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 NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-002306-MR

FRANCES GAYLE SPENCER

APPELLANT

v.
APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE FRANK A. FLETCHER, JUDGE
ACTION NO. 04-CR-00139

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

*** * * * *

BEFORE: VANMETER AND WINE, JUDGES; LAMBERT,¹ SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Appellant Frances Gayle Spencer was convicted of possession of a controlled substance in the first degree pursuant to a conditional guilty plea.² With her plea, she reserved the right to challenge the denial of her

¹ Senior Judge Joseph E. Lambert 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.

² Kentucky Rules of Criminal Procedure (RCr) 8.09.

motion to suppress evidence and now appeals from that order. She argues that evidence taken from her person during a search should have been suppressed because the Commonwealth did not have probable cause to arrest her. Upon review, we affirm the decision of the Breathitt Circuit Court.

On June 19, 2004, Kentucky State Police Trooper Gary Sandlin was working in Breathitt County when he received a call from dispatch reporting that shots had been fired at an address on Riley Branch Road in the Clayhole section of the county. Sandlin and Deputy Randy Gabbard of the Breathitt County Sheriff's Office proceeded in that direction. As they were turning onto Riley Branch Road, dispatch advised them that the vehicle believed to have been involved in the shooting was being driven out of Riley Branch. Dispatch also gave a description of the vehicle in question and the name of the suspected driver, Fred Napier. The officers subsequently passed a vehicle that matched the description given and initiated a traffic stop.

Trooper Sandlin asked Napier to step out of his vehicle and then escorted him to the vehicle's trunk area, where he began questioning him about the shooting incident. At the same time, Sandlin observed Spencer, who was a passenger in Napier's vehicle. According to Trooper Sandlin, Napier denied any involvement in the shooting and denied having a gun on his person or in his vehicle. Sandlin then began a pat-down of Napier for a weapon, at which time he observed Spencer making unusual movements with her hands close to her body as

if she were trying to hide something on her person. After checking the vehicle's registration, Sandlin charged Napier with having the wrong tags on his vehicle and for having no insurance, put him in handcuffs, and placed him in the back seat of the police cruiser. Trooper Sandlin then directed Spencer to step out of Napier's vehicle and walked her to the trunk area.

According to Sandlin, he was suspicious that Spencer was attempting to hide the gun that had been used in the shooting incident. He questioned her as to whether she was hiding something on her person or if she had hidden something under the passenger's seat. At first, Spencer said nothing, but when Sandlin told her that he had seen her making suspicious movements and that he believed that she had been trying to hide something, she admitted that she had become scared and had hidden two pills in her underwear. At this point, Sandlin arrested Spencer, placed her in the back of the other officer's police cruiser, and searched Napier's vehicle. He did not pat down or search Spencer at the scene of arrest, and no weapons were found in the vehicle. Sandlin then drove the cruiser to the home of Randy Mullins, who told Sandlin that Napier had shot the tires on Mullins' truck. Two bullet holes were found in one of the truck's tires, and Napier was placed under arrest for the shooting.

Spencer was then taken to the Breathitt County Jail. Trooper Sandlin asked a deputy female jailer to search Spencer and to find the pills Spencer had acknowledged having. Upon searching Spencer, the jailer found the two pills, along with several other pills and thirteen baggies of suspected cocaine. Sandlin

then called poison control so that the pills could be identified and read Spencer her *Miranda*³ rights. She was ultimately cited for four offenses: (1) possession of a controlled substance in the first degree, first offense (cocaine), in violation of KRS 218A.1415; (2) possession of a controlled substance in the second degree, first offense (drug unspecified), in violation of KRS 218A.1416; (3) possession of a controlled substance in the third degree, first offense (drug unspecified), in violation of KRS 218A.1417; and (4) possession of a prescription controlled substance not in its original container, first offense, in violation of KRS 218A.210.

On October 1, 2004, the Breathitt County Grand Jury indicted Spencer for possession of a controlled substance in the first degree. The indictment alleged that Spencer had knowingly and unlawfully possessed cocaine and a number of other controlled substances. On December 10, 2004, Spencer appeared in open court with counsel and entered a plea of “not guilty.”

On December 21, 2004, Spencer filed a motion to suppress any evidence obtained during her detention and search on grounds that she was not properly advised of her *Miranda* rights. A suppression hearing was held on February 18, 2005. Trooper Sandlin was the only person to give testimony at the hearing. On June 13, 2005, Spencer filed a supplement to her motion in which she argued that any evidence obtained from her detention and search should be suppressed because Sandlin did not have probable cause to arrest her. On April 7, 2006, the trial court entered an order denying Spencer’s motion to suppress.

³ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Among its findings, the court concluded that probable cause to arrest Spencer arose when she told Trooper Sandlin that she had hidden two pills in her underwear.

Upon denial of her suppression motions, Spencer entered a conditional guilty plea to the charge of possessing cocaine, reserving the right to challenge the trial court's suppression ruling on appeal. The trial court then entered a judgment whereby Spencer was determined to be guilty of possession of a controlled substance in the first degree, first offense. Spencer was sentenced to two years' imprisonment; however, it was further ordered that she serve only 60 days of that sentence, with the remainder of the sentence to be probated for three years.

