RENDERED: NOVEMBER 16, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002278-MR

CORY[1] KENTRELL WASHINGTON — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 06-CR-00425

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: KELLER, LAMBERT, AND STUMBO, JUDGES.

KELLER, JUDGE: Cory Kentrell Washington has directly appealed from the Fayette Circuit Court's Final Judgment sentencing him to a total of seven years for his conviction following a jury trial on charges of possession of a handgun by a convicted felon, second-degree escape, and carrying a concealed deadly weapon. The only issue raised on appeal

[1] In the body of the notice of appeal, the appellant's first name is listed as "Corey." However, the spelling of that name in the rest of the circuit court record and in the briefs is listed as "Cory," which is how this Court will refer to Washington's first name.

was the circuit court's denial of Washington's motion to suppress, which addressed whether his 4th Amendment rights were violated. We reverse and remand.

During the late morning hours of January 27, 2006, Officer Jackie Bowen of the Lexington Metro Police Department was on his regular patrol in the Cardinal Valley area of Lexington, known to be a high-crime, high-drug, and high-gang area. Officer Bowen was specifically looking for criminal mischief due to a recent rash of car break-ins in the area. During his patrol, Officer Bowen saw a homeless man who was unfamiliar to him. Officer Bowen turned his cruiser around, stopped, approached this person, and began talking to him. While doing so, Officer Bowen saw another unfamiliar man walking about thirty yards away. This man (later identified as Washington) was black, and he was wearing what appeared to Officer Bowen to be gang attire, including a red top, black shoes with red laces, black pants with the left leg kicked up, red fingerless gloves, and a black baseball hat turned to the left. When Washington saw Officer Bowen talking to the homeless man, he changed his course and started to walk across the street.

As soon as Washington started walking away from him, Officer Bowen called to him and asked him to "come here a minute." Officer Bowen indicated that he wanted to ask Washington about the recent criminal activity in the area. As Washington approached Officer Bowen, he put his hands in his jacket pockets. Officer Bowen asked Washington to remove his hands from his pockets for safety purposes, which he did initially. Officer Bowen then told both men to sit down on the curb and called for back-up. Shortly after this, back-up officers arrived at the scene. At that point, Officer Bowen

separated Washington and the homeless man, asked each of them for his name and identification, and told them they could be free once he checked for warrants. Upon questioning, Washington told Officer Bowen that he was on his way to a job interview. He denied being in a gang, but claimed to be a professional boxer. The warrant checks eventually revealed that neither man was wanted on an outstanding warrant.

Throughout the encounter, Officer Bowen asked Washington to keep his hands out of his pockets. Although he complied at first, Washington kept putting his hands back in his pockets. Both Officer Bowen and Officer Todd Phillips, who responded as back-up, saw Washington continue to do this, despite their repeated requests for him to stop. In addition, Officer Phillips noted that Washington appeared to be nervous and was getting agitated, as shown by his gritting his teeth and making fists. Finally, Officer Bowen asked Washington if he had anything in his pocket. In response, Washington stated that he had a gun in his pocket that he was carrying for a friend. He also told the officers that he was a convicted felon. For their safety, the officers frisked Washington, retrieved the gun from his pocket, and put him in handcuffs. Before putting him in the cruiser, Officer Bowen checked the backseat while Washington sat on the curb. Still wearing handcuffs, Washington fled from the scene. A chase ensued, and the officers eventually caught Washington at an apartment building, where they arrested him.

