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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000280-MR

LAVONTA DESHAWN SMITH — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR, JUDGE
ACTION NO. 14-CR-00643

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL, STUMBO, AND VANMETER, JUDGES.

NICKELL, JUDGE: Lavonta Deshawn Smith (Lavonta) appeals from the Fayette Circuit Court's judgment imposing concurrent sentences of five years for being a convicted felon in possession of a handgun[1] and twelve months for violation of an emergency protective order/domestic violence order (EPO/DVO),[2] for a total of

[1] Kentucky Revised Statutes (KRS) 527.040, a Class C felony.

[2] KRS 403.763, a Class A misdemeanor. Lavonta was also charged with carrying a concealed deadly weapon, another Class A misdemeanor under KRS 527.020, but this charge was dismissed.

five years. Punishment resulted from Lavonta's entry of a conditional guilty plea after the trial court denied a motion to suppress evidence seized during his detention by two police officers on a parking lot. Having reviewed the record, the briefs and the law, we affirm the judgment.

FACTS

This case pertains to an event that occurred just after midnight on May 18, 2014, in Lexington, Kentucky. Versions of the encounter, as told by Lavonta and the two Lexington police officers during a hearing in August 2014, varied.

According to Officer Tyler Smith, at midnight, he and Officer James McCullough began an off-duty assignment patrolling a Housing and Urban Development (HUD) apartment complex. The officers, in uniform, started the shift with a foot patrol of the complex grounds. As the officers crossed from one "decent[ly]" lit parking lot to another, Officer Smith saw two men standing at the end of the lot. As the officers drew closer, the two men walked away and were not seen again.

At that point, Officer Smith noticed an individual—later determined to be Lavonta—sitting alone in a parked vehicle directly facing him and Officer McCullough at a distance of twenty to twenty-five feet. When Lavonta saw the policemen, Officer Smith thought Lavonta looked shocked and began looking around, as if seeking an escape route. Officer Smith saw no one enter or exit the car, and no one attempted to speak to the lone occupant.

As Officer Smith approached the driver's side window, he smelled the odor of marijuana—a smell he was trained to recognize. Officer McCullough, who was now on the passenger side of the vehicle, indicated to his partner he also smelled marijuana. Officer Smith, a six-and-a-half-year veteran of the police force, did not recall whether the car's engine was running, nor whether its headlights were shining, but he believed the driver's side window was down.

Officer Smith asked Lavonta whether he had been smoking marijuana that day. Lavonta replied he had not, but volunteered that friends had recently smoked marijuana in the car, although he did not specify when they had done so. During the encounter, Lavonta kept his right hand on his right knee; Officer Smith did not recall the location of his left hand.

Officer Smith asked Lavonta for identification, which Lavonta produced, and then spoke with him for several minutes about his purpose for being in the area. Thinking he had probable cause to believe the car contained marijuana, Officer Smith decided to ask Lavonta to exit the vehicle so the car could be searched. As Lavonta began to exit the vehicle, Officer Smith saw a shiny object protruding from Lavonta's right front pants pocket and told Lavonta to stop and place his hands on the steering wheel. Lavonta obeyed and when asked, admitted he had something he should not have. As Lavonta put his hands on the steering wheel, Officer Smith saw the cylinder and handle of a revolver in Lavonta's pocket, removed the gun and handed it to Officer McCullough.

At some point, the car door was opened—Officer Smith did not recall how or when this occurred. Officer Smith then assisted Lavonta in exiting the car. As Officer Smith frisked[3] Lavonta for weapons, which revealed nothing more, he gave Lavonta his *Miranda*[4] rights and told him he was not under arrest. Thereafter, Lavonta admitted being a convicted felon and being subject to an active DVO[5] prohibiting him from possessing a gun. A more thorough search ensued. Neither marijuana nor drug paraphernalia was found inside the vehicle. Officer Smith then arrested Lavonta on three charges—carrying a concealed deadly weapon (because the revolver was hidden in his pants pocket); being a convicted felon in possession of a handgun; and violating a Kentucky DVO.

Officer McCullough also testified at the suppression hearing. In his account, he and Officer Smith began the shift at midnight with a foot patrol of the HUD property. Around 12:10 or 12:15 a.m., he saw a person sitting alone in a parked car. As he approached the passenger side of the vehicle, he immediately smelled marijuana and advised Officer Smith of the odor. Officer McCullough, with two years of police experience, testified he did not see a gun until Officer Smith retrieved it from inside the car and handed it to him. Officer McCullough stated he could hear Officer Smith, but he could not hear anything Lavonta said. Officer

[3] Pursuant to *Terry v. Ohio,* 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

[4] *Miranda v. Arizona*, 384 U.S. 436, 439, 86 S. Ct. 1602, 1609, 16 L. Ed. 2d 694 (1966).

