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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002137-MR

ANTHONY GRAGSTON — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 05-CR-00469

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DYCHE[1] AND SCHRODER, JUDGES.

COMBS, CHIEF JUDGE: After having entered a conditional plea of guilty, Anthony Dewayne Gragston brings this appeal from a Final Judgment and Sentence of the Fayette Circuit Court, which convicted him of possession of marijuana[2] and evading or fleeing police.[3] The issue on appeal is whether the trial court correctly overruled the motion to suppress evidence seized by

[1] Judge R. W. Dyche concurred in this opinion prior to his retirement effective June 17, 2006.

[2] KRS (Kentucky Revised Statute) 218A.1422

[3] KRS 520.100

the police at the time of the arrest. After our review of the record and pertinent law, we affirm.

Gragston disputes whether the officers had a reasonable, articulable suspicion to justify the warrantless stop, seizure, and subsequent arrest in this case. The United States Supreme Court has ruled that unprovoked flight -- under certain circumstances -- may constitute sufficient suspicion. *See,* Illinois v. Wardlow, 528 U.S. 199, 120 S.Ct. 673 (2000). Kentucky case law mirrors the holding in Wardlow. *See*, Commonwealth v. Banks, 68 S.W.3d 347 (Ky. 2001).

On February 19, 2005, the night of the arrest, Gragston was observed approaching the passenger-side window of a parked vehicle on Breckenridge Street in Lexington, Kentucky. The vehicle had its brake lights on, and it appeared that the motor was running. Officer Curtsinger and Detective Sparks were patrolling the neighborhood (known as a high-crime area) in order to monitor criminal activity -- particularly street-level, drug-related crimes. The two officers were travelling on Breckenridge Street when they noticed Gragston near the vehicle, which was stopped on the road.

When Gragston saw the marked police cruiser approaching the vicinity, he began to walk in the opposite direction at an alleged “fast pace”. Upon observing Gragston’s conduct, the officers decided to investigate the matter further

in order to determine if criminal activity were afoot. Officer Curtsinger testified that although Gragston's actions were consistent with drug dealing behavior, the officers merely sought to ask some questions at that juncture. As the officers entered a nearby parking lot, Gragston began to run before any verbal exchange could occur. The officers then exited their vehicle, and a foot pursuit ensued. Gragston was observed tossing his jacket and reaching for his pockets. The officers repeatedly identified themselves as police and asked Gragston to halt. Gragston subsequently "gave up" and was subdued.

After the chase, the officers discovered a bag containing marijuana along the path of Gragston's flight. Accordingly, Gragston was charged with trafficking in a controlled substance within 1000 yards of a school and with fleeing or evading police. The former charge was later amended to possession of marijuana.

Claiming that there was no basis for the initial investigatory stop, Gragston filed a motion on May 26, 2005, asking the court to suppress the evidence seized as a result of the encounter. On June 17, 2005, the trial court denied the motion to suppress on the grounds that the officers possessed the requisite suspicion to stop Gragston initially. On August 5, 2005, Gragston entered a conditional plea of guilty to the amended charge of possession of marijuana and to fleeing or

evading police. He was sentenced to twelve months on each count. This appeal followed.

The proper standard of appellate review on a suppression issue is found in Commonwealth v. Neal, 84 S.W.3d 920, 923 (Ky.App. 2002):

> An appellate court's standard of review of the trial court's decision on a motion to suppress requires that we first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive. Kentucky Rules of Criminal Procedure (RCr) 9.78. Based on those findings, we must then conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law. (Citations omitted.)

The findings of fact with respect to the chase are undisputed. The factual findings by the trial court are well-supported by the testimony of the officers as well as by physical evidence collected at the scene. Additionally, Gragston does not dispute his running from the scene upon observing the police enter the parking lot. Pursuant to RCr[4] 9.78, the factual findings are conclusive in this matter.

