

DIVISION IV

ARKANSAS COURT OF APPEALS  
NOT DESIGNATED FOR PUBLICATION  
WENDELL L. GRIFFEN, Judge

CACR 06-178

OCTOBER 25, 2006

RANDALL KEVIN POE  
APPELLANT

APPEAL FROM THE WHITE  
COUNTY CIRCUIT COURT  
[NO. CR-2005-185]

V.

HONORABLE ROBERT EDWARDS,  
JUDGE

STATE OF ARKANSAS  
APPELLEE

AFFIRMED

Randall Poe appeals from his conditional guilty plea to drug-related charges, challenging the denial of his motion to suppress evidence seized in the search of his person and his vehicle. He argues that the investigating officer had no reasonable suspicion to conduct an investigatory stop; that the pat-down frisk was illegal because the officer had no reason to suspect that appellant was armed and presently dangerous; and that the illegality of the search was not cured by appellant's subsequent consent to remove items of contraband from his person. We affirm the denial of appellant's motion to suppress.

The warrantless search in this case occurred after Sergeant Preston Clark of the Narcotics Division of the White County Sheriff's Department received a telephone call from a confidential informant. The informant had previously provided reliable information to

Clark. He told the officer that he had “just been with” appellant; that appellant was on Highway 36 near Joy, Arkansas; and that appellant had nearly all of the components necessary to manufacture methamphetamine in his vehicle.

Clark, who was on Highway 36, approximately five miles from Joy when he received the call, proceeded to Joy. He knew the type of truck that appellant drove because he had made contact with appellant in another matter approximately one month before. Clark spotted appellant’s truck parked beside an air pump at a gas station.

The officer parked in front of appellant’s truck and walked to the driver’s side of the vehicle. As he walked by he looked into the truck. In plain view behind the driver’s seat, Clark saw a Tupperware container with plastic tubing and coffee filters. As he proceeded around the truck, Clark saw a gallon container can of camp fuel in the back of the truck.

Clark approached appellant as he (appellant) was lying down putting air in one of the truck’s tires. According to Clark, the following exchange then took place:

Mr. Poe stood up and I asked him if – I asked him if he had any lab components in his truck. And he looked at me and I thought he was going to fall down when I asked him. He became very nervous and just – I mean, started shaking almost uncontrollably. And I – you know, I was nice and he was nice. And I told him, I said, look, you need to calm down. It’s okay. And I said, do you have any weapons on you? And he said that he had a knife in his back pocket, and he pulled his shirt back. I got the knife and I – I set it on the back of the truck. But I asked him if he had any other weapons. He said he did not. I began to pat him down and he had just all kinds of stuff that I could feel in his pockets, bulging out of his pockets.

...

I asked him, I said, Kevin, do you mind taking the stuff out of your pockets? And he said “no” and he — the first thing he pulls out is a syringe. And he starts pulling

other stuff out of his pocket. Well, I noticed when I patted him down he still had other items on him. And I just asked him, I said, “What’s in your shirt?” And he just pulled it out and opened it up and it was a Marlboro container, and it had stained coffee filters in it on the top and what looked to be, you know, like phosphorous on the top, right on the top. So I just sat it down and at that time, I placed him — or I told him [that] he was under arrest.

When Clark was asked by the trial court why he conducted the pat-down search, the officer replied:

For weapons. He already said that he had one knife on him, and making contact with him, I — he from what I remember was on parole at the time. You know it was for my safety because when I asked him if he had any lab components, he was just — he was either going to fall down or run off in my eyes, the way he looked.

Clark also testified that, in his mind, a knife was not a weapon and was not a concern because “everybody has a knife.” The officer admitted that he was going to pat appellant down regardless of what appellant handed him. Clark further admitted that in his affidavit, he stated that appellant had “several unidentifiable objects in his pocket.” He said that at the point when appellant began acting nervous, “I knew at that point that — that there was — the information I received, the items that I had seen, his actions, and then I patted him down, he had more things on him.” Finally, Clark testified that he simply asked appellant to take the items out of his pockets but did not order him to do so. He said that appellant voluntarily produced the items from his pockets.

Based on the items that were on appellant’s person, he was arrested for possession of drug paraphernalia. The subsequent search of his vehicle yielded evidence of drug manufacture, for which he was charged with criminal attempt to manufacture a Schedule II

controlled substance (methamphetamine). Appellant thereafter filed a motion to suppress, which the trial court denied on the grounds that the officer's initial inquiries were proper and that the protective frisk was permissible, given appellant's nervousness and the fact that he had one weapon on his person. The trial court also concluded that the search of appellant's vehicle was a permissible search incident to his valid arrest. Appellant subsequently entered a conditional guilty plea; he was sentenced to serve 108 months on each charge, with the two sentences to run concurrently.

