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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001791-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CHARLES L. CUNNINGHAM, JR., JUDGE
ACTION NO. 07-CR-002403

LONNIE HOLMAN AND
KEITH HOLMAN — APPELLEES

OPINION
REVERSING

** ** ** ** **

BEFORE: CAPERTON AND WINE, JUDGES; LAMBERT,[1] SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: The Commonwealth of Kentucky appeals from the August 27, 2009, Jefferson Circuit Court order suppressing evidence. Because we hold that the trial court applied an incorrect legal standard and erroneously ordered suppression, we reverse.

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

This case involves the search and seizure, by two police officers, of Appellees Lonnie Holman and Keith Holman.[2] On December 11, 2006, Detective Mike Dixon and Detective Joel Phillips were on patrol in the area of the Guardian Court Apartments in Louisville, Kentucky. According to Detective Dixon, the area was known as a high narcotics area which generated many complaints and reports of illegal drug activity. Detective Dixon also testified that the manager of the apartment complex had requested assistance regarding drug dealing in the area. While patrolling the area, the two officers parked their vehicle at a nearby adult entertainment establishment and walked to the apartment complex where they observed the Appellees sitting in a pick-up truck parked in front. Lonnie Holman was sitting in the driver's seat and Keith Holman was sitting in the passenger seat.

The two officers approached the truck and observed the occupants passing a cigarette pack back and forth. The officers testified that the occupants began making sudden frantic movements with their hands, which led the officers to believe that the men might be armed or attempting to hide contraband. The officers asked the two men to exit the vehicle, explaining that they were not being arrested but detained for officer safety. While being patted down by Detective Phillips, Keith Holman attempted to run and struggled with Detective Phillips. Detective Dixon witnessed Lonnie Holman pitch something away from his body with his hand. Appellants were secured and a K-9 unit was called to retrieve what Lonnie Holman had thrown. The object was found and was identified as a black

[2] Because the Appellants failed to file a brief, our account of the facts is based entirely on the Commonwealth's brief and the testimony presented at the suppression hearing.

leather pouch containing crack cocaine and digital scales. The officers found additional crack cocaine in a pack of cigarettes in the passenger compartment of the vehicle.

Both Appellants were indicted for trafficking in a controlled substance, tampering with physical evidence, and illegal possession of drug paraphernalia, In addition, Keith Holman was indicted for criminal mischief, and resisting arrest. Lonnie Holman, by counsel, filed a motion to suppress the fruits of the search, seizure and/or stop. An evidentiary hearing was held and the trial court granted the suppression motion in an order entered on August 27, 2009. This appeal followed.

On appeal, the Commonwealth argues that the trial court erred in its suppression ruling because its findings of fact were not supported by substantial evidence and its application of law to the facts was incorrect. When reviewing a trial court's ruling on a suppression motion, we apply a *de novo* standard of review to conclusions of law and review factual findings for clear error. *See, e.g. Jackson v. Commonwealth*, 187 S.W.3d 300 (Ky. 2006). A trial court's findings of fact are deemed conclusive if they are supported by substantial evidence. RCr[3] 9.78; *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky.App. 2002). The Commonwealth further argues that the trial court applied the incorrect legal analysis to the search of the Appellees.

[3] Kentucky Rules of Criminal Procedure.

"There are three types of interaction between police and citizens: consensual encounters, temporary detentions generally referred to as *Terry* stops, and arrests." *Baltimore v. Commonwealth*, 119 S.W.3d 532, 537 (citing *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). "Police officers are free to approach anyone in public areas for any reason." *Commonwealth v. Banks*, 68 S.W.3d 347, 350 (Ky.2001). In general, a warrant is required for searches and seizures. However, brief investigatory stops and limited pat-down searches of suspects have been continuously recognized as an exception to the warrant requirement. *Terry*, 392 U.S. 1. More specific to the case at hand, "[w]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others," the officer may conduct a pat-down search "to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm." *Id.* at 24. Such a search is strictly limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby. *Commonwealth v. Crowder*, 884 S.W.2d 649 (Ky. 1994), citing *Terry, supra*.

