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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002427-MR

DAWAN Q. MULAZIM — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 06-CR-01686

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CLAYTON, AND KELLER, JUDGES.

KELLER, JUDGE: Dawan Q. Mulazim (Mulazim) appealed directly from the judgment of the Fayette Circuit Court convicting him of Possession of a Handgun by a Convicted Felon pursuant to Kentucky Revised Statutes (KRS) 527.040 and Persistent Felony Offender Second Degree (PFO II) pursuant to KRS 532.080(2). Mulazim was sentenced to five (5) years' imprisonment for the weapon charge,

which was enhanced to ten (10) years as a result of the PFO II conviction. Mulazim filed a motion to suppress the evidence gathered after police stopped him, based upon a tip from a known informant who received information from an anonymous informant. Thereafter, appellant filed a motion to amend or dismiss the indictment which was likewise denied. For the reasons set forth below, we affirm.

FACTS

On October 17, 2006, Francis White (Francis), telephoned the Lexington Division of Police and Officer Hyer was dispatched to her home. Francis told Officer Hyer that Mulazim was driving in East Lexington, with a gun, searching for her son, Philip White (Philip), in order to harm him. She also alleged that Mulazim had stabbed Philip the night before. Francis gave Officer Hyer a description of Mulazim and of Mulazim's car, including a partial license plate number. When asked the basis of her knowledge, Francis said that she received the information from a third party who did not wish to be named or involved.[1]

After hearing a bulletin with the above information about Mulazim, Sergeant Webb spotted Mulazim's car and pulled him over to the side of the road. As Sergeant Webb got out of his cruiser, Mulazim likewise left his car and fled the scene. He was later arrested by other officers. Sergeant Webb ordered the other two occupants out of the car and opened the driver's side door exposing

[1] We note that the third party was later identified as the mother of Philip's son; however, it is undisputed that this information was not disclosed until after Mulazim's arrest.

the butt of a firearm under the driver's seat. Sergeant Webb then searched the area to insure his safety; however, he did not secure the other passengers.

Following his arrest, Mulazim was charged with Possession of a Controlled Substance First Degree, Possession of a Handgun by a Convicted Felon, Carrying a Concealed Deadly Weapon, Possession of Drug Paraphernalia, Fleeing or Evading Police Second Degree, Violation of an Emergency Protective or Domestic Violence Order and Persistent Felony Offender Second Degree.

Mulazim moved to suppress the evidence seized by Sergeant Webb, arguing that Sergeant Webb had no basis to stop him. During the suppression hearing, the Commonwealth produced two witnesses, Officer Hyer and Sergeant Webb. The Commonwealth did not produce Francis, Philip, or the anonymous source. Following the suppression hearing, the circuit court entered findings of fact, conclusions of law, and an order denying the motion to suppress. Mulazim thereafter entered a conditional guilty plea, and this appeal followed. On appeal, Mulazim argues the trial court erred when it denied his motion to suppress and the Commonwealth improperly used the same prior conviction to obtain the possession and PFO II convictions.

STANDARD OF REVIEW

The decision of the circuit court on a motion to suppress or admit evidence is subject to a two-part analysis: (1) the factual findings of the court are conclusive if they are not clearly erroneous and are supported by substantial

evidence; and (2) the ultimate issue of the existence of reasonable suspicion or probable cause is a mixed question of law and fact subject to *de novo* review. *Baltimore v. Commonwealth*, 119 S.W.3d 532 (Ky. App. 2003). "Substantial evidence is defined as evidence of substance and relative consequence having the fitness to induce conviction in the minds of reasonable [persons]." *Kentucky Unemployment Ins. Com'n v. Landmark Community Newspapers of Kentucky, Inc.,* 91 S.W.3d 575, 579 (Ky. 2002). When reviewing the trial court's findings of fact "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Kentucky Rules of Civil Procedure (CR) 52.01.

The second issue raised by Mulazim, application of the PFO II enhancement, primarily sounds in law; therefore, our review is also *de novo.* *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001), *Aubrey v. Office of Attorney General*, 994 S.W.2d 516, 519 (Ky. App. 1998). With the above factual background and the applicable standards of review ascribed, we will address the issues raised by Mulazim in the order set forth above.

