RENDERED: NOVEMBER 13, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001920-MR

ZIRL BROWN — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO SCORSONE, JUDGE
ACTION NO. 08-CR-00458

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND VANMETER, JUDGES; LAMBERT,[1] SENIOR JUDGE.

NICKELL, JUDGE: Zirl L. Brown appeals from a judgment of the Fayette Circuit Court following a conditional guilty plea[2] to charges of criminal attempt to possess

[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.

a controlled substance[3] (amended) for which his sentence was fixed at twelve months probated for two years; possession of open alcohol beverage container in a motor vehicle[4] for which he was ordered to pay a $30.00 fine; and operating on a suspended/revoked operator's license[5] for which he was ordered to pay a fine of $100.00. On appeal, he argues the trial court erroneously denied his motion to suppress evidence obtained during a warrantless search of his sports utililty vehicle (SUV) because police lacked reasonable, articulable suspicion to conduct the search. After reviewing the record and the law, we are convinced the officers had reasonable, articulable suspicion to stop Brown's SUV. Therefore, we affirm the judgment of the Fayette Circuit Court.

This appeal stems from a traffic stop made in the early morning hours of March 1, 2008, in an area of Fayette County, Kentucky, known for drug sales. Details of the stop and subsequent search were provided by Officer Brian Peterson of the Lexington Division of Police, the only witness to testify at the suppression hearing.

While on patrol in a marked police cruiser, Officer Peterson was flagged down by a white woman waving her arms from her car at the intersection of Seventh and Jackson Streets. She told Officer Peterson she was a nurse on her

[3] Brown was indicted for possession of controlled substance first degree under KRS 218A.1415, which is a Class D felony. However, he ultimately entered a conditional guilty plea to and was convicted of criminal attempt to possession of controlled substance, a class A misdemeanor. Criminal attempt is explained in KRS 506.010.

[4] KRS 189.530(2), a violation.

[5] KRS 186.620(2), a Class B misdemeanor.

way to work and while waiting at the stop sign at Sixth Street and Elm Tree Lane, a black man wearing light colored pants approached her car on foot. Nothing else happened as she waited at the stop sign, but the woman complained that people often approach her car as she travels through the area en route to work and she was tired of it. Officer Peterson testified police receive many complaints about nightly drug activity and loitering in that area. He compared drug sales in that neighborhood to a drive-thru restaurant window where a potential buyer drives into the area, briefly stops his vehicle, a seller approaches the vehicle on foot, drugs are exchanged for money, and the driver leaves the scene with the drugs.

Based on his knowledge of the area and the information provided by the nurse, Officer Peterson called for two additional uniformed officers to assist him in investigating the complaint. At the intersection of Sixth Street and Elm Tree Lane the officers saw a dark SUV parked near a stop sign. The officers observed a black male, later identified as John H. Adams, Jr., approach the passenger side of the SUV by foot, remain less than one minute, leave, and return within one minute. Officer Peterson did not know if the SUV's motor was running or how many people, if any, were inside the SUV. Officers never saw Adams reach inside the SUV.

As officers approached the intersection to speak with Adams, he began walking away from the SUV and crossed the street. As officers got closer to Adams, he began running along Sixth Street. The officers gave chase and one of them caught and detained Adams who had tossed what was believed to be a gun

during the foot chase. Officers recovered a BB pistol that Adams said he carried for protection. A *Terry*[6]-type search of Adams revealed no other weapons. Officers did not search Adams for drugs or money because they did not believe they had probable cause to perform a warrantless search. Furthermore, Officer Peterson did not believe Adams was the man who had approached the nurse. When asked, Adams denied any involvement with the SUV. Even though officers had just observed Adams approach the SUV twice, they permitted him to leave the scene.

While officers were speaking with Adams, the SUV left, heading east on Sixth Street. Dispatch was alerted that a dark Chevy Blazer, last seen headed toward Ohio Street on Sixth Street, might be related to the narcotics trade. About five minutes later, the Blazer passed the officers again and one of them recorded the license plate number which was relayed to dispatch. Solely on the strength of the radio dispatch, another officer stopped the SUV at the intersection of Maple and Loudon Avenues.

