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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000443-MR

TIMOTHY SHOCKLEY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 07-CR-03124

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND WINE, JUDGES; LAMBERT,[1] SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Timothy Shockley appeals from the November 7, 2008, order denying his motion to suppress evidence, and the February 7, 2009, judgment of conviction. Because we hold that the trial court appropriately denied his motion to suppress evidence, we affirm.

[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 KRS 21.580.

At approximately 6:45 a.m. on July 21, 2007, Officer Robert King was driving his daughter home from her newspaper delivery route, through a residential neighborhood, when he noticed Appellant walking on the side of the street. Appellant was wearing a leather jacket and Officer King observed that the barrel of a shotgun was protruding from beneath the jacket. Officer King also observed what appeared to be blood on the front of the Appellant's shirt. Officer King was in his own personal vehicle, and was not dressed in uniform. He pulled alongside the Appellant and exited his vehicle while holding his wallet-badge in one hand and his service weapon in the other. He then identified himself as a police officer and ordered the Appellant to lay the gun down and get on the ground. Initially the Appellant did not respond, but Officer King made the order several more times and the Appellant eventually complied.

After the Appellant had gotten on the ground, Officer King used his cell phone to call dispatch for assistance. While Officer King was on the phone, the Appellant began to move around on the ground, attempting to reach into his pockets. In order to maintain control over the Appellant, Officer King threw his cell phone into his vehicle, which in turn prompted dispatch to issue an alarm that Officer King may be in trouble. The first officer arrived approximately three minutes later and eventually ten to twelve officers arrived at the scene.

Prior to the arrival of other officers, the Appellant told Officer King that he was turkey hunting. When Officer King noted that it wasn't turkey hunting

season, the Appellant replied that he was also dear hunting and that his father, who had been in the woods with him, would be along shortly. In response to Officer King's inquiry about the blood on his shirt, Appellant stated that he had cut his hands on briar bushes in the woods.

Upon the arrival of the first uniformed officer, Appellant was handcuffed and searched. The search yielded, among other items, a .38 revolver, several shotgun shells, three knives, a class ring and other jewelry, a cellular telephone, and three bottles of prescription medication. The bottles of medication were clearly labeled with a nearby address. An officer went to the address and discovered that it had been burglarized.

On September 26, 2007, Appellant was indicted on charges of burglary in the first degree; two counts of criminal mischief I; carrying a concealed deadly weapon; and disorderly conduct in the second degree. Appellant filed a motion to suppress all evidence that was seized as a result of his July 21, 2007, arrest and search. The trial court denied the Appellant's motion to suppress in an order entered on November 7, 2008. On November 12, 2008, Appellant entered a conditional guilty plea, in which he preserved the suppression issue for appeal. He was subsequently sentenced to ten years in prison in a February 7, 2009, judgment of conviction. This appeal followed.

On appeal, Appellant argues that the trial court committed prejudicial error by failing to suppress evidence as a result of Appellant's illegal, warrantless arrest. In support of his argument, Appellant makes the following sub-arguments:

1) Appellant was arrested when Officer King showed his badge, pointed his gun at Appellant, and ordered him to lie on the ground; 2) Officer King's warrantless arrest of Appellant was unsupported by probable cause therefore violating his constitutional rights ; 3) Officer King's actions did not amount to a *Terry* stop and the Commonwealth failed to meet its burden that the items discovered during the search fell within the "plain feel" requirement; and 4) because Appellant's arrest was unlawful, any evidence recovered as a result must be suppressed.

"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 (citing *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). "Police officers are free to approach anyone in public areas for any reason." *Commonwealth v. Banks*, 68 S.W.3d 347, 350 (Ky. 2001). In general, a warrant is required for searches and seizures. However, brief investigatory stops and limited pat-down searches of suspects have been continuously recognized as an exception to the warrant requirement. *Terry*, 392 U.S. 1. "When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others," the officer may conduct a pat-down search "to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm." *Id.* at 24. Such a search is strictly limited to that which is necessary for the discovery of weapons which might be used to

harm the officer or others nearby. *Commonwealth v. Crowder*, 884 S.W.2d 649 (Ky. 1994), *citing Terry, supra*.

The legitimacy for an investigative stop is based on the existence of a reasonable and articulable suspicion that the suspect may be armed and dangerous. *Banks*, 68 S.W.3d at 351 (citing *Terry*, 392 U.S. at 30). Such a suspicion is based on the officer's objective justification for his actions, measured in light of the totality of the circumstances. *See Bauder v. Commonwealth*, 299 S.W.3d 588 (Ky. 2009). When considering the totality of the circumstances, "due deference must be given to the reasonableness of inferences made by police officers." *Id.* at 592 (citation omitted).

