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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002016-MR

MARCUS DESHAWN FRESH — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A. C. MCKAY CHAUVIN, JUDGE
ACTION NO. 06-CR-002255

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, MOORE, AND VANMETER, JUDGES.

MOORE, JUDGE: Marcus Deshawn Fresh appeals the Jefferson Circuit Court's judgment convicting him of first-degree illegal possession of a controlled substance, *i.e.*, cocaine; illegal possession of a controlled substance, *i.e.*, marijuana; and second-degree criminal trespass. After a careful review of the

record, we affirm because Fresh's rights against unreasonable searches and seizures were not violated.

Fresh was arrested in the Iroquois Homes neighborhood of Jefferson County after he was discovered by an officer with the Louisville Metro Police Department to have marijuana and cocaine in his possession. In the circuit court, he moved to suppress that evidence on the basis that it constituted fruits of an unconstitutional search and seizure. The circuit court held an evidentiary hearing on the motion to suppress and ultimately denied the motion. The court found that Fresh was not seized or placed in custody during his initial encounter with officers and, thus, Fresh's statement to the officers informing them that he had marijuana in his pocket was not the product of a custodial interrogation. The court held that this statement then gave the officers probable cause to arrest Fresh for possession of marijuana, and the search of Fresh, which revealed the cocaine in his pocket, was made "contemporaneously with and incident to his lawful arrest for possession of marijuana." Alternatively, the circuit court held that, even if it considered Fresh to have been seized at the time of the initial encounter, the officers had a reasonably articulable suspicion justifying their stop of Fresh because they knew he did not live in the Iroquois Homes neighborhood and through personal experience, at least one of the officers knew Fresh's reputation for trafficking in narcotics in that neighborhood.

Fresh entered a guilty plea but reserved the right to appeal his search and seizure issue. Fresh was sentenced to serve two years for the offense of first-

degree illegal possession of a controlled substance (cocaine); twelve months for the offense of illegal possession of a controlled substance (marijuana); and credit for time served for the offense of second-degree criminal trespass. The sentences were ordered to run concurrently, for a total of two years of imprisonment.

Fresh now appeals, contending that the circuit court's judgment must be reversed because: (a) this Court cannot make a reasoned evaluation of the circuit court's ruling because the circuit court failed to enter specific findings of fact concerning Fresh's motion to suppress; (b) location and bad reputation are insufficient to give rise to a reasonable and articulable suspicion of criminal activity; and (c) Section 10 of the Kentucky Constitution does not allow stops like those permissible under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

I. STANDARD OF REVIEW

> If the trial court's findings of fact are supported by substantial evidence, then they are conclusive. We conduct *de novo* review of the trial court's application of the law to the facts. We review findings of fact for clear error, and we give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.

Hallum v. Commonwealth, 219 S.W.3d 216, 220 (Ky. App. 2007) (internal quotation marks and citations omitted).

II. ANALYSIS

A. CLAIM REGARDING CIRCUIT COURT'S FAILURE TO ENTER SPECIFIC FINDINGS OF FACT

Fresh first asserts that this Court cannot make a reasoned evaluation of the circuit court's ruling because the circuit court failed to enter specific findings of fact concerning Fresh's motion to suppress. Fresh notes that, pursuant to RCr[1] 9.78, the circuit court was required to enter findings of fact following the evidentiary hearing on his motion to suppress. Kentucky Rule of Criminal Procedure 9.78 provides as follows:

> If at any time before trial a defendant moves to suppress, or during trial makes timely objection to the admission of evidence consisting of (a) a confession or other incriminating statements alleged to have been made by the defendant to police authorities, (b) the fruits of a search, or (c) witness identification, the trial court shall conduct an evidentiary hearing outside the presence of the jury and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling. If supported by substantial evidence[,] the factual findings of the trial court shall be conclusive.

Fresh failed to move the court, after it entered its order denying his motion to suppress, to render more specific factual findings. Pursuant to CR[2] 52.04,

> [a] final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court by a written request for a finding on that issue. . . .

[1] Kentucky Rule of Criminal Procedure.

[2] Kentucky Rule of Civil Procedure.

This Court has previously held that a criminal defendant waives the right to raise an issue on appeal concerning the denial of a suppression motion when the defendant failed to move the trial court, pursuant to CR 52.04 and RCr 13.04, for further findings following the trial court's denial of the motion to suppress. *See Farmer v. Commonwealth*, 169 S.W.3d 50, 53 (Ky. App. 2005). Therefore, because Fresh failed to move the circuit court for further findings of fact, he has waived the right to raise that issue here.

