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Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002017-MR

GREGORY KERRY BLAIR — APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 05-CR-00315

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND TAYLOR, JUDGES; PAISLEY,[1] SENIOR JUDGE.

NICKELL, JUDGE: Gregory Kerry Blair (Greg) entered a conditional guilty plea pursuant to Kentucky Rules of Criminal Procedure (RCr) 8.09 in the Fayette Circuit

[1] Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Court to the amended charges[2] of possession of a controlled substance in the first degree[3] and persistent felony offender in the first degree (PFO I)[4] and received a sentence of ten years' imprisonment. Within the guilty plea, Greg reserved the right to appeal the circuit court's denial of his motion to suppress evidence. It is from this denial that he appeals to this Court. For the following reasons, we affirm.

On January 14, 2005, officers from the Lexington Metro Police Department were patrolling an area[5] of Lexington due to citizen complaints of loitering and drug activity. The area is known to the police department as a high crime area, as well as an area known for drug activity.[6] Officers in the area were in both marked and unmarked patrol cars. At approximately 10:00 p.m., Officer Matthew Greathouse observed two persons acting suspiciously in the Hedgewood Court area, and noted that one of the two turned and walked away when he noticed the officer's patrol car. A few moments later,

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[2] Greg was originally charged with trafficking in a controlled substance in the first degree, resisting arrest, operating on a suspended operator's license, no/expired registration plates, and persistent felony offender in the first degree. Pursuant to the plea negotiations, the trafficking charge was amended to possession of controlled substance in the first degree, the PFO I remained unchanged, and the other three charges were dismissed.

[3] Kentucky Revised Statutes (KRS) 218A.1415.

[4] KRS 532.080(3).

[5] The officers were patrolling the Woodhill, Osage, and Hedgewood Court areas of Lexington, Kentucky.

[6] Greg alleges in his brief that the Commonwealth failed to prove that the area being patrolled was a high crime area. We note that there was no trial in this matter, only the suppression hearing which is at issue in this appeal. Officers testified therein that the area was known for criminal activity and Greg did not dispute this. In fact, in his testimony, Greg states that there had been some recent home invasions and robberies in the area. Taken together, the court could reasonably find, for purposes of a suppression motion, that the officers' statements were true.

Officer Greathouse saw the same two individuals on Osage Court and radioed for an unmarked vehicle to come to the scene to assist him in his observation of the subjects. Officer Dean Hammond and Officer K. Huddleston arrived in the area in their unmarked cruiser and observed the two subjects exiting a residence. One of the subjects, later identified as Greg, got into a white vehicle and drove away from the area. Officer Hammond and Officer Huddleston determined that they should follow the subject vehicle for further observation while Officer Greathouse remained on Osage Court to continue his observation.

The trailing officers noticed that the white vehicle had an expired registration plate and that the driver failed to give a turn signal when making a left turn. After approximately three-quarters of a mile, the white vehicle made a turn onto a dead-end street. The officers decided to attempt a traffic stop based upon the aforementioned violations and placed a "light bar" on the dashboard of their cruiser. Before the officers could activate their emergency equipment, the white vehicle pulled to the side of the road and the driver got out, leaving the driver's side door ajar, and began to move away from the officers.[7] The officers exited their vehicle to pursue the driver. According to their testimony, the officers had their badges hanging on chains around their necks and were wearing Lexington Police ball caps. A foot chase ensued,[8] wherein the officers

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[7] There was a dispute at the hearing as to whether Greg immediately began to run from the officers upon exiting the vehicle or was simply walking away from them. For purposes of this appeal this distinction is irrelevant.

[8] We note that Greg testified that he had been a high school track and field star, competing in the 400 and 800 meter runs, and had even qualified for the United States Olympic team.

repeatedly identified themselves and ordered Greg to stop. During the pursuit, Officer Huddleston observed Greg drop an unknown item[9] near a vehicle parked on the street.

