

**IMPORTANT NOTICE**  
**NOT TO BE PUBLISHED OPINION**

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RENDERED: FEBRUARY 19, 2004  
NOT TO BE PUBLISHED

**Supreme Court of Kentucky** **FINAL**

2002-SC-0937-MR

DATE 3-11-04 E. A. Grawley, DC  
APPELLANT

NATHANIEL WHITE

V. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE F. KENNETH CONLIFFE, JUDGE  
00-CR-521 AND 01-CR-1913

COMMONWEALTH OF KENTUCKY

APPELLEE

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

This is an appeal from a judgment based on a jury verdict which convicted White of trafficking in a controlled substance first degree while in possession of a firearm, and persistent felony offender second degree. He received a sentence of 15 years, enhanced to 25 years in prison.

The questions presented are whether (1) the trial court erred by admitting the evidence seized from his person because these were the fruits of an illegal search and seizure because the police lacked reasonable suspicion or probable cause to support the stop or the arrest; and, (2) the trial court erred to overrule his motion for a directed verdict for acquittal on the charge of trafficking in a controlled substance.

The police had received complaints of drug trafficking activity in the Everett Avenue area. On August 24, 1999, an officer was assigned to surveil the area and

parked an unmarked vehicle behind an apartment building and next to a swimming pool. Shortly after arriving, he saw White approach two men in a lighted area near the pool. These three men each looked into a red bag and then got into a Ford Explorer, in which White became a passenger. The officer testified that he had not seen any others enter the lot nor had seen any other suspicious activity in the lot up to that point. The vehicle pulled out of the lot and proceeded down the street. The officer followed them in the unmarked car.

While following the vehicle, he called for the assistance of other officers and two responded. The driver of the vehicle, Ellis, had failed to signal a left turn, and after allowing the vehicle to continue for about a half mile down the road, the officer pulled the vehicle over for a traffic stop. He requested the identification of each person in the vehicle in order to check for warrants. White responded that he had no identification on his person so the officer then requested his name and social security number. White first responded his name to be "Raphael Hightower" and gave the officer a social security number. This social security number returned a different name when radioed for a warrant check. White was warned that it was a crime to provide false identification to a peace officer but White repeated the name several times. The officer then asked White to step out of the car, and when he did, the officer saw a wallet in the back seat where White had been sitting. The wallet contained a picture I.D. with the name "Nathaniel Morrison". This information was checked and it was returned as an alias for Nathaniel White with a warrant for escape from another jurisdiction. The officer then placed White under arrest for providing a false name and for the fugitive warrant.

During the search incident to arrest, the officer discovered White to be in possession of a loaded .25 caliber pistol, \$327 cash, a pager, a cell phone, and a pager

bag containing approximately 25 rocks of crack cocaine. White was then arrested on a citation for the charges of trafficking in a controlled substance, possession of a handgun by a convicted felon, carrying a concealed deadly weapon, and giving false information to a police officer.

A suppression hearing was held on February 8, 2002 where White argued that police lacked reasonable and articulable suspicion to stop the vehicle and therefore the evidence had been illegally seized from his person. The Commonwealth argued that reasonable suspicion developed in the parking lot activity and the failure to signal provided enough for a pretextual traffic stop. The trial judge found that while the officer was able to make reasonable inquiries of the driver in a traffic stop, he also needed information rising to a reasonable suspicion to approach the passengers. The judge found that once the officer observed the activity in the parking lot, he had reasonable suspicion to approach all three men, including White, for further investigation. However, because the vehicle pulled away before back-up could arrive, the opportunity to investigate did not occur until the traffic stop. Under the totality of the circumstances, the trial judge found that the brief roadside detention was reasonable and denied the motion to suppress.

At trial, the Commonwealth submitted evidence that the substance tested positive for cocaine, weighed approximately 4.97 grams, and was contained in 23 separate packets. Another Commonwealth witness, a police detective, explained the significance of the use of baggie corners to hold the crack cocaine rocks in different sizes and that street-level dealers generally carry between one and five grams of crack cocaine. He testified that during his 28 years of police service, he has had significant narcotics training and that in his experience, dealers carry larger amounts, but users of

crack cocaine rarely have more than one or two rocks in their possession. Based on his experience, it was his opinion that the number and variety of sizes held by White indicated that he intended to sell crack cocaine and the packages had a street value between \$1,000 and \$1,200.

