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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002320-MR

ANTONIO JEROME WAITE — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY BUNNELL, JUDGE
ACTION NO. 06-CR-0826-001

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND VANMETER, JUDGES; GRAVES,[1] SENIOR JUDGE.

NICKELL, JUDGE: Following a jury trial, Antonio J. Waite (Waite) was convicted of trafficking in a controlled substance in the first degree,[2]

[1] Senior Judge J. William Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

[2] KRS 218A.1412, a Class C felony.

fleeing/evading police in the second degree,[3] and being a persistent felony offender in the second degree[4] (PFO II). He was sentenced to a total of fifteen years' imprisonment.[5] He now appeals from the Fayette Circuit Court's June 12, 2007, denial of his motion to suppress pursuant to RCr[6] 9.78. Further, he requests for the first time on appeal to this Court, a new trial due to the inadvertent destruction of a portion of the trial record by the circuit court clerk's office.[7] For the following reasons, we affirm the trial court's denial of the motion to suppress and deny the request for a new trial.

On March 29, 2006, detectives from the narcotics division of the Lexington Fayette Urban County Government Division of Police received a tip from a confidential informant. According to the tip, an individual named Paul E. Taylor (Taylor) was selling drugs on Race Street in Lexington, Kentucky. Police officers arrived at the specified location one to two hours later, delaying their arrival to protect the identity of the confidential informant. Upon arrival, Waite

[3] KRS 520.100, a Class A misdemeanor.

[4] KRS 532.080.

[5] The jury set Waite's sentence at ten years' imprisonment for trafficking in a controlled substance in the first degree and six months' imprisonment for fleeing/evading police in the second degree, for which a fine of $500.00 was also imposed. The jury enhanced the sentence to twenty years' imprisonment pursuant to Waite's status as a PFO II. However, without explanation, the trial court imposed a sentence of only fifteen years' imprisonment.

[6] Kentucky Rules of Criminal Procedure.

[7] Waite's trial was recorded on two separate compact disks. The clerk's procedure upon conclusion of a trial was to copy the proceedings from the master disks, in preparation for the next recording, and then erase those proceedings from the master disks. In this case, the clerk accidentally made two copies of the same disk instead of recording one copy of each disk. Thus, a large portion of the recording of the guilt phase of Waite's trial was forever lost.

was seen "walking in concert" with a man fitting the description of Taylor given by the informant. The narcotics detectives were the first to arrive at Race Street, followed closely by Officer Jonathan Bastian (Officer Bastian) and Officer William Nowlin (Officer Nowlin). When the narcotics detectives exited their unmarked cruiser, Waite immediately turned and ran from the approaching officers. Officer Bastian then exited his marked cruiser, and ordered Waite to stop running. When Waite continued running, Officer Bastian gave chase. During the foot pursuit, Officer Bastian observed Waite throw a "white or off-white" substance which struck a nearby residence and fell to the ground. After capturing Waite, Officers Bastian and Nowlin returned to the general location where Waite had discarded the unknown object and retrieved a small baggie of suspected cocaine.

Waite and Taylor were both arrested and charged in a single indictment. The charges against Taylor were later severed and Waite was convicted as charged in the indictment.

Waite now contends the trial court erred in denying his motion to suppress the evidence seized following his arrest. Additionally, he seeks a new trial based on the inadvertent destruction of a portion of the trial record by the circuit court clerk. Waite argues his constitutional right to appellate review has been rendered meaningless by the destruction of a portion of the video record of the guilt phase of his jury trial. Waite contends his counsel had no opportunity to

reformulate the events that took place at trial[8] and therefore, a new trial is mandated.

First, Waite argues Officer Bastian had insufficient reasonable, articulable suspicion to arrest him, thus the evidence obtained should have been excluded as the fruit of an unconstitutional search. We disagree. Following a hearing on the matter, the trial court denied Waite's motion to suppress the evidence seized by written order entered on June 12, 2007. The trial court ruled that in view of the totality of the circumstances, Officer Bastian had a reasonable, articulable suspicion that Waite was engaged in criminal behavior. Thus, the resulting chase and the evidence obtained following the pursuit were properly admitted at trial.

When a pre-trial motion to suppress is heard, a trial court's findings of fact regarding the admissibility of evidence seized during the search are conclusive when supported by substantial evidence. RCr 9.78; *Davis v. Commonwealth*, 795 S.W.2d 942, 955 (Ky. 1990); *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky. App. 2002). Once we determine the trial court's factual findings are supported by substantial evidence, we review *de novo* the trial court's application of those facts to the law to determine whether its decision is correct as a matter of law. *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998); *Commonwealth v. Opell*, 3 S.W.3d 747, 751 (Ky. App. 1999). Since Waite does not challenge the trial court's

[8] Different attorneys represented Waite at trial and on appeal.

findings of fact, we will focus solely on whether the court correctly applied the facts to the law.