We next consider whether the trial court correctly applied the law to the facts of this case; *i.e.*, whether the court correctly determined that the officers had reasonable, articulable suspicion to justify an investigative stop of

[4] Kentucky Rules of Criminal Procedure.

Gragston. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Terry holds that under appropriate circumstances and in an appropriate manner, a police officer may **approach** a person to investigate the possible occurrence of criminal activity -- even though there is no probable cause to make an arrest. Id. The lesser standard of reasonable suspicion is a sufficient basis for such an inquiry. Kentucky law holds that a police officer may approach a person, identify himself as a police officer, and ask a few questions without even implicating the Fourth Amendment. Fletcher v. Commonwealth, 182 S.W.3d at 559 (Ky.App. 2005); Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 889 (1968).

There are three types of interactions between citizens and police officers: consensual encounters, temporary detentions, and arrests. Baltimore v. Commonwealth, 119 S.W.3d 532, 537 (Ky.App. 2003). Consensual encounters do not implicate the Fourth Amendment -- unlike and as distinguished from temporary detentions and arrests. Id. Terry stops generally fall into the category of temporary detentions. Initially, the police officers sought to engage in a consensual encounter with Gragston in order to ask a few questions. When he took flight and attempted to elude the police, Gragston wholly changed the dynamics of the encounter and triggered the justification for a Terry stop.

The police officers were conducting surveillance for drug-related activity. Officer Curtsinger testified that Gragston's actions (*e.g.*, approaching a parked car in the middle of a street) were consistent with drug dealing behavior. Although Gragston's mere presence at this location would not suffice for a Terry stop, other additional factors taken in the aggregate justified the stop: Gragston's immediate flight from the scene upon seeing the police; the reputation of Breckenridge Street for being a high-crime area with a high frequency of drug activity; Gragston's behavior in tossing his jacket and reaching for his trousers as being consistent with drug-related activity.

United States v. Cortez held that the totality of the circumstances must be assessed in determining whether an officer has a reason to initiate an investigative stop. United States v. Cortez, 449 U.S. 411, 419, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981). Common sense and experience come into play when evaluating whether the "totality of the circumstances" permits questioning and subsequent seizure of a suspicious person. Cortez recites as follows:

> The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; jurors as fact finders are permitted to do the same—**and so are law enforcement officers**. Finally, the evidence thus collected must be seen and weighed not

> in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement. (Emphasis added.)

Cortez, 449 U.S. at 418, 101 S.Ct. at 695, 66 L.Ed.2d 621 (1981). In the case before us, the police officers properly drew reasonable inferences with respect to Gragston's unprovoked flight. The officers had just pulled into a parking lot when Gragston ran away before any hint of a stop or seizure could occur. Relevant to this case, the United States Supreme Court discusses the nuances of *seizure* as follows:

> The word "seizure" readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful. It does not remotely apply, however, to the prospect of a policeman yelling "Stop, in the name of law!" at a fleeing form that continues to flee. That is no seizure.

California v. Hodari, 449 U.S. at 626, 111 S.Ct. at 1550 (1991).

Gragston instantly created reasonable suspicion for a Terry stop upon taking flight. In Wardlow, supra, the Court addressed a strikingly similar situation and held:

> It was not merely respondent's presence in an area of heavy narcotics trafficking that aroused the officer's suspicion, but **his unprovoked flight** upon noticing the police. Headlong flight—wherever it occurs—is the consummate act of evasion: **It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such.** (Emphases added.)

Wardlow, 528 U.S. at 124, 120 S.Ct. at 676 (2000). Wardlow continues:

> Unprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not 'going about one's business'; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning.

Wardlow, 528 U.S. at 125, 120 S.Ct. at 676 (2000). We conclude that Wardlow is dispositive of this case. The police officers had a reasonable, articulable suspicion to pursue, to seize, and subsequently to arrest Gragston upon his unprovoked flight. The evidence seized in the course of his arrest was, therefore, admissible.

Accordingly, we affirm the judgment of the Fayette Circuit Court.

ALL CONCUR.

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