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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001997-MR

TEDDY ROBERTSON — APPELLANT

v.

APPEAL FROM TODD CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 02-CR-00017

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM, COMBS, and DYCHE, Judges.

COMBS, JUDGE. Teddy L. Robertson, II (Robertson) appeals from an order of the Todd Circuit Court of August 29, 2002, which denied his motion to suppress evidence. He entered a conditional guilty plea to one count of possession of a controlled substance, first degree, and possession of marijuana, less than eight ounces.

Robertson argues on appeal that the arresting officer, Tracy White (White), violated his Fourth Amendment rights against unreasonable searches and seizures when he searched Robertson and seized both marijuana and methamphetamine. He contends that the circuit court should have suppressed the drugs as "fruit of the poisonous tree." After our review of the record, we conclude that the Todd Circuit Court did not err in denying Robertson's suppression motion. Therefore, we affirm.

According to White's testimony at the August 7, 2002 suppression hearing, on January 27, 2002, he observed a vehicle turn without signaling and noticed that the vehicle's license plate was not illuminated. Based on these minor traffic violations, White stopped the vehicle and ordered the driver to get out of the car. After briefly speaking with the driver, White asked if he could search the vehicle. The driver consented.

White then approached the driver's side of the vehicle and saw the passenger, Robertson, tucking an unknown item into the waistband of his trousers. White ordered Robertson out of the car and asked Robertson to lower his trousers, but Robertson did not respond. White then conducted a protective patdown search of Robertson for weapons pursuant to Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). White did not detect a weapon, but he did feel and heard

"something squishy like a sandwich bag" in Robertson's front pocket. When White asked Robertson what this item was, he did not answer. White asked Robertson if he could remove the unknown item from Robertson's pocket. Robertson consented, and White removed a sandwich bag that contained a small amount of marijuana. White arrested Robertson for possession of marijuana, and after a search incident to the arrest, he discovered two small bags of methamphetamine on Robertson's person.

On March 15, 2002, a Todd County grand jury indicted Robertson on one count of possession of marijuana, less than eight ounces, KRS[1] 218A.1422(2), and one count of possession of a controlled substance in the first degree, methamphetamine, KRS 218A.1415. After the circuit court denied his motion to suppress, Robertson entered a conditional guilty plea, reserving the right to appeal the suppression issue.

On appeal, Robertson argues that Officer White violated his right to be free from unreasonable searches and seizures pursuant to the Fourth Amendment to the United States Constitution. He contends that the Todd Circuit Court erred in failing to suppress both the contraband initially seized and the evidence flowing from the subsequent arrest. Robertson cites Richardson v. Commonwealth, Ky. App., 975 S.W.2d 932 (1998), in

[1] Kentucky Revised Statutes.

support of his argument that the patdown search did not fall under any of the exceptions to the warrant requirement, including exigent circumstances, consent, plainview, search incident to arrest, probable cause, or inventory search.

He claims that Officer White lacked reasonable suspicion since White never articulated any belief that Robertson was armed, did not testify that he thought he might be in danger, and did not testify that the vehicle might have contained a weapon. White's sole testimony was that he saw Robertson tuck something unidentifiable into his trousers.

Robertson observes that he was detained at the time he was frisked; therefore, he argues that White was required to advise him of his rights pursuant to Miranda v. Arizona, 384 U.S. 436, 86 S.Ct 1602 (1966), before he could legitimately ask Robertson for consent to remove the item from his pocket.

He also claims that when White ordered him to exit the car and then frisked him, White acted improperly by exceeding the scope of patdown searches set forth in Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). In reliance on Commonwealth v. Crowder, Ky., 884 S.W.2d 649 (1994), Robertson argues that Terry allows for the seizure of non-threatening contraband detected by touch during a pat-down search if and when the requirements of Terry have been met and if the non-threatening nature of the contraband was immediately

apparent from the sense of touch. According to White's testimony, Robertson notes that White did not immediately recognize that the sandwich bag contained contraband, asking Robertson the identity of its "squishy" contents.

In reviewing a suppression order, an appellate court must first review the findings of fact by the trial court to determine whether they were supported by substantial evidence. If they were supported by substantial evidence, the factual findings are deemed to be conclusive. We then review *de novo* the court's application of the law to the facts to determine if its legal conclusions were correct. Commonwealth v. Neal, Ky. App., 84 S.W.3d 920, 923 (2002).

The order denying Robertson's suppression motion reads in pertinent part as follows:

> Officer Tracy White testified as to the facts of the stop of the motor vehicle in which the defendant was riding and the subsequent search which led to his arrest. Based upon the officer's testimony, the Court finds that there was sufficient reasonable articulable suspicion based upon the observations of the officer to initiate a stop of the vehicle. The officer saw the defendant put something into his belt or waistband. The officer then ordered the defendant out of the vehicle and asked for consent to search the defendant's pockets and remove the contents. Consent was given and the officer found marijuana. The defendant was then placed under arrest and incident to arrest, another search was conducted in which methamphetamine was found. Based upon the testimony, the Court

> finds that the consent was freely and voluntarily given and that the procedure utilized was not unreasonable.

The Todd Circuit Court failed to address Robertson's argument that White lacked sufficient reasonable articulable suspicion to conduct a patdown search for weapons; indeed, the circuit court never mentioning the patdown search at all. However, the record substantiates that White testified that he saw Robertson tuck an unknown item into his waistband. Robertson never contradicted this testimony. White testified that since he did not know what this item was, he frisked Robertson for weapons for purposes of safety pursuant to the clear directive of Terry, supra. The record demonstrates that White objectively had sufficient reasonable articulable suspicion to believe that Robertson might be armed. Minnesota v. Dickerson, 508 U.S. 366, 374, 113 S.Ct. 2130, 2135-2136, 124 L.Ed.2d 334(1993), quoting Terry v. Ohio, supra. We believe that the record adequately supports the court's determination that reasonable suspicion justified the patdown search.

Robertson also argues that White exceeded the scope of a Terry search. According to the record, upon frisking Robertson and feeling an unknown item, White ended the patdown search and asked Robertson what the item was. When Robertson failed to answer, White asked for consent to remove the unknown

item. Robertson voluntarily consented. White properly complied with Terry requirements as to the scope of the search.

Finally, Robertson argues that White was required to advise him of his Miranda rights. We disagree. A police officer is not required to advise a criminal suspect of his Miranda rights or to advise the suspect that he has a right to refuse the search as a prerequisite for asking him for his consent to a search. Cook v. Commonwealth, Ky., 826 S.W.2d 329, 331 (1992). Cook holds that the consent should be evaluated for voluntariness in light of the circumstances. Id. The record reflects that Robertson voluntarily gave consent for White to remove the sandwich bag from his pocket.

Therefore, we affirm the order of the Todd Circuit Court of August 29, 2002, denying Robertson's suppression motion.

BUCKINGHAM, JUDGE, CONCURS.

DYCHE, JUDGE, DISSENTS.

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