The Fayette County grand jury returned a three-count indictment against Washington. He was charged with Possession of a Handgun by a Convicted Felon pursuant to KRS 527.040 (a Class C Felony), Second-Degree Escape pursuant to KRS

520.030 (a Class D Felony), and Carrying a Concealed Deadly Weapon pursuant to KRS 527.020 (a Class A Misdemeanor). Washington retained private counsel, who moved to suppress the evidence and statements the officers obtained, arguing that Officer Bowen had no grounds for the stop. At the conclusion of the suppression hearing, the circuit court entered oral findings of fact into the videotaped record. Specifically, the circuit court made the following factual findings, which were later adopted in the written order:

> The Court finds that Officer Bowen was in the Cardinal Valley section of our community on January 27, 2006. The Court will note that Cardinal Valley, both from my past experience and from testimony today, has been described as a high crime area for good reason. Specifically, the officer was there in regard to numerous complaints of car break-ins.
>
> Upon first coming up around this area, the officer observed a male white who appeared to be unfamiliar with the area and while engaged in conversation with this male white, the officer observed another individual, who later turned out to be Mr. Washington. So the defendant in this case was walking about 30 yards behind him. The officer observed that the defendant was wearing a red shirt, hat tilted a certain way, red gloves, which the officer believed was some indicia of gang activity in the sense that some particular gang might wear the all red outfit being some indicia of that.
>
> The officer had gotten out of his cruiser and was talking to this male white at that point and the defendant was walking by 20-30 feet round numbers, was observed walking toward the officer when he deviated somewhat. I'm not as concerned about being, you know, sort of deviating from his exact path. I can see Mr. Baker's point about this officer talking to another citizen, you know, want to stay out of the way so the fact that the defendant was deviating from some perceived path. I made the observation but I don't really put a lot of emphasis on it.

> At that point, the officer called to the defendant, nobody articulated exact words something to the effect of, "Come over, let me talk to you." At that point, the Court finds the defendant had his hands in his pocket. Officer Bowen asked him to remove his hands, sat both beings down, called for back-up. The defendant was observed with his hands back in his jacket. Officer asked him to remove them again, this happened a couple of times after the officer had called Mr. Washington to come over and talk to him. The defendant did comply on at least one of the occasions, removed his hands but then he went right back. The other officer arrived, before we make the finding that Officer Phillips at that point in back-up approached Officer Bowen and the defendant, observed the defendant put his hands in his pocket and taking them out [and] put[ting] them back in.
>
> Now at this point Mr. Baker, I understand your argument about you know we can wear any outfit we basically want to so the fact that Mr. Washington was observed wearing red which may be some indicia of gang membership or whatever I don't believe that that in and of itself, the fact that he had on all red, certainly that doesn't justify an officer in harassing or seizing or arresting somebody under those circumstances clearly. I'm not going there, we're not there.

After making its factual findings, the circuit court held that Washington was not seized until after he admitted he had a gun in his possession and the officers handcuffed him. The circuit court held that Washington had no obligation to comply with Officer Bowen's request to come over, and that he was not seized when the officers asked him to remove his hands from his pocket, as that request was made for safety reasons. Furthermore, based upon Washington's statement that he had a gun, the pat down and search were justified. In support of its ruling, the circuit court relied upon two Supreme Court of Kentucky cases, *Banks v. Commonwealth*, 68 S.W.3d 347 (Ky. 2001), and *Baker v.*

Commonwealth, 5 S.W.3d 142 (Ky. 1999), as well as a United States Supreme Court case, *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983).

The matter proceeded to trial, after which the jury convicted Washington as charged in the indictment. The jury recommended a seven-year sentence on the handgun possession charge, a five-year sentence on the escape charge, and a three-month sentence on the carrying a concealed deadly weapon charge, all to be served concurrently for a total of seven years. Washington moved the circuit court for a new trial, citing its failure to instruct the jury with the instructions tendered by his attorney, its failure to instruct the jury on its ability to fine him, and its decision to allow the Commonwealth to rely upon evidence and statements obtained in violation of his constitutional rights. The circuit court denied the motion and entered a Final Judgment in conformity with the jury's recommended sentence. This direct appeal followed.

On appeal, Washington limits his arguments to those he raised in his motion to suppress. He asserts that his encounter with Officer Bowen was a seizure and that Officer Bowen did not have a reasonable suspicion that he had committed or was committing a crime. In its brief, the Commonwealth argues that the circuit court properly denied the motion to suppress, as Washington was not seized until the officers took physical control of him when the officers had a reasonable suspicion to conduct the pat-down.

