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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000271-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN O'MALLEY SHAKE, JUDGE
NO. 02-CR-001056

WILLIAM W. JACKSON — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: KNOPF, PAISLEY,[1] AND TACKETT, JUDGES.

KNOPF, JUDGE. This is an interlocutory appeal from an opinion and order of the Jefferson Circuit Court granting the motion of William W. Jackson to suppress evidence on the grounds that it was the fruit of an unlawful search. Because we agree with the Commonwealth that there was no "seizure" triggering the protections of the Fourth Amendment and that, consequently, the

[1] Judge Paisley voted in this matter prior to his retirement effective December 1, 2003.

circuit court erred when it analyzed the incident under the Terry v. Ohio "stop and frisk" exception to the warrant requirement,[2] we reverse the suppression order of the Circuit Court.

On the afternoon of September 10, 2001, Officer Ryan Scanlon saw Jackson standing on a sidewalk in a courtyard of the Beecher Terrace Housing Complex, an area known for drug trafficking activity and posted as no trespassing. Scanlon, a five-year veteran of the Louisville Police Department, testified that once Jackson saw Scanlon, who was driving slowly with another officer in a marked vehicle, he did a "double-take" and began walking in the opposite direction from the police car. Jackson had walked approximately twenty feet before Scanlon pulled the car next to Jackson in a maintenance roadway of the housing complex. Scanlon got out of the car, approached Jackson and asked him whether he had anything on him that could get him into trouble. Scanlon testified that this was a standard question used by police officers to determine whether an individual had a weapon. Jackson replied "No." Scanlon then asked Jackson for permission to search his person. Jackson consented and placed his hands on the police car. During the

[2] In Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the United States Supreme Court held that a brief investigative stop, detention and frisk for weapons based on reasonable suspicion does not violate the Fourth Amendment.

pat-down search, Scanlon felt something in Jackson's pocket, removed it and believed it to be a baggie of cocaine. Scanlon did not recover a weapon from Jackson. Scanlon then arrested Jackson and placed him in handcuffs.

Jackson testified that he had just left his own car and was walking through the housing complex to greet a friend when Scanlon stopped him. Jackson also stated that he did not recall Scanlon asking for permission to search him.

> Our standard of review of a decision of the circuit court on a suppression motion following a hearing is twofold. First, the factual findings of the circuit court are conclusive if they are supported by substantial evidence. Second, when the findings of fact are supported by substantial evidence, the question then becomes whether the rule of law as applied to the established facts is violated.[3]

The circuit court's findings of fact are amply supported by the testimonial evidence offered at the suppression hearing, and the parties themselves do not dispute what took place. The question therefore is whether the trial court employed the correct standard in its analysis of these facts, and whether that standard was properly applied.

In its opinion, the circuit court proceeded on the assumption that Jackson was seized when Scanlon stopped to talk

[3] Commonwealth v. Whitmore, Ky., 92 S.W.3d 76, 79 (2002)(citing RCr 9.78; Canler v. Commonwealth, Ky., 870 S.W.2d 219 (1994); Adcock v. Commonwealth, Ky., 967 S.W.2d 6 (1998)).

to him, and consequently ruled that reasonable suspicion had not existed to justify a Terry stop and frisk. In the Commonwealth's view, however, there was no seizure prior to the arrest and the search was permissible because Jackson had voluntarily consented to it.

The United States Supreme Court has defined a "seizure" within the meaning of the Fourth Amendment in the following manner. "[A] person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards."[4] Moreover, "a person has been 'seized' . . . only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[5] Some factors that may be considered in making the latter determination include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."[6]

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[4] United States v. Mendenhall, 446 U.S. 544, 553, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980).

[5] Id. at 554.

[6] Id.

The Supreme Court has also cautioned that "[l]aw enforcement officers do not violate the Fourth Amendment's prohibition against unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen."[7]

These standards have been applied by the Kentucky Supreme Court in two cases which are factually similar to the one presently before us. In Baker v. Commonwealth,[8] two police officers on patrol late at night in a high crime area observed Baker standing on a corner conversing with a known prostitute. One of the officers approached Baker and asked him to remove his hands from the pockets of his baggy pants. Baker refused to do so and the officer then ordered him to remove his hands from his pockets. Analyzing this set of circumstances, the Kentucky Supreme Court ruled that the officer's first request to Baker to remove his hands from his pockets was clearly not a seizure, because Baker was not under suspicion at that time, and the request was merely a safety precaution.[9]

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[7] United States v. Drayton, 536 U.S. 194, 201, 122 S.Ct. 2105, 153 L.Ed.2d 242 (2002); see also Florida v. Royer, 460 U.S. 491, 497, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983).

[8] Baker v. Commonwealth, Ky., 5 S.W.3d 142 (1999).

[9] Id. at 145.

In Commonwealth v. Banks,[10] two police officers on foot patrol in a high crime area observed Banks walking towards them through the front yard of an apartment building. The officers did not recognize Banks as one of the apartment complex residents. When Banks saw the police, he stopped, quickly put his hands in his pockets, turned, and then began to walk away from the officers. After taking a few steps, he stopped again and appeared startled. One of the officers approached Banks, and noticed a bulge in his pocket. The officer asked Banks to remove his hands from his pockets. Banks did so, but the bulge remained in his pocket. The officer conducted a pat-down search and found a crack pipe.

