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Supreme Court of Kentucky

2023-SC-0311-DG

DAVID VINCENT — APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
NO. 2022-CA-0989
METCALFE CIRCUIT COURT NO. 17-CR-00051

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION OF THE COURT BY JUSTICE THOMPSON

REVERSING AND REMANDING

David Vincent appeals from his conditional guilty plea before the Metcalfe Circuit Court for drug offenses, which resulted in a five-year sentence. The Court of Appeals affirmed on direct appeal. We granted discretionary review to consider Vincent's argument that the stop of the vehicle he was driving was unlawful because there was no valid basis to justify the stop, and everything discovered in his vehicle from such illegal stop should have been suppressed.

We reverse and remand because the articulated reasons for the traffic stop did not justify it. The officer's reliance on an equipment violation for the stop, when the law barring red parking lights had yet to take effect, could not be saved as a reasonable mistake of law. The officer's reliance on the known informant's tip that the driver and passenger were possibly intoxicated (which was only based upon observations subject to a variety of alternatively innocent

explanations) was improper where it did not provide him with reasonable suspicion to make a stop. The tip was also not corroborated by the officer's own observations.

I. FACTUAL AND PROCEDURAL BACKGROUND

On June 18, 2017, a female informant called Officer David Robertson of the Edmonton Police Department on his personal cell phone. Officer Robertson knew the informant because she had called the police before when her husband had assaulted her. She reported that there were two individuals at the Five Star gas station that "might be on something," and were "maybe high." In support of this supposition, the informant stated that the man was "fidgety" and "nervous," the woman was talking to herself in the store, and later the informant observed the woman jumping up and down on the rear area of their vehicle while it was sitting at the gas pump. The informant explained that she was familiar with how people act when they are high based on her experience with her husband using "meth." The informant did not give any description of the man and woman, or of their vehicle except to state that they were in a "big old car" at the gas pumps, which was at the "end of the pumps" or "the very last pump."

Officer Robertson was nearby and drove to a parking lot of a restaurant across the street from the Five Star. While there, he observed a vehicle at the first pump when pulling into the filling station and concluded it was the vehicle the informant intended to identify for him. He observed there was a man driving the vehicle and a woman in the passenger seat. Officer Robertson

observed that the vehicle's parking lights were red, which he had heard violated a new law which made such light color illegal. He followed the vehicle for approximately a quarter of a mile, and despite not observing any traffic violations (other than the supposed light color equipment violation) or other suspicious driving behavior, he pulled the vehicle over, asked Vincent for identification and discovered that his license was suspended. He also learned that the passenger had an active warrant. Officer Robertson arrested them, and after Vincent admitted to having one and one-half pills of Lortab in the vehicle, searched the vehicle and discovered a pipe with marijuana, a baggie with a white crystalline substance, and a bag of methamphetamine. Officer Robertson did not charge Vincent for driving under the influence.

Vincent was ultimately indicted for: trafficking in a controlled substance, first degree (methamphetamine), more than two grams first offense; drug paraphernalia-buy/possess; prescription controlled substance not in proper container, first offense; possession of marijuana; operating on a suspended revoked operator's license; and improper equipment. The trafficking count was the only felony.

Vincent filed a motion to suppress the search as fruit of the poisonous tree, but following a hearing at which Officer Robertson was the sole person to testify, the trial court denied the motion. The trial court reasoned that Officer Robertson had a good faith basis for believing that the new law making it illegal for parking lights to be any color other than white or amber, Kentucky Revised Statutes (KRS) 189.040(14)(a), justified his stop even though it did not go into

effect until approximately eleven days later. The trial court concluded that Officer Robertson's belief that the law was already in effect was an objectively reasonable mistake of law, the search after the stop was permissible as a search incident to arrest and, additionally, Vincent admitted to having contraband in the vehicle, thus making a search reasonable under the automobile exception. The trial court alternatively determined that the informant's tip also provided a sufficient basis for the stop, noting the informant was known and her information could reasonably be relied upon.

Vincent entered into a conditional plea agreement, reserving the right to challenge the denial of his motion to suppress. The Commonwealth moved to dismiss the improper equipment violation[1] and Vincent pled guilty to the other counts as charged. The trial court sentenced Vincent to five years of incarceration for the trafficking count, to be served concurrently with thirty-day sentences on the remaining four misdemeanor counts along with a $1000 fine.

Vincent appealed. The Court of Appeals affirmed, "hold[ing] that the initial seizure was supported by at least a reasonable, articulable suspicion of criminal activity, and the subsequent search was lawful under the automobile exception to the warrant requirement[.]" *Vincent v. Commonwealth*, 2022-CA-0989-MR, 2023 WL 3906750, at *1 (Ky. App. June 9, 2023) (unpublished).

