

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002051-MR

JAMES LEROY BROOKS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 05-CR-00521

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; NICKELL AND WINE, JUDGES.

COMBS, CHIEF JUDGE: James Leroy Brooks appeals from a judgment of the Fayette Circuit Court that sentenced him to a probated sentence of five-years' imprisonment after his entry of a conditional guilty plea. Brooks contends that the trial court erred in failing to grant his motion to suppress evidence that was found in the arresting officer's police cruiser during his arrest. After our review, we affirm.

On February 19, 2005, at approximately 3:15 a.m., Officer Gerald Florence of the Lexington Police Department, while on routine patrol, noticed Brooks and another

individual standing on the corner of Winburn Drive and McCullough Drive in north Lexington, a high-crime area. According to Florence, he pulled up alongside the two men, got out of his police cruiser, approached them, and asked their names and where they lived. Both men produced identification and claimed to live nearby.

Florence further alleged that while conversing with the two men, he noticed that Brooks appeared to be intoxicated because he was slurring his words and had bloodshot, watery eyes. Florence asked Brooks to show him his hands, which he did. Florence then asked Brooks if he had been smoking cocaine since he noticed distinctive burn marks on Brooks's thumb and index finger. At no point during this questioning did Florence give Brooks a *Miranda*¹ warning. Brooks admitted to Florence that he had smoked cocaine approximately an hour before. Florence then indicated to Brooks that he was not under arrest at the time but that he "had charges" and that Brooks would be detained if he attempted to leave. Florence then conducted a background check of Brooks's license and discovered an outstanding warrant for his arrest. When Florence approached Brooks to discuss the warrant, Brooks fled on foot. Florence apprehended Brooks and placed him under arrest for the outstanding warrant.

Following the arrest, Florence conducted a search of Brooks's person incident to arrest and found no contraband. While Florence was transporting Brooks to the detention center, he noticed Brooks lying down and getting up repeatedly in the police cruiser. Upon arrival at the detention center, Brooks was removed from the vehicle, and Florence conducted a search of the cruiser. During that search, Florence

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

discovered a dime-sized plastic baggy in the back floorboard of the cruiser that appeared to contain crack cocaine. Florence then charged Brooks with possession of a controlled substance.

On April 25, 2005, the Fayette County Grand Jury indicted Brooks on a series of offenses: one count of possession of a controlled substance, first-degree, a Class D felony pursuant to Kentucky Revised Statutes (KRS) 218A.1415; one count of resisting arrest, a Class A misdemeanor pursuant to KRS 520.090; one count of public intoxication, a Class B misdemeanor pursuant to KRS 525.100; and one count of being a persistent felony offender, second-degree, a Class C felony pursuant to KRS 532.080. On May 6, 2005, Brooks, appearing with counsel, entered a “not guilty” plea to the charges.

On August 30, 2005, Brooks filed a motion pursuant to Kentucky Rules of Criminal Procedure (RCr) 9.78 asking the trial court to suppress the evidence from his arrest. A suppression hearing was held on September 14, 2005. Officer Florence was the only person to testify at the hearing, and he recited the same version of events as set forth above. On September 21, 2005, the trial court issued an order denying the motion to suppress.² As the basis for its decision, the court found that any arguable taint caused by an allegedly illegal seizure or by Florence's failure to mirandize Brooks prior to questioning him had been cured by the outstanding arrest warrant. The court reasoned

² We note that Brooks failed to comply with Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(vii) when he omitted to include in the Appendix to his brief a copy of the order denying his motion to suppress from which this appeal is taken. Because we have suffered no real prejudice in our review, we have elected not to impose the sanction of striking the entire brief as permitted by CR 76.12(8)(a). However, the omission is duly noted.

that seizure of the evidence found in the floorboard of Florence's police cruiser resulted from a lawful arrest.

On July 21, 2006, Brooks entered a conditional guilty plea to possession of a controlled substance, first-degree, and to being a persistent felony offender, second-degree. The Commonwealth agreed to dismiss the remaining charges against him. The plea also preserved Brooks's right to appeal the denial of his motion to suppress. On July 25, 2006, the Fayette Circuit Court entered a judgment in accordance with his conditional guilty plea and sentenced Brooks to one-year imprisonment, enhanced to five (5) years. On August 31, 2006, the court entered a judgment suspending imposition of this sentence and placing Brooks on probation for five (5) years. This appeal followed.

On appeal, Brooks contends that the trial court erred in denying his suppression motion.

An appellate court's standard of review of the trial court's decision on a motion to suppress requires that we first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive. 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.

Commonwealth v. Neal, 84 S.W.3d 920, 923 (Ky. App. 2002). In conducting our review, our proper role is to review findings of fact only for clear error while giving due deference to the inferences drawn from those facts by the trial judge. *Commonwealth v. Whitmore*, 92 S.W.3d 76, 79 (Ky. 2002), quoting *Ornelas v. United States*, 517 U.S. 690, 699, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911, 920 (1996). After reviewing the record, we

conclude that the court's findings of fact are supported by substantial evidence; moreover, Brooks raises no arguments challenging those findings. Thus, our attention is focused solely upon whether the court properly applied the law to the facts as found. *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998), quoting *Ornelas*, 517 U.S. at 697, 116 S.Ct. at 1662.