### *III. Reasonable Suspicion to Detain*

Appellant first argues that the initial detention was illegal because the confidential informant was not reliable and because the officer had no reason to believe that appellant had committed or was about to commit a felony. In reviewing the denial of a motion to suppress, we conduct a *de novo* review based on the totality of the circumstances, reviewing findings of historical fact for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the trial court and proper deference to the trial court's findings. *Summers v. State*, 90 Ark. App. 25, \_\_\_ S.W.3d \_\_\_ (2005). The trial court's ruling will not be reversed unless it is clearly against the preponderance of the evidence. *Id.* We will defer to the trial court in assessing the credibility of witnesses. *Id.*

We agree with the trial court that the initial detention in this case was permissible. Pursuant to Arkansas Rule of Criminal Procedure 3.1, an officer who is lawfully present in

any place may stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit a felony. In turn, Rule 2.1 defines “reasonable suspicion” as a “suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion.” The validity of such an investigatory stop depends upon whether, under the totality of the circumstances, the police have specific, particularized, and articulable reasons indicating that the person or vehicle may be involved in criminal activity. *Johnson v. State*, 333 Ark. 673, 972 S.W.2d 935 (1998).

The existence of a reasonable suspicion must be determined by an objective standard, and due weight must be given to the “specific reasonable inferences” an officer is entitled to derive from the situation in light of his experience as a police officer. *McConnell v. State*, 85 Ark. App. 77, 146 S.W.3d 370 (2004). Further, pursuant to Ark. Code Ann. § 16-81-203(1)(3)(4)(9) (Repl. 2005), factors to be considered in determining whether the officer had reasonable suspicion include the demeanor of the suspect, any knowledge the officer may have of the suspect’s background or character, whether the suspect is carrying anything and what he is carrying, and any information received from third persons, whether known or unknown.

Appellant maintains that Officer Clark had no specific, particularized, and articulable reason to believe that he had committed or was about to commit a felony because the

officer's only basis for approaching him was the unreliable information received from the confidential informant. Appellant also argues that because the items seen in plain view may have been present for lawful reasons, their presence in his vehicle cannot be coupled with his nervousness to "bootstrap" a finding of reasonable suspicion.<sup>1</sup>

We hold that the trial court did not err in determining that the confidential informant was reliable. When reasonable suspicion is based solely on a citizen-informant's report, the three factors in determining reliability are (1) whether the informant was exposed to possible criminal or civil prosecution if the report is false, (2) whether the report is based on personal observations of the informant, and (3) whether the officer's personal observations corroborated the informant's observations. *Summers, supra*.

Here, all of the factors were met. The informant could have easily been prosecuted had the information proven to be incorrect. Further, the report was based on the informant's personal observations because he told Clark that he had "just been with" appellant and that the items to manufacture methamphetamine were in appellant's vehicle. The officer then drove straight to Joy, a distance of only about four or five miles, when he saw appellant's truck at a gas station. Finally, before the officer even spoke with appellant, he corroborated

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<sup>1</sup>He further asserts that whether the officer had "reasonable suspicion" should be measured at the time the officer received the telephone call from the informant. However, this argument is not supported by any authority and would render § 16-81-203 meaningless, because some of the factors listed in that statute, such as the suspect's demeanor, would not be known until an officer makes contact with a suspect.

the informant's information because he saw evidence of meth lab components in plain view as he approached appellant's vehicle.

Simply because the confidential informant had not specifically provided information to Clark relating to a meth lab on a prior occasion does not mean that the informant was not reliable; to the contrary, despite Clark's mistaken belief that the information was not reliable for that reason, he plainly testified that the informant had provided information to him on a prior occasion that had been proven to be correct.

Appellant cites to *Summers, supra*, because the *Summers* court reversed the denial of the defendant's motion to suppress where the police made a stop based solely on a report from a citizen that the defendant had purchased a large quantity of matches, and the defendant thereafter consented to the search of his vehicle, which revealed items leading to drug-related charges. However, in *Summers*, the officers were not in a lawful position because they had illegally stopped the *Summers* defendant. In the instant case, by contrast, Clark was lawfully present when he approached appellant's vehicle because he was investigating a crime based on a tip from a reliable informant. *See Frette v. City of Springdale*, 331 Ark. 103, 959 S.W.2d 734 (1998).<sup>2</sup>

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<sup>2</sup>In any event, even if the officer had not received a tip regarding a crime, he merely walked by appellant's vehicle, which was parked in a public parking lot – something the officer could have done even in the absence of information by the confidential informant.

Upon investigation, the officer viewed the container of plastic tubing and coffee filters and the camp fuel in plain sight. While those items may also be used for innocent purposes, the viewing of those items, in conjunction with the information given by the reliable confidential informant that appellant presently had nearly all of the components needed to manufacture methamphetamine, gave rise to a specific, particularized suspicion, beyond bare conjecture, by which the officer could further question appellant regarding his activities. *See Kilpatrick v. State*, 322 Ark. 728, 912 S.W.2d 917 (1995). On these facts, we hold that the initial detention was permissible under Rule 3.1.

