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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002316-MR

KELVIN MCCRAY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 05-CR-001944

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; TAYLOR, JUDGE; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: Kelvin McCray appeals from a judgment of the Jefferson Circuit Court which reinstated an earlier conviction following a

[1] Senior Judge Michael L. Henry 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.

successful appeal by the Commonwealth. Having reviewed the record and applicable case law, we affirm.

On June 22, 2005, McCray was indicted on the following charges: trafficking in a controlled substance in the first degree while in possession of a firearm; tampering with physical evidence; and possession of a firearm by a convicted felon. He moved for a separate trial on the latter charge on the ground that the evidence of a prior felony conviction, which is an essential element of the charge, would not be admissible in a trial of either the trafficking or tampering charges. The Commonwealth agreed to the severance but suggested that the trial be trifurcated rather than seating a new jury to try the charge of possession of a firearm by a convicted felon. Defense counsel agreed to that arrangement, and the trial court ordered the charge of possession of a firearm by a convicted felon to be tried separately from the other counts in the indictment. McCray also filed motions to suppress evidence and an alleged oral statement he had made to the police. The trial court denied these motions after conducting a hearing.

McCray was convicted of possession of a handgun by a convicted felon and illegal possession of a controlled substance in the first degree. The trial court subsequently granted his motion for a judgment notwithstanding the verdict on the handgun charge. This ruling was reversed on appeal. *See Commonwealth v. McCray*, 2008 WL 299025 (Ky. App. 2008) (2006-CA-001152-MR).

The present appeal is from the judgment entered on November 10, 2008,[2] which reinstated the conviction for possession of a handgun by a convicted felon. McCray argues that the trial court erred in: 1) denying his motion to suppress evidence; 2) permitting the Commonwealth to introduce additional evidence in the second phase of his trifurcated trial; and 3) refusing to grant a mistrial when hearsay evidence was admitted.

On the day he was arrested, McCray was spotted by police after they received a tip from a confidential informant. He fled into a nearby apartment, where the police recovered a handgun and a bag of cocaine. McCray argues that, as a guest in the apartment, he had a reasonable expectation of privacy and that the warrantless entry by police violated his Fourth Amendment rights. He further argues that the initial approach by the police and their subsequent pursuit of him into the apartment were improper. We set forth the pertinent facts:

Detectives Marcus Laytham, William Bass and Lloyd Baker, members of a Flex Platoon which investigates street level narcotics transactions, were patrolling a Louisville housing project in an unmarked SUV when Laytham received a call to his personal cell phone. The call came from a reliable confidential informant whose name Laytham knew, who told him that an African-American male was trafficking narcotics in the 1200 block of Liberty Court, a high-crime area. The officers drove to Liberty Court and saw McCray standing on the porch of 1224 Liberty Court. McCray kept tapping his right hip with his right

[2] An order correcting the judgment was entered on December 5, 2008, which substituted the term "handgun" for "firearm."

elbow. Laytham claimed that, based on his training with the Bureau of Alcohol, Tobacco and Firearms, McCray's actions strongly indicated to him that McCray was carrying a firearm. Bass also thought McCray might be armed because he kept making movements towards his waist.

Laytham, who was driving, stopped the vehicle near the porch. As Bass and Baker got out, Laytham told them to watch McCray's hands. At that point, Bass, who had arrested McCray on three prior occasions on drug and handgun possession charges, recognized McCray and shouted either "Hey Kelvin" or "Kelvin, stop!" McCray walked quickly towards the door of 1224 Liberty Court, opened it and entered the apartment. As McCray tried to shut the door behind him, Bass put out his hand and held the door open.

Bass could see the living room of the apartment from the doorway. A little girl with a coloring book was sitting next to a woman on a couch. Another woman was sitting on an adjacent couch.

Bass testified that McCray had an unidentifiable object in his hand which he placed behind a pillow on the couch where the woman and little girl were sitting. Bass testified that the woman looked scared when she saw him, that she immediately raised her hands and said "It's not mine! Come and get it!" According to Bass, McCray turned and walked back toward him. Bass, who had drawn his gun, demanded to see McCray's hands. McCray put up his hands and threw a bag of crack cocaine on the floor. Bass found a handgun containing six live rounds under the pillow on the couch.