[1] As the trial court had already determined, the prohibition against red parking lights pursuant to KRS 189.020(14)(a) was not in effect at the time of the stop. Therefore, the officer's mistake of law "[could not] justify . . . the imposition . . . of criminal liability[.]" *Heien v. North Carolina*, 574 U.S. 54, 67 (2014).

Relying on *Heien*, 574 U.S. at 61, the Court of Appeals concluded that the mistake of law regarding the improper equipment violation was objectively reasonable and supported the traffic stop. The Court of Appeals specifically stated that it did not need to resolve whether the stop was a reasonable investigatory stop pursuant to the informant's tip. Finally, the Court of Appeals ruled that the automobile search was lawful pursuant to the automobile exception to the warrant requirement.

II. ANALYSIS

In challenging the trial court's denial of his motion to suppress, Vincent does not dispute the trial court's factual findings, but rather its application of the law to the facts. We apply a *de novo* standard of review to conclusions of law. *Jackson v. Commonwealth*, 187 S.W.3d 300, 305 (Ky. 2006).

Vincent argues that the violation of a law which is not yet in effect could not justify Officer Robertson's stop of Vincent's vehicle and the informant's tip did not provide sufficient justification for the stop. The Commonwealth counters that the traffic stop did not violate the Fourth Amendment because it was based upon a reasonable mistake of law and the informant's tip also provided reasonable suspicion for the stop.

It is well established 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." *Collins v. Commonwealth*, 142 S.W.3d 113, 115 (Ky. 2004).

The Fourth Amendment permits police officers to engage in "brief investigatory stops of persons or vehicles that fall short of traditional arrest" so long as such stops are "supported by reasonable suspicion to believe that criminal activity may be afoot[.]" *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (internal citations omitted). "Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417–18 (1981). In reviewing the propriety of such stops, courts "must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." *Arvizu*, 534 U.S. at 273.

A. The Stop Based upon a Vehicle Equipment Violation Pursuant to a Law which was Not in Effect, Cannot Constitute a Reasonable Mistake of Law.

To justify his actions in stopping Vincent's vehicle, at the suppression hearing Officer Robertson referenced hearing some talk around the police department that there was a new law going into effect that would ban red headlights. Officer Robertson testified that he personally observed that Vincent's vehicle had red headlights or red parking lights. Officer Robertson clarified that he did not know anything about when the law was going to go into effect, any specific details about the law, and had not read the law or received any training about it. It was undisputed at the suppression hearing that this law was not in effect when Officer Robertson stopped Vincent's vehicle.

Officer Robertson had apparently heard about the additional language added to KRS 189.040 which went into effect on June 29, 2017. KRS 189.040(10) specified that headlamps "shall only emit white light[,]"and KRS 189.040(14) stated that "[v]isible front lights on a motor vehicle . . . shall only be white or amber, unless installed as original equipment by the manufacturer." This language made both red headlights and front red parking lights, if not original, illegal equipment once the change in the law took effect.

In *Heien v. North Carolina*, 574 U.S. 54, 61 (2014), the United States Supreme Court found that an otherwise lawful traffic stop premised on a mistake of law does not violate the Fourth Amendment so long as the mistake is reasonable. The Court determined that the officer's erroneous belief that a single working brake light violated the ambiguously worded statute was a reasonable mistake of law, especially given that the provision at issue had never previously been construed by the North Carolina appellate courts and, thus, the stop was a constitutionally valid. *Id.* at 70.

Determining when the new provision of KRS 189.040(14(a) went into effect depends upon a straightforward application of Section 55 of the Kentucky Constitution and a mathematical calculation of when ninety days has elapsed from the adjournment of the legislative session. In making such a calculation, the trial court correctly determined that the change to KRS 189.040(14)(a) was not in effect on June 18, 2017, when Officer Robertson stopped Vincent's vehicle.

Heien is distinguishable as in *Heien* there was a valid, controlling law in effect and the only confusion was whether it applied to the situation with which the officer was confronted. This is a very different situation. Here, no law was in effect prohibiting red parking lights.

An officer cannot stop a motorist based on speculation about what the law requires. There can be no good faith under such circumstances. An officer is to enforce the law as written by our General Assembly, which is currently in effect, as interpreted by our Appellate Courts. At minimum, this requires an officer to either read the law to be enforced (including its effective date), or to have received formal training about it, before seeking to enforce it.

