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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000115-MR

JAMES RYAN MCKENZIE — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE V, JUDGE
ACTION NO. 09-CR-00338

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART AND
VACATING IN PART

** ** ** ** **

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

ISAAC, SENIOR JUDGE: James McKenzie appeals from a Campbell Circuit Court judgment convicting him of first-degree possession of a controlled substance and sentencing him to serve one year. McKenzie entered a plea of guilty to the

[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.

charge conditioned upon his right to appeal the circuit court's denial of his motion to suppress evidence. He also appeals the imposition of court costs and a public defender fee.

McKenzie was detained when police in Newport executed a search warrant on a residence at 412 Constance Alley. The police obtained the warrant after learning from an informant that an individual named Randall Pearson was selling heroin at that address. Officers also conducted a controlled buy of heroin from the residence. The warrant authorized a search of the house and the person of Randall Pearson. The warrant was executed by officers of the Newport Police narcotics directive unit and the Newport Police SWAT team. The SWAT team broke through the front door of the house with a battering ram and secured the occupants of the residence. Officer Chris Carpenter found McKenzie, whom he did not know, standing in the kitchen. He ordered McKenzie to lie face down on the floor and secured his wrists with flex cuffs. As he patted McKenzie down for weapons, Officer Carpenter spotted the tip of a plastic baggie sticking out of McKenzie's pocket. Carpenter later testified that he believed, based on his experience, that the baggie would contain drugs. Office Carpenter removed the baggie from McKenzie's pocket. It was later shown to contain heroin. McKenzie was charged with first-degree possession of a controlled substance.

McKenzie moved to suppress the evidence. After a hearing, the trial court denied his motion on the grounds that suppression was not the remedy for a violation of the "knock and announce" rule; that the officers lawfully detained

McKenzie during their search of the residence; and that the plastic bag in McKenzie's pocket was in plain view and its incriminating nature readily apparent to Officer Carpenter. McKenzie entered a conditional plea of guilty to the charge of first-degree possession of a controlled substance and this appeal followed.

> An appellate court's standard of review of the trial court's decision on a motion to suppress requires that we first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive. Based on those findings of fact, we must then conduct a de novo review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law.

Commonwealth v. Neal, 84 S.W.3d 920, 923 (Ky.App. 2002) (footnotes omitted).

"[T]he Fourth Amendment incorporates the common law requirement that police officers entering a dwelling must knock on the door and announce their identity and purpose before attempting forcible entry." *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998) (citing *Wilson v. Arkansas*, 514 U.S. 927, 933, 115 S.Ct. 1914, 1918, 131 L.Ed.2d 976 (1995)). Not every entry must be preceded by an announcement; the police may justify a no-knock entry if they have a reasonable suspicion that knocking and announcing would be dangerous or futile. *Id*. at 9. Whether the rule was violated in this case is not at issue; the Commonwealth does not dispute the trial court's finding that the police did violate the "knock and announce" rule. But, as the trial court correctly stated, the remedy for this violation is not the suppression of the evidence. In *Hudson v. Michigan*, the United States Supreme Court balanced the societal costs of applying the

exclusionary rule against the need to deter such behavior on the part of the police and concluded that "[r]esort to the massive remedy of suppressing evidence of guilt is unjustified." 547 U.S. 586, 599, 126 S.Ct. 2159, 2168, 165 L.Ed.2d 56 (2006). We can find no support in Kentucky law to justify the imposition of the exclusionary rule to evidence recovered as a result of the violation of the knock and announce rule.

McKenzie next argues that the search warrant was facially invalid because it did not describe the person to be searched, Randall Pearson, with sufficient particularity. The warrant simply identified the person to be searched as "Randall Pearson – M/W" [male, white]. Even if, solely for the sake of argument, we assume that the description of Pearson was inadequate, it did not invalidate the remainder of the warrant, which described the residence at 412 Constance Alley with great specificity. As an occupant of the residence at the time the search was conducted, McKenzie's detention was lawful because "a warrant to search [a house] for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Michigan v. Summers*, 452 U.S. 692, 705, 101 S.Ct. 2587, 2595, 69 L.Ed.2d 340 (1981) (footnotes omitted).

