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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000297-MR

SHANTEZ BURNSIDE APPELLANT

v.

APPEAL FROM FULTON CIRCUIT COURT
HONORABLE TIMOTHY A. LANGFORD, JUDGE
ACTION NO. 10-CR-00093

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

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

LAMBERT, JUDGE: Pursuant to a conditional guilty plea, Shantez Burnside has appealed from the final judgment of the Fulton Circuit Court convicting him of tampering with physical evidence and possession of marijuana, and sentencing him to a total of three years' imprisonment. Burnside specifically appeals from the trial court's denial of his motion to suppress evidence obtained following what he describes as an unlawful stop and arrest. Having considered the record, including

the suppression hearing, we find no error in the trial court's decision to deny the motion to suppress. Therefore, we affirm the judgment below.

During the evening of September 22, 2010, Video Plus clerk Deborah Arnold called the Fulton Police Department to request that a police officer come by the establishment. Ms. Arnold reported that she had had a "contrary" customer who was upset because she refused to let him rent any movies as he was not an account holder. She stated that the customer sat in his car in the parking lot for awhile until another customer arrived, when he apparently drove away. Once Video Plus closed at 9:00 p.m., Ms. Arnold locked the door and began her closing duties. She made her call requesting assistance at 9:20 p.m., and Officer Kyle Latta responded to her call a few minutes later.

When Officer Latta pulled into the Video Plus parking lot, he saw Burnside shake the door of the establishment and then walk back to his car. Officer Latta knew Burnside from a recent arrest where Burnside was a passenger in an automobile he stopped. Assuming he was the subject of Ms. Arnold's call for assistance, Officer Latta approached Burnside and asked him what was going on. Burnside refused to talk to him, stating, "F*#! you. I don't have to talk to you." Burnside then left in his vehicle.

Ms. Arnold then exited the building, and Officer Latta talked with her for a few moments. She indicated that she did not know what was going on with Burnside and then left. Much later, Ms. Arnold clarified that Burnside was not the "contrary" customer she had encountered in Video Plus. However, Officer Latta

did not know this. Assuming Ms. Arnold was referring to Burnside, Officer Latta proceeded to follow him in his cruiser to further investigate the situation. He pulled his cruiser beside and behind Burnside's car, saw Burnside leaning into the passenger side and back seat of the car, and turned on his emergency lights. Burnside did not pull over immediately, but eventually pulled into the Kingsway Motel parking lot. By this time, two other officers had responded to the call. Once he stopped, Burnside exited his vehicle and began yelling at the officers. The officers could see that Burnside had a green, leafy material in his mouth, which he was spitting out. The officers suspected this substance was marijuana. They arrested Burnside for disorderly conduct and resisting arrest, and, after Officer Latta's canine alerted on the driver's side of the car, they searched his vehicle incident to the arrest. They recovered marijuana as well as a digital scale under the back seat. The officers also recovered $428.00 in cash in Burnside's pocket.

As a result of these actions, the Fulton County grand jury returned a seven-count indictment against Burnside, charging him with 1) tampering with physical evidence (Kentucky Revised Statutes (KRS) 524.100); 2) disorderly conduct (KRS 525.060); 3) possession of marijuana (KRS 281A.1422); 4) trafficking in marijuana (KRS 218A.1421(3)); 5) resisting arrest (KRS 520.090); 6) possession of drug paraphernalia (KRS 218A.500); and 7) being a first-degree persistent felony offender.

Burnside moved to suppress the evidence the police officers obtained incident to his arrest. He argued that the officers lacked probable cause to stop him

because there was no manifestation that he was engaged in criminal activity. In response, the Commonwealth argued that Officer Latta did not implicate the Fourth Amendment when he approached Burnside at Video Plus and had no reason to believe that any criminal activity was afoot until Burnside reacted the way he did to his question in conjunction with Ms. Arnold's call concerning a "contrary" customer. The Commonwealth also argued that the officer did not need probable cause to stop Burnside, but rather he needed to only establish that he had a reasonable and articulable suspicion that criminal activity was afoot in order to make an investigatory traffic stop, which Burnside's unprovoked evasive actions provided. Burnside's action while in his vehicle (moving towards the passenger side while driving) also raised the officer's suspicions, in light of Burnside's known history of drug trafficking.

