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Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001774-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 01-CR-002251

RONALD D. MARR — APPELLEE

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

BEFORE: BAKER, GUIDUGLI, AND KNOPF, JUDGES.

KNOPF, JUDGE: On September 26, 2001, a Jefferson County grand jury returned an indictment charging Ronald D. Marr with one count each of manufacturing methamphetamine while in possession of a firearm,[1] trafficking in a controlled substance (methamphetamine) in the first degree, while in possession of a

[1] KRS 218A.1432, 218A.992, a class A felony.

firearm,[2] possession of drug paraphernalia while in possession of a firearm,[3] and possession of a controlled substance (marijuana), while in possession of a firearm.[4] Thereafter, Marr moved to suppress all evidence seized as a result of a pat-down search of his person and a subsequent consensual search of his residence. Following a hearing, the trial court granted the motion, finding that the police officer did not have a reasonable suspicion sufficient to warrant a pat-down search, and that Marr's subsequent consent to the search of his residence was not voluntary. The Commonwealth now brings an interlocutory appeal from this order. Finding that the trial court properly granted the motion to suppress, we affirm.

On July 31, 2001, the trial court conducted a hearing on Marr's motion to suppress. Officer Steven Bailey of the Jefferson County Police Department was the only witness to testify at the hearing. According to Officer Bailey, on April 25, 2001, another officer had received information that methamphetamine was being sold out of an auto-body shop located at 7675 Dixie Highway in Jefferson County. The informant described the seller as an older, white, "biker-type" male.

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[2] KRS 218A.1412, KRS 218A.992, a class B felony.

[3] KRS 218A.500, 218A.992, a class D felony.

[4] KRS 218A.1422, KRS 218A.992, a class D felony.

Officer Bailey and several other police officers conducted surveillance on the building located at that address. They observed a number of vehicles coming and going from the business during a short period of time. Officer Bailey stated that, in his experience, this pattern was consistent with drug trafficking. Officer Bailey further testified that he and the other officers stopped several of the vehicles leaving the body shop. During one of the stops, an officer found two pounds of marijuana in a vehicle. However, Officer Bailey conceded that this marijuana was not related to the suspected drug trafficking at the body shop.

After further surveillance, the officers decided to go into the business and speak to the owner. Officer Bailey testified that the owner acted "surprised", "fidgety" and "nervous." Officer Bailey testified that he heard noise coming from another room, and he asked the owner if there was anyone else in the building. The owner replied "no", but kept looking at the area from where the noise had come.

Finally, Officer Bailey went over to the other room and called for the person to come out. Officer Bailey testified that an older, white, bearded, "biker-looking" male, later identified as Marr, came out. Officer Bailey stated that Marr appeared to be nervous and his voice cracked when he spoke to the officers. Officer Bailey testified that, based on the

suspicions of drug trafficking and the other circumstances, he decided to perform a pat-down search of Marr to check for weapons. Officer Bailey testified that, during the pat-down, he felt two baggies, two plastic tubes and a large amount of cash in Marr's pants pocket. Based on his prior experience and the circumstances, Officer Bailey suspected that the baggies contained methamphetamine and that the plastic tubes were "hitters", which are used to ingest drugs. After conducting the search, Officer Bailey asked Marr what was in his pockets. Marr did not respond to the question. At that, Officer Bailey reached into Marr's pocket and removed two large baggies containing methamphetamine, two plastic "hitters", and $4,150.00 in cash.

Following the seizure of this evidence, Officer Bailey asked Marr if he had anything else at his residence, to which Marr replied that he did not. Officer Bailey then asked Marr if he could search his residence, and Marr verbally agreed. Thereupon, Officer Bailey drove to Marr's residence, where Marr executed a written consent to the search.[5]

[5] Officer Bailey did not testify about the results of the search of Marr's residence. However, his arrest report states that in the course of that search, the police officers found several more baggies of methamphetamine, along with marijuana, electronic scales, several handguns, and materials related to the manufacture of methamphetamine.

