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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-002154-MR

HOWARD JONES — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 11-CR-00347

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, COMBS AND NICKELL, JUDGES.

NICKELL, JUDGE: Howard Jones entered a conditional plea of guilty to an amended charge of trafficking in controlled substance in first degree,[1] for which he was sentenced to a term of one year, probated for four years. He also forfeited $9,620.00 in cash and four cell phones. As part of the plea agreement, the

[1] Kentucky Revised Statutes (KRS) 218A.1412, a Class D felony. A charge of possession of controlled substance in first degree, first offense, a Class D felony under KRS 218A.1415, was dismissed in Fayette District Court.

Commonwealth recommended dismissal of a charge of possession of drug paraphernalia, first offense.[2] When entering his plea, Jones reserved the right to challenge the Fayette Circuit Court's ruling that a "pill bottle" taken from his pants pocket would be suppressed due to a search that exceeded the bounds allowed by *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), but all other evidence subsequently seized from his motel room and from his wallet while at the jail could be offered at trial due to Jones having consented to the search of the motel room and the inevitable discovery doctrine. Upon review of the briefs, the law and the record, we reverse and remand for further proceedings.

FACTS

Police in Lexington, Kentucky, received a telephone call from a man saying his stepdaughter, Robin Helton, a white female, was in Room 255 of the Lexington Motor Inn with a black man named Howard. The caller alleged Helton and Howard were doing drugs and Howard was selling drugs from the room.

Officer James Norris and a second officer were dispatched to the motel in separate cars. Officer Norris arrived first, parked, and began walking toward the building. While looking for Room 255, he spotted a black male approaching the driver's side door of a red SUV containing two white females.

Officer Norris approached the black male and inquired if he was staying at the motel. The man said "yes," and when asked in which room he was staying, he responded "255." Officer Norris told him, "OK. You're probably the

[2] KRS 218A.500(2), a Class A misdemeanor.

guy I'm looking for. Let me talk to you real quick." Upon being asked, the man said his name was "Howard." At that point, Officer Norris placed Jones's arms behind his back and frisked him for weapons. At a subsequent suppression hearing, Officer Norris testified he conducted the weapons search for his safety because he knew the motel's reputation for illegal drug sales; he was responding to a call about a black man named "Howard" selling narcotics from the motel; drug sellers are usually armed; and, Officer Norris was alone. No weapons were found and Jones was cooperative throughout the contact.

During the frisk, Officer Norris felt an item in Jones's right front pants pocket he believed to be a pill bottle. Upon asking Jones what it was, Jones confirmed it was a pill bottle. Officer Norris retrieved the bottle from Jones's pocket, but did not open it, and told Jones he was not under arrest, but was merely being placed in handcuffs for the officer's safety while he awaited backup.

When a second officer arrived a few minutes later, Officer Norris asked Jones (still in handcuffs) several times what was in the pill bottle. Jones finally admitted it contained drugs. When Officer Norris opened the bottle, he discovered 13.5[3] pills of various colors. According to Officer Norris's testimony at the suppression hearing, Jones was effectively under arrest at that point but he did not communicate that fact to Jones.

[3] Through lab testing, these pills were determined to be 30 milligram oxycodone tablets from 3 different drug manufacturers.

Jones denied trafficking in drugs and claimed the pills were for his own personal use. He gave consent for a search of his SUV, but no contraband was found. The two females in the SUV also consented to being searched; no contraband was found on them, but it was confirmed one of the women was Robin Helton, the woman whose stepfather had initiated the telephone call.

Jones also consented to a search of his motel room and accompanied Officer Norris to Room 255 which they entered using a key provided by Jones. Jones observed the search that revealed a suitcase containing a plastic bag and three bundles of cash totaling $2,970.00—Jones admitted this money was profit from drug sales. Other items found in the room were: a syringe taped under a coffee table; filter material and a can with residue; another travel-size pill bottle on a night stand; two non-working cell phones inside the night stand; a prescription bottle bearing the name "Frank Fathergill"; $750.00 that Jones stated was his personal money; and, two cell phones in Jones's pockets containing voice messages about drug sales.

Jones was transported to jail where a subsequent search revealed $5,900.00 in cash in his wallet. Jones was adamant this was his personal money and not the result of drug sales. Jones was cordial and cooperative throughout his interaction with police.

Following indictment, Jones filed a written motion to suppress "any and all physical items seized in connection with this case." The Commonwealth provided discovery, including his statements, to Jones at arraignment. Thus, on

March 24, 2011, Jones had received notice the Commonwealth intended to use statements he had made to Officer Norris as evidence against him, but his written suppression motion did not request exclusion of his statements or any other item by name.

