RENDERED: OCTOBER 8, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001301-MR

JASON WOOD — APPELLANT

v.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 07-CR-00372

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND KELLER, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

CLAYTON, JUDGE: This is an appeal of the trial court's denial of a motion to suppress evidence obtained as the result of a *Terry* pat down. Based upon the following, we affirm the decision of the trial court.

[1] Senior Judge David C. Buckingham 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.

BACKGROUND INFORMATION

Bobby Hill observed an overturned motorcycle in a field near the intersection of Kentucky Highways 564 and 94. He also saw another motorcycle parked on the side of the road. This motorcycle was black and had monkey bar handlebars.

Hill called 911 after noticing a man and an injured woman in the field. While waiting for an emergency vehicle to arrive, Hill saw a truck arrive on the scene. A male exited the truck, and he and the other male put the female into the back of the truck.

The male got on the motorcycle with the monkey bar handlebars and followed the truck away from the scene. Two state troopers arrived and interviewed Hill. As the interview took place, a motorcycle with monkey bar handlebars drove past.

Appellant, Jason Wood, was riding the motorcycle and was stopped by Kentucky State Trooper Kevin Pervine ("Trooper Pervine"). During the stop, Trooper Pervine did a pat down of Wood's body and discovered methamphetamine. Wood was arrested and a Graves County Grand Jury subsequently indicted him for possession of methamphetamine, second offense. The Grand Jury also indicted Wood for leaving the scene of an accident/failure to render aid; failure to maintain insurance, first offence; expired registration plates; no helmet and Persistent Felony Offender II.

Wood contends that Trooper Pervine did not perform a legal stop as he did not have reasonable articulable suspicion that Wood had committed a crime. Consequently, Wood contends that the stop was illegal and, therefore, the evidence obtained as a result of the stop should have been suppressed. Wood brought a motion to suppress before the Graves County Circuit Court.

The trial court held:

> the officer being advised since someone on a black motorcycle with monkey bars was at the scene of the accident and had helped load the victim, it would not be unreasonable as part of the inquiry to stop the motorcycle fitting that description that appeared close to place and time of the scene of the accident. The stop would not necessarily be because the officer had probable cause to believe the gentleman on the motorcycle was involved with the accident, but simply to inquire if he knew anything about it.
>
> There is no doubt that the officer would be entitled to make a Terry pat down of the Defendant because of the circumstances that faced the officer that day. The situation was peculiar. There had been an accident, a woman had been loaded in a truck and hauled away, and the statement to a bystander that they were taking her to a hospital, seems contradicted by the direction in which they left. Further, the Defendant's attorney points out in his brief that the officer knew that the Defendant was an associate of the Hells Angels' chapter.

Trial Court Opinion at p. 3-4.

In summary, the trial court found that Trooper Pervine had a reasonable articulable suspicion, was investigating an accident and was aware of Wood's involvement with the Hell's Angels. The trial court believed, therefore, that the stop was a valid stop. The trial court then turned to the issue of the "plain

feel" doctrine. Specifically, the trial court examined whether Trooper Pervine's *Terry* pat down lawfully produced the methamphetamine that was found on Wood's person.

The trial court held:

> Here invoking "plain feel" doctrine we have the officer testifying as to his training experience, allowing him to form the belief he held, and the curious circumstances involving the accident that the officer was investigating in which he believed the Defendant to be involved. We have also the officer being aware that the Defendant being an associate of Hells Angels, and we also have the item being located in the watch pocket of the Defendant's trousers. The Court finds, considering the totality of the circumstances, the officer had probable cause to believe the incriminating nature of the object under the "plain feel" doctrine. Therefore, the Defendant's Motion to Suppress is DENIED.

Trial Court Opinion at p. 5.

Wood entered an Alford plea and reserved his right to appeal the denial of his suppression motion.

