RENDERED: MARCH 11, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001522-MR

MITCHELL JACKSON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NOS. 07-CR-003265, 07-CR-003670, & 08-CR-000504

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND MOORE, JUDGES, AND ISAAC,[1] SENIOR JUDGE.

MOORE, JUDGE: Mitchell Jackson appeals the judgments of the Jefferson Circuit Court convicting him of: first-degree illegal possession of a controlled substance (two counts); tampering with physical evidence; resisting arrest; first-degree fleeing or evading police (two counts); illegal use or possession of drug

[1] Senior Judge Sheila R. Isaac, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

paraphernalia (two counts); theft by unlawful taking over $300 (two counts); third-degree criminal trespass; reckless driving; second-degree fleeing or evading police; first-degree criminal mischief (two counts); fraudulent use of a credit card; and being a first-degree persistent felony offender (PFO-1st). After a careful review of the record, we affirm because the circuit court properly denied Jackson's motion to suppress; Jackson's sentences were properly ordered to be served consecutively to his prior sentences; and the Commonwealth did not breach its plea agreements.

I. FACTUAL AND PROCEDURAL BACKGROUND

Jackson was charged in three indictments. In case number 07-CR-3265, he was charged with: first-degree illegal possession of a controlled substance, schedule II (cocaine); tampering with physical evidence; and resisting arrest. In case number 07-CR-3670, Jackson was charged with: first-degree illegal possession of a controlled substance, schedule II (cocaine) – subsequent offender; first-degree fleeing or evading police (motor vehicle); and illegal use or possession of drug paraphernalia – subsequent offender. Finally, in case number 08-CR-0504, he was charged with: two counts of theft by unlawful taking over $300; illegal use or possession of drug paraphernalia – subsequent offender; third-degree criminal trespass; reckless driving; first-degree fleeing or evading police (motor vehicle); second-degree fleeing or evading police (pedestrian); two counts of first-degree criminal mischief; fraudulent use of a credit card; and PFO-1st.

Jackson entered a guilty plea in case number 08-CR-0504 and conditional guilty pleas in case numbers 07-CR-3265 and 07-CR-3670. All of

those guilty pleas were entered pursuant to *North Carolina v. Alford*,[2] 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). The two conditional guilty pleas were conditioned on Jackson reserving his right to appeal the denial of his motions to suppress in those cases.

Jackson was sentenced to a total of three years of imprisonment in case number 07-CR-3265, two years in case number 07-CR-3670, and three years in case number 08-CR-0504, to be served consecutively for a total of eight years of imprisonment. Additionally, this eight-year sentence was ordered to be served consecutively to a twenty-year sentence that Jackson was apparently on probation for at the time he committed the offenses in the three cases presently before us.

Jackson now appeals, contending that: (a) Louisville Metro Officer Beth Bizzell's search of Jackson was unreasonable and went beyond what is permissible as a pat down for weapons under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), so the fruits of the search should be suppressed; (b) the court should have ordered Jackson's sentences in these cases to be served concurrently to his prior twenty-year sentence because the revocation of his probation on the twenty-year sentence occurred more than ninety days after the grounds for revocation became known; and (c) the Commonwealth breached the plea agreement, so the judgments should be vacated and remanded. Other facts will be set forth as needed to address these claims, *infra*.

II. ANALYSIS

[2] This type of plea, known as an *Alford* plea, "permits a conviction without requiring an admission of guilt and while permitting a protestation of innocence." *Wilfong v. Commonwealth*, 175 S.W.3d 84, 103 (Ky. App. 2004).

A. CLAIM REGARDING MOTION TO SUPPRESS

Jackson first contends that in case number 07-CR-3265, Officer Beth Bizzell's search of him was unreasonable and went beyond what is permissible as a pat-down search for weapons under *Terry*, 392 U.S. 1, 88 S. Ct. 1868, and therefore, the fruits of the search should be suppressed. Specifically, Jackson alleges: he could not lawfully be searched incident to the issuance of a citation for a traffic violation; Officer Bizzell stated no basis to believe that Jackson was armed and dangerous; the frisk, which was not limited to Jackson's outer clothing, went beyond that allowed by *Terry*; and the "plain feel" exception to the warrant requirement does not apply.

