RENDERED: SEPTEMBER 5, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000999-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
INDICTMENT NO. 06-CR-01212-01 AND 06-CR-01212-02

BRITTANY MCKINNEY and
JAMES PRATER — APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART AND
VACATING AND REMANDING IN PART

** ** ** ** **

BEFORE: NICKELL AND THOMSON, JUDGES; ROSENBLUM,[1] SPECIAL JUDGE.

ROSENBLUM, SPECIAL JUDGE: The Commonwealth of Kentucky appeals the May 7, 2007, opinion and order of the Fayette Circuit Court granting Brittany McKinney's and James Prater's motions to suppress evidence seized from their

[1] Retired Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

vehicle as well as any statements made by McKinney and Prater.[2] We affirm in part, reverse in part and vacate and remand in part.

On April 27, 2006, Detective David Bradley, a police officer with the University of Kentucky police department, was contacted by an anonymous caller regarding possible drug activity at some apartments on campus. A few hours later the caller, David Wickstrom, called Bradley again and made arrangements to meet him to discuss the allegations. Wickstrom and his girlfriend, Angelica Lea, met with Bradley and provided him with the following information: Lea lived with McKinney; Lea knew McKinney and her boyfriend used drugs; Lea and Wickstrom had observed McKinney possessing plastic baggies earlier in the day; Lea and Wickstrom had observed a high volume of traffic in and out of the apartment; Lea and Wickstrom saw McKinney and Prater exchange duffel bags earlier that day and Lea and Wickstrom suspected McKinney and Prater of drug trafficking; and Prater and McKinney drove a blue vehicle.

After Lea gave Bradley permission to search her bedroom and the apartment common areas, Bradley contacted Detective McPhearson to meet him at the apartment. McPherson is a narcotics investigator and drug dog handler. When Bradley arrived at the apartment complex, he saw Wickstrom pointing to a blue car containing a man and a woman. Wickstrom then told Bradley "that's the vehicle there." Bradley decided to follow the vehicle. Bradley would later testify that he

[2] Although Prater contends that he made no statements that would warrant suppression, we note that the trial court's order suppressed the statements, if any, made by *both* McKinney and Prater.

believed the driver of the blue vehicle recognized his vehicle as a police vehicle because it sped through the parking lot at a high rate of speed, approximately 30 miles per hour, despite speed bumps and the posted speed limit of 15 miles per hour. When McPhearson approached the apartment complex, he saw Bradley's vehicle following another vehicle and saw Bradley point to the blue vehicle. McPhearson then turned his vehicle around and attempted to catch up to Bradley.

Bradley would later testify that he initiated his car's emergency equipment and cut off the blue car being driven by Prater because he felt that Prater was trying to get away from him. Bradley got out of his vehicle and displayed his badge. Bradley testified that Prater was making "furtive movements" with his hands.[3] Concerned that Prater might have a weapon, Bradley drew his gun and ordered Prater and McKinney out of the car. Bradley testified that he conducted a pat down for weapons[4] and placed them on the side of the road. The testimony of the parties is conflicting as to whether or not Prater or McKinney were handcuffed. Bradley also visually checked the front seat and the front console area for weapons.

A few moments after the vehicle was stopped, Detective McPherson arrived. He ran "Gus" the drug dog around the car and Gus alerted at the passenger side of the car. The vehicle was searched and McPherson discovered cocaine in McKinney's purse, which was located on the floor of the vehicle. McKinney claimed that the cocaine was not hers and had been placed in her purse

[3] McKinney would later testify that Prater was hiding drugs in McKinney's purse.
[4] It is unclear whether Bradley conducted the pat down on both parties or only on Prater.

by Prater. McPherson also found marijuana in the vehicle. McKinney and Prater were then arrested and taken to the University of Kentucky police headquarters. McPherson testified that he read McKinney her Miranda rights from a card that he carried and that she waived them. Bradley also testified that before he interviewed McKinney he inquired if she remembered her rights and she stated that she did. McKinney testified the police never read her rights to her.

McKinney and Prater each filed motions to suppress evidence obtained from the search of the car they were traveling in at the time of their arrest and any statements taken from them after their arrest.[5] Both parties argued that the search of the vehicle was made without a warrant, without probable cause, without consent and therefore in violation of their constitutional rights. The trial court found that the search was unlawful and suppressed the evidence seized from the vehicle as well as any statements made by both Prater and McKinney, if any, following their arrest. This appeal followed.

