RENDERED: MAY 18, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002541-MR

GREGORY KENT MASON — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 99-CR-00334

COMMONWEALTH OF KENTUCKY — APPELLEE

AND

NO. 1999-CA-002637-MR

COMMONWEALTH OF KENTUCKY — CROSS-APPELLANT

v.

CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 99-CR-00334

GREGORY KENT MASON — CROSS-APPELLEE

OPINION

AFFIRMING IN APPEAL NO. 1999-CA-002541-MR
DISMISSING IN CROSS-APPEAL NO. 1999-CA-002637-MR
** ** ** ** **

BEFORE: GUIDUGLI, KNOPF, AND SCHRODER, JUDGES.

KNOPF, JUDGE: By judgment entered September 28, 1999, the Fayette Circuit Court convicted Gregory Kent Mason of first-degree possession of a controlled substance[1] and sentenced him to one year in prison. The judgment confirmed a jury verdict finding Mason guilty of having had in his possession several rocks of "crack" cocaine folded inside a ten-dollar bill. In appeal number 1999-CA-002541-MR, Mason concedes that he possessed the cocaine, but contends that it should not have been allowed into evidence at his trial because the security guards who seized it did so illegally. Persuaded that the trial court did not err by refusing to suppress the cocaine evidence, we affirm its judgment.

The Commonwealth has also appealed from the judgment convicting Mason. In appeal number 1999-CA-002637-MR, it challenges the trial court's disallowance, during jury selection, of one of its peremptory strikes of a potential juror. Because our affirmance of Mason's conviction renders the Commonwealth's appeal moot, we dismiss that appeal.

It is not seriously disputed that between 1:30 and 2:00 o'clock on the morning of January 16, 1999, Mason and a companion drove to the Villa Green Apartments on Hollow Creek Road in Lexington. They went there to purchase cocaine. While his companion waited in the car, Mason entered one of the apartments. A very few minutes later, as he was making his way back to his car, two off-duty Lexington-Fayette County detention facility

[1]KRS 218A.1415.

officers working as security guards for the apartment complex pulled up in their car, got out, and asked what he was doing.

From this point, the parties' accounts of the incident differ. At the hearing on Mason's motion to suppress the cocaine evidence, both officers testified that Mason had appeared unsteady on his feet and nervous. They had identified themselves, they claimed, and had shown Mason their badges, but he had ignored their demand that he stop and their requests for his name and for the name of the resident he had visited. Instead, he continued moving toward his companion, who had gotten out of their car and was standing next to it. The officers moved to intercept him. As they got closer, they saw that he seemed to be clutching something in his right hand and was glancing about as though in search of a place to leave or throw it. The officers reached Mason's companion at just about the same time Mason did. They saw Mason hand her whatever it was he carried, and one of them immediately took it from her. It proved to be a ten-dollar bill and a one-dollar bill, the ten-dollar bill folded into a sort of packet. Mason's companion had also seemed unsteady on her feet, and when the officers had come within touching distance of her and Mason, they could smell alcohol emanating from them both.

By this time, Mason had told the officers his name and had placed his wallet on the car, but he and his companion both refused to say why they were there. Thereupon, the officers had arrested them for third-degree trespassing and alcohol intoxication. At about the same time, the officer who had

confiscated the ten-dollar bill had unfolded it and had discovered what seemed and later proved to be several pieces of "crack" cocaine.

Mason did not testify at the suppression hearing, but he argued that the warrantless seizure of the cocaine had been unlawful because the officers lacked sufficient justification either to stop or to search him and his companion. It should have been apparent to the officers, he maintained, that he and his companion were not trespassing. He had just emerged from one of the apartments and thus had clearly been visiting one of the residents. The arrests, moreover, had followed the seizure of the ten-dollar bill and so could not provide an after-the-fact justification for it.

In response, the Commonwealth argued that Mason had, in effect, abandoned the packet of cocaine when he had handed it to his companion and that he lacked standing to complain of any alleged violation of his companion's rights. There had been no violation, moreover, because the officers had had probable cause to arrest both suspects, and the search that produced the cocaine was a lawful incident of those arrests. By way of reply, Mason defended his standing by insisting that the officers had taken the cocaine from him, either in fact by intercepting it before it reached his companion, or constructively by, in essence, having her hand it to them from him. Denying the motion to suppress, the trial court agreed with both of the Commonwealth's arguments. It found that Mason had passed the cocaine to his companion and lacked standing to complain of its being taken from her. And, in

any event, as long as the search and seizure were genuinely incident to a lawful arrest, as here they were, they were reasonable and therefore lawful regardless of whether they occurred just before the arrest or just after. It is from this ruling that Mason has appealed.

