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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000388-MR

DONNELL MILSAP — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 07-CR-000946

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND NICKELL, JUDGES; KNOPF,[1] SENIOR JUDGE.

NICKELL, JUDGE: Donnell Milsap (Milsap) has appealed from the Jefferson Circuit Court's January 24, 2008, judgment following a jury trial convicting him of possession of a controlled substance in the first degree, second or subsequent

[1] Senior Judge William L. Knopf 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.

offense,[2] and being a persistent felony offender in the first degree[3] (PFO I). Milsap waived his right to have his sentence fixed by the jury, and the trial court set his sentence at thirteen years' imprisonment. For the following reasons, we affirm.

On August 29, 2006, officers from the Louisville Metro Police Department (LMPD) were conducting a "violent crime reduction detail." As a part of that detail, officers were patrolling Beecher Terrace, a housing project in Jefferson County known to the officers to be a high crime area. Officer Michael Lauder (Officer Lauder) and Sergeant Larry "Joe" Seelye (Sergeant Seelye), who were familiar with the Beecher Terrace area and its residents, were patrolling the area on foot while dressed in civilian clothes. The officers were wearing department-issued green wristbands and badges identifying themselves as police officers.

At approximately 2:45 a.m., the officers observed Milsap riding a bicycle between the buildings of Beecher Terrace. Neither officer recognized Milsap as a resident of the housing community. They observed Milsap heading west on a sidewalk toward a parked patrol car. The officers then observed Milsap turn east upon spotting the marked police car and head straight toward their location. Milsap later testified he was merely turning to go "check-out" the approaching police officers because he thought they were "some women he knew." As Milsap got closer, the officers noticed he had a "deer in the headlights look."

[2] KRS 218A.1415, a Class C felony.

[3] KRS 532.080.

Because the buildings had No Loitering/No Trespassing signs posted on them, and the officers did not recognize Milsap as a resident, the officers determined to stop Milsap and ask his reasons for being in the high crime area.

After identifying themselves as police officers, they ordered Milsap to stop and he complied. Officer Lauder inquired whether Milsap lived in Beecher Terrace, to which Milsap answered in the negative. Upon further inquiry, it was determined Milsap was not visiting a resident of the complex. Officer Lauder then asked Milsap to dismount the bicycle and keep his hands visible. Again, Milsap complied with the request.

Officer Lauder asked Milsap if he had anything on his person that would "get him in trouble." Milsap stated he had "three pieces of dope" and a knife in his pocket. A subsequent search uncovered three bags of suspected "dope,"[4] a knife, and three Viagra pills in Milsap's pocket. Officer John Osbourne (Officer Osbourne) arrived on the scene and transported Milsap's bicycle, the knife and the narcotics to the LMPD property room.

Milsap was subsequently indicted for possession of a controlled substance in the first degree (cocaine), second or subsequent offense, carrying a concealed deadly weapon,[5] and criminal trespass in the third degree.[6] Prior to trial, the Commonwealth moved to dismiss the concealed weapon charge.

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[4] The "dope" was tested by the Kentucky State Police crime lab and found to be crack cocaine.

[5] KRS 527.020, a Class A misdemeanor.

[6] KRS 511.080, a violation.

Milsap moved the trial court to suppress the seized evidence alleging it was gathered as the result of an unconstitutional investigative stop because the officers lacked reasonable suspicion. At a suppression hearing, the court found, based on the totality of the circumstances, that the officers had a reasonable articulable suspicion to stop Milsap and engage him in conversation. The court concluded that even a minor violation such as trespassing was sufficient to justify the stop, and denied Milsap's motion to suppress the drugs and the knife.

Following a two-day jury trial, Milsap was found guilty of possession of a controlled substance, but was acquitted of the criminal trespass charge. Milsap waived his right to have the jury set his penalty and agreed to a sentence of thirteen years' imprisonment.[7] He reserved only the right to appeal from the verdict in the guilt phase of the trial. This appeal followed.

Milsap advances three arguments on appeal. First, he contends the trial court erred in denying his suppression motion. Second, he contends the trial court erred in refusing to grant his motion for a directed verdict on the controlled substance charge due to an alleged break in the chain of custody for the crack cocaine seized from his pocket. Finally, he argues for the first time on appeal, that the officers were required to advise him of his *Miranda*[8] rights before subjecting

[7] Milsap agreed to a five-year sentence on the possession of a controlled substance offense, enhanced to ten years as a subsequent offense, and further enhanced to thirteen years by virtue of his PFO I conviction. He has not appealed from the sentencing phase of trial.

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

him to a custodial interrogation. Having carefully reviewed the claims, the record, and the law, we affirm.