ANALYSIS

The Fourth Amendment to the U.S. Constitution and Section 10 of the Kentucky Constitution protect citizens from unreasonable searches and seizures by police officers. Typically, there are three types of encounters between citizens and police officers that are covered by the preceding: consensual interactions, temporary detentions typically referred to as *Terry* stops, and arrests. At issue here

is a *Terry* stop, which is a temporary detention of a citizen so that a police officer may conduct an investigation. During a *Terry* stop, a police officer may conduct a limited search in order to pursue the investigation. The purpose of such a search is not to discover evidence of a crime, but to ensure the officer's and the public's safety. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *Commonwealth v. Whitmore*, 92 S.W.3d 76, 79 (Ky. 2003); *Baltimore v. Commonwealth*, 119 S.W.3d 532, 537 (Ky. App. 2003). Police officers must have a reasonable and articulable suspicion that a crime is occurring before they may perform a temporary investigative stop of a person who is on foot, or driving a car. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S.Ct. 1391, 1401, 59 L.Ed.2d 660, 673 (1979).

The above legal principles defy concrete definition, thus leading to the case by case analysis currently employed by our courts:

> Articulating precisely what "reasonable suspicion" and "probable cause" mean is not possible. They are commonsense, nontechnical conceptions that deal with "'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" As such, the standards are "not readily, or even usefully, reduced to a neat set of legal rules." We have described reasonable suspicion simply as "a particularized and objective basis" for suspecting the person stopped of criminal activity, and probable cause to search as existing where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found. We have cautioned that these two legal principles are not "finely-tuned [sic] standards," comparable to the standards of proof beyond

> a reasonable doubt or of proof by a preponderance of the evidence. They are instead fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed.

Ornelas v. U.S., 517 U.S. 690, 695-96, 116 S.Ct. 1657, 166, 134 L.Ed.2d 911 (1996). (Internal citations omitted).

Herein, Mulazim argues that Sergeant Webb conducted the *Terry* stop of his car predicated on an anonymous tip. In doing so, Mulazim points out that the police knew the identity of the tipster, Francis; however, they did not know the identity of the source of the information. Mulazim argues that because the source of the information (the mother of Philip's son) was completely unknown to the officer at the time of the stop, the tip from Francis was the equivalent of an anonymous tip. As noted by Mulazim, "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity," sufficient to justify a *Terry* stop. *Alabama v. White*, 496 U.S. 325, 329, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990). In support of his contention, Mulazim cites to decisions from other jurisdictions referencing "crime stoppers" and other similar organizations for the principle that anonymous information does not become more reliable simply because it has been fed through an identified conduit.

The U.S. Supreme Court has clarified the process of reviewing whether an anonymous tip meets the "reasonable and articulable suspicion" standard. *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), dealt with an anonymous tip in the probable-cause context. The Court therein

abandoned the "two-pronged test" previously developed in *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and *Spinelli v. United States,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), in favor of a "totality of the circumstances" approach to determining whether an informant's tip establishes probable cause. The *Gates* court made clear, however, that those factors considered critical under *Aguilar* and *Spinelli* -- an informant's "veracity," "reliability," and "basis of knowledge" -- remain "highly relevant in determining the value of [an informant's] report." *Gates,* 462 U.S. at 230, 103 S.Ct. at 2328. One measure of an informant's credibility is whether she can be held accountable if the information proves to be inaccurate. *See Florida v. J.L.*, 529 U.S. 266, 120 S.Ct. 1375, 1461 L.Ed.2d 254 (2000), and *Commonwealth v. Kelly*, 180 S.W.3d 474 (Ky. 2005).

We agree with Mulazim that Francis's tip contained only identifying information, described little predictive information as to Mulazim's behavior, and came primarily from an informant with an unidentified source, who provided no concrete basis for the information. However, we disagree with Mulazim that Francis was unaccountable or that the source of the information was truly anonymous.

When determining the close question before us, this Court deems its previous decision in *Tucker v. Commonwealth*, 199 S.W.3d 754 (Ky. App. 2006), and the Supreme Court's decision in *Kelly, supra,* to be persuasive. In *Tucker*, the officer who made the stop did not know the identity of the informant; however, the

informant had identified himself to the dispatcher. Therefore, the tip was not anonymous. Rather, it was a tip or information provided by a person who identified himself to the law enforcement agency. The fact the dispatcher did not advise the officer of the identity of the informant did not mean the tip was an anonymous one. Because the source of the information was known to the police agency, the tip was entitled to a greater presumption of reliability than a tip from an anonymous informant. *See United States v. Pasquarille,* 20 F.3d 682, 689 (6th Cir. 1994). *See also United States v. Swihart,* 554 F.2d 264, 269 (6th Cir. 1977), and *United States v. Phillips,* 727 F.2d 392, 397 (5th Cir. 1984). *Id*. 199 S.W.3d at 757.

