

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000652-MR

PHILLIP SAPP

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 16-CR-00288

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: JONES, KRAMER, AND D. LAMBERT, JUDGES.

LAMBERT, D., JUDGE: Phillip Sapp appeals from his judgment and five-year sentence of imprisonment entered by the Franklin Circuit Court on March 29, 2017. Sapp was arrested following a narcotics investigation of his co-defendant, Steven Bowman. Following the circuit court's denial of his suppression motion, Sapp entered a conditional guilty plea. After careful consideration, we affirm.

In August 2016, the Franklin County Sheriff's Office conducted three controlled buys of methamphetamine from Bowman. After the controlled buy on August 31, 2016, the confidential informant ("CI") informed law enforcement that later that day there was to be a delivery of drugs to Bowman at 309 Conway Street, Frankfort, Kentucky—Bowman's father's residence (hereinafter "the Conway residence"). Detectives Banta and Farmer both stated in their testimony at the suppression hearing that they considered the CI to be reliable. Based on the CI's information, the detectives conducted surveillance on the Conway residence.

During this surveillance, the detectives observed Bowman outside the residence. According to the detectives, he was seen speaking on a cell phone, pacing and acting in an anxious or nervous manner, and looking up and down the street as though waiting for someone. This suggested to the detectives that the CI was accurate in the information given to them—that Bowman was to receive a delivery of drugs at the Conway residence that day.

The detectives then observed a vehicle approaching the Conway residence and Bowman getting into the backseat. Inside the vehicle at this point were Bowman, Sapp, who was in the front passenger seat, and another co-defendant, Joie B. Craig, who was the driver. Based on the CI's information and what they had observed, the detectives believed criminal activity was occurring or was about to occur. The detectives drove their unmarked vehicle towards the

vehicle occupied by Bowman, parked it in front of the vehicle, and engaged their blue lights.

As the detectives approached the vehicle, Detective Farmer observed Sapp reach forward underneath his seat. Detective Farmer was immediately concerned that Sapp was reaching for a weapon, and he drew his own weapon and directed the occupants of the vehicle to put their hands up. Detective Farmer testified that as Bowman raised his hands, an object fell to the floor. Detective Banta, who was now standing on the driver's side of the vehicle, observed a bag of what he believed to be crystal methamphetamine next to Bowman's feet. At this point, the occupants of the vehicle were instructed to exit the vehicle.

The vehicle was searched, and the detectives found the bag of methamphetamine, along with a bag of methamphetamine underneath the passenger seat (where Sapp was sitting) and digital scales.¹ Bowman also had a set of digital scales on his person and \$40.00 acquired during the controlled buy earlier that day. The occupants were then placed under arrest based on the search. It was also discovered that Sapp had an outstanding warrant for his arrest. En route to the jail, Sapp stated to the detectives that he had driven to Louisville that day to purchase methamphetamine which he was to deliver to Bowman.

¹ Laboratory analysis later confirmed that the substances found in the vehicle were all methamphetamine.

After hearing the evidence, the trial court directed both parties to submit simultaneous proposed findings of fact and conclusions of law. The court then entered an order denying Sapp's suppression motion. Sapp entered a conditional guilty plea to first-degree trafficking in a controlled substance (methamphetamine), first offense; possession of drug paraphernalia; and being a second-degree persistent felony offender. He was sentenced to five years imprisonment. Sapp now appeals pursuant to his conditional plea.

On appeal, Sapp first argues that the circuit court erred in allocating the burden of proof. Sapp also argues that the circuit court erred in denying his motion to suppress because the investigating detectives did not have reasonable suspicion when they conducted a warrantless search and seizure. He contends this violated his constitutional guarantees against unreasonable search and seizure found in the Fourth Amendment of the United States Constitution and in Section 10 of the Kentucky Constitution.

