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(FILE NO. 2006-SC-0781-D)

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000654-MR

JOHN W. BLACK — APPELLANT

ON REMAND FROM SUPREME COURT OF KENTUCKY
NO. 2004-SC-000432-DG

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 03-CR-00143

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: JOHNSON, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: This matter is before us on remand by the Kentucky Supreme Court by Opinion and Order dated April 12, 2006. The Supreme Court vacated our opinion rendered May 14, 2004, and ordered us to reconsider in light of Commonwealth v. Kelly, 180 S.W.3d 474 (Ky. 2005) and Commonwealth v. Priddy, 184 S.W.3d 501 (Ky. 2005). Having reviewed Kelly and Priddy, we believe the facts in the instant appeal are distinguishable from

the facts in those cases. 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. Thus, upon reconsideration, we reinstate our previous opinion reversing and remanding.

On October 22, 2002, the Lexington police department received an anonymous tip that a black male, wearing a blue-jean jacket and blue jeans, was riding a purple bicycle and selling narcotics across from a Speedway store located at the corner of Georgetown Street and Glenn Arvin. The anonymous tipster also mentioned that the narcotics were inside a newspaper the black male was carrying.

At approximately 2:37 p.m., Officer David Lewis investigated the anonymous tip. Upon arriving at the described location, Officer Lewis observed appellant wearing a blue-jean jacket and blue jeans, riding a purple bicycle, and carrying a newspaper. As Officer Lewis drove past appellant in a marked police cruiser, the officer made "eye contact" with appellant. One block later, the officer turned his vehicle around and noticed appellant "had left the area."[1] Officer Lewis then drove for a short distance and located appellant riding the bicycle.

Officer Lewis stopped his police cruiser in front of appellant "to cut him off" and "to block his path." Officer

[1] The dissenting opinion states "appellant began to take evasive action upon observing the officer." A review of the record reveals otherwise. Officer David Lewis testified that appellant simply "had left the area." There was no evidence of record that appellant evaded the officer.

Lewis exited the police cruiser and informed appellant that police had received "a call" alleging appellant was selling narcotics. As Officer Lewis approached appellant, he directed appellant to place the newspaper on the ground. Appellant did so. Officer Lewis continued his approach while reiterating the reason for "stopping him." Appellant then put his right hand in his sweatshirt pocket. Officer Lewis repeatedly directed appellant to remove his hand from inside his pocket. Appellant failed to do so; at which time, Officer Lewis attempted to handcuff him. In the process, the newspaper was knocked around and cocaine fell from the newspaper. Appellant was then placed under arrest. During a search of appellant's person, a folded one-dollar bill was found in appellant's right pants' pocket.

Appellant was indicted upon the offenses of possession of a controlled substance in the first degree (Kentucky Revised Statutes (KRS) 218A.1415) and for being a persistent felony offender in the first degree (KRS 532.080). Appellant subsequently filed a motion to suppress. Appellant contended the anonymous tip was insufficient to constitute reasonable suspicion of criminal activity to justify the initial stop. The circuit court disagreed and denied appellant's motion to suppress.

Consequently, appellant entered a conditional plea of guilty to possession of a controlled substance in the first degree and to being a persistent felony offender in the second degree. Ky. R. Crim. P. 8.09. Appellant reserved the right to

appeal the circuit court's denial of the motion to suppress. By judgment entered March 11, 2003, appellant was sentenced to five years' imprisonment. This appeal follows.

Appellant contends the circuit court erred by denying the motion to suppress evidence. Specifically, he contends 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). Upon review of the record and applicable case law, we are compelled to agree.

A police officer may make an investigatory (Terry) stop if he possesses a reasonable suspicion that criminal activity is afoot. Id. It is axiomatic that reasonable suspicion to support an investigatory stop must be measured by what the police knew *before initiating the stop*. Id. A stop or seizure is said to occur when "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." United States v. Mendenhall, 446 U.S. 544, 554 (1980).

