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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001979-MR

SHAWNTAI DAWN HASH — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 17-CR-00201

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, LAMBERT AND SPALDING,[1] JUDGES.

ACREE, JUDGE: Shawntai Hash appeals the Fayette Circuit Court's judgment after she entered a conditional guilty plea for trafficking a controlled substance, possession, and complicity. Hash argues the trial court erred by: (1) failing to

[1] Judge Jonathan R. Spalding concurred in this opinion prior to the expiration of his term of office. Release of this opinion was delayed by administrative handling.

suppress evidence violating the exclusionary rule; and (2) denying her motion to exclude her grand jury testimony. After review, we affirm.

BACKGROUND

On January 9, 2017, Lexington Police received a tip from a "qualified confidential informant"[2] (C.I.) that David Carlin was driving a black Chevrolet pick-up truck with expired tags and a suspended driver's license. The C.I. went on to say Carlin was also in possession of a large amount of crystal methamphetamine. Attempting to verify the information, police searched several databases.[3] The search led police to believe the information was accurate. Because of this information, police alerted the Narcotics Enforcement Unit to the location provided by the C.I. The narcotics K-9 handler drove to retrieve his dog.

Based on the C.I.'s information, other officers drove to an animal hospital where they spotted a black Chevrolet pick-up truck entering the parking lot. A white male and white female exited the truck with a bulldog. The police recognized the male driver as Carlin but did not recognize the female passenger. The police decided to wait and approach the couple when they exited the building.

[2] According to Appellant, Detective Danny Page described the unnamed individual who provided the tip as a "qualified confidential informant." (Appellant's brief, p. 2).

[3] The search yielded information regarding a David Carlin, who was pulled over by Lexington Police in May 2016 in a black Chevrolet pick-up truck. The police also discovered Carlin's driver's license was suspended in June 2016 and that he was a convicted felon. Additionally, the truck's registration expired in November 2016.

After approximately twenty minutes, as Carlin exited the animal clinic, police saw the woman still inside but approaching the front counter. The woman appeared to see the police encounter with Carlin, after which she was observed walking purposefully from the front counter back to a restricted area of the vet clinic. The woman entered the restricted area of the clinic despite the objection of the vet clinic's staff. Police went into the vet clinic and to the restricted area where the woman was trespassing, obtained her identity, and escorted her to the front of the business. A couple of minutes later, police discovered a loaded .380 caliber handgun in a trash can in the restricted area that did not belong to any of the vet clinic staff. At about 12:17 p.m., Hash admitted attempting to hide the handgun, at which point the police detained her.

Another officer had been questioning Carlin. Carlin initially lied about driving the truck but soon admitted to driving on a suspended license after police told him they observed him driving and exiting the driver's side of the truck. Carlin denied knowing of anything illegal in the truck and told the police the truck belonged to his mother. While police were questioning Carlin and after Hash was detained, the K-9 unit arrived. It was 12:24 p.m. The dog immediately alerted to narcotics in the truck. Once the dog alerted, the police searched the vehicle and found: (1) a loaded .45 caliber High Point pistol; (2) a black case in the glove compartment containing a bag of crystal methamphetamine, cocaine, and

marijuana; and (3) a set of digital scales. Police arrested Carlin for possession and arrested Hash for tampering with physical evidence based on her attempt to discard the .380 caliber handgun.[4]

The prosecution presented Carlin's case to the Grand Jury on February 14, 2017. Hash willingly testified. However, when Hash was questioned about the status of a criminal proceeding in Shelby County involving her, she said she was not aware of the status of that other case. Consequently, the prosecutor took a break and called the Department of Public Advocacy (DPA) to ensure her rights were protected and to have an attorney advise her of those rights.

