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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000803-MR

JOSHUA DEHAVEN — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE TIMOTHY KALTENBACH, JUDGE
ACTION NO. 17-CR-00059

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: ACREE, JONES AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Joshua Dehaven entered a conditional guilty plea to numerous charges: carrying a concealed deadly weapon; possessing an open alcoholic beverage container in a motor vehicle; possession of drug paraphernalia; first-degree possession of a controlled substance, methamphetamine, second offense; first-degree trafficking in a controlled substance, less than 2 grams

methamphetamine, first offense; giving a false name or address; and third-degree possession of a controlled substance, diazepam. His sentences were ordered to run concurrently for a total of six years. Dehaven's conditional guilty plea preserved his right to appeal the trial court's denial of his motion to suppress evidence found in a vehicle in which he was a passenger. We conclude the deputy who stopped the vehicle had no reasonable articulable suspicion that criminal activity was afoot and reverse.

Our recitation of the facts is based on those developed at the suppression hearing.

On January 4, 2017, Philip Williford, a volunteer deputy for the McCracken County Sheriff's Department, was patrolling the Reidland area of Paducah, when he saw a parked car backed into the rear door of Hucks convenience store at 1:00 a.m. with its headlights off. The store had been closed for less than one hour. He testified that when he pulled into the lot, the car pulled away. Williford testified that, until the car moved, he did not know whether the car was running. Although there was no report of any crime the prior evening or the early morning of January 4, 2017, Williford testified he had received reports of suspicious activity at Hucks on other occasions and the store had been burglarized sometime within the last eight to ten years. He was also concerned that propane

tanks and soda machines had been vandalized in the area and that there had been loitering at Hucks.

Williford followed the car and, as he followed, the driver of the car made no attempt to elude him, avoid him, or speed, and no traffic violation was committed. After following the car for some time, Williford called for backup and initiated the stop. Body camera footage played during the suppression hearing revealed Williford telling an assisting officer that he stopped the car to determine if the occupants were Hucks' employees. As a result of the stop and subsequent search, narcotics and other items were discovered.

Williford testified that being parked by a back door in the dark after the store was closed seemed suspicious and he stopped the car to "see if there was suspicious" activity. When asked what crime he suspected the car's occupants were committing, he stated that people had broken into propane tanks and soda machines in the area. However, Williford admitted that the propane tanks were near the front of the store, far from where the car was located, and there were no soda machines outside Hucks.

Dehaven testified the car was running when in the Hucks' lot. The driver pulled in to get directions and immediately pulled back out. Dehaven testified he saw the blue lights of Williford's car for less than three seconds and then they were turned off. He testified he had no idea what Williford was doing

and Williford followed them for miles after they left Hucks before activating his lights again.

The trial court concluded that the stop of the car was supported by a reasonable suspicion. It found that the car Dehaven occupied was backed up to the rear door behind a closed business with its lights off and that as Williford entered the parking lot, the car pulled out. It further found that Williford was aware of prior thefts in the area and loitering at Hucks. Based on the totality of the circumstances, the trial court concluded Williford had a particularized and objective reason to believe criminal activity might be occurring.

Unreasonable searches and seizures are prohibited by the Fourth Amendment of the United States Constitution and Section 10 of Kentucky's Constitution. A basic tenet of Fourth Amendment analysis is that evidence obtained in an illegal or unreasonable search is not admissible in court. *Wong Sun v. United States*, 371 U.S. 471, 485, 83 S. Ct. 407, 416, 9 L.Ed.2d 441 (1963). On appeal of a trial court's ruling on a motion to suppress by the trial court, our inquiry is twofold. "First, Kentucky Rule[s] of Criminal Procedure (RCr) 9.78 provides that, 'If supported by substantial evidence[,] the factual findings of the trial court shall be conclusive.' The trial court's application of the law to the facts is reviewed *de novo.*" *Hall v. Commonwealth*, 438 S.W.3d 387, 390 (Ky.App. 2014).

