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(2006-SC-000647-D)

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002604-MR

DEJUAN BARGER APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NO. 03-CR-003316

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON AND TAYLOR, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

JOHNSON, JUDGE: DeJuan Barger has appealed from the judgment of conviction and sentence of the Jefferson Circuit Court entered on November 30, 2004, following his conditional guilty plea to operating a motor vehicle under the influence of intoxicants[2] and operating a motor vehicle on a suspended or revoked operator's

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[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

[2] KRS 189A.010(1)(d).

license.[3] Having concluded that the trial court's factual findings are not clearly erroneous and that it correctly applied the law to those facts in denying Barger's motion to suppress evidence, we affirm.

At the suppression hearing, Sergeant Mike Redmond of the Louisville Metro Police Department[4] testified that on October 18, 2003, at around 4:30 p.m. he was making a routine patrol of the area around 21st Street and Duncan Street in Louisville, Jefferson County, Kentucky, which included a Speedway gas station. This area was receiving extra patrol due to several "snatch and grab"[5] incidents at the Speedway in prior weeks. Apparently, Sgt. Redmon was not aware of any description of a perpetrator or any vehicle that might have been involved in the "snatch and grab" incidents.

As Sgt. Redmond drove by the Speedway, he observed a vehicle "full of people" in the front parking lot.[6] Approximately 30 minutes later when Sgt. Redmond was responding to a call and passed the Speedway again, he observed the same vehicle in the parking lot. On this second occasion the vehicle

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[3] KRS 186.620(2).

[4] Sgt. Redmond had been employed by the LMPD for 16 years.

[5] Sgt. Redmond testified that a "snatch and grab" occurs when a cashier opens a cash register drawer and a person grabs money from the open drawer and runs away.

[6] Sgt. Redmond testified that there were two people in the front seat and either two or three people in the back seat.

was parked on the other side of the store near the gas pumps. Sgt. Redmond became suspicious that the occupants of the vehicle might have been involved in the recent “snatch and grab” incidents, and he radioed Officer Kevin Hamlin to be on the lookout for the vehicle.

When Sgt. Redmond passed the Speedway for the third time approximately one hour later, he observed the same vehicle leaving the parking lot. Acting upon his previous suspicion, Sgt. Redmond began to follow the vehicle.[7] Sgt. Redmond ran a check on the license plate and the vehicle owner’s address was in another part of Louisville.

As the suspicious car approached a four-way stop on Duncan Street, the driver signaled a turn. The driver then turned off the signal and continued driving west on Duncan Street. At one point, the driver stopped in front of a house and the front passenger door opened. However, no one exited the vehicle and approximately 30 seconds later the door was closed and the vehicle continued down Duncan Street. As the vehicle turned north onto 26th Street, Sgt. Redmond radioed that he was going to stop the vehicle, activated his emergency lights, and attempted to stop the vehicle.[8] The vehicle eventually stopped

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[7] Sgt. Redmond was in an unmarked police vehicle, but he was wearing his police uniform.

[8] Sgt. Redmond testified that he was not stopping the vehicle for any traffic violations and the driver had not been driving carelessly. Sgt. Redmond

on St. Cecilia Street. As Sgt. Redmond approached the vehicle, he smelled alcohol on the driver, who was later identified as Barger. Barger failed a number of field sobriety tests and was unable to produce a driver's license.[9] Barger was arrested and taken to the Jefferson County Detention Center where his blood-alcohol level was measured by a breathalyzer test and registered .207.

Barger was indicted on December 16, 2003, by a Jefferson County grand jury for operating a motor vehicle under the influence of intoxicants, fourth offense, and operating a motor vehicle on a suspended or revoked operator's license. On September 2, 2004, Barger filed a motion to suppress evidence, arguing the evidence had been obtained as a result of an illegal stop. A suppression hearing was held on September 24, 2004. On October 6, 2004, the trial court entered oral factual findings and conclusions of law and ruled that an investigatory stop of the vehicle was proper because under the totality of the circumstances there was reasonable and articulable suspicion of criminal activity. The totality of the circumstances included the recent thefts at the Speedway, the fact that the same vehicle was in the parking lot three times in two hours in three

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indicated he only wanted to get identification information from the occupants of the vehicle so he could turn the information over to the detectives working on the "snatch and grab" cases.