The Commonwealth contends that these specific arguments were not presented to the trial court. The Commonwealth acknowledges that although Jackson's motion stated that "'the initial stop was illegal because there was no reasonable suspicion to stop and question him' and that 'even if there was reasonable suspicion to stop and question Mr. Jackson, there was no similar justification for searching Mr. Jackson's person' . . . his argument to the court was limited to the former that the initial stop was illegal." Therefore, the Commonwealth asserts that this Court should not consider Jackson's arguments concerning the denial of his motion to suppress because Jackson now concedes that the initial stop was legal, and the Commonwealth contends that Jackson cannot present different issues on appeal from those he presented to the circuit court.

We agree with the Commonwealth to the extent that Jackson's argument to the circuit court during the suppression hearing focused on his claim that the stop of his vehicle was improper. Jackson now concedes on appeal that the stop of his vehicle was proper because of the excessive window tinting. However, Jackson also alleged in his motion to suppress that

> [e]ven if there was reasonable suspicion to stop and question Mr. Jackson, there was no similar justification for searching Mr. Jackson's person or automobile, in that he provided no reasonably articulable suspicion to the officer that would justify an investigation as to what he may or may not be in possession of or any other restraint on his liberty.

Therefore, based on this allegation from Jackson's motion to suppress, we find that his appellate claims asserting that he could not lawfully be searched incident to the issuance of a citation for a traffic violation and that Officer Bizzell stated no basis to believe that Jackson was armed and dangerous, are preserved for appellate review. However, Jackson's appellate claims alleging that the frisk went beyond that allowed by *Terry* because it was not limited to his outer clothing and that the "plain feel" exception to the warrant requirement does not apply were not preserved for appellate review. Regardless, even if these claims had been preserved, they lack merit, as discussed, *infra*.

The circuit court denied Jackson's motion to suppress, holding as follows: "P.O. [presumably, "police officer,"] conducted valid traffic stop due to def[endant's] excessive window tinting. P.O. properly conducted *Terry* stop [and] pat down for weapons."

We review the denial of a motion to suppress as follows:

> If the trial court's findings of fact are supported by substantial evidence, then they are conclusive. We conduct *de novo* review of the trial court's application of the law to the facts. We review findings of fact for clear error, and we give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.

Hallum v. Commonwealth, 219 S.W.3d 216, 220 (Ky. App. 2007) (internal quotation marks and citations omitted).

Officer Bizzell testified during the suppression hearing that in late July 2007, she saw Jackson's vehicle traveling down the road and that it had excessively tinted windows. She drove her cruiser behind Jackson's vehicle with the intention to pull it over for the excessive window tint. She noted that Jackson made two left turns and was preparing to take another left turn, as if he was going to circle the block. Officer Bizzell was under the impression that Jackson was driving in that manner to try to avoid her. She then pulled Jackson's vehicle over due to the illegally tinted windows.

Officer Bizzell attested that as she approached Jackson's vehicle, Jackson rolled down his window, and Jackson appeared extremely nervous, to the point where he was "visibly sweating." She testified that Jackson was also stammering, not talking in a "regular flow," and his conversation was not a normal, relaxed way of speaking. Although it was July 31st, Officer Bizzell stated it was not a particularly warm day. She asked for Jackson's identification, and she ran his name through her computer in her cruiser. She discovered that he had prior

drug charges. Officer Bizzell attested that the neighborhood they were in at the time was a neighborhood well known for its drug activity.

Officer Bizzell testified that she called for backup because she was concerned for her safety. She decided to pat Jackson down for a weapon due to his extreme nervousness. After the other officer arrived, Officer Bizzell asked Jackson to get out of his car so that she could conduct the pat down. Officer Bizzell testified that Jackson was cooperative until the officers asked him to put his hands on the vehicle so they could pat him down, and Jackson did not want to acquiesce. She attested that Jackson kept pulling away and reaching for his waistband. This made the officers very nervous, as they were worried he was reaching for a weapon. Therefore, the officers handcuffed Jackson so that they could pat him down.

Officer Bizzell conducted the pat down. She testified that when she conducts pat downs, she typically places her thumb inside the waistband near the edge to ensure that there are no weapons stuffed inside the waistband. She stated that this is what she did with Jackson. As she ran her thumb inside his waistband, she discovered a pouch, which, based on her previous experience as an officer, she knew contained drugs. She did not know for certain what types of drugs were in the pouch until she pulled a plastic bag out of Jackson's waistband. The bag contained suspected crack cocaine and a couple of pills. After they discovered these suspected narcotics,[3] the officers arrested Jackson. As they were escorting

[3] Officer Bizzell testified that lab tests revealed that the pills were not narcotics, but they were an "unknown substance."

