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Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000918-MR

JEFF BELL — APPELLANT

v.

APPEAL FROM SIMPSON CIRCUIT COURT
HONORABLE WILLIAM R. HARRIS, JUDGE
ACTION NO. 00-CR-00017

COMMONWEALTH OF KENTUCKY — APPELLEE

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

BEFORE: BUCKINGHAM, COMBS, and SCHRODER, Judges.

COMBS, JUDGE: Jeff Bell appeals from a jury verdict convicting him of first-degree possession of a controlled substance and of being a second-degree persistent felony offender. Bell contends that the search which lead to the discovery of a rock of crack cocaine in his sock was illegal and that the trial court erred in denying his motion to suppress the evidence at trial. We believe that the search was authorized and that the seizure of the contraband was warranted. Therefore, we affirm.

On January 31, 2000, the Simpson County Grand Jury indicted Bell for first-degree possession of a controlled substance, second or subsequent offense (KRS 218A.1415), and for

being a first-degree persistent felony offender (KRS 532.080). The indictment was based on an allegation that on August 21, 1999, Bell was found to be in possession of a quantity of crack cocaine.

On March 9, 2000, Bell filed a motion to suppress in order to prevent the Commonwealth from introducing the crack cocaine at trial, contending that it was discovered as a result of an illegal search. A suppression hearing was held on March 13, 2000, and the trial court denied the motion to suppress. The trial followed on March 16, 2000. Bell renewed his motion to suppress prior to the commencement of the trial and again at the conclusion of the presentation of the Commonwealth's evidence. The trial court denied both motions. A jury found Bell guilty of first-degree possession of a controlled substance and of being a second-degree persistent felony offender, recommending a sentence of nine-years' imprisonment.

On March 23, 2000, Bell filed motions for judgment notwithstanding the verdict or, in the alternative, for a new trial. The motions once again raised the suppression issue. On March 30, 2000, the trial court entered an order denying both of Bell's motions and pronounced judgment and sentence pursuant to the jury's verdict and sentencing recommendation. This appeal followed.

At the suppression hearing of March 13, 2000, the arresting officer, Franklin Police Department Officer Eddie Lawson, was called as a witness by the Commonwealth. He testified that at approximately 6:30 p.m. on August 21, 1999, he

observed a pickup truck making a wide turn and suspected that the driver might have been under the influence of alcohol. Lawson stopped the vehicle. The driver of the vehicle was Rockie Amburgey; appellant Bell was sitting next to the passenger window, and an unidentified female was sitting between Amburgey and Bell.

Following the stop, Lawson asked Amburgey to exit the vehicle and administered a series of sobriety tests, which Amburgey failed. Some time after the stop, Deputy Sheriff Mark Spitzer of the Simpson County Sheriff's Department arrived at the scene as back-up for Lawson. For about ten minutes, Lawson was occupied with booking Amburgey for driving under the influence. He did not observe the activities of Spitzer, Bell, or the female during this interval. Following his arrest of Amburgey, Lawson recalled that a fellow police officer had informed him that Amburgey had been in an argument recently and that he might be carrying a gun -- information which had impressed Lawson enough that he had made note of it at the time in his log. He searched Amburgey, but did not find a weapon.

Having completed his arrest of Amburgey, Lawson turned his attention to the other two passengers in the vehicle. Mindful of the report that Amburgey was carrying a gun but not having found a gun on Amburgey's person, Lawson conducted a patdown search of Bell as a precaution against the possibility that Amburgey might have slipped the gun to Bell. Lawson did not conduct a precautionary patdown of the female, however, believing that Deputy Spitzer had already done so.

Bell was wearing short pants and athletic socks. While patting down the top of Bell's athletic socks, Lawson felt an object which he recognized as crack cocaine. He testified that he was immediately able to tell that the substance was crack cocaine because during his four years as a police officer, he had made between ten and twenty arrests involving the discovery of crack in a suspect's sock. Lawson arrested Bell for possession of the controlled substance (.37 grams of crack cocaine).

At the conclusion of the suppression hearing and after the trial court had denied the motion to suppress, Bell raised as a discovery issue the Commonwealth's failure to disclose the name of the unknown female passenger. Since trial was scheduled for three days later, in order to avoid the possibility of a continuance because of this new issue, the trial court ordered that Deputy Spitzer be located for questioning regarding the identity of the female. When Spitzer appeared, Bell asked to question him concerning issues relating to the search of Bell and the seizure of crack cocaine. The trial court permitted the questioning of Spitzer.