Brown, wearing light tan pants, was the Blazer's only occupant. A K-9 officer at the scene made a positive hit on the SUV. After having Brown exit the SUV, Officer Peterson found a loose rock of suspected crack cocaine in the center console of the vehicle underneath some items. An open can of beer, standing upright, was also found on the floor of the Blazer.

---

[6] *Terry v. Ohio,* 392 U.S. 1, 21, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968).

Brown was arrested shortly after 4:00 on the morning of March 1, 2008, and indicted in April 2008. He entered a not guilty plea at arraignment. While no written motion to suppress was filed, the trial court[7] conducted a suppression hearing at Brown's request on July 10, 2008. After hearing testimony from Officer Peterson and argument from counsel, the court made the following oral findings: officers had reasonable, articulable suspicion to believe crime was afoot and to stop Adams and the SUV when Adams ran from officers after they had twice observed Adams approach the SUV; allowing Adams to leave the scene did not dissipate their reasonable, articulable suspicion that the SUV had been involved in a drug crime and to continue investigating the SUV and its driver; the lack of drugs on Adams could reasonably be interpreted to mean Adams was the seller and the drug he sold was now inside the SUV; the stop and search were conducted by an experienced officer[8] in an area known for high drug activity; Officer Peterson had just received a citizen complaint about someone approaching her car on foot; officers traveled to and observed the intersection identified by the nurse before approaching Adams and later the SUV; officers acted carefully and conservatively and tried to stay within constitutional boundaries by not searching Adams for anything other than weapons; and finally, Brown's vehicle was not

[7] Judge Sheila Isaac presided over the suppression hearing. Judge Ernesto M. Scorsone presided over entry of the guilty plea and final sentencing.

[8] Officer Peterson testified he has been a police officer for six years. Throughout that time he has worked the same beat, known as the Central Sector, covering downtown Lexington and an area just north of the city. Officer Peterson testified he was familiar with the Sixth Street and Elm Tree Lane neighborhood. At the time of the stop, he was in uniform and driving a marked police cruiser.

searched until a K-9 officer had made a positive hit on the SUV. Based upon these findings of fact, the trial court denied the suppression motion. The trial court did not reduce its findings to a written order but merely stated, "the motion is hereby Denied for reasons stated on the record."

On August 22, 2008, Brown entered a conditional guilty plea to all three charges. Although no writing shows any issue was reserved for appeal as required by RCr 8.09, defense counsel did state on the record during the guilty plea colloquy that a conditional plea was being entered and that Brown was reserving the court's suppression ruling. This appeal followed. We affirm.

We begin with a word about preservation. Although mentioned by neither party, RCr 8.09 governs the entry of a conditional guilty plea. That rule specifies in pertinent part,

> [w]ith the approval of the court a defendant may enter a conditional plea of guilty, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified trial or pretrial motion.

While Brown's defense counsel stated during the guilty plea colloquy that a conditional plea was being entered and that the suppression ruling was appealed, grounds for an appeal were not reserved *in writing* as required by RCr 8.09. Thus, nothing was properly preserved for our review. Although inartful, we will consider the oral reservation of the issue by defense counsel, and the lack of any objection by the Commonwealth, to be adequate to preserve the issue for our review under these circumstances. *See Gabbard v. Commonwealth,* 887 S.W.2d

347, 350 (Ky. 1994) (holding acknowledgement and reference by court to an issue in conditional plea proceedings can preserve said issue for appellate review).

The Fourth Amendment to the United States Constitution and Section Ten of Kentucky's Constitution forbid unreasonable searches and seizures. While warrantless searches or seizures are generally improper, *Williams v. Commonwealth,* 147 S.W.3d 1, 4 (Ky. 2004), an exception to the warrant requirement allows officers to make brief investigatory stops when they "have a reasonable articulable suspicion that 'criminal activity may be afoot.'" *Id.* at 5, *quoting Terry,* 392 U.S. at 30, 88 S.Ct. at 1884. The reasonable, articulable suspicion requirement is "less demanding . . . than probable cause and requires a showing considerably less than preponderance of the evidence. . . ." *Illinois v. Wardlow,* 528 U.S. 119, 123, 120 S.Ct. 673, 675, 145 L.Ed.2d 570 (2000). Since Brown contests only the propriety of the stop, the single question before us is whether officers had a sufficient reasonable, articulable suspicion that criminal activity was afoot when they engaged in a *Terry*-style detention of Brown.

