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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002057-MR

KENNETH A. WILLIAMS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC COWAN, JUDGE
ACTION NO. 07-CR-002378

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, DIXON, AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Kenneth A. Williams appeals from a judgment of the Jefferson Circuit Court following his conditional guilty plea to possession of a handgun by a convicted felon, carrying a concealed deadly weapon, and loitering. Concluding that Williams's constitutional rights were not violated, we affirm.

On March 29, 2007, Louisville Metro Police Officers Chris Davis and James Kaufling were dispatched to an address on 43rd Street to investigate a report of drug activity and loitering. After arriving in the vicinity of the alleged criminal activity, the officers positioned their unmarked police car at a vantage point where they could observe the suspect address. They observed nine individuals gathered in front of a vacant house. Various individuals of the group were standing on a sidewalk, sitting on a retaining wall, and sitting on parked cars. Because of the large number of individuals, the officers requested backup.

After observing the scene for approximately fifteen minutes, the officers were joined by two additional officers who all observed two or three group members smoking marijuana in front of the vacant house. The officers then approached the group to conduct an investigatory stop for drugs. As the officers neared the group, two or three individuals discarded their marijuana blunts (marijuana rolled up to resemble a cigar), and several of the individuals attempted to leave the scene. The officers then engaged several suspects.

At this time, Officer Davis heard another officer yell, "Gun," indicating that the officer had observed an armed suspect. Another officer then indicated that a second suspect was armed. Concerned for his and his fellow officers' safety, Officer Davis drew his sidearm and ordered everyone face down on the ground. As he proceeded to pat-down the suspects for weapons, he observed a bulge in the small of Williams's back. When he touched it and

recognized that Williams was armed, Officer Davis removed a loaded handgun from Williams and arrested him for carrying a concealed deadly weapon.

On July 18, 2007, a Jefferson County grand jury indicted Williams for possession of a handgun by a convicted felon, carrying a concealed deadly weapon, and loitering. Williams then filed a motion to suppress the gun to prevent its admission against him, arguing that police did not have reasonable suspicion of his involvement in criminal activity to justify searching him. Denying his motion, the trial court wrote the following:

> Here we have a case where four officers approached a distinct group of nine individuals who, reportedly, had been smoking drugs. From a distance, the officers observed two or more of the individuals actually smoking what appeared to be marijuana cigarettes and the officers actually smelled burning marijuana. They also witnessed the suspects discard their "blunts" as the officers approached them and the blunts were on the ground when the officers arrived. Further, the officers noticed a large bulge under the clothing of one suspect who subsequently admitted that it was a bag of marijuana. All told, and without even considering the impact of the officers' discovery of weapons, the Court believes that the officers possessed more than enough facts to justify a reasonable and articulable suspicion that criminal activity may have been afoot; since the officers were clearly outnumbered and some of the suspects had been milling about and acting restless, the officers were more than justified in immobilizing them until they had finished their investigation. *United States v. Miller*, 974 F.2d 953, 957 (8th.Cir. 1992) (concluding that handcuffing suspects during *Terry* stop where suspects outnumbered officer 6 to 3 was reasonably necessary to achieve purposes of *Terry* stop).

Williams then entered a conditional guilty plea to possession of a handgun by a convicted felon, carrying a concealed deadly weapon, and loitering but reserved his right to appeal. He was sentenced to five-years' imprisonment for felony handgun possession; twelve months in jail for carrying a concealed deadly weapon; and was fined $250 for loitering. This appeal follows.

Williams first argues that the trial court's findings of fact were clearly erroneous due to their incorrect conclusions. Williams argues that the trial court's findings that the nine individuals were a "distinct group;" that the individuals "were joined together in ... a manner that indicated they were somehow associated, however loosely"; and that some of the individuals were "milling about and acting restless" when police arrive were clearly erroneous. Arguing that no evidence in the record supports these factual findings, Williams argues that the trial court's suppression order must be reversed. We disagree.

Our review of a trial court's suppression ruling is a two-step process whereby we review its factual findings under a clearly erroneous standard, and its application of the law to those facts under *de novo* review. *Henry v. Commonwealth*, 275 S.W.3d 194, 197 (Ky. 2008). Findings of fact are not clearly erroneous if they are supported by substantial evidence. *Hallum v. Commonwealth*, 219 S.W.3d 216, 220 (Ky.App. 2007). Substantial evidence constitutes facts that a reasonable mind would accept as sufficient to support a conclusion. *Moore v. Asente***,** 110 S.W.3d 336, 354 (Ky. 2003).

Police first became aware of Williams's group when they were dispatched to the scene following a report of drug use by a group of men. After police arrived at the scene, they observed nine individuals standing in front of a vacant house and heard some of the people speaking to each other. Specifically, Officer Davis testified that the men were "all in a group together talking and carrying on." Officer Davis then testified that some threw down their marijuana blunts and some attempted to leave after police arrived on the scene.

