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SUPREME COURT GRANTED DISCRETIONARY REVIEW:
FEBRUARY 11, 2009
(FILE NO. 2008-SC-0894-DG)

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002518-MR

NABRYAN MARSHALL — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 07-CR-00242

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING

** ** ** ** **

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

COMBS, CHIEF JUDGE: On October 15, 2007, Nabryan Marshall entered a conditional guilty plea in Fayette Circuit Court to one count of trafficking in a

[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.

controlled substance and one count of bail jumping. He appeals an order of the trial court denying a motion to suppress evidence that was obtained through a strip search. He also contends that he should have received a competency hearing. After carefully reviewing the record and examining the law, we vacate in part and remand and affirm in part.

On January 2, 2007, Officer Schwartz of the Lexington Metro Police Department was on patrol in the east side of Lexington when he saw Marshall approach a convenience store. That area had been Officer Schwartz's regular beat for approximately one year, and he recognized Marshall from previous encounters. Officer Schwartz was aware of an unconfirmed warrant for Marshall's arrest[2] and had been told by residents of the area that Marshall was trafficking in drugs and that at times he was carrying a firearm.

Because of the rumors that Marshall might be armed, Officer Schwartz waited for backup (Officers Eden and Burns) before entering the convenience store in order to approach Marshall. The clerk informed the officers that Marshall did not enter the store but that he had run north upon seeing the patrol car. Based upon prior knowledge that Marshall had been staying in some apartments on Dalton Court, Officers Schwartz, Eden, and Burns approached the apartments. They soon received a report from a resident that there was a disturbance in Apartment #2 involving Marshall.

[2] An "unconfirmed warrant" means that the officer had learned of the existence of a warrant at a previous date but that he was not aware of whether it had been served in the interim. This particular warrant related to traffic charges.

Officers Eden and Burns entered the apartment while Officer Schwartz went around the back. He found two women leaving the apartment through a window and ordered them back inside. Upon entering the apartment, he heard a "verbal disorder" in the back of the apartment. Officer Schwartz found Marshall in a back bedroom, facing the wall, with his hands inside the front of his pants. A witness in the next room with Officer Burns yelled out, "It's in his crotch!"

Officer Schwartz testified that he handcuffed Marshall in order to conduct a frisk for weapons. He confirmed at the suppression hearing that Marshall was not under arrest at that time. During the frisk, Officer Schwartz felt a round object in Marshall's crotch. As he suspected that it was a rock of crack cocaine, he unfastened Marshall's pants and pulled them down just above knee level and then pulled Marshall's underwear below his buttocks. At that time, he and Officer Eden observed a bag of crack cocaine hanging from the genital area. Confusion ensued in the next few moments. Marshall managed to grab the crack cocaine and went down on the ground, taking three police officers with him.[3] After threatening him with a taser, they were able to get the crack cocaine from him and complete the search. They placed Marshall under arrest and charged him with trafficking in a controlled substance and tampering with evidence.

[3] At some point, Officer Burns had joined Officers Eden and Schwartz in the room where they conducted the search. Only Officers Eden and Schwartz were in the room when Marshall was actually disrobed.

Prior to trial, Marshall filed a motion to suppress the crack cocaine found during the search. The trial court denied his motion. Subsequently, Marshall entered a conditional guilty plea, preserving the motion for appeal. As part of the guilty plea, the count of tampering with physical evidence was dropped, and a count of bail jumping was added because Marshall had missed a previous trial date. He received a sentence of six years, which the judge probated.

Marshall first argues that his motion to suppress was improperly denied because the strip search violated his right to privacy under the Fourth Amendment. The Fourth Amendment of the United States Constitution (as well as Section 10 of the Kentucky Constitution) guarantees "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures[.]" The trial court admitted into evidence the crack cocaine found during the search of Marshall, ruling that the search was reasonable because it "was not overly intrusive." Marshall disagrees and contends that the strip search conducted before he was arrested was unreasonable.

The standard of a review for a motion to suppress evidence is two-fold. First, Kentucky Rule(s) of Criminal Procedure (RCr) 9.78 provides that, "If supported by substantial evidence the factual findings of the trial court shall be conclusive." If upon review of the factual findings under a clearly erroneous standard, we conclude that they are supported by substantial evidence, we then undertake a *de novo* review of the trial court's application of the law to those facts. *Lynn v. Commonwealth*, 257 S.W.3d 596, 598 (Ky. App. 2008).

The Supreme Court has authorized warrantless stop and frisks of suspects under carefully defined circumstances. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). However, these *Terry* frisks, or pat-downs, must be reasonable and are generally restricted to searching for weapons and to preventing destruction of evidence. *Id*. at 17 n.12, 19. In order to be reasonable, the search must be justified from its inception, and it must be "reasonably related in scope to the circumstances which justified the interference in the first place." *Id*. at 20.