A suppression hearing was held on May 11, 2011. Officer Norris was the only witness to testify for the Commonwealth; Jones offered no proof. The Commonwealth argued the patdown for weapons and seizure of the pill bottle from Jones's pocket were proper in light of all the circumstances that led Officer Norris to focus on Jones at the Lexington Motor Inn—a location known for drug sales by armed drug dealers. The Commonwealth further argued the searches of the vehicle and Room 255 were proper because Jones had given consent, or alternatively, discovery of evidence in the room was inevitable. In contrast, counsel for Jones suggested two problems with the *Terry* frisk—first, from the circumstances, there was no reason to think Jones was armed and dangerous since he had been cooperative throughout his contact with Officer Norris and the telephone caller had mentioned nothing about "Howard" being armed; and second, there was no reason for Officer Norris to think a pill bottle was a weapon. In Jones's view, anything seized as a result of the *Terry* frisk had to be suppressed.

The trial court stated it had no problem with the *Terry* frisk itself, but needed time to consider and research whether removal of the pill bottle from Jones's pocket was lawful. On June 10, 2011, the court orally stated on the record that it would suppress the pill bottle because Officer Norris had testified he

believed it to be a pill bottle, not a weapon. The court went on to say, in light of Jones having given consent and the inevitable discovery doctrine, it would deny suppression of all items seized from the motel room. On June 14, 2011, the trial court

entered a written order suppressing "the pill bottle"[4] but nothing else. The written order did not explain the trial court's decision.

On August 31, 2011, Jones pled guilty to one count of trafficking in a controlled substance in the first degree, but retained the right to appeal the trial court's ruling on the suppression motion. The court dismissed a separate charge of possession of drug paraphernalia and sentenced Jones to a one-year term on the trafficking charge, probated for four years. The trial court also ordered forfeiture of $9,620.00 in cash and four cell phones. Jones now appeals the suppression order. As explained below, we reverse and remand for further proceedings.

ANALYSIS

All searches conducted without a warrant are presumptively unreasonable unless they fall within one of the many exceptions to the warrant requirement. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). *Terry* allows a limited search for weapons to ensure officer

[4] Multiple pill bottles were seized in this case—one containing oxycodone was taken from Jones's pocket and two empty pill bottles were taken from Room 255. From on-the-record discussions, we presume the trial court suppressed "the pill bottle" seized from Jones's pocket, but readily acknowledge this is supposition on our part because it is not so stated in the order. A trial court speaks through its written orders. *Allen v. Walter*, 534 S.W.2d 453, 455 (Ky. 1976); *Holland v. Holland*, 290 S.W.3d 671, 675 (Ky. App. 2009). However, we may take note of a trial court's oral comments made on the record to better understand its reasoning. *Coleman v. Commonwealth,* 100 S.W.3d 745, 749 (Ky. 2003).

safety. Consent is another recognized exception, *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976), as is inevitable discovery. *Nix v. Williams,* 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984).

> Motions to suppress are governed by Kentucky Rules of Criminal Procedure (RCr) 9.78. That rule provides that a court facing a motion to suppress "shall conduct an evidentiary hearing outside the presence of the jury and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling." When reviewing an order that decides a motion to suppress, the trial court's findings of fact are "conclusive" if they are "supported by substantial evidence." Using those facts, the reviewing court then conducts a *de novo* review of the trial court's application of the law to those facts to determine whether the decision is correct as a matter of law.

Commonwealth v. Jones, 217 S.W.3d 190, 193 (Ky. 2006) (footnotes omitted). *See also Ornelas v. United States,* 517 U.S. 690, 698-99, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). Here, after conducting a hearing, the trial court entered a succinct order stating in relevant part, "IT IS HEREBY ORDERED BY THE COURT that the portion of the Motion to Suppress is sustained in part as to the pill bottle and overruled as to the remaining portions." While we defer to factual findings supported by substantial evidence, here we have no findings[5] at all. Thus, our review is wholly *de novo. Jones,* 217 S.W.3d at 196.

[5] Neither party moved for findings of fact pursuant to Kentucky Rules of Civil Procedure (CR) 52.04. Furthermore, in the appellate briefs, neither party alleged a lack of detail in the order suppressing the pill bottle. Since neither party argued the trial court failed to make sufficient findings, and the question posed is a legal one rather than a factual one, we follow the lead of *Jones,* 217 S.W.3d at 194, and *Coleman,* 100 S.W.3d at 749, and determine we can adequately review the trial court's ruling on the motion to suppress without remanding the case for findings of fact.

