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TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001085-MR

LLOYD A. PRIDDY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NO. 99-CR-002681

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: GUDGEL, JOHNSON AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Lloyd A. Priddy has appealed from a judgment of conviction and sentence entered by the Jefferson Circuit Court on April 30, 2001, following his conditional plea of guilty to the charges of illegal possession of a controlled substance in the first degree,[1] illegal possession of drug paraphernalia,[2] no motor vehicle insurance,[3] and being a persistent felony offender

[1]Kentucky Revised Statutes (KRS) 218A.1415.

[2]KRS 218A.500.

[3]KRS 304.39-080.

in the second degree (PFO II).[4] Having concluded that a critical finding of fact relied upon by the trial court in denying the motion to suppress was clearly erroneous, we must reverse and remand.

This case arose on September 4, 1999, when Officer Michael Koenig of the Jefferson County Police Department was responding to a domestic violence call on Third Street in Louisville, Jefferson County, Kentucky. While Officer Koenig was driving along Outer Loop Road en route to the disturbance, he was waived over by an anonymous person. The tipster informed Officer Koenig that a narcotics transaction was occurring in the K-Mart parking lot at 191 Outer Loop Road "as we spoke."[5] The tipster told Officer Koenig a narcotics dealer would be selling drugs to an unknown buyer; the dealer would be a white male approximately 6 feet tall, weighing approximately 150 to 170 pounds, with curly, shoulder length, black hair and he would be driving a late 1970's, black, Ford, pickup truck with primer on the hood.

After receiving this information, Officer Koenig proceeded approximately 1/2 mile to the K-Mart parking lot. As

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[4]KRS 532.080(2). The judgment of conviction and sentence erroneously states that Priddy's sentence was enhanced as a PFO I. The plea agreement, which was signed by the Assistant Commonwealth's Attorney, Officer Koenig, Priddy and his attorney, calls for amending the PFO I charge to PFO II. The trial court entered an order on January 30, 2001, approving this amended charge.

[5]This quote was from Officer Koenig's testimony. "As we spoke" constituted Officer Koenig's summary of the time of the drug sale. It was not a quote from the tipster.

Officer Koenig drove through the K-Mart parking lot, he observed a man driving a pickup truck; the man and the truck both fit the description given by the tipster. As the truck began to leave the K-Mart parking lot, Officer Koenig followed the truck, activated his emergency equipment, and called for a backup unit. Officer Koenig testified that after he activated his emergency equipment he observed Priddy "making frantic moves as if he was trying to conceal something." Priddy immediately stopped his pickup truck; but Officer Koenig waited for the backup unit to arrive before he exited his patrol car. Officer Steve Bailey arrived in only ten to 20 seconds.

Officer Koenig and Officer Bailey approached Priddy's vehicle and asked Priddy to exit the vehicle. Upon Priddy exiting the vehicle, the officers noticed a large bulge in Priddy's front pants' pocket, in the groin area. Officer Bailey asked Priddy about the bulge, and Priddy advised that it was a crack pipe. Priddy was escorted by both police officers to a nearby grassy area where Priddy unbuttoned his pants and gave the officers the crack pipe, which was wrapped in a red cloth. Officer Bailey then asked Priddy if he had any other drugs on him, and Priddy stated that he had some crank.[6] After the officers examined the crack pipe and observed cocaine residue, they arrested Priddy and informed him of his Miranda[7] rights.

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[6]"Crank" is a slang term for the drug methamphetamine.

[7]Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d (continued...)

Priddy was then transported to the police station where a Marlboro cigarette box containing a large piece of crank was seized.

On November 3, 1999, Priddy was indicted by a Jefferson County grand jury for trafficking in methamphetamine in violation of KRS 218A.1435, a Class C felony; illegal possession of drug paraphernalia; no motor vehicle insurance; and being a persistent felony offender in the first degree (PFO I).[8] Priddy's motion to suppress the contraband as evidence was denied by the trial court at the conclusion of a hearing held on November 17, 2000. Priddy subsequently entered a conditional guilty plea to the charges as amended and a judgment of conviction and sentence was entered on April 30, 2001. Priddy received a prison sentence of one year on his conviction for illegal possession of a controlled substance in the first degree and 12 months on his conviction for illegal possession of drug paraphernalia, with the sentences to run concurrently. The one-year felony sentence was enhanced to five years as a result of the PFO II conviction. Priddy was also fined $1,000.00 on his conviction for not having motor vehicle insurance. This appeal followed.