Jackson to the cruiser, he jerked away as if he was going to try to get away from the officer who was escorting him. Nevertheless, Jackson was arrested and charged in that case with first-degree illegal possession of a controlled substance; tampering with physical evidence; and resisting arrest.

Pursuant to KRS[4] 189.110, a person may not operate a motor vehicle with excessive window tinting. Furthermore, KRS 189.990 provides that a person who violates KRS 189.110 shall be fined. In the present case, Jackson's vehicle was stopped for excessive window tinting. Officer Bizzell testified that when she approached Jackson after stopping his vehicle, he appeared extremely nervous, and he was "visibly sweating," stammering, and not talking in a "regular flow." This behavior gave her a reason to believe that Jackson may be armed. "'[P]olice may order persons out of an automobile during a stop for a traffic violation, and may frisk those persons for weapons if there is a reasonable belief that they are armed and dangerous.'" *Dunn v. Commonwealth*, 689 S.W.2d 23, 27 (Ky. App. 1984), *ordered to be published* (Ky. 1985) (quoting *Michigan v. Long*, 463 U.S. 1032, 1045, 103 S.Ct. 3469, 3478, 77 L.Ed.2d 1201, 1217 (1983)). Therefore, Officer Bizzell's act of ordering Jackson to get out of his car and conducting a pat down of his clothes was proper.

However, Jackson contends that when Officer Bizzell placed her thumbs inside his waistband and pulled out the plastic bag containing suspected narcotics, she went beyond what was permissible under *Terry*. Typically, during "*Terry* frisks, an officer may seize any contraband he finds, so long as the illegal

[4] Kentucky Revised Statute.

nature of the contraband is immediately apparent to the plain feel of his hand." *Commonwealth v. Marshall*, 319 S.W.3d 352, 357 (Ky. 2010).

> These brief *Terry* frisks often mature into full-blown probable-cause-based searches, particularly when an officer, while conducting a pat down, becomes immediately aware of contraband, and does so without manipulation of the object felt, but with the simple plain feeling of his hand. In other words, under the "plain feel" doctrine the object must be immediately identifiable as a weapon or contraband by a simple "pat down" before it may be legally seized. Once recognized as a weapon or contraband, an officer may perform a more invasive search such as entering the pockets of the suspect or even placing his hands down a suspect's pants, wherever the immediately apparent contraband may be.

Marshall, 319 S.W.3d at 357 (internal citations omitted). An officer may not manipulate an object inside a suspect's pocket by doing such things as "squeezing" and "sliding" it to determine that it is contraband or a weapon, in order to justify a more intrusive search. *Minnesota v. Dickerson*, 508 U.S. 366, 378, 113 S.Ct. 2130, 2138, 124 L.Ed.2d 334 (1993). Rather, to justify the more intrusive search, the officer must have been able to identify the object as a weapon or contraband simply by conducting a pat down of the suspect's clothing. *Id.*, 508 U.S. at 379, 113 S.Ct. at 2139.

In the present case, Officer Bizzell attested that after she and the other officer on the scene asked Jackson to put his hands on the car so that they could conduct a pat down, Jackson kept pulling away and reaching for his waistband. Officer Bizzell testified that this made the officers very nervous, as they were worried he was reaching for a weapon.

Although an unobtrusive pat down is all that is permitted in a typical "stop and frisk," there are occasionally circumstances in a case that permit the scope of the intrusion to be varied. *See Hampton v. Commonwealth*, 231 S.W.3d 740, 749-50 (Ky. 2007). For example, the Kentucky Supreme Court in *Hampton* stated as follows:

> When an officer sees a suspect stow an object in an item of clothing, such as a shoe, where it could not be revealed by a mere pat-down, a broader search may be allowed if concern about safety is sufficiently high. The trial court [in the *Hampton* case] specifically found that the item the officers observed [Hampton] hiding in his shoe was unidentifiable and could have been a weapon (specifically a knife). In such a situation, it is not unreasonable for the officer to slightly expand the scope of the pat-down to include reaching into the shoe to determine the nature of the object hidden there.

Hampton, 231 S.W.3d at 750.

