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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000263-MR

YAOTING TIM HUANG — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 13-CR-01386

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, NICKELL, AND, VANMETER, JUDGES.

NICKELL, JUDGE: Yaoting Tim Huang (Huang) brings this appeal from the Fayette Circuit Court's final judgment on a conditional guilty plea pursuant to *North Carolina v. Alford*[1] to six counts of attempted criminal possession of a forged instrument in the first degree.[2] Huang was sentenced to a term of 180 days for each separate count, service of which was conditionally discharged for two

[1] 400 U.S. 25, 91, S.Ct. 160, 27 L.Ed.2d 162 (1970).

[2] Kentucky Revised Statutes (KRS) 506.010, 516.050.

years provided he maintained good behavior and refrained from violating the law. Huang specifically reserved his right to appeal denial of his suppression motion. Having reviewed the briefs, the record and applicable law, we affirm.

Huang was arrested on November 9, 2013, at a bar in Lexington. Bar employees suspected he was using counterfeit bills, and an officer patrolling the area was flagged down. Employees identified Huang to the officer as the person passing the bills, but did not indicate Huang had a weapon. The officer began to question Huang about the money and asked him to show the cash he had on his person. Huang produced $59.00 in currency. The officer used a testing marker to confirm this cash was *not* counterfeit. The officer proceeded to pat down Huang and felt a bulge in his left front pants pocket. The officer inquired as to the content of the pocket, and Huang removed several bills from the pocket and gave them to the officer. The bills were discolored, odd in texture and some had the same serial number. The officer used the testing marker on these bills, and confirmed they *were* counterfeit. Huang was subsequently arrested. No weapons were recovered from Huang.

Huang moved to suppress seizure of the counterfeit bills, as well as statements he had made to the officer. The trial court suppressed the statements, but overruled suppression of the seized counterfeit bills. Ruling from the bench, the trial court found the officer had a reasonable and articulable suspicion of Huang's criminal activity justifying his initial detention under *Terry v. Ohio*, 392

U.S. 1, 98 S.Ct. 1868, 20 L. Ed.2d 889 (1968).[3] The court found, however, there was no evidence showing the officer reasonably suspected Huang possessed a weapon so as to justify a *Terry* pat down. In the suppression hearing testimony, the officer stated it was his standard policy—for his own safety—to conduct pat downs every time he detains someone. Thus, the court ruled although the initial *Terry* stop was proper, the subsequent pat down was improper.

Even so, the trial court then found Huang, although not required to do so, voluntarily gave the counterfeit bills to the officer. The officer discovered the pocket bulge, but did not reach into Huang's pocket and seize the bills, nor did he order Huang to give him the bills. Had the officer removed the bills from Huang's pocket himself after the pat down, the court would have suppressed the counterfeit bills.

Huang entered an *Alford* plea on January 9, 2015.[4] This appeal followed.

The central question before us is whether the trial court erred in denying the motion to suppress the counterfeit bills. Huang argues the officer only obtained the bills as a result of his unlawful pat down under *Terry* and the trial court erred in finding Huang's handing over the counterfeit bills intervened and removed the taint associated with the improper *Terry* pat down. Huang argues the bills are fruit of the poisonous tree. *See Goncalves v. Commonwealth*, 404 S.W.3d 180, 191

[3] The trial court's written order was entered on May 20, 2014.

[4] The written judgment was entered by the trial court on January 14, 2015.

(Ky. 2013) (noting evidence recovered from an illegal search is inadmissible against a defendant).

We review a trial court's ruling on a motion to suppress by applying a two-step analysis. *Id.* at 189. First, we determine if the trial court's findings of fact are supported by substantial evidence. *Id*. (citing *Peyton v. Commonwealth*, 253 S.W.3d 504 (Ky. 2008); *Adcock v. Commonwealth*, 967 S.W.2d 6 (Ky. 1998)). Factual findings supported by substantial evidence are conclusive and bind the appellate court. *Goncalves*, 404 S.W.3d at 189. Second, we conduct a *de novo* review of the law as applied by the trial court to those facts. *Commonwealth v. Marshall*, 319 S.W.3d 352, 357 (Ky. 2010).

Here, the facts are undisputed. The trial court's findings are supported by substantial evidence and will not be disturbed on appeal. Thus, we proceed to the second prong of the inquiry.

Unless it falls within a narrowly defined exception to the warrant requirement, a warrantless search is presumed to be unreasonable. *Carter v. Commonwealth*, 358 S.W.3d 4, 6 (Ky. App. 2011) (citing *Gallman v. Commonwealth*, 578 S.W.2d 47, 48 (Ky. 1979)); *Bishop v. Commonwealth*, 237 S.W.3d 567, 568 (Ky. App. 2007). A *Terry* stop is one of the well-known exceptions, and involves a brief investigatory stop by a law enforcement officer when he or she has a reasonable suspicion, based upon specific and articulable facts, that a person has either committed or is about to commit a criminal offense. *Terry*, 392 U.S. at 21. Under *Terry*, where an officer observes unusual conduct

leading to a reasonable belief that criminal activity may be occurring and the officer reasonably believes the person with whom he is dealing may be armed and dangerous, he is entitled, for the protection of himself and others in the area, to conduct a carefully limited pat down in an attempt to discover weapons. In instances when a police officer confronts a person and restrains his or her freedom to walk away, a seizure has occurred. *Id*. at 30. Under the Fourth Amendment such seizures must be reasonable. *See generally United States v. Brignoni–Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); *Singleton v. Commonwealth*, 364 S.W.3d 97 (Ky. 2012).

Here, the officer was at the bar because of a report of criminal activity, and Huang was specifically identified by employees as the person passing counterfeit bills. In evaluating whether a police officer has a reasonable suspicion supported by specific and articulable facts, a court must consider the totality of the circumstances. *Patton v. Commonwealth,* 430 S.W.3d 902, 907 (Ky. App. 2014). In analyzing the totality of the circumstances, we are convinced the officer had probable cause to detain Huang and the trial court was correct in that portion of its *Terry* analysis.

We also agree with the trial court's conclusion that the officer had no basis under *Terry* to pat down Huang because there was no allegation and no evidence presented to the officer before or during the initial detention that Huang was armed and dangerous. The officer testified he routinely pats down all detainees, without any indication the person has a weapon. Thus, the officer failed to follow *Terry*'s

requirement of reasonable belief the detainee is armed and dangerous, and, therefore, he had no legal basis to pat down Huang.

Although the pat down was improper, Huang's voluntary act of providing the bills cuts squarely against his argument the bills are fruit of the poisonous tree. Had the factual circumstances differed slightly–if the officer had pulled the bills from Huang's pocket or if the officer had told Huang to immediately hand over the items–our conclusion would likely be different. But that did not happen.

Huang could have given a verbal response, said nothing, or done nothing when the officer asked about the contents of his pocket. Huang responded by voluntarily giving the officer the incriminating evidence. Applying the analysis used by the United States Supreme Court in *Colorado v. Connelly*, 479 U.S. 157,169-170, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986), we deem the handing over of the counterfeit bills an act of free will on Huang's part and not, in this very narrow fact pattern, an act of police coercion or overreaching. *See also Keeling v. Commonwealth*, 381 S.W.3d 248, 269 (Ky. 2012); *Stanton v. Commonwealth,* 349 S.W.3d 914, 916-17 (Ky. 2011). As the trial court correctly concluded, the taint of the improper pat down was overcome by Huang's voluntary action. Thus, we discern no error in the trial court's decision to deny Huang's suppression motion.

For the foregoing reasons, the order of the Fayette Circuit Court is hereby affirmed.

ALL CONCUR.

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