STANDARD OF REVIEW

In appeals addressing the denial of a motion to suppress following an evidentiary hearing, our standard of review is two-fold. Our first determination is whether the findings of fact are supported by substantial evidence. If so, those findings are conclusive. RCr 9.78; *Adcock v. Commonwealth,* 967 S.W.2d 6, 8 (Ky. 1998). If not, the factual findings must be overturned as clearly erroneous. *Farmer v. Commonwealth,* 169 S.W.3d 50, 53 (Ky.App. 2005). Second, we must perform a *de novo* review of those factual findings to determine whether the lower court's decision is correct as a matter of law. *Ornelas v. United States,* 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); *Commonwealth v. Banks,* 68 S.W.3d 347, 349 (Ky. 2001); *Stewart v. Commonwealth,* 44 S.W.3d 376, 380 (Ky.App. 2000).

ANALYSIS

Washington first argues that he was improperly seized by police before he admitted he had a gun in his pocket, as a reasonable person would not have felt free to leave in his situation. The Commonwealth, on the other hand, maintains that Washington was not seized until the police took physical control of him after he admitted to having a gun in his possession.

The United States Supreme Court stated in *Terry v. Ohio*, 392 U.S. 1, 8-9, 88 S.Ct. 1868, 1873, 20 L.Ed.2d 889 (1968), that "[t]he Fourth Amendment provides that 'the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .' This inestimable right of

personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs." Evidence that is recovered, either directly or indirectly, from an illegal search or seizure is inadmissible as "fruit of the poisonous tree." *Northrop v. Trippett*, 265 F.3d 372, 377-78 (6th Cir. 2001).

The *Terry* Court made it clear that "not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." 391 U.S. at 19, n. 16. The Supreme Court further addressed this issue in *United States v. Mendenhall*, 446 U.S. 544, 554-55, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980), concluding that:

> [A] person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person. (Citations and footnote omitted.)

In *Florida v. Royer*, 460 U.S. 491, 497-98, 103 S.Ct. 1319, 1324, 75 L.Ed.2d 229 (1983), the Supreme Court observed:

> [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing

> to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds. If there is no detention – no seizure within the meaning of the Fourth Amendment – then no constitutional rights have been infringed. (Citations omitted.)

See also United States v. Drayton, 536 U.S. 194, 122 S.Ct. 2105, 153 L.Ed.2d 242 (2002), *Florida v. Bostick*, 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991), *INS v. Delgado*, 466 U.S. 210, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984), *United States v. Buchanon*, 72 F.3d 1217 (6th Cir. 1995).

Kentucky's state appellate courts have also addressed this issue. The Supreme Court reviewed the applicable law in *Baker v. Commonwealth*, 5 S.W.3d 142 (Ky. 1999), and *Commonwealth v. Banks*, 68 S.W.3d 347 (Ky. 2001). In *Baker*, the Court addressed whether an officer's order to Baker to remove his hands from his pocket after he refused to comply with the officer's earlier request to do so constituted a seizure. While holding that the initial request was not a seizure, but merely a safety precaution, the Court nevertheless held that the officer's "subsequent direct order for [Baker] to remove his hands from his pockets must be interpreted as a show of authority which, we believe, would compel a reasonable person to believe he was not free to leave." 5 S.W.3d at 145. The Court ultimately held that the seizure was reasonable based upon its

consideration of the totality of the circumstances. In *Banks*, the Supreme Court stated that "[p]olice officers are free to approach anyone in public areas for any reason. Officers are entitled to the same freedom of movement that the rest of society enjoys." 68 S.W.3d at 350. The *Banks* Court also cited to *Baker* regarding the officer's request for Banks to remove his hands from his pockets; the officer's request for him to do so was not a seizure, while an order would have been. *See also Baltimore v. Commonwealth*, 119 S.W.3d 532 (Ky. 2003).