On appeal, Spencer argues that the trial court erred in denying her suppression motion. She specifically contends that Trooper Sandlin did not have probable cause to arrest her at the time he placed her in the back of the police cruiser; therefore, she contends, the evidence seized from her person when she was searched at the jail must be suppressed.

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. Based on those findings of fact, 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.

Commonwealth v. Neal, 84 S.W.3d 920, 923 (Ky. App. 2002); *see also* RCr 9.78.

From the record, we conclude that the trial court's findings of fact are supported by

substantial evidence, and indeed, Spencer raises no arguments challenging those findings. Thus, our attention is focused solely upon whether the trial court properly applied the law to the established facts. *Ornelas vs. United States*, 517 U.S. 690, 696-97, 116 S.Ct. 1657, 1662, 134 L.Ed.2d 911 (1996); *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998).

We agree with the trial court that Trooper Sandlin's initial suspicion of criminal activity was reasonable. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Sandlin was in the process of investigating a shooting. From Spencer's suspicious behavior, he had reason to suspect that she was attempting to hide a gun. Thus, her temporary detention and questioning at the scene were entirely justifiable. Indeed, Spencer does not dispute this in her brief.

We further agree with the trial court that Spencer's initial detention ripened into an arrest when she was placed in the police cruiser and transported to jail. A person's involuntary transport to a police station for questioning is "sufficiently like arres[t] to invoke the traditional rule that arrests may constitutionally be made only on probable cause." *Kaupp v. Texas*, 538 U.S. 626, 630, 123 S.Ct. 1843, 1846, 155 L.Ed.2d 814 (2003), quoting *Hayes v. Florida*, 470 U.S. 811, 816, 105 S.Ct. 1643, 1647, 84 L.Ed.2d 705 (1985). We note that Trooper Sandlin admitted at the suppression hearing that Spencer was considered under arrest when he placed her in the back of the cruiser and took her to the jail to be searched. Therefore, probable cause for the arrest was required. *Id.*

“A warrantless arrest of an individual in a public place for a felony, or a misdemeanor committed in the officer's presence, is consistent with the Fourth Amendment if the arrest is supported by probable cause.” *Maryland v. Pringle*, 540 U.S. 366, 370, 124 S.Ct. 795, 799, 157 L.Ed.2d 769 (2003). The probable cause standard is a fluid one that is “incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances.” *Id.*, 540 U.S. at 371, 124 S.Ct. at 800. With this said, however, the question of whether probable cause for arrest existed in a particular case requires us to consider whether there is a reasonable ground for belief of guilt and whether that belief is particularized with respect to the person to be searched or seized. *Id.* To determine whether a police officer had probable cause to arrest an individual, we must examine the events leading up to the arrest, and then decide whether these facts, when viewed from the standpoint of “an objectively reasonable police officer,” created probable cause for the arrest. *Id.*, quoting *Ornelas*, 517 U.S. at 696, 116 S.Ct. at 1661-62.

Kentucky courts have interpreted the U.S. Supreme Court's jurisprudence in this respect as holding that probable cause for an arrest exists “when a reasonable officer could conclude from all the facts and circumstances that an offense is being committed in his presence.” *Commonwealth v. Fields*, 194 S.W.3d 255, 258 (Ky. 2006); *Greene v. Commonwealth*, 244 S.W.3d 128, 134 (Ky. App. 2008). As a general rule, determinations of probable cause should be reviewed *de novo*; however, we must “take care both to review findings of

historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.” *Ornelas*, 517 U.S. at 699, 116 S.Ct. at 1663; *see also Richardson v. Commonwealth*, 975 S.W.2d 932, 934 (Ky. App. 1998).

Spencer argues that there was no probable cause to arrest her. We are convinced, however, that Spencer’s incriminating admission that she had hidden two pills in her underwear justified her arrest for possession of a prescription controlled substance not in its original container. The fact that she was not ultimately indicted for this offense is irrelevant. While Trooper Sandlin did not ask Spencer to identify the types of pills that she was concealing, the fact of the concealment permitted the reasonable inference that the pills were controlled substances. Thus, Sandlin had probable cause to arrest Spencer and her subsequent search was incident to a lawful arrest. *See Cook v. Commonwealth*, 826 S.W.2d 329, 331 (Ky. 1992); *Stewart v. Commonwealth*, 44 S.W.3d 376, 379 (Ky. App. 2000).

Finally, Trooper Sandlin’s failure to search Spencer before placing her in the cruiser was not unreasonable in light of his testimony that he wanted a female officer to perform the search of her person. The United States Supreme Court has held that searches of a person and those articles “immediately associated” with the person incident to arrest may be made either at the time of arrest or when the accused arrives at the place of detention. *United States v. Edwards*, 415 U.S. 800, 803, 94 S.Ct. 1234, 1237, 39 L.Ed.2d 771 (1974).

In conclusion, there was probable cause to arrest Spencer and the subsequent search of her person was legally permissible. Therefore, we affirm the judgment of the Breathitt Circuit Court.

ALL CONCUR.

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