

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-001139-MR

JEROME LAMAR JOINTER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 12-CR-01132

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: DIXON, JONES AND NICKELL, JUDGES.

NICKELL, JUDGE: Jerome Lamar Jinter has appealed from a July 1, 2014, Final Judgment and Sentence of Probation entered by the Fayette Circuit Court sentencing him to seven years' imprisonment probated for a period of five years upon a conditional guilty plea pursuant to RCr¹ 8.09. On appeal, Jinter argues

¹ Kentucky Rules of Criminal Procedure.

the trial court erred in denying his motion to suppress. Because we discern no error, we affirm.

Following his arrest and indictment for charges of trafficking in a controlled substance (cocaine) in the first degree,² possession of marijuana,³ and theft of identity,⁴ Jinter filed a motion to suppress the evidence seized from his vehicle and his person. He contended the arresting officer searched him without obtaining consent and exceeded the permissible scope of a “pat-down” or “frisk” when the officer entered his pockets. Jinter argued the evidence was unlawfully seized and suppression was required. A hearing on the motion occurred on November 19, 2012.

The salient facts surrounding Jinter’s arrest were set forth in detail in the trial court’s December 11, 2012, opinion and order overruling Jinter’s suppression motion. In the interest of judicial economy, we shall set them forth in their entirety.

On July 18, 2012, at sometime just before midnight, as [Lexington Fayette Metropolitan Police (“LMPD”)] Officers [Timothy] Moore and [Nathan] Muller patrolled an area near the intersection of Florence Avenue and Price Road on foot, they noticed two (2) individuals, a male and female, talking near a legally-parked vehicle in front of a house on Price Road. Moore had seven (7) years of experience as a police officer, while Muller had eight (8) years experience. The purpose for the Officers’

² Kentucky Revised Statutes (KRS) 218A.1412, a Class C felony.

³ KRS 218A.1422, a Class A misdemeanor.

⁴ KRS 514.160, a Class D felony.

foot patrol was for “high-visibility” police presence in the area, as several recent shootings had occurred.

As the Officers approached the vehicle, they observed the duo for approximately two (2) minutes, with the aid of a street light in the immediate vicinity which illuminated the vehicle. The vehicle’s ignition was turned off, and its driver-side door was ajar. The male, Defendant, was sitting in the driver’s seat of the vehicle, while the female, [Jointer’s girlfriend, Keisha] Brown, was standing adjacent to the vehicle, smoking. Neither Brown nor Defendant appeared to notice the Officers until they were approximately ten (10) to fifteen (15) yards from the vehicle, when Brown walked to the rear of the vehicle, toward the Officers, and spotted them. Brown returned to the vehicle’s open door and alerted Defendant to the Officers’ proximity.

Defendant’s movements inside the vehicle—described as reaching down, shifting his body away from the view of the Officers, and appearing to conceal something in the vehicle or on his person, immediately after Brown cued him to the Officers’ presence—raised the suspicions of the Officers. Defendant’s movement in exiting the vehicle further aroused the Officers’ suspicions, as Defendant leapt or sprung from the vehicle, as if to flee, although no flight was ultimately attempted. Defendant had not been addressed by the Officers’ (sic) before his hasty exit from the vehicle. The Officers split apart and approached the vehicle from opposite directions to discourage flight. As the Officers neared the vehicle, both detected a strong odor of burnt marijuana.

Defendant was immediately handcuffed by Moore for officer safety in order to secure Defendant while he was *Terry*⁵-frisked for weapons.

Moore was concerned that Defendant’s suspicious movements inside the vehicle may have been to conceal a weapon on Defendant’s person or somewhere in the vehicle. No weapons were discovered on Defendant’s person, but Moore decided to investigate further, and sat Defendant down before searching the vehicle for possible

⁵ *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

weapons and marijuana; meanwhile, Miller tended to Brown, who was not *Terry*-frisked.

Inside the vehicle, no weapons were discovered, but Moore did find marijuana. Both Defendant and Brown admitted to smoking marijuana. Moore indicated he was going to write Defendant a citation for Possession of Marijuana, but as he began to remove the handcuffs from Defendant, Moore asked Defendant if he could search Defendant's person. Defendant did not deny Moore's request to search, and upon Moore initiating the search of defendant's person, Defendant did not object or ask Moore to stop. Moore could not recall Defendant's exact response to Moore's search inquiry, but heard Defendant say something like "It's OK." Moore even offered that he had an audio recording of the exchange, but Defendant's response to Moore's request to search was inaudible.

Moore located 9.8 grams of cocaine, a quantity of marijuana, and \$580.00 cash in Defendant's pockets. Rather than completely remove the handcuffs following discovery of the contraband, Moore re-cuffed Defendant and placed him under arrest. Upon asking Defendant for his identification, Defendant told the Officers his name was "Rodney Slaughter," and produced an identification card of that name. Defendant later admitted that his true identity was not Slaughter, but Jerome Jointer.

Defendant's girlfriend, Brown, admitted that she had been smoking a cigarette and saw the Officers approaching. She had walked away from the car to flick her cigarette butt and then returned to Defendant who remained in the vehicle.

Defendant also testified at the hearing. Defendant's testimony was difficult to understand, as he mumbled frequently and spoke at a very low volume. Defendant testified that he responded "Nah" when Moore asked permission to search his person. The veracity of his testimony was called into question by the Commonwealth, based on Defendant's admitted ruse to police in masquerading as Rodney Slaughter. Thus, this

Court does not give great weight to Defendant's credibility.

(Footnote added).