In the case at hand, we conclude the "stop" took place when the officer blocked appellant's path with the police cruiser, approached appellant, and ordered him to place the newspaper on the ground. At this point, a reasonable person would not believe he was free to leave. Whether Officer Lewis possessed the requisite reasonable suspicion of criminal activity must be measured by what he knew before the "stop" took place. As the investigatory stop took place *before* appellant

was ordered to remove his hand from his pocket and *before* the cocaine was discovered in the newspaper, such circumstances cannot form the basis of reasonable suspicion to justify the stop.[2] Indeed, Officer Lewis testified that other than the anonymous tip he had no reason to stop appellant.[3]

It is well established that an anonymous tip may provide the reasonable suspicion necessary to justify such an investigatory stop. See Alabama v. White, 496 U.S. 325 (1990); Stewart v. Commonwealth, 44 S.W.3d 376 (Ky.App. 2000). To determine if an anonymous tip supplied the requisite quantum of suspicion, the court must look to the "totality-of-the-circumstances." Alabama v. White, 496 U.S. at 330. In particular, the anonymous tip must contain:

> "[A] range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted." . . . What was important was the caller's ability to predict respondent's *future behavior*, because it demonstrated inside information--a special familiarity with respondent's affairs.

[2] We recognize that a suspect's failure to remove his hand from his pocket may be a factor when determining reasonable suspicion of criminal activity. See Baker v. Commonwealth, 5 S.W.3d 142 (Ky. 1999)(holding that failure to remove hands from pockets coupled with other circumstances constituted reasonable suspicion to justify a Terry stop and frisk). As reasonable suspicion must be measured by what Officer Lewis knew before the stop, the dissent's reliance upon the fact that appellant placed his hand in his pocket is erroneous because the "stop" had already taken place.

[3] We observe the police had an alternative to an unlawful stop based upon the unreliable tip; the police could have utilized the information provided by the tip to conduct an investigation yielding evidence to corroborate the tipster's allegation of criminal activity.

Id. at 332 (emphasis added)(quoting Illinois v. Gates, 462 U.S. 213, 245 (1983)).

In the case *sub judice*, the anonymous tip was that a black male, wearing a blue-jean jacket and a pair of blue jeans, was riding a purple bicycle and was selling narcotics across from a Speedway store located at the corner of Georgetown Street and Glenn Arvin. The anonymous tipster also stated that the narcotics were inside a newspaper the black male was carrying.

We view the facts of this case strikingly similar to the facts presented in Florida v. J.L., 529 U.S. 266 (2000). There, police received an anonymous tip that a young black male was carrying a gun. The tip specified that the black male would be standing at a specific bus stop and wearing a plaid shirt. When the police arrived at the bus stop, three black males were standing there and one of the three (J.L.) was wearing a plaid shirt. Aside from the tip, the police had no reason to suspect any of the three were engaged in criminal activity. A police officer searched J.L. and seized a gun from J.L.'s pocket.

The United States Supreme Court held the tip lacked the requisite indicia of reliability to create the reasonable suspicion required to support a stop under Terry. Most importantly, the Supreme Court observed:

> 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.

Florida v. J.L., 529 U.S. at 272.

In the case at hand, the facts supplied by the anonymous tip could have been easily observed by any member of the general public. The tip merely described appellant's appearance and location. The tip failed to predict appellant's future behavior and, thus, failed to reveal an insider's knowledge of concealed criminal activity.[4] Additionally, the tip was not corroborated by Officer Lewis nor did he observe any criminal activity prior to the stop. Simply stated, the tip provided no information upon which police could corroborate its reliability and provided no basis for its allegation of criminal activity. See id.; Alabama v. White, 496 U.S. 325.

Upon the totality of the circumstances, we are of the opinion the anonymous tip was insufficient to create reasonable suspicion that appellant was engaged in criminal activity; thus, the investigatory stop was violative of the Fourth Amendment of the United States Constitution and of Section 10 of the Kentucky

[4] The dissent opines that the majority opinion "is difficult to reconcile" with Taylor v. Commonwealth, 987 S.W.2d 302 (Ky. 1998), *cert. denied*, 528 U.S. 901 (1999). We, however, believe it easily reconcilable and distinguishable. In Taylor, the anonymous tip **predicted** that a blue Oldsmobile convertible "would soon be in the area of a particular street corner. . . ." Id. at 303. This tip provided information predictive of future behavior that could not have been known by a member of the general public; rather, such predictive information would require an insider's knowledge of criminal activity. See Alabama v. White, 496 U.S. 325 (1990). In contrast, the anonymous tip at issue in the case *sub judice* merely indicated appellant was **currently** selling drugs at a particular location; it provided no information predicting appellant's future behavior. Of course, had appellant been selling drugs at this location and Officer Lewis witnessed the sale, then the stop would have been justified.