On appeal, the Commonwealth argues that the trial court erred in suppressing the evidence because there was reasonable suspicion to make an investigatory stop of the vehicle based upon the citizen informants' and the officer's observations. The Commonwealth also argues that there were grounds for a valid traffic stop and whether or not the stop was pretextual is irrelevant.

[5] Because only McKinney's record was submitted to this Court, we were only able to confirm the requests made in McKinney's motion to suppress. The information regarding Prater's motion to suppress is taken from the May 7, 2007, opinion and order of the Fayette Circuit Court.

When reviewing a trial's courts admission or suppression of evidence, the Court utilizes a two-part evaluation. Factual findings are conclusive if they are supported by substantial evidence. RCr 9.78.[6] *See also Morgan v. Commonwealth*, 189 S.W.3d 91 (Ky. 2006). The trial court's application of the law to the facts is reviewed *de novo*. *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky. 2002).

The Commonwealth first argues that there was reasonable suspicion to make an investigatory stop of the car based upon the citizen informants' and the officer's observations. The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. There are three types of interaction between police officers and citizens: consensual encounters, temporary detentions typically referred to as *Terry* stops, and arrests. *Baltimore v. Commonwealth*, 119 S.W.3d 532, 537 (Ky.App. 2003). A *Terry* stop is an investigatory stop which is merely a temporary detention of the citizen so as to enable the police officer to complete his investigation without fear of violence or physical harm. *Commonwealth v. Whitmore*, 92 S.W.3d 76, 79. The purpose of the limited search is to allow the officer to pursue the investigation without fear of violence, not to discover evidence of a crime. *Id.* The protection against unreasonable search and seizure, as provided by the Fourth Amendment, applies only to *Terry* stops and arrests. *Baltimore*, 119 S.W.2d at 537.

> Evaluation of the legitimacy of an investigative stop involves a two-part analysis. First, whether there is a proper basis for the stop based on the police officer's awareness of specific and articulable facts giving rise to

[6] Kentucky Rules of Criminal Procedure.

> reasonable suspicion. Second, whether the degree of intrusion was reasonably related in scope to the justification for the stop.

Baltimore v. Commonwealth, 119 S.W.3d 532, 538 (Ky.App. 2003). Courts should consider the totality of the circumstances in determining if police had such a reasonable and articulable suspicion. *United States v. Arvizu*, 534 U.S. 266, 122 S.Ct. 744 (2002).

The Commonwealth outlines multiple factors which it claims gave Bradley a reasonable and articulable suspicion that McKinney and Prater had committed or were about to commit a crime. Those factors are: Lea said she knew McKinney and Prater used cocaine; Bradley verified that Lea roomed with McKinney; Lea and Wickstrom stated that there was a high volume of people in and out of the apartment; Lea and Wickstrom stated that McKinney and Prater had exchanged duffel bags that morning; Lea and Wickstrom witnessed McKinney and Prater with plastic baggies the day of the arrest; Lea and Wickstrom had stated that McKinney and Prater drove a blue car before Bradley encountered McKinney and Prater; Wickstrom indicated to Bradley that the blue car leaving the apartment parking lot was that belonging to McKinney and Prater, and the driver of the car acted suspiciously, as if trying to avoid an encounter with the police, by leaving the apartment parking lot at a high rate of speed.

The Commonwealth argues that an identified informant is entitled to a greater presumption of reliability and thus provides a reliable basis for reasonable

suspicion to warrant an investigatory stop. In support of this argument, the Commonwealth cites *Commonwealth v. Kelly*, which held, in relevant part:

> [i]n cases involving identifiable informants who could be subject to criminal liability if it is discovered that the tip is unfounded or fabricated, such tips are entitled to a greater "presumption of reliability" as opposed to the tips of unknown "anonymous" informants (who theoretically have "nothing to lose").

Commonwealth v. Kelly, 180 S.W.3d 474, 477 (Ky. 2005) (citation omitted). In the case at bar, Wickstrom and Lea were citizen informants who met in person with Bradley. Furthermore, they were in a position to observe the activity which they described to Bradley and they had also previously described the blue car that Prater and McKinney were operating. Lastly, Bradley believed that his police vehicle had been recognized by Prater and McKinney, resulting in them speeding away. Based upon the totality of the circumstances, we hold that there was reasonable suspicion to justify the investigative stop. *See Kelly, Id. See also Commonwealth v. Priddy*, 184 S.W.3d 501 (Ky. 2005).

