

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

NO. 2014-CA-001543-MR

LAMAR LEE BOYD

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE, THOMAS L. CLARK, JUDGE  
ACTION NO. 13-CR-01133

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: D. LAMBERT, STUMBO AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Lamar Lee Boyd appeals from a judgment of the Fayette Circuit Court entered following a jury verdict convicting him of possession of a firearm by a convicted felon. Boyd's appeal is based upon the trial court's denial of his motion to suppress. After careful review, we affirm.

Boyd was indicted by a Fayette County grand jury for possession of a handgun by a convicted felon, possession of a controlled substance in the first degree, carrying a concealed deadly weapon, resisting arrest, and possession of marijuana. Prior to trial, Boyd moved the trial court to suppress the gun found on his person as fruit of an illegal stop and frisk.

At the suppression hearing, Detective Franz Wolff of the Lexington Police Department testified that on August 19, 2013, he and six other detectives went to Green Acres Park in an effort to locate Boyd who police believed could assist them in the investigation of a homicide that occurred in the area. Earlier, Detective Wolff and the other detectives received information that Boyd frequented the area and sold drugs out of the park. Detectives were also aware that Boyd had a previous conviction for a homicide involving a firearm.

Detectives drove past the Green Acres Park in two unmarked vehicles shortly before 11:00 p.m. and observed numerous individuals loitering in the park despite the park being closed. Detective Wolff testified that the park was dark and he did not observe any park activities taking place. The detectives decided to enter the park to investigate. Wearing street clothes and black ballistic vests with "POLICE" written in large white lettering on the front and back, the detectives approached approximately ten people in the parking lot. The detectives did not know that Boyd was present when they approached.

While his colleagues made contact with other individuals in the parking lot, Detective Wolff made contact with the person closest to him and

explained that he and the other detectives approached because it was 11:00 at night, dark, the park was closed, and numerous individuals were loitering in the park. When Detective Wolff asked the individual his name, the individual remained silent and handed the detective his identification card. Detective Wolff read the identification card and realized the individual was Boyd.

Standing behind Boyd, Detective Wolff held Boyd's hands and asked him to sit on the pavement in the middle of the parking lot. Boyd complied. With Boyd sitting on the ground, Detective Wolff asked him if he had any weapons. Boyd immediately pulled his arm away from the detective's control, reached into his front pocket, and discarded a quantity of narcotics on the pavement. When Boyd then attempted to get up, other detectives rushed over to assist Detective Wolff in an attempt to regain control of Boyd. After eventually getting Boyd under control and handcuffed, one of the detectives frisked Boyd and found a loaded firearm in his back pants pocket.

Boyd's version of events differed considerably. Boyd testified that after he gave Detective Wolff his identification, the detective forcefully grabbed his shoulder and yelled, "Here he is! We've got him!" Detective Wolff then put Boyd's hands behind his back and shoved him to the pavement. He asked Boyd if he had any weapons, but before Boyd could answer, Detective Wolff forced his hands into Boyd's pockets. Boyd reached for his pocket, and when his hands broke free, the detectives jumped on him and placed him in handcuffs. While

Boyd was in handcuffs, Detective Wolff frisked him and found a firearm. Boyd insisted that he did not have any drugs and did not throw any drugs on the ground.

In denying Boyd's motion to suppress, the trial court noted there was a direct contradiction between Detective Wolff's testimony and Boyd's testimony. However, the court chose to believe Detective Wolff's testimony. The court found the detectives had a right to stop Boyd to investigate loitering or trespassing in the park. It further found the search uncovered the firearm that was incident to Boyd's lawful arrest for possession of a controlled substance.