[9] The uniform citation indicated that Barger had a suspended Georgia driver's license on the date of the incident.

different locations, and the erratic driving. Subsequently, Barger entered a conditional guilty plea to the charged offenses on October 8, 2004. On November 22, 2004, the trial court sentenced Barger to two years' imprisonment for operating a motor vehicle under the influence and 90 days for operating a motor vehicle without a license with the sentences to run concurrently for a total of two years. This appeal followed.

Our standard of review in reviewing a trial court's decision on a motion to suppress evidence is well-established in that we must "first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive.[10] Based on those findings of fact, we must then conduct a de novo review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law."[11]

Under both the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution, a police officer must have reasonable and articulable suspicion of some violation of a law before stopping an automobile.[12] In determining the reasonableness of a police officer's actions in

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[10] Kentucky Rules of Criminal Procedure (RCr) 9.78.

[11] Commonwealth v. Neal, 84 S.W.3d 920, 923 (Ky.App. 2002) (citing Adcock v. Commonwealth, 967 S.W.2d 6, 8 (Ky. 1998); and Commonwealth v. Opell, 3 S.W.3d 747, 751 (Ky.App. 1999)).

[12] Delaware v. Prouse, 440 U.S. 648, 661, 99 S.Ct. 1391, 59 L.Ed.2d 660, 672 (1979); Creech v. Commonwealth, 812 S.W.2d 162, 163 (Ky.App. 1991).

making an investigatory stop, the trial court must consider whether the facts available to the officer at the time establish that the officer had "reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity."[13] The propriety of a traffic stop must be considered based upon the totality of the circumstances as they existed at the time including various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of criminals. From this information, a trained officer may draw inferences and make deductions that might not occur to an untrained person. This process does not deal with hard certainties, but with probabilities. In the end, there must be a particularized and objective basis for suspecting the particular individual being stopped is, or is about to be, engaged in criminal activity or is wanted for past criminal conduct.[14] "[T]he relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion

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[13] United States v. Hensley, 469 U.S. 221, 227, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985) (quoting United States v. Place, 462 U.S. 696, 702, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983)). See also United States v. Cortez, 449 U.S. 411, 417-18, 101 S.Ct. 690, 66 L.Ed.2d 621, 628-29 (1981); and Docksteader v. Commonwealth, 802 S.W.2d 149, 150 (Ky.App. 1991).

[14] Hensley, 469 U.S. at 227; Cortez, 449 U.S. at 417-18.

that attaches to particular types of noncriminal acts" [internal quotations omitted].[15]

Barger contends the trial court erroneously denied the motion to suppress evidence of his intoxication because the initial stop of his vehicle was not based upon reasonable and articulable suspicion of criminal activity. The Commonwealth contends that the traffic stop was justified because (1) the Speedway had been the target of recent "snatch and grabs" resulting in increased police patrol; (2) Sgt. Redmond observed Barger's vehicle in the Speedway parking lot over a period of two hours in three different locations, which may have indicated someone was "casing" the Speedway; (3) the occupants of the vehicle did not appear to be engaged in any commercial activity outside the vehicle; (4) the car was registered to an owner who did not live in the immediate area around the Speedway; and (5) Barger drove erratically after he left the Speedway parking lot.[16] Sgt. Redmond conceded that he had not seen Barger commit any traffic offense, nor had he seen Barger weaving in traffic or driving recklessly on the roadway. Furthermore, Sgt. Redmond had not been advised by store personnel that Barger or his passengers were acting suspiciously, nor had Sgt. Redmond

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[15] United States v. Sokolow, 490 U.S. 1, 10, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989) (quoting Illinois v. Gates, 462 U.S. 213, 243-44, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)).

[16] Certainly, the assertion that Barger was driving erratically is debatable.

witnessed anything suspicious or otherwise illegal from Barger or any of the passengers in the vehicle while it was parked at the Speedway.

In Hensley, the first case where the United States Supreme Court addressed the police’s stopping a person because he was a suspect in a completed crime, the Court stated as follows:

> In our previous decisions involving investigatory stops on less than probable cause, police stopped or seized a person because they suspected he was about to commit a crime, e.g., Terry [v. Ohio, 392 U.S. 1, 22-3, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)], or was committing a crime at the moment of the stop, e.g., Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972). Noting that Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983), struck down a particularly intrusive detention of a person suspected of committing an ongoing crime, the Court of Appeals in this case concluded that we clearly intended to restrict investigative stops to the context of ongoing crimes. We do not agree with the Court of Appeals that our prior opinions contemplate an inflexible rule that precludes police from stopping persons they suspect of past criminal activity unless they have probable cause for arrest. To the extent previous opinions have addressed the issue at all, they have suggested that some investigative stops based on reasonable suspicion of past criminal activity could withstand Fourth Amendment scrutiny. Thus United States v. Cortez, 449 U.S. 411, 417, n.2, 101 S.Ct. 690, 695, n.2, 66 L.Ed.2d 621 (1981), indicates in a footnote that “[o]f course, an officer may stop and question a person if there are reasonable grounds to believe that

