RENDERED: MARCH 23, 2012; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000219-DG

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

ON DISCRETIONARY REVIEW FROM HART CIRCUIT COURT
HONORABLE JOHN DAVID SEAY, JUDGE
ACTION NO. 10-XX-00004

BENJAMIN CLINE, II — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, COMBS, AND LAMBERT, JUDGES.

LAMBERT, JUDGE: On the Commonwealth's motion, this matter is before the Court on discretionary review from the opinion and order of the Hart Circuit Court, sitting as an appellate court, reversing the Hart District Court's order denying Benjamin Cline, II's motion to suppress evidence. Because we agree with the

Commonwealth that the circuit court improperly reversed the district court's ruling, we reverse.

This case originated in the Hart District Court following Cline's arrest for operating a motor vehicle under the influence of alcohol in violation of Kentucky Revised Statutes (KRS) 189A.010. On November 26, 2008, at 4:50 p.m., an anonymous woman called the Hart County Dispatch to report that an intoxicated man operating a motorcycle and wearing a black leather jacket had left the Hartway Apartments in Munfordville and was traveling in the direction of Horse Cave. Dispatch notified Horse Cave Police Department Chief of Police Alan Shirley, who was on duty until 6:00 p.m. that evening. Chief Shirley proceeded north on Highway 31W to the city limits where he watched for a motorcycle. By the time his shift ended, Chief Shirley had not encountered a motorcycle, and he passed the information on to Officer Sean Henry, also of the Horse Cave Police Department. Officer Henry began his shift at 6:00 p.m. when Chief Shirley went off duty.

Within minutes of beginning his shift, Officer Henry saw a motorcycle traveling southbound on Highway 31W. He did not pull the driver over, but instead he followed the motorcycle for one mile. During that time, Officer Henry noticed erratic driving in the form of abrupt starts and speed changes. He activated his blue lights to pull the driver over, but it took the driver another half of a mile to actually pull over. Officer Henry stated this was an extremely long time for the driver to come to a stop. The driver of the motorcycle

was Cline. Officer Henry performed field sobriety tests, including an intoxilyzer which showed an alcohol level of .121. Cline also admitted that he had consumed two drinks and a shot of Tequila. Officer Henry arrested Cline for operating the motorcycle under the influence of alcohol.

At the district court level, Cline moved to suppress the evidence obtained as a result of the stop, arguing that the anonymous tip was inherently unreliable and that Officer Henry did not have an articulable suspicion of criminal activity sufficient to support his decision to perform a traffic stop. The Commonwealth argued that the anonymous tip in conjunction with Officer Henry's observation of erratic driving was sufficient to justify the stop. Following a suppression hearing, at which both Chief Shirley and Officer Henry testified as detailed above, the district court denied Cline's motion to suppress. In denying the motion, the district court held that the arresting officer's observation of erratic driving corroborated the anonymous tip, which together justified the stop. Cline then entered a guilty plea conditioned on his right to appeal the suppression ruling. The circuit court, in its appellate jurisdiction, remanded the matter to the district court for findings relative to Officer Henry's observations.

On remand, the district court included a lengthier statement of its factual findings, but again denied the motion to suppress based upon Officer Henry's observation of erratic driving coupled with the anonymous tip. Cline again appealed the ruling to the circuit court, continuing to argue that there was no

articulable suspicion to support the traffic stop and that the district court failed to identify specific acts of abrupt starts or speed changes to support its findings.

Agreeing with Cline, the circuit court reversed the district court's ruling and held that the evidence obtained as a result of the traffic stop should have been suppressed. The court held that the anonymous tip, which it described as stale, and Officer Henry's observation of erratic driving without any further explanation, did not provide a particularized and objective basis for the officer to conclude that an offense had been or was about to be committed. The Commonwealth moved this Court for discretionary review, which a three-judge panel of this Court granted.

On appeal, the Commonwealth contends that the circuit court substituted its judgment for that of the district court and imposed an improper rule of law, citing *Collins v. Commonwealth*, 142 S.W.3d 113 (Ky. 2004). Cline continues to argue that the circuit court properly ruled that the evidence should have been suppressed due to the officer's lack of reasonable suspicion to conduct the stop.

Our standard of review from a denial of a motion to suppress is as follows: First, we must determine whether the findings of fact are supported by substantial evidence. If so, those findings are conclusive. Kentucky Rules of Criminal Procedure (RCr) 9.78; *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998). If not, the factual findings must be overturned as clearly erroneous. *Farmer v. Commonwealth*, 169 S.W.3d 50, 53 (Ky. App. 2005). "Based on those

findings of fact, we 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." *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky. App. 2002) (citation omitted). The parties do not appear to contest the findings of fact, so we shall assume that the findings were supported by substantial evidence of record and confine our analysis to whether the ruling on the suppression motion was correct as a matter of law.

"At a suppression hearing, the ability to assess the credibility of witnesses and to draw reasonable inferences from the testimony is vested in the discretion of the trial court." *Pitcock v. Commonwealth*, 295 S.W.3d 130, 132 (Ky. App. 2009), citing *Commonwealth v. Whitmore*, 92 S.W.3d 76, 79 (Ky. 2002). "On review, the appellate court should not reevaluate the evidence or substitute its judgment of the credibility of the witnesses for that of the jury." *Commonwealth v. Suttles*, 80 S.W.3d 424, 426 (Ky. 2002), citing *Commonwealth v. Jones*, 880 S.W.2d 544 (Ky. 1994). "In conducting our review, our proper role is to review findings of fact only for clear error while giving due deference to the inferences drawn from those facts by the trial judge." *Perkins v. Commonwealth*, 237 S.W.3d 215, 218 (Ky. App. 2007).