White offered rebuttal testimony from various witnesses to support that he had been working as a barber prior to the arrest and one testified that White and his party were not in the apartment parking lot, but in Ditto's restaurant. White testified that the driver of the Explorer, Ellis, gave him this larger amount of cocaine to be used as White wished to consume it rather than asking for each dose. White further denied being in the parking lot and denied possession of the pistol taken from his person. White was found guilty of trafficking in a controlled substance first degree while in possession of a firearm and persistent felony offender second degree.

### **I. The *Terry* Stop and Subsequent Arrest.**

White argues that because there was no transaction between the individuals observed by the officer, nor cash exchange hands or cash shown or displayed, that this activity could not supply reasonable suspicion. White further claims that we must follow the analysis of Ornelas v. United States, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). White's characterization of this analysis is that it involves a *de novo* review and the abuse of discretion standard. In Kotila v. Commonwealth, Ky., 114 S.W.3d 226 (2003), we revisited this subject and explained that whenever a peace officer stops an individual and detains his freedom, such a stop is to require "reasonable suspicion," the presence or absence of which is determined on appeal under a *de novo* standard of review, citing Ornelas, supra., 517 U.S. at 698-99.

A police officer gains reasonable suspicion to detain an individual for an investigative stop when he observes unusual conduct leading him or her to reasonably conclude, in light of experience, that criminal activity is afoot. Such conclusions must be more than an inchoate hunch, but reasonable and articulable. See Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Reasonable suspicion does not justify a full arrest because an arrest requires probable cause, which is a higher standard, but it does permit an investigative stop by the officer to gather more information. Finally, in Commonwealth v. Banks, Ky., 68 S.W.3d 347 (2001), we recognized that "the level of articulable suspicion necessary to justify a stop is considerably less than proof of wrongdoing by preponderance of the evidence." (citing United States v. Sokolow, 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989)). Further, officers are permitted to make brief stops or seizures of persons for purposes of investigation when the circumstances are such that the action appears reasonable. In such cases, no probable cause need exist at the time for believing the person stopped had actually committed a crime." Deberry v. Commonwealth, Ky., 500 S.W.2d 64 (1973).

With regard to vehicles, "*Terry stops*" are permitted upon suspicion that a misdemeanor traffic violation has been committed, and the Court has held that both the driver and the passenger may be ordered out of the car while the traffic citation is processed. see Kotila, supra. (citing Maryland v. Wilson, 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997) (passenger); Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977) (driver)).

Under the totality of the circumstances, we find that the officer had a reasonable suspicion at the time he watched the men view the contents of the bag and enter the

vehicle. The officer testified that he had been assigned to surveil the apartment buildings because the Metro Narcotics unit had received several complaints of drug trafficking. White claims that the officer lacked specific articulable facts of this parking lot being a high drug traffic area because the complaints were received in another police division and filtered down to the officer. White contends that this situation is similar to acting on an anonymous tip alone and relies on Florida v. J.L., 529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000). This argument is fallacious because reasonable suspicion does not require all information be based on the officer's personal observation. See Adams v. Williams, 407 U.S. 143, 982 S.Ct. 1921, 32 L.Ed.2d 612 (1972). Further, this case is not like J.L., supra, because officers here were not acting on an anonymous tip alone without also seeing suspicious behavior of the defendant. Rather the specific suspicious activity conducted by White and observed by the officer in this case, together with the tips that drug trafficking was occurring in that lot, provided reasonable suspicion in this case.

There was no foot traffic in the area for the half hour of the surveillance prior to this activity. It was around 10 to 11 p.m. The officer saw two men appear and stand around waiting for something to occur. Then he saw White arrive, the men met and each viewed the contents of a red bag. After viewing the contents of the bag, they then entered a vehicle together. Coupled with the drug trafficking complaints, this information was sufficient for the officer to reasonably conclude that a drug sale was in progress. White argues that because the officer did not see money or items exchanged, he lacked sufficient information to make a reasonable conclusion about a drug sale. This argument fails because police need only suspect that a transaction was afoot. In addition, it is reasonable to assume that because the area was well-lit, the

exchange of money or contraband, if it were to occur, would happen out of sight, such as in the vehicle or in another location.

