

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000914-MR

DEMARCUS CLAY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 07-CR-01169

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: MOORE AND WINE, JUDGES; HENRY, SENIOR JUDGE.

WINE, JUDGE: Demarcus Clay (“Clay”) was indicted by a Fayette County grand jury on the charges of first-degree trafficking in a controlled substance; possession of a firearm by a convicted felon; carrying a concealed deadly weapon; second-degree fleeing or evading police; possession of marijuana; loitering for prostitution purposes; and second-degree persistent felony offender. A Fayette County jury

found Clay guilty of first-degree trafficking in a controlled substance, second-degree fleeing or evading police, and possession of marijuana and sentenced him to ten years' imprisonment, from which he now appeals. On appeal, Clay contends that the arresting officer lacked probable cause and that the trial court improperly denied his motion to suppress pursuant to Kentucky Rules of Criminal Procedure ("RCr") 9.78. Upon review, we affirm.

Factual and Procedural Background

In the late evening hours of July 20, 2007, Officer Ron Kornrumpf ("Kornrumpf") of the Lexington police noticed a woman walking back and forth several times on West Seventh Street, a known high crime, high narcotics and high prostitution area. Although Kornrumpf suspected the woman was loitering for purposes of prostitution, he was unable to investigate as he was responding to another call.

At 3:20 a.m. on the morning of July 21, 2007, Kornrumpf observed a black Toyota traveling on Limestone Street. The vehicle pulled over on the left side of the street immediately after passing Fifth Street. Kornrumpf observed a black male (later identified as Clay), and two females (one white and one black, and one of whom he had observed walking the street earlier), immediately cross the street and approach the Toyota. As Kornrumpf drove past the stopped vehicle, he observed the black female being helped into the back seat of the car by Clay. He also observed the white female talking to a second black male (later determined to be the driver of the vehicle) at the rear of the vehicle.

Kornrumpf pulled behind the vehicle and turned on his emergency lights for safety. He exited his vehicle and asked all four individuals to step to the rear of the vehicle so he could speak with them. The second black male (the driver) fled down the street and refused to obey Kornrumpf's commands for him to return to the vehicle.

Clay, without being asked, handed his wallet with his identification to Kornrumpf. Clay refused to make eye contact with Kornrumpf and repeatedly looked over his shoulders. Kornrumpf testified that this behavior aroused his suspicions and that he believed Clay was either going to run or try to harm him.

Kornrumpf informed Clay he was going to pat him down to check him for weapons. Clay was wearing baggy pants and a hooded sweatshirt at the time. He stated he would not allow Kornrumpf to search him unless there were charges against him. Kornrumpf requested back-up, then asked Clay to place his hands on his head. Clay complied, but fled once Kornrumpf positioned himself to frisk Clay.

Kornrumpf followed Clay, commanding him to stop. While Clay was running, he did not swing his arms at his sides, but rather he kept his hands in front of his waistband. During the foot pursuit, Kornrumpf observed Clay making a throwing motion toward a residence at 545 North Limestone. As Clay did so, his left hand caught the top of a fence, which allowed Kornrumpf to catch him.

During a search incident to Clay's arrest, officers found a small package of crack cocaine and a small baggie containing marijuana. Additionally, a

9mm gun was found at 545 North Limestone, but Clay denied ownership and no fingerprints were found on the gun. Clay was subsequently arrested on the charges of loitering for prostitution; fleeing or evading police; possession of marijuana; possession of a handgun by a convicted felon; and carrying a concealed deadly weapon. He was also charged with trafficking in a controlled substance as he stated to police that he was trying to “fleece her for some head”, trading cocaine for sexual favors. The charge of loitering for prostitution was later dismissed.

Clay made a motion to suppress, and a hearing was held on January 4, 2008. At the conclusion of the suppression hearing, the trial court made oral findings of fact and conclusions of law, finding that Kornrumpf had a reasonable, articulable suspicion to conduct a search of Clay.¹ The trial court subsequently entered a written order denying Clay’s motion to suppress.

Thereafter, Clay was tried before a jury on January 10, 2008. The jury returned guilty verdicts on the charges of possession of marijuana, trafficking in a controlled substance and second-degree fleeing or evading police. Further, the jury returned not guilty verdicts on the charges of possession of a handgun by a convicted felon and carrying a concealed deadly weapon. The jury ultimately recommended a ten-year sentence for the felony offense of trafficking in a controlled substance. The Commonwealth and Clay agreed to twelve month sentences for each of the misdemeanor offenses.