The motion to suppress in this case addressed an investigatory stop of Cline's motorcycle. In *Taylor v. Commonwealth*, 987 S.W.2d 302, 305 (Ky. 1998), the Supreme Court of Kentucky addressed the investigatory stop of automobiles, holding that:

> In order to justify an investigatory stop of an automobile, the police must have a reasonable articulable suspicion that the persons in the vehicle are, or are about to become involved in criminal activity. *United States v. Cortez*, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); *Commonwealth v. Hagan*, Ky., 464 S.W.2d 261 (1971). In order to determine whether there was a reasonable articulable suspicion, the reviewing appellate court must weigh the totality of the circumstances. *See Alabama v. White*, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990).

In *Johnson v. Commonwealth*, 179 S.W.3d 882, 884 (Ky. App. 2005), this Court addressed the same issue, setting forth the applicable law as follows:

> It is well settled that an investigative stop of an automobile is constitutional as long as law enforcement officials have a reasonable suspicion – supported by specific and articulable facts – that the occupant of the vehicle has committed, is committing, or is about to commit an offense. *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct.1391, 59 L.Ed.2d 660 (1979); *Collins v. Commonwealth*, 142 S.W.3d 113 (Ky. 2004). In addition to the requirement that the stop be justified at its inception, the police officer's subsequent actions must be reasonably related in scope to the circumstances that gave credence to the initial stop. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). "[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319, 1325, 75 L.Ed.2d 229, 238 (1983).

We recognize that reasonableness "is measured in objective terms by examining the totality of the circumstances." *Ohio v. Robinette*, 519 U.S. 33, 39, 117 S.Ct. 417, 421, 136 L.Ed.2d 347 (1996).

Both parties have cited to *Collins v. Commonwealth*, 142 S.W.3d 113 (Ky. 2004), in which the Supreme Court of Kentucky addressed the effect of an anonymous tip.

> 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. *Alabama v. White*, 496 U.S. 325, 332, 110 S.Ct. 2412, 2417, 110 L.Ed.2d 301, 310 (1990).

Collins, 142 S.W.3d at 115. In *Collins*, the Court held that the evidence should have been suppressed because the officer did not "independently observe any illegal activity, or any other indication that illegal conduct was afoot." *Id*. at 116. However, as the Commonwealth has pointed out, the Court went on to state:

> 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; however, when coupled with independent observations by police of suspicious conduct, such tips do carry the requisite reliability. *See Raglin v. Commonwealth*, Ky., 812 S.W.2d 494, 495 (1991) (determining that an anonymous tip accurately identifying the appellant's car and location did not in and of itself provide reasonable suspicion to conduct an investigatory stop; an adequate basis for the stop was, however, created once police also independently observed suspicious behavior).

Collins, 142 S.W.3d at 116.

In *Raglin*, by contrast, the Court made it clear that:

> the anonymous informer's tip, in and of itself, did not provide probable cause upon which to justify issuing a search warrant, nor did it provide a reasonable suspicion to make an investigatory stop of appellant or of his vehicle. It was not until after much of the information in the tip was corroborated by the police investigation and surveillance and until appellant and his Corvette returned to the scene, where he proceeded to open the Oldsmobile and transfer property to it, that there was an adequate basis for an investigatory stop. *Alabama v. White*, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990). With the combination of the foregoing events and the signal from the dog as to the presence of drugs, the probable cause requirement was met.

Raglin, 812 S.W.2d at 495.

Turning to the case before us, we must hold that the district court properly denied Cline's motion to suppress, and that the circuit court incorrectly reversed that ruling. To be sure, this matter was initiated by an anonymous tip identifying a person operating a motorcycle heading in the direction of Horse Cave wearing a black leather coat as being intoxicated. In and of itself, the tip would certainly not be reliable or provide any reason for Officer Henry to have stopped Cline. However, coupled with Officer Henry's observation of erratic driving, which he described as consisting of abrupt starts and speed changes, we must hold that there was sufficient reason for Officer Henry to initiate the investigatory stop. In reversing the district court's ruling denying the motion to suppress, the circuit court appears to have substituted its own judgment for that of the district court. The circuit court went too far in requiring the Commonwealth to provide "specific information concerning the nature, number or location of the abrupt starts and

speed changes." Furthermore, we disagree with the circuit court's statement that Officer Henry did not observe any traffic violation or criminal offense, or that he did not see anything that would constitute a danger to other individuals. Rather, Cline's erratic driving certainly could form the basis for Officer Henry's belief that he was driving impaired. Therefore, we hold that the district court properly denied Cline's motion to suppress and that the circuit court should have affirmed that ruling.

For the foregoing reasons, the opinion and order of the Hart Circuit Court is reversed, and this matter is remanded for reinstatement of the Hart District Court's judgment of conviction.

ALL CONCUR.

BRIEF FOR APPELLANT:

Mike Nichols
Hart County Attorney
Munfordville, Kentucky

Jack Conway
Attorney General of Kentucky
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Matthew T. Roberts
Munfordville, Kentucky