At the conclusion of Officer Bailey's testimony, Marr's counsel argued that the police lacked any reasonable, articulable suspicion to justify the initial pat-down search of Marr. In the alternative, Marr argued that Officer Bailey exceeded the reasonable scope of the pat-down search. The court recessed the hearing until the next day to allow Marr's counsel to brief the issues.

When the trial court reconvened, the court and parties reviewed the testimony of Officer Bailey. The trial judge then stated that he was inclined to grant Marr's motion to suppress. The court found that none of the information available to Officer Bailey at the time was sufficient to give rise to a "reasonable, articulable suspicion" that Marr was engaged in criminal activity to justify the pat-down. Consequently, the court ordered that the evidence seized as a result of the pat-down search must be suppressed. On Marr's motion, the court extended its ruling to include any evidence seized from the residence, finding that the improper pat-down search vitiated Marr's consent to the search of his residence. On August 6, 2002, the trial court entered an order granting the motion to suppress based on its oral findings at the August 1 hearing. The Commonwealth now appeals from that order.[6]

[6] The Commonwealth's appeal from this ruling is designated as interlocutory pursuant to RCr 12.04 and KRS 22A.020(4). Two

RCr 9.78 sets out the procedure for conducting suppression hearings and establishes the standard of appellate review of the determination of the trial court. Our standard of review of a circuit court's decision on a suppression motion following a hearing is twofold: First, the factual findings of the court are conclusive if they are supported by substantial evidence; and second, this Court conducts a *de novo* review to determine whether the trial court's decision is correct as a matter of law.[7] In this case, the evidence introduced by the Commonwealth was uncontroverted. Therefore, we must assume that those were the facts upon which the trial court based its order. Thus, our task is to decide whether the trial court properly applied the rule of law to the established facts.[8]

The Fourth Amendment of the United States Constitution guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[9] In Terry v. Ohio,[10] the United States

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days after the Commonwealth filed its notice of appeal, the trial court entered an order dismissing the indictment without prejudice. However, this appeal is from the trial court's August 6, 2002, order.

[7] Adcock v. Commonwealth, Ky., 967 S.W.2d 6, 8 (1998).

[8] Id. (*citing* Ornelas v. United States, 517 U.S. 690, 697, 134 L. Ed. 2d 911, 919, 116 S. Ct. 1657 (1996)).

[9] U.S. Const. amend. IV.

Supreme Court recognized an exception to the warrant requirement by sanctioning both investigatory stops and limited pat-down searches of suspects. When there is a reasonable suspicion that criminal activity is afoot, a police officer may briefly detain an individual on the street, even though there is no probable cause to arrest him.[11]

Terry also held that "[w]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others," the officer may conduct a pat-down search "to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm."[12] Frisking a suspect during a Terry stop is strictly limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby.[13] Furthermore, in Ybarra v. Illinois,[14] the United States Supreme Court cautioned that the narrow scope of the Terry exception does not permit a frisk for weapons on less than reasonable belief or suspicion

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[10] 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968).

[11] Id. at 30-31, 20 L. Ed. 2d at 911.

[12] Id. at 24, 20 L. Ed. 2d at 908.

[13] Commonwealth v. Crowder, Ky., 884 S.W.2d 649 (1994), *citing* Terry, *supra*.

[14] 444 U.S. 85, 62 L. Ed. 2d 238, 100 S. Ct. 338 (1979).

directed at the person to be frisked, even though that person happens to be on premises where an authorized narcotics search is taking place. "Nothing in Terry can be understood to allow a generalized 'cursory search for weapons' or indeed, any search whatever for anything but weapons."[15]

The Fourth Amendment requires some minimum level of objective justification for the officer's actions measured in light of the totality of the circumstances.[16] When considering the totality of the circumstances, a reviewing court should take care not to view the factors upon which police officers rely to create reasonable suspicion in isolation. Rather, courts must consider all of the officer's observations, and give due weight to inferences and deductions drawn by trained law enforcement officers.[17] The 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

[15] Id. at 93-94, 62 L. Ed. 2d at 247.