The trial court concluded the totality of the circumstances compelled a finding the officers had reasonable, articulable suspicion that criminal activity was afoot, and such suspicion authorized the *Terry*-frisk. Contrary to Jointer's argument, the trial court found the officers were justified in restraining Jointer upon contact with him and concluded no Fourth Amendment violation occurred. This decision was based on the trial court's reading of and reliance on *Owens v. Commonwealth*, 291 S.W.3d 704 (Ky. 2009), *Miller v. Commonwealth*, 321 S.W.3d 275 (Ky. App. 2010), and *United States v. Foster*, 376 F.3d 577 (6th Cir. 2004), among others. Upon holding the initial detention and frisk passed Constitutional muster, the trial court further concluded the odor of burnt marijuana gave the officers probable cause to search the vehicle, all items therein, and Jointer himself, citing *Dunn v. Commonwealth*, 199 S.W.3d 775 (Ky. App. 2006). In addition, the trial court concluded Jointer freely and voluntarily consented to a search of his person, further justifying the officers' actions. Based on its factual findings and legal conclusions, the trial court denied Jointer's motion to suppress the evidence seized.

Thereafter, Jointer entered a conditional guilty plea in which he reserved the right to appeal from the trial court's denial of his suppression motion. Following final sentencing, Jointer initiated this appeal. He alleges the officers

unlawfully seized, searched and arrested him, and the trial court's decision on his suppression motion was both unsupported by substantial evidence and incorrect as a matter of law. Joiner contends reversal is necessary. We disagree.

Our review of a trial court's ruling on a motion to suppress is two-fold. First, factual findings are deemed conclusive if supported by substantial evidence. RCr 9.78. Substantial evidence is "evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable men." *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972) (quoting *O'Nan v. Ecklar Moore, Exp., Inc.*, 339 S.W.2d 466 (Ky. 1960)). A trial court's findings of fact must be upheld unless they are clearly erroneous. *See Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); *Roark v. Commonwealth*, 90 S.W.3d 24, 28 (Ky. 2002). If without evidentiary foundation, the trial court's factual findings are deemed clearly erroneous. *Commonwealth v. Banks*, 68 S.W.3d 347, 349 (Ky. 2001). Second, we conduct a *de novo* review to determine whether the trial court's decision was correct as a matter of law. *Roberson v. Commonwealth*, 185 S.W.3d 634, 637 (Ky. 2006).

We have reviewed the record, including the videotaped suppression hearing. Although conflicting testimony was presented, evidentiary support for each of the trial court's factual findings appears in the record, and we discern no clear error. Thus, we conclude the trial court's findings are supported by substantial evidence and are therefore deemed conclusive.

Having discerned no error with respect to the trial court's factual findings, we now turn to a *de novo* examination of its legal conclusions. After a careful review, we are unable to discern any error.

Traditionally, under *Terry*, an officer “may stop and frisk a suspect for weapons if the officer can point to reasonable and articulable facts that indicate that criminal activity may be afoot, and the suspect may be armed and dangerous.” *Banks*, 68 S.W.3d at 349 (citing *Terry*, 392 U.S. at 21, 88 S.Ct. at 1880). “To determine whether an officer had reasonable suspicion, a court must look at the totality of the circumstances.” *Commonwealth v. Morgan*, 248 S.W.3d 538, 540 (Ky. 2008). Evasive behavior has been considered a relevant factor when determining whether a defendant is involved in criminal activity. *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S.Ct. 673, 676, 145 L.Ed.2d 570 (2000). In addition, an officer may entertain reasonable suspicion based on a defendant's conduct, even when that conduct is consistent with innocent activity. *Morgan*, 248 S.W.3d at 542. “[T]he relevant inquiry is not whether particular conduct is ‘innocent’ or ‘guilty,’ but the degree of suspicion that attaches to particular types of noncriminal acts.” *Id.* (citing *U.S. v. Sokolow*, 490 U.S. 1, 10, 109 S.Ct. 1581, 1587, 104 L.Ed.2d 1 (1989) (quoting *Illinois v. Gates*, 462 U.S. 213, 243–244, n. 13, 103 S.Ct. 2317, 2335, n.13, 76 L.Ed.2d 527 (1983))).

Jointer argues the trial court committed reversible error when it failed to grant his motion to suppress because his conduct did not rise to the level

sufficient to create the reasonable, articulable suspicion necessary to conduct the frisk. We disagree.

The totality of the circumstances presented to the trial court were that Jointer: was in a high crime area particularly known for a recent spike in violent crimes marked by shootings; made furtive movements in his vehicle when made aware of the officers' presence; leapt from the vehicle as if to flee while continuing to attempt to conceal an item or items in his pockets; and exited a vehicle emanating a strong odor of burnt marijuana. These facts are supported by the record. The trial court concluded Jointer's behavior exhibited a strong inference he was under the influence of drugs, and/or was armed, and was foiled in his attempt to flee by the officers' rapid approach, making the *Terry* frisk appropriate. Given the totality of the circumstances, we discern no error in the trial court's conclusion that Jointer's behavior gave rise to the reasonable suspicion necessary to justify a *Terry* frisk. Thus, the trial court correctly denied Jointer's suppression motion.

Finally, we have examined each of Jointer's additional arguments and are unconvinced by his assertions that the officers improperly prolonged Jointer's detention or unlawfully placed him in handcuffs prior to locating any contraband. Jointer's attempts to factually distinguish this matter from the cases relied upon by the trial court are likewise unpersuasive. No further discussion of these matters is warranted.

For the foregoing reasons, the judgment and sentence of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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