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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-001454-MR

FRANKIE LEE HALL

APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 11-CR-00863

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

*** * * *

BEFORE: CLAYTON, MAZE, AND NICKELL, JUDGES.

NICKELL, JUDGE: Frankie Lee Hall, Jr., appeals from the August 13, 2012, judgment and sentence of the Fayette Circuit Court accepting Hall's conditional guilty plea and finding him guilty of possession of a handgun by a convicted felon,¹ carrying a concealed deadly weapon,² and being a persistent felony offender

¹ Kentucky Revised Statutes (KRS) 527.040, a Class C felony.

² KRS 527.020, a Class A misdemeanor.

in the second degree (PFO II).³ On appeal, Hall argues the trial court erred in denying his motion to suppress. Because we discern no error, we affirm.

On May 26, 2011, the Lexington Police Department received an anonymous tip indicating a possible murder suspect had been seen sitting at the bus stop at 1301 Centre Parkway. The caller described the individual as a black male wearing a black hat, black shirt, and blue jeans. Sergeants Brian Jared and Eric Hobson, who were in the vicinity, arrived at the specified location within moments. They observed a man matching the caller's description walking away from the bus stop and into the breezeway of the apartment complex located at 1301 Centre Parkway.

Sgt. Jared testified he parked and exited his cruiser and attempted to catch up to the man, later identified as Hall. Because he observed Hall was talking on the phone, Sgt. Jared approached quietly so as not to alert Hall. Hall started ascending the stairwell of the apartment complex and Sgt. Jared followed. When Hall turned and saw him, Sgt. Jared stated "police department, I need to talk to you." At that time, Hall ended his cell phone call and began backing away from the officer. Sgt. Hall repeated he was with the police department and needed to talk to Hall. Hall did not verbally respond, but frantically attempted to open the door of a nearby apartment. Sgt. Jared grabbed Hall's arm and took control of him. Sgt. Jared asked Hall multiple times if he had any guns or drugs, to which Hall remained silent. Sgt. Jared then took control of Hall's other arm and

³ KRS 532.080.

performed a *Terry*⁴ frisk, whereupon he discovered a hard metal object in Hall's back pocket. Sgt. Jared asked as to whether the object was a firearm, but Hall remained silent. Sgt. Jared asked a second time whether the object was a firearm and although Hall remained silent, he shrugged his shoulders and slightly nodded his head. Sgt. Jared then removed a loaded .25 caliber firearm from Hall's pocket. Hall was arrested for carrying a concealed deadly weapon. In a search incident to arrest, a small bag of marijuana was discovered.

As a result of the items discovered on Hall, he was charged with one count each of: possession of a handgun by a convicted felon; carrying a concealed deadly weapon; possession of marijuana;⁵ and PFO II. Hall filed a motion to suppress all the evidence seized during the *Terry* frisk and the subsequent search incident to his arrest. A hearing was held and Sgt. Jared testified as to the above-stated facts. In addition, Sgt. Jared testified the area where the arrest occurred is a high crime area with a reputation for violent crimes.

Following the hearing, Hall's motion was denied. He then entered a conditional guilty plea pursuant to RCr⁶ 8.09, preserving his right to appeal the denial of his suppression motion. As a result, Hall was found guilty of the two weapons offenses and adjudicated as being a PFO II. The marijuana possession

⁴ *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

⁵ KRS 218A.1422, a Class A misdemeanor.

⁶ Kentucky Rules of Criminal Procedure.

charge was dismissed. He received a sentence of ten years' imprisonment. This appeal followed.

Our review of a trial court's ruling on a motion to suppress is two-fold. First, factual findings are deemed conclusive if supported by substantial evidence. RCr 9.78. If without evidentiary foundation, the trial court's factual findings are deemed clearly erroneous. *Commonwealth v. Banks*, 68 S.W.3d 347, 349 (Ky. 2001). Second, we conduct a *de novo* review to determine whether the trial court's decision was correct as a matter of law. *Roberson v. Commonwealth*, 185 S.W.3d 634, 637 (Ky. 2006).

Traditionally, under *Terry*, an officer "may stop and frisk a suspect for weapons if the officer can point to reasonable and articulable facts that indicate that criminal activity may be afoot, and the suspect may be armed and dangerous." *Banks*, 68 S.W.3d at 349 (citing *Terry*, 392 U.S. at 21, 88 S.Ct. at 1880). "To determine whether an officer had reasonable suspicion, a court must look at the totality of the circumstances." *Commonwealth v. Morgan*, 248 S.W.3d 538, 540 (Ky. 2008). Evasive behavior has been considered a relevant factor when determining whether a defendant is involved in criminal activity. *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S.Ct. 673, 676, 145 L.Ed.2d 570 (2000). In addition, an officer may entertain reasonable suspicion based on a defendant's conduct, even when that conduct is consistent with innocent activity. *Morgan*, 248 S.W.3d at 542. "[T]he relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types

of noncriminal acts.” *Id.* (citing *U.S. v. Sokolow*, 490 U.S. 1, 10, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989) (quoting *Illinois v. Gates*, 462 U.S. 213, 243–244, n. 13, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983))).

Hall argues the trial court committed reversible error when it failed to grant his motion to suppress because his conduct did not rise to the level sufficient to create the reasonable articulable suspicion necessary to conduct the frisk. We disagree.

The totality of the circumstances presented to the trial court were that Hall: was in a high crime area particularly known for violent crimes; refused to answer Sgt. Jared’s requests to talk; backed away from Sgt. Jared; and frantically attempted to enter a nearby apartment. These facts are supported by the record. The trial court concluded Hall’s behavior exhibited an attempt to evade or elude Sgt. Jared, making the *Terry* frisk appropriate. Given the totality of the circumstances, we discern no error in the trial court’s conclusion that Hall’s behavior exhibited an attempt to elude police, giving rise to the reasonable suspicion necessary to justify a *Terry* frisk. Thus, the trial court correctly denied Hall’s suppression motion.

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

MAZE, JUDGE, CONCURS.

CLAYTON, JUDGE, CONCURS IN RESULT ONLY.

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