Boyd proceeded to trial. A jury convicted him for the crime of possession of a firearm by a convicted felon and recommended a sentence of eighteen-months' imprisonment. Thereafter, on the advice of counsel, Boyd pleaded guilty to his remaining charges. The trial court sentenced Boyd to eighteen months for possession of a firearm by a convicted felon, one year for possession of a controlled substance in the first degree, twelve months for carrying a concealed deadly weapon, twelve months for resisting arrest, and forty-five days for possession of marijuana. The court ordered that all sentences run concurrent, except that one-half of the one year sentence for possession of a controlled substance was to run consecutive, for a total sentence of two-years' imprisonment. Boyd appealed his conviction for possession of a firearm by a convicted felon on the basis of what he claims was an illegal seizure and pat-down search.

As explained in *Turley v. Commonwealth*, 399 S.W.3d 412, 417 (Ky. 2013) (internal citations omitted), we review a circuit court’s ruling concerning suppression issues following a hearing by applying a two-pronged analysis:

First, we will affirm the trial court’s findings of fact if those findings are supported by substantial evidence.... [W]e will only examine the trial court’s findings for clear error and give deference to reasonable inferences made from the evidence. Second, if the trial court’s findings of fact are supported by substantial evidence, we then conduct a *de novo* review of the court’s application of the law to the facts.

“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.” *Pitcock v. Commonwealth*, 295 S.W.3d 130, 132 (Ky. 2009).

The trial court, after hearing Boyd’s and Detective Wolff’s testimony at the suppression hearing, concluded that Detective Wolff’s testimony described what occurred at Green Acres Park. After reviewing the record and the testimony from the evidentiary hearing, we are convinced that the trial court’s factual findings are supported by substantial evidence and are conclusive.

Having determined that the trial court’s factual findings are not clearly erroneous, we must now determine whether its decision to deny Boyd’s motion to suppress was correct as a matter of law. Boyd argues that the police did not have a right to seize and detain him after initially approaching him in the parking lot. He further argues that a pat-down search was not permissible under the circumstances and, without justification for a pat-down search, physical detention was improper.

The Fourth Amendment to the United States Constitution provides that “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]” In *Baltimore v. Commonwealth*, 119 S.W.3d 532, 537 (Ky.App. 2003), the Court observed that of the three types of interactions between police and citizens, consensual encounters, temporary detentions and arrests, the protections of the Fourth Amendment only applies to temporary detentions and arrests. Generally, the seizure of a person must be supported by probable cause. *Id.* However, under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 889 (1968), a police officer may stop and briefly detain an individual if he reasonably suspects that that individual is involved in criminal activity, despite lacking probable cause to make an arrest. The officer may also frisk the individual suspected of criminal activity if the officer has reason to believe that the suspect may be armed and dangerous. *Id.* at 30-31, 88 S.Ct. 1884-85; *Commonwealth, v. Banks*, 68 S.W.3d 347, 349 (Ky. 2001).

Evaluating whether a search and seizure were unreasonable requires a dual inquiry. We must first determine “whether the officer’s action was justified at its inception[.]” *Terry*, 392 U.S. at 20, 88 S.Ct. at 1879. In other words, we must ascertain whether the officer had “reasonable, articulable suspicion to justify an investigatory stop[.]” *Frazier v. Commonwealth*, 406 S.W.3d 448, 453 (Ky. 2013). Second, we decide whether the degree of intrusion “was reasonably related in scope to the circumstances which justified the interference in the first place.”

*Terry*, 392 U.S. at 20, 88 S.Ct. at 1879. This is “judged by examining the reasonableness of the officials’ conduct given their suspicions and the surrounding circumstances.” *Frazier*, 406 S.W.3d at 453 (quoting *United States v. Davis*, 430 F.3d 345, 354 (6<sup>th</sup> Cir. 2005)).

Detectives justifiably stopped Boyd to investigate possible criminal behavior. Detective Wolff testified that he and his colleagues observed a group of people gathered in the parking lot of a park after closing hours and there were no activities occurring in the park that would justify the individuals being there. Based on these facts articulated by Detective Wolff, further investigation was warranted to determine whether the individuals in the park were loitering and/or trespassing. Trespassing and loitering alone provide sufficient reasonable suspicion for an officer to stop and question a subject. *Simpson v. Commonwealth*, 834 S.W.2d 686, 688 (Ky.App. 1992). The detectives’ action of stopping and temporarily seizing Boyd for the purpose of further investigation into a possible crime was justified at its inception.

