No. 22945 - Beverly S. Jackson Muscatell v. Jane L. Cline, Commissioner

Workman, J., dissenting:

I respectfully dissent from the majority opinion because it fails to address and to apply the appropriate standard for determining the constitutionality of an investigatory stop.

First, a review of the facts: Between 5:30 and 6:00 p.m., the trooper received a radio call[1] from the State Police Communication

[1]As the majority notes, it was later learned that the anonymous call came from Trooper Paul Ferguson, a State Police officer in Grafton, West Virginia, who was investigating a reported

Office in Shinnston, West Virginia, requesting him to be on the lookout for a small, light blue vehicle traveling toward Clarksburg from the Grafton area. He was also informed that the driver of the vehicle was named Beverly S. Jackson Muscatell, and that she might have been involved in a hit and run accident, and might be under the influence of alcohol. Next, shortly after 6:00 p.m., the trooper observed a woman driving a light blue small car, thought to be a Dodge Omni or Plymouth Horizon, traveling toward Clarksburg. The trooper also testified that the vehicle "straddled or went across the center line one time before coming back to the driving lane." The trooper then pulled the car over and asked the driver if her name was

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hit-and-run accident. The accident ultimately turned out to be a family argument that did not involve a hit-and-run incident.

Beverly, to which she affirmatively replied. Additionally, he looked at her operator's license. Even though the trooper observed no damage to the vehicle, while questioning her as to her name, he did detect the strong odor of alcohol "from the vehicle and from her person as she was speaking to me briefly there about the incident . . . ."

The majority analyzes whether the initial stop was valid utilizing the following law enunciated in syllabus point five of the opinion:

> For a police officer to make an investigatory stop of a vehicle the officer must have an articulable reasonable suspicion that a crime has been committed, is being committed, or is about to be committed. In making such an evaluation, a police officer may rely upon an anonymous call if subsequent police work or other facts support its reliability, and, thereby,

> if is sufficiently corroborated to justify the investigatory stop under the reasonable-suspicion standard.

The majority ultimately concludes, however, that a remand is necessary because the record was inadequately developed below. This decision to remand is not premised upon the above-mentioned law, it is premised upon the majority's determination that the trooper's subjective intent for making the stop is vital to the constitutional validity of the stop. As the majority stated "[i]t must be determined that the stop is not justified by mere pretext that would mock the constitutional protections to which all citizens are entitled."

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[2]I could perhaps accept the majority's ultimate resolution of this case if the opinion did not erroneously venture into the area of pretext as possible basis for invalidating an otherwise lawful stop. The focus of the inquiry should be quite specific: does the record evidence demonstrate that the officer had a reasonable articulable suspicion to

Simply stated, the majority is incorrect in its examination of this issue in the context of what the trooper's subjective intent was at the time he stopped the vehicle. Contrary to the majority opinion, an examination of the law reflects that it matters not whether the trooper stopped the vehicle due to a traffic violation or whether he stopped the vehicle based on an anonymous tip. Either ground is sufficient to support the stop, because the United States Supreme Court has very recently stated that the decision should turn on whether the trooper's conduct in stopping the vehicle was reasonable

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stop the
vehicle. The majority resolves to proceed to inject into West Virginia criminal jurisprudence a new dimension of subjectivity in an area already overburdened with confusing constitutional standards. This opinion certainly and unnecessarily adds to the confusion.

when the circumstances of that stop are viewed objectively. See Wren v. United States, No. 95-5841, __ U.S.__ (June 10, 1996);

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[3]The application of the objective standard involves a determination of whether a reasonable officer could have made a legal stop anyway, apart from his or her subjective suspicions. We do not examine the subjective motivations of individual officers or their particular job assignments, both of which are subject to change at any time. Instead, we should concentrate simply upon the conduct of the suspect, the information possessed by the officer at the time of the stop, and whether a reasonable officer with authority to do so would stop the vehicle when confronted with such conduct and information. See Scott v. United States, 436 U.S. 128, 137 (1978) (stating that "almost without exception in evaluating alleged violations of the Fourth Amendment the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances known to him"). Thus, expanding upon the concepts enunciated by the United States Supreme Court in Scott and Wren v. United States, No. 95-5841, __ U.S.__ (June 10, 1996), in order to determine the lawfulness of a stop, a court need only find that (1) under the circumstances a reasonable officer would stop the vehicle for purposes of investigating a violation of a specified law, and (2) it was within the detaining officer's scope of responsibility to enforce that law. A court need not answer the more specific question of

State v. Todd Andrew H., No. 23186, __ W. Va. __, __, __ S.E.2d __, __ n. 9 (1996).

