

RENDERED: SEPTEMBER 7, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000854-MR

JACORI PERKINS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 16-CR-00990

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KRAMER, J. LAMBERT AND TAYLOR, JUDGES.

KRAMER, JUDGE: Jacori Perkins appeals the Fayette Circuit Court's judgment convicting him of first-degree possession of a controlled substance, second offense, and possession of synthetic drugs. After a careful review of the record, we affirm because the circuit court properly denied Perkins's motion to suppress.

I. FACTUAL AND PROCEDURAL BACKGROUND

Jacori Perkins was indicted on charges of first-degree possession of a controlled substance, second offense, and possession of synthetic drugs. He moved to suppress the evidence seized and statements he made as fruits of an illegal stop and search of his automobile. After conducting a hearing, the circuit court denied his motion to suppress.

Perkins then moved to enter a conditional guilty plea regarding both charges. His plea was conditioned on his right to appeal the denial of his motion to suppress. The circuit court accepted Perkins's conditional guilty plea. Perkins was sentenced to one year of imprisonment for the first-degree possession of a controlled substance, second offense, conviction; and to twelve months of imprisonment for the possession of synthetic drugs conviction. The sentences were ordered to run concurrently to each other and consecutively to the sentence he had received in circuit court case number 15-CR-01146.

Perkins now appeals, contending that the circuit court erred in denying his motion to suppress because: (a) the court's findings of fact are clearly erroneous; (b) the court erred in finding the plain view exception applied because as a matter of law, Perkins was seized before Officer Baker discovered the contraband; and (c) the court erred in finding that the contraband was in plain view.

II. STANDARD OF REVIEW

The Kentucky Supreme Court has stated:

When reviewing an order denying a motion to suppress, we consider the trial court’s findings of fact “conclusive” if they are “supported by substantial evidence.” RCr^[1] 9.78. Using those facts [if supported], the reviewing court then conducts a *de novo* review of the trial court’s application of law to those facts to determine whether the decision is correct as a matter of law.

King v. Commonwealth, 374 S.W.3d 281, 286 (Ky. 2012) (internal quotation marks and citation omitted); *see also Simpson v. Commonwealth*, 474 S.W.3d 544, 546-47 (Ky. 2015) (holding that the standard of review of a trial court’s decision regarding a motion to suppress remains the same, even after RCr 9.78 was superseded by RCr 8.27).

III. ANALYSIS

A. FINDINGS OF FACT

Perkins first alleges that the circuit court’s findings of fact are clearly erroneous. During the suppression hearing, Officer Baker of the Lexington Police Department testified that on the night in question, he was dispatched to 723 Charles Avenue because a call had been made stating subjects were out in front of that address being loud and selling narcotics. Officer Baker stated that area was a high crime area. When Officer Baker arrived at the address, he observed Perkins

¹ Kentucky Rule of Criminal Procedure.

standing flat-footed in front of the address. Perkins was not walking, looking at his cellular telephone, or speaking with anyone. When Perkins saw Officer Baker approaching, Perkins walked to a nearby white vehicle that was parked on the street, opened the driver's door, and entered the vehicle. Officer Baker attested that it appeared Perkins was trying to avoid making contact with him and leave the scene. Officer Baker pulled his police cruiser behind Perkins's vehicle, exited the cruiser, and walked up to Perkins's vehicle before Perkins closed the driver's door. As Officer Baker approached the open driver's door, he saw in an open compartment of the door a torn corner of a clear plastic bag that was tied in a knot with a substance inside the bag that appeared to be crack cocaine. Officer Baker testified that the corner of a clear plastic bag is commonly used to package narcotics. He saw the bag in the door because he had a flashlight that he used to shine light into the door's open compartment as he was approaching the car. After seeing the bag, Officer Baker detained Perkins. He asked Perkins to exit the vehicle, obtained Perkins's consent to conduct a pat-down search of Perkins, and read Perkins his *Miranda*² rights. Perkins stated that he understood those rights. Officer Baker asked Perkins what was in the bag, and Perkins denied any knowledge of it. The substance inside the bag from the car door was field tested, and it tested positive for cocaine. A substance that appeared to be synthetic

² *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

marijuana was discovered in another bag in Perkins's pocket. Officer Baker attested that Perkins admitted the substance found in his pocket was a type of synthetic marijuana.

