RENDERED: NOVEMBER 2, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000928-MR

DERJUAN WATKINS APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 15-CR-00615

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, MAZE AND NICKELL, JUDGES.

ACREE, JUDGE: Derjuan Watkins appeals from the Fayette Circuit Court's June 8, 2016 final judgment and sentence. The issue before us is whether the circuit court erred when it denied Watkins' motion to suppress certain evidence discovered during a warrantless search of his person. We find no error, and affirm.

A grand jury returned an indictment charging Watkins with first-degree trafficking in a controlled substance, two or more grams of heroin, numerous traffic-related offenses, and being a first-degree persistent felony offender (PFO). Watkins filed a motion to suppress, claiming a police officer conducted a warrantless search of his person without probable cause and without any exception to the warrant requirement. The circuit court held a suppression hearing on August 26, 2015. Detective Luke Vanhoose with the Kentucky State Police testified first.

On May 28, 2015, Detective Vanhoose, along with other Kentucky State Police officers, executed a search warrant on the Progress Mini Mart located at Sixth Street and Limestone in Lexington, Kentucky. The officers were investigating claims that store employees were stealing and re-selling merchandise.

Krispy Krunchy Chicken, a fast-food restaurant, is connected to the mini mart store. The rear of the store section of the building extends beyond that of the restaurant section; along that extended part of the building is an exterior door to the mini mart store. The businesses share a parking lot.

As Detective Vanhoose pulled into the parking lot, he noticed a white van parked three feet from the mini mart's rear door. He also observed Watkins looking "back and forth" from behind the van; specifically, Watkins was "peering around from the driver's side and then over from the passenger side, walking back

and forth." Watkins then got into the passenger side of a red car parked in front of the van. Tiffany White was seated behind the steering wheel.

Detective Vanhoose, unsure if Watkins was an employee of the mini mart or if he had come out the exterior back door, pulled in next to the red car and activated his emergency lights. He approached the red car and identified himself as a Kentucky State Police officer. Detective Vanhoose noticed Watkins reaching underneath the seat and into his pocket. He testified Watkins appeared nervous. The detective ordered Watkins and White out of the car and requested identification. Watkins, lacking identification, provided Detective Vanhoose with his name, social security number, and birthdate.

At this point, Detective Vanhoose's testimony became somewhat jumbled. He first testified that he called dispatch to determine if Watkins had any outstanding warrants. Dispatch informed the detective that Watkins' name was in the e-warrants system, indicating there were "possible warrants." Detective Vanhoose then patted down Watkins and located a baggie containing a brownish substance, later identified as heroin, in Watkins' right front pants' pocket. Dispatch then confirmed Watkins indeed had an active warrant out of Fayette County.

On cross-examination, Detective Vanhoose testified he searched Watkins because he had already placed him under arrest for an active warrant,

contrasting his previous testimony that he confirmed the warrant after the search. Detective Vanhoose stated he did not have a radio, made only one phone call to dispatch, and executed the search with two hands, suggesting he searched Watkins before he called dispatch about any possible warrants.

In his written report, completed within days of the encounter, Detective Vanhoose reported that he saw Watkins, identified him, placed him under arrest, searched him, found drugs, and then called dispatch to confirm the warrants. The detective testified at the suppression hearing that all of the events were indicated in the report, but that the report did not reflect the chronological order of the events. Detective Vanhoose confirmed that he detained Watkins, discovered Watkins had possible warrants, searched him, and then confirmed that a Fayette County warrant was active.

White, the driver of the red car, also testified at the suppression hearing. She stated that she and Watkins were parked behind the building with the intention to get chicken from the restaurant. White testified Watkins got about halfway down the sidewalk on his way to the chicken restaurant before he saw the police activity and returned to the car. She testified one officer immediately pulled Watkins out of the car and searched him. White described the entire scene as "very chaotic," lasting only a few minutes.