Priddy claims that the trial court erred by denying his motion to suppress because his constitutional rights under the Fourth Amendment to the United States Constitution and Section 10

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[7](...continued)
694 (1966).

[8]KRS 532.080(3).

of the Kentucky Constitution were violated when the police officers searched him without having reasonable articulable suspicion to support the investigatory stop of his vehicle and that the search exceeded the narrow scope of a protective search as authorized by Terry v. Ohio.[9] [10] Priddy argues that the police did not have reasonable articulable suspicion to justify an investigatory stop of him because the anonymous tip was so lacking in specific details and predictive information that it failed to rise to the level of reasonable suspicion.

This Court recently addressed this issue in Stewart v. Commonwealth,[11] as follows:

> Generally, the police may not search an individual without a warrant unless it can be shown that the search falls within one of the recognized exceptions to the rule. The recognized exceptions include: (1) a consensual search; (2) a plain view search; (3) a search incident to an arrest; (4) a probable cause search; (5) a search based on exigent circumstances; and (6) an inventory search. However, in Terry v. Ohio, the United States Supreme Court balanced individual liberty interests and the public safety interest in recognizing a limited exception to the warrant requirement by sanctioning both investigatory stops and

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[9]392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

[10]Priddy also argues that his right to not incriminate himself under the Fifth Amendment to the United States Constitution and Section 11 of the Kentucky Constitution was violated when he was questioned by the police without being advised of his rights. However, this issue was not raised before the trial court and it was not preserved for appellate review pursuant to the conditional guilty plea. See Kentucky Rules of Criminal Procedure (RCr) 8.09.

[11]Ky.App., 44 S.W.3d 376, 379-80 (2000).

> restricted pat-down searches of suspects. Police officers may briefly detain an individual on the street, even though there is no probable cause to arrest him, if there is a reasonable suspicion that criminal activity is afoot. The existence of a reasonable articulable suspicion or probable cause is based on an analysis of all the facts and the totality of the circumstances. The standard for reasonable suspicion is less demanding than the grounds for probable cause.
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> Our standard of review of a circuit court's decision on a suppression motion following a hearing is twofold. First, the factual findings of the court are conclusive if they are supported by substantial evidence. The second prong involves a de novo review to determine whether the court's decision is correct as a matter of law. Kentucky has adopted the standard of review approach articulated by the Supreme Court in Ornelas v. United States,[12] where the Court said that:
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> > [A]s a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal. Having said this, we hasten to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers [citations omitted].[13]

Stewart involved a situation similar to the case before us, but in Stewart this Court affirmed the trial court's determination that the specific details and predictive

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[12]517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996).

[13]Stewart, supra at 379-80.

information provided by the tipster and corroborated by the police "exhibited sufficient indicia of reliability to satisfy the lesser reasonable suspicion standard to justify an investigatory stop."[14] The tipster, an anonymous telephone caller, had informed the police that Stewart and a female companion, Barbara Grubbs, had just purchased crack cocaine and that they would be arriving in Cadiz at approximately 10:00 p.m. The caller stated that the pair would be traveling in Grubb's vehicle from the direction of Hopkinsville, and that Stewart would be carrying the cocaine in his mouth.

The police spotted Grubb's vehicle traveling westward from the direction of Hopkinsville into Cadiz on Main Street. Shortly after the police officers began to follow the suspects, they pulled off the roadway into the parking lot of a convenience grocery store. The officers watched Stewart exit the car and walk across the street to a motel. The officers then drove their vehicle into the parking lot of the motel and asked Stewart to approach them. One of the officers asked Stewart if he could search him, but Stewart refused to consent. An officer then asked Stewart what he had in his waistband. Stewart pulled out an object, and as he handed it to the officer, he told him that it was his pill bottle. The officer then asked Stewart to open his mouth, and he complied. Because the officer had some difficulty at first seeing inside Stewart's mouth, he asked him

[14]Stewart, supra at 382.

to open his mouth again. This time the officer saw an object he believed to be crack cocaine sticking to the roof of Stewart's mouth, but before the officer could retrieve it, Stewart had swallowed the object. Stewart later told the officers that the object was cocaine. The police officers arrested Stewart on several drug charges; and he eventually pled guilty pursuant to a conditional plea to three drug possession charges.

