

Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-000951-MR

MARNA HOWES

APPELLANT

v. APPEAL FROM MAGOFFIN CIRCUIT COURT
HONORABLE KIM C. CHILDERS, JUDGE
INDICTMENT NO. 05-CR-00078

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT AND STUMBO, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

LAMBERT, JUDGE: Marna Howes appeals from her conditional guilty plea to charges of illegal possession of a controlled substance. The decision reserved for appeal is the circuit court's denial of her motion to suppress incriminating evidence seized by a peace officer following an investigatory stop. For the reasons stated herein, we affirm the circuit court's decision to deny suppression.

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 KRS 21.580.

Background

In this case, the peace officer received a telephone call from a person that identified himself as an employee of Magoffin-Johnson Home Health Care. The caller indicated that he had observed the defendant-appellee, Marna Howes, who was also an employee of Home Health Care, take into her possession controlled substances that she stole from her place of employment. The caller then described Howes's vehicle and accurately reported her license plate number. Acting on this tip, the peace officer made an investigatory vehicle stop that lead to Howes's arrest and ultimately her conditional guilty plea.

Issue and Standard of Review

On appeal, Howes's sole argument is that the peace officer's investigatory stop was improper and, therefore, that the incriminating evidence obtained from it must be suppressed. Under RCr 9.78, a trial court's determination of facts on a suppression motion is conclusive when supported by substantial evidence. *See also Taylor v. Commonwealth*, 987 S.W.3d 302, 305 (Ky. 1998). But, application of the law to the facts is reviewed *de novo*. *See Adcock v. Commonwealth*, 976 S.W.2d 6, 8 (Ky. 1998), *citing Ornelas v. United States*, 517 U.S. 690, 697 (1996). Finally, under *Terry v. Ohio*, 392 U.S. 1, 21 (1968), a peace officer may conduct an investigatory stop when he has a “reasonable and articulable suspicion that the person seized is engaged in criminal activity.”

Analysis

The uncontroverted facts of record indicate that the tipster in this case was an identifiable citizen informant. Indeed, although the informant did not give the peace officer his name at the time he called in the tip, he did tell the officer his place of employment and his basis of knowledge of the crime. Also, the tip was made to the officer's cell phone. Therefore, the officer was able to specifically identify the tipster after the investigatory stop and arrest. Moreover, the record indicates that the tipster was simply a concerned citizen, not a paid police informant. Consequently, based on the facts of record, we find *Commonwealth v. Kelly*, 180 S.W.3d 474 (Ky. 2005), to be controlling. In *Kelly*, the Court held that tips from identifiable citizen informers regarding contemporaneously observed criminal acts constitute a sufficient basis for a peace officer to conduct an investigative stop of the identified suspect. *See id.* at 477-79.

We are unpersuaded by Howes's argument that this case involved nothing more than an anonymous tip as in *Florida v. J.L.*, 529 U.S. 266 (2000). In *J.L.*, the police never ascertained the identity of the tipster, because he had given them no reasonable basis to do so. Thus, the tip was truly anonymous and, therefore, without any inherent indicia of reliability. In contrast, here, the tipster identified himself in all but name when he called the peace officer, and he was subsequently specifically identified by the same peace officer. In short, the tip had inherent indicia of reliability, as the tipster would have known that he could be held accountable for making any false criminal allegations. Consequently, this case is an identifiable-citizen-informer case controlled by *Kelly*, not an anonymous-tipster case controlled by *J.L.*

Conclusion

For the foregoing reasons, we hold that the peace officer had a reasonable and articulable suspicion of crime, justifying his investigatory detention of Howes. Consequently, the trial court did not err in overruling Howes's suppression motion. Her conviction and sentence are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lance A. Daniels
Paintsville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Kristin N. Logan
Assistant Attorney General
Frankfort, Kentucky