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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000790-MR

WARD CARLOS HIGHTOWER

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA GOODWINE, JUDGE
ACTION NO. 04-CR-00509-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; DYCHE AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Ward Carlos Hightower (a/k/a Orlando J.

Hightower) has appealed from a final judgment and sentence of ten years' imprisonment entered by the Fayette Circuit Court on March 16, 2005, upon his entry of a conditional plea of guilty to one amended count of robbery in the second degree,¹ and to being a persistent felony offender in the second degree (PFO II).² Hightower's motion to suppress evidence was denied by the

¹ Kentucky Revised Statutes (KRS) 515.030.

² KRS 532.080(2).

trial court on October 7, 2004, and he then entered his guilty plea, reserving the right to appeal the suppression ruling.

Having concluded that the trial court properly denied Hightower's motion to suppress evidence, we affirm.

The facts of this case were succinctly set forth in the trial court's October 7, 2004, order denying the suppression motion as follows:

[Hightower] was arrested on March 11, 2004[,] by Officer Joshua Yahr. Prior to arresting [Hightower], Officer Yahr was sitting in his patrol car at Coolavin Apartments in Lexington, Kentucky, talking to the security guard there.³ Approximately one hour earlier, he heard an Attempt to Locate (ATL) report over his radio regarding a robbery.⁴ According to Officer Yahr, the description was that of a white van with plastic over the rear window⁵ containing three suspects, a black male, a white female and a white male. Officer Yahr observed a white van with a plastic cover over the rear window pull into the parking lot and leave.⁶ He was able to see two occupants through the rear window[,] but could not tell anything about them. Officer Yahr followed the van from the parking lot to 513 Willy Street in Lexington, Kentucky[,] and pulled in behind the van when it parked in front of that address. Officer Yahr believed the van

³ This occurred between 2:00 a.m. and 3:00 a.m.

⁴ The location of the robbery was on the other side of town.

⁵ The ATL report also stated that the white van had plastic over the passenger side window.

⁶ Officer Yahr only recalled seeing the rear window covered in plastic, but the victim, William James, testified that when he was taken to the show-up location, the passenger side window of the white van at the location also had plastic covering on it.

might be the one described in the ATL and he wanted to talk to the occupants.⁷ There is no allegation of any traffic violations, nor is there an allegation of an illegal stop. In essence, Officer Yahr did not "stop" the van; he simply allowed the van to park and he pulled in behind the van.

A white female exited from the driver's side, and a black male exited from the passenger side of the van. Officer Yahr asked the occupants to come over toward his cruiser so he could talk to them for a minute. The white female began walking toward the front porch of 513 Willy Street and the [black male] was walking toward the far front side of a vehicle parked in the driveway of 513 Willy Street, away from Officer Yahr.⁸ The vehicle parked in the driveway was between Officer Yahr and the [black male]. The [black male] was later identified as the defendant, [] Hightower.

Hightower was standing near the front of the vehicle in the driveway when Officer Yahr stopped and asked him to come over and talk for a few minutes. Hightower stated he had to urinate. After a few seconds, Officer Yahr asked Hightower to come over and talk to him. A few seconds later, Hightower came around the front of the vehicle toward the porch and toward Officer Yahr. Hightower was about 20 feet away from Officer Yahr. Hightower's hands were down by his sides and he did not make any furtive movements. Officer Yahr believed Hightower and the white female to be suspects in the robbery described in the ATL. He also was fearful, especially since they did not respond to his first request for them to come over and talk to him.

⁷ This occurred one hour after Officer Yahr received the ATL report.

⁸ This was a different vehicle than the white van that Hightower arrived in.

Hightower and the white female were at the front porch of the house when they talked to Officer Yahr, giving him information.⁹ Hightower initially gave Officer Yahr false information regarding his name.¹⁰ Officer Yahr then called for back up.¹¹ Officer Wolfe [sic] arrived on the scene. Officer Yahr advised Officer Wolfe [sic] of the situation and asked Officer Wolfe [sic] to watch the two subjects while he walked over to the car where Hightower had been standing. Officer Yahr used his flashlight to see if he could find any urine in the area around the front of that vehicle, but he did not see any.¹² Officer Yahr did see, however, the end of a plastic baggie sticking out of the front bumper of the vehicle. He extracted the baggie and observed what he believed to be cocaine inside. The substance in the baggie field tested positive for cocaine. Officer Yahr then arrested Hightower for Possession of Cocaine, but did not give Hightower any Miranda [v. Arizona, 396 U.S. 868, 90 S.Ct. 140, 24 L.Ed.2d 122 (1969)] warning.

