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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001629-MR

TIMOTHY TAYLOR — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 10-CR-01324

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, DIXON AND STUMBO, JUDGES.

DIXON, JUDGE: Appellant, Timothy Taylor, entered a conditional guilty plea in the Fayette Circuit Court to one count of first-degree possession of a controlled substance, reserving the right to appeal the trial court's ruling on his suppression motion. After reviewing the record, we conclude that the suppression motion

should have been granted. As such, we reverse the trial court and remand this matter for further proceedings.

On August 7, 2010, Lexington police received an anonymous call that an African American male with braids, wearing a light colored shirt and an orange and blue baseball cap was on Rand Street selling narcotics. Officer Benjamin Walker responded to the call and observed Appellant standing inside a fenced yard on Rand Street dressed according to the caller's description. When Officer Walker informed Appellant about the call police had received, he became argumentative, claiming harassment and asking for proof of the call. At some point, Appellant reached into his pocket and was immediately told by Officer Walker to take his hand out of his pocket and sit down in a nearby lawn chair until back-up officers arrived. Although Appellant was hostile, there is no question that he complied with Officer Walker's instructions.

After other police officers arrived, Officer Walker conducted a pat down or "*Terry* frisk" of Appellant over his objection. Officer Walker felt a hard cylindrical object on the inside of Appellant's thigh, which he stated that he recognized as being crack cocaine. Appellant was handcuffed and placed under arrest.

Appellant was indicted in the Fayette Circuit Court for first-degree possession of a controlled substance and for being a first-degree persistent felony offender. Appellant subsequently moved the trial court to suppress the evidence, arguing that it was obtained as a result of an unreasonable search and seizure.

Following a hearing, the trial court denied the suppression motion. The court noted that the fact that Appellant happened to match the description given in an unverified anonymous tip did not give officers reasonable grounds to conduct the *Terry* frisk. Nevertheless, the court stated that those facts coupled with Appellant's conduct "under the totality of the circumstances" did justify Officer Walker conducting a pat down for safety purposes. Further, the court noted:

> [I]n this case, Mr. Taylor, when the officer approached him, I don't think that Mr. Taylor was seized. I don't think he was under arrest. I think he could have walked off, walked into the house, done anything he wanted to.

Appellant thereafter entered a conditional guilty plea and was sentenced to one year imprisonment, with credit for time served. He now appeals the suppression issue to this Court as a matter of right.

In this Court, Appellant argues that he was seized at the point that Officer Walker told him to sit and wait for back-up officers to arrive. Further, Appellant claims that the seizure and subsequent search violated the Fourth Amendment because the anonymous tip did not have sufficient detail, was not corroborated, and did not create reasonable articulable suspicion of criminal activity. As a result, Appellant contends that the evidence seized as a result of the unlawful detention was "fruit of the poisonous tree" and should have been suppressed. *See Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

Our standard of review of a trial court's decision on a suppression motion following a hearing is twofold. First, the factual findings of the court are

conclusive if they are supported by substantial evidence. Kentucky Rules of Criminal Procedure (RCr) 9.78; *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998); *Stewart v. Commonwealth*, 44 S.W.3d 376 (Ky. App. 2000). The second prong involves a *de novo* review to determine whether the court's decision is correct as a matter of law. *Commonwealth v. Opell*, 3 S.W.3d 747, 751 (Ky. App. 1999). Kentucky has adopted the standard of review approach articulated by the United States Supreme Court in *Ornelas v. United States*, 517 U.S. 690, 698-700, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911 (1996), wherein the Court observed:

> [A]s a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal. Having said this, we hasten to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.

Furthermore, at a suppression hearing, the trial court is the sole trier of fact and the sole judge of credibility of the witnesses. If the facts are supported by substantial evidence, they are conclusive. RCr 9.78.

The facts in this case are not in dispute. The sole issue is whether Officer Walker had articulable suspicion that criminal activity may have been afoot and that Appellant may have been armed and dangerous so as to justify the stop and frisk. Appellant argues that the seizure was illegal because there was not sufficient articulable suspicion to believe that he was engaging in criminal activity. The Commonwealth responds that the anonymous call gave police a contemporaneous eyewitness account that Appellant was selling narcotics.

Further, the Commonwealth contends that the fact that Appellant matched the caller's description and was located on Rand Street weighs in favor of the tip's reliability. Accordingly, the Commonwealth concludes that the anonymous tip coupled with Appellant's demeanor gave Officer Walker reasonable suspicion to conduct a *Terry* frisk.