[16] *See* United States v. Sokolow, 490 U.S. 1, 104 L. Ed. 2d 1, 109 S. Ct. 1581 (1989); Eldred v. Commonwealth, Ky., 906 S.W.2d 694 (1994).

[17] United States v. Arvizu, 534 U.S. 266, 272-75, 151 L. Ed. 2d 740, 749-51, 122 S. Ct. 744 (2002). *See also* United States v. Martin, 289 F.3d 392, 398 (6th Cir., 2002).

reasonable facts to suspect that criminal activity may be afoot and that the suspect may be armed and dangerous.[18]

The trial court compared the facts of the present case to those presented in Florida v. J.L.[19] In that case, the police received information from an anonymous telephone caller that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun. Upon arriving at the bus stop, the police saw three black males "'just hanging out [there]'."[20] When the police frisked J.L., who was a juvenile and was wearing a plaid shirt, they discovered a handgun in his pocket. J.L. was charged with carrying a concealed firearm without a license and possessing a firearm while under the age of 18. Subsequently, the trial court granted J.L.'s motion to suppress the gun as the fruit of an unlawful search in violation of the Fourth Amendment, and the Florida Supreme Court affirmed the trial court.

In agreeing with the state court, the United States Supreme Court reaffirmed its decision in Alabama v. White,[21] and

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[18] Commonwealth v. Banks, Ky., 68 S.W.3d 347, 351 (2001) (*citing* Terry v. Ohio, 392 U.S. at 30, 20 L. Ed. 2d at 911).

[19] 529 U.S. 266, 146 L. Ed. 2d 254, 120 S. Ct. 1375 (2000).

[20] Id. at 268, 146 L. Ed. 2d at 259.

[21] 496 U.S. 325, 110 L. Ed. 2d 301, 110 S. Ct. 2412 (1990). In Alabama v. White, the Supreme Court discussed the standards applicable to establishing reasonable articulable suspicion with

distinguished the situation in J.L. based on the facts. The Court relied in large part on the predictive aspects of the information, rather than a particular physical description of the suspect, as a major element in facilitating corroboration by the police and creating "'sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop.'"[22] The Court stated:

> The tip in the instant case lacked the moderate indicia of reliability present in White and essential to the Court's decision in that case. The anonymous call concerning J.L. provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility. That the allegation about the

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respect to an anonymous telephone tip. The Court held that even when an unverified tip would have been insufficient to establish probable cause for an arrest or search warrant, where the information supplied carries sufficient "indicia of reliability," it would support a forcible investigatory stop under Terry. Id. at 328, 110 L. Ed. 2d at 307. The Court held that the "totality of the circumstances" approach adopted in Illinois v. Gates, 462 U.S. 213, 76 L.Ed.2d 527, 103 S. Ct. 2317 (1983), applied to the reasonable-suspicion analysis for an anonymous tip. "Reasonable suspicion ... is dependent upon both the content of information possessed by police and its degree of reliability." Alabama v. White, 496 U.S. at 330, 110 L. Ed. 2d at 309. The information must be viewed based on the personal observation and independent investigation of the police that would tend to corroborate significant, but not necessarily all, of the facts supplied by the informant. Another important factor involves whether the information contains facts and conditions as to future actions of third parties ordinarily not easily predicted. Id. at 332, 110 L. Ed. 2d at 310.

[22] Florida v. J.L., 529 U.S. at 270, 146 L. Ed. 2d at 260 (*quoting* Alabama v. White, 496 U.S. at 327, 110 L. Ed. 2d at 301).