DISCUSSION

Wood first contends that certain findings of fact upon which the

Graves

Circuit Court based its order denying appellant's motion to suppress are not supported by substantial evidence. In his brief, however, Wood does not point to any specific finding. Instead, he argues,

> The references to the testimony found in the Statement of the Case, *supra*, clearly indicate that the factual findings rendered by the lower court are not supported by substantial evidence. Because the factual findings are not supported by substantial evidence, it follows that the legal conclusions derived therefrom [sic] are also faulty, and, therefore not conclusive.

We do not agree with Wood's argument. We find the facts as recited by the trial court to have been based upon the testimony. In fact, we find nothing in the recitation of facts set forth by Wood to directly contradict anything set forth in the trial court's facts. Thus, we deny Wood's appeal on this issue.

Next, Wood argues that when the Kentucky State Police stopped him, Trooper Pervine did not possess a reasonable articulable suspicion that he was involved in criminal activity. He contends that Trooper Pervine manufactured a reason to stop him by alleging he had violated KRS 189.580(1)(a), leaving the scene of an accident. Wood asserts that this statute is only applicable if he had been operating a vehicle that was involved in an accident. In the present case, however, the accident involved a woman on a motorcycle accompanied by another individual on a motorcycle. The mere fact there was a motorcycle accident and that the parties left before emergency assistance arrived is not sufficient to demonstrate that there was a reasonable, articulable suspicion that criminal activity was afoot. Further, we note that the Commonwealth did not attempt to defend this portion of the trial court's ruling in its brief.

Next, Wood argues that the community care taking function as previously discussed by the Kentucky Court of Appeals should not be applied to the case at bar. In *Poe v. Com.*, 169 S.W.3d 54 (Ky. App. 2005), the Kentucky Court of Appeals dealt with the "community caretaking function" of the police:

> The community caretaking function was first articulated by the United States Supreme Court in *Cady v. Dombrowski,* 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973). The Court explained the idea in the context of a case where the police had searched a vehicle without a warrant that had been removed from an accident scene. The search occurred later in time from the accident and was made to locate the driver's, who was a Chicago police officer, service revolver. *Id*. 413 U.S. at 437, 93 S.Ct. at 2526. The Court found the search not to violate Constitutional principles stating:
>
> > Because of the extensive regulation of motor vehicles and traffic, and also because of the frequency with which a vehicle can become disabled or involved in an accident on public highways, the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office. Some such contacts will occur because the officer may believe the operator has violated a criminal statute, but many more will not be of that nature. Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.

Id. 413 U.S. at 441, 93 S.Ct. at 2528.

In *Poe,* the Court found the community caretaking function was not applicable in a case where the officer had thought the driver might have been lost and stopped him to give directions. In this case, however, Wood had possibly left the scene of an accident. There were accounts that the individual hurt in the accident had been taken in the opposite direction of the closest hospital. All these facts made it likely that stopping Wood was an effort to both find out what had happened and what aid may be needed. We believe the circuit court was correct in its determination that the community caretaking function was a legitimate reason to stop Wood.

Wood also argues that under the circumstances present in this case, the Kentucky State Police did not have the constitutional authority to conduct a *Terry* pat down of his person. We disagree. Pursuant to *U.S. v. Cole,* 628 F.2d 897, 899 (5th Cir. 1980), *cert. denied*, 450 U.S. 1043, 101 S.Ct. 1763, 68 L.Ed.2d 241 (1981), an officer must provide "specific articulable facts [that] support an inference that the suspect might be armed and dangerous . . ." in order to justify a pat down after a stop.

"When a police officer lawfully pats down the outer clothing of a suspect and feels an object whose contour or mass makes its identity immediately apparent, there is no violation of privacy beyond that already permitted by the pat down search for weapons." *Com. v. Jones*, 217 S.W.3d 190, 195 (Ky. 2006). Woods, however, contends that the stop itself was not lawful. As set forth above,

we disagree. Having found that the stop was justified, we also find that the *Terry* pat down of Wood was also lawful. Thus, we affirm the decision of the trial court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

William C. Adams, III
Murray, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General

Bryan D. Morrow
Assistant Attorney General
Frankfort, Kentucky