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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001945-MR

DAVID TYRONE JONES, JR. — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 12-CR-00218

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, CLAYTON, AND JONES, JUDGES.

CLAYTON, JUDGE: David Tyrone Jones, Jr., entered a plea of guilty to one charge of possession of cocaine conditioned on his right to appeal the Fayette Circuit Court's denial of his motion to suppress evidence. Having reviewed the record and applicable law, we affirm.

The evidence which Jones has sought to suppress was recovered during the course of a traffic stop. At the suppression hearing, the trial court heard testimony from Officer Chris Cooper, who pulled Jones over, and from Jones himself.

Officer Cooper testified that he and Officer Maynard, an ATF agent, were stopped behind Jones at a traffic light when he observed that Jones was not wearing a seat belt. Cooper activated the lights on his vehicle, indicating to Jones that he should pull over. Officer Cooper testified that Jones did not stop right away; instead, he acted nervous, checked his mirrors and seemed to be manipulating something in the center console of his car. Cooper suspected that Jones was trying to conceal something. Officer Cooper activated his siren briefly. After Jones eventually pulled over, Officer Cooper walked straight to the driver's side door and asked Jones to step out of the car, with the intention of conducting a *Terry* frisk to check for a weapon. Officer Cooper testified that Jones was confrontational about getting out of the car, and told the officer that the vehicle was a rental car which he would be late returning because of the stop. Cooper frisked Jones and found nothing to indicate that he had a weapon.

After the frisk, Cooper asked Jones for his identification. Jones reached into his pocket to pull out his wallet, and a baggy fell from his wallet onto the ground. Cooper picked up the baggy and saw that it contained little crumbles resembling crack cocaine. The crumbles field tested positive as crack. Cooper asked Jones if he could search the car; Jones refused. Cooper called a K-9 officer,

who arrived a few minutes later. The dog alerted on the car. Cooper searched the car but did not find any contraband. Jones was searched again, and thirteen broken pieces of alprazolam, which is generic Xanax, were recovered from his person. Jones told the officer he was taking the medicine according to a prescription.

Jones testified that he was wearing his seatbelt when he left home to return the rental car. He noticed police lights after he made a left turn, but because a car was passing him, he could not pull over immediately. When he did stop, an officer wearing an "ATF" shirt approached the passenger side of the car, and asked for Jones's identification. Jones handed over his identification. As the ATF agent walked back to the police vehicle, Jones reached over to the glove compartment to get the paperwork for the rental car. Another officer approached from the driver's side, pulled him out of the car, and asked what he was reaching for. The officer started to search Jones, who protested that he was only supposed to frisk him. According to Jones, as the officer put his hand in Jones's pocket to pull out his wallet, the wallet and some medication fell out. Jones was indicted for first-degree possession of a controlled substance, cocaine; third-degree possession of a controlled substance, alprazolam; and failure to wear a seat belt.

Following the suppression hearing, the trial court made oral findings that the failure to wear a seatbelt is a primary offense and that the officers were justified in pulling Jones over. The trial court found Cooper's testimony that Jones was not wearing a seat belt credible. The trial court found Jones's testimony that he was wearing a seat belt not credible because he never debated the issue with the

officer upon being pulled over, whereas he testified that he was willing to challenge the officer on other grounds regarding the search of his person and the car. The trial court also found that Cooper articulated a legitimate reason for the subsequent frisk because Jones was reaching around inside the car. Jones entered a conditional plea of guilty to one charge of possession of cocaine, and was sentenced to one year, probated for five years. This appeal followed.

> An appellate court's standard of review of the trial court's decision on a motion to suppress requires that we first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive. Based on those findings of fact, we must then conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law.

Commonwealth v. Neal, 84 S.W.3d 920, 923 (Ky. App. 2002) (footnotes omitted).

