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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001504-MR

TERRY S. RANDOLPH

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 09-CR-00114

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, LAMBERT AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Terry Randolph was indicted by a Muhlenberg Grand Jury and charged with one count each of first-degree possession of a controlled substance methamphetamine, possession of drug paraphernalia, possession of marijuana, and possession of a controlled substance. Randolph filed a motion to suppress the evidence seized as a result of the stop of a vehicle based on

information conveyed to the police officer by a citizen. After the motion was denied, she entered a conditional guilty plea to the charges contained in the indictment. Following the entry of a judgment and final sentencing, Randolph appealed.

Randolph and the Commonwealth agree that the circuit court's statement of the facts is accurate and, therefore, the material facts are not disputed. On April 21, 2009, Officer McGehee was on patrol at the Hillside Manor Apartments in Central City, Kentucky, when an unnamed individual approached and informed him that three people had stolen a vacuum cleaner from an apartment porch and placed it in the trunk of their vehicle. The informant pointed out the vehicle as it was about to exit the parking lot. Officer McGehee then motioned the vehicle to stop. After the vehicle stopped, Officer McGehee approached the driver and asked his name as well as the two passengers' names. Upon hearing the driver's name and realizing that the driver was wanted on an outstanding arrest warrant, the driver was asked to exit the vehicle and placed under arrest. A search of the driver revealed illegal drugs prompting Officer McGehee to request that Randolph exit the vehicle.

When Randolph exited the vehicle, Officer McGehee requested to search a fanny pack she was wearing. Randolph denied consent but, after Officer McGehee asked if he should be concerned about its contents, she opened the fanny pack and produced marijuana. She was then placed under arrest. Officer McGehee's search of the fanny pack revealed methamphetamine and two syringes.

At some point during the encounter, another officer arrived at the complex and questioned the owner of the vacuum cleaner who informed the officer that the driver of the vehicle had permission to take the vacuum cleaner.

After the discovery of the illegal drugs, Randolph was transported to the Muhlenberg Detention Center where she was Mirandized. She subsequently informed Officer McGehee that she had purchased the methamphetamine for \$25.

In her motion to suppress, Randolph argued that Officer McGehee lacked a reasonable suspicion that criminal activity had occurred and that even if a lawful investigatory stop of the vehicle occurred, she did not consent to the search of her person or fanny pack. She further argued that her statement to the police should be suppressed as fruit of the illegal search.

On appeal, Randolph admits that she voluntarily opened and displayed the contents of her fanny pack and, therefore, the only issue she presents on appeal is whether the stop of the vehicle in which she was a passenger was lawful. We begin our analysis with the applicable standard of review.

The standard was aptly stated in *Baltimore v. Commonwealth*, 119 S.W.3d 532, 539 (Ky.App. 2003):

Kentucky has adopted the standard of review set out by the United States Supreme Court in *Ornelas v. United States*. Under that approach, the decision of the circuit court on a motion to suppress based on an alleged illegal search following a hearing is subject to a two-part analysis. First, factual findings of the court involving historical facts are conclusive if they are not clearly erroneous and are supported by substantial evidence. Second, 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. In conducting this analysis, the reviewing court must give due weight to inferences drawn from the facts by the trial court and law enforcement officers and to the circuit court's findings on the officers' credibility. (footnotes and citations omitted).

Because Randolph and the Commonwealth agree that the circuit court's findings of fact are accurate, our review is strictly *de novo*.

It is a basic premise of Constitutional law that unreasonable searches and seizures by police officers are prohibited. *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998). Interactions between police and citizens are characterized as consensual encounters, temporary investigative detentions referred to as *Terry* stops, and arrests. The Federal and State Constitutional prohibitions apply only to the latter two. *Baltimore*, 119 S.W.3d at 537. In this case, we are concerned with the parameters of a *Terry* stop which evolved from the pivotal U.S. Supreme Court case of *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

As *Terry* and its progeny have been interpreted, to effectuate a legal *Terry* stop, the officer must have a reasonable, articulable suspicion that criminal activity is afoot. In *Green v. Commonwealth*, 244 S.W.3d 128, 133-134 (Ky.App. 2008), the Court detailed the requisites of a *Terry* stop:

[T]o justify a stop under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the officer must be able to articulate more than a mere “inchoate and unparticularized suspicion or ‘hunch’” of criminal activity. *Id.* at 27, 88 S.Ct. at 1883. Rather, a warrantless stop of a vehicle is permissible if the officer has an “articulable and reasonable suspicion” of criminal

activity. *Creech v. Commonwealth*, 812 S.W.2d 162, 163 (Ky.App. 1991).

The objective justification for the officer's actions must be measured in light of the totality of the circumstances. *See United States v. Sokolow*, 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989); *Eldred v. Commonwealth*, 906 S.W.2d 694 (Ky. 1994). When considering the totality of the circumstances, a reviewing court should take care not to view the factors upon which police officers rely to create reasonable suspicion in isolation. Courts must consider all of the officers' observations, and give due weight to the inferences and deductions drawn by trained law enforcement officers. *United States v. Arvizu*, 534 U.S. 266, 272–75, 122 S.Ct. 744, 750, 151 L.Ed.2d 740 (2002). *See also United States v. Martin*, 289 F.3d 392, 398 (6th Cir. 2002).

