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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002188-MR

ADAM JASHIENSKI — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 01-CR-00106

COMMONWEALTH OF KENTUCKY — APPELLEE

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

BEFORE: COMBS, GUIDUGLI, and SCHRODER, Judges.

COMBS, JUDGE: Adam Jashienski appeals the judgment of the Christian Circuit Court convicting him of possession of cocaine, possession of marijuana, and disorderly conduct. Jashienski entered a conditional guilty plea to these offenses pursuant to RCr[1] 8.09 after the trial court denied his motion to suppress evidence seized at the time of his arrest. The appellant contends that the evidence underlying his conviction should have been suppressed as it was obtained during an unlawful stop and arrest. We disagree and affirm.

[1]Kentucky Rules of Criminal Procedure.

At approximately 2:25 p.m. on January 13, 2001, Officer Robert Schneider of the Hopkinsville Police Department was on a routine patrol in the vicinity of a liquor store located in a high-crime area of Hopkinsville. He observed Jashienski, a young white male, talking to a group of older black men. Officer Schneider testified that this was the first time in the five years he had been patrolling this area that he had seen a white person in that particular vicinity. He suspected that Jashienski either was attempting to obtain alcohol from the older men or was involved in a drug transaction. Upon becoming aware of the presence of the police, Jashienski turned his back to the officer and faced the group of men. By the time Officer Schneider turned his vehicle around and returned to where the men were congregating, Jashienski had left. He asked the men for the direction Jashienski had taken.

When Officer Schneider caught up with Jashienski, he was walking down the street talking on a cell phone. He asked Jashienski to stop and to take his right hand out of his pocket. Jashienski terminated his phone conversation, but he refused to take his hand out of his coat pocket. Officer Schneider attempted to frisk Jashienski "for his own safety," but Jashienski pushed his hands away. As he stepped toward Jashienski, Jashienski correspondingly moved backward, thereby keeping a distance between them. Motorists driving by noticed the incident, and the officer then arrested Jashienski for disorderly conduct. A search incident to that arrest revealed a plastic bag containing both marijuana and cocaine.

The Christian Circuit Court held a suppression hearing at which Officer Schneider testified. The Commonwealth argued that the officer's encounter with Jashienski was a lawful investigative stop pursuant to reasonable suspicion that Jashienski was engaged in criminal activity. Jashienski pointed out that he was merely walking down the street talking on a cell phone in the middle of the day. He argued that Officer Schneider could not reasonably have suspected him of any criminal activity and contended that he was the subject of racial profiling.

Based on Officer Schneider's description of Jashienski's behavior, the trial court denied the motion to suppress the evidence and found that he was loitering. In its overview of the totality of the circumstances, the court concluded that Officer Schneider's suspicion of Jashienski was sufficiently particularized and objective to justify the initial investigative stop and the officer's subsequent attempts to question him. Jashienski then entered a conditional guilty plea and reserved for our review the issue of the legality of the warrantless search and seizure. He was sentenced to serve four years in prison; the sentence was ordered to run consecutively to a felony conviction in Tennessee.

The merits of this case involve the application of the principles set forth in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the seminal case on the implications of the Fourth Amendment with respect to warrantless stops. In Terry, the Supreme Court recognized that police officers may make investigatory stops when their experience indicates that

specific, articulable facts (and any reasonable inferences to be drawn from those facts) have created a reasonable suspicion that criminal activity is afoot. Id. 392 U.S. at 16, 88 S.Ct. at 1877. See also, Commonwealth v. Banks, Ky., 68 S.W.3d 347 (2001). As this is a question of law, our review is *de novo*. Thus, our task is to analyze whether the seizure was justified under Terry and its progeny while giving due deference to the court's findings of fact.

> With regard to the factual findings of the trial court "clearly erroneous" is the standard of review for an appeal of an order denying suppression. However, the ultimate legal question of whether there was reasonable suspicion to stop or probable cause to search is reviewed de novo. Ornelas v. United States, 517 U.S. 690, 691, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996).

Banks, 68 S.W.3d at 349.