In *Kelly*, two unnamed employees of a restaurant called in a tip about a drunk driver. The Supreme Court of Kentucky 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.

Commonwealth v. Kelly, 180 S.W.3d 474, 477 (Ky. 2005).

As with the tipsters in *Kelly*, there is a strong presumption the ultimate source of the information Francis gave to Officer Hyer could be discovered in the event it turned out to be false. Francis gave the information in a face-to-face

interview with Officer Hyer. She knew the identity of the person from whom she received the information. She could ultimately be held accountable for giving a false report had the information proved to be false. This removes this case from the typical "crime stoppers" report, where the tip can truly be characterized as anonymous or unknown. The informant here was not unknown, she was merely unnamed. Furthermore, the fact that Francis could be held accountable if the information proved to be inaccurate lends credibility to the source.

Further, we believe it is significant that Francis alleged her son had been stabbed on the previous night by Mulazim. When exigent circumstances are present, such as the threat of imminent injury or the imminent destruction of evidence, police are permitted to enter a home without a search warrant. *See Commonwealth v. McManus,* 107 S.W.3d 175, 177 (Ky. 2003); *Hughes v. Commonwealth,* 87 S.W.3d 850, 852 (Ky. 2002); *Hallum v. Commonwealth,* 219 S.W.3d 216, 222 (Ky. App. 2007). The United States Supreme Court held "that an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made." *Welsh v. Wisconsin*, 466 U.S. 740, 753, 104 S. Ct. 2091, 2099, 80 L. Ed. 2d 732 (1984). This exigent circumstance, an impending second attempt on her son's life, coupled with the detailed identifying information and limited "anonymity" of the source of the information, created a reasonable, articulable suspicion of criminal activity sufficient to warrant further investigation via the limited detention and inconvenience of a *Terry* stop.

Next, we turn our attention to Mulazim's second issue, i.e., violation of the double jeopardy clause by improper application of the PFO II conviction. At the outset, we note the Commonwealth asserts Mulazim's counsel conceded the issue during a hearing on this matter. Our review of the record reveals Mulazim filed a written motion on this issue and otherwise maintained his objection to the application of the PFO II throughout the proceedings. Therefore, we hold the Commonwealth's argument is without merit.

The crux of Mulazim's argument is that the felony used to create the offense of Possession of a Handgun by a Convicted Felon was impermissibly used to add punishment, or to enhance his sentence via the Persistent Felony Offender statute. Mulazim was convicted of being a PFO II and sentenced pursuant to KRS 532.080(2) because he had been convicted of Assault in the Second Degree and Tampering with Physical Evidence in 2002. These prior felonies were named in the same indictment, and the sentences were served simultaneously. Mulazim argues that, pursuant to KRS 523.080(4), those prior felonies merged and could not be used to convict him for both offenses, possession of a handgun and PFO. KRS 523.080(4) provides that:

> for the purpose of determining whether a person has two (2) or more previous felony convictions, two (2) or more convictions of crime for which that person served concurrent or uninterrupted consecutive terms of imprisonment shall be deemed to be only one (1) conviction, unless one (1) of the convictions was for an offense committed while that person was imprisoned.

KRS 527.040 provides that a person is guilty of Possession of a Handgun by a Convicted Felon, if he:

> possesses, manufactures, or transports a firearm when he has been convicted of a felony, as defined by the laws of the jurisdiction in which he was convicted, in any state or federal court . . . .

The line of cases, beginning with *Boulder v. Commonwealth*, 610 S.W.2d 615 (Ky. 1980), through the most recent decision in *Morrow v. Commonwealth,* 77 S.W.3d 558, 561 (Ky. 2002), muddied the waters of sentence enhancement. Confusion arises with regard to the interaction of the merger provision of the PFO statute and the *Boulder* court's holding that

> [a]lthough a person's status as a felon may be used to punish him, as evidenced by statutes such as KRS 527.040, KRS 527.020(5), and KRS 532.080, it may not be used to punish him again and again, over and over. Specifically, this status may not be used to obtain a primary conviction, then re-used to increase the punishment for that conviction, and then re-used again to enhance a sentence for another primary conviction.