> Motions to suppress are governed by Kentucky Rules of Criminal Procedure (RCr) 9.78, which provides that a court presented with a motion to suppress "shall conduct an evidentiary hearing outside the presence of the jury and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling." Upon appellate review, the trial court's findings of fact are "conclusive" if they are "supported by substantial evidence. . . ." "Using those facts, the reviewing court then conducts a de novo review of the trial court's application of the law to those facts to determine whether the decision is correct as a matter of law."

McCloud v. Commonwealth, 286 S.W.3d 780, 784 (Ky. 2009) (citing RCr 9.78 and *Commonwealth v. Jones*, 217 S.W.3d 190, 193 (Ky. 2006)).

At the suppression hearing, the trial court found that the police officers had a reasonable, articulable suspicion initially to approach McCray, based on the informant's tip. It further found that the officers had reason to proceed after him, based on their observations that McCray avoided them and that he reached in his waistband, coupled with the fact that one of the officers recognized McCray as someone he had previously arrested while in possession of a gun. The trial court also expressed doubt that McCray had "standing" to challenge the search of the apartment.

McCray's first argument is that he had a legitimate expectation of privacy in the Liberty Court apartment and, consequently, had standing to challenge the entry and search by police. Describing himself as a "social guest," he contends that he was present with the permission of one of the adult females

whom Detective Bass believed was one of the lessees. He asserts that his status as a guest was evinced by the fact that he opened the door and entered the apartment without knocking.

> The concept of standing is a misnomer for Fourth Amendment analysis. *Minnesota v. Carter*, 525 U.S. 83, 88, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998) ("[I]n determining whether a defendant is able to show the violation of his (and not someone else's) Fourth Amendment rights, the definition of those rights is more properly placed within the purview of substantive Fourth Amendment law than within that of standing.") (internal quotation marks omitted). More properly, a court must determine whether a defendant . . . "had an actual, subjective expectation of privacy, and second, whether that expectation was a legitimate, objectively reasonable expectation." *United States v. Smith*, 263 F.3d 571, 582 (6th Cir.2001).

Id., 784 n.4.

In this case, although McCray may have held a subjective belief that he had a right to privacy in the apartment at 1224 Liberty Court, his subjective expectation is not "one that society is prepared to recognize as 'reasonable[.]'" *United States v. Tolbert*, 692 F.2d 1041, 1044 (6th Cir. 1982) (citation omitted). The occupants of the apartment did not greet McCray when he entered nor did they exhibit any behavior or make any remarks to suggest that he had their permission to enter. Indeed, one of the women immediately disavowed any ownership of the item McCray had placed behind the sofa cushion. The United States Supreme Court has held that "an overnight guest in a home may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the

householder may not." *Minnesota v. Carter*, 525 U.S. 83, 90, 119 S.Ct. 469, 473, 142 L.Ed.2d 373 (1998). In McCray's case, there was no evidence that he was present in the household with the consent of the occupants, much less that he was an overnight guest. The trial court did not err as a matter of law in determining that McCray could not assert a Fourth Amendment right to privacy in the apartment.

McCray next argues that the trial court incorrectly concluded that the police officers had a reasonable, articulable suspicion to approach him initially based on the informant's tip since the only information provided was that there was a black male selling narcotics in the area of the 1200 block of Liberty Court.

In *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 1889, 20 L.Ed.2d 889 (1968), the United States Supreme Court set forth the constitutionally permissible parameters of a warrantless investigatory stop. Under *Terry*, a police officer may make an investigatory stop if he possesses a reasonable suspicion that criminal activity is afoot. *Id.* Reasonable suspicion must be measured by what the officer knew before the stop. *Id.*, 392 U.S. at 21-22, 88 S.Ct. at 1884. The officer must have a "particularized and objective basis for suspecting the particular person stopped of criminal activity" based on the totality of the circumstances. *United States v. Cortez*, 449 U.S. 411, 417-18, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981). An "'officer need not be absolutely certain that the individual' is engaged in an unlawful enterprise; 'the issue is whether a reasonably prudent man in the circumstances would be warranted in his belief' that the suspect is breaking, or is

about to break, the law." *Williams v. Commonwealth*, 147 S.W.3d 1, 5 (Ky. 2004), citing *Terry*, 392 U.S. at 27, 88 S.Ct. at 1868.