Jashienski first contends that the court's finding that he was loitering is not supported by the evidence. He points out that he was not were arrested for loitering. Further, he argues that the officer's testimony establishes that the officer did not observe him for a sufficient period of time to prove that he was loitering. While we agree that Jashienski could not have been convicted of loitering under the facts presented at the suppression hearing, our real inquiry is whether Officer Schneider could reasonably infer from the circumstances that Jashienski was engaging in an illegal activity:

> [T]he test for a *Terry* stop and frisk is not whether an officer can conclude that an individual is engaging in criminal activity, but rather whether the officer can articulate reasonable facts to suspect that criminal activity may be afoot and that the suspect

> may be armed and dangerous. The totality of the circumstances must be evaluated to determine the probability of criminal conduct, rather than the certainty. As the Supreme Court held in United States v. Sokolow, 490 U.S. 1, 7, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989), the level of articulable suspicion necessary to justify a stop is considerably less than proof of wrongdoing by preponderance of the evidence. (Emphasis added.) Id. at 350-351. (Citations omitted).

Jashienski directs our attention to Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979), a case he describes as "similar" and "factually on point." In that case, the Supreme Court held that:

> the fact that the defendant "was in a neighborhood frequented by drug dealers, standing alone, is not a basis for concluding that [the defendant] himself was engaged in criminal conduct.

Id. 443 U.S. at 52. While *Brown* holds that one's location in a high crime neighborhood is not enough to create a reasonable suspicion to conduct a *Terry* search, it is nonetheless a legitimate and relevant factor that can be taken into consideration "in deciding whether an officer can conduct a Terry stop." See, Banks, at 350, citing Illinois v. Wardlow, 528 U.S. 199, 124, 120 S.Ct. 673, 676, 145 L.Ed.2d 570 (2001).

We believe that the case before us is distinguishable from *Brown* in that Officer Schneider articulated specific reasons for being suspicious of Jashienski besides the mere fact of the neighborhood in which he had been observed. The officer testified that there was a group of men — including Jashienski — who appeared to be loitering near a liquor store in an area of

town commonly known for loitering. It was an area where the officer had made several drug-related arrests. In addition, the officer noticed that Jashienski was considerably younger than the remaining members of the group; that he was in a neighborhood rarely frequented by other members of his race; that Jashienski turned his back when he realized he was being watched by a police officer; that he left the scene immediately after realizing that police were the area; and that when approached by the officer, Jashienski refused to remove his hand from his pocket and otherwise attempted to evade the officer. We agree that when taken all together, these facts and circumstances relied on by Officer Schneider were sufficient to give rise to a reasonable suspicion that Jashienski might have been engaging in criminal activity. See also, Simpson v. Commonwealth, Ky.App., 834 S.W.2d 686 (1992).

Jashienski also argues that the officer's surveillance of him constituted improper racial profiling. In support of this argument, Jashienski cites an unpublished employment law case and KRS[2] 15A.195, which was enacted after his arrest. The statute prohibits the detention or search "of any person when such an action is solely motivated by consideration of race." (Emphasis added.) While it is obvious from the testimony at the hearing that the officer's suspicions were at least partly aroused because of Jashienski's race, the appellant fails to indicate how his Fourth Amendment rights were implicated. See, Whren v.

[2]Kentucky Revised Statutes.

United States, 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996), where the Supreme Court analyzed this issue as follows:

> We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.

See also, Wilson v. Commonwealth, Ky., 37 S.W.3d 745 (2001).

Finally, Jashienski argues that there was no evidence at the suppression hearing that Officer Schneider had reason to believe that he was armed or dangerous. He points to Officer Schneider's testimony that it was his practice to frisk all persons whom he stops for investigative purposes -- a practice Jashienski characterizes as a "flagrant offense to the standards outlined by *Terry*." Officer Schneider testified that he sought to frisk Jashienski for his own safety and for Jashienski's safety. The officer admitted that it was his practice to pat down all persons in such situations as he did not know who was armed and who was not. We are not convinced that Jashienski's rights have been violated.

> Once a stop is made, in order to frisk for weapons, what is required is that the officer's observations lead him reasonably to conclude that the person with whom he is dealing may be armed and dangerous. See Terry v. Ohio, 88 S.Ct. At 1883. In some cases the right to frisk for weapons will follow automatically from the circumstances, such as where the stop is for suspicion of a violent crime.

Although Officer Schneider did not suspect him of having committed a violent crime, Jashienski surely aroused a higher

level of suspicion or fear by refusing to remove his hand from his pocket. We agree with the Commonwealth that this refusal constituted sufficiently threatening behavior to justify the officer's decision to frisk for weapons.

For the foregoing reasons, the judgment of the Christian Circuit Court is affirmed.

GUIDUGLI, JUDGE, CONCURS.

SCHRODER, JUDGE, DISSENTS.

BRIEF FOR APPELLANT:

Misty J. Dugger
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

Gregory C. Fuchs
Assistant Attorney General
Frankfort, Kentucky