

RENDERED: NOVEMBER 9, 2007; 2:00 P.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2007-CA-000969-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM MARSHALL CIRCUIT COURT  
HONORABLE DENNIS R. FOUST, JUDGE  
ACTION NO. 07-CI-00101

JACK M. TELLE, JUDGE, MARSHALL DISTRICT COURT  
AND CHARLES P. STUBER

APPELLEES

OPINION  
AFFIRMING

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BEFORE: STUMBO AND WINE, JUDGES; GUIDUGLI,<sup>1</sup> SENIOR JUDGE.

STUMBO, JUDGE: This appeal comes from the Marshall Circuit Court's denial of a Writ of Prohibition. The writ was filed with the circuit court in an effort to stop the Marshall District Court from enforcing an order to suppress evidence from a traffic stop which resulted in a charge of DUI. The court suppressed the evidence finding that based on the totality of the circumstances, there was no reasonable suspicion to stop the vehicle.

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<sup>1</sup> Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

A tip from someone at the Marshall County Hospital alerted the police to the possible drunk driver. The court found that the caller had not been identified and should therefore be treated as an anonymous tipster. The Commonwealth argues that the caller was not anonymous because she had the ability to be identified. If the caller is not anonymous, then the support for a reasonable suspicion to stop the vehicle increases. The Commonwealth's argument is that the court erred when it classified the caller as anonymous. The standard of review for writs of prohibition when dealing with issues of law is *de novo*. *Southeastern United Medigroup, Inc. v. Hughes*, 952 S.W.2d 195, 199 (Ky. 1997). After reviewing the arguments and the law, we find that the writ was properly denied and that the suppression order is enforceable.

Charles P. Stuber (Appellee) was arrested on May 7, 2006, for driving under the influence after the Marshall County Police Dispatch received a call from the Marshall County Hospital. The caller, who did not identify herself, stated she believed Appellee was intoxicated and that he was leaving the parking lot of the hospital in a car which she described.

The Dispatch alerted Officer Jeff Daniel of the situation and gave him the car's description. Upon arriving at the hospital, the officer observed the car in the parking lot, but saw no one in it. The officer proceeded to park his car and observe the vehicle. Although the officer did not see anyone enter the vehicle, 15 minutes after his arrival, it departed the parking lot. Officer Daniel followed the vehicle for a short distance. During this time, the vehicle obeyed all traffic signals and was not weaving or

driving erratically. After about 2 or 3 minutes, Officer Daniel initiated the traffic stop. After coming into contact with Appellee, Officer Daniel smelled the odor of alcohol and administered a breathalyzer test. Appellee failed the test and Officer Daniel arrested him.

Appellee entered a not guilty plea and shortly thereafter, filed a Motion to Suppress alleging the evidence against him had been obtained as a result of an unconstitutional stop. At the suppression hearing, the district judge made the following findings of fact in regard to the information relayed to the officer:

1. That a call was received from the Marshall County Hospital Emergency Room. This person apparently was not identified at the time and has not been identified. There is no information as to whether the caller was a health care provider, staff or a mere bystander.
2. That the source reported that the individual was going to leave the hospital in a green Saturn vehicle with Florida tags. There is an element of “predicting” future activity but there is nothing in this information (that a vehicle is going to leave a location) that is an indication of special knowledge or something that could not be ascertained by casual observation.
3. That the source reported that the alleged operator was believed to be under the influence. Given that the officer found the vehicle unoccupied, and the fact that the vehicle was not occupied for approximately 15 minutes, the officer’s initial findings did not support the report from dispatch about an impaired driver. Moreover, the officer made no attempt to locate the reporting source or conduct any inquiry at the hospital.

“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.” *Collins v.*

*Commonwealth*, 142 S.W.3d 113, 115 (Ky. 2004).

The Commonwealth cites *Commonwealth v. Kelly*, 180 S.W.3d 474 (Ky. 2005) in support of its position. In *Kelly*, two callers, who identified themselves as Waffle House employees, stated that a customer, they believed to be intoxicated, was about to leave the restaurant. They gave their own location and details about the suspect and his vehicle. An officer responded to the location and saw two people, whom he assumed were the employees, standing outside and pointing in the direction of the vehicle. The officer approached the vehicle and conducted an investigatory stop. The court provided its reasoning for the conclusion that the call was not anonymous and we find it beneficial to reiterate it. The court stated:

We find that the setting and circumstances of this case do not support a conclusion that the tip was truly “anonymous.” While the tipsters did not give their names, they (1) identified themselves as employees of the Waffle House restaurant; and (2) provided the location of the particular restaurant where they worked. This information alone raises a strong presumption that these informants could likely be located in the event that their tip was determined to be false or made for the purpose of harassment. However, in addition to the identifying information given over the telephone, Officer Hastings reasonably believed that he had face-to-face contact with the actual tipsters when he pulled into the parking lot of the restaurant and observed two people (1) waiting outside for him; and (2) pointing toward a vehicle that had the same description as the one provided in the dispatch broadcast. When all these facts are considered in their totality (including and especially the pre-detention investigation which verified most of the information given by the tipsters), it is clear to us that this tip was generated from identifiable informants as opposed to anonymous informants.

*Id.* at 477.

The Commonwealth argues that the *Kelly* case establishes that if callers can be potentially identified at the time the officer receives the information, then they are not truly anonymous. While we agree with that interpretation, here the facts cannot support the same conclusion. In the case at bar, the caller stated she was calling from a hospital and gave a description of the car. In and of itself, this is insufficient to establish that the caller was identifiable. The district court judge found after hearing evidence at the suppression hearing that “[t]here is no information as to whether the caller was a health care provider, staff or a mere bystander.” This is greatly different than identifying oneself as a Waffle House employee. A caller from a hospital could be any number of people while Waffle House employees are limited in number. Also, the *Kelly* officer saw two people whom he believed to be the callers standing in front of the restaurant pointing to the car belonging to the suspect, while the officer in our case did not see anyone he considered to be the caller.

Our case fits more into the category of *Collins v. Commonwealth, supra*, wherein an unidentified person called from a gas station stating that someone had thrown a bottle of alcohol at another driver and then pulled out of the station. The caller was even able to give the police the license plate number of the vehicle. The *Collins* court, however, held that the caller was anonymous. “Anonymous descriptions of a person in a certain vehicle or location, though accurate, do not carry sufficient indicia of reliability to justify an investigative stop.” *Collins* at 116.

We find that the caller from the hospital was not identifiable and therefore an anonymous caller. Because the caller was anonymous, there was no reasonable suspicion to perform the investigative stop and the evidence acquired from it was properly suppressed. We, therefore, hold that the writ of prohibition was rightfully denied and affirm the circuit court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE,  
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NO BRIEF FILED FOR APPELLEE,  
JACK M. TELLE, JUDGE,  
MARSHALL DISTRICT COURT