A DPA counsel spoke with Hash and explained he could not advise her further because no court had appointed him to represent her. However, he said he was concerned she might incriminate herself. He then went over the "Waiver of Immunity" form with her. At that point, Hash identified her co-defendant, Carlin, to DPA counsel. Upon learning Carlin's identity, DPA counsel told Hash he could not advise her anymore due to a conflict of interest; he and Carlin's attorney worked in the same office. Hash took the waiver form with her and entered the Grand Jury room.

[4] After police found in Hash's purse a loaded pistol magazine for the same type and caliber handgun as was found in the trash can, she admitted that she purposefully hid the handgun in the trashcan.

The prosecutor warned Hash of the possible consequences of testifying. Hash testified anyway. She stated: (1) she owned the gun found in the clinic trash can; (2) she knew of the significant amount of methamphetamine, cocaine, and marijuana in the truck; and (3) the drugs belonged to her. She was subsequently charged with the crimes first mentioned.

After being charged, Hash filed a motion to suppress the evidence, but the trial court denied the motion. This led Hash to enter a conditional guilty plea. This appeal followed.

STANDARD OF REVIEW

Our review of a trial court's decision on a motion to suppress is two-fold. *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998). First, we must determine whether the trial court's findings of fact are supported by substantial evidence. *Id.* If so, they are conclusive. RCr[5] 8.27. Second, we review *de novo* the trial court's application of the law to those facts. *Brown v. Commonwealth*, 416 S.W.3d 302, 307 (Ky. 2013).

ANALYSIS

Motion to Suppress

Calling the interaction with police a traffic stop, Hash argues the search should be suppressed because the stop was unreasonably extended. She

[5] Kentucky Rules of Criminal Procedure.

contends such a stop should take ten to fifteen minutes, and the much longer stop she endured (24 to 28 minutes) violated the Fourth Amendment. We disagree.

Initially, we note that even assuming the evidence-yielding search of Carlin's vehicle violated the Fourth Amendment, the right which was hypothetically violated was Carlin's, not Hash's. "It has been recognized that the protection of the Fourth Amendment against unreasonable search and seizure is a personal right and cannot be vicariously asserted." *Garcia v. Commonwealth*, 185 S.W.3d 658, 666 (Ky. App. 2006) (citing *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978) (citing *Alderman v. United States*, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969)). Hash lacks standing to challenge the legality of the stop of Carlin and search of his vehicle. "To have standing to contest a search and seizure, an individual must possess a legitimate expectation of privacy in the area searched or property seized." *Id.* (citing *Rakas*, 439 U.S. 128, 99 S.Ct. 421). Hash has no such legitimate expectation of privacy.

However, this standing argument was not made to this Court, and it does not appear to be the reason for denying Hash's suppression motion. For purposes of review, we will presume standing and consider Hash's arguments.

Hash relies on *Commonwealth v. Smith*, 542 S.W.3d 276 (Ky. 2018). In *Smith*, the Kentucky Supreme Court held a "traffic stop can become unlawful if it is prolonged beyond the time reasonably required to issue a traffic citation." *Id.*

at 281 (citing *Illinois v. Caballes*, 543 U.S. 405, 407, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005)). This is accurate, but inapplicable, Kentucky jurisprudence. This police investigation did not unfold as a traffic stop.

Prior to any encounter with Hash or Carlin, the police investigation had yielded evidence that justified encountering him. The police, having accurately identified Carlin, observed him driving an unregistered vehicle on a suspended license. After Carlin stopped and exited the vehicle of his own volition, he became a pedestrian who entered a place of business. Only after he left that business, and before he re-entered the vehicle, did the police approach him. To the extent police interaction with Carlin exceeded a consensual encounter,[6] that interaction did, as it must, "arise from a reasonable articulable suspicion that criminal activity is afoot." *Docksteader v. Commonwealth*, 802 S.W.2d 149, 150 (Ky. App. 1991) (citing *Terry v. Ohio*, 392 U.S. 1, 22, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889, 906 (1968)). This was a *Terry* stop, justified by a reasonable articulable suspicion that Carlin was engaged in criminal activity – he was observed by police driving an unregistered vehicle without a license. Those two

[6] "No 'Terry' stop occurs when police officers engage a person . . . in conversation by asking questions." *Strange v. Commonwealth*, 269 S.W.3d 847, 850 (Ky. 2008) (citing *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983)). In Fourth Amendment jurisprudence, such conduct is characterized as a "consensual encounter" and is not itself a search or a seizure. *United States v. Campbell*, 486 F.3d 949, 954 (6th Cir. 2007).

tips from the C.I. proved true and, as it turned out, so did the tip regarding methamphetamine. Carlin does not contest that lawful stop.