The officer had, at this point of his surveillance, enough information to supply articulable facts that criminal activity was afoot. He was free to conduct a *Terry* stop at this point, however, for safety concerns, he radioed for backup but the men had already entered the white Explorer and begun to drive away. Having seen the Explorer fail to signal a left turn, and with knowledge that back-up officers were en route to him, he made the vehicle stop at that time. Because we have held that a mere traffic violation can supply sufficient cause for a traffic stop, this stop based on observing suspicious behavior and observing a traffic violation was reasonable. See Kotila, supra.

Our analysis here is whether the police detention of the individuals in the vehicle was reasonable. The officer only asked each individual in the car for identification. The driver and the passenger complied, but White stated he had no identification on him and gave the officer the name of "Raphael Hightower" and a social security number. When the officer radioed the social security number in for a warrant check, it returned a name different than that provided by White. The officer testified at the suppression hearing that he then warned White that providing false information to an officer was a crime. White insisted this was his name. He was ordered out of the car. This was reasonable because the officer had reasonable suspicion of all three men engaging in some activity, but now had further suspicions that White was providing false information. See Wilson, supra. He then saw a wallet in the back seat where White had been sitting. The wallet contained a picture identification bearing White's photo and the name "Nathaniel Morrison". A check for warrants revealed that this name was a recognized alias for White and that White had an outstanding warrant for escape in



another jurisdiction. At this time, White was arrested and a search incident thereto was conducted.

White argues that probable cause could not exist because the officer lacked reasonable suspicion. Our review supports that the officer acted reasonably when following the vehicle because he already had sufficient reasonable suspicion that the three occupants were possibly engaged in a drug transaction. After seeing the traffic violation he conducted a reasonable traffic stop. White has not pointed out anything in the police conduct that was unreasonable. We have found nothing to suggest unreasonable detention in these facts.

White states that the officer lacked probable cause for the arrest. However, prior to arrest, the officer discovered an escape warrant and observed White commit an offense in his presence. He was therefore justified to arrest White and conduct a search incident to arrest. Police could have arrested White on the charge of providing false information to him alone. Atwater v. City of Lago Vista, 532 U.S. 318, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001). (A police officer's ability to arrest and jail a person upon probable cause applies to misdemeanor as well as felony offenses). However, White also had a warrant for his arrest. It was during this arrest that the officer discovered the cocaine and firearm among other items. Reviewing these facts *de novo* has revealed no unreasonable activity on the part of police, and we therefore find no abuse of discretion by the trial court in denying White's motion to suppress admitting these items into evidence.

## II. Sufficiency of Evidence for the Trafficking Charge

White charges the trial judge with error in denying his motion for a directed verdict of acquittal on the charge of trafficking in a controlled substance. On appeal, the standard for determining sufficiency of evidence is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). On a motion for directed verdict, the trial judge must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. On appeal the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal. Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991).

White maintains that the Commonwealth failed to prove that White intended to sell the crack cocaine. He contends that his possession of over 20 crack cocaine rocks was for his personal consumption. He also reiterates that police never saw a transaction be completed between White and any other person, and therefore no proof exists that he intended to sell. White asks us to base our review by only considering his evidence, rather than the evidence as a whole.

The Commonwealth provided expert testimony from a narcotics agent that consumers of crack cocaine are not generally in possession of this amount because they consume it too rapidly. Further, a dealer would not entrust such amounts to a user without demanding payment because it would all be consumed. His testimony added

information that addicts would rarely have this amount on their person and cash as well because of the habit itself. Likewise, he testified that common tools of the trade for dealers included the cell phone and pager as methods of communication with their potential customers. Finally, he testified that dealers need guns to protect themselves from rival dealers and from their own customers. Such testimony rebuts White's own assertions that he was merely holding this amount for personal consumption. Given this testimony, it would not have been unreasonable for a jury to find guilt for trafficking. It was therefore not erroneous for the trial court to deny the motion for directed verdict of acquittal because the evidence was sufficient.

The judgment of conviction is affirmed.

All concur except Stumbo, J., who dissents without opinion.

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