

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2001-CA-002189-MR

HAROLD A. RAYBURN, JR.

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE LAURANCE VANMETER, JUDGE  
ACTION NO. 01-CR-00185

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, DYCHE, AND KNOPF, JUDGES.

KNOPF, JUDGE: In February 2001, a Fayette County grand jury indicted Harold A. Rayburn, Jr. for four offenses including possession of a handgun by a convicted felon.<sup>1</sup> When the Fayette Circuit Court refused to suppress the handgun evidence, Rayburn pled guilty to the possession offense but reserved the right to challenge the trial court's suppression ruling on appeal. On September 13, 2001, the trial court entered a final judgment sentencing Rayburn as a second-degree persistent-felony offender to ten years in prison. We are asked to decide whether the trial

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<sup>1</sup>KRS 527.040(2).

court erred when it determined that the police officers who discovered the handgun did not violate Rayburn's rights under the Fourth Amendment to the United States Constitution and Section Ten of the Kentucky Constitution. We agree with the trial court that they did not.

At the suppression hearing, there was evidence that at approximately 1:30 in the morning on January 3, 2001, Rayburn was walking along Red Mile Road in Lexington toward and not far from Harrodsburg Road. Patches of ice and slush marred the walkway, and Rayburn was veering back and forth to avoid them. A patrolling Lexington police officer noticed Rayburn's erratic course, thought that Rayburn might be intoxicated, and so stopped to question him. Among other routine questions, such as his destination at that hour of the morning, the officer asked Rayburn to identify himself. When Rayburn told him that he had been issued but was not carrying a state identification card in the name of Bruce Bennett, the officer radioed a request for confirmation that such a card existed. During the three-to-five-minute delay to process the officer's request, two other officers arrived on the scene. One of them mentioned that Rayburn matched the description of a suspect in a shooting incident that had occurred two nights earlier about two blocks away. About the same time, the first officer learned that there was no record of a "Bruce Bennett" identification card. His suspicions thus somewhat aroused and wanting to question Rayburn about the shooting incident, that officer next advised Rayburn that he was going to search him--"frisk" him--for weapons. As he approached

Rayburn to do so, however, Rayburn bolted. The officers quickly overtook him, and he explained that he had run because he was carrying a small quantity of marijuana. Thereupon, the officers arrested him. In the search of Rayburn's person incident to the arrest, they discovered a twenty-two caliber handgun.

Rayburn correctly notes that warrantless investigatory stops and frisks are unconstitutional unless the investigating officer can point to objective facts that led him or her reasonably to suspect that the person stopped had been or was about to be involved in a crime or that the person frisked was presently armed and dangerous.<sup>2</sup> He is also correct in noting that an investigatory stop is to last no longer and is to be no more invasive than necessary to permit the officer to verify or dispel the suspicion giving rise to it.<sup>3</sup> Rayburn contends that the handgun evidence should have been suppressed in this case because the detention leading to its discovery was excessive--extending beyond the officer's determination that Rayburn was not intoxicated--and because there was no reason for the officers to believe that he was armed and dangerous and thus no grounds for them to frisk him. We disagree with both contentions.

In the first place, we do not agree that the officer detained Rayburn when he first approached and questioned him. Officers do not violate either the state or federal constitution by approaching an individual on the street, asking him to

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<sup>2</sup>Commonwealth v. Banks, Ky., 68 S.W.3d 347 (2001); Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968).

<sup>3</sup>Commonwealth v. Fox, Ky., 48 S.W.3d 24 (2001); Florida v. Royer, 460 U.S. 491, 75 L. Ed. 2d 229, 103 S. Ct. 1319 (1983); United States v. Mesa, 62 F.3d 159 (6<sup>th</sup> Cir. 1995).

identify himself, and "putting questions to him if the person is willing to listen."<sup>4</sup> That the officer thought Rayburn might be intoxicated--that is, that the officer had grounds for an investigatory stop--did not convert his initial approach into a detention. A detention occurs, rather, only when, by an exercise of force or by some show of authority, the officer restrains the subject's liberty.<sup>5</sup> Although we do not doubt that Rayburn felt nervous about having attracted the officers' attention, that attention was at first limited to routine questioning devoid of any assertion of authority. Not until the officer told Rayburn that he intended to frisk him and question him about the shooting incident was there an indication that Rayburn's liberty had been restrained. Until that point, therefore, there was no detention, much less an illegal detention.

Nor do we agree with Rayburn that the officer lacked grounds to frisk him. In connection with the shooting incident of two days before, the police sought a white male, thin to medium build, in his late teens or early twenties, wearing a blue hooded sweatshirt and light-colored pants. Rayburn, a thin, white male in his early twenties, was wearing a blue hooded sweatshirt and white pants. Although the description of the suspect was fairly general, it was not stale only two days after the incident, as Rayburn asserts. The fact that Rayburn matched each point of the description and his presence close to where the

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<sup>4</sup>Florida v. Royer, *supra*, 460 U.S. at 497, 75 L. Ed. 2d at 236; Baker v. Commonwealth, Ky., 5 S.W.3d 142 (1999).

<sup>5</sup>Florida v. Royer, *supra*; Baker v. Commonwealth, *supra*.

shooting occurred created a reasonable suspicion that he might have been involved in the shooting and so justified the officer's determination to question him about it. Because the incident involved a shooting, furthermore, the officer was clearly justified in believing that Rayburn might be armed and dangerous. The decision to frisk prior to questioning, therefore, was reasonable.

Rayburn concedes that his attempted flight justified the more forcible detention that followed, and that his marijuana possession justified his arrest and the search that produced the handgun. Because we agree with the trial court that the officers did not violate Rayburn's constitutional rights prior to his flight, we concur in its decision not to suppress the handgun evidence. Accordingly, we affirm the September 13, 2001, judgment of the Fayette Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Alicia A. Sneed  
Lexington, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III  
Attorney General

Dennis W. Shepherd  
Assistant Attorney General  
Frankfort, Kentucky