First, when this Court reviews the denial of a motion to suppress, a trial court's findings of fact regarding the admissibility of evidence seized during the search are deemed conclusive if they are supported by substantial evidence. RCr[9] 9.78; *Davis v. Commonwealth*, 795 S.W.2d 942, 955 (Ky. 1990); *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky. App. 2002). Once it is determined that the trial court's factual findings are supported by substantial evidence, we review *de novo* the trial court's application of those facts to the law to determine whether the decision is correct as a matter of law. *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998); *Commonwealth v. Opell*, 3 S.W.3d 747, 751 (Ky. App. 1999). Milsap does not challenge the trial court's findings of fact, and based upon our review of the record, we hold they were supported by substantial evidence. Thus, we will focus solely on whether the trial court correctly applied the law to the facts.

Milsap argues that riding his bicycle in a common area of Beecher Terrace did not constitute criminal trespass and was insufficient to provide reasonable suspicion to justify an investigative stop. Thus, he contends the trial court should have suppressed all of the evidence seized as a result of the allegedly improper stop. We disagree.

[9] Kentucky Rules of Criminal Procedure.

It is well-settled that if an officer has a reasonable, articulable suspicion that criminal activity is afoot, any citizen may be subjected to a brief investigatory stop to determine whether the officer's suspicions are correct without running afoul of the Fourth Amendment's prohibition against warrantless searches and seizures. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Police must consider the totality of the circumstances in determining the probability that a stop is justified. *U.S. v. Cortez*, 449 U.S. 411, 417-418, 101 S.Ct. 690, 692, 66 L.Ed.2d 621 (1981); *Henson v. Commonwealth*, 245 S.W.3d 745, 748 (Ky. 2008). Appellate courts are to give due deference to the inferences drawn from such facts by trial courts and law enforcement officers. *Ornelas v. U.S.*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). *Accord Commonwealth v. Banks*, 68 S.W.3d 347 (Ky. 2001).

In the case *sub judice*, two officers observed Milsap riding his bicycle in an area posted with "no trespassing" signs and known for its high frequency of crime. It was after 2:00 a.m. and the officers did not recognize him as a resident of the complex based upon their intimate knowledge of the area and its residents. Further, the officers watched Milsap abruptly change his course upon seeing a marked patrol car and having a "deer in the headlights" look on his face when they identified themselves as law enforcement officers. Although any of these factors alone may seem innocent, when taken as a whole, these facts clearly gave the officers reasonable suspicion to believe criminal activity was afoot. "Trespass and loitering, being minor criminal activity, alone provide sufficient reasonable

suspicion for an officer to stop and question a subject." *Gray v. Commonwealth*, 150 S.W.3d 71, 74 (Ky. App. 2004) (citing *Simpson v. Commonwealth*, 834 S.W.2d 686, 688 (Ky. App. 1992)). "[U]nprovoked evasive maneuvers of a suspect can provide the requisite reasonable, articulable suspicion to justify a brief *Terry* stop investigation." *Commonwealth v. Fields*, 194 S.W.3d 255, 257 (Ky. 2006). Although Kentucky courts have ruled a person's mere presence in a high crime area is insufficient to justify reasonable suspicion, *Strange v. Commonwealth,* 269 S.W.3d 847, 852 (Ky. 2008) (citing *Illinois v. Wardlow,* 528 U.S. 119, 124, 120 S.Ct. 673, 676, 145 L.Ed.2d 570) (2000)), police are permitted to take into account their knowledge of whether a particular area is known as a high crime area when evaluating the totality of the circumstances. *Commonwealth v. Marr,* 250 S.W.3d 624, 627 (Ky. 2008). Milsap argues the only factor giving officers reasonable suspicion to stop him was his presence at Beecher Terrace, a targeted location for a violent crime reduction detail. However, as the trial court correctly concluded, in light of the totality of the circumstances the officers were justified in conducting a brief investigative stop to determine the correctness of their suspicion that criminal activity was afoot. Thus, there was no violation of Milsap's constitutional rights, and the trial court correctly denied the motion to suppress.

Second, Milsap argues the trial court erred in denying his motion for a directed verdict. He claims the Commonwealth insufficiently proved the chain of custody of the crack cocaine seized from him, and thus a directed verdict was

mandated. Again, we disagree. The standard of review of a trial court's denial of a motion for directed verdict is also well-settled.

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.
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> On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991); *see also Commonwealth v. Sawhill,* 660 S.W.2d 3 (Ky. 1983).