Officers are not justified in stopping drivers based upon their "fuzzy" understanding and "suppositions" about what the law requires. Therefore, we eliminate Officer Robertson's observation of "improper equipment" as justifying the stop of Vincent's vehicle.

B. The Stop Made Based on the Informant's Tip was Unjustified Because the Information the Informant Provided was Insufficient to Establish Reasonable and Articulable Suspicion.

In considering the information provided to Officer Robertson by the informant, we discuss how her being a known informant supports the officer giving due consideration of the information she provided. We simultaneously untangle her status as a known informant from the conclusion that a known informant's information must be deemed reliable even when it simply does not provide actionable information.

1. Reliability of Known Informants

Our law categorizes informants based on whether they are known or unknown and deems known informants to be more reliable. *See Illinois v. Gates*, 462 U.S. 213, 233–34 (1983) (discussing that the known reliability of an informant makes knowing the basis for the informant's knowledge less important); *Florida v. J.L.*, 529 U.S. 266, 270 (2000) (comparing the reliability from a known informant "whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated" with that of an anonymous tipster).

The mere fact that an informant is known, however, does not automatically provide reasonable and articulable suspicion for an officer to stop a motor vehicle based on that informant's report. "[R]easonable suspicion . . . requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." *J.L.*, 529 U.S. at 272. Factors such as "an informant's 'veracity,' 'reliability,' and 'basis of knowledge'—remain 'highly relevant in determining the value of his report.'" *Alabama v. White*, 496 U.S. 325, 328 (1990) (quoting *Gates*, 462 U.S. at 230).

> Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability. Both factors—quantity and quality—are considered in the "totality of the circumstances—the whole picture," *United States v. Cortez*, 449 U.S. 411, 417 (1981), that must be taken into account when evaluating whether there is reasonable suspicion.

White, 496 U.S. at 330 (internal parallel citations omitted).

Among known informants, "a particular informant known for the unusual reliability of his predictions of certain types of criminal activities in a locality," can offset "his failure, in a particular case, to thoroughly set forth the basis of his knowledge" and information from an informant whose motives may be in doubt may be entitled to greater weight if he provides "his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand[.]" *Gates*, 462 U.S. at 233–34. These are matters which can all be considered under a totality of the circumstances analysis "which permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip[.]" *Id.* at 234.

Therefore, tips by confidential informants who have proven reliable in the past, are known by name and reputation, and who have insider information corroborated by the accuracy of future predictive acts, can have "sufficient objective indicia of reliability to be the sole basis for stopping [an individual]." *Williams v. Commonwealth*, 147 S.W.3d 1, 5–6 (Ky. 2004). However, in *Commonwealth v. Smith*, 542 S.W.3d 276, 283–84 (Ky. 2018), information provided by reliable confidential informants about a suspect's trafficking of cocaine at a bar, and knowledge of the suspect's past criminal record did not provide reasonable suspicion to stop the suspect's vehicle where extensive police surveillance did not confirm that suspicious activity consistent with drug dealing was occurring or provide a basis for establishing that the vehicle was used to transport the drugs.

An informant being known is not definitive as to whether she should be considered reliable, and an informant's reliability is just part of what must be considered to conclude whether reasonable and articulable suspicion could be established from her tip. Essentially, there is a sliding scale as to whether this particular informant's information should be believed and relied upon under the circumstances. Her basis of knowledge, the wisdom of her judgment, and her certainty that criminal activity is afoot are all also at issue.

2. Although the Informant was Known, this was Insufficient to Establish that her Report that Two People were Possibly Intoxicated was Reliable.

The testimony that Officer Robertson provided as to how he knew the informant—she had called the police before when her husband was assaulting her—did not provide any basis to establish that she was generally trustworthy, accurate, and honest. Additionally, she was just an observing bystander and had no insider knowledge as to the basis for the couple's behavior.

While Officer Robertson stated that the informant must have been concerned enough to report their behavior to him on his personal cell phone, this was his supposition rather than based on anything she said to him. We do not know why this informant had the officer's cell phone number or how many times they may have talked previously. The informant may have had a variety of possible motivations for calling Officer Robertson on his personal cell phone to report the behavior she observed rather than going through the official channel of calling 911 and making a report in that manner. Some but not all of these motivations could be: loneliness or boredom; a desire to form a personal

relationship with Officer Robertson and hope that making a report would give her an opportunity to see him; a dislike of the couple and wish to get them in trouble; or a desire for self-aggrandizement, to show she was important enough to have "pull" with authorities.

3. The Informant's Report Did Not Provide Officer Robertson with a Particularized and Objective Basis for Suspecting that the Two People in the Vehicle he Stopped were Engaged in Criminal Activity.