There is no bright line for determining when an investigatory stop crosses the line and becomes constitutionally unreasonable. The United States Supreme Court has clearly stated that "[m]uch as a 'bright line' would be desirable, in evaluating whether an investigative detention is unreasonable, common sense and ordinary human experiences must govern over rigid criteria." United States v. Sharpe, 470 U.S. 675, 685 (1985). Therefore, whether a stop is valid

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what was the reason that motivated this specific police for effectuating the stop. To do otherwise, would impose a particular examination, akin to a subjective test, which expressly was rejected in Wren. As will be discussed later in the main text, if the majority had applied this standard, a remand

depends on all the surrounding circumstances, and each case must be decided on its own facts. Thus, in the present case, the factfinder had to resolve the abstruse issue of reasonable articulable suspicion in the context of a stop of a moving vehicle on an isolated stretch of highway by a police officer faced with an individual who may have been drunk, who may have been the culprit of a hit and run and who the officer personally observed as driving across the center line.

Nevertheless there are some standards that should be honored. When reviewing the legality of a vehicular stop, we are to accept the factfinder's assessment of the evidence unless it is clearly erroneous and review de novo the ultimate determination of reasonableness

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would have been unnecessary.

under our Constitution. State v. Lilly, 194 W.Va. 595, 461 S.E.2d 101 (1995); State v. Stuart, 192 W.Va. 428, 452 S.E.2d 886 (1995); see also Ornelas v. United States, __ U.S. __ , 116 S.Ct. 1657 (1996). We have stated repeatedly that the weight given to the evidence as well as the inferences and conclusions drawn therefrom, are matters for the factfinder. Once a decision has been reached below, we interpret the evidence from a coign of vantage most favorable to the winning side, in this case the Commissioner. State v. LaRock, __ W.Va .__, __, 470 S.E.2d 613, 623 (1996). More pertinent here, if the lower tribunal "did not make the necessary findings, the matter may either be remanded with appropriate directions or the [lower tribunal's] denial of a motion to suppress upheld if there is any reasonable view of the evidence to

support it." State v. Lacy, __ W.Va .__ , __, 468 S.E.2d 719, 725 (1996) (emphasis added); see State v. Farley, 192 W.Va. 247, 452 S.E.2d 50 (1994).

Unquestionably, a routine traffic stop is a seizure under both Fourth Amendment and the West Virginia Constitution. Such a stop is analyzed as an investigative detention, which need only be supported by a reasonable and articulable suspicion that the person and vehicle seized is engaged in criminal activity. Pennsylvania v. Mimms, 434 U.S. 106 (1977) (finding that a vehicular stop and frisk of car's occupant is governed by reasonable suspicion set forth in Terry v. Ohio, 392 U.S. 1 (1968)); Stuart, 192 W.Va. at 431-32, 452 S.E.2d at 889-90 (finding that brief investigative stop is permissible

when investigating officers have reasonable suspicion grounded in articulable facts and person stopped is involved or has been engaged in criminal activity). We employed a two-step inquiry when evaluating such investigative detentions, considering first "whether the officer's action was justified at its inception", and second, "whether [the action] was reasonably related in scope to the circumstances which justified the interference in the first place." Terry, 392 U.S. at 20.

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[4]It is well-established that the constitution does not prohibit all seizures but only those that are unreasonable. See Lacy, __W.Va. at __, 468 S.E.2d at 726-27. An investigative stop under Terry, a brief, nonintrusive stop by police, is a seizure within the federal and West Virginia Constitution but it requires only that the officers have specific and articulable facts that give rise to a reasonable suspicion that a person has committed or is committing a crime.

