

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: NOVEMBER 1, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2006-SC-000781-DG

DATE 11-26-07 Elm Grove, KY, D.C.

COMMONWEALTH OF KENTUCKY

APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
CASE NUMBER 2003-CA-000654
FAYETTE CIRCUIT COURT NO. 03-CR-000143

JOHN W. BLACK

APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING

The Commonwealth appeals from a decision of the Court of Appeals reversing the Fayette Circuit Court's denial of Appellee John W. Black's motion to suppress. On appeal, the Commonwealth argues that the Court of Appeals erred in concluding that there was no reasonable suspicion to justify the initial stop of Appellee. For the reasons set forth herein, we reverse the Court of Appeals and affirm Appellee's convictions and sentence.

I. FACTS

On October 22, 2002, Lexington police received an anonymous tip that a black male riding a purple bicycle was selling drugs across from a Speedway at the corner of Georgetown Street and Glen Arvin. The man was described as wearing a blue denim jacket and blue jeans. The informant mentioned that the drugs were inside a newspaper the man was carrying.

Officer David Lewis, who was patrolling nearby, responded to the tip. Upon arriving at the location, he observed a man who fit the description. Officer Lewis and Appellee made eye contact as the officer drove by in a marked police cruiser. Officer Lewis drove another block and turned around. Meanwhile, Appellee left the area. Officer Lewis drove for a short distance and located Appellee.

Officer Lewis drove in front of Appellee, stopped, and exited his cruiser. Officer Lewis, who knew Appellee, called him by his name, and told him that there had been a complaint about him selling drugs. As Officer Lewis approached, he asked Appellee to place the newspaper on the ground, and Appellee complied. Appellee then put his right hand in his sweatshirt pocket. Officer Lewis repeatedly asked Appellee to remove his hand, but he refused to comply.

As Officer Lewis attempted to handcuff Appellee, the newspaper was knocked around and cocaine spilled out of it. Appellee was then placed under arrest. A search of Appellee's person revealed a folded dollar bill also containing cocaine.

Appellee was indicted for possession of a controlled substance in the first degree and for being a persistent felony offender in the first degree. Appellee moved to suppress the drugs, arguing that the anonymous tip did not provide reasonable suspicion to justify the stop. The circuit court denied the motion.

Appellee then entered a conditional guilty plea to the charges, reserving the right to appeal the denial of his motion to suppress. On March 11, 2003, he was sentenced to five years imprisonment for these crimes.

Appellee appealed the denial of his motion to suppress to the Court of Appeals. In an opinion rendered on May 14, 2004, the Court of Appeals reversed, holding that the anonymous tip was insufficient to create reasonable suspicion.

The Commonwealth sought, and we granted, discretionary review of the decision of the Court of Appeals. On April 12, 2006, this Court entered an opinion and order vacating the Court of Appeals' decision and remanding the case to the Court of Appeals for further consideration in light of Commonwealth v. Kelly, 180 S.W.3d 474 (Ky. 2005), and Commonwealth v. Priddy, 184 S.W.3d 501 (Ky. 2005).

On remand, the Court of Appeals again reversed in a second opinion rendered on October 6, 2006, holding that the anonymous tip was insufficient to create reasonable suspicion. The Court of Appeals found the facts in the present case distinguishable from the facts of Kelly and Priddy. "Unlike Kelly and Priddy, the tip at issue in this appeal was not from an 'identifiable informant' or a 'citizen informant' but, rather, from a truly anonymous informant."

This matter is before the Court a second time upon the Commonwealth's motion for discretionary review. We now reverse the Court of Appeals and affirm Appellee's convictions and sentence.

II. ANALYSIS

The Court of Appeals concluded that the circuit court erred in failing to suppress the drugs. According to the Court of Appeals, the police violated Appellee's right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; Ky. Const. § 10. Specifically, the Court of Appeals held that

“the anonymous tip did not create reasonable suspicion of criminal activity necessary to support a forcible investigatory stop under Terry v. Ohio, 392 U.S. 1 (1968).”