Although a search inside the suspect's waistband typically would not be justified in a *Terry* stop, it was not unreasonable, given Jackson's suspect conduct, for Officer Bizzell to run her thumb inside Jackson's waistband during the pat down to ensure there was no weapon. While placing her thumb inside Jackson's waistband, she discovered a plastic bag which she knew, based on her previous experience as an officer, contained drugs. "[I]f while conducting a legitimate pat-down of a stopped individual . . . the officer discovers contraband other than weapons, he should not be required to ignore it, and the Fourth Amendment does not require its suppression." *Dunn*, 689 S.W.2d at 27. Therefore, Officer Bizzell properly seized the drugs she found in Jackson's

waistband, and the circuit court did not err in denying Jackson's motion to suppress.

B. CLAIM REGARDING CONSECUTIVE SENTENCES

Jackson next asserts that the court should have ordered his sentences to be served concurrently to the twenty-year sentence he had previously received in other cases because the revocation of his probation on the twenty-year sentence occurred more than ninety days after the grounds for revocation became known. Jackson cites the case of *Sutherland v. Commonwealth*, 910 S.W.2d 235 (Ky. 1995), in support of his argument.

However, subsequent to the *Sutherland* opinion, the Kentucky Supreme Court entered its opinion in *Brewer v. Commonwealth*, 922 S.W.2d 380 (Ky. 1996). In *Brewer*, the Supreme Court discussed KRS 533.040 and KRS 533.060. Kentucky Revised Statute 533.040(3) provides as follows:

> A sentence of probation or conditional discharge shall run concurrently with any federal or state jail, prison, or parole term for another offense to which the defendant is or becomes subject during the period, unless the sentence of probation or conditional discharge is revoked. The revocation shall take place prior to parole under or expiration of the sentence of imprisonment or within ninety (90) days after the grounds for revocation come to the attention of the Department of Corrections, whichever occurs first.

However, KRS 533.060(2), states:

> When a person has been convicted of a felony and is committed to a correctional detention facility and released on parole or has been released by the court on probation, shock probation, or conditional discharge, and is convicted or enters a plea of guilty to a felony

> committed while on parole, probation, shock probation, or conditional discharge, the person shall not be eligible for probation, shock probation, or conditional discharge and the period of confinement for that felony shall not run concurrently with any other sentence.

As the Kentucky Supreme Court noted in *Brewer*, "[t]he two statutes clearly contradict if read in conjunction. . . . Since KRS 533.060 was enacted in 1976, and KRS 533.040 was enacted in 1974, the former controls." *Brewer*, 922 S.W.2d at 382. Therefore, KRS 533.060 is the controlling statute and, according to that statute, Jackson's sentences were not permitted to be run concurrently because he was on probation for at least one felony at the time that he was convicted of the felonies in the three underlying cases. Consequently, the circuit court did not err in ordering Jackson's sentences in the underlying three cases to be run consecutively to the twenty-year sentence he had received in previous cases.

C. CLAIM REGARDING BREACH OF PLEA AGREEMENTS

Finally, Jackson alleges that the judgments should be vacated and remanded because the Commonwealth breached the plea agreements. Specifically, Jackson contends that the plea agreements he entered into with the Commonwealth each had this provision: "The Commonwealth will take no stand of wether [sic] this sentence will run concurrent or consecutive to the 20 years in 00CR0667 and 00CR1372." However, Jackson states that at his sentencing, the Commonwealth "urged the court to impose consecutive sentences" by saying: "Judge, we'd ask the

court order to reflect that it must be served consecutively to any sentence he's already serving, that the order reflect that." Jackson acknowledges that this claim is not preserved for appellate review, but he asks this court to review it, nonetheless.

The Commonwealth argues that, contrary to Jackson's allegation,

> the Commonwealth specifically asked the court to sentence in accord with the agreement. And the court did follow the agreement . . . but the court also sentenced appellant to eight years for a total of eight years to serve in addition to whatever other sentence he was serving which was not a violation of the agreement. After the judge pronounced that sentence, the Commonwealth recognizing that the court ordered consecutive sentences (and the potential problems which might arise if the judgment was not clear . . .) then requested that the order reflect that pronouncement that it be served consecutively.

Thus, the Commonwealth asserts that it did not breach the plea agreements. Although Jackson's claim is not preserved for appellate review, we nevertheless find that it lacks merit; therefore, that it does not amount to palpable error under RCr[5] 10.26.