In *Minnesota v. Dickerson*, 508 U.S. 366, 373, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993), the U.S. Supreme Court held that contraband seized in a *Terry* pat-down is admissible evidence as long as the search was conducted within the confines of *Terry*. The Court applied a plain-feel doctrine, analogizing it to the plain-view warrant exception. It emphasized that touch is more intrusive than sight; therefore, any unknown object that is not a weapon must be *immediately* identifiable as contraband in order to be properly seized. *Id*. at 375. An object's identity is not immediately apparent for plain-feel purposes if it must be determined by moving or manipulating the object. *Commonwealth v. Jones*, 217 S.W.3d 190, 197 (Ky. 2006). The result of *Dickerson* was the exclusion of a crack cocaine rock found in the defendant's pocket in the course of a *Terry* pat-down. In *Commonwealth v. Crowder*, 884 S.W.2d 649 (Ky. 1994), our Supreme Court applied *Dickerson* to exclude drugs found in the defendant's pocket in the course of a *Terry* pat-down.

This search was conducted as a *Terry* pat-down rather than a search incident to an arrest. The record indicates that the arrest occurred *after* the search, and Officer Schwartz testified that the outstanding warrant was unconfirmed at the beginning of the encounter. Furthermore, he himself described the search as a "*Terry* frisk." Even if the search had been conducted incident to an arrest, we note the reservation of the D.C. Circuit: "the bare fact that a person is validly arrested does not mean that he is subject to any and all searches that the arresting officer may wish to conduct." *U.S. v. Mills*, 472 F.2d 1231, 1234 (D.C. Cir. 1972).

We agree with the parties that the *Terry* pat-down itself was justified. Officer Schwartz had been told that Marshall sometimes carried a firearm, and he certainly had a reasonable basis for performing a protective frisk. However, we conclude that the strip search exceeded the scope of a *Terry* stop-and-frisk.

First, Officer Schwartz testified that he felt a crack cocaine rock in Marshall's pants while patting him down. Under the plain-feel doctrine, further exploration was not proper. Officer Schwartz had already determined that there was no weapon. He described the object merely as a hard, round object that could "possibly be crack cocaine." Marshall was wearing jeans, and a hard, round object could have been numerous items other than contraband.

In *Jones*, a police officer could not ascertain that the defendant did not have a prescription on a container until he removed it from the defendant's pocket. Our Supreme Court held that the pill bottle was improperly seized because it was

not *immediately apparent* that the bottle contained contraband. The extra, impermissible element of exploration tainted the search. 217 S.W.3d at 197.

We are persuaded that the police officers exceeded the bounds of propriety and reasonableness in pulling down Marshall's pants and underwear, leaving him exposed. Though some states have statutes that specifically govern how strip searches should be conducted, Kentucky does not. Therefore, we must apply Fourth Amendment principles of reasonableness, which the U.S. Supreme Court has defined as:

> a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Bell v. Wolfish, 441 U.S. 520, 559, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), *Masters v. Crouch*, 872 F.2d 1248, 1253 (6th Cir. 1989). We conclude that the search of Marshall fails this test.

We shall first examine the scope and manner of the search. In a venerable old case, the U.S. Supreme Court stressed the sanctity of one's personal privacy when it said:

> The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one . . . to lay bare the body, or to submit it to the touch of a stranger, without *lawful authority*, is an indignity, an assault, and a trespass[.]

Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 11 S.Ct. 1000, 35 L.Ed. 734 (1891) (emphasis added). The Eighth Circuit reiterated this concept more recently when it

stated that: "a strip search, regardless how professionally and courteously conducted, is an embarrassing and humiliating experience." *Hunter v. Auger*, 672 F.2d 668, 674 (8th Cir. 1982).

The trial court made a finding that the search did not cause Marshall embarrassment – contrary to Marshall's direct assertion that he was "acutely embarrassed." Officer Schwartz testified that he pulled Marshall's pants almost to his knees; he pulled Marshall's underwear down past his buttocks, leaving him fully exposed. Marshall was in handcuffs at the time. Although Officer Schwartz testified that he did not believe anyone could see into the room where the search was conducted, he admitted that the door was open and that several people were in the apartment. He also had told two women to stay inside the apartment. We are not aware that he took any precautions to prevent them from viewing the scene of the search.

By contrast, in *U.S. v. Williams*, 477 F.3d 974 (8th Cir. 2007), the defendant was taken to a more private location for a search after police felt an object under his clothing. Additionally, the statutes for Florida, Connecticut, and New Jersey all require strip searches to be conducted in sanitary premises where the search *cannot* be observed by anyone not necessarily involved in the procedure; it must be approved in writing by a supervisor. Fla. Stat. Ann. § 901.211, Conn. Gen. Stat. Ann. § 54-33l, N.J. Stat. Ann. § 2A:161A-4. In the most similar Kentucky case, a strip search at the scene of arrest was conducted in a closed bathroom, and it was the result of an otherwise corroborated tip specifically

detailing that the suspect had drugs concealed in his buttocks. *Williams v. Commonwealth*, 147 S.W.3d 1 (Ky. 2004).