B. CLAIM REGARDING FRESH'S LOCATION AND BAD REPUTATION AS BASES FOR THE OFFICER'S REASONABLE AND ARTICULABLE SUSPICION OF CRIMINAL ACTIVITY

Fresh next contends that location and bad reputation are insufficient to give rise to a reasonable and articulable suspicion of criminal activity to justify a stop. Fresh notes that the circuit court, in paragraph number two of its findings in its order denying Fresh's motion to suppress, stated as follows:

> Nevertheless, at the time of the encounter, police had reason to believe that the Defendant did not live in Iroquois Homes and were aware, through personal experience, of his repute for trafficking in narcotics in the Iroquois Homes neighborhood. This information and belief provided the officers with sufficiently reasonable articulable suspicion to stop the Defendant in order to confirm or allay that suspicion. *See Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

The Commonwealth contends that Fresh's encounter with the officers did not amount to a *Terry* stop because the encounter was consensual. "There are three types of interaction between police and citizens: consensual encounters, temporary detentions generally referred to as *Terry* stops, and arrests." *Baltimore*

v. Commonwealth, 119 S.W.3d 532, 537 (Ky. App. 2003) (footnote omitted). Regardless, even if the circuit court found that the encounter constituted a *Terry* stop, there was nothing improper about the stop in this case.

"Police officers are free to approach anyone in public areas for any reason." *Commonwealth v. Banks*, 68 S.W.3d 347, 350 (Ky. 2001).

> A "seizure" occurs when the police detain an individual under circumstances where a reasonable person would feel that he or she is not at liberty to leave. Where a seizure has occurred, if police have a reasonable suspicion grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, then they may make a *Terry* stop to investigate that suspicion. Evaluation of the legitimacy of an investigative stop involves a two-part analysis. First, whether there is a proper basis for the stop based on the police officer's awareness of specific and articulable facts giving rise to reasonable suspicion. Second, whether the degree of intrusion was reasonably related in scope to the justification for the stop.

Baltimore, 119 S.W.3d at 537-38 (internal quotation marks and footnotes omitted).

The officers in the present case had reason to believe that Fresh did not reside in Iroquois Homes.[3] They were permitted to use this information in conjunction with other information they had to justify stopping Fresh. *See Banks*, 68 S.W.3d at 350 (noting that fact that "officers did not recognize [Banks] as a resident of the complex with which they were familiar" was one of several factors supporting officer's reasonably articulable suspicion that Banks was engaging in criminal activity).

[3] One of the officers testified that he had a list of all of the people residing in Iroquois Homes, as he was an officer assigned to the Iroquois Homes complex.

Additionally, the circuit court found that the officers knew from personal experience that Fresh had a reputation for trafficking in the Iroquois Homes neighborhood. During the evidentiary hearing on Fresh's motion to suppress, one of the arresting officers testified that he had previously arrested Fresh for possession of a controlled substance and that Fresh was a known "dope dealer" in Iroquois Homes. Certainly, if officers are permitted to consider "whether a particular *location* has a reputation for being a 'known drug' area – when forming a reasonable and articulable suspicion," *Commonwealth v. Marr*, 250 S.W.3d 624, 627 (Ky. 2008) (emphasis added), they should also be permitted to take into account their personal knowledge that a *person* has a known history as a drug dealer when forming a reasonable and articulable suspicion. When considered together with the fact that the officers had a reasonable belief that Fresh did not live in the Iroquois Homes neighborhood, Fresh's prior drug arrest by the same officer involved in this case and Fresh's reputation as a drug dealer, as known by the officers, provided sufficient bases for the officers to form a reasonable and articulable suspicion that Fresh was engaging in criminal activity. Thus, the stop was proper.

We note that Fresh makes no argument addressing the second part of the *Terry* stop analysis, *i.e.*, "whether the degree of intrusion was reasonably related in scope to the justification for the stop." *Baltimore*, 119 S.W.3d at 538. We assume this is because Fresh apparently informed the officers almost as soon as their encounter began that he had marijuana in his pocket. Thus, because he

does not address this in his brief, there is no need for us to determine whether the degree of intrusion was reasonable, as is typically done in analyzing *Terry* stop claims. *See Baltimore*, 119 S.W.3d at 538. Consequently, Fresh's second claim lacks merit.

C. CLAIM THAT TERRY STOPS ARE NOT PERMITTED UNDER KY. CONST. SECTION 10

Finally, Fresh alleges that Section 10 of the Kentucky Constitution does not allow stops like those permissible under *Terry*. However, *Terry* was a case interpreting the Fourth Amendment of the United States Constitution, and "the Kentucky Supreme Court has held that Section 10 of the Kentucky Constitution provides no greater protection than does the federal Fourth Amendment." *Nichols v. Commonwealth*, 186 S.W.3d 761, 763 (Ky. App. 2005) (internal quotation marks omitted). Additionally, "Kentucky has expressly adopted the language of *Terry v. Ohio*, permitting a forcible stop even where probable cause for arrest is lacking." *Deberry v. Commonwealth*, 500 S.W.2d 64, 66 (Ky. 1973). Thus, Fresh's claim lacks merit.

Accordingly, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

J. David Niehaus
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General

Bryan D. Morrow
Assistant Attorney General
Frankfort, Kentucky