RENDERED: MAY 25, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000527-MR

MARLON GERARD BERRY — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 05-CR-00733-002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MOORE, AND NICKELL, JUDGES.

NICKELL, JUDGE: Marlon Gerard Berry (hereinafter "Berry") entered a conditional guilty plea pursuant to Kentucky Rules of Criminal Procedure (RCr) 8.09 in the Fayette Circuit Court to the charges of trafficking in controlled substance in the first degree[1] and disorderly conduct,[2] and received a sentence of five years in prison. Within the guilty

[1] Kentucky Revised Statutes (KRS) 218A.1412.

[2] KRS 525.060.

plea, Berry reserved the right to appeal the circuit court's denial of his motion to suppress evidence. He appeals to this Court from that denial. For the following reasons, we affirm.

On April 27, 2005, Berry was a passenger in a vehicle stopped for a minor traffic violation by Officer Kevin Duane of the Lexington-Fayette County Police Department. The driver was placed under arrest for operating the vehicle while his driver's license was suspended. As Officer Duane was placing the driver into the police cruiser, Officer Henry Hicks arrived on-scene to provide assistance. Berry was ordered to exit the vehicle in order for the officers on-scene to conduct a search of the vehicle incident to the lawful arrest of the driver. Upon Officer Duane's request, Berry gave consent to a pat-down search of his person and affirmatively stated that he had no weapons on his person.

While Officer Duane was conducting the frisk of Berry, Officer Hicks began to search the vehicle. Officer Hicks located a firearm concealed under the driver's seat and informed Officer Duane of this fact. Shortly thereafter, Berry became loud, boisterous, and fidgety as Officer Duane moved his hand up Berry's right thigh. There, Officer Duane found a large, hard, and unknown object and inquired of Berry as to its identity.[3] Berry responded by yelling, screaming, and making vulgar comments. Officer Duane again inquired as to the identity of the object, this time specifically asking if it was a gun. Berry became more belligerent and attempted to pull away from Officer Duane.

[3] In his testimony at the suppression hearing, Officer Duane indicated that he could not tell exactly what the object was, but could not rule out the possibility that it was a gun or an ammunition magazine.

Officer Duane noticed several people who had exited their homes upon hearing the disturbance. At this point, a vehicle stopped nearby and a woman exited who attempted to calm Berry. Other vehicles also stopped to inquire as to whether Berry was alright. Berry continued his verbal tirade throughout this time and continued to struggle with Officer Duane. Officer Duane determined it to be appropriate to arrest Berry for disorderly conduct.

Subsequent to the arrest, Officer Duane attempted to remove the concealed object from Berry's pants, but was unable to do so. After reaching through several layers of Berry's clothing, Officer Duane determined that the object was a quantity of cocaine. Upon arrival at the jail, detention officers were able to remove a plastic baggie containing 17.8 grams of cocaine by cutting through the layers of Berry's clothing. Approximately $766.00 in cash was also located in Berry's pocket.

On June 13, 2005, Berry was indicted for trafficking in controlled substance in the first degree and disorderly conduct. On July 8, 2005, Berry filed a motion to suppress the evidence seized. An evidentiary hearing was held on August 24, 2005, wherein the trial court heard testimony from Officer Duane and Officer Hicks. Both parties were subsequently allowed to file memoranda in support of their positions. An oral ruling, along with findings of fact, was issued from the bench on September 30, 2005, followed by a written order entered on October 4, 2005, denying Berry's motion. Berry entered his conditional plea to the trafficking and disorderly conduct charges on October 14, 2005, and received a sentence of five years in prison. This appeal followed.

Our standard of review of a decision of a circuit court on suppression issues following a hearing consists of a two-pronged analysis. First, if supported by substantial evidence and not clearly erroneous, factual findings of the circuit court are deemed conclusive. RCr 9.78; *Canler v. Commonwealth*, 870 S.W.2d 219 (Ky. 1994); *Baltimore v. Commonwealth*, 119 S.W.3d 532, 539 (Ky.App. 2003). Second, we review determinations of reasonable suspicion and probable cause de novo as mixed questions of fact and law. *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). *See also Commonwealth v. Banks*, 68 S.W.3d 347 (Ky. 2001); and *Adcock v. Commonwealth*, 967 S.W.2d 6 (Ky. 1998).

