

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001777-MR

MARCUS ANTWAN CHAMBERS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 15-CR-00226

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, JONES AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Marcus Antwan Chambers appeals from the Fayette Circuit Court's judgment of conviction and sentence pursuant to a conditional guilty plea challenging the denial of his motion to suppress.

On March 11, 2015, Chambers was indicted for being a convicted felon in possession of a handgun; possession of controlled substance, first degree,

first offense; carrying a concealed deadly weapon; and being a persistent felony offender in the second degree (PFO-2). Chambers filed a motion to suppress on the basis that there was no reasonable suspicion to frisk him during a traffic stop.

At the suppression hearing, Officers Gary Thurman and Adam Ray of the Lexington Police Department testified. Officer Thurman serves as a gang resource officer with the Community Law Enforcement Action Response (CLEAR) unit. On January 14, 2015, at about 10 p.m., Officers Thurman, Kennedy and Stafford were in an unmarked vehicle. They drove through the parking lot of the Sportsman Motel to investigate a narcotics complaint. While driving through the parking lot, the officers observed a group of people near a Dodge Dart. When their unmarked vehicle approached, the group quickly dispersed and the Dart pulled out of the parking lot. Officer Thurman attributed the actions of the people and driver to the fact that many people in the area were familiar with his unmarked vehicle.

Officer Thurman instructed Officer Kennedy, who was driving, to follow the Dart, which contained three people. While they were following, the Dart was traveling over the speed limit so he noted the license plate number and identifying characteristics of the driver. When the Dart began traveling at over sixty miles per hour in a residential neighborhood with a speed limit of thirty-five, they stopped trying to keep up with the vehicle.

Officer Thurman radioed other units about the Dart. He explained he was conducting an investigation at the Sportsman Motel when the Dart fled at a high rate of speed. He requested any officer who could locate the vehicle to conduct a traffic stop based on speeding and reckless driving. He stated where the Dart was last seen, provided its license plate number and described the driver as white and wearing a black and white checkered jacket.

One of the officers who was contacted was Officer Ray. Officer Ray was familiar with the Sportsman and was suspicious that drugs or prostitution could be involved, but knew there was only probable cause to stop the vehicle for the traffic violations.

Officer Ray observed what he believed was the vehicle being sought and contacted Officer Thurman to confirm that he had located the correct vehicle. Officer Thurman confirmed the identity of the vehicle from Officer Ray's recitation of the license plate number and description of the vehicle and driver.

Officer Thurman then requested that Officer Ray perform a traffic stop for reckless driving and told Officer Ray that he would identify the driver. Officer Thurman wanted to make sure that a passenger had not switched seats with the driver who was speeding. Officer Ray radioed dispatch about the traffic stop he would be conducting and activated his emergency equipment.

As soon as he activated his lights and siren, Officer Ray observed the front passenger lift his waist off the seat and reach for something. He could see the passenger's arm digging around toward the right side of his body. Officer Ray thought this movement was suspicious coming from a passenger as he would expect a driver might be getting his wallet out to present identification, yet no one else in the vehicle was making any movement. He was concerned about weapons because the vehicle was coming from the Sportsman Motel.

Officer Ray stopped the Dart, approached the driver and requested his license, registration and insurance. The driver stated it was a rental car but could not locate the rental agreement and provided an identification card rather than a driver's license. Because he was alone, Officer Ray remained with the driver, kept his eyes on the passengers when talking to the driver and did not ask anyone to exit the vehicle.

Officers Thurman, Kennedy and Stafford arrived and Officer Thurman observed that Officer Ray was alone at the Dart's driver's side window. Officer Ray informed them the front passenger, Chambers, made furtive movements and requested that Officer Stafford have him exit the vehicle to be frisked for weapons. As Officer Stafford was patting Chambers down, he felt what he thought was a gun. Officer Stafford handcuffed Chambers and removed a gun from his waistband.

Officer Stafford detained Chambers and then determined he was a convicted felon with an extensive narcotics record. Officer Stafford arrested Chambers and searched him incident to arrest. Later, he patted him down again and discovered Chambers had a baggy in his wallet with a light brown powder suspected to be heroin.

After the suppression hearing, the parties submitted memoranda on their respective positions. Chambers argued the traffic stop was unduly prolonged beyond the appropriate time necessary to complete the purpose of the stop and police officers lacked a reasonable belief that Chambers was armed to justify patting him down.

The circuit court ruled Chambers's furtive movements provided a legitimate reason for Officer Ray to be concerned about his safety and justify a pat-down. Furthermore, the six-minute delay between when Officer Ray stopped the vehicle and the frisk of Chambers was not unreasonable.

Chambers entered a conditional guilty plea in exchange for the Commonwealth's recommendation that he receive a five-year sentence for convicted felon in possession of a handgun, enhanced to ten years for his conviction of being a PFO-2; amending possession of controlled substance, first degree, first offense to possession of controlled substance, second degree, with twelve months, to be served concurrently; and the dismissal of the charge of

carrying a concealed deadly weapon for a total of ten-years of incarceration. The circuit court sentenced Chambers in accordance with this agreement. Chambers appealed.