## *II. Terry Frisk*

We further hold that the patdown frisk of appellant's person was proper. Arkansas Rule of Criminal Procedure 3.4 authorizes police officers to conduct protective frisks for officer safety, in accordance with *Terry v. Ohio*, 392 U.S. 1 (1968). This rule provides that if a law enforcement officer who has detained a person under Rule 3.1 reasonably suspects that the person is armed and presently dangerous to the officer or others, the officer may search the outer clothing of the person and the immediate surroundings for, and may seize, any weapon or other dangerous thing which may be used against the officer or others. Rule 3.4 further provides that a protective search under that rule may be no more extensive than is reasonably necessary to ensure the safety of the officer or others. The test for determining whether a *Terry* frisk is reasonable is an objective test—whether a reasonably prudent person in the officer's position would be warranted in believing that his safety or the safety of others



was in danger. *Leopold v. State*, 15 Ark. App. 292, 692 S.W.2d 780 (1985). The officer's belief that the suspect is armed and dangerous must be based on specific and articulable facts. *Pettigrew v. State*, 64 Ark. App. 339, 984 S.W.2d 72 (1998).

Appellant maintains that the search was a pretext to search for contraband and that Clark pointed to no evidence that appellant was armed or posed a threat to the officer's safety. He notes that Clark did not consider the knife a weapon and was not concerned about the knife because, in the officer's words, "everybody has a knife." Nonetheless, we hold that the frisk was objectively reasonable due to appellant's behavior, his possession of a weapon, and the nature of the crime involved.

When Clark asked appellant if he had any meth lab components in his truck, appellant became nervous and began "shaking almost uncontrollably." Clark asked appellant if he had any weapons; appellant confirmed that he had a knife in his back pocket and allowed the officer to pull the knife from his pocket. The officer then asked if appellant had any other weapons and appellant said, "no." At this point, the officer conducted the frisk and felt bulges in appellant's pants pockets that he could not identify as either contraband or a weapon. Clark then asked appellant if he would mind taking the items out of his pockets; appellant said, "no" and took out a syringe and other items. The officer then asked appellant what was in his shirt. Appellant removed a Marlboro container that held coffee filters that appeared to be stained with phosphorous (which is used in manufacturing methamphetamine). The officer then placed appellant under arrest for possession of drug

paraphernalia; the subsequent search of his vehicle revealed items on which the attempt to manufacture charge was based.

On these facts, the dispositive question is: would a reasonably prudent person in the officer's position be warranted in believing that a frisk was necessary to secure his safety where: 1) the officer was acting on a reliable informant's tip that the suspect presently had the components of a meth lab in his vehicle; 2) the officer saw items consistent with meth manufacture in plain view in the vehicle; 3) the suspect, upon questioning about meth lab components in his vehicle began to "shake almost uncontrollably," to the point the officer thought he would either pass out or flee; 4) where the suspect admitted to having a knife, but insisted that he had no other weapons?

We hold that, under these circumstances, a reasonably prudent person would believe that a protective frisk was necessary to secure his safety. The suspect's possession of an actual weapon is a compelling reason to conduct a protective frisk. Even though appellant denied that he had any other weapons on him, the officer was not required to believe him, especially when his denial was coupled with nervous behavior, the presence of another weapon, the information from the confidential informant, and the evidence found in plain view that was consistent with components of a meth lab. While nervousness alone does not provide reasonable suspicion, it is a factor to consider in determining whether reasonable suspicion exists. *Davis v. State*, 351 Ark. 406, 94 S.W.3d 892 (2003). Moreover, even if

Clark may not have subjectively felt threatened by the presence of a knife, the test is not what Clark *personally* felt, but what a reasonable person in Clark's situation would have felt.

Finally, because we hold the initial detention and the protective frisk was proper, we do not address appellant's argument that his subsequent consent to search did not cure any illegality of the search. However, we note that the search was otherwise permissible as a search incident to appellant's arrest. Given the information by the reliable informant that appellant had nearly all of the components needed to manufacture meth in his vehicle, when the officer saw items in plain view that are used to manufacture meth, he had reasonable cause at that point to arrest appellant, if not for attempted manufacture, then for possession of drug paraphernalia, pursuant to Ark. Code Ann. § 5-64-403 (Repl. 2005).

Accordingly, at that point, the officer could have conducted a search of appellant's person and his vehicle incident to his arrest. The fact that the search preceded the arrest would be of no moment because reasonable cause to arrest existed prior to the search and because the arrest was substantially contemporaneous with the search. *See Blockman v. State*, 69 Ark. App. 192, 11 S.W.3d 562 (2000)(finding a valid search incident to arrest, even though the search preceded the suspect's formal arrest, where the police had probable cause to arrest the suspect based on a known informant's information regarding the suspect's drug possession, and where the police arrested the suspect after conducting a *Terry* frisk that revealed possession of crack). Thus, even if the search was not permissible under *Terry*, it was permissible as a search incident to arrest.

Affirmed.

VAUGHT and ROAF, JJ., agree.