McKenzie nonetheless argues that under *Johantgen v. Commonwealth*, 571 S.W.2d 110 (Ky. 1978), the terms of the warrant were not broad enough to include his detention. But *Johantgen* expressly permits a limited detention of precisely the type experienced by McKenzie. In *Johantgen*, the police

had a warrant to search an individual named Daryl Driver, his car, his residence and "any other person present believed to be involved in the illegal use of, possession of, or trafficking in controlled substances." When the officers arrived at the Driver residence, the only people there were a woman and a child. The police began the search and a few minutes later Driver arrived, accompanied by Johantgen. Johantgen was searched and heroin was found in his pocket. On appeal, it was held that the evidence recovered from Johantgen had to be suppressed because

> [t]he mere fact that the appellant arrived at the residence where a search was being conducted in the company of one named in the search warrant and on whom drugs were found does not meet the test of probable cause. Absent some other incriminating circumstances or behavior, any search of his person beyond the "pat-down" search was unjustified. . . . The fact that appellant was in the company of the person described in the warrant is not sufficient to legitimize a search of him beyond that necessary to reveal any weapons.

Johantgen, 571 S.W.2d at 112-113.

Under *Johantgen* and *Summers*, therefore, the pat-down search of McKenzie by Officer Carpenter was permissible. It was also fully in keeping with *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), which held that a brief investigative stop, detention, and frisk for weapons do not violate the Fourth Amendment as long as the initial stop is supported by reasonable suspicion. McKenzie argues that there was no justification for a *Terry* stop and frisk because there was no reasonable and articulable suspicion that he was involved in criminal

activity or that he was armed and dangerous. He contends that once police discovered that he was not Randall Pearson, he should have been free to leave. We disagree. McKenzie was found in the kitchen of a house where the police had probable cause to believe heroin was being sold. In a factually similar case, the Sixth Circuit Court of Appeals held that the Fourth Amendment was not violated when occupants of a house being searched for narcotics were handcuffed and forced to lie face down.

> When occupants of a residence are detained during the execution of a search warrant, the circumstances ordinarily will justify more intrusive behavior by the police than in a typical on-the-street detention. . . . Concern for safety of the agents and the need to prevent disposal of any narcotics on the premises, justified the restraint of the occupants[.] . . . And those concerns are the same regardless of whether the individuals present in the home being searched are residents or visitors.

United States v. Fountain, 2 F.3d 656, 663 (6th Cir.1993). Concern for the officers' own safety and the potential destruction of evidence justified Officer Carpenter's decision to handcuff and frisk McKenzie.

McKenzie further contends that even if the detention and frisk were lawful, Officer Carpenter exceeded the bounds of what is permissible under *Terry*. "[T]he 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." *Johantgen*, 571 S.W.2d at 112. The trial court nonetheless found that the seizure of the baggie was permissible because it was in "plain view."

In order for the "plain view" exception to the warrant requirement to apply, three elements must be met:

> First, the law enforcement officer must not have violated the Fourth Amendment in arriving at the place where the evidence could be plainly viewed. Second, not only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must have a lawful right of access to the object itself. Finally, the object's incriminating character must also be immediately apparent.

Hazel v. Commonwealth, 833 S.W.2d 831, 833 (Ky. 1992) (internal citations and quotation marks omitted).

As we have previously determined, the first two elements were met in this case because Officer Carpenter was lawfully on the premises executing a valid search warrant, and McKenzie had not been seized in violation of his Fourth Amendment rights. As to the third element, McKenzie argues that because the officer only saw the tip of the baggie in his pocket, the incriminating character of the item seized was not immediately apparent.