The informant's basis of knowledge in being able to discern whether the two people she reported "might be on something," and "maybe high" was not well established. While her report was based on her personal observations at the Five Star, it did not appear that she had any direct contact with these individuals either in the store or by the gas pumps.

The fact that the informant's husband used "meth," did not make her any kind of an expert on what kinds of behavior people who are under the influence of various kinds of intoxicating substances may generally exhibit. While such history could give her the ability to compare other people's behavior to her husband's when he was intoxicated, her general statement that "I know how they act" was insufficient to communicate how their behavior was the same as her husband's.

Additionally, and more importantly, the information the informant conveyed to Officer Robertson about the couple's behavior to support her inference that individuals could intoxicated was far from definitive. It could not form a particularized and objective basis for concluding that the couple was using drugs, and thus provide reasonable and articulable suspicion to stop

their vehicle for public intoxication[2] or drunk driving.[3] Instead, the behavior she reported was just as consistent with innocent behavior as intoxicated behavior.

As to the man, the only behavior the informant identified as supporting her supposition of intoxication was that he was "fidgety" and "nervous" but as defense counsel pointed out because the informant did not know the man, she did not know whether this behavior was normal for him or caused by intoxication. People can appear to be "fidgety" or "nervous" for a variety of reasons, including being worried about something or having consumed caffeinated beverages. Some people may have social anxiety, residual effects from a stroke, various phobias, autism spectrum disorders, or neurological conditions which may cause them to twitch or engage in repetitive behaviors that may appear "fidgety" or "nervous" to a lay observer who does not know them personally.

As to the woman, Officer Robertson stated that the informant reported that she was talking to herself in the store and the informant then observed the woman jumping up and down on the rear area of their vehicle while it was sitting at the gas pump. This behavior, just as it was for the man, is equally consistent with innocent behavior as it is with intoxication. A person may appear to be talking to herself when she has an earbud in her ear and is having

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[2] *See* Kentucky Revised Statutes (KRS) 525.100(1); *Maloney v. Commonwealth*, 489 S.W.3d 235, 240 (Ky. 2016).

[3] *See* KRS 189A.010(1)(c), (d).

a phone conversation, may be someone that talks to herself to think things through, or may have a mental health condition. The informant did not report on what the self-talk was about or provide any other context for why the woman's conduct in the store appeared to indicate possible intoxication. The woman's action of jumping on the rear area of their vehicle may be indicative of trying to secure a broken trunk latch, testing out the vehicle's shocks, or simple horseplay. Intoxicated people are not known to have a particular predilection for jumping on the rear area of their own vehicles. While jumping on other people's vehicles could indicate atypical or possibly criminal behavior, there is nothing particularly suspicious in "messing around" with one's own vehicle in a manner that is unlikely to damage it.

4. The Informant Failed to Definitively Identify the Two People she Reported and their Vehicle.

It must be emphasized that when Officer Robertson approached the Five Star, he did not observe ANY behavior that either confirmed the informant's description of the people or their possible intoxication, and there is some doubt whether he even correctly identified the couple that the informant described. As noted in *J.L.*, 529 U.S. at 272, "[a]n 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."

Officer Robertson stated that the informant said they were in a "big old car" at the gas pumps, which was at the "end of the pumps" or "the very last pump." She did not provide the make, model, type, color or license plate

number for the vehicle, or a pump number for where it was located. Thus, Officer Robertson's determination of which vehicle the informant was referencing was entirely dependent on its location at the pumps.

Officer Robertson interpreted the informant's indication that the vehicle was at the last pump as actually meaning the first pump when pulling into the filling station. Whether this interpretation was correct or not was not explored. Officer Robertson was never asked about the number of cars at the filling station or their locations. Accordingly, we have no way of knowing, whether there were cars at both ends of the filling station or not, or whether there were many cars present or only one or two.

Officer Robertson did connect the persons in the vehicle to the informant's description in that he indicated he could see the driver and passenger, and thus knew the driver was a man and the passenger was a woman. But a man and a woman being in a vehicle is hardly specific information for identifying the subjects at issue when it was unclear what other vehicles and persons were located at the Five Star pumps. Therefore, the Commonwealth additionally failed to establish through Officer Robertson's testimony that the individuals who were leaving the filling station in their vehicle when Officer Robertson followed them were indeed the same individuals which the informant told him about.