Both the Fourth Amendment to the United States Constitution and Section Ten of the Kentucky Constitution prohibit unreasonable searches and seizures by the government. *Id.* Brooks argues that Officer Florence unlawfully seized him because Florence lacked a reasonable, articulable suspicion for an investigatory stop and that Florence then proceeded to unlawfully interrogate him without a *Miranda* warning. According to Brooks, this illegal seizure and interrogation tainted his arrest. Consequently, any subsequent search was illegal, and the contraband procured from Florence's police cruiser had to be suppressed as evidence. Citing to *Hardy v. Commonwealth*, 149 S.W.3d 433 (Ky.App. 2004), in support of its position, the Commonwealth argues that the discovery of the outstanding warrant for Brooks's arrest was an intervening circumstance that cured any possible earlier taint resulting from Florence's conduct. We agree.

In *Hardy*, the appellant claimed that he was unlawfully seized when police officers refused to allow him to leave a traffic stop while they were waiting for dispatch to complete a background check of his driver's license. *Id.* at 435. According to the appellant, "since the officers did not have reasonable, articulable suspicion that he was

engaged in criminal activity, the officers unlawfully ‘seized’ him by denying his requests to leave the scene.” *Id.* Thus, the appellant argued that the seizure “tainted” his arrest and that the evidence found on his person should be suppressed since he had not been lawfully detained in the first place: “the officers would not have learned that [he] had an outstanding warrant for his arrest, and if not for his arrest pursuant to that warrant, the crack cocaine on his person would not have been discovered.” *Id.*

We were not persuaded by that line of reasoning in *Hardy*. We held that *Hardy* had been arrested pursuant to a valid, outstanding warrant, which we held was an intervening circumstance that was sufficient to dispel any taint arising from the alleged misconduct on the part of the officers in detaining the appellant while awaiting the results of his background check. *Id.* at 436. Since the appellant's arrest was lawful, the search of his person incident to that arrest was also lawful. In support of this position, we noted that the United States Supreme Court has rejected “a 'but for' test when determining whether an “intervening circumstance” is sufficient to dissipate the taint caused by prior unlawful conduct on the part of the police.” *Id.* at 435; *see also United States v.*

Ceccolini, 435 U.S. 268, 276, 98 S.Ct. 1054, 1060, 55 L.Ed.2d 268 (1978). We also cited to our previous decision in *Baltimore v. Commonwealth*, *supra*, in which we held that:

a valid arrest may constitute an intervening event that cures the taint of an illegal detention sufficient to rebut the application of the exclusionary rule to evidence recovered in a search incident to an arrest.

Id. at 435, quoting *Baltimore*, 119 S.W.3d at 541 n.37.

We revisited this issue in *Birch v. Commonwealth*, 203 S.W.3d 156 (Ky.App. 2006), in which the appellant argued that he was improperly seized during the course of his questioning by a police officer and that this seizure tainted both his arrest and the resulting search that uncovered crack cocaine on his person. *Id.* at 158-59. As in *Hardy*, the arrest resulted from the discovery of an outstanding warrant for the appellant's arrest. The appellant contended that but for the improper seizure, the officers would not have learned that the outstanding warrant existed; thus, the cocaine on his person would not have been discovered. *Id.* at 159.

However, we again held that “regardless of the potential illegality of the police officer’s initial contact with [the appellant], the outstanding arrest warrant was an independent, untainted ground for the arrest.” *Id.* at 157. In *Birch*, we concluded that any evidence uncovered in the search incident to that valid arrest was properly seized and did not warrant suppression. *Id.* We set forth the following rule:

If, during a non-flagrant but illegal stop, the police learn the defendant's name, and the disclosure of that name leads to the discovery of an outstanding warrant for the defendant's arrest, and the execution of that warrant leads to the discovery of evidence, the existence of the arrest warrant will be deemed an independent intervening circumstance that dissipates the taint of the initial illegal stop vis-a-vis the evidence discovered as a consequence of a search incident to the execution of the arrest warrant.

Id. at 159, quoting *McBath v. State*, 108 P.3d 241, 248 (Alaska Ct.App. 2005).

The factual scenario now before us is highly similar to that in *Hardy* and *Birch*. Officer Florence learned Brooks’s name during an allegedly illegal stop and

discovered the existence of a warrant for Brooks's arrest. In turn, this arrest led Florence to discover cocaine in the back of his police cruiser following a search. Brooks contends that the initial stop by Florence was "flagrant" and that the independent warrant for his arrest did not cure the taint resulting from the stop. *Birch* squarely addressed that argument and held that an officer's presumably illegal seizure of the appellant after entering the appellant's **home** was "not so flagrant as to destroy the independent, untainted nature of the arrest warrant." *Id.* at 160. Under the facts presented here, the arguably illegal seizure of Brooks by Florence on a street corner was not so egregious an invasion of privacy as was entry into a home, which was held by *Birch* not to be so flagrant as to constitute a violation of the reasonable expectation of privacy protected by the Fourth Amendment.

Brooks contends that our holding in *Birch* is "a flawed and dangerous restriction on the exclusionary doctrine." However, he has presented no compelling arguments to persuade us to abandon that decision. Therefore, we conclude that the rule enunciated in *Hardy* and *Birch* governs in this case. The outstanding warrant for Brooks's arrest acted as an intervening circumstance that cured any taint that may have arisen from Florence's initial seizure and questioning of Brooks. The trial court did not err in denying Brooks's motion to suppress.

Therefore, we affirm the judgment of the Fayette Circuit Court.

ALL CONCUR.

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