

RENDERED: DECEMBER 4, 2015; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2014-CA-001353-MR

DERRIUS DANTE KING

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE KIMBERLY N. BUNNELL, JUDGE  
ACTION NO. 13-CR-01043

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING IN PART,  
REVERSING IN PART,  
AND REMANDING

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BEFORE: COMBS, J. LAMBERT AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Derrius Dante King entered a plea of guilty to several charges, including first-degree attempt to commit robbery, conditioned on his right to appeal the trial court's denial of his motion to suppress evidence. He argues that

his seizure by the police exceeded the limits of a permissible *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), stop.

On July 18, 2013, employees of a branch of the American Founders Bank in Lexington observed two black males, one of whom was King, loitering around the bushes near the bank. King entered the bank that day. Two days later, bank employees saw the same individuals by the bushes again, and both men entered the bank. The employees described the men's activities as suspicious and felt there was something "just not right" about them. Bank employee Donna Collins contacted the Lexington Police Department to report what they had observed. On July 24, both men again entered the bank and King sat on a couch while the other man spoke with a teller. The other man had a cross tattoo on his forehead. During one of their visits to the bank, King's companion provided false credit card information to the employees.

On July 30, 2013, King entered the bank and inquired about opening an account. He left but returned a short time later. The bank employees were so suspicious of his behavior and concerned about their own safety that they locked the doors and would not let him enter the bank. He returned the next day, but the employees again locked the door and would not let him enter.

On August 1, 2013, detectives with the Lexington Police Department's Robber/Homicide Unit, Personal Crimes Section, met to discuss the case. Surveillance video provided by the bank showed King with a bulge in his jeans which led the police to believe he was armed.

That afternoon, the detectives stationed themselves inside and outside the bank. King was spotted walking on a road adjacent to the bank. He appeared to drop something in a mail box and then walked towards the parking lot of the bank. He sat on the curb for about five minutes, walked towards the bank doors where he stopped to adjust his shoes, and then entered the bank. King spoke briefly with a teller and left.

Detective McCowan, who was wearing a tactical vest with "Police" printed on it, grabbed King's arm as he left the bank, and moved him away from the door for safety. Approximately ten officers immediately surrounded King. Detective McCowan asked King if he had "anything on him." King replied that he had "a nine," referring to a nine millimeter handgun. The officers restrained King, grabbed his arms, placed him in a full nelson hold and forced him to the ground. The officers lifted his shirt, found the handgun in his waistband, and charged him with carrying a concealed deadly weapon. They searched King and found an additional loaded magazine for the handgun, a handwritten demand note to the bank personnel, a pair of surgical gloves, an ink stamper, a rag, a dollar bill and a plastic Kroger grocery bag.

King was indicted for first-degree criminal attempt to commit robbery; being a convicted felon in possession of a handgun; receiving stolen property (firearm); carrying a concealed deadly weapon; and being a second-degree persistent felony offender (PFO II). Following a hearing, the trial court made oral findings and denied King's motion to suppress the evidence, concluding

that the police behaved lawfully. King entered a conditional plea to the charges of first-degree criminal attempt, being a convicted felon in possession of a handgun, and being a PFO II. 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).

Under *Terry*, 392 U.S. at 20-23, 88 S.Ct. at 1878-81, “[p]olice officers may briefly detain an individual on the street, even if there is no probable cause to arrest him, if there is a reasonable suspicion that criminal activity is afoot.” *Gray v. Commonwealth*, 150 S.W.3d 71, 74 (Ky.App. 2004). Under certain circumstances, the detention may include a pat-down search. “When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others,” the officer may conduct a pat-down search “to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.” *Terry*, 392 U.S. at 24, 88 S.Ct. at 1881–82. “The ‘narrow scope’ of the *Terry* exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked[.]” *Nunn v. Commonwealth*, 461

S.W.3d 741, 746 (Ky. 2015) (quoting *Ybarra v. Illinois*, 444 U.S. 85, 93–94, 100 S.Ct. 338, 343, 62 L.Ed.2d 238 (1979)).

At the suppression hearing, King’s attorney conceded the police had reasonable suspicion to initiate a *Terry* stop, but argued that the subsequent frisk for weapons was not justified. The trial court found the detective initially moved King away from the door for reasons of safety; when King responded to the officer’s question by admitting that he had a handgun, the officers were fully justified in restraining and searching him.