Deputy Spitzer testified that he had arrived within a very short time after the stop. While Lawson was attending to Amburgey, Spitzer asked Bell and the female to exit the pickup truck. Spitzer stated that he did not search the female and that he did not tell Lawson that he had done so. Spitzer further testified that he had briefly patted the pockets of Bell's short pants, but he did not tell Lawson that he had done so.

When Lawson was called to testify at trial, defense counsel sought to impeach his testimony from the suppression hearing as to the number of arrests he had made involving the discovery of crack cocaine in a suspect's sock. In the course of cross-examination of Lawson, defense counsel stated that he had searched the case files of Simpson District Court and Simpson Circuit Court for cases in which Lawson had been involved and that he could find no cases in which Lawson had made an arrest involving the discovery of cocaine in a suspect's sock. While Lawson maintained that he had made such arrests, he could not provide any specific details. Defense counsel recounted that his search of the records disclosed a total of only eight crack cocaine arrests in which Lawson had been involved during his four-year career as a police officer. Lawson conceded that he would not dispute the validity of that number. According to the representations of defense counsel, none of Lawson's eight crack cocaine arrests involved the presence of the drug in the socks of any of the suspects.

At trial, Deputy Spitzer testified that he had briefly patted down the unknown female's front pants pockets -- an inconsistency with his testimony at the suppression hearing. Spitzer referred to his brief search of Bell and the female as a Terry stop patdown search.[1]

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[1]In its brief, the Commonwealth contends that the proper scope of review of the suppression issue is the evidence that was presented at the suppression hearing and that evidence adduced subsequent to the hearing should not be considered. We disagree since Bell renewed his motion to suppress prior to the beginning of the trial and again at the conclusion of the presentation of

(continued...)

Bell contends that the trial court erred in refusing to suppress the use of the crack cocaine as evidence on the basis that the search underlying its discovery was conducted in violation of Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Specifically, Bell contends that Officer Lawson had no reason to suspect that he was armed; that Lawson's information that Amburgey had a gun was unreliable; that Lawson's failure to search the female as well was inconsistent with his suspicion that Amburgey may have passed the gun to one of the passengers; and that since Deputy Spitzer had already searched Bell, Lawson was not authorized to conduct a second search.

While Bell does not challenge Lawson's initial traffic stop, he does attack the validity of Lawson's patdown search following that stop. At the suppression hearing and at trial, Lawson testified that his purpose for searching Bell was dictated by concern for the safety of himself and others in the area based upon his belief that Bell may have been in possession of a firearm.

> When a reasonably prudent police officer believes that his safety or that of others is in danger he may make a reasonable search for weapons of the person believed by him to be armed and dangerous, regardless of whether he has probable cause to arrest the individual or not.

Phillips v. Commonwealth, Ky., 473 S.W.2d 135, 138 (1971) (citing Terry, supra). "This is true even though the officer is not absolutely certain that the individual is armed." Id. However,

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[1](...continued)
the Commonwealth's evidence.

"a mere apprehension for personal safety, and the opportunity such provides for pretext, is insufficient to create an exception to the warrant requirement." Commonwealth v. Johnson, Ky., 777 S.W.2d 876, 880 (1989).

In order to justify the type of safety search at issue here, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry, 392 U.S. at 21, 88 S.Ct. at 1880. Judicial review of the officer's conduct should assess the facts according to the objective standard of whether "the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate[.]" Id. at 21-22, 88 S.Ct. at 1880. (Citations omitted.) Inarticulate hunches and simple good faith on the part of the officer are not enough:

> [I]n determining whether the officer acted reasonably [under the] circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.

Id.

The uncontradicted testimony at the suppression hearing was that Officer Lawson had been previously informed by a fellow police officer that Amburgey was thought to be carrying a weapon. This information apparently had been circulated throughout the police department, and Officer Lawson so heeded the warning that he recorded it in his log. Thus, his suspicion that Amburgey

might have a weapon was not an inchoate and unparticularized suspicion or hunch. Following his stop and arrest of Amburgey, Lawson searched him and did not find a weapon. Bell had been in the same vehicle with Amburgey just moments before. We agree that a reasonably prudent police officer was justified in believing that his safety — or that of others — would have been jeopardized if a search of Bell had not been conducted. Under the circumstances, Officer Lawson was indeed warranted in his belief that a patdown of Bell was necessary. "[A] car passenger . . . will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrong doing." Wyoming v. Houghton, 526 U.S. 295, 119 S.Ct. 1297, 1302, 143 L.Ed.2d 408 (1999).

Bell also argues that Officer Lawson's failure to search the female passenger somehow taints the legality of his search of Bell. Lawson testified at the suppression hearing that he did not search the female because he believed that Deputy Spitzer had done. It is true that Spitzer's suppression hearing testimony and trial testimony were conflicting on whether the female was searched. However, we cannot agree that this peripheral issue -- regardless of the inconsistency -- in any way affects the validity of the search of Bell.