At the conclusion of the testimony, the circuit court rejected the Commonwealth's argument that this was a search incident to arrest, finding it inconsistent with Detective Vanhoose's report and testimony. It characterized the detective's order of events as "questionable." However, convinced that the initial seizure was proper based on Watkins' suspicious behavior, the circuit court concluded that, upon discovering Watkins' had an active outstanding warrant, the heroin would have been inevitably discovered. It explained on the record:

> [w]hat I don't know . . . is the order of things. But what I do know is ultimately there is a valid outstanding warrant, and when that valid outstanding warrant was executed, they would have had the authority to search his person thoroughly, and whatever would have been found pursuant to that outstanding warrant would have inevitably been discovered.

The circuit court denied Watkins' suppression motion by order entered August 31, 2015. Watkins proceeded to trial, and a jury found him guilty of first-degree trafficking in heroin (greater than two grams) and sentenced him to five years' imprisonment, enhanced to thirteen years for being a first-degree PFO. This appeal followed.

Our review of a trial court's ruling on a motion to suppress requires a two-step determination. The factual findings by the trial court are reviewed under a clearly erroneous standard, and the application of the law to those facts is

conducted under *de novo* review. *Brown v. Commonwealth*, 416 S.W.3d 302, 307 (Ky. 2013) (citation, internal quotation marks, and ellipsis omitted).

Watkins claims there are two unconstitutional infringements in this case: the initial investigatory stop and the subsequent search of his person. Watkins' position is that, because the investigatory stop was unlawful, the inevitable discovery rule cannot save the evidence discovered as a result of the subsequent unlawful search of his person.

Explained further, Watkins argues his initial detention was unconstitutional because Detective Vanhoose did not have a reasonable, articulable suspicion that he was engaged in criminal activity. And, but for his illegal detention, the detective would not have confirmed Watkins' outstanding warrant and it would not have been inevitable that the heroin would have been discovered. We disagree.

The Fourth Amendment to the United States Constitution guards citizens against unreasonable searches and seizures. U.S. CONST. amend. IV; *see also* Ky. CONST. § 10. Evidence obtained from an illegal search or seizure is inadmissible and subject to exclusion. *Turley v. Commonwealth*, 399 S.W.3d 412, 424 (Ky. 2013).

Generally, police may not conduct a warrantless seizure without both probable cause and exigent circumstances. *Guzman v. Commonwealth*, 375

S.W.3d 805, 808 (Ky. 2012). However, under *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), "[a] police officer may constitutionally conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." *Bauder v. Commonwealth*, 299 S.W.3d 588, 590-91 (Ky. 2009) (citing *Terry*, 392 U.S. at 30, 88 S.Ct. 1868). "What is 'reasonable suspicion' must be based on the totality of the circumstances." *Commonwealth v. Cox*, 491 S.W.3d 167, 177 (Ky. 2015).

Though often touted as an objective standard, the reasonable suspicion test "is plainly and indisputably driven by subjective considerations." *Whren v. United States*, 517 U.S. 806, 814, 116 S.Ct. 1769, 1774, 135 L.Ed.2d 89 (1996). It is an objective test with a subjective component which takes into consideration the police officer's individual experience, background, and knowledge. *Bauder*, 299 S.W.3d at 592 (we must apply an objective test from the officer's viewpoint).

> Terms like "articulable reasons" and "founded suspicion" are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.

Commonwealth v. Bucalo, 422 S.W.3d 253, 259-60 (Ky. 2013) (quoting *U.S. v. Cortez,* 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981)). "So long as the

officer can articulate facts giving rise to his suspicion of criminal activity, and where his suspicions are reasonable under the circumstances, a brief stop of a suspect is constitutionally condoned." *Commonwealth v. Marshall*, 319 S.W.3d 352, 356-57 (Ky. 2010).

Watkins claims Detective Vanhoose seized him solely because the detective observed Watkins looking around while walking to his car from the chicken restaurant. Frequenting a restaurant during normal operating hours, Watkins argues, does not suggest criminal activity. While we agree generally with Watkins' latter sentiment, Detective Vanhoose observed much more than a person seeking to curb his hunger with a bucket of chicken.