When the police first spotted McCray as a result of the informant's tip and decided to speak to him, there was no indication yet that a fully fledged *Terry* stop would ensue.

> [N]ot every interaction on the streets between a police officer and a private citizen rises to the level of an investigatory stop with all of its Constitutional ramifications. We held in *Commonwealth v. Banks*, 68 S.W.3d 347, 350 (Ky. 2001), that "[p]olice officers are free to approach anyone in public areas for any reason," and that "[o]fficers are entitled to the same freedom of movement that the rest of society enjoys." *Id.* No "*Terry*" stop occurs when police officers engage a person on the street in conversation by asking questions. *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983).

Strange v. Commonwealth, 269 S.W.3d 847, 850 (Ky. 2008). After spotting McCray, however, the detectives observed his suspicious hand movements around his waistband, and Detective Bass recognized him from prior arrests involving guns and drugs. These observations, coupled with the fact that the informant's identity and reliability were known to Detective Laytham, were sufficient to justify a *Terry* stop. McCray's decision to flee when Bass called out to him further justified an investigative stop.

> [N]ervous, evasive behavior is a pertinent factor in determining reasonable suspicion. Headlong flight-wherever it occurs-is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such.

. . .

> [U]nprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not "going about one's business"; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning.

Illinois v. Wardlow, 528 U.S. 119, 124-25, 120 S.Ct. 673, 676, 145 L.Ed.2d 570 (2000) (citations omitted).

As we have already held that McCray had no reasonable expectation of privacy in the apartment, his argument regarding the "hot pursuit" exception, which permits the warrantless entry by police officers into a suspect's residence under particular circumstances, is moot and need not be addressed here.

McCray's next argument is that the trial court erred in allowing Detective Bass to give additional testimony in the second phase of the trial on the charge of possession of a firearm by a convicted felon ("PFCF"). Defense counsel moved to stipulate that McCray is a convicted felon and objected to any additional proof on the charge because evidence about the gun had already been presented in the first phase. The trial court agreed to give the stipulation but permitted the Commonwealth to recall Detective Bass to the stand to supplement his previous testimony. The jury found McCray guilty of the charge and further found that the firearm was a handgun.

The separate phase of the trial on this charge "was designed for the specific purpose of obviating the prejudice that necessarily results from a jury's

knowledge of previous convictions while it is weighing the guilt or innocent of a defendant on another charge[.]" This phase was conducted in accordance with the holding in *Hubbard v. Commonwealth*, 633 S.W.2d 67, 68 (Ky. 1982).

McCray argues that the trial court prejudiced the outcome by permitting the Commonwealth to introduce additional evidence in the second phase although it had already presented proof concerning the other elements of PFCF in the first phase. He relies on *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), a case in which three or four masked gunmen robbed six men engaged in a poker game. Ashe was acquitted of one count of robbery against one of the victims but was then prosecuted a second time for robbery against one of the other victims. The United States Supreme Court held that the second prosecution violated the federal rule of collateral estoppel and the Fifth Amendment guarantee against double jeopardy. It explained that after the first jury had acquitted Ashe of robbing one victim, the state could certainly not have brought him to trial again on that charge. "The situation is constitutionally no different here, even though the second trial related to another victim of the same robbery. For the name of the victim, in the circumstances of this case, had no bearing whatever upon the issue of whether the petitioner was one of the robbers." *Id.*, 397 U.S. at 446, 25 L.Ed.2d at 477.

McCray concedes that the doctrines of double jeopardy and collateral estoppel were addressed and rejected by this Court in his direct appeal, but he nonetheless argues that the reasoning in *Ashe* is applicable in the context of due

process and a fair trial. He points out that the direct examination of Detective Bass in the second phase was conducted by the more experienced of the two prosecutors, who McCray claims was able to elicit more detailed testimony from Bass. He contends that this testimony gave the prosecutors a second chance to prove what they failed to prove in the first phase – that McCray was in possession of a gun – and that the thoroughness with which the senior prosecutor conducted his examination of Detective Bass showed that the first phase of the trial on the drug and tampering charges was "no more than a dry run for the second prosecution . . . ." *Ashe*, 397 U.S. at 447, 90 S.Ct. at 1196.