Hash, who was still inside the clinic during Carlin's interaction with police, reacted to that lawful stop in a way that raised the suspicions of police regarding her association with Carlin. Police observed Hash distance herself from Carlin and the police by trespassing in a restricted area of the vet clinic. An officer followed and directed her out of the restricted area and to the front of the clinic.

Contrary to the Commonwealth's position that Hash had not yet been detained, Hash claims she was seized when the officer controlled her movement to the front of the clinic. If Hash was seized for Fourth Amendment purposes when she was escorted out of the restricted area, that seizure was lawful under *Commonwealth v. Fields*, 194 S.W.3d 255 (Ky. 2006).

In *Fields*, a police detective was patrolling for a suspected drug dealer when he noticed Fields in the parking lot of an apartment complex which was posted against trespassing and loitering. "When Fields saw the police vehicle, he abruptly turned and walked away from the cruiser . . . in what seemed to be an attempt to avoid contact with the police." *Id.* at 255. The detective eventually did speak with Fields, but Fields could not give the officer a lawful reason for being in the restricted area. "The officer then arrested Fields for criminal trespass. . . . A

person is guilty of criminal trespass when he 'knowingly enters or remains unlawfully in or upon the premises.' KRS 511.080(1)." *Id.* at 256, 257.

When Fields appealed the denial of his motion to suppress the evidence found incident to that arrest (cocaine and a crack pipe), the Kentucky Supreme Court noted that "unprovoked evasive maneuvers[,]" even when such movement is not trespassing, "can provide the requisite reasonable, articulable suspicion to justify a brief *Terry* stop investigation." *Id.* at 257 (citation omitted). The initial stop was lawful under *Terry* because of Fields's evasive movements.

But *Fields* further held that, when trespassing is observed by a police officer, the trespasser can be arrested. The Court cited KRS 431.005 which says: "A peace officer may make an arrest . . . [w]ithout a warrant when a violation of KRS . . . 511.080 [criminal trespass in the third degree] has been committed in his or her presence . . . ." KRS 431.005(1)(e).

"[T]he appropriate analysis to determine a lawful misdemeanor arrest is whether a reasonable officer could conclude from all the facts that a misdemeanor is being committed in his presence." *Fields*, 194 S.W.3d at 256. The Supreme Court held that the officer "reached a reasonable conclusion that Fields was committing a trespassing violation in his presence. . . . The officer then arrested him for third-degree trespassing [KRS 511.080(1)]." *Id.* at 257. The Court summarized by saying: "Here, the arrest was proper, the search was proper,

the stop was proper and the circuit court decision to allow the evidence was also proper." *Id.* at 258. To the extent one could conclude Hash was seized for Fourth Amendment purposes when the officer escorted her from the premises, we would apply the foregoing analysis and hold that any such seizure was lawful under the analysis of *Fields*.

However, Hash presented no evidence that, once she was brought out of the restricted area, the police behaved in such a way as would have caused a reasonable person to suspect she was not free to leave the scene. "In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person." *United States v. Mendenhall*, 446 U.S. 544, 555, 100 S.Ct. 1870, 1877, 64 L Ed.2d 497 (1980).

