Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-316

APRIL TERM, 2018

State of Vermont v. Kimberly Love*	}	APPEALED FROM:
	}	
	}	Superior Court, Franklin Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 433-4-16 Frcr
		Trial Judge: A. Gregory Rainville

In the above-entitled cause, the Clerk will enter:

Defendant appeals from her conditional nolo contendre plea to driving under the influence (DUI). She argues that the court erred in denying her motion to suppress and dismiss. We affirm.

Defendant was charged with disorderly conduct, DUI #2, and DUI #2-test refusal in April 2016. The State later dismissed the disorderly conduct charge without prejudice. Defendant filed a motion to suppress and dismiss, arguing that the officer who stopped her lacked a reasonable and articulable suspicion that she had committed a crime. Following a hearing, the court denied the motion on the record at a later status conference.

The court made the following findings. On April 24, 2016, a police officer received a call from dispatch alerting him to a disturbance at a convenience store/gas station. A store clerk had called police to report that three older women had been creating a "scene" in the store. While the officer was en route with his cruiser lights activated, dispatch informed the officer that the three women had left the store and were standing just outside near a car, which was described in detail including the license plate number. The officer arrived on the scene shortly thereafter. He observed a car matching the provided description backing out of a parking place and he stopped the car. The defendant was the driver. Initially, the officer asked defendant to pull back into her parking spot so that he could talk with her about the disturbance complaint, which she did. While speaking with defendant, the officer observed signs that she was intoxicated. Defendant was arrested on suspicion of DUI and engaging in disorderly conduct. A video of the officer's interaction with defendant was also admitted into evidence.

Based on its findings, the court concluded that the stop was justified. As set forth above, the court explained that at the time of the stop, the officer was investigating a disturbance, which eventually resulted in a disorderly conduct charge against defendant. The officer possessed detailed information concerning the individuals and vehicle associated with the report. Relying on case law, the court found that the call from the store clerk exhibited sufficient indicia of reliability and that the officer had a reasonable and articulable suspicion of criminal activity. At the close of the hearing, defendant asked the court to amend its finding to reflect that the dispatcher reported that the women were "causing a scene" rather than "causing a disturbance." The court agreed that the dispatcher had said "three women causing a scene," which the officer had

characterized in his testimony as a disturbance. Following the court's ruling, defendant pled nolo contendre to an amended charge of DUI #1, reserving the right to challenge the court's ruling on her motion to suppress and dismiss. This appeal followed.

Defendant argues that the court erred in denying her motion because the tip did not support a reasonable articulable suspicion that she had committed disorderly conduct or any other crime but instead raised the possibility that she was stopped for uttering protected speech. Defendant asserts that if her alleged conduct in "causing a scene," without further description, constituted reasonable suspicion of disorderly conduct, this would substantially burden First Amendment rights. Defendant also argues that the court erred in finding that the women had caused a "disturbance" or that there was a report of a "disturbance" when the dispatcher told the officer that the women were "causing a scene." As reflected above, the court acknowledged on the record that the dispatcher had used the words "causing a scene," which the officer had characterized in his testimony as a report of a "disturbance."

"A motion to suppress presents a mixed question of law and fact." State v. Davis, 2007 VT 71, ¶ 5, 182 Vt. 573. We will uphold the trial court's findings unless they are clearly erroneous; we review the court's legal conclusion de novo. Id.

As the trial court explained, a police officer may "make an investigatory stop based on a reasonable and articulable suspicion of criminal activity." Id. ¶ 7 (citation omitted). "The officer must have more than an unparticularized suspicion or hunch of criminal activity, but needs considerably less than proof of wrongdoing by a preponderance of the evidence." Id. (citation omitted); see also State v. Kettlewell, 149 Vt. 331, 334 (1987) ("A police officer may make a brief investigatory stop of a suspect based on less than probable cause . . . as long as the stop is less intrusive than a full-blown arrest and the investigating officer, based on objective facts and circumstances, reasonably believes that the suspect is, or is about to be, engaged in criminal activity." (citation omitted)). "Grounds for an investigatory stop are not limited to the officer's own observations. An informant's tip, if it carries enough indicia of reliability, may justify a forceable stop." Kettlewell, 149 Vt. at 335. "Generally, information about criminal or suspicious activity from a citizen, who is not a paid informant and is unconnected with the police, is presumed to be reliable." Id. at 336; see also Navarette v. California, 134 S. Ct. 1683, 1689 (2014) (explaining that where informant provides specific information related to report, such as model and make of car and license plate number, caller necessarily claims eyewitness knowledge of incident, and "[t]hat basis of knowledge lends significant support to the tip's reliability," as does contemporaneous reporting of observed criminal activity, use of 911 system, and police confirmation of vehicle's predicted location). Of course, "[e]ven a reliable tip will justify an investigative stop only if it creates reasonable suspicion that criminal activity may be afoot." Navarette, 134 S. Ct. at 1690 (quotation omitted)).

Defendant does not challenge the reliability of the tip. Instead, she argues that the tip did not give rise to a reasonable suspicion that a crime had been committed. We disagree. As recounted above, a store clerk contacted police to report that three women were causing a scene inside the store. It was reasonable for the officer to interpret this as "causing a disturbance;" the two words are essentially interchangeable in this context. Neither the clerk nor the dispatcher had to use the language of the disorderly conduct statute to give rise to a reasonable suspicion that this crime had been committed. In a similar vein, the State did not have to prove that defendant had in fact committed disorderly conduct, and the constitutionality of the disorderly conduct statute is not at issue here. Instead, as set forth above, the content of the tip needed to give rise to a reasonable suspicion that defendant had committed a wrongdoing, which requires "considerably less than proof by a preponderance of the evidence." Davis, 2007 VT 71, ¶ 7.

Disorderly conduct requires in relevant part "that a defendant voluntarily engage in violent, tumultuous, or threatening behavior while in a public place." State v. Amsden, 2013 VT 51, ¶¶ 12, 15, 194 Vt. 128 (recognizing that disorderly conduct statute "refers to the elements of violence and tumultuousness in the disjunctive"); 13 V.S.A. § 1026(a)(1). The clerk's report that defendant was "causing a scene" supported a reasonable suspicion that she was engaged in "tumultuous behavior" in a public place. We have recognized that tumult includes the "commotion and agitation of a large crowd," and that, although "[a] crowd of people is not the essence of a tumult," the fact that three persons witnessed an outburst "would satisfy any 'crowd' requirement." State v. Lund, 144 Vt. 171, 178-79 (1984), overruled on other grounds by State v. Begins, 148 Vt. 186 (1987). The clerk's tip gave rise to a reasonable suspicion that "tumult" had occurred, including the satisfaction of any "crowd" requirement. Defendant suggests that the reported "disturbance" could have involved her use of "protected speech." As the Supreme Court has made clear, however, "reasonable suspicion need not rule out the possibility of innocent conduct." Navarette, 134 S. Ct. at 1691 (quotation omitted).

This case is not like Kettlewell, 149 Vt. 331, cited by defendant. In Kettlewell, the tip that led to a seizure was equivocal. 149 Vt. at 335. The tipster conveyed no information, not even a suspicion, that the defendants were engaged in criminal activity. The same is not true here. As set forth above, the facts in this case supported a reasonable suspicion that defendant engaged in disorderly conduct, thereby justifying the stop. The court did not err in denying defendant's motion to suppress and dismiss.

Affirmed.

BY THE COURT:

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Marilyn S. Skoglund, Associate Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice