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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001054-MR

JOHN WHITNEY JACKSON — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 09-CR-01093

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; LAMBERT AND THOMPSON, JUDGES.

TAYLOR, CHIEF JUDGE: John Whitney Jackson brings this appeal from a May 18, 2010, judgment of the Fayette Circuit Court upon a conditional plea of guilty to sundry offenses and sentence of ten-years' imprisonment. Kentucky Rules of Criminal Procedure (RCr) 8.09. We affirm.

The facts are as follows. Officer Will McMinoway was on patrol in the Russell Cave Road area of Lexington, Kentucky. Just before 1:00 a.m., Officer

McMinoway noticed a van parked in a parking lot near a nightclub. The van was the only vehicle in the parking lot. Appellant was in the driver's seat of the van with the window rolled down, and the van's parking lights were illuminated. Officer McMinoway observed a second individual, later identified as Anthony Henderson, standing next to the driver's-side door of the van with his hands at or inside the window. Officer McMinoway then observed appellant make contact with Henderson's hands. As Officer McMinoway drove past, he made eye contact with Henderson. In response, Henderson quickly pulled his hands away from the window and abruptly walked away from the van.

Based upon Officer McMinoway's experience and training, he believed appellant and Henderson had just engaged in a "hand-to-hand" drug transaction. Officer McMinoway then turned onto New Circle Road and circled around to the parking lot. Officer McMinoway noticed that appellant's van was pulling out of the parking lot and that Henderson was now in the passenger seat. Officer McMinoway decided to investigate, so he effectuated a stop of appellant's van. After stopping the van, Officer McMinoway approached the driver's-side window. According to Officer McMinoway, appellant was perspiring heavily, his hands were shaking, and he was very hesitant when answering basic questions. Officer McMinoway then asked appellant about Henderson's identity. Appellant initially responded that Henderson was a friend, then stated that he knew Henderson from prison, and finally that Henderson was just a familiar face. Appellant never identified Henderson by name.

Officer McMinoway also asked appellant for his insurance card and registration for the van. In response, the officer stated that appellant reached across with his left hand to open the glove box. Officer McMinoway noticed that while appellant was reaching for the glove box with his left hand, he was manipulating something with his right hand. Officer McMinoway feared appellant might be reaching for a gun. Officer McMinoway stepped back from the vehicle, removed the safety from his gun, and requested appellant to place his hands in plain view. Appellant continued doing something with his right hand but eventually complied with the officer's instructions. Officer McMinoway then asked appellant to step out of the van.

After appellant exited the vehicle, he repeatedly put his hands into his pockets despite Officer McMinoway's warnings to the contrary. Officer McMinoway believed that appellant could have a weapon, so he conducted a pat down of appellant's person. While conducting the pat down with his open hand, the officer testified that he felt a lump in appellant's pocket and heard the crumpling sound of a plastic baggy. Based upon his experience, Officer McMinoway immediately recognized the item as contraband. Upon removing the item from appellant's pocket, Officer McMinoway found 8.2 grams of cocaine contained in individual plastic baggies.

Appellant was indicted by a Fayette County Grand Jury upon trafficking in a controlled substance (first-degree), possession of drug paraphernalia, and with being a PFO I. Thereafter, appellant filed a motion to

suppress evidence seized from his person; he alleged that the stop of his van and seizure of cocaine from his person were unconstitutional. Following an evidentiary hearing, the circuit court denied the motion to suppress.

Appellant and the Commonwealth subsequently negotiated a plea agreement. Pursuant thereto, appellant entered a conditional guilty plea under RCr 8.09 to the amended charge of possession of a controlled substance (first degree), possession of drug paraphernalia and with being a PFO I. Appellant's guilty plea was conditioned on a right to appeal the circuit court's denial of his motion to suppress. Appellant was ultimately sentenced to ten-years' imprisonment. This appeal follows.

Appellant contends the circuit court erred by denying his motion to suppress evidence. Appellant initially asserts that the stop of his van violated the constitutional guarantee against unreasonable search and seizure secured by Section 10 of the Kentucky Constitution and Fourth Amendment of the U.S. Constitution. We disagree.