We recognize warrantless searches are deemed unreasonable unless falling within one of the exceptions to the requirement that all searches be performed pursuant to a warrant. *Cook v. Commonwealth*, 826 S.W.2d 329 (Ky. 1992); *Smith v. Commonwealth*, 181 S.W.3d 53 (Ky.App. 2005) . Consent has long been recognized as such an exception, and the Commonwealth is required to prove the voluntariness of such consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *Farmer v. Commonwealth*, 6 S.W.3d 144 (Ky.App. 1999). Furthermore, it is axiomatic that a warrantless search following an arrest is permissible as incident to that lawful arrest. *See United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973); *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *Draper v. United States*, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959); *Pruitt v.*

Commonwealth, 286 S.W.2d 551 (Ky. 1956); and *Johnson v. Commonwealth*, 240 Ky. 123, 41 S.W.2d 913 (1931).

In the case sub judice, the circuit court expressly found Berry had, in fact, voluntarily consented to Officer Duane's request to perform a pat-down search for weapons.[4] This determination is a preliminary question of fact to be decided by the circuit court, and is to be determined by a preponderance of the evidence from the totality of the circumstances. *Talbott v. Commonwealth*, 968 S.W.2d 76 (Ky. 1998). There was substantial evidence presented upon which the circuit court could have based its determination of the voluntariness of Berry's consent, and therefore its finding is conclusive. There was no evidence of coercion, duress, deceit, or other bad act on the part of law enforcement to induce Berry to give his consent. Officer Duane testified that it is his common practice to request consent for a pat-down search for weapons for his own safety prior to conducting searches of vehicles, and that he followed this routine practice with regard to his interaction with Berry. Officer Duane stated that he had no suspicion that Berry was involved in any form of criminal activity at the time of the request and that he was not searching for contraband or other evidence of wrongdoing. There is nothing in the record to contradict the officer's testimony, and Berry does not

[4] This is a different situation from a search for officer safety and requires a different standard of review. In cases of protective searches without a warrant, the officer must have a basis of reasonable suspicion which is less than probable cause, and the search "must be strictly limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." *Commonwealth v. Whitmore*, 92 S.W.2d 76, 79 (Ky. 2002) (citing *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). As we are dealing here with a consensual search, our inquiry is limited to the voluntariness of the consent and the factual background relied upon by the circuit court in reaching its decision.

now argue (1) that he did not give his consent, (2) that such consent was involuntarily given, or (3) that he subsequently attempted to revoke such consent at any time. Therefore, the circuit court correctly relied upon Berry's consent to a weapons search as an exception to the warrant requirement when denying his motion to suppress the evidence.

Next, Berry contends that Officer Duane exceeded the scope of the consent when he reached through several layers of Berry's clothing, thus invalidating the search and requiring suppression. However, Berry fails to note that this increased scrutiny occurred only after Officer Duane had determined to arrest him for disorderly conduct. The testimony provided to the Circuit Court revealed that Officer Duane inquired multiple times as to the identity of the unknown object, only to be met with increasingly loud and vulgar comments. Based on his professional training and experience as a law enforcement officer, and due to Berry's conduct and the increasing number of bystanders gathering around the scene, Officer Duane made the decision to place Berry under arrest. The circuit court found that there was, in fact, probable cause to effectuate the arrest. We find this determination to be supported by substantial evidence and will not disturb it on appeal. Once under arrest, Officer Duane had every right to conduct a full search of Berry's person as a search incident to that lawful arrest. The fruits of the search were properly obtained, and the circuit court was correct in refusing to grant suppression of the evidence.

For the forgoing reasons, the judgment and sentence of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Samuel N. Potter
Frankfort, Ketucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Todd D. Ferguson
Assistant Attorney General
Frankfort, Kentucky