Detective Vanhoose testified law enforcement had information that criminal activity was occurring at the mini mart. Upon arriving there, the detective observed a person, later identified as Watkins, lurking behind and suspiciously peeking around both sides of the back of a van. The van was situated mere feet from the mini mart's rear exterior door, and the detective could not discern if the person was a mini mart employee. Watkins' evasive conduct coupled with the detective's knowledge that employees were allegedly stealing from the mini mart caused the detective to reasonably suspect Watkins was engaged in criminal activity. On this basis, Detective Vanhoose conducted a constitutionally-sound investigatory stop. *See Terry*, 392 U.S. at 30, 88 S.Ct. at 1868 (officer must have

reasonable, particularized suspicion, based on the totality of the circumstances, that person stopped was engaged in criminal activity).

Upon approaching the red car where Watkins relocated, Watkins engaged in additional suspicious behavior. He was fidgeting, looked nervous, and was evasively rummaging in his pockets and reaching under his seat. This conduct justified a continuation of the limited investigatory detention.

The detective, upon discovering Watkins lacked proof of his own identification, obtained Watkins' identifying information and sought to confirm his identity. This process revealed Watkins had possible warrants. It is unclear at this point whether the detective searched Watkins before or after confirming he indeed had an active outstanding warrant. We agree with the circuit court that, regardless, the heroin would have been inevitably discovered.

Under the inevitable discovery rule, it is permissible to admit "evidence unlawfully obtained upon proof by a preponderance of the evidence that the same evidence would have been inevitably discovered by lawful means." *Hughes v. Commonwealth*, 87 S.W.3d 850, 853 (Ky. 2002) (citing *Nix v. Williams*, 467 U.S. 431, 444, 104 S.Ct. 2501, 2509, 81 L.Ed.2d 377 (1984)). "The rationale behind the rule is that it does not put the police in a better position than they would have been absent the error, but only puts them in the same position as if there had

been no unlawful search." *Commonwealth v. Elliott*, 714 S.W.2d 494, 496 (Ky. App. 1986) (citing *Nix*, 467 U.S. at 443, 104 S.Ct. at 2509).

We agree with Watkins that, based on the facts of this case, the detective had no reasonable basis to search Watkins' person. Detective Vanhoose candidly admitted he was not conducting a mere *Terry* frisk. *See Guzman v. Commonwealth*, 375 S.W.3d 805, 808 (Ky. 2012) (*Terry* authorizes officers who have restrained a person's movement upon "articulable suspicion" of a crime being committed to frisk for weapons). And, information that Watkins had "possible warrants" did not give the detective probable cause, at this point, to search his person beyond a *Terry* frisk or to place Watkins under arrest. *Baltimore v. Commonwealth*, 119 S.W.3d 532, 538-39 (Ky. App. 2003) ("A warrantless search more extensive or intrusive than a pat-down for weapons is illegal unless it is supported by probable cause or one of the other exceptions such as consensual search, a plain view search, a search incident to an arrest, a search based on exigent circumstances or an inventory search. . . . Similarly, probable cause for arrest involves reasonable grounds for the belief that the suspect has committed, is committing, or is about to commit an offense.").

Nevertheless, regardless of when Detective Vanhoose searched Watkins, it is undisputed the detective had obtained Watkins' identifying information and had provided that information to dispatch. The identification

process would have inevitably led to discovery of Watkins' outstanding warrant. Once the detective had received that information, executed the warrant, and placed Watkins under arrest, he would have had authority to search Watkins and the heroin would have been discovered. *Frazier v. Commonwealth*, 406 S.W.3d 448, 457-58 (Ky. 2013) (the search incident to arrest exception to the warrant requirement "allows an officer to conduct a warrantless post-arrest search of an arrestee's person as well as all areas within the arrestee's immediate control").

Detective Vanhoose should have waited to search Watkins until it was confirmed Watkins had an active, outstanding warrant. Despite this flaw, information of the warrant came close in time to the search. Detective Vanhoose, as part of his limited investigation, would have inevitably discovered the active warrant, executed the warrant, arrested Watkins, and searched his person, inevitably discovering the heroin. Accordingly, we agree with the circuit court that suppression of the heroin was not warranted.

We affirm the Fayette Circuit Court's August 31, 2015 order denying Watkins' motion to suppress.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Jerry L. Wright
Lexington, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Mark D. Barry
Assistant Attorney General
Frankfort, Kentucky