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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001786-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 16-CI-00998

KENNETH L. EASTERLING, JUDGE,
KENTON DISTRICT COURT; AND
SARAH MCNEIL (REAL PARTY IN INTEREST) — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, MAZE, AND TAYLOR, JUDGES.

MAZE, JUDGE: The Commonwealth of Kentucky appeals an order of the Kenton Circuit Court denying its writ of prohibition against the Hon. Kenneth L. Easterling, Kenton District Court Judge. The Commonwealth argues the district court erred by finding that an investigatory stop for a misdemeanor committed outside of a police officer's presence violates the Fourth Amendment of the United

States Constitution. For reasons stated below, we affirm the circuit court's holding that the investigatory stop in question violated the Fourth Amendment.

I. Facts and Procedural History[1]

On October 26, 2015, Officer Douglas Ullrich of the Covington Police Department learned that police dispatch had received a call from someone alleging that a female suspect had pick-pocketed three individuals inside a bar in Covington, Kentucky. The caller was able to identify the suspect's appearance, attire, vehicle make and model, and license plate number. Soon afterwards, Officer Ullrich saw a vehicle matching the caller's description drive past his patrol car. Officer Ullrich began following the vehicle and was informed by dispatch that the caller had reported that most, if not all, of the stolen items had been recovered. Officer Ullrich elected to stop the vehicle anyway, which was driven by real-party in interest Sarah McNeil. It is undisputed that Officer Ullrich had, at most, only reasonable suspicion that McNeil had committed misdemeanor theft outside his presence.

After approaching McNeil, Officer Ullrich obtained evidence she was under the influence of drugs or alcohol. Following a short investigation, McNeil was arrested for driving under the influence, possession of an open container of

[1] No appellee brief was filed in this case; therefore, we accept the Commonwealth's statement of the facts and issues as correct. *See* Kentucky Rule of Civil Procedure 76.12(8)(c)(i).

alcohol, and failure to produce an insurance card. McNeil then moved to suppress evidence of her impairment, arguing the initial stop of her vehicle violated the Fourth Amendment because Kentucky law prohibits a peace officer from arresting someone for a misdemeanor committed outside the officer's presence. *See* KRS[2] 431.005. Officer Ullrich was the only witness called at the subsequent suppression hearing and he testified to the above facts. The district court agreed with McNeil's reasoning and granted her motion to suppress.

The Commonwealth then filed a writ of prohibition in circuit court, arguing that statutes prohibiting peace officers from arresting someone for a misdemeanor committed outside their presence are irrelevant to an officer's authority to conduct an investigatory stop. The Commonwealth contended that once Officer Ullrich had reasonable suspicion McNeil had been involved or was wanted in connection with a crime, he had the authority under the Fourth Amendment to conduct a brief investigatory stop of her vehicle. The circuit court was unpersuaded and denied the petition. This appeal follows.

II. Standard of Review

"Whether to grant or deny a writ of prohibition is within the sound discretion of the court with which the petition is filed." *Commonwealth v. Peters*, 353 S.W.3d 592, 595 (Ky. 2011). "However, if the basis for the grant or denial

[2] Kentucky Revised Statutes.

involves a question of law, the appellate court reviews this conclusion *de novo.*" *Id.*

When a court is acting within its jurisdiction, as is undisputed in this case, a writ of prohibition may be granted only when (1) there is no adequate remedy by appeal or otherwise, and (2) the petitioner will suffer irreparable injury if the writ is not granted. *Hoskins v. Maricle*, 150 S.W.3d 1, 10 (Ky. 2004). Both of these conditions are satisfied when a trial court erroneously grants a defendant's motion to suppress. *Commonwealth v. Bell*, 365 S.W.3d 216, 223 (Ky. App. 2012). Review of a trial court's ruling on a suppression motion is two-fold. First, the trial court's factual findings will not be disturbed if supported by substantial evidence. *Stewart v. Commonwealth*, 44 S.W.3d 376, 380 (Ky. App. 2000). Second, whether the trial court correctly applied the law to the facts is reviewed *de novo*. *Id.*

