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Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000122-MR

USEF MILLINER — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 98-CR-000724

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: HUDDLESTON, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Appellant, Usef Milliner, appeals from his conviction of possession of a controlled substance with a firearm, possession of marijuana with a firearm, and loitering, pursuant to a conditional guilty plea reserving the right to appeal the trial court's denial of a suppression motion. Having determined that the stop and pat-down search of appellant and subsequent seizure of evidence was constitutionally valid, we affirm.

Testimony from Louisville police officers Elvis Colbert (Officer Colbert) and Dominic Fearen (Officer Fearen) at suppression hearings revealed the following facts. On

January 16, 1998 at approximately 6 p.m., Officer Colbert, while patrolling in his police cruiser, observed appellant and three other individuals standing in front of a grocery store in the 1000 block of South 32nd Street in Louisville, Kentucky, engaged in what appeared to him to be a drug transaction. Officer Colbert pulled closer, and saw one of the individuals start to hand money to appellant. As appellant reached out to take the money, he became aware of the police cruiser, pushed the man with the money out of the way, and took off running. Officer Colbert testified that he did not chase after appellant because he knew who appellant was, having arrested him before, and knew appellant frequented the area. Officer Colbert told the other three men to leave the area. Officer Colbert testified that he radioed his partner, Officer Fearen, who was also patrolling in the vicinity, advised him of what he had seen, described appellant, and told Officer Fearen to stop appellant if he saw him.

Officer Colbert testified that about 20 to 30 minutes later, he saw appellant emerge from the same grocery store, get on a bicycle, and start riding northbound down 32nd Street. Officer Colbert testified that he radioed Officer Fearen, who was just up the street heading southbound, to stop appellant. Officer Fearen did not testify as to this radio transmission, but testified that approximately 20 minutes after the first radio call regarding the suspected drug transaction, he saw a man matching appellant's description coming southbound on 32nd Street towards him on a bike. Officer Fearen testified that he got out of his police car, and as appellant approached he told appellant

to "come here", simultaneously grabbing appellant so he could not get away. Appellant did not resist or try to flee. Officer Fearen radioed Officer Colbert that he had appellant. Officer Fearen testified that appellant was wearing gloves, and that he saw something white in plastic in appellant's hand. Officer Fearen testified that he wasn't certain what it was, but, based on the information he had received from Officer Colbert, he thought it could be crack cocaine. Officer Fearen told appellant to get up against the police car and drop what was in his hand. Appellant got up against the car, but would not unclench his fist. At that point Officer Colbert arrived. Officer Colbert testified that he grabbed appellant's wrist, which was on the windshield of the car, and saw something white fall out of appellant's hand onto the windshield which he thought was crack cocaine. Officer Colbert testified that he then said something to the effect that appellant had some crack cocaine, after which appellant opened his hand and the rest of the crack cocaine fell out. Officer Fearen then conducted a pat-down search, discovering a handgun and a bag of marijuana. Both officers testified that, prior to the pat-down, they had no reason to believe that appellant had a gun. Officer Fearen testified that he conducts pat-down searches of everyone he stops.

On March 18, 1998, appellant was indicted by the Jefferson County Grand Jury on one count of trafficking in a controlled substance first degree (cocaine) while in possession of a firearm; trafficking in marijuana (less than eight ounces) while in possession of a firearm; carrying a concealed deadly

weapon; and loitering. On April 28, 1998, appellant filed a motion to suppress the items seized during the warrantless search and seizure of January 16, 1998. The court held evidentiary hearings on the motion on May 27, 1998 and November 18, 1998. On February 15, 1999, the court entered an order denying the motion. On October 8, 1999, appellant entered a conditional guilty plea to possession of a controlled substance with firearm, possession of marijuana with firearm, and loitering, reserving the right to appeal the court's denial of the motion to suppress. This appeal followed.

On appeal, appellant argues that the evidence seized in the pat-down search should have been suppressed, as the search violated the Fourth Amendment of the United States Constitution and Section 10 of the Kentucky Constitution. The Kentucky Supreme Court has held that the Kentucky Constitution affords individuals the same protections from unreasonable searches and seizures as the United States Constitution. See Crayton v. Commonwealth, Ky., 846 S.W.2d 684 (1992).

A trial court's findings of fact pursuant to a motion to suppress and a hearing thereon are conclusive if they are supported by substantial evidence. RCr 9.78; Davis v. Commonwealth, Ky., 795 S.W.2d 942 (1990). In Ornelas-Ledesma v. United States, 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996), the United States Supreme Court enunciated a new standard of appellate court review of a trial court's suppression rulings on investigative stops and warrantless searches. Richardson v. Commonwealth, Ky. App., 975 S.W.2d 932, 934 (1998). The Court

rejected a "clear error" or "abuse of discretion" standard, stating:

> [A]s a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal. Having said this, we hasten to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.

Richardson, 975 S.W.2d at 934, quoting Ornelas, 517 U.S. at 699, 116 S. Ct. at 1663.

Appellant argues that both the investigatory stop and subsequent pat-down search were invalid under the principles of Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). We shall first address the issue of the investigatory stop by Officer Fearen. Under the standard set forth in Terry, the police can conduct an investigatory stop of an individual if they have a reasonable and articulable suspicion that the person is engaged in criminal activity. Whether there is a reasonable and articulable suspicion is a question of fact which must be determined in each situation from the totality of the circumstances. United States v. Cortez, 449 U.S. 411, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981).

Officer Colbert and Officer Fearen were patrolling in a neighborhood known for drug activity. While appellant's presence in a high drug trafficking area, standing alone, is not sufficient for an investigatory stop, the fact that a location is a high crime area is a relevant factor which may be considered in a Terry analysis. Illinois v. Wardlow, 528 U.S. 119, 120 S. Ct.