At one point, Officer Huddleston had a grip on Greg's sweatshirt, but Greg was able to wrestle free and continue to run. He changed his course and began to run directly toward a dimly-lit yet highly-traveled roadway. This change of course caused Greg to run directly past Officer Hammond who identified himself as a police officer and again ordered him to stop. Greg continued to run down the middle of the road, with both officers in pursuit. Officer Hammond drew his Taser X26[10] (taser) and deployed it into Greg's back. Greg fell to the ground, sustaining minor injuries in the fall. Officer Hammond testified that Greg continued to struggle and was non-compliant, so a second blast from the taser was administered,[11] at which time the officers were able to take Greg into custody.

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[9] The item was later recovered and found to be a set of gray digital scales.

[10] Officer Hammond's taser is a Conducted Energy Weapon that uses nitrogen propelled probes connected to the weapon by wires which carry a high-voltage electric charge to the target. The charge overpowers the normal electrical signals within the body's nerves, causing loss of muscular control and coordinated action. Two probes are deployed from the weapon and can travel up to 21 feet. These probes are barbed and can penetrate up to two inches of clothing prior to delivering the electric current.

[11] For purposes of clarity, we note that the second shock was through the same wires as the initial shock, and not a second set of wires fired from the weapon.

Greg was placed under arrest for the expired registration plate,[12] resisting arrest,[13] and operating a motor vehicle on a suspended license.[14] The officers thereupon conducted a search of Greg incident to that arrest, finding 7.2 grams of crack cocaine, a cellular telephone, 12 empty plastic baggies, and $147.00 in U.S. currency, in addition to the digital scales which Greg dropped during the pursuit. Based upon these findings, Greg was indicted by a Fayette County grand jury for trafficking in a controlled substance in the first degree,[15] resisting arrest, operating a motor vehicle on suspended operator's license, no/expired registration plates, and PFO I.

On June 2, 2005, Greg filed a motion to suppress the evidence seized from him on the grounds that the police had only reasonable suspicion to conduct a *Terry*[16] stop, and that the search and seizure were unreasonable. A hearing was held on the motion on June 22, 2005, wherein Officer Greathouse and Officer Hammond testified, as did Greg. All three testified as to their actions on the night of the arrest. At the conclusion of the hearing, the circuit court ordered the parties to submit briefs supporting their positions prior to its issuing a ruling. On July 29, 2005, the circuit court verbally overruled the suppression motion during a status hearing, stating its reasoning on the

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[12] KRS 186.170.

[13] KRS 520.090.

[14] KRS 186.620.

[15] KRS 218A.1412.

[16] *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

record. No written findings were entered and Greg did not object thereto. The trial court's written order was entered on August 2, 2005.

On August 26, 2005, Greg entered a conditional guilty plea to the amended charges of possession of controlled substance in the first degree, and PFO I, reserving the right to appeal the denial of his suppression motion. On September 28, 2005, Greg was sentenced, pursuant to the Commonwealth's recommendation, to five years on the possession charge, enhanced to ten years by the PFO I charge. The following day, Greg entered his notice of appeal on the sole issue of the denial of his suppression motion.

The standard for our review is set forth in *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). Under that decision, the determination of a circuit court regarding a suppression motion based on an alleged illegal search is subject to a two-pronged analysis. First, historical facts should be reviewed for clear error, and the facts are deemed to be conclusive if supported by substantial evidence. Second, determinations of reasonable suspicion and probable cause are mixed questions of law and fact and are therefore subject to de novo review. *See also Baltimore v. Commonwealth*, 119 S.W.3d 532, 539 (Ky.App. 2003). Furthermore, we are bound to give "due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Ornelas*, 517 U.S. at 699.

In the case at bar, Greg contends the circuit court erred in denying his suppression motion because his interaction with the police officers was in violation of the

Fourth Amendment[17] search and seizure provisions and the guidance set forth in *Terry*, arguing the officers utilized excessive force in effectuating his arrest for the crimes he allegedly committed. Pursuant to *Ornelas*, we shall first address the historical facts for clear error and then consider the circuit court's determination of reasonable suspicion and probable cause. Furthermore, as Greg has alleged the use of excessive force in effectuating his search and seizure, we must also look at the officers' actions in view of the Fourth Amendment's "reasonableness" standard elucidated in *Graham v. Conner*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).[18]