> Officers may draw on their own experience and specialized training to make inferences from, and deductions about, the cumulative information available to them that might well elude an untrained person. Police officers are in an extraordinary position that requires them to make split-second determinations of reasonable suspicion, sometimes in dire and even dangerous circumstances. This determination is generally made through the prism of each officer's own training and experience.

Id. (citations omitted).

Appellant maintains that the actions of Officer King exceeded that of a *Terry* stop and instead amounted to an arrest. A police officer may make an arrest "[w]ithout a warrant when a felony is committed in his presence; or . . . he has probable cause to believe that the person being arrested has committed a felony; or . . . when a misdemeanor, as defined in KRS 431.060, has been

committed in his presence." KRS 431.005. "Probable cause has been defined as a reasonable ground for belief of guilt and requires the belief of guilt to be particularized with respect to the person to be searched or seized." *Taylor v. Commonwealth*, 276 S.W.3d 800, 805 (Ky. 2008)(citation omitted).

When reviewing a trial court's ruling on a motion to suppress, based on an alleged illegal search, we apply a two-part analysis. *Commonwealth v. Whitmore*, 92 S.W.3d 76, 78 (Ky. 2002). First, we deem the factual findings of the trial court as conclusive if they are not clearly erroneous and are supported by substantial evidence. *Id.,* RCr 9.78. Next, we review the existence of reasonable suspicion or probable cause *de novo*, giving due weight to the inferences drawn from the trial court. *Baltimore*, 119 S.W.3d at 539. Because Appellant has not challenged the trial court's factual findings as being clearly erroneous, and has not demonstrated them to be unsupported by substantial evidence, they are conclusive. Accordingly, our review is limited to the existence of reasonable suspicion or probable cause necessary to conduct the search which led to the discovery of the evidence which Appellant sought to suppress.

Officer King's testimony revealed that Appellant was wearing a leather jacket in July; that he was attempting to conceal a shotgun under his jacket while walking in a residential area; and that he appeared to have blood on his shirt. Officer King further testified that Appellant initially disregarded his instructions to get down and then began fidgeting and attempting to reach into his pockets. Based on this testimony, there is sufficient evidence to support reasonable suspicion that

Appellant may have been armed and dangerous. Accordingly, Officer King's stop and search of Appellant was appropriate to neutralize the threat of harm. A warrantless search which exceeds a mere pat-down for weapons is improper unless it is supported by probable cause or another exception such as a plain feel search. *See, e.g., Commonwealth v. Crowder*, 884 S.W.2d 649 (Ky. 1994). Under the plain feel exception, contraband is appropriately seized when its identity is immediately apparent by touch. *Id.*

Appellant contends that the search of his person exceeded that of a *Terry* stop and exceeded the plain feel requirement. We do not agree. Appellant gave every appearance of being a threat to Officer King by refusing to obey commands while visibly in possession of a weapon. Once the pat-down for weapons was initiated, it revealed that Appellant was concealing another gun, several bullets, and several knives. It is entirely likely that Officer King recognized such items through feel alone and removed them from Appellant's possession to neutralize the threat of harm against himself and others. Upon discovery of the weapons, it was appropriate to arrest Appellant for carrying a concealed deadly weapon and Appellant was thereby subject to a search incident to arrest. *See, e.g., Davis v. Commonwealth*, 120 S.W.3d 185 (Ky.App. 2003). At that time, the additional contraband of jewelry and prescription medication would have been discovered. Thus, with or without the discovery of the jewelry and prescription bottles during the *Terry* search, it was inevitable that the contraband would be discovered and suppression would not have been justified under *Nix v.*

Williams, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984), and *Hughes v. Commonwealth*, 87 S.W.3d 850, 852-3 (Ky. 2002).

Appellant argues that probable cause for his arrest did not exist, because the end of the shotgun was visibly sticking out of the bottom of his jacket, therefore failing to meet the definition of a concealed deadly weapon. Appellant supports this argument with a lengthy analysis of what constitutes a "concealed" deadly weapon. However, the probable cause required to make an arrest does not necessarily rise to the level of evidence needed to convict. What is required for a lawful arrest is a reasonable *belief of guilt*. *See, Taylor, supra,* 276 S.W.3d 800. This conclusion must be reached by an arresting officer, at the time of the arrest, based on the information before him. Appellant's possession of multiple concealed weapons is sufficient to fulfill this requirement. On the other hand, a determination that the elements of a crime exist sufficient to return a conviction of guilt must be reached by a fact-finder, be it judge or jury, after the presentation of evidence, not at the time of arrest. "[I]f probable cause existed at the time of the arrest, the fact that investigation proves the person arrested to be innocent does not make the arrest unjustifiable." *Wilson v. Commonwealth*, 403 S.W.2d 705, 708 (Ky. 1966).

Accordingly, we hold that the trial court did not err in its determination that the evidence discovered on Appellant's person was admissible.

For the foregoing reasons, the judgment of conviction is affirmed.

ALL CONCUR.

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