673, 676, 145 L. Ed. 2d 570, 576 (2000); Simpson v. Commonwealth, Ky. App., 834 S.W.2d 686, 687-88 (1992). Officer Colbert, who had been a Louisville police officer for five years, testified that he observed appellant standing with three other individuals, engaged in what appeared to him to be a drug transaction. Appellant contends that this conduct - standing with a group of people in front of a grocery store and being handed money by another person - was insufficient to support a reasonable belief that he was engaging in criminal activity. However, as did Officer Colbert, a police officer "may draw inferences of illegal activity from facts that may appear innocuous to a layman." Richardson, 975 S.W.2d at 934, citing Ornelas, 517 U.S. 690, 116 S. Ct. 1657. "Reviewing courts should give due weight to the trial court's assessment of the officer's credibility and the reasonableness of the inference." Id.

Upon seeing Officer Colbert's police cruiser, appellant fled. In Illinois v. Wardlow, 528 U.S. 119, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000), the United States Supreme Court considered the constitutionality of a Terry stop, involving a similar fact situation. In Wardlow, police officers patrolling in an area known for heavy drug trafficking noticed the respondent, Wardlow, standing next to a building holding an opaque bag. Upon seeing the officers, Wardlow fled. Two officers caught up with him, and conducted a pat-down search of Wardlow and his bag. In finding that Wardlow's conduct gave rise to a reasonable articulable suspicion of criminal activity justifying a Terry stop, the Court stated:

> [I]t was not merely respondent's presence in an area of heavy narcotics trafficking that aroused the officers' suspicion, but his unprovoked flight upon noticing the police. Our cases have also recognized that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion. [Citations omitted.] Headlong flight — wherever it occurs — is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such. . . .
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> [I]n Florida v. Royer, 460 U.S. 491, 75 L. Ed. 2d 229, 103 S. Ct. 1319 (1983), [] we held that when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business. Id. at 498. And any "refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." Florida v. Bostick, 501 U.S. 429, 437, 15 L. Ed. 2d 389, 111 S. Ct. 2382 (1991). But unprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature is not "going about one's business"; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning.

Wardlow, 120 S. Ct. at 676, 145 L. Ed. 2d at 577. The aforementioned factors - high drug trafficking area, suspected drug transaction attempt, and flight - considered as a whole, supported a reasonable suspicion by Officer Colbert that appellant was engaging in criminal activity in front of the grocery store. Hence, Officer Colbert, as well his partner Officer Fearen to whom he had relayed the information, were justified in making an investigatory stop when spotting appellant a short time later.

Having determined that the investigatory stop was proper, we must next determine if the pat-down search was proper as well. A police officer, for his protection, may conduct a reasonable search for weapons "where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." Terry v. Ohio, 392 U.S. at 27, 88 S. Ct. at 1883. Appellant argues that there were no specific and articulable facts from which either officer could have concluded that appellant was armed and dangerous, particularly in light of both officers' testimony that neither one of them believed he was armed. However, Terry does not require that the officer be absolutely certain that an individual is armed before conducting a pat-down search for weapons. Id. "[T]he issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." Id.; see also, Docksteader v. Commonwealth, Ky. App., 802 S.W.2d 149, 150 (1991). This Court has observed that "narcotics investigations are fraught with dangers", and police officers have a right and duty to check suspects for weapons to protect themselves and others. Johantgen v. Commonwealth, Ky. App., 571 S.W.2d 110, 112 (1978). Officer Colbert witnessed appellant engaging in what he believed was a drug transaction and appellant fled upon becoming aware of the police car. The area was high crime, and Officer Fearen saw what he believed was a bag of crack cocaine in appellant's hand. Accordingly, we cannot say that it was unreasonable for the officers to assume that appellant was

involved in illegal drug activity and to conduct a pat-down search for their protection. Id.; see also Docksteader, 802 S.W.2d 149. (Terry pat-down search can be appropriate even where individual suspected of committing a non-violent misdemeanor offense.) "[I]f while conducting a legitimate pat-down of a stopped individual within Terry, the officer discovers contraband other than weapons, he should not be required to ignore it, and the Fourth Amendment does not require its suppression. (citations omitted.)" Dunn v. Commonwealth, Ky. App., 689 S.W.2d 23, 27 (1984); see also Commonwealth v. Crowder, 884 S.W.2d 649 (1994). With regard to Officer Fearen's testimony that he pats down every individual he stops, we agree with the trial court that this is inappropriate, however, under the circumstances of this case, the pat-down of appellant was constitutionally permissible.

Additionally, we believe that the officers had probable cause to conduct a search of appellant's person when Officer Fearen saw appellant holding what he reasonably believed was a plastic bag of crack cocaine. In Texas v. Brown, 460 U.S. 730, 742, 103 S. Ct. 1535, 1543, 75 L. Ed. 2d 502 (1983), the Supreme Court stated:

> [P]robable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would "warrant a man of reasonable caution in the belief," [citation omitted] that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such belief be correct or more likely true than false. A "practical, nontechnical" probability that incriminating evidence is involved is all that is required. [citation omitted].

The facts available to Officer Fearen - high drug trafficking area, and the suspected drug transaction and flight relayed by Officer Colbert - combined with Officer Fearen's direct observation of what appeared to be crack cocaine in appellant's hand, warranted such a reasonable belief that appellant possessed crack cocaine.

For the foregoing reasons, we conclude that the stop, search and seizure were proper, and thus, the trial court did not err in denying appellant's motion to suppress. The judgment of the Jefferson Circuit court is affirmed.

ALL CONCUR.

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