The trial court held a suppression hearing on November 23, 2010. Both Officer Latta and Sergeant James Buckingham testified as to the events of September 22nd, as did Ms. Arnold. Burnside also testified as to his version of the events. He testified that he and Officer Latta had a three-minute conversation at Video Plus and that he left the area without permitting the officer to pat him down. He denied using the language Officer Latta reported, and he denied that he refused to pull his car over once Officer Latta turned on his police siren and lights. Rather, he did not realize Officer Latta wanted him to pull over because he was not committing any traffic violations, and he pulled over at the first opportunity he had. Also during the hearing, evidence was introduced that dispatch reported that

the “contrary” customer had left the Video Plus parking lot before Officer Latta arrived, leading Burnside to argue that Officer Latta had no reason to approach him.

The trial court considered the evidence at the conclusion of the hearing, including the log of the dispatch calls, and made several findings from the bench. The court weighed the testimony and found the officers’ testimony to be more believable based upon the timeline established by the dispatch log. Based on Burnside’s suspicious behavior and Ms. Arnold’s confusion about who was in the parking lot, it was reasonable for Officer Latta to assume that the subject of her call was Burnside. The trial court ultimately denied the motion to suppress in a written docket order entered that day.

Immediately following the ruling on the motion to suppress, Burnside and the Commonwealth reached a plea agreement whereby Burnside agreed to plead guilty to tampering with physical evidence and possession of marijuana with the remainder of the charges being dismissed. The circuit court accepted the plea after holding a guilty plea hearing that day. The plea was conditioned on Burnside’s right to appeal the suppression ruling. As a result of the plea, the circuit court entered a judgment on January 15, 2011, finding Burnside guilty of the tampering and possession charges, and dismissing the remaining charges. Pursuant to the terms of the plea agreement, Burnside received a three-year sentence on the tampering conviction and a nine-month sentence on the possession conviction, to be served concurrently for a total of three years.

Shortly thereafter, Burnside moved to reconsider the suppression ruling on the basis of the audio recording of the dispatch records showing that dispatch advised the officers that the subject had left the area. He claimed this eliminated any probable cause the officers might have had to perform an investigatory stop. The court reviewed the audio recordings as well as its prior findings on the record, but found no basis to change its original ruling. There was no reason to disbelieve Officer Latta's testimony, particularly in light of the fact that Ms. Arnold did not see who Officer Latta was talking to in the parking lot. Both on the record and in the written docket order, the trial court indicated that the Commonwealth Attorney would provide a written order for the court to enter as a written order. The record does not reflect that a written order was ever tendered or entered. This appeal follows.

The sole argument Burnside brings on appeal is that officers did not have a sufficiently reasonable and articulable suspicion that criminal activity was afoot to justify his investigatory stop based upon the totality of the circumstances, specifically the dispatch communication that the subject had left the Video Plus parking lot. Burnside contends, without citation to any authority, that whatever reasonable suspicion Officer Latta might have had at Video Plus became stale once he failed to immediately stop him when he returned to his car or notify other officers in the area.

The Commonwealth, in its brief, first contends that Burnside conceded that the trial court's findings were conclusive. We disagree with this

statement as we are unable to locate any statement in Burnside's brief where he concedes that the factual findings were supported by substantial evidence. Rather, it appears that Burnside was reciting the applicable standard of review on page 5 of his brief when he stated "the factual findings of the court are conclusive *if they are supported by the evidence*." (Emphasis added). The Commonwealth goes on to argue that the trial court's factual findings, rejecting Burnside's account, were supported by the record, that the officers had probable cause to arrest Burnside because he committed the offense of disorderly conduct in Officer Latta's presence, and because the stop was supported by reasonable suspicion based upon Ms. Arnold's call for assistance, Burnside's suspicious behavior at Video Plus, as well as his flight from the area.