Jones claims *everything* seized as a result of the *Terry* frisk, which yielded no weapons, should have been suppressed. We agree. *Terry* permits a patdown search for the limited purpose of officer safety and finding weapons; searching for evidence of crime is not an acceptable purpose. *Commonwealth v. Crowder,* 884 S.W.2d 649, 651 (Ky. 1994) (citing *Adams v. Williams,* 407 U.S. 143, 146, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612 (1972)). When the limited search "goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed." *Crowder,* at 651 *(*citing *Sibron v. New York,* 392 U.S. 40, 65-66, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968), and *Minnesota v. Dickerson*, 508 U.S. 366, 373, 113 S.Ct. 2130, 2136, 124 L.Ed.2d 334 (1993)).

The facts of *Crowder* and the case at bar are strikingly similar. Louisville Police Officer Brian Nunn was fairly certain Crowder was trafficking in marijuana on the corner of 22nd and Garland, an area known for drug trafficking, but catching him in the act proved difficult. The third time Officer Nunn saw Crowder on the same corner, he directed Officer David Sanford to detain Crowder and pat him down while Officer Nunn spoke to two women on the same corner. During the patdown, Officer Sanford felt no weapons, but did feel keys in one pocket, and something that "may have been a bindle of drugs" in another pocket. When Officer Sanford retrieved the item that felt "like a small gumball," it turned out to be an ounce of cocaine. A panel of this Court held:

> since the officer did not feel anything resembling a weapon, we believe that the officer exceeded the scope of permissible search under a *Terry* patdown when he reached into appellant's pocket to retrieve an object which he believed to be drugs and not a weapon.

Crowder, 884 S.W.2d at 650. Our Supreme Court granted discretionary review and affirmed our holding.

Applying *Crowder* to the facts at bar, Officer Norris properly frisked Jones for weapons based upon the totality of the circumstances, but he exceeded his authority under *Terry* by removing the pill bottle from Jones's pants pocket. He believed the item to be a pill bottle and Jones identified it as such when asked. Officer Norris not believing the item to be a weapon, and there being nothing inherently illegal about possessing a pill bottle, *Jones,* 217 S.W.3d at 198, the trial court had no option but to suppress the pill bottle (and its contents) seized from Jones's pocket. Just as in *Jones,* until Officer Norris removed the pill bottle from Jones's pocket and inspected it, "he had no way to know whether or not Jones had a valid prescription for the medicine in the bottle, thus the contraband nature of the item was not readily apparent." *Id.*

When Officer Norris determined Jones was unarmed, his authority to search Jones under *Terry* ended, and his contact with Jones should have ended too. Alas, it did not. Officer Norris questioned Jones about the contents of the pill bottle, opened it, deemed Jones to be under arrest without informing Jones of his change in status, and then requested and received permission to search Jones's car and ultimately his motel room. The Commonwealth argues the search of the motel

room and the subsequent search of Jones's wallet at the police station were proper because Jones consented to the search and because discovery of the evidence was inevitable. For the following reasons, we disagree, reverse and remand for further proceedings.

Normally, items discovered through exploitation of unlawful police action must be suppressed as "fruit of the poisonous tree," a concept argued by Jones during the suppression hearing. *Wong Sun v. United States,* 371 U.S. 471, 488, 83 S.Ct. 407, 418, 9 L.E.2d 441 (1963).

> The exclusionary rule requires the suppression of any evidence that is either the direct or indirect result of illegal police conduct. The "fruit of the poisonous tree" doctrine precludes not only the admissibility of evidence which is the direct result of a violation of the defendant's rights, but also any evidence obtained by an exploitation of that violation. In order for a defendant to invoke the doctrine, defendant must show that: (1) he or she has standing to challenge the original violation, i.e., the tree; (2) the original police activity violated his or her rights; and (3) the evidence sought to be admitted against him or her, i.e., the fruit, was obtained as a result of the original violation. The burden of proving that the evidence is not the fruit of the poisonous tree is on the prosecution.

(Footnotes omitted). 8 Leslie W. Abramson, Kentucky Practice, Criminal Practice and Procedure § 17:5 (5th ed. 2010). One way to prove evidence is not fruit of the poisonous tree is to show an intervening event between the illegal police conduct and discovery of the evidence. *Williams v. Commonwealth,* 213 S.W.3d 671, 679 (Ky. 2006) (citing *Wong Sun,* 371 U.S. at 487-88*)*.