The test for such a stop and frisk is whether there is a reasonable and articulable suspicion that the suspect may be armed and dangerous. *Banks*, 68 S.W.3d at 351 (citing *Terry*, 392 U.S. at 30). Such a suspicion is based on the officer's objective justification for his actions, measured in light of the totality of the circumstances. *See Bauder v. Commonwealth*, 299 S.W.3d 588 (Ky. 2009). When considering the totality of the circumstances, "due deference must be given

to the reasonableness of inferences made by police officers." *Id.* at 592 (citation omitted).

> Officers may draw on their own experience and specialized training to make inferences from, and deductions about, the cumulative information available to them that might well elude an untrained person. Police officers are in an extraordinary position that requires them to make split-second determinations of reasonable suspicion, sometimes in dire and even dangerous circumstances. This determination is generally made through the prism of each officer's own training and experience.

Id. (citations omitted).

In the case *sub judice*, the trial court's findings of facts and conclusions of law are as follows:

> a) The ostensible basis for the police officers' initial inquiry of the Defendants on the night in question was their observation of the Defendants passing of a package of cigarettes between themselves in a vehicle parked in an area where substantial drug activity was known to occur;
> b) No exigent circumstances existed which prevented the officers from seeking a search warrant while maintaining surveillance of the vehicle;
> c) Probable cause did not exist to search the vehicle or the Defendants and had a search warrant been sought, it would not have been granted;
> d) The search in this case was improper and all evidence which is fruit of that search must be suppressed and will not be allowed into evidence at trial.
>
> Although subsequent events demonstrated the officers were correct in their suspicions, if this search was not improper, th[e]n Kentuckians who have the misfortune of residing in areas plagued by significant crimes, especially drug activity, would be subjected to additional misery in the form of warrantless searches for

> nothing more than parking in the "wrong" block and sharing a pack of smokes. The Constitution does not allow this.

We disagree with the trial court's view of the law as quoted hereinabove. The trial court seems to be critical of the officers' initial approach to the Appellees due to their sharing a cigarette in a notoriously high crime area. However, as already stated, "[p]olice officers are free to approach anyone in public areas for any reason." *Banks*, 68 S.W.3d at 350. Accordingly, the officers' reasons for their initial approach to the Appellees is irrelevant. The trial court seems also to have relied heavily on its conclusion that the officers did not have probable cause to search the vehicle or the Appellees, that the officers could have sought a search warrant, and that a search warrant would have been denied. This too appears irrelevant to the legal analysis. The appropriate legal analysis is whether the officers had a *reasonable suspicion*, based on the totality of the circumstances, that Appellees might be armed and dangerous. *Terry, supra*, 392 U.S. at 30. From the officers' testimony, it was revealed that the Appellees were parked in an area notorious for high drug-trafficking, that the officers had specifically been asked to patrol the area for drug-dealing, that the Appellees began making frantic movements upon being approached by the officers, that is was dark, and visibility was poor. From the totality of these circumstances, the officers were justified in a reasonable suspicion that the Appellees might be armed. As such, they were entitled to make a *Terry* pat-down search, to verify or disprove their suspicions. *Terry*, 392 U.S. at 30. What transpired thereafter, attempted flight, resisting arrest

and discovery of drugs, was a direct result of the lawful pat-down search. As there was no constitutional violation when the officers approached the Appellees and the initial contact with them, upon the occurrence of Appellees' unlawful behavior, a reasonable basis emerged for the arrest and subsequent search of the vehicle. *Id.; see also, e.g. Baltimore v. Commonwealth*, 119 S.W.3d 532 (Ky.App. 2003).

For the foregoing reasons, the August 27, 2009, Jefferson Circuit Court order suppressing evidence is reversed.

WINE, JUDGE, CONCURS.

CAPERTON, JUDGE, CONCURS AND FILES SEPARATE OPINION.

CAPERTON, JUDGE, CONCURRING: I would vacate and remand for the correct legal standards, as set forth in the majority opinion, to be applied by the trial court.

BRIEF FOR APPELLANT:

Jack Conway
Attorney General of Kentucky

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Louisville, Kentucky

BRIEF FOR APPELLEES:

No brief was filed on behalf of the appellees.