Our standard of review from a denial of a motion to suppress is two-fold. First, we must determine whether the findings of fact are supported by substantial evidence. If so, those findings are conclusive. Kentucky Rules of Criminal Procedure (RCr) 9.78; *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998). If not, the factual findings must be overturned as clearly erroneous. *Farmer v. Commonwealth*, 169 S.W.3d 50, 53 (Ky. App. 2005). Second, we must perform a *de novo* review of those factual findings to determine whether the lower court's decision is correct as a matter of law. *Ornelas v. United States*, 517 U.S. 690, 697, 116 S.Ct. 1657, 1662, 134 L.Ed.2d 911 (1996); *Commonwealth v. Banks*, 68 S.W.3d 347, 349 (Ky. 2001); *Garcia v. Commonwealth*, 185 S.W.3d 658, 661 (Ky. App. 2006); *Stewart v. Commonwealth*, 44 S.W.3d 376, 380 (Ky. App. 2000).

Because we have rejected the Commonwealth's contention that Burnside conceded the accuracy of the factual findings, we must first determine whether the trial court's findings of fact were based upon substantial evidence of record. While we are somewhat troubled by the lack of a written order incorporating the trial court's findings of fact, we are satisfied with the oral findings the court made on the record following the suppression hearing. *See Commonwealth v. Alleman*, 306 S.W.3d 484, 487 (Ky. 2010), *cert. denied*, 131 S.Ct. 418, 178 L.Ed. 2d 326 (U.S. 2010) ("we see no reason why oral findings made from the bench, as long as otherwise adequate, cannot satisfy the due process requirement of *Morrissey*, at least where, as here, we possess a video record that is sufficiently complete to allow the parties and us to determine 'the evidence relied on and the reasons for revoking probation.' *Romano*, 471 U.S. at 612, 105 S.Ct. 2254; *Barth*, 899 F.2d at 201.").

In *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 307-08 (Ky. 1972), the Court defined substantial evidence as follows:

> Substantial evidence is defined in *Chesapeake and Ohio Railway Company v. United States*, 298 F.Supp. 734 (D.C.1968), as follows:
>
> > '* * * Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; it is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.' (Citations omitted.)

> In *O'Nan v. Ecklar Moore Express, Inc.*, Ky., 339 S.W.2d 466 (1960), this court said:
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> > '* * * We have defined 'substantial' evidence as being evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable men.'
>
> The test of substantiality of evidence is whether when taken alone or in the light of all the evidence it has sufficient probative value to induce conviction in the minds of reasonable men. *Blankenship v. Lloyd Blankenship Coal Company, Inc.*, Ky., 463 S.W.2d 62 (1970).

Our review of the testimony confirms that the trial court's finding that the officers' version of the events was more believable than Burnside's version is adequately supported by the record. Burnside's version, which includes a purported three-minute conversation with Officer Latta, does not match the short timeline of the Video Plus parking lot encounter as reflected in the dispatch records. Accordingly, we hold that the trial court's findings of fact are supported by substantial evidence of record and are conclusive.

Next, we shall consider *de novo* whether the trial court's decision to deny the motion to suppress was correct as a matter of law. While Burnside confines his argument to whether the traffic stop itself was proper, the Commonwealth also argues that the arrest was proper because Officer Latta witnessed Burnside committing a misdemeanor in his presence, and the subsequent arrest was based upon probable cause.

KRS 431.005(1) permits a peace officer to make an arrest in the following situations:

> (a) In obedience to a warrant; or
>
> (b) Without a warrant when a felony is committed in his presence; or
>
> (c) Without a warrant when he has probable cause to believe that the person being arrested has committed a felony; or
>
> (d) Without a warrant when a misdemeanor, as defined in KRS 431.060, has been committed in his presence; or
>
> (e) Without a warrant when a violation of KRS 189.290, 189.393, 189.520, 189.580, 511.080, or 525.070 has been committed in his presence, except that a violation of KRS 189A.010 or KRS 281A.210 need not be committed in his presence in order to make an arrest without a warrant if the officer has probable cause to believe that the person has violated KRS 189A.010 or KRS 281A.210.