As an appellate court, our standard of review of a circuit court's denial of a motion to suppress evidence is limited. RCr 9.78; *Commonwealth v. Neal*, 84 S.W.3d 920 (Ky. App. 2002). Initially, we must determine whether the circuit court's findings of fact were supported by substantial evidence of a probative value. If so, the findings of fact are conclusive. *Id.* Then, we conduct a *de novo* review to determine whether the circuit court's decision was correct as a matter of law. *Id.* We are also mindful that police officers may infer "illegal

activity from facts that may appear innocent to a lay person." *Fletcher v. Com.*, 182 S.W.3d 556, 558 (Ky. App. 2005). Thus, we give deference to the circuit court's assessment of the officer's credibility and reasonableness of his inferences. *Id.* (*citing Ornelas v. United States*, 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996)).

It is well-established that stopping a motor vehicle and detaining its occupants amounts to a seizure under the Fourth Amendment of the United States Constitution and Section 10 of the Kentucky Constitution. Additionally, a police officer may conduct an investigatory stop of a vehicle if the officer possesses a reasonable suspicion that criminal activity has occurred or is imminent. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979); *Garcia v. Com.*, 185 S.W.3d 658 (Ky. App. 2006). To determine whether reasonable suspicion of criminal activity exists, we look to the totality of the circumstances before the investigatory stop occurred. *Terry*, 392 U.S. 1.

In the case *sub judice*, Officer McMinoway testified that the following facts created a reasonable suspicion of criminal activity:

- Almost 1 A.M. [sic]
- Appellant's van, alone in a parking lot
- The area, and parking lot in particular, known as a high crime area
- Henderson standing at the window of the van, hands inside the window

- Appellant reaching over his body with his right hand, touching hands with Henderson

- Upon eye contact, Henderson quickly retracts his hands and walks away

- After circling around, Henderson now in van with Appellant and they are driving off.

Appellee's Brief at 8 (citations to the record omitted). More specifically, the officer believed that appellant's and Henderson's behavior indicated that a drug transaction had just occurred between them. Appellant's van was located in a parking lot known to be a high crime area at approximately 1 a.m. in the morning. Henderson quickly pulled his hands away from the window and abruptly walked away from the van upon seeing Officer McMinoway. However, once the officer was out of sight, Henderson then became a passenger in the van. Upon the totality of the circumstances, we conclude that the circuit court's findings of fact were not clearly erroneous and that the circuit court properly decided that the officer possessed a reasonable suspicion of criminal activity, thus justifying the investigatory stop of the van. Hence, we do not believe the circuit court erred by determining the stop of appellant's van was constitutionally permitted.

Appellant next contends that the pat down of his person and subsequent seizure of the cocaine were constitutionally impermissible. We also reject this contention.

After an officer effectuates a constitutionally valid stop of a vehicle, he may order a suspect out of the vehicle and may conduct a pat down for a weapon if the

officer possesses a reasonable belief the suspect is armed and dangerous. *Dunn v. Com.*, 689 S.W.2d 23 (Ky. App. 1984)(*quoting Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983)). If during the pat down for weapons the officer "becomes immediately aware of contraband," the contraband may be constitutionally seized. *Com. v. Marshall*, 319 S.W.3d 352, 357 (Ky. 2010). This is known as the "plain feel" doctrine:

> These brief *Terry* frisks often mature into full-blown probable-cause-based searches, particularly when an officer, while conducting a pat down, becomes immediately aware of contraband, and does so without manipulation of the object felt, but with the simple plain feeling of his hand. *Dickerson*, 508 U.S. at 376, 113 S. Ct. 2130. In other words, under the "plain feel" doctrine the object must be immediately identifiable as a weapon or contraband by a simple "pat down" before it may be legally seized. *Id.* Once recognized as a weapon or contraband, an officer may perform a more invasive search such as entering the pockets of the suspect or even placing his hands down a suspect's pants, wherever the immediately apparent contraband may be.

Id. at 357.

In the case sub judice, Officer McMinoway possessed a reasonable basis for believing appellant was possibly armed. Appellant repeatedly attempted to place his hands in his pockets after Officer McMinoway instructed otherwise. This action was especially troubling following appellant's repeated attempts to manipulate something with his right hand while in the van. Therefore, Officer McMinoway's decision to pat down appellant for weapons was constitutionally proper.

Upon conducting the pat down, Officer McMinoway stated that he felt a lump in appellant's pocket and heard the familiar sound of crumbling plastic baggies. Based upon his training and experience, Officer McMinoway testified that he immediately suspected the item was contraband and seized it. This evidence is sufficient to support the circuit court's findings of fact and its decision that the officer was justified in seizing the cocaine from appellant's pocket under the plain feel doctrine. Consequently, the circuit court properly concluded that the seizure of cocaine from appellant's person was constitutionally sound.

In sum, we hold that the circuit court appropriately denied appellant's motion to suppress.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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