The historical facts are relatively simple and were presented at the suppression hearing through the testimony of the defendant and officers involved in the underlying arrest. The date, time, and location of the incident are undisputed and are therefore conclusive. The testimony reveals the officers were following Greg's vehicle in an unmarked cruiser and they did not activate their emergency equipment at any time during the encounter. Officer Greathouse's observations precipitating Officer Hammond's and Officer Huddleston's arrival on-scene were never challenged during the

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[17] The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[18] In *Graham,* the United States Supreme Court held excessive force claims should be "analyzed under the Fourth Amendment's 'objective reasonableness' standard, rather than under a substantive due process standard." 490 U.S at 388-9. Further, "the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397. We therefore will analyze Greg's claims pursuant to this Constitutional guidance.

hearing and are thus not in issue. Likewise, there is no dispute a foot chase occurred prior to Greg's arrest.

Greg does dispute whether he was made aware that the two men following him were, in fact, police officers. Conflicting testimony was given as to whether the officers' identification was plainly visible. Further conflicting testimony was elicited regarding whether the officers informed Greg of their identity as police officers when ordering him to stop running. Greg also alleged he did not fail to signal a left-hand turn and denied the officers were ever in a position to identify his license plates as being expired, contrary to the testimony given by Officer Hammond. Finally, contrary to the testimony of Officer Hammond that Greg had broken free from the grip of Officer Huddleston, Greg testified that neither of the officers had laid hold of him until after he was lying on the ground.[19]

In reviewing the record, we find that the circuit court took all of the evidence into account, including the supplemental briefs presented by the parties, prior to making a decision. The rule in Kentucky is that if substantial evidence appears in the record to support the circuit court's findings, even if there is conflicting evidence, the decision will not be disturbed on appeal. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky.

[19] In his brief, Greg calls into question certain other facts testified to only by the police officers, now claiming that the Commonwealth failed to prove its allegations. However, on review, we must look only at the evidence presented to the circuit court in order to determine whether there was clear error with regard to determination of the facts. Without conflicting evidence, the trial court is free to draw inferences consistent with the evidence actually presented. However, insofar as the facts complained of go to the circuit court's determination of reasonable suspicion and/or probable cause, we shall address them de novo in keeping with the ruling in *Ornelas*.

2003); Kentucky Rules of Civil Procedure (CR) 52.01. Moreover, "judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court." *Id*. (citing *Bowling v. Natural Resources & Environmental Protection Cabinet*, 891 S.W.2d 406 (Ky.App. 1994)). We find the historical facts relied upon by the circuit court were supported by substantial evidence and are therefore not clearly erroneous. Thus, the facts for purposes of this appeal, are conclusive.

Our next inquiry addresses the Circuit Court's determination of the existence of reasonable suspicion or probable cause. When making such a determination, the "totality of the circumstances--the whole picture--must be taken into account. Based upon that whole picture, the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981). In *United States v. Arvizu*, 534 U.S. 266, 273, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002), it was held that such a "process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person" [internal quotation marks omitted] [citations omitted].

A brief recitation of some of the facts of this case, which we have held above to be conclusive, are necessary to a proper determination of reasonable suspicion or probable cause. Officer Greathouse testified about the arousal of his suspicions by two male subjects in the Osage Court area. He then testified that he called for back-up

officers to come to the scene. Officer Hammond and Officer Huddleston arrived shortly thereafter and also observed suspicious activity. The Osage Court area was classified by the officers as a "high-crime" area and no contradictory testimony was elicited. Officer Hammond testified that he observed Greg enter and operate a white vehicle which failed to signal a left-hand turn. He further testified that he was able to observe that the registration plate on Greg's vehicle had expired. Additionally, Officer Hammond testified that he and his partner had determined to effectuate a traffic stop based on these observed violations, but that Greg stopped his vehicle, exited, and began moving away from the officers before emergency equipment could be activated.[20] The location of these events was a dimly lit dead-end street with no overhead street lamps. The officers, identified by their badges and ball caps, ordered Greg to stop. Instead, and for no apparent reason, Greg began to flee from the officers, thus not allowing an opportunity for the officers to make their full intentions known. No testimony indicated the officers knew Greg or whether he might be armed, and this only added risk to an already dangerous interaction.[21] After numerous orders to stop were ignored, and Greg broke free from the grip of Officer Huddleston, a taser was deployed to effectuate an arrest.