Under the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution, a police officer's warrantless detention and search of an individual is presumptively unlawful. Owing to the exigencies and dangers of police work, however, courts have recognized exceptions to this rule and have deemed certain searches and seizures reasonable and therefore constitutional even in the absence of a warrant.[2] One such exception to the warrant requirement is the rule that a police officer may arrest one who commits a misdemeanor in his presence and may, incident to that arrest, search the individual's person to remove potential weapons and to preserve evidence of crime.[3] In determining whether a particular arrest and search come within this rule, reviewing courts are to consider the totality of the circumstances presented to the officer, including the officer's training and experience, and are to ask whether, given those circumstances and reasonable inferences from them, a prudent, reasonable, cautious officer would have believed it more likely than not that the arrestee had committed a misdemeanor in the

[2]Cook v. Commonwealth, Ky., 826 S.W.2d 329 (1992).

[3]Mash v. Commonwealth, Ky., 769 S.W.2d 42; Commonwealth v. Wood, Ky. App., 14 S.W.3d 557 (1999).

officer's presence.[4] Although this Court defers to the trial court's properly supported factual findings on this question, and gives due weight to the trial court's reasonable inferences based on those findings, nevertheless, "'[a]s a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal.'"[5]

Did the trial court correctly determine that the officers had probable cause to believe that Mason and his companion committed a misdemeanor in their presence? We believe that it did. Before addressing this question, however, we shall note that the other ground urged in support of the trial court's decision is less clear. It is true, as the Commonwealth observes, that "[a] warrantless search or seizure of property that has been 'abandoned' does not violate the fourth amendment."[6] Abandonment in this context refers not so much to property-law notions as to the relinquishment of one's reasonable expectation of privacy in the place or the object.[7] Some courts have held, however, that, where an illegal stop or detention both precedes and induces the "abandonment," the constitutional right

---

[4]Mash v. Commonwealth, *supra,* United States v. Davis, 458 F.2d 819 (D.C. Cir. 1972).

[5]Richardson v. Commonwealth, Ky. App., 975 S.W.2d 932, 934 (1998) (quoting from Ornelas v. United States, 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996)).

[6]United States v. Thomas, 864 F.2d 843, 845 (D.C. Cir. 1989).

[7]Rawlings v. Kentucky, 448 U.S. 98, 65 L. Ed. 2d 633, 100 S. Ct. 2556 (1980); United States v. Thomas, *supra.*

is implicated.[8] Because it is arguable, at least, that the officers stopped Mason prior to the abandonment and that the stop induced him to abandon the money-wrapped cocaine, we are reluctant to say that he lacks standing to challenge the legality of that stop. We need not resolve these issues, however, for even if the trial court erred in its ruling on standing, we agree with it that the officers lawfully arrested Mason and lawfully discovered and seized the cocaine incident to the arrest.

As noted above, according to the officers, Mason and his companion refused to tell them why they were on the apartment's premises at about 2:00 in the morning or whom they were visiting. The officers, both of whom had worked at the complex for several years, recognized neither Mason nor his companion. They testified that burglary and drug dealing were rife in the complex and that the apartment's management had posted "no trespassing" signs at all the entrances. It was reasonable under these circumstances, we believe, for the officers to stop Mason and ask him to explain why he was on the apartment's grounds. His refusal to comply gave them probable cause to believe that he was trespassing in their presence. This conclusion is not altered by the fact that Mason had just emerged from an apartment, inasmuch as it was entirely possible for Mason to have been in the apartment without the occupant's knowledge or approval.

---

[8] Hollinger v. State of Florida, 620 So. 2d 1242 (Fla. 1993); State of Connecticut v. Oquendo, 613 A. 2d 1300 (Conn. 1992).

The officers also had probable cause to believe that Mason was, in their presence, intoxicated in a public place contrary to KRS 222.202.[9] They both testified that his unsteady walking and his demeanor had plainly told them that he was intoxicated even before they got close enough to him to smell the strong scent of alcohol. One of the officers testified that he would not have considered allowing either Mason or his companion to drive. On either of these grounds, therefore, the officers were authorized to arrest Mason as he was handing off the cocaine.

The fact that the officer seized the cocaine moments before the arrest does not change the result. Where probable cause for the arrest existed prior to the search and the search followed quickly on the heels of the arrest, it is not "particularly important that the search preceded the arrest rather than vice versa."[10]

In sum, we agree with the trial court that the discovery and seizure of the cocaine in Mason's possession were incidents of a lawful arrest and thus did not violate the constitutional prohibition against warrantless searches. The trial court did not err, therefore, by refusing to suppress the evidence of that possession. Accordingly, in appeal number 1999-CA-002541-MR, we affirm the trial court's September 28, 1999,

---

[9]KRS 222.020 condemns, in pertinent part, manifest public alcohol intoxication that renders one a danger either to oneself, to others, or to property.

[10]Rawlings v. Kentucky, 448 U.S. at 111, 65 L. Ed. 2d at 646, 100 S. Ct. at 2564; Richardson v. Commonwealth, *supra.*

judgment, and in appeal number 1999-CA-002637-MR, we dismiss the appeal as moot.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-APPELLEE:

H. Wayne Roberts
Lexington, Kentucky

BRIEF FOR APPELLEE/CROSS-APPELLANT:

A. B. Chandler, III
Attorney General of Kentucky

Joseph T. Bouvier
Special Assistant Attorney General
Lexington, Kentucky