Analysis

¹ Clay does not challenge the sufficiency of these findings.

We first address Clay's claim that the trial court erred by denying his motion to suppress. RCr 9.78 requires that, on a motion to suppress, the "trial court shall conduct an evidentiary hearing outside the presence of the jury" and shall resolve the issues of fact. If those facts are supported by substantial evidence, the finding of the trial court shall be conclusive.

When reviewing a trial court's ruling on a motion to suppress, this Court must determine whether the trial court's findings were supported by substantial evidence. *Commonwealth v. Whitmore*, 92 S.W.3d 76 (Ky. 2002). We review for clear error, giving deference to the inferences drawn by the trial court. *Id.* at 79.

If the findings are supported by substantial evidence, we review the trial court's application of the law to those facts *de novo*. *Commonwealth v. Jones*, 217 S.W.3d 190, 193 (Ky. 2006). Reasonable suspicion is determined by examining the "totality of the circumstances" in order to decide whether a police officer had a "particularized and objective basis" for suspecting criminal activity was afoot. *United States v. Arvizu*, 534 U.S. 266, 273, 122 S.Ct. 744, 750, 151 L.Ed.2d 740 (2002).

Kornrumpf's first suspicion that something was amiss was premised on the quick departure of the second male who had been the driver of the suspect vehicle. That individual refused to return to the vehicle despite Kornrumpf's repeated requests for him to do so. When considering the totality of the circumstances, the flight of other individuals is one of many factors that, when

taken together, may give an officer reasonable suspicion for a brief detention.

Fletcher v. Commonwealth, 182 S.W.3d 556, 559 (Ky. App. 2005).

Clay was observed with a suspected prostitute in a high crime, high narcotics and high prostitution area at 3:20 a.m. Kornrumpf had seen this suspected prostitute hours earlier walking back and forth on the street. Kornrumpf believed, from his experience, that the female was loitering for purposes of prostitution. Later, Kornrumpf saw the same female, along with Clay and a second female, approaching a vehicle he had just observed pull over to the side of the road. Kornrumpf then observed one of the females being helped into the back of the car, further arousing his suspicion. From his experience, Kornrumpf believed this behavior to be indicative of solicitation for prostitution or possibly promoting prostitution. All of these circumstances, when considered together, led the officer to believe that criminal activity was afoot, affording him the opportunity to make a brief, investigatory stop. *Baker v. Commonwealth*, 5 S.W.3d 142, 146 (Ky. 1999). The area of town and the flight of an individual are factors that, when considered as a whole, could lead to reasonable suspicion. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). Although presence in a high narcotics area is not sufficient on its own to form a reasonable suspicion, an officer is not required to ignore relevant characteristics of a particular location when determining if further investigation is warranted. *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S.Ct. 673, 676, 145 L.Ed.2d 570 (2000).

During the stop, Clay continuously looked around and over the officer's shoulder, which indicated to Kornrumpf that he was possibly going to flee or try to hurt him. Clay was wearing baggy clothing which could have concealed a weapon. A protective search which is permitted without a warrant (and on the basis of reasonable suspicion less than on probable cause) must be strictly limited to that which is necessary for the discovery of any weapons that might be used to harm an officer or others nearby. *Terry v. Ohio*, 392 U.S.1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *see also Commonwealth v. Crowder*, 884 S.W.2d 649 (Ky. 1994). The purpose of a limited search is not to discover evidence of a crime, but rather to allow an officer to pursue an investigation without fear of violence. *Minnesota v. Dickerson*, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993). In the case *sub judice*, the officer made it clear he wanted to pat down the appellant to determine if he possessed any weapons.

Taking into account all of these circumstances, the trial court correctly found that Kornrumpf had a reasonable, articulable suspicion to conduct a *Terry* search to ensure his own safety and the safety of those around him. *Terry, supra*.

Conclusion

For the foregoing reasons, we hold that the trial court did not commit error when it denied Clay's motion to suppress. The ruling of the Fayette Circuit Court is therefore affirmed.

ALL CONCUR.

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