The Commonwealth contends that the incriminating nature of the baggie was immediately apparent because people do not normally carry baggies in their pockets and, furthermore, because the stop and frisk took place in a residence where the sale of illegal drugs was suspected, by an experienced officer who testified that narcotics are commonly trafficked in plastic baggies. But "the court must not evaluate whether the incriminating nature of an item is immediately apparent from the viewpoint of a law enforcement officer with extensive training

and experience." *United States v. Guzman-Cornejo*, 620 F.Supp.2d 917, 922 (N.D. Ill. 2009). Rather, the court is required to determine "whether the facts available to the officer would warrant a man of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime." *Id.* (*citing Texas v. Brown*, 460 U.S. 730, 742, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983)). Similarly, the Supreme Court of Virginia has stated that, under the plain view doctrine,

> probable cause cannot be established solely on the observation of material which can be used for legitimate purposes, even though the experience of an officer indicates that such material is often used for illegitimate purposes. Moreover, it is not sufficient probable cause to seize an item from inside the suspect's clothing if the officer has no more than an educated 'hunch' . . . that the item might be contraband.

Cauls v. Commonwealth, 683 S.E.2d 847, 851- 852 (Va.Ct.App.2009) (internal citations and quotation marks omitted). There is nothing inherently incriminating about plastic baggies, which are widely used for legitimate purposes and not solely for packaging illegal narcotics. "[T]he court cannot say that a man of reasonable caution who was aware of the facts surrounding the investigation would have believed, rather than suspected," that the baggie contained contraband. *Guzman-Cornejo*, 620 F.Supp. 2d at 922. Plastic baggies "are not single purpose containers such that their contents could be readily inferred from their outward appearance." *Id*.

Although the seizure of the baggie was impermissible under the plain view exception, it was nonetheless ultimately justified under the "inevitable discovery" doctrine. In *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984), the United States Supreme Court adopted the "inevitable discovery" rule to permit the admission of evidence unlawfully obtained by police upon proof by a preponderance of the evidence that the same evidence would have been inevitably discovered by lawful means. *Id*., 467 U.S. at 444, 104 S.Ct. at 2509. After McKenzie was detained, it was discovered that he had an active warrant against him on a charge of giving a police officer a false name. Officer Arnberg, who swore out the probable cause affidavit in support of the search warrant and was present at the execution of the warrant, testified that he recognized McKenzie and that McKenzie would have been arrested on the basis of the outstanding warrant even if narcotics had not been found on his person.

In *Nix*, the Supreme Court noted that the purpose of the exclusionary rule was to deter police from constitutional violations and then explained that the inevitable discovery rule operated conversely to ensure that the prosecution should not be put in a worse position simply because of some earlier police error or misconduct. Thus, even if Officer Carpenter had not spotted and removed the baggie, McKenzie would have been searched and the heroin lawfully recovered when the outstanding warrant was discovered. Indeed, the Ohio Court of Appeals has extended the rule to hold that because "an outstanding arrest warrant operates to deprive its subject of the reasonable expectation of privacy the Fourth

Amendment protects, the exclusionary rule does not apply to a search and seizure of the subject that would otherwise be illegal[.]" *State v. Walker-Stokes*, 903 N.E.2d 1277, 1282 - 1283 (Ohio Ct. App. 2008).

McKenzie has argued otherwise, relying on *State v. Crossen*, 536 P.2d 1263 (Or.Ct.App. 1975), in which the Oregon Court of Appeals reasoned that failing to suppress evidence illegally recovered from an individual who was later shown to have three arrest warrants would encourage the police to conduct unlawful searches in the hope that probable cause would be developed after the fact. 536 P.2d 1263, 1264. A similar concern was expressed by this Court in *Commonwealth v. Elliott*, 714 S.W.2d 494 (Ky.App. 1986), that extending the inevitable discovery rule "would open the door to virtually every pretext for upholding an unlawful search." 714 S.W.2d at 497. The facts in this case are sufficiently distinguishable, however. In *Elliott*, the police improperly entered a room of the defendant's sister's house while conducting a warrantless arrest and saw illegal drugs in plain view. In *Crossen*, the police were in a house without a warrant and noticed a bulge in the shirt pocket of an individual whom they subsequently searched before discovering he had three outstanding arrest warrants. By contrast, the detention and pat-down of McKenzie was entirely legal up until the moment Officer Carpenter retrieved the baggie; the discovery of the evidence was purely incidental to the primary purpose of executing the search warrant of the residence.