Believing that he had located the robbery suspects, [Officer] Yahr contacted the officer who called the ATL. The victim was brought to the scene for a show-up during which the victim identified Hightower

⁹ The white female provided information that she was Heather Adams.

¹⁰ Hightower initially told Officer Yahr that he had no identification on him and that his name was Orlando J. Hightower; however, he had no written identification and did not know his social security number. Officer Yahr informed Hightower that lying to the police as to his name and address was an arrestable offense.

¹¹ Officer Yahr wanted another officer, Officer Franz Wolff, to observe Hightower and Adams while he ran their information through the police radio channel for confirmation and while he walked over to check the area where Hightower urinated.

¹² Officer Yahr believed that there would be a "reflection" on the grass caused by the urine.

and the white female¹³ as two of the three people who robbed him.¹⁴ Hightower was handcuffed standing in the headlights of the cruiser accompanied by police officers. The victim was inside a police cruiser. Hightower was subsequently charged with the robbery.

On April 26, 2004, Hightower was indicted by a Fayette County grand jury for robbery in the first degree,¹⁵ possession of a controlled substance in the first degree,¹⁶ giving an officer a false name/address,¹⁷ and being a PFO II.¹⁸ Hightower was arraigned on April 29, 2004, and he waived formal arraignment and entered a plea of not guilty.¹⁹ Although

¹³ During the show-up, Hightower and Adams were shown separately to the victim for identification.

¹⁴ Hightower was identified by the robbery victim in a show-up at the scene. However, he states in his brief to this Court that "[he] can find no fault with the court's ruling on the issue of prejudice to [him] due to the nature of the show-up, in view of the length of time [he] spent with the alleged victim before the alleged robbery, so that issue will not be pursued on this appeal."

¹⁵ KRS 515.020. This offense is a Class B felony. The indictment stated that, "[o]n or about the 11th day of March 2004, in Fayette County, Kentucky, [Hightower] committed the offense of Robbery First Degree when [he] used physical force upon William James, causing physical injury, in the course of committing a theft[.]"

¹⁶ KRS 218A.1415. This offense is a Class D felony.

¹⁷ KRS 523.110. This offense is a Class B misdemeanor.

¹⁸ This offense is a Class B felony. The indictment stated that "[p]rior to the commission of the felony offenses contained in this Indictment, [Hightower] committed and was convicted of Assault Third Degree by final judgment of the Fayette Circuit Court in May 2002[.]"

¹⁹ A pretrial conference was held in the case on May 14, 2004, at which time the Commonwealth offered a plea bargain in which the count of robbery in the first degree would be amended to robbery in the second degree and because of Hightower's charge of PFO II, his sentence on the robbery charge would be enhanced from a five-year prison term to a ten-year prison term. The charges of possession of a controlled substance in the first degree and giving an officer a false name/address would be dismissed as part of the agreement. A

Hightower did not file a written motion to suppress evidence, an evidentiary hearing was held on August 18, 2004, on his oral motion to suppress, wherein the trial court heard his arguments that he was illegally seized and arrested without probable cause.²⁰ On September 14, 2004, Hightower filed a brief in support of his motion to suppress. The Commonwealth filed its memorandum of law in opposition to the motion to suppress on September 29, 2004. On October 7, 2004, the trial court entered an order, containing findings of fact and conclusions of law, denying Hightower's first motion to suppress.²¹

The case was set for trial on February 14, 2005. However, on February 11, 2005, pursuant to an offer by the Commonwealth, Hightower entered a conditional plea of guilty to the amended charge of robbery in the second degree and to being

status conference was held on June 18, 2004, and the trial court set a date for the suppression hearing.

²⁰ This was one of two suppression hearings in this case.