On appeal, the Commonwealth argues that the Court of Appeals failed to consider other circumstances relevant to the reasonable suspicion inquiry. According to the Commonwealth, the totality of the circumstances gave Officer Lewis reasonable suspicion to stop Appellee. Such circumstances included: Officer Lewis found Appellee in an area known for illegal drug sales and other crime; Officer Lewis recognized Appellee from previous encounters; and Appellee began to take evasive action upon observing Officer Lewis.

It is well-settled that investigatory stops are permissible if the officer has reasonable and articulable suspicion that a violation of the law is occurring. Kelly, 180 S.W.3d at 476. An anonymous tip may provide the reasonable suspicion necessary to justify an investigatory stop. See Alabama v. White, 496 U.S. 325, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990); Stewart v. Commonwealth, 44 S.W.3d 376 (Ky. App. 2000). When determining whether a set of facts is sufficient to generate reasonable suspicion, we must look at the totality of the circumstances. White, 496 U.S. at 330, 110 S. Ct. at 2416. We review de novo the applicability of the law to the facts found. Welch v. Commonwealth, 149 S.W.3d 407, 409 (Ky. 2004).

Upon review of the record, we agree with the Commonwealth that reasonable suspicion existed at the time of the stop. Accordingly, we reverse the Court of Appeals.

The Court of Appeals' decision relied on Florida v. J.L., 529 U.S. 266, 120 S. Ct. 1375, 146 L.Ed.2d 254 (U.S. 2000), where an anonymous caller reported to the police that a young black male standing at a specific bus stop and wearing a plaid shirt was carrying a gun. Upon arriving at the bus stop, the police saw three black males, one of whom was wearing a plaid shirt. Aside from the tip, the police had no reason to suspect that any of the men were engaged in illegal activity. The police searched J.L. and seized a gun from his pocket.

The United States Supreme Court held that an anonymous tip that a person is carrying a gun is, without more, insufficient to justify a stop of that person. The Court observed that:

An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.

Id. at 272.

However, the basis for finding reasonable suspicion here is stronger than in the J.L. case. In the present case, the tip was more than a bare description of Appellee's appearance and location. In particular, the tipper knew that Appellee would be selling drugs and carrying his cocaine in a newspaper. That Appellee had concealed cocaine in a newspaper is not a fact that could be easily observed by the general public and, therefore, shows that the tipper had "knowledge of concealed criminal activity." Id.

Moreover, the fact that Appellee was in a high crime area and acted furtively after observing the officer, coupled with the anonymous tip, supports a

finding of reasonable suspicion. In addition, the stop occurred near Douglass Park, an area that is, as the Commonwealth points out, known for illegal drug sales and other crime. See Illinois v. Wardlow, 528 U.S. 119, 124, 120 S. Ct. 673, 676, 145 L.Ed.2d 570 (U.S. 2000) (holding that an individual's presence in an area of expected criminal activity, by itself, is not enough for reasonable suspicion, but the police are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation); Simpson v. Commonwealth, 834 S.W.2d 686, 688 (Ky. App. 1992) (holding that being in a high crime area is a relevant factor in reasonable suspicion analysis).

Our conclusion that it was reasonable for Officer Lewis to stop Appellee is not inconsistent with recent decisions of this Court. See Collins v. Commonwealth, 142 S.W.3d 113, 115 (Ky. 2004) (holding that an anonymous tip, once suitably corroborated, can provide reasonable suspicion).

III. CONCLUSION

For the foregoing reasons, we reverse the decision of the Court of Appeals and affirm Appellee's convictions and sentence.

All sitting. Abramson, Cunningham, Minton, Noble and Scott, JJ., concur. Lambert, C.J., and Schroder, J., dissents.

COUNSEL FOR APPELLANT

Gregory Stumbo
Attorney General of Kentucky

Michael Harned
Assistant Attorney General
Criminal Appellate Division
Attorney General's Office
1024 Capitol Center Drive
Frankfort, KY. 40601

COUNSEL FOR APPELLEE

V. Gene Lewter
Fayette Co Legal Aid, Inc.
111 Church Street
Lexington, KY. 40507