We must next consider whether the degree of intrusion was reasonably related in scope to the justification for the stop. For the following reasons, we hold that it was. The use of a dog to sniff the outside of a vehicle for drugs during a lawful stop that reveals no information other than the location of an illegal substance does not violate the Fourth Amendment. *Illinois v. Caballes*, 543 U.S. 405,409, 125 S.Ct. 834, 838 (2005). When conducting an investigatory stop, a court may consider "whether the police diligently pursued a means of

investigation that was likely to confirm or dispel their suspicions quickly." *United States v. Sharpe*, 470 U.S. 675, 686, 105 S.Ct. 1568, 1575 (1985). The lapse of time between the stop of the vehicle and the utilization of the dog was no more than two minutes. Longer detentions have been upheld when police have performed a diligent investigation after a stop. *Id.* at 687 .

The Kentucky Supreme Court has also held:

> the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to affect it. This is because there is a substantial law enforcement interest in preventing the flight of a suspect in the event that incriminating evidence is found, in protecting the safety of the officers, and in the orderly completion of the search which is facilitated by the presence of the suspects.

Williams v. Commonwealth, 147 S.W.3d 1,6 (KY. 2004) (internal citation omitted). *See also Taylor v. Commonwealth,* 182 S.W.3d 521 (Ky. 2006) (holding that briefly handcuffing and detaining until the completion of an investigation constituted a seizure but not an arrest). Bradley testified that he drew his gun because he suspected that Prater and McKinney were trafficking drugs and also because Prater moved suspiciously after being stopped. Thereafter Gus alerted to the presence of narcotics, creating probable cause to search making a search warrant unnecessary. *Johnson v. Commonwealth*, 179 S.W.3d 882, 886 (Ky.App. 2005). It was not until the vehicle was searched and the drugs were discovered that Prater and McKinley were arrested. We find that Detective Bradley acted reasonably during the brief time that it took for him to ensure his safety, prevent

the flight of Prater and McKinley and complete his search in an orderly fashion. Accordingly we hold that the degree of intrusion was reasonably related in scope to the justification for the stop.

The Commonwealth next argues that there were also grounds for a valid traffic stop and that it does not matter whether the stop was pretexual. In support of its finding that the traffic stop was not valid, the trial court cited several reasons: the speed bumps in the apartment parking lot would have precluded speeding; Bradley failed to initiate his vehicle's emergency equipment at the time he alleges that Prater sped away from him; the time of day and high volume of traffic most likely made speeding difficult if not impossible; McPherson was unable to get any closer to Bradley than five to six cars away due to the heavy traffic; Bradley failed to request personal identification, registration or insurance from Prater or McKinney; and Bradley failed to issue a citation for speeding, fleeing or evading, or excessive window tinting (McKinney acknowledged excessive window tinting). The trial court is vested with the discretion to determine the credibility of witnesses and draw reasonable inferences from their testimony. *Commonwealth v. Whitmore*, 92 S.W.3d 76, 78 (Ky. 2002) *see also* RCr 9.78. We hold that substantial evidence supports the trial court's findings that this was not a valid traffic stop.

The trial court order further suppressed any statements made by either Prater or McKinney. McKinney's request to suppress these statements[7] relied

[7] Again, it is unclear to this Court whether Prater also moved to suppress any statements. If so, then these instructions would be applicable to him as well.

heavily on her argument that she was never given her *Miranda* warnings. *See Miranda v. Arizona*, 384 U.S. 436, 444-445, 16 L.Ed.2d 694, 707, 86 S.Ct. 1602 (1966). Our review of the trial court's order reveals that the issue of whether or not the *Miranda* warnings were ever issued was never resolved. Accordingly, this portion of the trial court's order is vacated and remanded for additional findings. Should the trial court determine that *Miranda* warnings were given, there must also be a determination made by the trial court as to the voluntariness of McKinney's statements.

For the foregoing reasons, the May 7, 2007, opinion and order of the Fayette Circuit Court is affirmed in part, reversed in part, and vacated and remanded in part in conformity with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Jack Conway
Attorney General of Kentucky

James C. Shackelford
Assistant Attorney General
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Bernard Pafunda
Lexington, Kentucky