

RENDERED: MAY 1, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2019-CA-000430-DG

ELAINE AVIGNONE

APPELLANT

ON DISCRETIONARY REVIEW FROM HARDIN CIRCUIT COURT
v. HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 18-XX-00021

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON, CHIEF JUDGE; KRAMER AND L. THOMPSON,
JUDGES.

KRAMER, JUDGE: Elaine Avignone appeals from her conviction upon a conditional guilty plea, following the Hardin District Court's denial of her motion to suppress evidence obtained during a vehicular stop. The Hardin Circuit Court affirmed, and we granted discretionary review. After examining the district court

proceedings, the dash camera video of Avignone's traffic stop, and the circuit court's opinion on direct appeal, we affirm.

In the early evening of May 26, 2018, Officer Sidney Cates of the Elizabethtown Police Department received an anonymous tip, through dispatch, regarding a vehicle on Dixie Highway in Elizabethtown. The vehicle was said to be driving erratically, indicating a possibly intoxicated driver, and identified the license plate of the car. Officer Cates located the vehicle and followed it for approximately one-quarter of a mile. According to his later testimony at the suppression hearing, Officer Cates observed the vehicle swerving within its lane. Specifically, he asserted the vehicle "swerved extremely close to the curb," then "swerved to the left, almost going into the next lane." At that point, Officer Cates initiated a traffic stop of the vehicle, which traveled a short distance before pulling into a restaurant parking lot. As he exited his cruiser, Officer Cates smelled alcohol as he approached the stopped vehicle. Officer Cates questioned the driver, Avignone, and administered field sobriety tests. Based on the results, he determined Avignone was intoxicated and charged her with driving under the influence of alcohol.

Avignone moved the district court to suppress evidence resulting from an improper traffic stop, which she asserted violated her rights under the Fourth Amendment of the United States Constitution and Section 10 of the Kentucky

Constitution. During the suppression hearing, the district court heard testimony from Officer Cates and viewed video footage from the dash camera in Officer Cates's cruiser, which recorded the entirety of the incident. Officer Cates testified consistently with the above narrative, including his allegations that Avignone's vehicle was swerving within its lane. However, the dash camera video appeared to show Avignone driving comparably to the surrounding vehicles, without the severe swerving asserted by Officer Cates.

When defense counsel asked Officer Cates about the video's seeming contradiction to his testimony, he explained that the dash camera showed a different viewing angle from that of the cruiser's driver, because it is mounted on the passenger side of the vehicle. As a result, Officer Cates testified that the dash camera "had a better view" of the incident. Nevertheless, Officer Cates maintained it was his recollection that Avignone's vehicle was swerving within the lane. In support of his account, the officer pointed to a portion of the video where Avignone's vehicle approached the line marking the left lane, although he admitted she did not cross the line.

In her argument, Avignone contended suppression of the evidence was warranted in this case because Officer Cates did not have sufficient justification to stop her vehicle, and the video supported her account. The Commonwealth, for its part, contended Officer Cates had reasonable articulable

suspicion to stop the vehicle based on the anonymous tip and supported by Officer Cates's observations. Considering the question, the district court found Avignone's driving, in itself, did not justify the stop. However, the district court also found the anonymous tip, viewed in conjunction with Officer Cates's testimony, sufficed for reasonable articulable suspicion justifying the stop. As a result, the district court denied Avignone's suppression motion.

Avignone subsequently entered a conditional guilty plea preserving her right to appeal the denial of her suppression motion. The district court thereafter sentenced her on a charge of second-offense driving under the influence of alcohol, with aggravating circumstances, pursuant to KRS¹ 189A.010. On direct appeal, the Hardin Circuit Court held that the anonymous tip alone would not justify the stop and agreed with the district court that the officer's "observations alone did not amount to weaving of such a nature to justify the stop." (Opinion and Order Affirming, Record (R.) at 24.) Nonetheless, the circuit court concluded that the circumstances, considered together, amounted to reasonable and articulable suspicion justifying the traffic stop. (R. at 25.) The circuit court then affirmed Avignone's judgment and conviction. We subsequently granted Avignone's petition for discretionary review, and this appeal followed.

¹ Kentucky Revised Statute.