Bell argues that Spitzer's brief patdown of Bell's pants pockets transformed Lawson's later patdown into an illegal search and that Terry did not authorize serial searches. However, at the suppression hearing, Lawson testified that he was unaware of any search of Bell by Spitzer, and Bell produced no

evidence to the contrary. The trial court made a finding, which was supported by Lawson's uncontradicted testimony, that Lawson was unaware of the previous, abbreviated patdown by Spitzer. We find no error on this issue.

Bell next contends that even if it had been proper for Lawson to conduct a patdown search for a weapon, he was unjustified in searching Bell's athletic socks. Bell was wearing short pants, the socks were lying flat against his legs, it was daylight, and plain view should have revealed that Bell did not have a weapon concealed in his socks.

Like any other search, a search for weapons in the absence of probable cause is strictly circumscribed by the exigencies arguably justifying its initiation. Terry v. Ohio, supra, 392 U.S. at 25-26, 88 S.Ct. at 1882. [citation omitted]. "Thus it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby[.]" Id. (Emphasis added.) If the protective search goes beyond the scope of what is necessary to determine if the suspect is armed, it ceases to be valid under Terry, and its fruits will be suppressed. Sibron v. New York, 392 U.S. 40, 64-66, 88 S.Ct. 1889, 1903-1904, 20 L.Ed.2d 917 (1968) and Waugh v. Commonwealth, Ky. App., 605 S.W.2d 43 (1980).

Police officers perform patdown searches as a routine part of their duties. A patdown would typically include a search "of the prisoner's arms and armpits, waistline and back, the groin area . . ., and [the] entire surface of the legs down to the feet." Terry v. Ohio, supra, 792 U.S. at 17, 88 S.Ct. at

1877, n 13 (quoting Priar & Martin, Searching and Disarming Criminals, J.Crim.L.C. & P.S. 481 (1954)). Thus, pursuant to Terry, a search of the ankle area is an accepted part of the patdown technique. We do not agree that Lawson exceeded the legitimate scope of what his discretion and experience dictated in searching the sock/ankle area in this case.

Finally, Bell contends that the seized cocaine should have been suppressed because Lawson's lack of professional experience revealed in his testimony establishes that he could not have immediately recognized the substance he detected in the sock as crack cocaine pursuant to the plain feel doctrine:

> [A] narrowly drawn exception to the warrant requirement is appropriate when: (1) the requirements of Terry are otherwise complied with; and (2) the nonthreatening contraband is *immediately apparent* from the sense of touch." Commonwealth v. Crowder, Ky., 884 S.W.2d 649, 651 (1994), (quoting Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130, 1237, 124 L.Ed.2d 334 (1993)).

If contraband is discovered during a "patdown," its warrantless seizure would be justified by the same practical considerations inherent in the plain view doctrine. Id. If the nonthreatening contraband is immediately apparent from the sense of touch during an otherwise lawful patdown, an officer should not be required to ignore it. Id. (citing Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed. 1201 (1983).

Officer Lawson testified that when he felt the foreign substance in Bell's sock, he immediately recognized it as crack cocaine and was "positive" that it was crack cocaine. Lawson testified that he based his conclusion on his four years as a

police officer, prior arrests that he had made involving crack cocaine, his experience in knowing how crack cocaine feels, and the commonly known fact that crack cocaine users frequently conceal the drug in their socks.

The trial court specifically found that Lawson had the requisite experience to recognize the substance in Bell's sock as crack cocaine by plain feel while performing the patdown. When a pretrial suppression hearing is held to determine the admissibility of evidence obtained during a warrantless search, the trial court's findings of fact are conclusive if they are supported by substantial evidence. RCr 9.78; Canler v. Commonwealth, Ky., 870 S.W.2d 219 (1994). We agree that Lawson's uncontradicted testimony of his recognition of crack cocaine under these circumstances was substantial evidence to support the trial court's finding. We find no error.

There was a discrepancy between Lawson's testimony at trial and at the suppression hearing as to the total number of crack cocaine arrests he had made — and as to the number of arrests in which it had been hidden in a sock. However, Lawson did have four years of experience as a police officer, had been the arresting officer in at least eight crack cocaine arrests, and had been involved in other arrests as a backup officer. We find no error in the finding of the trial court that Lawson had sufficient training and experience to have been able to recognize crack cocaine by plain feel.

In summary, we find no error in the refusal of the trial court to suppress the use of the evidence at trial. We therefore affirm the judgment of the Simpson Circuit Court.

ALL CONCUR.

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