Based upon our application of the law to the factual findings, which we hold are supported by substantial evidence of record, we must conclude that the circuit court's decision as to when Washington was seized is erroneous as a matter of law. While we agree that Washington voluntarily approached Officer Bowen at his request, Washington was seized when Officer Bowen told him and the other individual to sit on the curb while he waited for back-up officers to arrive. Any reasonable person would not have felt free to leave once a uniformed officer told him to sit on the ground. This was certainly a show of force that would indicate that Washington had been seized at that point in time.[2] Furthermore, we hold that for the same reason Officer Bowen's statement to Washington that he could be free if his warrant check was negative, which preceded Washington's admission that he had a gun, also constituted a seizure. Accordingly, we hold that the circuit court erred by concluding that Washington was not seized until the

[2] We need not address whether Officer Bowen's requests that Washington remove his hands from his pockets constituted a seizure; the law is clear that such a request is not a seizure. The record supports the circuit court's factual finding that Officer Bowen requested, but did not order, Washington to remove his hands from his pockets once he crossed the street.

officers conducted the pat-down and recovered the gun from his pocket. However, our analysis does not end here.

Next, we must determine whether Officer Bowen had a reasonable suspicion upon which to detain Washington. In his brief, Washington focuses on whether his possible gang affiliation, based upon his clothing, can form the basis for a reasonable suspicion. The Commonwealth asserts that the investigative stop was justified.

In *Terry*, the United States Supreme Court set forth the standard for an investigative stop:

> [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

392 U.S. at 30-31. In *Royer*, the Supreme Court reiterated *Terry*'s holding that "certain seizures are justifiable under the Fourth Amendment if there is articulable suspicion that a person has committed or is about to commit a crime." 460 U.S. at 498. More recently in *Illinois v. Wardlow*, 528 U.S. 119, 123-24, 120 S.Ct. 673, 676, 145 L.Ed.2d 570 (2000), the Supreme Court stated that an "officer must be able to articulate more than an

'inchoate and unparticularized suspicion or "hunch"' of criminal activity. . . . But officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation." In *United States v. Cornelius*, 391 F.3d 965 (8th Cir. 2004), the Eight Circuit Court of Appeals listed several factors to consider in determining whether a reasonable suspicion exists, including a past history of drug or gang activity, the criminal propensity of an area, and a suspect's nervous actions such as putting his hands in his jacket pocket.

The Supreme Court of Kentucky addressed this issue in *Taylor v. Commonwealth*, 987 S.W.2d 302 (Ky. 1998), albeit it in relation to automobile stops. The Supreme Court held:

> In order to justify an investigatory stop of an automobile, the police must have a reasonable articulable suspicion that the persons in the vehicle are, or are about to become involved in criminal activity. *United States v. Cortez*, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); *Commonwealth v. Hagan*, Ky., 464 S.W.2d 261 (1971). In order to determine whether there was a reasonable articulable suspicion, the reviewing appellate court must weigh the totality of the circumstances. *See Alabama v. White*, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990).

Taylor, 987 S.W.2d at 305.

Based upon the facts of this case, we cannot hold that Officer Bowen had a reasonable suspicion that any criminal activity was afoot when he detained Washington. We agree with the circuit court's decision to attach little to no importance to Washington's clothing or to his decision to deviate from his original course. Therefore, the only factor actually left to consider was that Washington was in a high-crime area

where there had a been a recent rash of break-ins. However, Officer Bowen admitted that he had not observed any criminal activity on Washington's part, but merely thought he might be in a gang. This is simply not enough to form a reasonable and articulable suspicion that Washington was engaged in criminal activity or to justify his seizure and continued detention. Accordingly, we must hold that Officer Bowen's seizure of Washington was unjustified, and that the evidence seized and statements Washington made while he was unlawfully detained should have been suppressed as fruits of the poisonous tree.

Despite this holding, we obviously recognize and appreciate the safety issues police officers in the Commonwealth face every day. We certainly support their efforts to maintain their own safety in the face of possibly escalating situations. However, those efforts must be continually balanced against the constitutional right of citizens to be free from unwarranted seizures.

For the foregoing reasons, we reverse the judgment of the Fayette Circuit Court and remand this matter for further proceedings in accordance with this opinion.

ALL CONCUR.

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