The Supreme Court held that "the seizure of [Banks] did not occur when [the officer] requested him to remove his hands from his pockets, since the request was merely a safety precaution. If [Banks] had not agreed to remove his hands from his pockets and the officer had ordered that [he] remove his hands, there would have been a seizure. Consequently, the seizure of [Banks] did not occur until [the officer] frisked him."[11] The Kentucky Supreme Court also commented that "[p]olice officers are free to approach anyone in public areas for any

[10] Commonwealth v. Banks, Ky., 68 S.W.3d 347 (2001).
[11] Id. at 350.

reason. Officers are entitled to the same freedom of movement that the rest of society enjoys."[12]

Under the holdings of these cases in which the fact patterns so closely mirror those before us, we conclude that Jackson was not "seized" when Scanlon asked him whether he had anything on him that could get him into trouble.

Jackson has argued that the location of the encounter in a high-crime area, and the nature of the police officer's comments, meant that no reasonable person would expect to be free to go his own way. Jackson also maintains that the marked police vehicle was the "ultimate" show of authority, and that his immediate submission to the request for a search indicates that he was subjected to a show of force.

As the United States Supreme Court has stated, however, the reasonable person test is objective and "presupposes an *innocent* person."[13] There is no indication that the presence of a marked police vehicle in a high-crime area would exercise a coercive influence on a reasonable person. Jackson's personal reaction does not prove that he was subjected to physical force or a show of authority such that he was compelled to remain. There were only two officers present. Scanlon did not raise his voice or threaten Jackson, and the

[12] Id.
[13] Florida v. Bostick, 501 U.S. 429, 437-38, 11 S.Ct. 2382, 115 L.Ed.2d 389 (1991).

encounter took place in broad daylight. If Scanlon's conduct was coercive and intimidating, it is puzzling that Jackson's testimony at the suppression hearing was, at best, ambiguous. When he was asked by his attorney to describe what Scanlon had said to him, he stated that he could not recall.

The circuit court erred, therefore, in proceeding immediately to an analysis of this episode as a seizure. Under the standards established by the United States Supreme Court and applied by the Kentucky Supreme Court, there was no seizure within the meaning of the Fourth Amendment when Scanlon drove up to Jackson and questioned him.

Jackson also claims that he did not consent to the search. The circuit court's opinion states that Jackson did consent. Consent constitutes one of the exceptions to the warrant requirement.[14] The burden is on the government to prove by a preponderance of the evidence that valid, voluntary consent was obtained.[15] The issue of whether the consent was indeed voluntary is a question of fact to be determined from the totality of all the circumstances.[16] This issue is a preliminary question to be decided by the trial court, and its findings are

[14] United States v. Watson, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976).

[15] Cook v. Commonwealth, Ky., 826 S.W.2d 329, 332 (1992).

[16] Schneckloth v. Bustamonte, 412 U.S. 218, 227, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

conclusive if they are supported by substantial evidence.[17] Furthermore, "[t]he question of voluntariness is to be determined by an objective evaluation of police conduct and not by the defendant's subjective perception of reality."[18] Scanlon testified that Jackson had consented to the search, had placed his hands on the police car, and had never at any time withdrawn his consent to the search. In his motion to suppress, Jackson admitted that he had told Scanlon "go ahead, you can search." Scanlon also testified that he felt that Jackson knew what he was doing when he consented to the search. Jackson testified that he could not recall Scanlon's questions nor could he remember whether Scanlon had asked permission to search him. Jackson's testimony did not seriously repudiate that of Scanlon,[19] and considered under the standards outlined above, the circuit court did not err in determining that Jackson had consented to the search.

Jackson has also argued that when Scanlon retrieved the cocaine from his pocket he exceeded the scope of the protective search permissible under the Terry stop and frisk standard. Such a search "must be strictly limited to that which

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[17] See RCr 9.78; Talbott v. Commonwealth, Ky., 968 S.W.2d 76, 82 (1998).

[18] Cook at 331-32, citing Colorado v. Connelly, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986).

[19] Cook at 331.

is necessary for the discovery of weapons which might be used to harm the officer or others nearby."[20] The purpose of the limited search is not to discover evidence of a crime.[21] Even if this had been a legitimate Terry stop, however, Scanlon may well have been permitted to remove the cocaine under the "plain feel" rule.[22]

Scope is assessed differently, however, when the search is consensual. In Florida v. Jimeno, the United States Supreme Court held that "[t]he standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness--what would the typical reasonable person have understood by the exchange between the officer and the suspect?"[23] Scanlon testified that he was initially concerned with determining whether Jackson had a weapon. Thereafter, when Jackson gave consent to be searched, Scanlon stated that he felt that there was no objection to a more

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[20] Commonwealth v. Whitmore, Ky., 92 S.W.3d 76, 79 (2002)(reh'g den. 2003).

[21] Adams v. Williams, 407 U.S. 143, 146, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972).

[22] "When a police officer lawfully pats down the outer clothing of a suspect and feels an object whose contour or mass makes its identity immediately apparent, there is no violation of privacy beyond that already permitted by the pat-down search for weapons." Whitmore at 80, citing Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993).

[23] Florida v. Jimeno, 500 U.S. 248, 251, 111 S.Ct. 1801, 114 L.Ed.2d 297(1991)(citations omitted).

thorough search. Scanlon also testified that at no time did Jackson tell him not to search his pockets or any other part of his clothing or person. Under the standard outlined in Jimeno, we conclude that a reasonable person would have understood that the scope of the search would have extended to items in his pockets, particularly in light of Scanlon's question regarding whether Jackson had anything on his person that could get him into trouble.

For the foregoing reasons, the order of the Jefferson Circuit Court granting Jackson's motion to suppress is reversed, and this case is remanded for further proceedings consistent with this opinion.

TACKETT, JUDGE, CONCURS.

PAISLEY, JUDGE, DISSENTS.

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