5. Reasonable and Articulable Suspicion did Not Arise from Officer Robertson's Personal Observations.

While there was nothing wrong with Officer Robertson following the vehicle to see if reasonable and articulable suspicion would arise, this did not

occur. Officer Robertson admitted that he did not see the driver commit any traffic infractions or otherwise drive in a manner to suggest he was intoxicated before Officer Robertson stopped the vehicle. If anything, Officer Robertson's observations, rather than providing even minimal corroboration of the informant's supposition, suggested that the informant was incorrect to suspect that the driver was intoxicated.

Officer Robertson pulled the driver over on a pretext, that the color of the vehicle lights violated KRS 189.040(14)(a). As we explained *supra*, he was in error in doing so when this portion of the law was not in effect yet, resulting in such a stop not being made in good faith. While Officer Robertson indicated that the informant's concerns informed his decision to pull the vehicle over, it is unclear whether Officer Robertson would have pulled Vincent's vehicle over if his sole justification had been her tip.

Although after-the-fact evidence of intoxication cannot save a stop which was not justified by reasonable and articulable suspicion at the onset, we observe that despite the informant's expressed concern about the couple's possible intoxication, Officer Robertson did not testify that anything which occurred during the stop made him suspicious that either of the vehicle's occupants could be intoxicated. While an impaired driver could be charged with driving while intoxicated (DUI), Officer Robertson was apparently unconcerned that Vincent might be impaired even after Vincent admitted to possessing drugs as Officer Robertson failed to ask him whether he "was on

anything" and failed to ask him to perform any field sobriety testing or submit to breath testing.

6. *Commonwealth v. Kelly* does Not Require a Different Result.

While upon first comparison, *Commonwealth v. Kelly*, 180 S.W.3d 474 (Ky. 2005), appears substantially similar and potentially controlling, it differs in important qualities. *Kelly* focused more on whether the informants there should be considered anonymous or known informants where they identified themselves as Waffle House employees, and "reported that they suspected a recent patron of their restaurant of being intoxicated and that the suspect was about to drive away from the restaurant." *Id.* at 476.

The Court determined that providing their place of employment which was the situs of the vehicle when they made the report, combined with their presence outside of the restaurant and pointing to the vehicle they had described, connected them as being the employees and made them known informants. *Id.* at 477.

In the category of known informants, their report was strengthened by the fact that there were two of them, they were acting within the scope of their employment where it was likely they had direct interactions with the individual at issue, had to conclude that the matter was important enough to interrupt them from their employment duties, and they pursued this matter through the appropriate formal channels. The Court observed in *Kelly*:

> [T]he reliability and veracity of the tip in this case was corroborated by Officer Hastings to the extent that: (1) he was able to verify most

> of the details given in the tip, including the identity of the tipsters; and (2) he was able to personally observe the tipsters.

Id. at 478–79. The officer in *Kelly* was able to verify details of the tip because the Waffle House employees provided a much clearer description of the vehicle at issue, that it was "a red, older model Camaro with Tennessee tags." *Id.* at 476. The employees also pointed across the street where the vehicle was located when the officer arrived. *Id.*

The Waffle House informants' simple assertion that that the man leaving their restaurant was drunk, without adding any details that undercut this impression, and keeping in mind that there is more widespread "general knowledge" of how to identify someone as drunk, is entitled to greater weight than the lone informant here indicating that the couple may or might be intoxicated from drugs, accompanied by statements which were intended to support her supposition, but did not in fact support it. The very actions needed to pay the Waffle House bill, get up from the table, and exit the restaurant, could easily demonstrate impairment and cause concern about such a person's ability to safely drive. Additionally, two employees shared the same concerns.

In contrast, the details the informant gave Officer Robertson did not show any obvious impairment. Officer Robertson did not testify that the informant expressed any concern about their ability to drive safely. Instead, the minor and ambivalent signs that the informant believed might indicate intoxication from drugs—the man was fidgety and nervous, and the woman talked to herself and jumped on the back of their vehicle—belied any clear impairment. Therefore, because the informant's tip and the officer's personal

observations did not establish a reasonable and articulable suspicion of criminal activity, Officer Robertson could not lawfully stop Vincent's vehicle.

III. CONCLUSION

Officers sometimes seize upon a minor violation to permit them to make a traffic stop and investigate further; such stops are objectively reasonable because a traffic or equipment violation provides reasonable, articulable suspicion that the driver has violated the law. What officers cannot do without offending the protections embodied in the Fourth Amendment is stop motorists when there is no reasonable and articulable suspicion to justify such action.