Using the *Bell* factors, we recapitulate the sequence of events of the search in this case. The police thought that there was an outstanding warrant for traffic offenses for Marshall's arrest. When they found him, his hands were inside his pants. A witness was yelling, "It's in his crotch." The police handcuffed Marshall and determined that he did not have a weapon on his body. Even though Officer Schwartz detected an unknown object under Marshall's clothes, it was not immediately apparent by touch alone that the object was contraband. Because of the handcuffs, Marshall could not have destroyed the evidence. In fact, Marshall was not able to grab the bag of crack cocaine until the officers undressed him. They could have placed him under arrest for the outstanding warrant and then have proceeded to conduct such an intrusive search in a controlled environment.

The U.S. Supreme Court has reinforced heightened measures for personal modesty, declaring that:

> Police conduct that would be . . . embarrassingly intrusive – on the street can more readily – and privately – be performed at the station. . . . [T]he interests supporting a search incident to arrest would hardly justify disrobing an arrestee on the street, but the practical necessities of routine jail administration may even justify taking a prisoner's clothes before confining him, although that step would be rare.

Illinois v. Lafayette, 462 U.S. 640, 645, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983). The North Carolina Court of Appeals has recently held that looking down a

suspect's pants with a flashlight was unreasonable and exceeded the scope of a *Terry* frisk. *State v. Stone*, 634 S.E.2d 244 (N.C. Ct. App. 2006).

Kentucky's prison disciplinary manual, Kentucky Corrections Policies and Procedures (KCPP) at § 9.8 provides very specific guidelines for how a strip search of inmates should be conducted. Such a search is required to be logged and performed "in a dignified manner" and in sanitary conditions. KCPP § 9.8(II)(A)(1)(g). The U.S. Supreme Court has consistently upheld the concept that prison inmates have a diminished right of privacy due to institutional safety interests. *See Bell, supra*; *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984); *Samson v. California*, 547 U.S. 843, 126 S.Ct. 2193, 165 L.Ed.2d 250 (2006). At the time of this search, although Marshall was not in custody, he was not afforded the level of dignity provided by our state's procedures for inmates. Forcefully disrobing an unarrested man in handcuffs in an apartment without even closing the door falls far short of the standard "in a dignified manner." We hold that the search of Marshall exceeded the legitimate scope of a *Terry* frisk and that it was, therefore, unreasonable.

Marshall also argues that the court erred by not ordering a competency evaluation and hearing. Kentucky Revised Statute(s) (KRS) 504.100 directs a trial judge to order a competency evaluation and hearing if he "has reasonable grounds to believe the defendant is incompetent to stand trial[.]"

In Kentucky, the standard of competency is "whether the defendant has a substantial capacity to comprehend the nature and consequences of the proceedings against him and to participate rationally in his defense." *Alley v. Commonwealth*, 160 S.W.3d 736, 739 (Ky. 2005). Our standard of review is "[w]hether a reasonable judge, situated as was the trial court judge . . . should have experienced doubt with respect to competency to stand trial." *Mills v. Commonwealth*, 996 S.W.2d 473, 486 (Ky. 1999) (citations omitted). Such "reasonable grounds must be . . . so obvious that the trial court cannot fail to be aware of them[.]" *Via v. Commonwealth*, 522 S.W.2d 848 (Ky. 1975).

During his guilty plea colloquy, Marshall informed the court that in the past he had been diagnosed with post-traumatic stress disorder, bi-polar disorder, and obsessive compulsive disorder and that he had not taken medication for approximately two years. Marshall stated in court that neither the mental conditions with which he had been diagnosed nor the lack of medication affected his understanding of the proceedings. He displayed a thorough understanding of the implications of his conditional guilty plea and what issue could be appealed when asked if he knew what his plea meant. Additionally, his attorney indicated that Marshall was "very bright and very articulate" and that they had engaged in "very meaningful conversations" concerning his choices. There is no evidence of any obvious implication of KRS 504.100.

Courts give substantial weight to a defendant's statements, his attorney's statements, and the findings of the trial court judge during a guilty plea

colloquy. *Blackledge v. Allison*, 431 U.S. 63, 73-74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). In order to contradict the outcome of the colloquy, allegations must be specific – not conclusory. *Id*.

Marshall has failed to provide specific examples of any adverse effects of the bi-polar disorder, post-traumatic stress, or obsessive compulsive disorder. He does not offer any reason that his particular illnesses should have affected his ability to understand the proceedings and to participate in his defense. In *West v. Commonwealth*, 161 S.W.3d 331, 335 (Ky. App. 2004), this court rejected the defendant's claim of incompetence because it was not based on "any clear facts." The record does not show any clear factual evidence to contradict Marshall's own statements asserting his competency. The trial court did not err by not ordering a competency evaluation and hearing. We affirm this issue.

We conclude that the search of Marshall exceeded Fourth Amendment principles of reasonableness. Therefore, we vacate the order of the Fayette Circuit Court on the motion to suppress evidence and remand for a trial. We find no error in the court's failure to order a competency evaluation and hearing. We affirm on that issue.

Accordingly, we vacate in part and remand and affirm in part.

ALL CONCUR.

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