NO. COA06-865

NORTH CAROLINA COURT OF APPEALS

Filed: 1 May 2007

STATE OF NORTH CAROLINA

v. McDowell County
Nos. 01 CRS 3332-33,
01 CRS 3427

JAMES EDWARD CASSELMAN,
Defendant.

Appeal by defendant from judgments dated 22 February 2006 by Judge C. Philip Ginn in McDowell County Superior Court. Heard in the Court of Appeals 7 March 2007.

Attorney General Roy Cooper, by Assistant Attorney General Edwin Lee Gavin II, for the State.

Carol Ann Bauer for defendant.

BRYANT, Judge.

James Edward Casselman (defendant) appeals from judgments dated 22 February 2006, entered consistent with a jury verdict finding him guilty of maintaining a vehicle that was used for keeping or selling a controlled substance; possession of marijuana; and having attained the status of an habitual felon. For the reasons below, we reverse defendant's convictions and remand for a new trial.

Facts

On 2 January 2000, Kimberley Davis, a Patrol Officer with the Marion Police Department, responded to an anonymous tip phoned in

to the police department dispatcher. The anonymous caller stated a blue 1992 Chevrolet Corsica with the license plate number LWK-1824 would be driving south on U.S. Highway 221 into the town of Marion. The caller further stated the car would be driven by defendant and would be carrying a large amount of marijuana. Officer Davis drove up U.S. Highway 221 North, and waited for the car to appear.

When the car appeared, Officer Davis followed it into Marion and verified that the license plate was registered in defendant's name to a 1992 Chevrolet Corsica. Upon verifying this information, Officer Davis stopped the car. Officer Davis identified defendant as the driver and asked him to get out of the car. As defendant got out of the car, Officer Davis observed a bag of marijuana in plain view between the door and the driver's seat. Defendant gave permission to search his car and was subsequently placed under arrest. The search revealed eight small bags of marijuana inside one large bag and a nine-millimeter handgun.

Procedural History

On 24 July 2001, defendant was indicted by the McDowell County Grand Jury for the offenses of possession with intent to sell and deliver marijuana, maintaining a vehicle that was used for keeping or selling a controlled substance; possession of marijuana; and having attained the status of an habitual felon. Defendant was subsequently tried before a jury and convicted, however that decision was appealed to this Court which ordered that he be

granted a new trial. *See State v. Casselman*, 172 N.C. App. 172, 616 S.E.2d 30 (2005) (unpublished).

Defendant was again tried before a jury on the same charges in McDowell County Superior Court on 21-22 February 2006, the Honorable C. Philip Ginn, Judge, presiding. Defendant was found guilty of maintaining a vehicle that was used for keeping or selling a controlled substance; possession of marijuana; and having attained the status of an habitual felon. On 22 February 2006, the trial court sentenced defendant to a presumptive sentence of 116 months to 149 months imprisonment for the offenses of possession of marijuana and having attained the status of an habitual felon, and forty-five days imprisonment for the offense of maintaining a vehicle that was used for keeping or selling a controlled substance. Defendant appeals.

The dispositive issue before this Court is whether the trial court erred in denying his motion to suppress evidence discovered as a result of his vehicle stop. "The scope of review of the denial of a motion to suppress is 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.'" *State v. Bone*, 354 N.C. 1, 7, 550 S.E.2d 482, 486 (2001) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)), *cert. denied*, 535 U.S. 940, 152 L. Ed. 2d 231 (2002). "The trial court's conclusions of law,

however, are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

In the instant case, after hearing the testimony of Officer Davis on *voir dire*, the trial court found as fact "that there was nobody else that would fit this description on this particular day and that the description of the vehicle and the individual, down to his name, is sufficient to form the articulable suspicion for the stop." The trial court denied defendant's motion to suppress the admission of the evidence found as a result of Officer Davis' stop of defendant's car. Defendant now does not contest the facts established by Officer Davis' testimony, only that the trial court erred in determining that the facts support the trial court's holding that reasonable suspicion existed for the stop.

This Court has held that "before the police can conduct a brief investigatory stop of a vehicle and detain its occupants without a warrant, the officer must have a reasonable suspicion of criminal activity." *State v. McArn*, 159 N.C. App. 209, 212, 582 S.E.2d 371, 374 (2003) (citing *Terry v. Ohio*, 392 U.S. 1, 30, 20 L. Ed. 2d 889, 911 (1968)). "The reasonable suspicion must arise from the officer's knowledge prior to the time of the stop." *Hughes*, 353 N.C. at 208, 539 S.E.2d at 631. "A court must consider 'the totality of the circumstances--the whole picture' in determining whether a reasonable suspicion to make an investigatory stop exists." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (citing *United States v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 629 (1981)).

"An anonymous tip may provide reasonable suspicion if it exhibits sufficient indicia of reliability and if it does not, then there must be sufficient police corroboration of the tip before the stop can be made." *McArn*, 159 N.C. App. at 213, 582 S.E.2d at 374 (citing *Hughes*, 353 N.C. at 207, 539 S.E.2d at 630). However, "[u]nlike a tip from a known informant whose reputation can be assessed and who can be held responsible if [the] allegations turn out to be fabricated, an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity." *Florida v. J.L.*, 529 U.S. 266, 270, 146 L. Ed. 2d 254, 260 (2000) (internal citations and quotations omitted). Our Supreme Court has further held 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."

Hughes, 353 N.C. at 209, 539 S.E.2d at 632 (quoting *J.L.*, 529 U.S. 266 at 272, 146 L. Ed. 2d at 261).

Here, Officer Davis, without any further observations of illegal or suspicious activity, instigated an investigatory stop of defendant's vehicle based solely upon the anonymous tip received by the police department. This tip identified the color, make, license plate number, driver and location of defendant's car. Prior to making the stop, Officer Davis was able to corroborate

only that the car she was stopping was registered to defendant and matched the car described in the anonymous tip. Officer Davis could not confirm that defendant was the actual driver until after making the stop.

There was nothing about the tip or defendant's actions at the time of the stop to indicate any reliability as to the criminal activity alleged in the anonymous tip. The anonymous tip and subsequent corroboration merely established the reliability of the tip to identify a "determinate person." As there was no sufficient indicia of reliability as to any criminal activity on the part of defendant established through the tip or subsequent corroboration by Officer Davis, the conclusion of the trial court, that the tip created sufficient reasonable suspicion to justify stopping defendant's vehicle, was error. Accordingly, we reverse the denial by the trial court of defendant's motion to suppress and remand the case for a new trial. As we are remanding this case for a new trial, we find it unnecessary to address defendant's remaining assignments of error.

Reversed and remanded.

Judges McCULLOUGH and LEVINSON concur.

Report per Rule 30(e).