[5] A Courtnet search performed by Officer Smith confirmed Lavonta was a convicted felon and a DVO was in effect against him from January 11, 2012, through January 11, 2015.

McCullough stated he was there for protection as Lavonta exited the vehicle, was handcuffed and placed on the curb. He stated Officer Smith patted-down Lavonta, secured Lavonta, ran the car's license plate and transported Lavonta to the detention center. Officer McCullough said he booked in the handgun and thought he had searched the vehicle.

On cross-examination, Officer McCullough testified he did not recall seeing anyone other than Lavonta during the encounter; he saw no one speak to Lavonta; he did not believe the car was running or its headlights shining; and, he recalled the car being a two-door model with both windows down. He did not recall whether the car had a center console. He confirmed he was beside the car when he smelled the odor of marijuana. He did not recall whether Lavonta handed Officer Smith a driver's license or merely stated his name and date of birth. He did not recall who ran the car's license plate even though he testified on direct Officer Smith had done so.

When the Commonwealth closed its proof, Lavonta testified in his own behalf. According to him, he parked on the HUD lot between 12:00 and 12:05 a.m. When he arrived, two men were three or four apartment units away, on the passenger side of the car; the two men entered an apartment. Lavonta testified he was alone, and after waiting four or five minutes for a female friend, two police officers walked up. He said on this night, as he often does, he was driving the car of a female friend named Misty. On this occasion, the engine of Misty's car was running, the lights were off and the windows were rolled up.

Lavonta testified Officer Smith approached the vehicle, told Lavonta to roll down the window and shut off the engine. In response, Lavonta cracked the window and turned off the engine. When asked for identification, Lavonta obeyed. When asked if the address on his license was valid, Lavonta responded, "Yes." When asked if he had outstanding warrants, Lavonta responded, "No, I'm a convicted felon, I served out in October," prompting Officer Smith to run Lavonta's name.

According to Lavonta, Officer McCullough asked him where his buddies (presumably the two men who disappeared into an apartment) had gone. Lavonta responded he knew no males in the complex and was waiting for a female. Officer Smith asked what was taking the female so long to appear. Lavonta stated Officer McCullough ran the license plate and returned saying the car, which bore a Missouri license plate, was "clean," but it was not registered to Misty, it was registered to her mother.

When Officer Smith asked Lavonta whether he had been smoking marijuana, he said, "No." Officer Smith then said the smell of marijuana gives police the right to search, opened the car door and asked Lavonta to exit the car. It was at that point that Officer Smith saw the handgun and took it. At some point, Officer Smith had told Lavonta he smelled marijuana. Lavonta was adamant no one besides Officers Smith and McCullough had approached the car on the parking lot and he never said friends smoked marijuana inside the car.

On cross-examination, Lavonta confirmed the handgun was tucked inside the change pocket of his pants. He also confirmed he was subject to an active DVO and knew he was not to possess a gun as a condition of the DVO.

During summation, defense counsel argued the stop and detention were unlawful. He emphasized contradictions in the proof as to whether the car windows were up or down, who searched the vehicle, and who ran the car's license plate—some of these contradictions were between Lavonta and the two officers, others between the testimony of the two officers. He also noted no physical evidence of marijuana or paraphernalia such as residue, seeds or shake was found in the car. Because no lighter was found on Lavonta or inside the car, defense counsel questioned the credibility of the police officers and whether they really smelled burning marijuana.

In contrast, the Commonwealth characterized the police testimony—other than who ran the license plate and who searched the vehicle—as entirely consistent. The prosecutor argued the lack of drug paraphernalia being found in the car supported the theory friends had recently smoked marijuana in the vehicle. The Commonwealth acknowledged it was a credibility issue, but stressed both officers had "followed the book," and Lavonta—knowing he was not to have a handgun as a convicted felon and as a specific condition of an active DVO—had strong motivation to lie.

The trial court made extensive findings of fact from the bench which were digitally recorded but not reduced to writing. The court noted this case did not

involve a classic traffic stop, but rather, upon encountering a curious situation, officers took control and directed Lavonta such that he probably did not feel free to leave or to ignore Officer Smith's commands. As a result, the court found all criteria for a stop existed.

In evaluating the proof, the trial court gave Lavonta the benefit of the doubt assuming "Misty" lived in the HUD complex and Lavonta was not trespassing. Numerous times the court mentioned trespassing on HUD property is prohibited.