The standard of review on a ruling concerning suppression is well-settled. First, we must determine whether the lower court's findings of fact are supported by substantial evidence. If so, those findings are conclusive. Second, we must perform a *de novo* review to determine whether the trial court's application of the law to those facts was correct.

Lydon v. Commonwealth, 490 S.W.3d 699, 701 (Ky.App. 2016) (internal citations omitted).

Chambers argues Officer Ray's observations of his movements were not sufficient to generate a reasonable belief that he was armed and dangerous, when such movements were equally consistent with him reaching for his wallet. Therefore, there was insufficient justification to frisk him.

As explained in *Commonwealth v. Banks*, 68 S.W.3d 347, 350–51 (Ky. 2001), “the test for a *Terry* [*v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 1884-85, 20 L.Ed.2d 889 (1968),] stop and frisk *is not* whether an officer can conclude that an individual is engaging in criminal activity, but rather whether the officer can articulate reasonable facts to suspect that criminal activity *may* be afoot and that the suspect *may* be armed and dangerous.” The purpose of a *Terry* search is not to discover evidence of a crime but to allow the officer to investigate “without fear of

violence or physical harm.” *Baltimore v. Commonwealth*, 119 S.W.3d 532, 538 (Ky.App. 2003). Therefore, “[a] lawful stop does not necessarily carry with it the authority to conduct a pat-down search.” *Bennett v. City of Eastpointe*, 410 F.3d 810, 822 (6th Cir. 2005).

Whether a pat-down is permitted depends upon whether the totality of the circumstances indicate there was reasonable suspicion the person may be armed and dangerous. *Adkins v. Commonwealth*, 96 S.W.3d 779, 787 (Ky. 2003). “The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.” *Terry*, 392 U.S. at 27, 88 S.Ct. at 1883.

In *Arizona v. Johnson*, 555 U.S. 323, 327, 129 S.Ct. 781, 784, 172 L.Ed.2d 694 (2009), the United States Supreme Court explained how *Terry* applies to passengers when a vehicle is stopped for a traffic violation. “[T]he first *Terry* condition—a lawful investigatory stop—is met whenever it is lawful for police to detain an automobile and its occupants pending inquiry into a vehicular violation” because all occupants are seized for the duration of a traffic stop. *Id.*

The police need not have, in addition, cause to believe any occupant of the vehicle is involved in criminal activity. To justify a patdown of the driver or a passenger during a traffic stop, however, . . . the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous.

Id. Because Chambers does not challenge Officer Ray's right to conduct a traffic stop of the vehicle in which he was a passenger based upon the driver speeding and driving recklessly, we only need to address whether the police had a reasonable suspicion that Chambers was armed and dangerous before frisking him.

Reasonable suspicion that a vehicle's occupants may be armed and dangerous is not satisfied by the commission of a traffic violation combined with mere nervousness or uncooperative behavior. *Frazier v. Commonwealth*, 406 S.W.3d 448, 453–55 (Ky. 2013). Similarly, a person's presence in a high-crime area and present association with a group of people committing crimes cannot justify a pat-down unless additional information emerges that the person himself might be armed and dangerous. *Williams v. Commonwealth*, 364 S.W.3d 65, 69–70 (Ky. 2011). Therefore, the fact that the driver of the Dart exited the parking lot of a motel known to be associated with illegal activities at a high rate of speed and committed traffic violations could not justify a *Terry* frisk of Chambers because these facts alone would not provide reasonable suspicion that he was armed and dangerous.

However, there were additional facts to justify a *Terry* pat-down based on Chambers's actions. This situation is analogous to *United States v. McDaniel*, 371 F.App'x 617, 621 (6th Cir. 2010). There, an officer approached a driver for a parking violation. The officer noticed the driver appeared startled,

turned his body away from him and then made a furtive movement as if he was putting something into his waistband, which the officer believed was consistent with an attempt to conceal a weapon. The Sixth Circuit concluded that these observations provided the officer with reasonable suspicion that the driver was armed and dangerous, justifying a *Terry* pat-down. *Id.*

Under the totality of the circumstances, Officer Ray was justified in his belief that Chambers was armed and dangerous based on the circumstances relating to the stop and Chambers's specific actions of lifting himself off from the seat and reaching around toward the right side of his body. Therefore, a frisk was justified.

Chambers also argues it was unreasonable for the traffic stop to be delayed by waiting for other officers to arrive. He argues the six-minute delay was unreasonable as it was made to pursue an unrelated criminal investigation and unreasonably prolonged the traffic stop.