person is wanted for past criminal conduct." And in United States v. Place, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983), decided barely a month before the Sixth Circuit's opinion, this Court stated that its prior opinions acknowledged police authority to stop a person "when the officer has reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity." Id., at 702, 103 S.Ct. at 2642 (emphasis added). See also Michigan v. Summers, 452 U.S. 692, 699, and n.7, 101 S.Ct. 2587, 2592, and n. 7, 69 L.Ed.2d 340 (1981). Indeed, Florida v. Royer itself suggests that certain seizures are justifiable under the Fourth Amendment even in the absence of probable cause "if there is articulable suspicion that a person has committed or is about to commit a crime." 460 U.S., at 498, 103 S.Ct., at 1324 (plurality opinion) (emphasis added).

At the least, these dicta suggest that the police are not automatically shorn of authority to stop a suspect in the absence of probable cause merely because the criminal has completed his crime and escaped from the scene. The precise limits on investigatory stops to investigate past criminal activity are more difficult to define. The proper way to identify the limits is to apply the same test already used to identify the proper bounds of intrusions that further investigations of imminent or ongoing crimes. That test, which is grounded in the standard of reasonableness embodied in the Fourth Amendment, balances the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion. United States v. Place, supra, 462 U.S., at 703, 103 S.Ct., at 2642; Michigan v. Summers, supra, 452 U.S., at 698-701, 101 S.Ct., at 2592-2594. When this balancing test is applied to stops to investigate past

crimes, we think that probable cause to arrest need not always be required.

The factors in the balance may be somewhat different when a stop to investigate past criminal activity is involved rather than a stop to investigate ongoing criminal conduct. This is because the governmental interests and the nature of the intrusions involved in the two situations may differ. As we noted in Terry, one general interest present in the context of ongoing or imminent criminal activity is "that of effective crime prevention and detection." Terry, 392 U.S., at 22, 88 S.Ct., at 1880. A stop to investigate an already completed crime does not necessarily promote the interest of crime prevention as directly as a stop to investigate suspected ongoing criminal activity. Similarly, the exigent circumstances which require a police officer to step in before a crime is committed or completed are not necessarily as pressing long afterwards. Public safety may be less threatened by a suspect in a past crime who now appears to be going about his lawful business than it is by a suspect who is currently in the process of violating the law. Finally, officers making a stop to investigate past crimes may have a wider range of opportunity to choose the time and circumstances of the stop. See Brown v. Texas, 443 U.S. 47, 51, 99 S.Ct. 2637, 2640, 61 L.Ed.2d 357 (1979); ALI Model Code of Pre-Arraignment Procedure 12 (Prop.Off. Draft No. 1, 1972).

Despite these differences, where police have been unable to locate a person suspected of involvement in a past crime, the ability to briefly stop that person, ask questions, or check identification in the absence of probable cause promotes the strong government interest in solving crimes and bringing offenders to justice. Restraining police action until after

> probable cause is obtained would not only hinder the investigation, but might also enable the suspect to flee in the interim and to remain at large. Particularly in the context of felonies or crimes involving a threat to public safety, it is in the public interest that the crime be solved and the suspect detained as promptly as possible. The law enforcement interests at stake in these circumstances outweigh the individual's interest to be free of a stop and detention that is no more extensive than permissible in the investigation of imminent or ongoing crimes.
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> We need not and do not decide today whether Terry stops to investigate all past crimes, however serious, are permitted. It is enough to say that, if police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, then a Terry stop may be made to investigate that suspicion.[17]

In determining that the investigatory stop in the case before us was justified, we find foreign authority with similar fact patterns to be persuasive. In Brisbane v. State,[18] the Supreme Court of Georgia held that there were reasonable and articulable grounds for suspicion of criminal activity when a police officer at 3:45 a.m. observed a vehicle drive slowly by an all-night service station which had been the scene of several recent robberies. The vehicle was observed slowing down in front of the station twice. Additionally, the United States

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[17] Hensley, 469 U.s. at 227-29.

[18] 211 S.E.2d 294, 297 (Ga. 1974).