When taken individually, and in isolation from the totality of the evidence, many of these factors could be characterized as being indicative of innocent conduct. In *Arvizu*, 534 U.S. at 277, the United States Supreme Court reiterated the fact that

[20] Logically, then, no traffic stop was ever actually effectuated.

[21] In *Maryland v. Wilson*, 519 U.S. 408, 414, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997), the United States Supreme Court acknowledged the inherent danger involved in routine traffic stops, even absent extraordinary circumstances. We wholeheartedly agree with that position.

determinations of whether "reasonable suspicion exists, however, need not rule out the possibility of innocent conduct" [citation omitted]. *See also United States v. Sokolow*, 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989). We are simply required to look at the circumstances as a whole in making our determination. In doing so, we find that the totality of the evidence in the case sub judice clearly indicates the officers did, in fact, have a particularized and objective basis for suspecting Greg was engaged in criminal activity, in accord with *Cortez*. Thus, on these facts, the officers were justified in attempting to stop and detain Greg for purposes of further investigation.

In addition, we note that after the officers had reasonable suspicion criminal activity was afoot, the situation quickly ripened into probable cause to arrest when Greg forcibly resisted the officers. Although Greg argues that he was merely offering "passive resistance" or being "nonsubmissive" and not resisting, the facts do not bear out his argument. We find no way of how wrestling oneself from the firm grasp of a police officer can be termed as "passive resistance" or "simple nonsubmission." Furthermore, Greg's continued flight down a darkened street toward a heavily traveled roadway created an escalating risk of physical injury to himself, the pursuing officers, and any motorist or bystander who happened along his path. Given these facts, the officers could reasonably believe that, if issued a citation, Greg would not appear at the time designated for further court proceedings, thus permitting them to make a physical arrest pursuant to KRS 431.015(2); and because misdemeanor offenses had been committed in their presence, KRS 431.005(1)(d) authorized the officers to make an arrest without a warrant.

Therefore, the officers had reasonable suspicion and probable cause to effectuate an arrest, and in fact did so, once Greg was apprehended.

It is axiomatic that a search following an arrest is permissible as incident to that lawful arrest. *See United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973); *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *Draper v. United States*, 358 U.S. 307 ,79 S.Ct. 329, 3 L.Ed.2d 327 (1959); *Pruitt v. Commonwealth*, 286 S.W.2d 551 (Ky. 1956); and *Johnson v. Commonwealth*, 41 S.W.2d 913 (Ky. 1931). In *Robinson*, 414 U.S. at 224, the United States Supreme Court stated that "[i]t is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment. . . . The validity of the search of a person incident to a lawful arrest has been regarded as settled since its first enunciation[.]" Thus the search of Greg's person, being incident to a valid arrest, passes constitutional muster, and the Circuit Court committed no error when it properly refused to suppress the evidence obtained thereby.

Our final analysis then turns to the Fourth Amendment's reasonableness standard and its application to the use of force by Officer Hammond in effectuating the search and seizure. Greg contends the use of a taser to accomplish his arrest and the subsequent search and seizure was violative of his Fourth Amendment rights, arguing at length that this action constitutes unreasonable use of force.[22] In *Graham*, 490 U.S. at

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[22] A review of his arguments reveals an implied call for the total elimination of the use of tasers in the Commonwealth as such devices have been declared to be "deadly weapons" in some other jurisdictions. However, Greg cites us to no controlling, nor even persuasive, authority to support this proposition. No published cases from Kentucky state courts mention the word "taser", and

396, the United States Supreme Court noted that "the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." A three-part test was mandated by *Graham* when analyzing reasonableness under the Fourth Amendment, including (1) the severity of the crime or crimes in issue, (2) whether there is an immediate threat to the safety of the arresting officers or others, and (3) whether the suspect is attempting to flee in order to escape arrest or is actively resisting such arrest.

Greg first argues that the crimes at issue in his case are merely minor traffic violations, and thus any use of force was unnecessary. However, he fails to recognize that the officers herein were legitimately attempting to make a physical arrest and that he repeatedly refused to comply with their orders for him to stop. Furthermore, Greg's argument fails to take into account the fact that he forcibly escaped from the grasp of Officer Huddleston. These facts certainly give rise to the reasonable belief by a police officer at the scene that some amount of force was necessary.