While we recognize Williams's argument that some of the individuals were spatially separated and that Officer Davis never used the phrase "milling about and acting restless," the trial court has the exclusive province of weighing evidence. *Id*. Consequently, based on the report of a group of individuals using drugs and loitering and the observations of police, the trial court's factual finding, classifying the nine individuals as a distinct group, was supported by substantial evidence and, thus, was not clearly erroneous. *Id.*

Additionally, while Officer Davis did not recite the exact words memorialized in the trial court's suppression order, reasonable men could believe that some of the group's individuals were "milling about and acting restless" when police arrived. Police observed the discarding of contraband and observed some of the individuals attempt to leave the immediate vicinity of the scene. While another trial court may have reached a different finding, mere doubt as the correctness of the trial court's findings is insufficient to invalidate its ruling. *Id*. We, thus, conclude that the trial court's factual finding was not clearly erroneous.

Williams next argues that the trial court erroneously ruled that police were constitutionally justified in searching him for weapons. Williams argues that police were required to have a particularized reasonable suspicion as to him exclusive of the other individuals in the group before he could be searched. Williams further argues that his mere presence around criminal activity was insufficient to support a finding of reasonable suspicion to justify his seizure and pat-down search. Arguing that the search of his person was unconstitutional, he argues that the gun evidence should have been suppressed. We disagree.

It is well settled that all searches and seizures without a valid search warrant are unreasonable unless they come within one of the exceptions to the rule that a search and seizure must be made pursuant to a valid warrant. *Owens v. Commonwealth*, 291 S.W.3d 704, 707 (Ky. 2009). Under one such exception, police are permitted to stop and briefly detain a person for investigative purposes if police have a reasonable suspicion supported by articulable facts that criminal activity may be afoot. *Commonwealth v. Priddy*, 184 S.W.3d 501, 505 (Ky. 2005).

When police detain an individual based on an investigatory stop, the U.S. Supreme Court has recognized that police are permitted to conduct their investigation without fear of violence or physical harm. *Adams v. Williams*, 407 U.S. 143, 146, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612 (1972). Therefore, if police reasonably believe that a legitimately stopped suspect is armed and dangerous, they may conduct a limited protective (pat-down) search for concealed weapons for the purpose of ensuring their own safety. *Id*.

Under Fourth Amendment analysis, an investigatory stop, detention, and frisk for weapons, without more, fall short of constituting a traditional arrest. *Baltimore v. Commonwealth***,** 119 S.W.3d 532, 537 (Ky.App. 2003). While these procedures may burden a person's privacy and freedom of movement, police must be permitted to take any reasonably necessary step to "protect their personal safety and to maintain the status quo during the course of the stop." *U.S. v. Hensley*, 469 U.S. 221, 235, 105 S.Ct. 675, 684, 83 L.Ed.2d 604 (1985).

Applying these principles to the present case, we conclude that Williams's constitutional rights against illegal searches and seizures were not violated. Police observed a group of individuals, observed some smoking marijuana, and decided to investigate. While police did not observe Williams consuming illegal drugs, he was directly engaged with individuals suspected of consuming drugs. Thus, police were permitted to use their own experience and specialized training to draw inferences from and deductions about the cumulative information available to them. *Commonwealth v. Marr*, 250 S.W.3d 624, 628 (Ky. 2008).

While we recognize that the chance of the non-smoking group members possessing contraband may have been low, even less than fifty percent, "'the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.'" *Id*. at 627, *quoting United States v. Arvizu*, 534 U.S. 266, 274, 122 S.Ct. 744, 751, 151 L.Ed.2d 740 (2002). Further, the reasonable suspicion

standard is applied using flexible concepts and in a commonsense manner based on the totality of the circumstances of each case. *Baltimore***,** 119 S.W.3d at 539. Under this standard, the police possessed sufficient grounds to execute an investigatory stop of the entire group of individuals.

Having found reasonable suspicion to permit an investigatory stop, our analysis must now determine the permissible scope of Williams's search. As stated in *U.S. v. Hensley*, 469 U.S. at 235, 105 S.Ct. at 684, while conducting an investigatory stop, police are permitted to take any reasonable step to protect themselves and to maintain the status quo. In determining the reasonableness of a protective search, courts must balance the limited violation of a person's privacy against the opposing interests in crime prevention and officer safety. *Dunaway v. New York*, 442 U.S. 200, 209, 99 S.Ct. 2248, 2255, 60 L.Ed.2d 824 (1979).

Under the facts of this case, police observed at least two suspects with guns during the course of their investigatory stop for suspected drug crimes. In *Johantgen v. Commonwealth*, 571 S.W.2d 110, 112 (Ky.App. 1978), the Court stated that drug investigations are fraught with danger, and we find this particularly true when, as here, police discover two armed suspects within seconds of initiating their investigation. Accordingly, after balancing the important opposing interests, we conclude that Williams's constitutional rights were not violated because police

were reasonably justified in their actions to ensure their own safety.[1] *Pennsylvania v. Mimms*, 434 U.S. 106, 110, 98 S.Ct. 330, 333, 54 L.Ed.2d 331 (1977).

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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[1] *U.S. v. Perdue*, 8 F.3d 1455, 1463 (10th.Cir. 1993)(citing multiple U.S. Circuit Courts of Appeal for the proposition that police's use of a firearm, ordering a suspect to the ground, handcuffing a suspect can be conducted pursuant to an investigatory stop based on reasonable suspicion).