Based on testimony from both officers that upon reaching the car they smelled the odor of marijuana the trial court found both had smelled marijuana inside the car. The court further found Lavonta's presence on the parking lot in a dark car at midnight, coupled with the smell of marijuana, constituted probable cause for the officers *not to arrest* Lavonta, *but to reasonably investigate* the situation. At that point, neither officer knew Lavonta was a convicted felon, subject to an active DVO, nor armed with a handgun. Under the circumstances, the court found the minor stop was based on reasonable articulable suspicion and justified since the officers were assigned to patrol the HUD property for criminal activity. The trial court further reasoned upon seeing the handgun, police had the right to seize it and ask Lavonta to exit the car. Then, upon learning Lavonta was a convicted felon and subject to an active DVO, they had the right to arrest him for carrying a concealed deadly weapon, violating a DVO, and being a convicted felon in possession of a handgun. Based on the foregoing facts and reasoning, and using

the analysis followed in *Frazier v. Commonwealth,* 406 S.W.3d 448 (Ky. 2013), the trial court concluded the stop was proper.

Trial was to occur December 1, 2014. On November 26, 2014, Lavonta changed his mind and entered a conditional guilty plea, reserving the right to challenge the trial court's denial of his suppression motion. This appeal followed.

ANALYSIS

Lavonta argues he was subjected to an unreasonable search and seizure. As a result, he challenges the trial court's denial of his motion to suppress. We disagree. While searches conducted pursuant to a warrant are preferred, not all warrantless searches are unconstitutional, only those that are unreasonable. *United States v. Rabinowitz*, 339 U.S. 56, 65-66, 70 S. Ct. 430, 435, 94 L. Ed. 653 (1950).

In reviewing a trial court's denial of a suppression motion,

> 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.

Dunn v. Commonwealth, 199 S.W.3d 775, 776 (Ky. App. 2006) (quoting *Commonwealth v. Neal,* 84 S.W.3d 920, 923 (Ky. App. 2002) (internal citations omitted)). Under the facts presented, while patrolling a HUD complex, two officers noticed a person sitting alone in a dark, parked vehicle just after midnight. Each officer smelled the odor of marijuana which both were trained to recognize. Under *Dunn*, the officers had probable cause to investigate illegal drug use inside

the car because they smelled marijuana emanating from the car. As Lavonta prepared to exit the car, Officer Smith saw what he believed was the cylinder of a handgun. He told Lavonta to stop moving and place his hands on the steering wheel, enabling Officer Smith to see the cylinder and handle of a revolver peeking out from Lavonta's right front pants pocket. In light of these facts, the stop and detention were entirely appropriate, as the trial court found.

Contrary to Lavonta's allegation, we do not believe the trial court "ignored" his testimony. "At a suppression hearing, the ability to assess the credibility of witnesses and to draw reasonable inferences from the testimony is vested in the discretion of the trial court." *Pitcock v. Commonwealth*, 295 S.W.3d 130, 132 (Ky. App. 2009) (internal citation omitted). The trial court considered all the proof, as demonstrated by its recitation of the testimony—some of which was contradictory between the officers and Lavonta, and on one point contradictory between Officer McCullough's direct and cross-examination testimony—but ultimately found the two officers were more credible, as was its prerogative. Defense counsel focused on the position of the car windows; his client testified they were up but both officers said they were down. The trial court stated it tended to believe the car windows were down—making it easier for the marijuana to be smelled—since it was May, leading to the possibility of a warm spring night. Ultimately, the trial court put little stock in whether the windows were up or down, who searched the vehicle and who ran the license plate. The salient facts found by the trial court

being supported by substantial proof, they are conclusive and will not be disturbed on appeal. *Dunn.*

In reviewing *de novo* the trial court's application of the law to the facts, we are convinced the odor of marijuana wafting from the car gave officers probable cause to search both Lavonta and the vehicle. *Dunn,* 199 S.W.3d at 777 (citing *People v. Stout,* 106 Ill.2d 77, 87 Ill.Dec. 521, 477 N.E.2d 498, 503 (1985)). As Lavonta prepared to exit the vehicle so it could be searched, Officer Smith saw what he believed to be the cylinder of a revolver in Lavonta's pants pocket. When Lavonta placed his hands on the steering wheel, as directed, Officer Smith saw and removed the revolver from Lavonta's pocket. Thus, the weapon was discovered through a series of events that began with the smell of marijuana emanating from a car. Each subsequent event determined the next police response, and each of those responses was reasonable under the circumstances.

We are confident the trial court correctly applied the law to the facts. Therefore, the judgment of the Fayette Circuit Court is AFFIRMED.

ALL CONCUR.

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