Court of Appeals for the Eighth Circuit in United States v. Abokhai,[19] affirmed the denial of a motion to suppress evidence obtained pursuant to a Terry stop where Abokhai and a companion were observed by a police officer at approximately 7:00 p.m. walking toward a convenience store. The store was near another convenience store which had been the object of an armed robbery only days before, but the suspects in the previous robbery were white males and these two men were black. Abokhai and his companion were wearing only light jackets even though the temperature was in the 30 to 40 degree range. The police officer observed the two men "acting very suspicious" and watching people coming and going from the parking lot. After the men made a purchase, they left the store and proceeded in the same direction before being stopped by the police.[20] Similarly, in the case before us, the police officer as justification for the investigatory stop articulated reasonable suspicion that the occupants of Barger's vehicle may have been involved in the "snatch and grab" incidents at the Speedway.

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[19] 829 F.2d 666, 668 (8th Cir. 1987).

[20] See also United States v. Dawdy, 46 F.3d 1427, 1430 (8th Cir. 1995) (holding sufficient grounds for a Terry stop where car was "parked after 10:00 p.m. on a Sunday night at the back of the otherwise deserted pharmacy parking lot and at some distance from the surrounding residences" and car attempted to leave when police car approached); State v. Freeman, 414 N.E.2d 1044, 1045 (Ohio 1980) (holding sufficient grounds for a Terry stop where defendant at 3:00 a.m. sat alone in a car at the rear of a motel for approximately 20 minutes and officer was aware of recent criminal activity in motel parking lot); and LaFave, Search & Seizure § 9.5(d) (4th ed. 2004).

Accordingly, the trial court's denial of Barger's suppression motion was proper as the totality of the circumstances supported the police officer's reasonable and articulable suspicion of criminal activity thereby justifying the investigatory stop. For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

BUCKINGHAM, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

BUCKINGHAM, SENIOR JUDGE, DISSENTING: The standard for determining what constitutes "reasonable suspicion" has not been reduced to "a neat set of legal rules." See Ornelas v. U.S., 517 U.S. 690, 695-96, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996), quoting Illinois v. Gates, 462 U.S. 213, 232, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). "[T]he concept of reasonable suspicion is somewhat abstract." U.S. v. Arvizu, 534 U.S. 266, 274, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002). For that reason, I believe that the cases interpreting "reasonable suspicion" are "all over the board" and that cases with similar facts sometimes have different results. The case *sub judice* is a close call. Since we review the trial court's order *de novo*, I must respectfully dissent.

"An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about

to be, engaged in criminal activity." United States v. Cortez, 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981). In Collins v. Commonwealth, 142 S.W.3d 113 (Ky. 2004), the Kentucky Supreme Court stated that "[i]n order to perform an investigatory stop of an automobile, there must exist a reasonable and articulable suspicion that a violation of the law is occurring." Id. at 115. In this case, Barger had actually driven the vehicle away from the Speedway store. In light of that fact, I fail to see how the officer could conclude that criminal activity was afoot. Furthermore, the officer testified that his only reason for stopping the vehicle was to get identification information so that he could turn the information over to the detectives who were working on the "snatch and grab" cases. Stopping a vehicle for a similar identification purposes was held by the U.S. Supreme Court in Delaware v. Prouse, 440 U.S. 648, 662, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), to be an unlawful investigatory stop. Likewise, I conclude this stop was unlawful.

In Fourth Amendment cases such as this, there is "a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." U.S. v. Brignoni-Ponce, 422 U.S. 873, 878, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975). I conclude that the facts of this case should weigh in favor of the individual's rights rather

than in favor of the public interest. I conclude that one who goes to a gas station or convenience store three times in a two-hour period should not be subjected to an investigatory stop by a law enforcement officer. The additional facts that Barger did not live in that part of Louisville, that Barger turned his blinker on and then off before proceeding straight at an intersection, and that the passenger door was opened for a 30-second period still does not change my opinion under the totality of the circumstances standard.

Finally, the majority relies on the Hensley case. That case authorizes a Terry stop where law enforcement officers have reasonable suspicion that the person was involved in or wanted in connection with a completed felony. 469 U.S. at 228. In Hensley, the defendant was wanted in connection with a robbery investigation, and a flyer had been issued by a law enforcement agency alerting other agencies to that fact and requesting that Hensley be picked up and held.

The facts in the case now before this court are distinguishable. Here, Barger was not the focus of any investigation in connection with the Speedway robberies, and I conclude that the officer did not have reasonable suspicion to stop him. In short, I respectfully dissent.

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