Upon review of the video recorded proceedings, we agree with the Commonwealth. During the sentencing proceedings, the circuit court stated that the total eight-year sentence in the three underlying cases was to be served "in addition to" other sentences Jackson had received, thus implying that the sentences were to be served consecutively to Jackson's prior sentences. After the circuit court made this statement, the Commonwealth merely asked the court to specify in

[5] Kentucky Rule of Criminal Procedure.

its order that the sentences were to be served consecutive to Jackson's prior sentences, in order to avoid confusion. In making this request, the Commonwealth was merely asking the court to clarify the sentence in its written orders of judgment against Jackson. Therefore, the Commonwealth did not breach its plea agreement because the court had already sentenced Jackson by the time the Commonwealth asked for clarification. Consequently, this claim lacks merit.

Accordingly, the judgments of the Jefferson Circuit Court are affirmed.

LAMBERT, JUDGE, CONCURS.

ISAAC, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

ISAAC, SENIOR JUDGE, DISSENTING: Respectfully, I dissent. I believe the issue that the search went beyond the scope of that allowed by *Terry* is preserved for appellate review. Appellant's trial court suppression motion stated, "even if there was reasonable suspicion to stop and question Mr. Jackson, there was no similar justification for searching Mr. Jackson's person…." At the suppression hearing, the Commonwealth argued that the pat-down search was proper under *Terry,* and the trial court specifically ruled that the search of the Appellant's person did not violate *Terry* by writing an order on the docket which stated, "P.O. properly conducted Terry stop & pat down for weapons." Under these circumstances, the issue of the alleged improper *Terry* search is properly before this court.

Moving to the merits, the first fact to be considered is the Officer's own testimony regarding the *Terry* pat-down she conducted. She stated,

> I went to pat him down and I generally ***will take my thumb and put it on the inside to right around the edge to feel*** if the gun is stuffed down in there. And when I did, I felt what I know from my past, because I've been on for a while, to be a package of drugs***. I didn't know what it was at the time until I actually pulled it out***, and then I knew it was suspected crack cocaine. (emphasis added)

In this statement, the officer admits to violating two different components of Fourth Amendment protections. In *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the United States Supreme Court set out in detail the limited nature of a constitutionally allowable pat-down in circumstances where an individual has been stopped for questioning. If certain circumstances exist, a "limited search of the outer surfaces of his clothing" may be allowed. *Terry*, at 16-17. Kentucky courts have followed suit and ruled that only the outer clothing of a suspect may be touched during a pat-down. In *Johantgen v. Commonwealth*, 571 S.W. 2d 110, 112 (Ky. App. 1978), this court stated, "the extent of a *Terry* pat-down is quite limited—only a search of outer clothing is justified unless the officer finds what he believes to be a weapon or anything that might be used as a weapon. If no weapons are discovered, a *Terry* search may proceed no further." In *Commonwealth v Johns,* 217 S.W. 3d 190, 195 (Ky. 2006), the Kentucky Supreme Court reiterates that a *Terry* pat-down is limited to the "suspect's outer clothing." This "outer surfaces" limitation exists as a proper

balance between the invasion of the personal security of the individual being searched and the protection of the officer.

A properly conducted pat-down of the outer services of clothing will allow an officer to detect a weapon. In this case, Officer Bizzell went beyond what was necessary for her own protection in feeling around the inside of the waistband of the Appellant's pants. This pat-down involving the interior parts of the Appellant's clothing invalidates a proper *Terry* protective search. "If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed." *Minnesota v. Dickerson*, 508 U.S. 366, 376, 113 S. Ct. 2130, 124 L.Ed. 2d 334 (1993).

The officer's improper pat-down led her to feel a corner edge of a plastic baggie. She testified that she pulled the baggie out not knowing what it was. If during a lawful pat-down, an object is felt, it may not be extracted from the person unless the incriminating character of the object is immediately apparent to the officer. She testified that it was not. In these circumstances, the courts have been clear that the "plain feel" exception to a warrant requirement is not available. *Commonwealth v. Crowder*, 884 S.W. 2d 649 (Ky. 1994), *Minnesota v. Dickerson*, 508 U.S. 366 (1993) and *Jones*, supra. However, the "plain feel" argument need not even be addressed since the initial pat-down which led the officer to feel the corner of the baggie was not a valid *Terry* protective search.

Based upon the illegal search of the Appellant, the resulting evidence obtained must be suppressed and I would reverse and remand the case to the trial court for proceeding consistent with that holding.

BRIEF FOR APPELLANT:

Bruce P. Hackett
Chief Appellate Defender
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky
Frankfort, Kentucky

Gregory C. Fuchs
Assistant Attorney General
Frankfort, Kentucky