²¹ The second suppression hearing was conducted on November 19, 2004, which related solely to Hightower's written motion to suppress in which he argued that the robbery victim's identification of Hightower at the time of his arrest was prejudicial. The trial court denied the motion to suppress by order entered on November 22, 2004. Hightower states in his brief that he is not raising an issue as to any fault with this identification, based on evidence offered at the second suppression hearing as to length of time that Hightower spent with the victim before the alleged robbery. The trial court determined that, based on the totality of the circumstances and factors listed in Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), the show-up was not unduly prejudicial and that under other circumstances, the victim would be able to identify Hightower as one of the perpetrators.

a PFO II.²² This conditional plea was accepted by the trial court on the same day, and on February 14, 2005, the trial court entered a judgment on the guilty plea and reserved ruling on the Commonwealth's sentencing recommendation. The trial court set the sentencing hearing for March 11, 2005, and ordered the Division of Probation and Parole to prepare a Prehearing Sentencing Investigation Report.²³ The trial court denied probation and entered its final judgment and sentence of imprisonment on March 16, 2005. Hightower was sentenced to five years' imprisonment, enhanced to ten years by virtue of his PFO II conviction.²⁴ Hightower reserved his right to appeal the denial of his first motion to suppress, and this appeal followed.

Hightower raises two issues before this Court. First, he argues that the trial court erred when it denied his motion to suppress the evidence, i.e., the cocaine and the show-up identification,²⁵ which identified him as the perpetrator of the

²² The trial court dismissed the charges of possession of a controlled substance in the first degree and giving an officer a false name/address as part of the plea bargain agreement between Hightower and the Commonwealth.

²³ On March 11, 2005, the Commonwealth filed a victim impact statement from James. On the same date, the Division of Probation and Parole filed a report recommending conditions of probation if granted by the trial court.

²⁴ Hightower's sentence was to run consecutively with any other previous felony sentence that he must serve. He also received 366 days of credit for jail time already served.

²⁵ While Hightower is not bringing before this Court the issue of the prejudicial nature of the show-up, he is arguing that he was unreasonably

robbery, as this evidence was obtained as the result of an illegal seizure. Second, he argues that the trial court erred in concluding that Hightower's arrest for possession of cocaine was proper.

First, Hightower argues that the information from the ATL report was not sufficient to justify his seizure. The Commonwealth conceded to the trial court that Hightower was seized, but argued that under the totality of the circumstances the seizure was based upon reasonable articulable suspicion that Hightower was involved in criminal activity.²⁶ We accept and adopt the ruling of the trial court as to this issue as set out in its order entered October 7, 2004, as follows:

1. The seizure

[Hightower] argues that Officer Yahr had no basis to conduct the initial investigatory detention of him, and therefore, he was illegally seized in violation of his constitutional rights. [The] Commonwealth concedes that Hightower was seized at the time Officer Yahr began to

detained for the show-up based on the cocaine retrieved from the bumper of the vehicle.

²⁶ In its brief to this Court, the Commonwealth lists the circumstances supporting Officer Yahr's reasonable suspicion that Hightower was involved in criminal activity as follows: (1) Hightower did not come immediately over to Officer Yahr when he was asked to do so; (2) Hightower gave Officer Yahr a false name; (3) when Hightower walked over to the vehicle to urinate he placed himself in a manner which obstructed Officer Yahr's visibility from Hightower's waist down, even when illuminated with a flashlight; (4) while Hightower was allegedly urinating, he held his hands down at his waist; (5) Hightower and Adams informed Officer Yahr that they were at the location to visit someone and did not live there themselves; and (6) Officer Yahr received the ATL report about an hour before he saw the van in the area of the Coolavin apartments.

question him. [The] Commonwealth argues that Officer Yahr conducted a proper Terry [v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)] investigation and had a reasonable articulable suspicion to question Hightower. Therefore, no violation of Hightower's constitutional rights occurred.

If a police officer has a reasonable and articulable suspicion that criminal activity has occurred or is about to occur, a police officer may briefly detain a person for investigative purposes. Terry v. Ohio, 20 L.Ed.[2d] 889. Baltimore v. Commonwealth, Ky.App., 119 S.W.[3d] 532, 538 (2003) sets forth a two-part analysis for evaluating the legitimacy of an investigatory stop. "First, whether there [was] a proper basis for the stop based on the police officer's awareness of specific and articulable facts giving rise to reasonable suspicion. Second, whether the degree of intrusion was reasonably related in scope to the justification for the stop" [footnotes omitted]. Id.

Hightower argues that Officer Yahr was acting on a hunch and his suspicions were not reasonable based on the totality of the circumstances. However, the Court disagrees. The standard for reasonable suspicion is less demanding than the grounds for probable cause and falls considerably short of satisfying a preponderance of the evidence standard. Id. A hunch is an intuitive feeling or guess about something or a premonition without basis.

