

RENDERED: OCTOBER 24, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000019-MR

NATHANIEL TYRONE BARNES

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 07-CR-00710

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; STUMBO, JUDGE; GUIDUGLI,¹ SENIOR JUDGE.

COMBS, CHIEF JUDGE: Nathaniel Tyrone Barnes appeals an order of the Fayette Circuit Court of August 20, 2007, denying his motion to suppress evidence. After our review, we affirm.

¹ Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On the evening of March 24, 2007, Officer Thomas Perkins of the Lexington Division of Police was dispatched to 1143 Centre Parkway, Apartment 19, to investigate trafficking in narcotics by individuals in that apartment. As the first officer to respond to the scene, Perkins observed two young men seated in a stairwell. One of them, Nathaniel Tyrone Barnes, stood to meet Perkins as he approached. Perkins testified that he immediately recognized that Barnes was intoxicated.

Officer Perkins asked the men where they had been, and Barnes responded that they had come from apartment 19. According to Perkins, Barnes appeared extremely nervous and evasive. Perkins then asked the men to provide him with some identification. As Officer Perkins examined the identification cards, he noticed that Barnes kept taking his hands in and out of his pockets in a furtive manner. Barnes continued to do so even after Perkins requested that he keep his hands away from his trouser pockets. Perkins admitted that Barnes's demeanor had caused him to begin to feel concerned for his safety and for the safety of others passing in and out of the nearby apartments. When Barnes moved his hands behind his back, Perkins decided to frisk him for weapons.

During a pat-down search of Barnes, Perkins felt two bulges in his front trouser pocket. Based upon his training and experience, Perkins knew that the bulges were likely to be narcotics. Officer Perkins placed Barnes under arrest and gave him his *Miranda*² warnings. In conducting a search incident to the arrest,

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

Perkins uncovered a digital scale covered with a white powder residue; one plastic bag containing a white powder; one plastic bag containing a white, rocky substance; one small bag containing what appeared to be marijuana; \$350.00 in small bills; and \$32.00 in another pocket. Barnes was transported to a nearby hospital where it was discovered that he had ingested a substantial amount of cocaine. Barnes's companion was not searched or questioned further.

On May 29, 2007, Barnes was indicted for trafficking in a controlled substance in the first degree and possession of marijuana. He filed a motion to suppress the evidence on August 14, 2007. Barnes argued that Officer Perkins's search exceeded the permissible scope of an investigatory stop, that it was not supported by adequate cause, and that it otherwise violated his constitutional rights.

Following an evidentiary hearing, the trial court concluded that Officer Perkins had undertaken a prudent and lawful search and seizure as a result of his reasonable investigation of the call. Barnes entered a conditional guilty plea and preserved his right to challenge the trial court's ruling on his motion to suppress evidence seized by police during the investigatory stop. He was sentenced to a five-year suspended term of imprisonment and to five-years' probation. This appeal followed.

Upon our review of the trial court's decision on a motion to suppress, the factual findings of the trial court are regarded as conclusive if they are supported by substantial evidence. Kentucky Rules of Criminal Procedure (RCr)

9.78. The trial court's application of the law to the facts is reviewed *de novo*.

Commonwealth v. Neal, 84 S.W.3d 920 (Ky. 2002).

On appeal, Barnes argues that the trial court erred by failing to grant his motion to suppress the evidence because the search and seizure were illegal. He contends that Officer Perkins's initial stop was improper under the principles established in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968). He claims that the officer's suspicion was based entirely on an allegation made by an anonymous tipster and that the tip lacked the requisite predictive information to justify the existence of any reasonable suspicion. As we disagree with Barnes's underlying premise, we conclude that Officer Perkins conducted a proper *Terry* search after he had developed a reasonable suspicion.

Officer Perkins testified that he arrived at 1143 Centre Parkway in response to a dispatch. He met Barnes and the other man as he approached apartment 19 and asked them about their activities. There were no constitutional implications inherent in this initial encounter. *Baker v. Commonwealth*, 5 S.W.3d 142 (Ky. 1999).

As the interchange among the men continued, Officer Perkins perceived that Barnes was under the influence of an intoxicant and that he was extremely edgy and evasive. In light of the totality of the circumstances, Perkins determined that the situation warranted further investigation, and he decided to detain Barnes. Barnes's demeanor plainly gave rise to an objectively reasonable

and articulable suspicion. The investigatory stop was fully justified at this point.

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968).

Later, when Perkins came to believe that Barnes was concealing a weapon, the officer was justified in conducting a pat-down search for his safety and the safety of others. *Id.* This search was narrowly circumscribed, and by means of a “plain-feel” search, Perkins discovered the secreted narcotics. *See Commonwealth v. Banks*, 68 S.W.3d 347 (Ky. 2001).

The trial court did not err by concluding that the search and seizure were wholly proper in this case. Consequently, we affirm the order of the Fayette Circuit Court denying the motion to suppress.

ALL CONCUR.

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