Next, Greg makes the unsupported argument that he posed no threat to the officers or others, as he was not armed and did nothing to put the officers at risk. Again we will not impute knowledge to the officers of facts for which there is no support. An officer involved in the day-to-day service of protecting the public must always be mindful of the possibility that a suspect is armed or dangerous, along with the many other inherent dangers involved in law enforcement. There is nothing in the record to indicate

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the few Sixth Circuit federal cases in which the term is referenced are civil suits filed by prisoners concerning allegations of civil rights violations.

that the officers herein should have felt otherwise. Furthermore, the mere fact that Greg was inexplicably fleeing down the middle of a darkened street toward a heavily traveled intersection clearly indicates a possible danger to the safety of the officers and other motorists and passersby.

Finally, Greg argues that although he did run away from the officers, he was not "fleeing" as that term is defined by statute or "evading arrest."[23] Because he allegedly was unaware of the officers' true identities and because they allegedly did not properly convey their intentions in ordering him to stop, he argues that his act of running was entirely proper under the circumstances. However, based upon the totality of the facts before us, this argument is without merit. It is uncontroverted that the police identified themselves prior to the foot chase, and that they were wearing their badges around their necks and ball caps clearly indicating their identity as police officers. The officers also verbally identified themselves and ordered Greg to stop. The failure, if any, of Greg to comprehend the officers' reasonable attempts to inform him of their identity

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[23] KRS 520.100, the applicable statute, sets forth the offense of fleeing or evading police as follows:

> (1) A person is guilty of fleeing or evading police in the second degree when:
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> (a) As a pedestrian, and with intent to evade or flee, the person knowingly or wantonly disobeys a direction to stop, given by a person recognized to be a peace officer who has an articulable reasonable suspicion that a crime has been committed by the person fleeing, and in fleeing or eluding the person is the cause of, or creates a substantial risk of, physical injury to any person. . . .

and intentions may best be explained by Greg's decision to run from the officers immediately upon exiting his vehicle. By very definition, Greg was fleeing from the officers, and thereby attempting to escape arrest. Despite his assertions to the contrary, Greg again evidenced that he was actively resisting being arrested when he wrenched himself from the grip of Officer Huddleston. There is nothing in the record to validate Greg's claims of simple passive resistance and nonsubmission. Greg's fleeing and resistance weighs heavily in favor of the force used by these officers to effectuate arrest.

"The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97. We find the facts presented to these officers on the scene were such that they reasonably believed the use of force was necessary to prevent danger and effectuate Greg's arrest. These officers wisely utilized their training and the professional tools provided to them when presented with this tense situation that Greg, himself, created. Greg's argument that tasers are deadly weapons or, at the least, a last resort prior to the use of lethal force, finds no support in the law.[24] Nor are we convinced that the administration of the second shock from the taser was facially unreasonable. The force employed was reasonably proportionate to the difficult, tense,

[24] Greg cites this Court to several cases from other jurisdictions in an attempt to bolster his argument. However, only two of those cases deal with the use of tasers, and neither of them constitute controlling precedent. The limited informational and analytical value of these cases in relation to the unreasonable use of force by law enforcement is noted. We find nothing in any of these cases which remotely indicates tasers are considered in any jurisdiction to be deadly weapons, nor that their use should be discontinued. Furthermore, all of the cases cited are easily distinguishable from the case at bar from even the most cursory of readings.

and uncertain situation Officer Huddleston and Officer Hammond faced and did not constitute excessive force. Although being struck by a taser is an unpleasant experience, the use thereof is not excessive per se. Under the "totality of the circumstances," we find Officer Hammond's use of the taser did not violate Greg's constitutional rights.

The Circuit Court correctly denied Greg's motion to suppress after taking into consideration the facts, law, and lengthy arguments of counsel. Having found no error, we affirm the order of the Fayette Circuit Court.

ALL CONCUR.

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ORAL ARGUMENT FOR APPELLANT:	**ORAL ARGUMENT FOR APPELLEE:**
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