The Court finds that Officer Yahr had reasonable suspicion to conduct a Terry investigation. First, Officer Yahr heard an ATL one hour prior to the stop. The ATL described the van as being a white van with plastic over the rear window. When Officer Yahr saw the van he observed the plastic [over] the window. The ATL also described the occupants of the van as being a white

female, a black male and a white male. When the van stopped in front of 513 Willy Street, a white female and a black male exited the vehicle. Based on the totality of the circumstances, the brief detention of Hightower passes constitutional muster. The information that Officer Yahr acted upon was sufficient to satisfy reasonable suspicion. It was more than a hunch.

The second part of the analysis involves whether the degree of intrusion was related in scope to the justification of the stop. In this case, a robbery had occurred approximately one hour prior to Officer Yahr's investigatory detention. Two people matching the general description of the suspects were in the van. This was sufficient to allow the officers to briefly stop the suspects, ask questions, or check identification in the absence of probable cause in an effort to solve crimes and bring offenders to justice. United States v. Hensley, 469 U.S. 221[, 105 S.Ct. 675, 83 L.Ed.2d 604] (1985).

Second, Hightower argues that there was no probable cause for Officer Yahr to arrest him for possession of cocaine and everything thereafter must be "thrown out". Hightower argues that his presence in the area of the cocaine stashed in the bumper of the vehicle is not sufficient to constitute probable cause for his arrest. In support of this position Hightower argues the following facts: (1) Officer Yahr did not see Hightower place the cocaine inside the bumper; (2) Officer Yahr did not ask Hightower about his connection to the cocaine; (3) Officer Yahr did not inquire as to the owner of the vehicle or as to who lived near where it was parked; (4) Officer Yahr

never saw Hightower bend over in the area to prove he could have placed the cocaine inside the bumper; and (5) Officer Yahr took no steps to investigate who owned the cocaine, but only assumed it belonged to Hightower because he was the closest person to it at the time it was found.

The Commonwealth argues that Hightower was already properly being detained on suspicion of the robbery at the time Officer Yahr found the cocaine, which was in plain view. Further, the Commonwealth argues that the degree of suspicion necessary to support probable cause to arrest is not based on whether conduct was innocent.²⁷ The trial court was persuaded by the Commonwealth and we accept and adopt the trial court's language from in its October 7, 2004, order as follows:

2. The arrest

Did Officer Yahr have probable cause to arrest Hightower? In order to have probable cause to arrest, a police officer must reasonably believe, in light of the facts and circumstances within their knowledge at the time of the arrest, that the suspect had committed or was committing an offense. "The standard is a flexible, practical[,] commonsense one which is met if the facts are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed" [citation omitted]. [United States] v. Hayes, 236 F.3d 891, 894 (7th Cir. 2001). However, the mere presence of a person near the area where criminal activity has

²⁷ See Terry, 392 U.S. at 1.

occurred does not support probable cause to arrest that person. [United States] v. Buckner, 179 F.3d 834, 838 (9th Cir. 1999).

In response to Officer Yahr's request, Hightower told him he had to urinate. A few seconds later, Officer Yahr again requested Hightower [to] come over and [to] talk to him. After a few seconds, Hightower came around the front of the vehicle toward the porch and toward Officer Yahr. They were about 20 feet apart. After backup arrived on the scene, Officer Yahr walked over to where Hightower had "allegedly" urinated and shined his flashlight in the area around the front of the vehicle in [the] driveway looking for urine[,] but did not see any urine. However, Officer Yahr did see the end of a plastic baggie sticking out of the front bumper of the vehicle. He extracted the baggie and observed what he believed to be cocaine inside. The substance field tested positive for cocaine. Officer Yahr then arrested Hightower, but did not give Hightower any Miranda warning. Officer Yahr did not mirandize Hightower because he did not intend to interrogate him. It is unclear whether Officer Yahr informed him of the charges. No questions were asked of Hightower regarding the cocaine or anything else. The Court finds that the facts stated in this paragraph are sufficient to create probable cause to believe that Hightower was, in fact, in possession of the cocaine. Therefore, the arrest was justified.

Based on the foregoing reasons, the final judgment and sentence of the Fayette Circuit Court is affirmed.

COMBS, CHIEF JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN RESULT ONLY.

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