"In determining whether the requisite reasonable and articulable suspicion exists, the reviewing court must examine the totality of the circumstances to see whether the officer had a particularized and objective basis for the suspicion." *Commonwealth v. Marr*, 250 S.W.3d 624, 627 (Ky. 2008). Officer Bastian's reasonable suspicion that Waite was engaged in criminal behavior is grounded in two observations he made upon arriving at Race Street. First, Waite appeared to be "walking in concert" with a man matching the description given by the confidential informant. Second, Waite engaged in unprovoked flight when the officers approached from their cruisers. In addition to these two observations, Officer Bastian testified that Race Street was a "high crime" area based on his three years as a police officer and his knowledge of numerous drug busts occurring on Race Street. Although courts in Kentucky have ruled mere presence in a high crime area is insufficient to justify reasonable suspicion, *Strange v. Commonwealth*, 269 S.W.3d 847, 852 (Ky. 2008) (citing *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S.Ct. 673, 676, 145 L.Ed.2d 570) (2000)), police are permitted to take into account their knowledge of whether a particular area is known as a high crime area when evaluating the totality of the circumstances. *Marr*, 250 S.W.3d at 627.

Kentucky courts have applied *Wardlow* in determining whether officers had reasonable, articulable suspicion to detain an individual.

Commonwealth v. Fields, 194 S.W.3d 255, 257 (Ky. 2006); *Commonwealth v. Banks*, 68 S.W.3d 347, 350 (Ky. 2001). In a case factually similar to the one we review today, the Supreme Court of Kentucky held officers reasonably concluded Fields was engaged in criminal activity when they spotted him while patrolling a high crime area for a suspected drug dealer. *Fields*, 194 S.W.3d at 257. When Fields saw the police vehicle, he abruptly turned and walked away from the cruiser. *Id*. Our Supreme Court reasoned that "unprovoked evasive maneuvers of a suspect can provide the requisite reasonable, articulable suspicion to justify a brief *Terry*[9] stop investigation." *Id.*

In *Banks,* the Court found officers had a reasonable, articulable suspicion to believe Banks was engaged in criminal behavior by his presence in a high crime area, his presence on the property of an apartment complex where a "No Trespassing" sign was posted, his startled appearance, and his attempt to run when officers approached him. *Banks*, 68 S.W.3d at 349. Similarly, in the case *sub judice*, Waite was observed in a high crime area, "walking in concert" with a person matching the description of the subject identified in the informant's tip, and he ran before officers had the opportunity to approach him.

Not only is the case at bar similar to *Fields* and *Banks*, it is similar to *Wardlow*. While on patrol, officers spotted Wardlow in a high crime area and he fled the scene when the officers approached. In deciding the officers in *Wardlow* had reasonable, articulable suspicion, the United States Supreme Court linked

[9] *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (footnote added).

Wardlow's presence in a high crime area to his unprovoked flight when officers the arrived. *Wardlow*, 528 U.S. at 124, 120 S.Ct. at 675. "It was not merely [Wardlow's] presence in an area of heavy narcotics trafficking that aroused the officers' suspicion, but his unprovoked flight upon noticing the police." *Id.* The Court then recognized that "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion." *Id.* The same logic applies here. Additionally, Officer Bastian's observation of Waite discarding something while fleeing further bolstered his suspicion of criminal activity.

While any of the foregoing factors may appear lawful when considered individually, when viewed as a whole they provide a substantial basis to hold that Officer Bastian had reasonable, articulable suspicion to pursue and arrest Waite. *Id.* at 125, 120 S.Ct. at 677. Thus, we conclude the trial court, in denying Waite's motion to suppress, correctly found the officers had reasonable, articulable suspicion to detain Waite.

Next, Waite contends we must grant him a new trial because a portion of the trial record was destroyed. Waite claims his attempt to appeal has been rendered meaningless by the destruction of a portion of the record. We disagree. While we realize part of the video record of the trial was destroyed, CR[10] 75.13 allows a party to supplement the record by compiling a narrative statement based on his recollection of the trial, as well as that of other individuals who participated in the original trial. Although not specifically required under the rule, courts have

[10] Kentucky Rules of Civil Procedure.

generally refused to grant a new trial in the absence of an attempt to supplement the record via a narrative statement. *Davis*, 795 S.W.2d at 949. Waite did not fully avail himself of the procedure outlined in CR 75.13.

It is incumbent upon the appellant to present a complete record to this Court for review. *Steel Technologies, Inc. v. Congleton*, 234 S.W.3d 920, 926 (Ky. 2007); *Davis*, 795 S.W.2d at 948-49. Moreover, "it is the duty of a party attacking the sufficiency of the evidence to produce a record of the proceedings and identify the trial court's error. Failure to produce such a record may preclude appellate review." *Chestnut v. Commonwealth*, 250 S.W.3d 288, 303-04 (Ky. 2008). Since Waite has failed to present this Court with a complete record, we will not undertake a detailed analysis of the merits of his claim.

Furthermore, Waite's only attempt at creating a narrative statement was to contact his trial counsel. Unfortunately for Waite, his previous counsel was unable to remember any specifics about his trial and is no longer practicing law within the Commonwealth. Waite made no attempt to contact the Commonwealth's Attorney or the trial court about preparing a narrative statement despite his stated intention to do so in the motion for an extension of time he filed in his brief to this Court.[11] Waite argues the Assistant Commonwealth's Attorney who prosecuted him is no longer working in that office. Nevertheless, it seems likely the Commonwealth Attorney's office would have maintained a file with notes about what had transpired at trial. Waite has given us no reason to excuse his

[11] By order entered on August 29, 2008, we granted Waite's motion for an extension of twenty days to file his brief.

failure to prepare a narrative statement. Under the facts of this case, we hold this failure to be fatal to his request for a new trial.

For the foregoing reasons, we affirm the decision of the trial court to deny Waite's motion to suppress and we deny his request, made for the first time on appeal, for a new trial.

ALL CONCUR.

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