Stewart argued on appeal that the circuit court had erred by denying his motion to suppress because the search was conducted without reasonable suspicion or probable cause and that it exceeded the narrow scope for a protective search. In affirming Stewart's conviction, this Court concluded that a substantial portion of the information supplied by the anonymous caller was verified by the personal observations of the police officers so as to create a reasonable suspicion that the suspect was in possession of illegal drugs. In its decision this Court thoroughly discussed the differences in the two leading United States Supreme Court cases of Alabama v. White,[15] and Florida v. J. L.[16]

The case before us also turns on the application of White and J. L. In J. L., the United States Supreme Court in unanimously holding the search to be unconstitutional discussed the lack of predictive information in that case as compared to

[15]496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990).

[16]529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000).

the police officers' corroboration of predictive information in White. The Court stated:

> In the instant case, the officers' suspicion that J. L. was carrying a weapon arose not from any observations of their own but solely from a call made from an unknown location by an unknown caller. Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, see Adams v. Williams, 407 U.S. 143, 146-147, 32 L.Ed.2d 612, 92 S.Ct. 1921 (1972), "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity," Alabama v. White, 496 U.S., at 329, 110 L.Ed.2d 301, 110 S.Ct. 2412. As we have recognized, however, there are situations in which an anonymous tip, suitably corroborated, exhibits "sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop." Id., at 327, 110 L.Ed.2d 301, 110 S.Ct. 2412. The question we here confront is whether the tip pointing to J. L. had those indicia of reliability.
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> In White, the police received an anonymous tip asserting that a woman was carrying cocaine and predicting that she would leave an apartment building at a specified time, get into a car matching a particular description, and drive to a named motel. Ibid. Standing alone, the tip would not have justified a Terry stop. 496 U.S., at 329, 20 L.Ed.2d 889, 110 S.Ct. 2412. Only after police observation showed that the informant had accurately predicted the woman's movements, we explained, did it become reasonable to think the tipster had inside knowledge about the suspect and therefore to credit his assertion about the cocaine. Id., at 332, 20 L.Ed.2d 889, 110 S.Ct. 2412. Although the Court held that the suspicion in White became reasonable after police surveillance, we regarded the case as borderline. Knowledge about a person's future movements indicates some familiarity with that person's affairs, but having such knowledge does not necessarily imply that the

informant knows, in particular, whether that person is carrying hidden contraband. We accordingly classified White as a "close case." Ibid.

The tip in the instant case lacked the moderate indicia of reliability present in White and essential to the Court's decision in that case. The anonymous call concerning J. L. provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility. That the allegation about the gun turned out to be correct does not suggest that the officers, prior to the frisks, had a reasonable basis for suspecting J. L. of engaging in unlawful conduct: The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search. All the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J. L. If White was a close case on the reliability of anonymous tips, this one surely falls on the other side of the line.

Florida contends that the tip was reliable because its description of the suspect's visible attributes proved accurate: There really was a young black male wearing a plaid shirt at the bus stop. Brief for Petitioner 20-21. The United States as amicus curiae makes a similar argument, proposing that a stop and frisk should be permitted "when (1) an anonymous tip provides a description of a particular person at a particular location illegally carrying a concealed firearm, (2) police promptly verify the pertinent details of the tip except the existence of the firearm, and (3) there are no factors that cast doubt on the reliability of the tip . . . ." Brief for United States 16. These contentions misapprehended the reliability needed for a tip to justify a Terry stop.

An accurate description of a subject's readily observable location and appearance is

> of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person. Cf. 4 W. LaFave, Search and Seizure § 9.4(h), p. 213 (3d ed. 1996) (distinguishing reliability as to identification, which is often important in other criminal law contexts, from reliability as to the likelihood of criminal activity, which is central in anonymous-tip cases).[17]

In the case sub judice, the trial court did not enter any written findings of fact in support of its order denying the motion to suppress, but instead it relied upon its oral findings from the bench. However, there was no evidence of record to support one of the trial court's critical findings of fact. The trial judge in distinguishing this case from J. L., erroneously stated:

> This case has more detail from the beginning. First, it involves a vehicle that was carefully described as a late 70's black Ford truck, primer on the hood. There was a description of the male as a white male subject, six feet tall, I think 150 to 170 pounds is what you said, I didn't get all the poundage written down, but shoulder length hair. That there would be a narcotics transaction at the K-Mart parking lot at 191 Outer Loop. So this officer goes and is on the Winn-Dixie parking lot and sees a vehicle matching that description and also sees him leaving the location after meeting up with another subject. So by his own observation he saw something that could indeed be the narcotics transaction. I think that had he

[17] J. L., 529 U.S. at 270-72, 146 L.Ed.2d at 260-61.