Our recent opinions, as well as the recent opinions of the United States Supreme Court, dispose of the Appellant's argument that the initial stop was of her vehicle was pretextual and therefore invalid. Under correct constitutional analysis a traffic stop is valid if the stop is based on an observed traffic violation or if the police officer has reasonable suspicion to believe that the driver of the vehicle is involved in criminal activity. It is thus irrelevant whether the particular officer "would" have stopped the vehicle according to general practices of police officers or police departments. It is equally irrelevant whether the officer may have other subjective motives for stopping the vehicle. As applied to the trooper's stop of appellee's vehicle, the above standards compel the conclusion that the Commissioner was not clearly wrong in determining that the stop was valid.

In the instant case, the trooper testified on direct examination that the reason he stopped the Appellee's vehicle was because he observed the vehicle " briefly straddling or crossing the centerline." On cross-examination, however, the majority noted that "the trooper appears to have testified that the information upon which he relied at the time of the stop was limited to the information contained in the anonymous phone call." Based on this conflicting testimony, the majority concludes that the "observations of the trooper immediately before the stop are critical to the legality of the stop." Such conclusion, which translates to an examination of the police officer's motivation for stopping the vehicle, is in direct contravention of the United States Supreme Court's most recent pronouncement on this

issue in Wren. See slip op. at 4-5; see also United States v. Robinson, 414 U.S. 218, 221 n.1 (1973) (stating that traffic-violation arrest would not be rendered invalid by fact that it was "mere pretext for a narcotics search").

In Wren, plainclothes policemen patrolling an area known for its drug activity in an unmarked car observed a truck driven by the petitioner Brown waiting at a stop sign for an unusually long period of time. The truck suddenly, without signaling, sped off at an "unreasonable" speed. Slip op. at 2. The policemen stopped the vehicle, assertedly to warn the driver about traffic violations. Upon approaching the truck, an officer observed plastic bags of crack cocaine in the petitioner Wren's hands. The petitioners were

arrested. Prior to trial, they moved to suppress the evidence maintaining that the stop had not been justified by either reasonable suspicion or probable cause to believe that they were engaged in illegal drug-dealing activity. Id.

In upholding the investigatory stop, the Supreme Court stated that the constitutional reasonableness of traffic stops does not depend on the "actual motivations of the individual officers involved." Id. at 4. In so holding, the Wren court relied upon the previously established principle that: "'the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the

action taken as long as the circumstances, viewed objectively, justify that action.'" Id. at 4 (quoting Scott, 436 U.S. at 138).

In ascertaining whether the trooper's conduct in the case sub judice was reasonable when the circumstances leading to the investigatory stop are viewed objectively, I turn to other Supreme Court cases that are factually analogous. For instance, in Adams v. Williams, 407 U.S. 143 (1972), a police officer, while on duty in a high-crime area, was approached by an informant who told him that an individual seated in a nearby vehicle was carrying narcotics and had a gun at his waist. Id. at 144-45. The officer approached the vehicle to investigate the informant's report, tapped on the car window and asked the occupant to open the door. The occupant

rolled down the car window, and the officer reached into the car and removed a fully loaded revolver from the occupant's waistband, where the informant indicated it would be. The weapon had not been visible to the officer from outside the vehicle. The occupant was arrested and charged with unlawful possession of a pistol. Id. at 145.

The respondent argued that the initial seizure of the pistol was not justified by the informant's tip. Id. In rejecting the respondent's argument, the Supreme Court stated that reasonable cause for a stop and frisk can be based on information supplied by

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[5]A search incident to arrest led to the discovery of substantial quantities of heroin on the occupant's person and car. 407 U.S. at 145.

another person. Id. at 147. Specifically, the Adams court stated that "while the Court's decisions indicate that this informant's unverified tip may have been insufficient for a narcotics arrest or search warrant, the information carried enough indicia of reliability to justify the officer's forcible stop of Williams." Id. (citations omitted).

Likewise, in Alabama v. White, 496 U.S. 325 (1990), the police received an anonymous telephone tip that the respondent would be leaving a particular apartment at a particular time in a particular vehicle. The anonymous caller also told the police the motel the respondent would go to and that she would be in possession of cocaine. The police immediately went to the apartment building and

saw the vehicle described by the caller. They then observed the respondent leave the building and get into that vehicle. They proceeded to follow her along the most direct route to the motel described by the caller, however, they stopped her vehicle just before she reached the motel. A consensual search of the car revealed drugs. The respondent ultimately pleaded guilty to possession of marijuana and cocaine. Id. at 327.

