does not show whether other individuals visited the motel room during the time period when the confidential informant was waiting to buy drugs, or at any other time during that day.

At Detective Evans' direction, Officer Fleischer pulled Witt over at some point after he left the parking lot. Detective Evans stated that he was four cars behind Witt, and that he saw Fleischer put handcuffs on Witt. When asked, Witt produced a bottle of generic Xanax from his pocket. Witt also told the detective that he had cocaine hidden in his pants. Detective Evans shook Witt's pants and 32.9 grams of cocaine fell out. A search of Witt's vehicle was made and an additional

83 grams of cocaine and a baggie of marijuana were found in the trunk in the Nautica bag.

Detective Evans stated that Officer Fleisher's reason for arresting Witt was Witt's failure to stop when the officer first flashed his lights. Detective Evans testified that Witt drove on for less than ¼ of a mile before pulling over. Witt was not charged for his failure to stop. The arresting officer, Officer Fleischer, stated that he arrested Witt because he had a suspended driver's license while operating a motor vehicle. Witt contends that the officers had no reason to stop him. He also argues that the officers had no reason to arrest him, as he stopped promptly when he saw the police car's lights.

Witt argues that his arrest was improper, and that the search which followed the arrest was also improper. Witt argued that the police had no probable cause or reasonable articulable suspicion to justify pulling him over. Witt contends that determinations of reasonable suspicion and probable cause are generally reviewed *de novo* on appeal. Ornelas v. United States, 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed 2d 911 (1996). A review of the record shows that the officers had probable cause to stop and detain Witt, and that the arrest was not improper.

KRS 431.005(1)(c) permits a police officer to make an arrest without a warrant when he has probable cause to believe that the person being arrested has committed a felony. The

police officers testified that Witt was arrested because he failed to stop promptly when the officer turned on his flashing lights. This reason is not fully supported by the record. The uniform citation contained in the record, however, states that Witt was pulled over in reference to a narcotics investigation. Witt was not cited or charged with failing to pull over promptly. The record does provide the surveillance and probable cause as a reason for the stop and detention, and the suspended license as a reason for an arrest.

Both the Fourth Amendment to the United States Constitution and Section Ten of the Kentucky Constitution guarantee "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Probable cause is required before a stop and search may occur. Adcock v. Commonwealth, 967 S.W.2d 6, 8 (Ky. 1998). Although a warrantless search is presumed unreasonable, as noted by the Court in Gallman v. Commonwealth, 578 S.W.2d 47, 48 (Ky. 1979), that presumption may be defeated by a showing that probable cause for the search existed. See: Stewart v. Commonwealth, 44 S.W.3d 376, 378 (Ky.App. 2000); Commonwealth v. Opell, 3 S.W.3d 747, 751 (Ky.App. 1999). The trial court ruled that the search of the car trunk was proper because Witt had been seen putting the blue Nautica bag into the trunk. Witt complains that as the record shows that the car was

registered to a third party, not to Witt, pulling him over and charging him with possession of the contraband was in error. Kentucky case law is reasonably clear that a person in possession of a vehicle in which contraband is found is properly held to be in possession of the contraband. Beaty v. Commonwealth, 125 S.W.3d 196, 199 (Ky. 2003).

Investigatory stops are proper in certain circumstances where probable cause for the stop does not exist. A limited exception to the warrant requirement was carved out permitting brief investigatory stops in circumstances where police officers have a reasonable articulable suspicion that "criminal activity may be afoot." Williams v. Commonwealth, 147 S.W.3d 1, 5 (Ky. 2004), (citing Terry v. Ohio, 392 U.S. 1, 30, 88 S.Ct. 1868, 1884, 20 L.Ed.2d 889 (1968)). Such encounters - "Terry stops," as they have come to be known - need not proceed pursuant to a warrant, nor must they be supported by probable cause. Id. The officer need not be absolutely certain that the individual is engaged in an unlawful enterprise. Id., (citing Terry, supra, 392 U.S. at 27, 88 S.Ct. at 1883). The issue is whether a reasonably prudent man in the circumstances would be warranted in his belief that the suspect is breaking, or is about to break, the law. Id., (citing Terry, supra, 392 U.S. at 27, 88 S.Ct. at 1883). Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably

less than preponderance of the evidence. Id., (citing Illinois v. Wardlow, 528 U.S. 119, 123, 120 S.Ct. 673, 675-76, 145 L.Ed.2d 570 (2000)).

A tip from an informant known to the investigating officers may provide probable cause for a stop. United States v. Padro, 52 F.3d 120 (6th Cir.1995)(identified informants are to be given more weight than anonymous tips.) This is particularly so where essential details in the information provided by the informant are substantiated by the investigating officer through his surveillance of the transaction. Williams v. Commonwealth, supra, at p. 5.

The Kentucky Supreme Court has recently held that when probable cause is based in part on a tip from an informant, the "totality of the circumstances test requires a balancing of the relative indicia of reliability accompanying an informant's tip." Lovett v. Commonwealth, 103 S.W.3d 72, 78 (Ky. 2003). See also: Stewart v. Commonwealth, 44 S.W.3d 376, 378 (Ky.App. 2000). We believe that the totality of the circumstances in this case supported the stop and resulting arrest and search of the vehicle. For the foregoing reasons, the trial court's denial of the motion to suppress the evidence is affirmed.

EMBERTON, SENIOR JUDGE, CONCURS.

ABRAMSON, JUDGE, CONCURS IN RESULT ONLY

BRIEF FOR APPELLANT:

Gene Lewter
Lexington, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Michael A. Nickles
Assistant Attorney General
Frankfort, Kentucky