We therefore affirm the trial court's denial of the motion to suppress, because an appellate court may affirm a lower court's decision on other grounds as long as the lower court reached the correct result. *McCloud v. Commonwealth*, 286 S.W.3d 780, 786, n.19 (Ky. 2009).

McKenzie's second main argument concerns the assessment of court costs and a partial public defender representation fee totaling $355.

McKenzie argues that the imposition of these charges violated KRS 23A.205(2), which states as follows:

> The taxation of court costs against a defendant, upon conviction in a case, shall be mandatory and shall not be subject to probation, suspension, proration, deduction, or other form of nonimposition in the terms of a plea bargain or otherwise, unless the court finds that the defendant is a poor person as defined by KRS 453.190(2) and that he or she is unable to pay court costs and will be unable to pay the court costs in the foreseeable future.

McKenzie argues that throughout the proceedings his indigent status was never in dispute because he was appointed a public defender who represented him throughout the proceedings. He was also allowed to proceed *in forma pauperis* on appeal.

The Supreme Court recently addressed the imposition of costs on an indigent criminal defendant in *Wiley v. Commonwealth*,___ S.W. 3d. ___, No. 2009-SC-000702-MR, 2010 WL 4146148 (Ky. Oct. 21, 2010).[2] In reviewing the issue under a palpable error standard, the Supreme Court ruled that:

[2] *Wiley* became final on March 24, 2011, and is designated for publication.

> Under KRS 23A.205(2), a trial court shall impose court costs on a defendant unless it finds that the defendant is a "poor person." In this regard, we have previously found it to be "manifestly unjust" to impose court costs on an indigent defendant. *Jackson v. Commonwealth*, Nos. 2008–SC–000216–MR, 2008–SC–000264–MR, 2009 WL 3526653, at *10 (Ky. Oct. 15, 2009); *see also Edmonson v. Commonwealth*, 725 S.W.2d 595 (Ky. 1987) (finding that the wavier [sic] of all costs for indigent defendants language of KRS 31.110(1)(b) controlled over KRS 23A.205(2), which provides the trial court discretion in imposing court costs). As we see no reason to depart from the reasoning in *Jackson*, we now reverse and vacate the trial court's imposition of court costs against Appellant.

Wiley, slip opinion at pp. 4-5.

In *Wiley*, beyond the fact that Wiley was indigent, we are not given many facts surrounding his status. However, the facts regarding indigent status in *Jackson*, which the Supreme Court relied upon in *Wiley*, are similar to McKenzie's.

In *Jackson*, the trial court appointed a public defender to represent Jackson after his private counsel withdrew. *Jackson*, 2009 WL 3526653, at *10. After Jackson was found guilty, the court assessed a fine and court costs against him. *Id.* The trial court explained to Jackson that he was entitled to have a public defender represent him on appeal and entered an order allowing Jackson to proceed *in forma pauperis* on appeal.

On review by the Supreme Court, the Court ruled that fines could not be levied against Jackson pursuant to KRS 534.030. The Court further held that:

> Nor may court costs be levied upon defendants found to be indigent. KRS 23A.205(2). As noted above, at the time of his trial and sentencing, Jackson was receiving the services of a public defender and he was granted the right to appeal *in forma pauperis*. Thus, the trial court clearly erred in imposing a fine and court costs upon Jackson.

Jackson, 2009 WL 3526653, at *11.

In McKenzie's case, he was appointed a public defender throughout the circuit court proceedings. The circuit court granted his motion to proceed *in forma pauperis* on appeal, and McKenzie is represented on appeal by counsel with the Department of Public Advocacy. Accordingly, following the Supreme Court's pronouncement in *Wiley* that it could "see no reason to depart from the reasoning in *Jackson*," we likewise can discern no reason to do so in the case presently under review.

For the foregoing reasons, the judgment of conviction is affirmed and the order imposing costs is vacated.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Steven Buck
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Jason B. Moore
Assistant Attorney General
Frankfort, Kentucky