Boyd argues the detectives’ conduct was more intrusive than necessary to effectuate an investigative detention for the purposes of determining whether he was trespassing. He believes a *Terry* frisk was not justified under the circumstances and, therefore, the detective’s act of controlling his arms and movement was improper. We disagree.

In *Williams v. Commonwealth*, 147 S.W.3d 1, 6 (Ky. 2004), our Supreme Court stated “the right to make an arrest or investigatory stop necessarily

carries with it the right to use some degree of physical coercion or threat thereof to affect it.” Indeed “[i]t would be paradoxical to give police the authority to detain pursuant to an investigatory stop yet deny them the use of force that may be necessary to effectuate the detention.” *People v. Starks*, 190 Ill.App.3d 503, 509, 546 N.E.2d 71, 76 (1989).

Further, police officers are authorized to take steps that are reasonably necessary to protect their personal safety and maintain the status quo. *United States v. Hensley*, 469 U.S. 221, 235, 105 S.Ct. 675, 683-84, 83 L.Ed.2d 604 (1985). When an officer has a justified belief that a suspect whose suspicious behavior he is investigating at close range is armed and presently dangerous, the officer may conduct a pat-down search of the individual in order to determine whether the person is in fact armed and presently dangerous. *Frazier*, 406 S.W.3d at 453.

Nonetheless, “[t]here is no doubt that at some point in the investigative process, police procedures can qualitatively and quantitatively be so intrusive with respect to a suspect’s freedom of movement and privacy interest as to trigger the full protection of the Fourth and Fourteenth Amendments.” *Hayes v. Florida*, 470 U.S. 811, 815-16, 105 S.Ct. 1643, 1646, 84 L.Ed.2d 705 (1985).

Therefore, the scope of a *Terry* stop must be limited to the “least intrusive means reasonably available to verify or dispel the officer’s suspicion in a short period of time.” *Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319, 1325-26, 75 L.Ed.2d 229 (1983). Moreover, the scope of the intrusion will vary as to the circumstances



of the case and the justification for the initial stop. *Id.* at 500, 103 S.Ct. at 1326.

Indeed, many courts have held that the use of handcuffs in some situations does not exceed the bounds of a *Terry* stop, as long as the circumstances warrant that precaution. *See Houston v. Clark County Sheriff Deputy John Does 1-5*, 174 F.3d 809, 815 (6th Cir. 1999); *United States v. Perdue*, 8 F.3d 1455, 1467 (10th Cir. 1993); *United States v. Taylor*, 716 F.2d 701, 709 (9th Cir. 1983).

Under the above standards, we reject Boyd's argument that a pat-down search was not justified and that it was impermissible for Detective Wolff to take physical control of Boyd to conduct the pat-down search. It is clear that when Detective Wolff initially approached Boyd and asked his name, Boyd had done nothing which would support a suspicion that he was then presently armed or dangerous. However, when Detective Wolff discovered Boyd's identity, he reasonably decided to control his movement to frisk Boyd. Detective Wolff was reasonable in his belief that Boyd was armed and dangerous because he knew that Boyd had previously been convicted of a homicide involving a firearm, he had information that Boyd sold drugs in the park and he knew from experience that people who deal narcotics are often armed. In these circumstances where the intrusive measures were minimal but the risk confronting Detective Wolff was extraordinary, it was appropriate for the detective to take such precautionary measures, including a *Terry* frisk. Detective Wolff was justified in keeping Boyd's arms under control until he could conduct the pat-down search to determine if

Boyd was armed. Moreover, we are convinced that the methods Detective Wolff used were the least intrusive means by which he could insure his safety.

The trial court did not abuse its discretion when it overruled Boyd's motion to suppress. The order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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