III. Analysis

Both the Fourth Amendment to the United States Constitution and Section Ten of the Kentucky Constitution protect citizens from unreasonable searches and seizures. *Williams v. Commonwealth*, 147 S.W.3d 1, 4 (Ky. 2004). Since *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), it has been settled that the police may perform a brief investigatory stop of a suspect if they have reasonable, articulable suspicion that the suspect was committing a

crime or is about to commit a crime. The same types of stops are permitted for automobiles. *Baker v. Commonwealth*, 475 S.W.3d 633, 634 (Ky. App. 2015). Until the United States Supreme Court rendered *United States v. Hensley*, 469 U.S. 221, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985), it was unclear if *Terry* stops were permitted for crimes that had already been committed. However, the Court in *Hensley* held that "if police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, then a *Terry* stop may be made to investigate that suspicion." *Id.* at 229, 680. The Court expressly declined to determine whether *Terry* stops were permitted for all past crimes. *Id.*

Since *Hensley*, various state appellate courts and federal circuit courts have split on whether *Terry* stops are permitted for completed misdemeanors. Some courts have held that such stops are unreasonable *per se*. *See*, *e.g.*, *United States v. Collazo*, 818 F.3d 247, 254 (6th Cir. 2016). Other Courts have refused a *per se* standard and have held that a reasonableness inquiry, based on the particular facts of the case, is necessary to determine the constitutionality of a *Terry* stop for a completed misdemeanor. *See, e.g.*, *United States v. Grigg*, 498 F.3d 1070, 1081 (9th Cir. 2007). As the Eighth Circuit has explained,

> The Supreme Court has consistently eschewed bright-line rules under the Fourth Amendment, instead emphasizing the fact-specific nature of the reasonableness inquiry. Like the Ninth and Tenth Circuits, this court declines to

> adopt a *per se* rule that police may never stop an individual to investigate a completed misdemeanor. To determine whether a stop is constitutional, this court must balance the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion. Under this test, the nature of the misdemeanor and potential threats to citizens' safety are important factors.

United States v. Hughes, 517 F.3d 1013, 1017 (8th Cir. 2008) (cleaned up).[3] It has yet to be decided where Kentucky falls in this debate. It is a conflict we do not need to resolve in this opinion because the Commonwealth analyzes this case as if it involved an ongoing crime. Those are not the facts of this case.

The undisputed facts in this case are that Officer Ullrich suspected McNeil was involved in a completed misdemeanor. The United States Supreme Court was explicit in *Hensley* that the standard of reasonableness embodied in the Fourth Amendment is different for stops based on ongoing criminal activity and those involving completed crimes:

> A stop to investigate an already completed crime does not necessarily promote the interest of crime prevention as directly as a stop to investigate suspected ongoing criminal activity. Similarly, the exigent circumstances which require a police officer to step in before a crime is committed or completed are not necessarily as pressing long afterwards. Public safety may be less threatened by a suspect in a past crime who now appears to be going

[3] This opinion uses the (cleaned up) parenthetical to indicate that internal quotation marks, alterations, ellipses, and citations have been omitted from quotations. *See, e.g.*, *Smith v. Commonwealth*, 520 S.W.3d 340, 354 (Ky. 2017).

> about his lawful business than it is by a suspect who is currently in the process of violating the law. Finally, officers making a stop to investigate past crimes may have a wider range of opportunity to choose the time and circumstances of the stop.

469 U.S. at 228-29, 105 S. Ct. at 680. The Commonwealth has not offered any argument why the government's interest in stopping McNeil for a completed misdemeanor theft justified such an intrusion on personal security. Even if we were inclined to find that *Terry* stops for completed misdemeanors are not unreasonable *per se*, we have not been provided grounds to find the stop in this case was permissible under the Fourth Amendment.

Accordingly, the order of the Kenton Circuit Court is affirmed.

JONES, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

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BRIEF FOR APPELLEE:

No brief filed.