An officer may act in good faith in misinterpreting what violates a law, thus not offending the Fourth Amendment by stopping a motorist for conduct that is later determined not to violate the law. However, an officer can never be justified in stopping a motorist for violating a law which has not yet taken effect. By taking such an action, an officer does not act in good faith. Officers should exercise utmost care in learning about the laws they are tasked with enforcing, and if in doubt should seek further guidance prior to making inappropriate stops. An officer's ignorance about when a law takes effect is not a reasonable mistake of law and a stop made pursuant to such justification is objectively unreasonable and violates the Fourth Amendment.

Officers cannot justify stopping motorists based on tips by any informant, known or unknown, which does not give rise to reasonable and articulable suspicion that a crime has occurred. Tips that fall short of establishing reasonable suspicion are still useful to law enforcement personnel

as they may merit further investigation and personal observation by officers to see if reasonable and articular suspicion may yet arise, but if it does not, a stop should not take place.

The mere fact that an informant may be known or knowable, alone, does not justify a traffic stop. The information given by known informants at minimum should both appear reliable and actionable. In the absence of such a standard, police stops may be used as a tool by malicious individuals to harass or prank law abiding citizens. It is unreasonable for vague reports of possible wrongdoing to justify stops that would not be justified had the officer personally made the same observations.

While the informant here may have acted in good faith in making her report, an officer must exercise independent judgment in determining whether under the totality of the circumstances the specific information reported (either from the tip alone or when combined with the officer's own observations) is sufficient to justify an investigatory stop.

Accordingly, as there was no valid basis for Officer Robertson to stop Vincent's vehicle, we reverse and remand for the trial court to grant the motion to suppress the fruits of this unlawful stop.

All sitting. Conley, Lambert, and Nickell, JJ., concur. Bisig, J., concurs in part and dissents in part by separate opinion in which VanMeter, C.J.; and Keller, J., join in part. Keller, J., dissents by separate opinion in which VanMeter, C.J., joins.

BISIG, J., CONCURRING IN PART AND DISSENTING IN PART: I cannot agree with the Majority Opinion that the information provided by the informant in this case was insufficient to create reasonable suspicion. Put simply, the facts show that the informant indicated there were two people, *both* of whom were acting strangely and possibly intoxicated, at the gas station on the evening in question. The informant further indicated the man was also acting nervous and fidgety, that the woman was talking to herself, and that the woman had climbed onto the bumper and then the trunk of the car and began jumping up and down. Moreover, the informant was also known to the officer, who knew her to be familiar with the behaviors of persons under the influence of drugs. Such circumstances are more than sufficient to create reasonable suspicion—a lower threshold than probable cause—that criminal activity was afoot. The majority errs in failing to consider these facts as a whole from the viewpoint of Officer Robertson, and instead substituting its own post-hoc consideration of whether each independent fact might have some innocent explanation. I therefore must respectfully dissent.

An investigatory stop such as that conducted by Officer Robertson is constitutionally permissible so long as it is supported by a "reasonable suspicion" of criminal activity. *Commonwealth v. Blake*, 540 S.W.3d 369, 373 (Ky. 2018). Notably, this standard is considerably less demanding than probable cause, and does not require certainty but rather only some probability of criminal activity. *Williams v. Commonwealth*, 147 S.W.3d 1, 5 (Ky. 2004) ("'[R]easonable suspicion' is less than probable cause, not only in the sense

that reasonable suspicion can be established with information that is different in quantity or content from that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause."); *U.S. v. Cortez*, 449 U.S. 411, 418 (1981) (noting that reasonable suspicion "does not deal with hard certainties, but with probabilities."). Moreover, we consider whether an investigatory stop is supported by reasonable suspicion not by considering each fact independently and in isolation, but rather by considering the totality of the circumstances surrounding the stop. *Blake*, 540 S.W.3d at 373.

Yet here, the Majority fails to consider the totality of the circumstances, instead concluding that Officer Robertson lacked reasonable suspicion because each separate piece of information provided by the informant might have some innocent explanation. However, a consideration of the information provided by the informant and the attendant circumstances *as a whole* make plain that Officer Robertson's stop was not prompted by some "unparticularized suspicion or hunch," but rather by reasonable suspicion that Vincent was under the influence of drugs. *See Bauder v. Commonwealth*, 299 S.W.3d 588, 591 (Ky. 2009).

Here, the informant—who was known to Officer Robertson and who had familiarity with the behaviors of individuals under influence of drugs—told Officer Robertson that *both* Vincent *and* the woman he was with (Erika Johnson) were acting "strangely." She also reported that *both* of them might be on something and were possibly "high." She further stated that Vincent was

also nervous and fidgety, that Erika was talking to herself, and that Erika had climbed onto the bumper and then the trunk of the car and began jumping up and down.