On appeal, King contends that the stop exceeded the limits of *Terry* when Detective McCowan grabbed his arm and the other officers “gang tackled” him because: (1) the bank employees’ suspicions were based on the prior actions of two men, one of whom had a cross tattoo on his forehead but on the day of his arrest, King was the only person at the bank and he does not have a cross tattoo on his forehead; (2) there was no evidence that the officers saw a bulge indicating a gun in King’s jeans on the day of his arrest; and (3) there was no testimony that he was engaging in the same or even similar behavior to that of the two men who were allegedly “casing” the bank in the two weeks before the day of the arrest because he was not hiding in the bushes, providing false information on a credit card application or leaving and returning to the bank.

We apply a two-step analysis in evaluating investigative detentions under *Terry v. Ohio*: first, we must determine whether officer had reasonable, articulable suspicion to justify an investigatory stop; and second, if the stop was proper, was the “degree of intrusion ... reasonably

related in scope to the situation at hand, which is judged by examining the reasonableness of the officials' conduct given their suspicions and the surrounding circumstances.” *United States v. Davis*, 430 F.3d 345, 354 (6th Cir. 2005).

*Frazier v. Commonwealth*, 406 S.W.3d 448, 453 (Ky. 2013).

As the Commonwealth has aptly observed, the facts of this case are similar to those of *Terry*, in which a police officer observed Terry and his associates loitering around a jewelry store and repeatedly looking in the window. *Terry*, 392 U.S. at 6, 88 S.Ct. at 1872. The police officer suspected the men were “casing” the store preparatory to committing a robbery, and feared they were armed. When the men “mumbled something” in response to his inquiries, the officer grabbed Terry and patted down the outside of his clothing, where he felt a pistol. *Id.* at 6-7, 88 S.Ct. at 1872.

Similarly, King and his associate had been loitering in and around the bank for no apparent reason for several days. Indeed, their behavior was so alarming that the bank employees notified the police and, on at least two occasions, locked the door to keep King from entering the bank. Even if the police did not observe any signs of a firearm on King on the day of the arrest, the earlier videotape evidence raised a reasonable suspicion that he might be armed. The police had a reasonable, articulable suspicion to justify an investigatory stop of King. Detective McCowan was well within the parameters of *Terry* when, for reasons of safety, he initially drew King away from the door of the bank and asked him whether he had anything on him.

The police did not restrain King until after he admitted to having a firearm in response to McCowan's question. Once he made that admission, the police were fully justified, again for reasons of safety, in restraining King and removing the firearm. He was arrested at that point for carrying a concealed deadly weapon. *See* Kentucky Revised Statutes (KRS) 431.005(1)(d) "A peace officer may make an arrest . . . [w]ithout a warrant when a misdemeanor . . . has been committed in his or her presence[.]" ; KRS 527.020(10) "Carrying a concealed weapon is a Class A misdemeanor[.]"

"Under the search incident to arrest exception, an officer is permitted to search the person arrested and the area within the arrestee's immediate control." *McCloud v. Commonwealth*, 286 S.W.3d 780, 785 (Ky. 2009). Thus, the further search of King's person was justified as incident to his arrest.

King next argues the trial court erred in ordering him to pay court costs in the amount of \$155. Relying on *Maynes v. Commonwealth*, 361 S.W.3d 922, 933 (Ky. 2012) and *Reynolds v. Commonwealth*, 393 S.W.3d 607, 613 (Ky.App. 2012), he contends that prior to the imposition of costs, he was entitled to a hearing to determine whether he is a poor person as defined by KRS 453.190(2), and consequently unable to pay costs now or in the foreseeable future. The Commonwealth does not object to remanding the case for such a hearing, but also does not object, for reasons of fiscal and judicial economy, to simply reversing the order to pay the costs. We agree with the Commonwealth's approach.

For the foregoing reasons, the Fayette Circuit Court's denial of King's motion to suppress is affirmed, and its final judgment is affirmed in all respects except as to the imposition of court costs. The portion of the final judgment ordering the payment of court costs is reversed, and the matter is remanded for entry of an order consistent with this opinion.

ALL CONCUR.

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