Randolph contends that Officer McGehee had no articulable reasonable suspicion because the tip on which he relied to stop the vehicle was unreliable and uncorroborated. We have persuasive guidance on this precise issue by our Supreme Court.

Our Supreme Court has made clear distinctions between anonymous informants and citizen informants. An anonymous informant is one that provides a tip without means of personal identification and with whom an officer has no face to face contact. Because an officer lacks ability to determine the informant's credibility, there exists an increased likelihood that the information is given for the purpose of harassment or vengeance, and corroboration is required. "A truly anonymous tip must bear some increased indicia of reliability such as an independent verification before the police may rely on it." *Hampton v. Commonwealth*, 231 S.W.3d 740, 745 (Ky. 2007). The inherent difficulty in

relying on an anonymous informant was explained in *Collins v. Commonwealth*, 142 S.W.3d 113, 115 (Ky. 2004):

In order to perform an investigatory stop of an automobile, there must exist a reasonable and articulable suspicion that a violation of the law is occurring. *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S.Ct. 1391, 1401, 59 L.Ed.2d 660, 673 (1979). 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).

In contrast to a truly anonymous informant, a tip provided by a citizen informant does not suffer the same credibility deficiency. In the latter scenario, emphasis is placed on the face to face contact between the citizen and an officer, who has the opportunity to determine the citizen's credibility. The case often cited to distinguish the two types of informants is *Commonwealth v. Kelly*, 180 S.W.3d 474 (Ky. 2005).

In *Kelly*, two callers identifying themselves as Waffle House employees called the police stating that a recent patron appeared intoxicated and drove away. They identified the location of the restaurant, the vehicle and the suspect. The officer arrived at the restaurant and observed two people pointing to a vehicle across the street matching the informants' description. The officer then followed the vehicle to a nearby hotel and conducted a *Terry* stop. *Id.* at 476.

Our Supreme Court held that the citizen informant's tip was sufficiently reliable to justify the stop and explained its reasoning as follows:

In 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"). See *Florida v. J.L.*, 529 U.S. 266, 276, 120 S.Ct. 1375, 1381, 146 L.Ed.2d 254 (2000) (Kennedy, concurring) ("the ability of the police to trace the identity of anonymous telephone informants may be a factor which lends reliability to what, years earlier, might have been considered unreliable anonymous tips"). Moreover, the tip in this case is entitled to even greater deference than it normally might be accorded due to its status as a "citizen informant" tip. See *Gates, supra* at 233, 103 S.Ct. at 2330 ("rigorous scrutiny of the basis of [a citizen informant's] knowledge [is] unnecessary"). What distinguishes a "citizen informant" tip from other types of tips is the fact that such tipsters are almost always bystanders or eyewitness-victims of the alleged criminal activity. *Pasquarille, supra*, at 689 ("Thus, because the informant's account was based on firsthand observations as opposed to idle rumor or irresponsible conjecture, we presume that the statements are reliable.") (internal quotations and citations omitted); see also, *Gates, supra*, at 233–35, 103 S.Ct. 2317 ("[E]ven if we entertain some doubt as to an informant's motives, his explicit and detailed description of wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case."). "Whereas other informants, who are often intimately involved with the persons informed upon and with the illegal conduct at hand, may have personal reasons for giving shaded or otherwise inaccurate information to law enforcement officials, such is not true of bystanders or eyewitness-victims who have no connection with the accused." *United States v. Phillips*, 727 F.2d 392, 397 (5th Cir. 1984) (internal quotations and citations omitted).

Id. at 477-478.

In this case, Officer McGehee was approached by a citizen who, although unidentified, was not anonymous. The officer had face to face contact with the citizen who could be reasonably identified if needed. Similar to the facts in *Kelly*, the informant was able to point directly to the vehicle that was exiting the apartment complex. Based on the information conveyed and with the ability to assess the credibility of the information conveyed, Officer McGehee motioned the vehicle to stop and approached the driver to investigate. Although Randolph suggests that the alternative and less intrusive approach would have been to question the owner of vacuum cleaner first, at that point the vehicle, its occupants, and the alleged stolen property would have departed the complex.

We conclude with the well established law that if the information given is found to be erroneous, it does not vitiate an otherwise properly conducted *Terry* stop. The reasonableness of the officer's action is determined by the facts available at the time. *Dockstader v. Commonwealth*, 802 S.W.2d 149, 150 (Ky.App. 1991). Although it was subsequently determined that the vacuum cleaner was lawfully taken, it remains that the vehicle was legally stopped and, upon the arrest of the driver, Randolph was properly asked to exit the vehicle. *See Owens v. Commonwealth*, 291 S.W.3d 704 (Ky. 2009), (holding that following the arrest of the driver, the remaining occupants may be requested to exit the vehicle). Moreover, Randolph concedes that she voluntarily revealed the drugs in her fanny pack and voluntarily stated that she had purchased the methamphetamine.

Based on the foregoing, the judgment of the Muhlenberg Circuit

Court is affirmed.

ALL CONCUR.

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