We utilize a two-part evaluation when reviewing denial of a suppression motion. We review factual findings for clear error; we review *de novo* the court's application of the law to the facts. *Ornelas v. United States,* 527 U.S. 690, 699, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911 (1996); *Adcock v. Commonwealth,* 967 S.W.2d 6 (Ky. 1998). *See also* RCr 9.78. It is well-settled in Kentucky that after a hearing on a defendant's suppression motion, the trial court's findings are deemed conclusive if supported by substantial evidence. *See e.g.,*

Talbott v. Commonwealth, 968, S.W.2d 76 (Ky. 1998); *Canler v. Commonwealth*, 870 S.W.2d 219 (Ky. 1994), citing *Harper v. Commonwealth*, 694 S.W.2d 665 (Ky. 1985); and *Crawford v. Commonwealth*, 824 S.W.2d 847 (Ky. 1992). Substantial evidence means that which "a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence . . . has sufficient probative value to induce conviction in the minds of reasonable men." *See Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). The determination that a stop was supported by reasonable articulable suspicion, in other words, that occupants within the vehicle are, or are about to be, involved in criminal activity, is reviewed *de novo*. *Ornelas,* 527 U.S. at 699. To make such a determination, we must consider the totality of the circumstances surrounding Brown's detention. *U.S. v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981); *Taylor v. Commonwealth,* 987 S.W.2d 302, 305 (Ky. 1998).

In reviewing the totality of the circumstances, we summarize the evidence as follows. Officer Peterson was familiar with the area due to working that beat for at least five years. He knew the neighborhood to be a high crime area for drug activity. A citizen flagged down Officer Peterson just before 4:00 a.m. to express her displeasure that people repeatedly approached her vehicle on foot as she drove to work. Upon receiving the complaint, Officer Peterson summoned two other officers to provide assistance. While conducting surveillance of the intersection of Sixth Street and Elm Tree Lane, the officers saw someone approach

a dark SUV on foot, stop briefly, leave and then return within one minute. This activity was consistent with the "drive-thru" drug transactions Officer Peterson knew to be common in that area.

When officers approached Adams, the man on foot, he ran and tossed what appeared to be a gun. Officers recovered the item which turned out to be a BB pistol Adams claimed he carried for protection. When officers asked Adams about the dark-colored SUV, he lied to them saying he knew nothing about it. This statement was inconsistent with the officer's own observations as they had just watched Adams approach the SUV, disappear and then reappear at the SUV's passenger-side door. Based upon the foregoing, officers had sufficient reasonable and articulable suspicion to conduct a *Terry*-type frisk of Adams which yielded no additional weapons. However, since Adams was not wearing light colored pants as described by the nurse and Officer Peterson did not believe him to be the person who had approached the nurse on foot, the officers did not believe they had probable cause to further investigate Adams and allowed him to leave.

However, contrary to Brown's argument, allowing Adams to leave did not dissipate their reasonable and articulable suspicion about the SUV being involved in a drug crime. Officers linked Adams and the SUV based on their observation of Adams approaching the vehicle twice in the span of a couple of minutes. Additionally, the search of the SUV did not occur until after the drug dog had positively alerted on the SUV.

As the trial court stated in denying Brown's suppression motion, the officers were careful and conservative in their actions. We agree. The court's factual findings constitute substantial evidence and are supported by the record. Thus, they are conclusive. *Talbott.* Furthermore, we are convinced the trial court correctly applied the law to its factual findings. As a result, we hold the officers had sufficient reasonable and articulable suspicion to stop and search Brown based upon their experience, personal observations, knowledge of the area's high crime reputation, and positive alert by the K-9 officer.

For the foregoing reasons, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

Steven J. Buck
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

John Paul Varo
Assistant Attorney General
Frankfort, Kentucky