The Commonwealth's position is that no seizure of Hash's person occurred until a couple of minutes later. Police suspicions heightened when they discovered the handgun Hash attempted to discard. The totality of the circumstances then – association with Carlin who was a convicted felon police observed violating the law, Hash's evasive maneuvers, trespassing, and hiding a handgun – provided police a sufficient reasonable articulable suspicion to suspect her of criminal activity. That was sufficient basis for a *Terry* stop, at least.

Terry v. Ohio determined that a brief investigatory stop of a person by police does not automatically give rise to a Fourth Amendment violation. *Terry*, 392 U.S. at 30, 88 S.Ct. at 1884-85. In determining the reasonableness of a *Terry* stop, the stop "must arise from a reasonable articulable suspicion that criminal activity is afoot." *Docksteader*, 802 S.W.2d at 150 (citation omitted). The stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity. *Taylor v. Commonwealth*, 987 S.W.2d 302, 305 (Ky. 1998) (citations omitted). The court must look at all the factual circumstances to determine a reasonable suspicion. *Terry*, 392 U.S. at 19, 88 S.Ct. at 1878-79.

This Court's analysis of all the circumstances begins with the C.I.'s tip. Police relied on information from a C.I. which gave rise to a reasonable suspicion of drug activity. This was not just an anonymous tip, but information from a qualified individual. *Williams v. Commonwealth*, 147 S.W.3d 1, 5 (Ky. 2004) (citing *United States v. Padro*, 52 F.3d 120 (6th Cir. 1995) (Identified informants are to be given more weight than anonymous tips.)). Police then attempted to verify as much information as possible before initiating the investigation. Thereafter, as previously detailed, Hash's conduct provided additional reasons for supporting a reasonable articulable suspicion that criminal activity was afoot, and eventually probable cause to arrest.

But Hash argues that waiting for the K-9 unit unreasonably extended her detention. That is not so. Neither Carlin nor Hash could lawfully drive the truck. Carlin's license was suspended, and Hash had been detained lawfully under the foregoing analysis. Carlin had to call his mother to come retrieve him and the vehicle. While they all waited on Carlin's mother, the K-9 unit arrived and was deployed. It was 12:24 p.m. and only seven minutes after Hash was detained. Carlin's mother did not appear until 12:43 p.m. The police did not delay any detention; circumstances of Hash's and Carlin's own making did. Therefore, we affirm the trial court's denial of Hash's motion to suppress evidence.

Grand Jury Testimony

Next, Hash argues the trial court erred by not excluding her Grand Jury testimony. She argues she was denied conflict-free counsel with whom to consult prior to her testimony as a witness at the Grand Jury proceedings. Hash believes the prosecutor should have called her prior counsel, instead of the DPA office where Hash's co-defendant's counsel worked.

Hash appears to argue ineffective assistance of counsel resulting from a conflict, but she fails to cite any applicable authority supporting her claim. To sustain an allegation of ineffective assistance of counsel, the movant must satisfy the two-pronged test set forth in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The *Strickland* test requires there be a showing of

deficient performance on the part of counsel, and that there be a finding of prejudice resulting from the deficient performance. *Pierce v. Commonwealth*, 902 S.W.2d 837, 837 (Ky. App. 1995). To the extent this assessment of her argument is accurate, the argument is unavailing.

It is important to note that when she gave her Grand Jury testimony, Hash was not charged and therefore not entitled to representation. Nevertheless, the prosecutor stopped the testimony in an effort for Hash to receive effective assistance of counsel. Upon consulting with Hash, the DPA counsel became aware of a conflict *after* he went over the Waiver of Immunity form and excused himself from Hash. The prosecutor *again* went over the form with Hash.

She chose to testify and did so voluntarily. At any point, she could have asked for her prior attorney. She chose not to do so, even after being read the Waiver of Immunity and after the prosecutor told her she was entitled to an attorney. We affirm the trial court because Hash knowingly and voluntarily waived her right to counsel prior to testifying before the Grand Jury.

CONCLUSION

For the foregoing reasons, we affirm the Fayette Circuit Court's judgment.

ALL CONCUR.

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