Id. at 618. In *Boulder,* the defendant had a *single* prior felony conviction, was convicted of assault, possession of a handgun by a convicted felon, and of being a PFO. The Commonwealth used that single felony conviction as the basis for a conviction of Possession of a Handgun by a Convicted Felon, and to enhance the defendant's sentences for the possession of the handgun and the assault. In other words, the Commonwealth used the single prior felony conviction three (3) different ways.

In *Eary v. Commonwealth,* 659 S.W.2d 198, 199-200 (Ky. 1983), the Court clarified that, in a case involving prosecution of a current felony with a defendant with a *single* prior felony, that prior felony:

> may not be used *at that trial* to prosecute the defendant under KRS 532.080. We are unwilling to further extend that holding. Where a defendant is convicted at his trial for possession of a handgun by a convicted felon and has been previously convicted of more than one prior felony, *those convictions in excess of* that for a single felony may be utilized for the purpose of persistent felony offender sentencing pursuant to KRS 532.080 . . . .

In 2002, the Supreme Court in *Morrow v. Commonwealth*, 77 S.W.3d 558, 561 (Ky. 2002), ruled that "second or subsequent offense" enhancement under KRS Chapter 218A and PFO were legitimate where the defendant had been convicted of more than one previous felony. The Court reasoned that the General Assembly had different aims or functions for each statutory scheme. It noted the differences in the qualifications required for each to apply to a particular defendant, e.g., "[t]he age limitations in KRS 532.080 reserve PFO enhancement for more mature offenders who have failed previous attempts at rehabilitation. While a defendant may be subject to KRS Chapter 218A penalty enhancement regardless of when the prior offense was committed . . . ." Ultimately, the Court determined, "[t]he broader range of cases in which penalty enhancement is available under KRS Chapter 218A demonstrates the General Assembly's intent to deal more harshly with repeat controlled substance offenders." *Id*. at 562 citing KRS 218A.010(25).

Had the defendant in *Morrow* previously been convicted of only one felony, "statutory and constitutional protections against double jeopardy would prevent the Commonwealth from using the one prior conviction for both Chapter 218A "second or subsequent offense" enhancement and for PFO enhancement." (*See Commonwealth v. Grimes*, 698 S.W.2d 836, 837 (Ky. 1985)). Because the Defendant had been convicted of two prior felonies, and noting that KRS 218A penalty enhancement precedes PFO enhancement chronologically, *Morrow* limits the KRS 532.080(4) "merger" provision for *PFO purposes only*. *Morrow v. Commonwealth*, 77 S.W.3d 558, 562 (Ky. 2002)

When applying the reasoning of *Morrow* to the facts of this appeal, the Court is faced with a PFO sentencing enhancement and a separate criminal offense of Possession of a Handgun by a Convicted Felon, both of which are supported by *more than one* prior felony. Mulazim argues that *Morrow* stands for the premise that the Kentucky Controlled Substances Act "trumps" the PFO merger statute and the handgun charge does not permit severance of the felonies citing *Corman v. Commonwealth*, 908 S.W.2d 122 (Ky. App. 1995), and *O'Neil v. Commonwealth*, 114 S.W.3d 860, 864 (Ky. App. 2003).

However, *O'Neil* supports the circuit court's ruling because of Mulazim's multiple preceding felonies,

> [b]ased upon the record before us, appellant has only one prior felony, which must necessarily be the basis for his conviction of possession of a handgun by a convicted felon. Therefore, this same prior felony cannot also be used under the PFO statute to further enhance appellant's

> sentence for that offense. *Corman,* 908 S.W.2d at 123. However, the Commonwealth correctly points out that the 1990 felony conviction may be used to enhance the burglary sentence.

O'Neil v. Commonwealth, 114 S.W.3d 860, 864 (Ky. App. 2003), citing *Dale v. Commonwealth,* 715 S.W.2d 227 (Ky. 1986).

Therefore, as in *Morrow*, the PFO merger doctrine applies only for PFO purposes not for the purposes of convicting of an underlying crime. The underlying offense committed by Mulazim, possession of a handgun by one who has a prior felony, chronologically preceded any PFO enhancement of his sentence; therefore, we hold that the trial court acted correctly when sentencing Mulazim. His prior convictions were not merged for these purposes and could be used separately, one for the underlying charge of possession of the handgun, and the other for the conviction of the PFO II. This holding is in keeping with precedent and the legislative intent to punish more severely those persons who have multiple prior offenses in their background and further punish those felons who continue to possess firearms despite their status as felons. We therefore affirm the judgment of the Fayette Circuit Court.

ALL CONCUR.

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