To the extent that this argument is a restatement of the collateral estoppel argument which was resolved in the Commonwealth's favor in the earlier appeal, it cannot be readdressed here. This Court stated that "McCray's acquittal on the firearm-enhanced drug offenses does not equate to a jury determination that he did not have a firearm in is possession."

At trial, McCray's attorney objected to the admission of Bass's testimony on the grounds that it was cumulative. Kentucky Rules of Evidence (KRE) 403 provides that

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

"Rulings upon admissibility of evidence are within the discretion of the trial judge; such rulings should not be reversed on appeal in the absence of a clear abuse of discretion." *Simpson v. Commonwealth*, 889 S.W.2d 781, 783 (Ky. 1994).

Having reviewed the record, we agree with the Commonwealth that the probative value of the testimony outweighed any prejudice to McCray. The jury had already sat through the first phase of the trial, which lasted two days, returned a verdict, and had been excused for the evening before returning on the third day for the second phase of the trial. Under these circumstances, the admission of Bass's testimony was not an abuse of discretion as it may have prevented confusion on the part of the jury.

McCray's third and final argument is that the trial court erred in admitting the hearsay statement made by one of the women in the apartment where McCray sought refuge from the police. Detective Bass testified that the woman's eyes got really big, she looked scared, put her hands up, and said "That's not mine," in reference to the object McCray had just placed behind a pillow on the couch. Defense counsel objected on the grounds that the statement was hearsay and requested a mistrial. The trial court overruled the objection on the ground that the statement fell under the "excited utterance" exception to the hearsay rule.

> According to KRE 803(2), an excited utterance is a statement describing a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. For an out-of-court statement to meet that definition, the declarant's condition at the time must give the impression that the statement was spontaneous, excited, or impulsive rather

> than the product of reflection and deliberation. The eight factors to consider in determining if a statement is an excited utterance are:
>
> > (i) lapse of time between the main act and the declaration . . ., (ii) the opportunity or likelihood of fabrication, (iii) the inducement to fabrication, (iv) the actual excitement of the declarant, (v) the place of the declaration, (vi) the presence there of visible results of the act or occurrence to which the utterance relates, (vii) whether the utterance was made in response to a question, and (viii) whether the declaration was against interest or self-serving.

Hartsfield v. Commonwealth, 277 S.W.3d 239, 245 (Ky. 2009) (citations omitted).

> The Kentucky Supreme Court has cautioned that
>
> > the above criteria do not pose a true-false test for admissibility, but rather act only as guidelines to be considered in determining admissibility. Whether a particular statement qualifies as an excited utterance depends on the circumstances of each case and is often an arguable point; and when this is so the trial court's decision to admit or exclude the evidence is entitled to deference. That is but another way of saying that when the determination depends upon the resolution of a preliminary question of fact, the resolution is determined by the trial judge under KRE 104(a) on the basis of a preponderance of the evidence; and the resolution will not be overturned unless clearly erroneous, i.e., unless unsupported by substantial evidence.

Young v. Commonwealth, 50 S.W.3d 148, 166-67 (Ky. 2001) (citations and internal quotation marks omitted).

In this case, the woman's statement was made spontaneously when McCray unexpectedly entered her apartment, followed by Detective Bass. There was almost no lapse of time between the act of McCray placing the object behind

the sofa cushion and the woman's statement. According to Bass's description, the woman was excited and frightened at the time she made the statement. Her utterance related directly to the gun discovered on the premises behind the cushion. Arguably, the woman could have had a motive to fabricate her statement and disclaim ownership of the gun if she had some illegal connection to it. But there were no absolutely facts to support this hypothesis. The handgun was the only item found behind the cushion, and Bass had seen McCray placing an object there immediately before the woman made her statement. The trial court's finding that the hearsay statement qualified as an excited utterance was supported by substantial evidence, and it did not abuse its discretion in denying the motion for a mistrial.

Accordingly, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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