In *Terry v. Ohio*, 392 U.S. 1, 8-9, 88 S.Ct. 1868, 1873, 20 L.Ed.2d 889 (1968), the United States Supreme Court held that "[t]he Fourth Amendment provides that 'the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated....' This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs." As such, evidence that is recovered, either directly or indirectly, from an illegal search or seizure is inadmissible as "fruit of the poisonous tree." *Northrop v. Trippett*, 265 F.3d 372, 377-78 (6th Cir. 2001), *cert. denied*, 535 U.S. 955 (2002).

However, the *Terry* Court made it clear that "not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry*, 391 U.S. at 20, n. 16, 88 S.Ct. at 1879. The Supreme Court further addressed this issue in *United States v. Mendenhall*, 446 U.S. 544, 554-55, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980), when it concluded that:

> [A] person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person. (Citations and footnote omitted.)

Similarly, in *Florida v. Royer*, 460 U.S. 491, 497-98, 103 S.Ct. 1319, 1324, 75 L.Ed.2d 229 (1983), the Supreme Court observed:

> [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds. If there is no detention-no seizure within the meaning of the Fourth Amendment-then no constitutional rights have been infringed. (Citations omitted.)

Kentucky's state appellate courts have also addressed this issue. In *Baker v. Commonwealth*, 5 S.W.3d 142 (Ky. 1999), our Supreme Court addressed whether

an officer's order for a suspect to remove his hands from his pocket after he refused to comply with the officer's earlier request to do so constituted a seizure. While noting that the initial request was not a seizure, but merely a safety precaution, the Court determined that the officer's "subsequent direct order for [Baker] to remove his hands from his pockets must be interpreted as a show of authority which, we believe, would compel a reasonable person to believe he was not free to leave." *Id.* at 145. The Court ultimately did conclude that the seizure was reasonable based upon its consideration of the totality of the circumstances. *See also Commonwealth v. Banks*, 68 S.W.3d 347 (Ky. 2001); *Baltimore v. Commonwealth*, 119 S.W.3d 532 (Ky. App. 2003)

Applying the law to the trial court's factual findings herein, we must conclude that the court's determination as to when Appellant was seized is erroneous as a matter of law. Officer Walker's directive to Appellant to sit in the chair until back-up officers arrived clearly constituted a seizure. Contrary to the trial court's finding, a reasonable person would not have felt free to leave once a uniformed officer told him to sit down. Unquestionably, such was a show of force that would indicate Appellant had been seized at that point in time.

Having determined that a seizure occurred, this Court must decide whether such was reasonable absent a warrant or exigent circumstances. There is no question that an officer may briefly detain, or seize, an individual even absent probable cause if the officer has reasonable suspicion that the person has or is

about to commit a crime. In *Terry*, the United States Supreme Court set forth the standard for an investigative stop:

> [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

Terry, 392 U.S. at 30-31, 88 S.Ct. at 1884-85. Thus, the test for a *Terry* stop and frisk is whether the officer can articulate facts giving rise to a reasonable suspicion that criminal activity may be afoot and that the suspect may be armed and dangerous. *See Banks*, 68 S.W.3d at 350-51.

Reviewing the facts herein, we cannot conclude that under the totality of the circumstances there was reasonable suspicion of criminal activity to justify seizing Appellant. Certainly, the anonymous unsubstantiated tip, standing alone, lacked sufficient indicia of reliability to establish reasonable suspicion to conduct a *Terry* stop. Moreover, we disagree with the Commonwealth that the anonymous tip was an "eyewitness account" entitled to heightened reliability. As the Supreme Court

in *Florida v. J.L.*, 529 U.S. 266, 272, 120 S.Ct. 1375, 1379, 146 L.Ed.2d 254 (2000), observed,

> An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity.

Similar to the facts in *Florida v. J.L.*, Officer Walker received a tip that an individual wearing certain clothing was involved in narcotics activity on Rand Street. There is no dispute that Rand Street is located in a high crime area of Lexington.[1] However, when Officer Walker arrived at the location, he observed nothing, other than Appellant wearing the described clothing, giving rise to a suspicion of criminal activity. Certainly, Appellant became argumentative, but he was also fully cooperative with Officer Walker's instructions. We simply cannot conclude that Officer Walker formed a reasonable and articulable suspicion that Appellant was engaged in criminal activity to justify his seizure and continued detention. Accordingly, we must hold that Officer Walker's seizure of Appellant was unjustified, and that the evidence seized while he was unlawfully detained should have been suppressed as fruits of the poisonous tree.

[1] In *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S.Ct. 673, 676, 145 L.Ed.2d 570 (2000), the United States Supreme Court stated that an individual's presence in a high crime area may be considered as a factor in deciding whether an officer can conduct a *Terry* stop. However, the mere instance of being in a high crime area, without any more articulable facts is insufficient to justify such a stop.

For the foregoing reasons, we reverse the judgment of the Fayette Circuit Court and remand this matter for further proceedings in accordance with this opinion.

ALL CONCUR.

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