For her sole issue, Avignone contends the district court erroneously denied her motion to suppress, arguing Officer Cates did not have reasonable articulable suspicion to initiate a traffic stop of her vehicle. “When reviewing a trial court’s denial of a motion to suppress, we utilize a clear error standard of review for factual findings and a *de novo* standard of review for conclusions of law.” *Greer v. Commonwealth*, 514 S.W.3d 566, 568 (Ky. App. 2017) (quoting *Jackson v. Commonwealth*, 187 S.W.3d 300, 305 (Ky. 2006)). Clearly erroneous findings are those which are unsupported by substantial evidence. *Jones v. Livesay*, 551 S.W.3d 47, 50-51 (Ky. App. 2018).

To determine whether an investigatory stop of an automobile was lawful, the Kentucky Supreme Court has provided the following guidance:

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).

Collins v. Commonwealth, 142 S.W.3d 113, 115 (Ky. 2004). An anonymous tip, even though accurate in its details, will not justify an investigatory stop unless “the investigating officer . . . independently observe[s] any illegal activity, or any other indication that illegal conduct was afoot.” *Brooks v. Commonwealth*, 488 S.W.3d 18, 22 (Ky. App. 2016) (quoting *Collins*, 142 S.W.3d at 116); *see also Florida v. J.L.*, 529 U.S. 266, 270, 120 S. Ct. 1375, 1378, 146 L. Ed. 2d 254 (2000).

Upon examining the record, we conclude the lower courts correctly found Officer Cates had reasonable articulable suspicion to make the traffic stop. “At a suppression hearing, the ability to assess the credibility of witnesses and to draw reasonable inferences from the testimony is vested in the discretion of the trial court.” *Sowell v. Commonwealth*, 168 S.W.3d 429, 431 (Ky. App. 2005) (citing *Commonwealth v. Whitmore*, 92 S.W.3d 76, 79 (Ky. 2002)). The district court heard testimony how, after receiving information from dispatch about the tip, Officer Cates maneuvered his cruiser behind Avignone’s car and observed Avignone’s car swerve within her lane. The district court found these observations to be credible and gave credence to the officer’s explanation that the angle of the dashboard camera was different from his perspective; thus, the district court, *i.e.*, the trier of fact in the matter, believed Officer Cates’ version of the events and his explanation of why the video of it may be different from his observations. As an

appellate court, we defer to the trial court's findings of fact and will not disturb those findings unless clearly erroneous. CR² 52.01.

The question then becomes whether an officer's observation of a driver swerving within the lane may contribute to a finding of reasonable articulable suspicion justifying a traffic stop. Based on our review of the case law, we must answer this question affirmatively. "In order to uphold the protections of the Fourth Amendment, an officer conducting an investigatory stop must have a reasonable suspicion, based on objective and articulable facts, that criminal activity has occurred, is occurring, or is about to occur." *Commonwealth v. Morgan*, 248 S.W.3d 538, 540 (Ky. 2008) (footnote and citations omitted). In determining whether an officer had reasonable articulable suspicion, a reviewing court must examine "the totality of the circumstances surrounding the officer's decision to conduct an investigatory stop." *Id.* (citation omitted).

In *Baker v. Commonwealth*, 475 S.W.3d 633 (Ky. App. 2015), we considered the question of whether a vehicle weaving in its own lane creates reasonable articulable suspicion.

Our review shows that many courts in other jurisdictions have held that a car weaving in its own lane is sufficient evidence on its own to create a reasonable suspicion. In Minnesota, for example, "[e]ven observing a motor vehicle weaving within its own lane in an erratic manner can justify an officer stopping a driver." *State v.*

² Kentucky Rule of Civil Procedure.

Richardson, 622 N.W.2d 823, 826 (Minn. 2001). The Arizona Supreme Court has held that weaving within a lane was “a specific and articulable fact which justified an investigative stop.” *State v. Superior Court*, 149 Ariz. 269, 718 P.2d 171, 175 (1986).

Id. at 635. In *Baker*, we concluded that a vehicle hugging the fog line, coupled with an incident of swerving within its lane, gave reasonable suspicion to justify a traffic stop under the totality of the circumstances. *Id.* at 636.

Here, as in *Baker*, the district court received evidence of substance indicating the appellant’s vehicle was weaving in its lane. Coupled with the anonymous tip of erratic driving he received through dispatch, we conclude Officer Cates had reasonable articulable suspicion justifying the traffic stop under the totality of the circumstances.

For the foregoing reasons, we affirm the Hardin Circuit Court’s decision regarding Avignone’s motion to suppress.

ALL CONCUR.

BRIEF FOR APPELLANT:

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