The prohibition of unreasonable searches and seizures extends to the stop of a vehicle. *United States v. Brignoni-Ponce*, 422 U.S. 873, 880-81, 95 S.Ct. 2574, 2579-80, 45 L.Ed.2d 607 (1975). Yet, the police are not required to have probable cause to believe the occupant or occupants are engaged or about to be engaged in criminal activity to stop a car. *Terry v. Ohio*, 392 U.S. 1, 22-26, 88 S.Ct. 1868, 1881, 20 L.Ed.2d 889 (1968).

Under *Terry*, a mere "hunch" that criminal activity is afoot will not validate the stop. *Nichols v. Commonwealth*, 186 S.W.3d 761, 764 (Ky.App. 2005). The officer must point to particular facts and inferences rationally drawn from those facts that, when viewed under the totality of the circumstances and in light of the officer's experience, create a reasonable suspicion that criminal activity is afoot. *Terry*, 392 U.S. at 27, 88 S.Ct. at 1883.

There is no precise definition of reasonable suspicion and, therefore, each case must be analyzed on its facts. Consequently, to determine whether Williford had reasonable suspicion to stop the car in which Dehaven was a passenger, we must look to the facts known to Williford that led to the stop.

The car Dehaven occupied was parked next to the back door of a closed business. Although the location of a car is a relevant factor in the reasonable suspicion analysis, "[a]n individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable,

particularized suspicion that the person is committing a crime." *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S.Ct. 673, 676, 145 L.Ed.2d 570 (2000). This is true even if the car is located in a high crime area. *Commonwealth v. Banks*, 68 S.W.3d 347, 350 n.1 (Ky. 2001). Likewise, the fact that it was 1:00 a.m. is not alone sufficient to establish reasonable suspicion but is only a factor. *United States v. See*, 574 F.3d 309, 314 (6th Cir. 2009). The location of the car[1] and time are "context-based factors that would have pertained to anyone in the parking lot at that time and should not be given undue weight." *Id.* These factors may lead to an inarticulable "hunch" that criminal activity is afoot, but for a reasonable suspicion to exist, there must be some articulable fact that is particular to the individual's behavior that justifies a suspicion that criminal activity is afoot. *Id.* [2]

There were no other facts supporting a reasonable inference that Dehaven or the driver of the car engaged in any criminal activity, were engaging in criminal activity, or were about to engage in criminal activity. While the car departed soon after Williford entered the Hucks' lot, there was no evidence that it did so to avoid Williford. Williford only briefly observed the car in the parking lot

[1] Whether the area was a "high crime" area is debatable. However, we refrain from such discussion as it is unnecessary to our result.

[2] Our Supreme Court made the same observation in *Geary v. Commonwealth*, 2005-SC-000296-MR, 2007 WL 543632, at *3 (Ky. Feb. 22, 2007) (unpublished). However, in that case there were particular facts such as the occupant's behavior, smell of propane in the car, and burglary tools in the car which formed the basis for the officer's reasonable suspicion. We cite this case pursuant to Kentucky Rules of Civil Procedure (CR) 76.28(4)(c).

and was unsure if it was running when he arrived. During the time Williford followed the car before making the stop, the driver did not attempt to evade him, speed, or commit any traffic violation.

Most telling, Williford testified he stopped the car to see if the occupants were Hucks' employees and to "see if there was suspicious" activity. This is precisely the "inarticulate hunch" prohibited by *Terry*. *Terry* does not permit a stop based on an officer's curiosity or a mere "inchoate and unparticularized suspicion or 'hunch'" of criminal activity. *Terry*, 392 U.S. at 27, 88 S.Ct. at 1883. The stop cannot create a reasonable suspicion. To the contrary, a reasonable suspicion must preexist the stop.

We conclude Williford did not have a reasonable suspicion to stop the car in which Dehaven was a passenger and, therefore, the evidence discovered from the search that followed must be suppressed.

The judgment and conviction of the McCracken Circuit Court is reversed.

ALL CONCUR.

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