Milsap contends the Commonwealth failed to establish who physically placed the seized narcotics into the evidence locker and when this activity occurred. We are convinced the Commonwealth introduced sufficient evidence to overcome the directed verdict motion. This is especially true since it is a "near universal recognition that the chain of custody need not be absolute." *Thomas v. Commonwealth*, 153 S.W.3d, 772, 779 (Ky. 2004) (citing *Rabovsky v. Commonwealth*, 973 S.W.2d 6, 8 (Ky. 1998)). Further, "[a]ll possibility of tampering does not have to be negated." *Id*. at 782; *Rabovsky*, 973 S.W.2d at 8; *Pendland v. Commonwealth*, 463 S.W.2d 130, 133 (Ky. App. 1971). "It is sufficient in these cases that the actions taken to preserve the integrity of the

evidence are reasonable under the circumstances." *Thomas,* 153 S.W.3d at 782. "Any gaps go to the weight, rather than the admissibility of the evidence, and the proponent need only demonstrate a reasonable probability that it has not been altered in any material respect." *Id.* at 781 (citing *McKinney v. Commonwealth*, 60 S.W.3d 499, 511 (Ky. 2001)); *Rabovsky*, 973 S.W.2d at 8. Given the liberal standard for proving a chain of custody, even a question of "whether the evidence has been misplaced, insecurely kept, or unstored for a significant period of time is not *per se* fatal to admissibility." *Thomas*, 153 S.W.3d at 781 (citing *Gilmore v. United States*, 742 A.2d 862, 870-72 (D.C. 1999)).

Officer Lauder and Detective Seelye testified that after the drugs were removed from Milsap's person, Officer Osbourne transported them, along with the other seized property, to the LMPD property room. Officer Sue Williams testified she retrieved the sealed package containing the narcotics from the drug vault and transported it to the Kentucky State Police laboratory. Officer Lauder further testified the drugs looked the same at trial as they had when they were retrieved from Milsap's pocket and he believed the three bags of "dope" and the three Viagra pills admitted into evidence were in fact the same evidence he confiscated from Milsap's person based on the initials that were printed of the flap of the envelope.

Officer Osbourne was not called to testify regarding his handling of the evidence, however, at a bench conference, Detective Seelye informed the court that the property receipts for the drugs and the other property were signed by

Officer Osbourne and indicated the evidence was logged into the property room at 3:21 a.m. and 3:26 a.m., respectively. Thus, drawing all inferences in the light most favorable to the Commonwealth, we believe the chain of custody was sufficiently proven to overcome a directed verdict motion and to allow the evidence to be presented to the jury for their consideration of how much weight and credibility it deserved. The trial court did not err.

Finally, Milsap requests palpable error review of his admittedly unpreserved challenge to the failure of officers to inform him of his constitutional rights before questioning him. He claims the officers' directive for him to dismount his bicycle transformed an initial investigatory stop into custody for purposes of *Miranda*. Therefore, he argues his statements were unconstitutionally obtained and should be suppressed, as should the narcotics found in his pocket based upon information gained during the tainted interrogation. RCr 10.26 authorizes us to review unpreserved claims on appeal and grant relief "upon a determination that manifest injustice has resulted from the error." See also *Bell v. Commonwealth*, 245 S.W.3d 738, 741 (Ky. 2008). Having reviewed the allegations, we are convinced the trial court did not err, and thus, there has been no manifest injustice.

Miranda warnings are required only in the context of custodial interrogations. *Commonwealth v. Lucas*, 195 S.W.3d 403, 406 (Ky. 2006) (citing *Callihan v. Commonwealth*, 142 S.W.3d 123, 127 (Ky. 2004)). "Custodial interrogation has been defined as questioning initiated by law enforcement after a

person has been taken into custody or otherwise deprived of freedom of action in any significant way." *Id*. at 405 (citing *Thompson v. Keohane*, 516 U.S. 99, 102, 116 S.Ct. 457, 460, 133 L.Ed.2d 383 (1995)). Courts must look at the totality of the circumstances to determine whether a suspect is "in custody" for purposes of *Miranda*, and the inquiry is ultimately to focus on whether there has been a formal arrest or whether officers have restrained the suspect's freedom of movement such as would be typically associated with an arrest. *Wilson v. Commonwealth*, 199 S.W.3d 175, 180 (Ky. 2006).

Here, the officers merely ordered Milsap to get off his bike in an attempt to control the investigative stop by being on equal footing with him. This did not rise to the level of a formal arrest since a reasonable person would not believe he was under arrest merely by being told to alight from his bicycle. Even after Milsap was ordered to dismount his bicycle, he was not placed into custody until *after* he had voluntarily disclosed the contents of his pocket which included "dope," Viagra, and a knife. As previously stated, the officers were justified in conducting an investigative stop based on the belief that he was trespassing in Beecher Terrace. They were not required to inform Milsap of his *Miranda* warnings *before* questioning him about his presence in the housing complex since he was not under formal arrest. The officers did not restrain Milsap's freedom of movement to an extent equated with a formal arrest. Based upon the totality of the circumstances, we agree with the trial court—Milsap was not "in custody" for purposes of *Miranda* and thus the officers were not required to inform him of his

constitutional rights. Accordingly, as there was no error, there can be no manifest injustice.

For the foregoing reasons, the order upon jury verdict and judgment of conviction and sentence entered by the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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