In deciding that an anonymous tip, as corroborated by independent police work, can exhibit a sufficient indicia of reliability to furnish reasonable suspicion for an investigatory stop, the Supreme Court reiterated that in cases involving reasonable suspicion,

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[6]The respondent's guilty plea was conditioned on her right to

"'[t]he Fourth Amendment [only] requires "some minimal level of objective justification" for making the stop.'" Id. at 329-30 (quoting United States v. Sokolow, 490, U.S. 1, 7 (1989)). Further, the White court indicated that in order to establish whether the anonymous tip was sufficiently corroborated, the totality of the circumstances approach was to be applied, "taking into account the facts known to the officers from personal observation, and giving the anonymous tip the weight it deserved in light of its indicia of reliability as established through independent police work." 496 U.S. at 330.

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appeal the denial of her suppression motion. 496 U.S. 327-28.

The Supreme Court concluded that the anonymous tip in White established reasonable suspicion, stating that "[i]t is true that not every detail mentioned by the tipster was verified, such as the name of the woman leaving the building or the precise apartment from which she left; but the officers did corroborate that a woman left the 235 building and got into the particular vehicle that was described by the caller." Id. at 331. Moreover, the Court found it important that "'the anonymous [tip] contained 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.'" Id. at 332 (quoting Illinois v. Gates, 462 U.S. 213, 245 (1983)).

It is true that an anonymous tip, considered wholly without regard to its content or context, is not deemed an adequate basis for a Terry stop. See Stuart, 192 W. Va. at 431, 452 S.E.2d at 889. However, where the tip is to some extent corroborated, as in this case, where the police observed a vehicle fitting the description of the tip and observed suspicious or unlawful driving of the vehicle, and where exigent circumstances exist, the situation is different. While there is still a chance that the tip is a lie, the Constitution does not require as prerequisite for an investigative stop that an officer be certain. Nor should we overlook the additional factor that the driver was alleged to have been driving under the influence of alcohol. Drunk drivers are so dangerous to the peace and welfare of the community that a tip that a person is under the influence while

operating a vehicle should be entitled to special consideration. As a realistic matter this information coupled with observed illegal driving, presents a compelling case for an investigative stop.

Reviewing the legality of the investigatory stop in the instant case in light of Wren, Adams and White, it is evident that the trooper's conduct in stopping the vehicle was reasonable when the circumstances surrounding the stop are viewed objectively. First, the reasonable suspicion standard was certainly met since the a decision to stop the vehicle could clearly be based on information received from State Police Communication Office in Shinnston. See United States v. Moore, 817 F.2d 1105, 1107 (4th Cir.), cert. denied, 484 U.S. 965, 108 S.Ct. 456, 98 L.Ed.2d 396 (1987) (finding that call

by dispatcher suggests existence of reasonable suspicion, and finding that police officer is not constitutionally required to be "certain" that a crime has occurred when he makes a stop). To the contrary, the failure of the police officer to take appropriate action to stop a properly identified vehicle would constitute a dereliction of duty. See Taft v. Vines, 70 F.3d 304, 312 (1995) ("Indeed ... to have refused to act on the radio dispatch order to stop the car, would have been to be negligent in the their duties."); United States v. Randall, 947 F.2d 1314, 1318 (7th Cir. 1991) (finding that limits of Terry not exceeded when police converged on and stopped suspect's vehicle when car matched description in radio dispatch of vehicle involved in a crime). Similarly, the trooper's conduct was equally justified under the reasonable suspicion standard if the stop of the vehicle was

precipitated by the trooper's observation of a traffic violation.

Thus, to hinge the opinion on the trooper's "conflicting" testimony as to why he stopped the vehicle, is to issue a ruling based on the trooper's subjective intent, which is irrelevant. Absent clear error, an appellate court should treat the factfinder's choice of which witnesses and what testimony to believe as conclusive on appeal. For all of these reasons, the Commissioner's decision on this issue should have been upheld. In remanding this case to resolve "the ambiguity in the record regarding the trooper's observations immediately before the stop," the majority applies the wrong standard for determining

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[7]The trooper's testimony on cross-examination did not conflict

whether the investigatory stop was legal, and stretches the boundaries of Section 6, Article III of the West Virginia Constitution to make our boundaries inconsistent with the Fourth Amendment. I must dissent.

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with his testimony on direct; rather, it expanded upon it.