Though the Majority dismisses each of these facts as possibly having an innocent explanation, taken together they plainly gave rise to reasonable suspicion that criminal activity was afoot. For example, the Majority's siloing of Vincent's nervous and fidgety behavior as possibly arising from various mental or physical conditions fails to acknowledge that the informant described not only Vincent, but *also* Erika, as exhibiting strange behavior. The odds such behavior results only from mental or physical conditions rather than intoxicants of course decreases when it appears in two people together, rather than in only a single person. Moreover, the informant did not only describe Vincent and Erika as being "strange," "nervous" or "fidgety," but also as possibly being "on something" or "high." This observation from a known informant familiar with the behaviors exhibited by persons under the influence of drugs further tipped the scales in favor of reasonable suspicion that criminal activity was afoot. In addition, the informant also described Erika's unusual additional behaviors of talking to herself and jumping on the trunk of the car. Though the Majority surmises one might jump on a car trunk to secure a broken latch or "test out the vehicle's shocks," it points to no reason Officer Robertson would have had to suspect that was the case here. To the contrary, when considered together with the other behaviors described by the informant and her familiarity with the behavior of drug users, it is plain that the totality

of the circumstances provided reasonable suspicion for Officer Robertson to believe criminal activity was afoot.

The Majority errs in failing to consider the totality of these circumstances, instead focusing myopically on whether each piece of information might have an innocent explanation. We have previously rejected such Monday morning quarterbacking of the determinations made by officers in the field, holding instead that the proper consideration is an objective examination of the totality of the circumstances from the viewpoint of the officer. For example, in *Bauder*, an officer stopped the defendant after he bypassed a law enforcement roadblock. *Bauder*, 299 S.W.3d at 589-90. The officer had participated in many such roadblocks, and his training and experience had taught that persons who intentionally bypass law enforcement roadblocks are seeking to evade arrest or detection. *Id.* at 590, 593. However, the defendant argued the stop was unconstitutional because simply avoiding a roadblock is not sufficient to create reasonable suspicion of criminal activity. *Id.* at 591.

We rejected that argument, concluding that while there might be innocent explanations for such conduct, the true inquiry is whether the totality of the circumstances from the viewpoint of the officer in the field objectively indicates the presence of reasonable suspicion:

> Police officers are in an extraordinary position that requires them to make split-second determinations of reasonable suspicion, sometimes in dire and even dangerous circumstances. This determination is generally made through the prism of each officer's own training and experience. This Court has made clear that due

> deference must be given to the reasonableness of inferences made by police officers.
>
> **Certainly, there are a multitude of reasons why a driver may avoid a police roadblock, many of which may be completely innocent. However, we must apply an objective test from the viewpoint of the officer.** We believe that under the circumstances of this case, reasonable suspicion arose and justified Appellant's stop by [the officer].

Id. at 592 (emphasis added) (citations omitted). We thus rejected the very analytical framework applied by the Majority today, namely an overly simplistic consideration within the quiet of far-removed judicial chambers as to whether each fact might have some innocent explanation.

In sum, because the totality of the circumstances demonstrate that Officer Robertson's stop was supported by reasonable suspicion, I would find the stop lawful and affirm Vincent's conviction and sentence. Thus, though I agree with the Majority that Officer Robertson's mistake of law was not reasonable and that the mere "known" status of an informant is not alone sufficient to create reliability, I must respectfully dissent from the remainder of the Opinion.

VanMeter, C.J.; Keller, J., join.

KELLER, J., DISSENTING: Respectfully, I must dissent from the Majority opinion. I join Justice Bisig's well-written opinion in most aspects; however, I write separately because I would hold that Officer Robertson's mistaken belief that the headlight statute was in effect was objectively reasonable under *Heien v. North Carolina*, 574 U.S. 54 (2014) and its progeny, and therefore provided a valid basis for the stop of Vincent's vehicle.

As a preliminary matter, I address our standard of review, and remind this Court of the importance of lending deference to the trial court. Our review of a trial court's motion to suppress involves a two-step analysis. First, we review the trial court's factual findings under the clear error standard. *Payton v. Commonwealth*, 327 S.W.3d 468, 471 (Ky. 2010). Importantly, if the trial court's factual findings are supported by substantial evidence, they are considered conclusive. *Id.* Substantial evidence is "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Owens–Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998) (citations omitted). Following this determination, we then conduct a *de novo* review of the trial court's application of the law to the facts. *Payton*, 327 S.W.3d at 471-472.