In this case, the Commonwealth argued the intervening event was Jones giving verbal consent to search Room 255.[6] Jones does not deny allowing the search to occur, but argues his consent was not voluntary. When he agreed to the search of his vehicle and then of Room 255, he was handcuffed and there was no testimony he had received a *Miranda*[7] warning. Furthermore, Officer Norris deemed Jones to be under arrest from the moment he discovered the pill bottle in Jones's pocket, but he did not convey that change in status to Jones. From Jones's perspective, he was standing on a parking lot in handcuffs being questioned by police officers—it was highly unlikely he felt he could walk away. In light of all the surrounding circumstances, we cannot conclude the Commonwealth proved by a preponderance of the evidence that Jones voluntarily consented to the search of his vehicle, his motel room or his wallet. *Cook v. Commonwealth,* 826 S.W.2d 229, 331 (Ky. 1992). We are more inclined to say Jones "acquiesced" in the searches which is not the equivalent of free and voluntary consent. *Bumper v. North Carolina,* 391 U.S. 543, 548-49, 88 S.Ct. 1788, 1792, 20 L.Ed.2d 797 (1968).

Alternatively, the Commonwealth argues the evidence seized was admissible because its discovery was inevitable. The inevitable discovery rule bars

[6] There was no testimony about the length of time that elapsed from Officer Norris's first contact with Jones until the wallet was searched at the jail. Officer Norris's suppression hearing testimony gives the impression this was one continuum of conduct without any breaks or intervening events. With Jones handcuffed, Officer Norris kept asking a compliant Jones if he could search his car and then his room and Jones agreed.

[7] *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

exclusion of proof that ultimately would have been discovered without police misconduct. *Nix,* 467 U.S. at 444, 104 S.Ct. at 2509. The Commonwealth has not convinced us that absent the excessive *Terry* frisk, any of Jones's incriminating statements would have been uttered; the oxycodone tablets in his pocket would have been found; or the money in his motel room and wallet would have been revealed.

Based on Officer Norris's testimony, this was a scenario in which police responded to a telephone call about drug use and drug dealing in a motel. Upon arriving at the motel, Officer Norris spied a black male fitting the description provided by the caller and upon speaking to the man, corroborated the room number and name mentioned by the caller. We believe Officer Norris was authorized to frisk Jones for weapons since he was in an area known for drug dealing, he was responding to a call about drug dealing, drug dealers are often armed, and he was alone, but upon finding no weapons, Officer Norris had no authority to go any further. From the moment Officer Norris began removing the pill bottle from Jones's pocket, he was exceeding his authority and he provided no testimony that purged the taint created by his illegal conduct. The inevitable discovery doctrine is inapplicable to the case at hand.

We comment on one final item. The Commonwealth argues Jones's statements should not be suppressed because Jones did not request that the trial court suppress them and under *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), he should not be permitted to feed one can of worms to the trial court

and another can to us. We agree that Jones's written suppression motion did not specifically mention his desire to exclude his statements and the better practice is certainly to be specific in any request for relief. Nevertheless, Jones did request palpable error review under RCr 10.26, and in light of our reversal and remand, suppression of Jones's statements is warranted.

WHEREFORE, the order of the Fayette Circuit Court denying suppression of items other than "the pill bottle" is reversed and remanded for further proceedings consistent with this Opinion.

CLAYTON, JUDGE, CONCURS.

COMBS, JUDGE, CONCURS IN RESULT AND FILES SEPARATE OPINION.

COMBS, JUDGE, CONCURRING: This case presents a very close call. Most troubling to me is the total absence of a *Miranda* warning after the police "deemed" the appellant to be under arrest but did not inform him of that critical fact.

The trial court properly suppressed the pill bottle as exceeding the scope of a *Terry* search. The seizure of that bottle alone, however, did not taint the "consensual" searches that followed. Thus, I do not believe that the doctrine of the "fruit of the poisonous tree" is implicated by the seizure of the pill bottle. If the searches of the car and the hotel room were indeed consensual, any arguable taint of the improper seizure of the pill bottle during the initial *Terry* search would have been cured and eliminated by the court's suppression order.

The issue which is most disturbing and upon which findings are needed is whether the later searches were indeed consensual. If police misconduct occurred so as to merit suppression of all the evidence seized in the searches of the car and the motel room, it was wholly attributable to the failure to give a *Miranda* warning. Howard was handcuffed and clearly not free to leave the scene. A *Miranda* warning is still a viable and necessary requirement of due process of law. Its absence in this case wholly vitiates the voluntariness of the consent, which in turn would trigger the doctrine of "fruit of the poisonous tree" so as to render the searches improper and the evidence thereby obtained inadmissible.

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