“Like a *Terry* stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's “mission”—to address the traffic violation that warranted the stop and *attend to related safety concerns.*” *Rodriguez v. United States*, 135 S.Ct. 1609, 1614, 191 L.Ed.2d 492 (2015) (internal citations omitted and emphasis added). A traffic stop is unreasonable if it lasts longer than necessary to effectuate the purpose of the stop, unless during the stop, under the

totality of the circumstances, a reasonable and articulable suspicion of criminal activity arises justifying a longer stop pursuant to *Terry*. *Commonwealth v. Bucalo*, 422 S.W.3d 253, 258-60 (Ky. 2013). There is no specific time limit on how long an investigative stop may take, so long as the police are acting with diligence under the circumstances. *United States v. Sharpe*, 470 U.S. 675, 686–88, 105 S.Ct. 1568, 1575–76, 84 L.Ed.2d 605 (1985); *United States v. Winfrey*, 915 F.2d 212, 217–18 (6th Cir. 1990).

Recently, the United States Supreme Court and the Kentucky Supreme Court have held that it is unreasonable to delay a traffic stop beyond its original purpose to forward an unrelated investigation for drugs conducted through a dog sniff. *See Rodriguez*, 135 S.Ct. at 1614-16; *Davis v. Commonwealth*, 484 S.W.3d 288, 291-94 (Ky. 2016). However, this case law is inapplicable to delays related to officer safety. In *Rodriguez*, 135 S.Ct. at 1616, the Court contrasted steps taken to address officer safety concerns from delays made to wait for a drug sniffing dog to arrive, explaining that addressing officer safety concerns stem from the mission of the stop itself.

A pat-down search need not be conducted immediately after reasonable suspicion arises that the suspect is armed and dangerous, so long as the basis for the pat-down search has not dissipated before the search is conducted. *Logan v. Commonwealth*, 29 Va.App. 353, 361–62, 512 S.E.2d 160, 164 (1999). It

is reasonable for the police to delay a frisk while making further inquiries which may enhance, confirm, have no effect on or dispel the police officer's initial suspicion: "To decide otherwise would encourage a bias toward hasty police action—rather than considered inquiry—and might result in otherwise avoidable intrusions upon individual rights." *State v. Burgess*, 104 Idaho 559, 562, 661 P.2d 344, 347 (App. 1983).

In *Logan*, the five-minute wait between when reasonable suspicion arose and when the officers conducted the pat-down search did not delay the stop itself, where the citation had yet to be issued at the time the pat-down was conducted and the reasons for the suspicion had not dispelled in the interim. *Logan*, 29 Va.App. at 361–62, 512 S.E.2d at 164. Other courts have repeatedly ruled that it is reasonable to delay a pat-down where, before the pat-down was conducted, the police continued to investigate and, thus, did not delay the completion of the stop. *United States v. Barnett*, 505 F.3d 637, 641 (7th Cir. 2007); *People v. Jackson*, 948 P.2d 506, 508 (Colo. 1997); *Commonwealth v. Ferrioli*, 10 Mass.App.Ct. 489, 492, 409 N.E.2d 244, 246–47 (1980).

It is also appropriate to delay the completion of the stop based on safety concerns, so that an officer may obtain back-up. For example, in *United States v. Crawley*, 526 F.App'x 551, 556-57 (6th Cir. 2013) and *United States v. Lester*, 477 F.App'x 697, 700 (11th Cir. 2012), officers were justified delaying an

investigation after a stop until backup could arrive. Both courts determined the short delays this caused (two to three minutes in *Crawley* and five to ten minutes in *Lester*) were reasonable to ensure officer safety. *Crawley*, 526 F.App'x at 554, 556-57; *Lester*, 477 F.App'x at 701 (11th Cir. 2012). See *United States v. Frierson*, 611 F. App'x 82, 85 (3d Cir. 2015).

Likewise, a delay in the stop while awaiting other officers to aid in the completion of the investigation can be reasonable. In *Sharpe*, 470 U.S. at 687 n.5, 105 S.Ct. at 1576 n.5, the United States Supreme Court determined a twenty-minute stop was reasonable and not unduly delayed where a highway patrolman, who was directed by a federal agent to make a traffic stop in a narcotics investigation held the suspect for a brief period of time pending the federal agent's arrival. It would be unreasonable for the patrolman to release the suspect without the agent's consent based on the patrolman's limited investigation where the patrolman could not be certain he was aware of all the facts that aroused the federal agent's suspicions. *Id.*

There is no evidence that the traffic stop involving Chambers would have been completed earlier if the pat-down of Chambers had occurred at the beginning of the stop or that the stop was delayed to further an unrelated investigation. Once it was revealed that the driver had rented the vehicle, could

not find the rental agreement, and had no license, the traffic stop became complicated and required more time to complete.

At most, the stop was only delayed by six minutes and the evidence was that Officer Ray was engaging in appropriate inquiries of the driver during that time. Any delay was reasonable to protect Officer Ray's safety by giving back-up officers time to arrive and aided in the investigation by allowing the officers who had seen the driver of the Dart commit the traffic violations the opportunity to confirm the identity of the driver.

Accordingly, we affirm Chambers's judgment of conviction and sentence because the Fayette Circuit Court properly denied his motion to suppress.

ALL CONCUR.

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