There is no dispute that Officer Latta did not have a warrant for Burnside's arrest. Therefore, his authority to arrest Burnside would fall under subsection (d).

In *Maryland v. Pringle*, 540 U.S. 366, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003), the United States Supreme Court addressed warrantless arrests and the concept of probable cause. The Court recognized as a general matter that, "[a] warrantless arrest of an individual in a public place for a felony, or a misdemeanor committed in the officer's presence, is consistent with the Fourth Amendment if the arrest is supported by probable cause." *Id.*, 540 U.S. at 370, 124 S.Ct. at 799. It went on to provide a comprehensive discussion of the probable cause standard:

> The long-prevailing standard of probable cause protects citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime, while giving fair leeway for enforcing the law in the community's protection. On many occasions, we have reiterated that the probable-cause standard is a practical, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Probable cause is a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules.
>
> The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances. We have stated, however, that the substance of all the definitions of probable cause is a reasonable ground for belief of guilt, and that the belief of guilt must be particularized with respect to the person to be searched or seized.

Id., 540 U.S. at 370-71, 124 S.Ct. at 799-800 (internal citations, quotations, and brackets omitted). The Court also instructed that "[t]o determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause[.]" *Id*., 540 U.S. at 371, 124 S.Ct. at 800.

In *Commonwealth v. Mobley*, 160 S.W.3d 783, 787 (Ky. 2005), the Supreme Court analogized the holding in *Pringle* to the circumstances involving a misdemeanor rather than a felony: "Although the present case deals with a misdemeanor rather than a felony, *Pringle* is analogous and persuasive. The

appropriate analysis to determine a lawful misdemeanor arrest is whether a reasonable officer could conclude from all facts that a misdemeanor is being committed in his presence."

In this case, Officer Latta arrested Burnside at the Kingsway Motel for the misdemeanor offenses of disorderly conduct and resisting arrest. KRS 525.060 defines the crime of disorderly conduct as:

> (1) A person is guilty of disorderly conduct in the second degree when in a public place and with intent to cause public inconvenience, annoyance, or alarm, or wantonly creating a risk thereof, he:
>
> > (a) Engages in fighting or in violent, tumultuous, or threatening behavior;
> >
> > (b) Makes unreasonable noise;
> >
> > (c) Refuses to obey an official order to disperse issued to maintain public safety in dangerous proximity to a fire, hazard, or other emergency; or
> >
> > (d) Creates a hazardous or physically offensive condition by any act that serves no legitimate purpose.
>
> (2) Disorderly conduct in the second degree is a Class B misdemeanor.

Officer Latta personally witnessed Burnside shaking the door of Video Plus, and he reasonably believed that Burnside was the subject of Ms. Arnold's call regarding the "contrary" customer by whom she felt threatened. That Burnside was ultimately not the "contrary" customer is of no import, as the circumstances surrounding the incident reasonably led Officer Latta to that conclusion when he

arrived at Video Plus. Dispatch records showing that the subject had left the area do not change this result because the subject could have returned by the time Officer Latta arrived at Video Plus. Burnside's subsequent behavior, including resisting arrest at the Kingsway Motel, further served as grounds for his arrest. Once the officers saw what they believed to be marijuana coming out of Burnside's mouth and the canine alerted on his car, the officers had sufficient probable cause to search the vehicle where they discovered marijuana and drug paraphernalia. *See Johnson v. Commonwealth*, 179 S.W.3d 882, 886 (Ky. App. 2005) ("After the dog alerted to the presence of narcotics, the officers undoubtedly had probable cause to search the vehicle.").

Accordingly, we agree with the Commonwealth that the officers' warrantless arrest of Burnside was proper under the circumstances of this case because the arrest was based at the outset upon his commission of a misdemeanor in Officer Latta's presence. Therefore, we hold that the trial court did not commit any error in denying Burnside's motion to suppress initially or upon reconsideration.

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

TAYLOR, CHIEF JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

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