Constitution. Accordingly, we hold the circuit court erred by failing to grant appellant's motion to suppress.

For the foregoing reasons, we reverse and remand this cause for proceedings consistent with this opinion.

JOHNSON, JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

VANMETER, JUDGE, DISSENTING: I respectfully dissent. The facts of *Florida v. J.L.*, 529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000), on which the majority opinion heavily relies, are not sufficiently similar to the facts in the present case so as to require reversal and suppression of the evidence seized. In *Florida v. J.L.*, the police were possessed with a bare anonymous tip that a young black man wearing a plaid shirt at a bus stop was in possession of a handgun. Upon arriving at the scene, the police observed a young man fitting the description, immediately confronted and frisked him, and seized the gun. As noted by the Court, "[t]he reasonableness of official suspicion must be measured by what the officers knew before they conducted their search. All the police had to go on in this case was the bare report of an unknown, unaccountable informant . . . ." 529 U.S. at 271, 120 S.Ct. at 1379.

In contrast, the facts of the instant case differ significantly. In addition to the "bare report"[5] of the

[5] While I believe the observations by the police at the scene justified the stop and subsequent frisk, the opinion of the majority is difficult to reconcile with *Taylor v. Commonwealth*, 987 S.W.2d 302 (Ky. 1998), cert. denied, 528 U.S. 901, 120 S.Ct. 239, 145 L.Ed.2d 200 (1999). In *Taylor*, the facts in the anonymous tip were that two black men in a blue Oldsmobile convertible with a specific license plate would soon be in the area of a particular street corner. A unanimous court held that this tip was

"unknown, unaccountable informant," the police also found the appellant in an area known for illegal drug sales and other crime, the officer who responded to the call recognized the appellant from previous encounters,[6] and the appellant began to take evasive action upon observing the officer. At this point, under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the officer had reasonable suspicion that criminal activity was afoot and was justified in making a brief stop of the appellant for further investigation. Then, as the officer approached, appellant placed his right hand inside his sweatshirt and refused to remove his hand despite the officer's three requests that he do so. Based not only on the anonymous tip, but more importantly on the officer's observations at the scene, especially his observation of appellant placing of his right hand in his pocket and his refusal to remove it, the officer had a reasonable basis to conduct a protective police

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sufficiently specific and confirmed in every detail by independent police observation to reasonably lead the police to believe that it was sufficiently truthful and reliable to justify the stop of the vehicle. 987 S.W.2d at 305. In comparison, the tip in the instant case was that a black male wearing a blue jean jacket and pants, riding a purple bicycle, carrying a newspaper, was located in the area of Georgetown Street and Glenn Arvin. Similarly, the description in the instant case is much more detailed than the description approved in *Graham v. Commonwealth*, 667 S.W.2d 697 (Ky.App. 1983)(white Camaro).

[6] The record indicates that the appellant was originally charged as a persistent felony offender in the first degree, indicative of at least two prior felony convictions.

search under the guidelines of *Terry v. Ohio*.[7] In *Baker v. Commonwealth,* 5 S.W.3d 142, 146 (Ky. 1999), the court stated:

> When an officer is justified in believing that an individual, who is unquestionably not cooperative, may be armed, it would be clearly unreasonable to deny that officer the authority to take necessary measures to determine whether the individual is, in fact, carrying a weapon, and to alleviate the threat of physical harm.

The drugs were discovered only as a result of the ensuing scuffle, as the newspaper in which they were being carried was kicked around. The drugs, therefore, are not the fruits of an illegal search or seizure, and should not be suppressed.

I would affirm the decision of the Fayette Circuit Court.

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BRIEF FOR APPELLEE:

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[7] As noted by the Court in *Florida v. J.L.*:

> "[w]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him."

529 U.S. at 269-70, 120 S.Ct. at 1378 (quoting *Terry v. Ohio,* 392 U.S. at 30-31, 88 S.Ct. at 1884-85).