Jones has chosen not to contest the lawfulness of the initial traffic stop. He concentrates on arguing that the subsequent *Terry* frisk was illegal. The Commonwealth contends that this argument is moot, however, because the baggy containing the crack cocaine was not recovered directly as a result of the frisk. According to Officer Cooper, the baggy did not fall out during the course of the frisk, but afterwards when he asked Jones for his identification. Nonetheless, if the frisk had not occurred, Jones would still have been seated in the car and the baggy might not have fallen from his pocket when he withdrew his wallet. We will, therefore, address his argument regarding the propriety of the *Terry* frisk.

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

> [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[.]

Terry, 392 U.S. at 30–31, 88 S.Ct. at 1884–85.

The test for a *Terry* stop and frisk is whether, under the totality of the circumstances, 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 *Commonwealth v. Banks*, 68 S.W.3d 347, 350–51 (Ky. 2001). Jones argues that Officer Cooper's testimony that he conducted the frisk because Jones acted nervous, checked his mirrors, failed to stop promptly and reached for something in the center console was not sufficient to create a reasonable and articulable suspicion that Jones was armed and dangerous. He contends that many motorists act nervously around the police, that he did not attempt to accelerate or to elude the police, and that he was reaching over to the glove compartment for the legitimate reason of getting out the rental car paperwork.

The trial judge in this case found Office Cooper to be the more credible witness. "At a suppression hearing, the ability to assess the credibility of witnesses and to draw reasonable inferences from the testimony is vested in the discretion of the trial court." *Sowell v. Commonwealth*, 168 S.W.3d 429, 431 (Ky. App. 2005). The trial court stressed in particular Officer Cooper's observation that Jones was reaching around inside the car after he became aware that the police vehicle was behind him. These actions were sufficient to create a reasonable belief on Officer Cooper's part that Jones might be armed and dangerous.

> [I]nvestigative detentions involving suspects in vehicles are especially fraught with danger to police officers. In *Pennsylvania v. Mimms*, 434 U.S. 106, 54 L. Ed. 2d 331, 98 S. Ct. 330 (1977), we held that police may order persons out of an automobile during a stop for a traffic violation, and may frisk those persons for weapons if there is a reasonable belief that they are armed and dangerous. Our decision rested in part on the "inordinate risk confronting an officer as he approaches a person seated in an automobile."

Dunn v. Commonwealth, 689 S.W.2d 23, 27 (Ky. App.1985) (quoting *Michigan v. Long*, 463 U.S. 1032, 1045, 103 S.Ct. 3469, 3478, 77 L.Ed.2d 1201, 1217 (1983)).

The trial court did not abuse its discretion in concluding that Cooper was a credible witness regarding the events leading up to the traffic stop, and that a *Terry* frisk was a necessary safety precaution under the totality of the circumstances.

The Fayette Circuit Court did not err in denying the motion to suppress, and its judgment is therefore affirmed.

JONES, JUDGE, CONCURS.

CAPERTON, JUDGE, CONCURS AND FILES SEPARATE OPINION.

CAPERTON, JUDGE, CONCURRING: I concur with the majority but write separately only to express my opinion that the analysis of the challenge to the search conducted pursuant to *Terry* is not relevant.

The Appellant argues that but for the *Terry* search which necessitated Jones's removal from the vehicle, the contraband would not have been discovered. To accept this argument, one must assume that the officer had no right to ask Jones to step out of the car other than for the purposes of the *Terry* search. This is contrary to *West v. Com*m*onwealth*, 358 S.W.3d 501, 503 (Ky. App. 2012), and *Pennsylvania v. Mimms*, 434 U.S. 106, 111, n. 6, 98 S.Ct. 330, 333, 54 L.Ed.2d 331 (1977). Since the officer could ask the Appellant to step out of the vehicle pursuant to *West* and *Mimms*, and the discovery of the contraband was a result of the events that followed Appellant's exit from the vehicle exclusive of the alleged *Terry* violation, then no constitutional violation led to the discovery of the contraband.

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