In particular, "a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Commonwealth v. Whitmore*, 92 S.W.3d 76, 79 (Ky. 2002) (quoting *Ornelas v. United States*, 517 U.S. 690, 699 (1996)). It is our responsibility, furthermore, to "give due weight to the assessment by the trial court of the credibility of the officer and the reasonableness of the inferences." *Id.*; *see also Commonwealth v. Perry*, 630 S.W.3d 671, 674 (Ky. 2021).

In its order denying Vincent's motion to suppress, the trial court heard extensive testimony from Officer Robertson, and found that his mistaken belief

as to the effective date of the statute was objectively reasonable. During the suppression hearing, Officer Robertson testified as follows:

> **Prosecutor**: We discussed yesterday, that when you noticed the red lights on the front, it was a strange situation where you were aware, and you correct me if I am wrong, you were aware of the change in the statute, but didn't realize it wasn't effective for another…
>
> **Officer**: No sir, someone in the department, you know, brought it up and said, you know, this is going to be a law. No one said what date it went into effect, so therefore that's why I stopped them.

On cross-examination, Officer Robertson explained:

> **Defense**: And the law regarding the traffic light, you just said you had just heard about it, but you didn't really know when it went into effect?
>
> **Officer**: Right, it had been spoken of inside the department, I mean, I don't remember how it was even told to us.
>
> **Defense**: And what exactly did the law say was the change? What was the new law?
>
> **Officer**: The red lights up front of vehicle for parking lights or turning signals was going to be illegal. From my perspective, when you see red lights in the front of something, you're assuming it's the back of something, you know, break lights.

In ruling that Officer Robertson's mistake of law was reasonable, the trial court found the above testimony compelling. I agree.

In keeping in mind our duty to "give due weight to the assessment by the trial court of the credibility of the officer and the reasonableness of the inferences," *Whitmore*, 92 S.W.3d at 79, I turn next to the determination of whether the trial court's decision was correct as a matter of law. The question before us is this: Was it "objectively reasonable for an officer in [Robertson's] position to think that [the use of red headlights] was a violation of [Kentucky] law[?]" *Heien*, 574 U.S. at 68.

In *Heien v. North Carolina*, the United States Supreme Court held that "[a]n officer may make a mistake, including a mistake of law, yet still act reasonably under the circumstances . . . [W]hen an officer acts reasonably under the circumstances, he is not violating the Fourth Amendment." 574 U.S. at 59. Though this case involves a mistake of law, we must still engage in a careful fact-specific analysis to determine whether Officer Robertson's mistake meets the threshold of "objective reasonableness."

The Majority characterizes Officer Robertson's conduct as an unreasonable mistake of law concerning the effective date of a statute. However, this conclusion fails to account for Officer Robertson's reliance on information disseminated by his department. This is not solely about the interpretation of a statute. Instead, it involves the split-second decision in which law enforcement must make a decision given the information available to them. Officer Robertson's uncertainty about the effective date of the statute he suspected Vincent was violating did not negate his conclusion that Vincent's conduct likely amounted to a verifiable statutory violation. Officer Robertson

reasonably believed the statute to be in effect at the time of the stop because he had been explicitly advised about the change in law by officers and other members of the department. Police officers are required to operate in real time without the benefit of judicial hindsight. They must be permitted to rely on their training and experience in making such decisions.

Furthermore, even if this were a case in which the sole issue involved a mistaken interpretation of the seemingly unambiguous statutory language of Section 55 of the Kentucky Constitution, such a conclusion would not necessarily preclude a finding that the officer's mistake of law was objectively reasonable. Though an issue of first impression before this Court, other courts have addressed this issue. *See State v. Houghton*, 868 N.W.2d 143, 154 (Wis. 2015) (holding that officer's mistaken belief that Wisconsin statute prohibited an object from being present in the front windshield of a vehicle, when it did not, was a reasonable mistake of law); *see also id.* at 152, 156, 158–59 (noting that *Heien* was "at odds" with that court's prior rulings, but nonetheless finding mistake reasonable in the face of unambiguous statutory language). For other illustrations, look to *People v. Campuzano*, 188 Cal. Rptr. 3d 587, 591–92, n.8 (Cal. App. Dep't Super. Ct. 2015) (concluding that mistake was reasonable despite clear statutory language), and *State v. Stadler*, No. 112,173, 2015 WL 4487059, at *5 (Kan. Ct. App. July 17, 2015) (per curiam) (finding mistake reasonable based on officer's training and experience).

For these reasons, I would hold that Officer Robertson's mistake of law was reasonable and therefore provided a valid basis for the stop of Vincent's vehicle.

VanMeter, C.J., joins.

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