> gun turned out to be correct does not suggest that the officers, prior to the frisks, had a reasonable basis for suspecting J.L. of engaging in unlawful conduct: The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search. All the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J.L. If White was a close case on the reliability of anonymous tips, this one surely falls on the other side of the line.[23]

The facts of the present case present a very close question regarding whether Officer Bailey had a reasonable and articulable suspicion to justify a pat-down search of Marr. Furthermore, at the suppression hearing, Marr's counsel primarily focused on the argument that Officer Bailey's seizure of the drugs, paraphernalia, and money exceeded the scope of a valid Terry pat-down. Consequently, Officer Bailey failed to testify about certain matters which would be relevant to determining the validity of the Terry stop. There was no evidence regarding the identity or reliability of the initial informant, whether the informant gave any predictive information about Marr's conduct, whether evidence seized from any of the vehicles which were stopped after leaving the body shop corroborated the information that drug activity was being

[23] Id., 529 U.S. at 271, 146 L. Ed. 2d at 260-61.

conducted in the body shop, or whether any evidence seized from the owner of the body shop would have implicated Marr in the suspected drug trafficking.

Nevertheless, Marr did challenge the sufficiency of the Terry pat-down, and the Commonwealth bore the burden of proving the justification for a warrantless search and seizure. Moreover, our review is confined to the evidence of record. Even when the circumstances are considered in their entirety, the evidence did not establish that Officer Bailey had a reasonable and articulable suspicion to justify the pat-down search of Marr.

The trial court found that, as was the case in Florida v. J.L., there was no evidence concerning the source of the original tip or the reliability of the informant. The informant's tip merely advised the police that someone who matched Marr's description would be at the scene. The informant provided no predictive information about his conduct, nor did the police surveillance corroborate the tip that Marr was trafficking in methamphetamine.

Furthermore, there was no evidence that the body shop was located in a high-crime area. While the surveillance did raise a legitimate suspicion of drug activity at the body shop, none of the surveillance corroborated the information that Marr was involved in the trafficking. In addition, Officer Bailey

admitted that the marijuana seized from one of the vehicles leaving the body shop was not connected to this investigation.

The events occurring inside the body-shop were no more conclusive. Although the owner lied about Marr's presence in the building, his denial of Marr's presence in the building did not directly implicate Marr. Indeed, Marr made no attempt to hide from the officers. Furthermore, there was no evidence, even from the unidentified informant, that Marr possessed a weapon. Thus, all that remained was Marr's resemblance to the very general description given by the informant, his presence at the scene of suspected drug activity, and Officer Bailey's perception of Marr's nervousness.

We agree with the trial court that these circumstances were insufficient to justify the pat-down search of Marr. Marr's presence in an area of expected criminal activity, standing alone, was not a sufficient basis for an investigatory stop.[24] And while an individual's nervousness or suspicious behavior can contribute to the establishment of an articulable suspicion,[25] Marr's nervousness alone was not sufficient to

[24] Simpson v. Commonwealth, Ky. App., 834 S.W.2d 686 (1992); Illinois v. Wardlow, 528 U.S. 119, 124, 145 L. Ed. 2d 570, 576, 120 S. Ct. 673 (2000).

[25] Simpson, 834 S.W.2d at 688. *See also* Arvizu, holding that a pattern of suspicious behavior may justify a reasonable inference that criminal activity is afoot. 534 U.S. at 27-28, 151 L. Ed. 2d 751-52.

create a reasonable inference that he was involved in criminal activity. Consequently, the trial court properly granted Marr's motion to suppress the evidence seized as a result of that search. Furthermore, because Marr's consent to the search of his residence flowed from the initial search of his person, the trial court properly granted his motion to suppress that evidence as well.

Accordingly, the August 6, 2002, order of the Jefferson Circuit Court is affirmed.

GUIDUGLI, JUDGE, CONCURS.

BAKER, JUDGE, DISSENTS.

BAKER, JUDGE, DISSENTING: Respectfully, I dissent. I perceive a clear distinction between the facts presented in the matter before the Court and those in Florida v. J.L., 529 U.S. 266, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000), upon which the majority relies.

In the matter before us, the arresting officer testified that he had received information that methamphetamine was being sold at a body shop at a specific location on Dixie Highway in Jefferson County. Not only did the officer know the location, he was also provided a description of the seller which matched Marr. In order to further his investigation, police officers conducted surveillance and observed people coming and going to the business and making short stays. One of the

persons leaving the business was pulled over and was found to be in possession of approximately two pounds of marijuana.