> driven to the parking lot and simply seen the truck, even though its more detailed that it was in the Supreme Court case of Florida v. J. L., I might be inclined to agree with you Mr. Conkin if he just saw the truck and followed the truck and stopped, but his testimony was that he observed him leaving the location after he had met up with another person, and then he followed him and stopped him and I think that that was appropriate [emphases added].

The above factual finding that Officer Koenig observed Priddy "leaving the location after meeting up with another subject" was clearly erroneous. The Commonwealth has conceded as much in its brief when it states that Officer Koenig not only "testified that he did not see any narcotics being sold" but also that "he did not testify one way or the other about appellant meeting up with another subject." Simply put, if Officer Koenig did not testify that Priddy met with another person, then there was not substantial evidence in the record to support the trial court's factual finding that such a meeting occurred, and such a finding was clearly erroneous.[18] Since it is obvious from the

[18]The trial court made reference to a police citation that had been filed in the record as support for its finding that Officer Koenig saw Priddy "leaving the location after meeting up with another subject." Unfortunately, the citation was not filed as an exhibit at the suppression hearing and Officer Koenig did not testify concerning the citation's reference to a meeting. The citation, which apparently was completed and signed by Officer Koenig, did make the following reference to a meeting, "Officer went to above location and subject matching description was just leaving that location after meeting up with another subject." The citation made no further reference to this other subject such as a description of the other subject or the vehicle the subject was using or if any questions were asked Priddy concerning the identity of the other subject and the purpose of their meeting. The information concerning the other subject that (continued...)

trial court's oral findings quoted above that the trial court relied heavily on this clearly erroneous factual finding in reaching its legal conclusion, we must hold that the trial court erred by ruling that based upon an analysis of all the facts and the totality of the circumstances that there was a reasonable articulable suspicion that criminal activity was afoot.

Without Priddy having met with another person in the parking lot where it would have been easy for a drug transaction to have occurred, the remaining facts in this case fail to support a reasonable articulable suspicion that a drug transaction was about to occur or had just occurred. The remaining facts consist of nothing more than a detailed description of Priddy and his vehicle at the K-Mart parking lot. These facts did not constitute the type of specific details and predictive information corroborated by the police that exhibited sufficient indicia of reliability to constitute reasonable articulable suspicion sufficient to justify an investigatory stop. Without Priddy having actually met with a potential drug buyer in the parking lot, this case very well could have involved

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[18](...continued)
was written on the citation raises more questions than it answers. In the Commonwealth's response to the order of discovery, the Assistant Commonwealth's Attorney in providing the bill of particulars pursuant to RCr 6.22 and James v. Commonwealth, Ky., 482 S.W.2d 92 (1972), included specific details of the date, time, and location of the alleged offense including many of the details provided by the tipster, the actions taken by Officers Koenig and Bailey, the evidence seized, and the names of all witnesses. Conspicuously absent from these details is any reference to Priddy "meeting up with another subject."

nothing more than an unknown person telling the police of the detailed description of a man who had been shopping at K-Mart and the vehicle he was using. As the trial court acknowledged in its findings, a critical detail in support of Officer Koenig having reasonable articulable suspicion that a drug sale had occurred at the K-Mart parking lot was the suspected drug dealer meeting with a potential buyer; without the meeting the anonymous tip lacked the specific detail and predictive information sufficient to support a reasonable articulable suspicion that a drug transaction had occurred. Accordingly, based on the evidence presented at the suppression hearing, we must reverse the trial court's denial of the motion to suppress since the case before us is more similar to J. L. than it is to White or Stewart. To paraphrase the United States Supreme Court in J. L., the case at bar surely falls on the J. L. side of the line.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is reversed and this matter is remanded to allow Priddy to withdraw his guilty plea and for entry of an order suppressing the evidence seized pursuant to the investigatory stop.

ALL CONCUR.

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