Because Sapp did not preserve his first claim, he has requested we review it for palpable error. According to RCr² 10.26, a palpable error is one that affects the substantial rights of party. Further, palpable error must be "easily perceptible, plain, obvious and readily noticeable," *Brewer v. Commonwealth*, 206

² Kentucky Rules of Criminal Procedure.

S.W.3d 343, 349 (Ky. 2006), and the appellate court must believe “there is a substantial possibility that the result would have been any different.” *Sheets v. Commonwealth*, 495 S.W.3d 654, 663 (Ky. 2016) (quoting *Commonwealth v. Pace*, 82 S.W.3d 894, 895 (Ky. 2002)).

At the suppression hearing, the Commonwealth presented its evidence first, which consisted of testimony from the two detectives involved in the investigation. Sapp cross-examined these witnesses, but did not present any other evidence. As mentioned above, the court requested the parties to simultaneously submit proposed findings of fact and conclusions of law. In the court’s order denying Sapp’s motion to suppress, paragraph one of the conclusions of law states, “[a] motion to suppress evidence ‘requires the moving party to carry the burden of establishing the evidence [sought to be suppressed] was secured by an unlawful search,’” (quoting *LaFollette v. Commonwealth*, 915 S.W.2d 747, 749 (Ky. 1999), *abrogated by Traft v. Commonwealth*, 539 S.W.3d 647 (Ky. 2018)).

Although it was error for the court to state the burden of proof as such, we do not find that it constitutes palpable error. The suppression hearing was conducted in accordance with the proper burden of proof. The remainder of the court’s order does not suggest that the misstatement influenced the court’s determination. It was apparent in the court’s conclusions that the Commonwealth was required to prove law enforcement had reasonable suspicion prior to the

investigatory stop. Further, we do not believe, for the reasons set out below, that the outcome would have changed if the burden of proof was stated correctly.

We now review the trial court's denial of Sapp's motion to suppress evidence as the result of an unlawful search. Specifically, the issue before us is whether law enforcement had the requisite reasonable suspicion to conduct an investigatory stop.

Appellate review of a trial court's ruling on a suppression motion is two fold. *Anderson v. Commonwealth*, 352 S.W.3d 577, 583 (Ky. 2011) (citations omitted). First, we must determine whether the trial court's factual findings were supported by substantial evidence. *Id.* If they were, then they are conclusive. Second, under *de novo* review, we must determine whether the trial court properly applied the law to the factual findings. *Id.* Additionally, the officer's justification for the stop "must be measured in light of the totality of the circumstances." *Greene v. Commonwealth*, 244 S.W.3d 128, 133 (Ky. App. 2008) (citations omitted).

Sapp argues that the investigatory stop was not justified. "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." *Collins v. Commonwealth*, 142 S.W.3d 113, 115 (Ky. 2004) (citing *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S.Ct. 1391, 1401, 59 L.Ed.2d 660, 673 (1979)). Here, the

detectives had previously conducted multiple controlled buys involving Bowman, had received information about another transaction, and had observed Bowman acting in a manner consistent with an individual about to commit a criminal act. Based on the detectives' testimony at the hearing, the circuit court found there was reasonable and articulable suspicion warranting the investigatory stop based on the detectives' observations and information from the CI. Taking the totality of the circumstances into consideration, we find the circuit court's findings were supported by substantial evidence.

Further, the circuit court found that the CI was sufficiently reliable because the detectives had worked with this CI multiple times on controlled drug buys. "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')." *Commonwealth v. Kelly*, 180 S.W.3d 474, 477 (Ky. 2005) (citations omitted).

Here, the detectives received information, identifying both the offense and the offender, from a known and reliable informant that a criminal act was imminent at the Conway residence. The movements and body language of Sapp's co-defendant, Bowman, just prior to the arrival of the vehicle corroborated the CI's information. Thus, we find the circuit court correctly concluded that the detectives

had reasonable suspicion of a criminal act to justify the investigatory stop of the vehicle and its occupants.

Accordingly, we affirm the order of the Franklin Circuit Court.

ALL CONCUR.

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