The police determined to speak to the owner of the body shop and identified themselves as being on a narcotics investigation. During this conversation, the officers heard a noise in the back of the business and specifically asked the owner if anyone else was on the premises. The owner informed the officers that there was not, and there is no question that the owner was lying in his response. By the officers' observation, the owner was acting very nervous, kept looking in the area from where the noise had come, and obviously lied about another person not being on the premises.

The officers directed the person who was in hiding in the back to come out, and Marr did so. By the officers' observation, Marr both appeared and sounded nervous when he spoke to the officers. Because the officers had reason to believe that illegal drugs were being sold from the business, the officers feared that Marr may be armed, and they conducted a pat-down search. They found drugs and drug paraphernalia, as well as a large amount of cash in this pat-down search.

By comparison, Marr relies upon Florida v. J.L., 529 U.S. 266, a case in which the facts demonstrated that the police received an anonymous tip that a young black male, wearing a plaid shirt, was armed and standing at a certain bus stop. The

police went to the bus stop and found a man matching that description. They conducted a pat-down search and retrieved a gun.

Each case involving a suppression hearing certainly must be decided on its own facts. I respectfully believe, however, that in the matter before the Court, the police officers had ample evidence to conduct the pat-down search which was in issue. Not only did they know the specific location of the alleged criminal activity along with a description of Marr, they also were specifically aware that one of the patrons to this location possessed a large amount of illegal drugs. From their own observations, they were able to detect nervous and suspicious behavior and caught, first hand, the owner of the premises in an obvious lie regarding Marr's presence on the property.

Considering the totality of the circumstances, I am of the opinion that the police possessed a reasonable suspicion that Marr was involved in criminal activity and was presently armed and dangerous. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Specifically, the informant's tip that methamphetamine was being sold at the body shop by someone matching Marr's description, the officers' surveillance of the body shop, and the Marr's suspicious behavior at the body shop together created a reasonable suspicion that Marr was, indeed,

involved in the sale of methamphetamine. Additionally, it is well-known that "narcotics investigations are fraught with dangers . . . ." Johantgen v. Commonwealth, Ky. App., 571 S.W.2d 110, 112 (1978). Our Court has previously recognized that "in some cases, the right to frisk for weapons will follow automatically from the circumstances, such as where the stop is for suspicion for a violent crime." Collier v. Commonwealth, Ky. App., 713 S.W.2d 827, 828 (1986). Similarly, the right to frisk for weapons should be automatic when the suspect is stopped upon a reasonable suspicion of trafficking in narcotics. Id. In sum, I would hold the Terry stop and frisk proper.

While the arresting officer did have a reasonable suspicion justifying the stop and frisk of Marr, an issue remains upon whether the police exceeded the **scope** of a Terry frisk by seizing contraband from Marr's person. It is well-established that an officer may properly seize contraband during a Terry frisk if such contraband is readily identifiable or immediately apparent. See Minnesota v. Dickerson, 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993). The record illustrates that the circuit court did not reach the issue of whether the police exceeded the scope of a Terry frisk. Thus, I would remand to the circuit court for a finding upon whether the police exceeded the scope of a Terry frisk.

The circuit court also suppressed evidence seized from a search of Marr's residence. Because the trial court held that the Terry stop and frisk was not based upon a reasonable suspicion, the circuit court concluded that Marr's consent to search his home was tainted and that the evidence seized therefrom should be excluded under the "fruit of the poisonous tree" doctrine. As I view the stop and frisk valid, I would, likewise, hold the ensuing consent and search of Marr's residence valid and constitutional.

Therefore, I dissent and would hold that (1) the officer had a reasonable suspicion that Marr was involved in criminal activity and was presently armed and dangerous; (2) the stop and frisk of Marr was, therefore, proper under the circumstances; (3) this matter should be remanded for further findings by the circuit court regarding the scope of the Terry frisk; and (4) the consent and search of Marr's home was proper.

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