After hearing the testimony, the circuit court entered its findings of fact and conclusions of law orally on the record during the suppression hearing.³ The court stated that in the present case, the anonymous tipster provided the tip to police dispatch, rather than to Officer Baker directly. The tipster provided no description of the people outside 723 Charles Avenue. The court found that Officer Baker was dispatched to the area, which was a high crime area. When he turned the corner, he observed Perkins standing in front of 723 Charles Avenue. When Perkins saw the police cruiser, he walked toward the driver's side door of a white vehicle parked near where he had been standing. Officer Baker arrived and thought Perkins was going to get into the vehicle and drive away, perhaps fleeing the scene. When Officer Baker approached the car on foot, Perkins had opened the car door. The court found that Officer Baker had a right to approach Perkins to talk with him, but he did not have a right to detain him based solely on the anonymous tip. However, the court found that when Officer Baker approached Perkins, the car door was open. Officer Baker was then able to see inside the door's compartment. The court stated that Officer Baker had a flashlight that he

³ The court subsequently entered a written order denying the motion to suppress.

was able to use to shine light into the door's open compartment, where he saw a bag with a torn corner. The court held that this gave Officer Baker a reasonable and articulable suspicion that criminal activity was afoot.

The circuit court found that Perkins was detained at that point, informed of his *Miranda* rights, asked to exit his vehicle, and subjected to a *Terry*⁴ frisk. Perkins was placed in the back of a police cruiser. Officer Baker went back to Perkins's car, retrieved the bag from the door compartment, and conducted a field test on the substance in the bag. The results of the field test revealed that the substance was suspected of being crack cocaine. The court also found that during a search incident to the arrest of Perkins, synthetic marijuana was found on Perkins's person. Perkins was arrested for possession of a controlled substance (crack cocaine) and possession of synthetic marijuana.

Contrary to Perkins's assertions, the circuit court's findings of fact are supported by substantial evidence from the record. Accordingly, they are conclusive, *see King*, 374 S.W.3d at 286. This claim therefore lacks merit.

B. APPLICABILITY OF PLAIN VIEW EXCEPTION

Next, Perkins asserts that the court erred in finding the plain view exception applied because as a matter of law, Perkins was seized before Officer Baker discovered the contraband. Perkins argues that "the trial court correctly

⁴ *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

found that Officer Baker lacked reasonable suspicion to subject Perkins to a *Terry* stop.”

The circuit court found that when Officer Baker approached the car door and saw the bag in the compartment, the bag was in plain view. Officer Baker immediately recognized what it was, which gave him the right to continue his investigation even though the initial tip had been an anonymous tip. Therefore, the court held that Officer Baker appropriately went to 723 Charles Avenue based on the anonymous tip. The court also concluded that the anonymous tip was corroborated,⁵ which provided sufficient indicia of reliability to justify the investigatory stop, resulting in Officer Baker seeing the crack cocaine in the door compartment in plain view. Based upon these conclusions, the circuit court denied Perkins’s motion to suppress.

In *Brooks v. Commonwealth*, 488 S.W.3d 18 (Ky. App. 2016), this

Court summarized the law regarding anonymous tips:

An anonymous tip, standing alone, cannot create a reasonable suspicion to justify a *Terry* stop. In *Florida v. J.L.*, [529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000),] the Supreme Court found that an anonymous tip, which accurately described an individual, his clothing, his location, and correctly claimed the individual

⁵ We pause to note that although the circuit court found that the anonymous tip was corroborated, it was not. Nevertheless, as we discuss *infra*, we affirm because the court did not err in denying Perkins’s motion to suppress. “[A]n appellate court may affirm a lower court for any reason supported by the record.” *McCloud v. Commonwealth*, 286 S.W.3d 780, 786 n.19 (Ky. 2009) (citation omitted).

possessed a concealed firearm, did not create a reasonable suspicion to permit the individual to be searched, because the tip “lacked sufficient indicia of reliability.” [*J.L.*, 529 U.S. at 270, 120 S.Ct. at 1378]. In *Alabama v. White*, [496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990),] the Supreme Court found an anonymous tip was sufficient to justify a *Terry* stop when the tip accurately predicted the future behavior of the person to be searched. This prediction of future behavior indicated the tipster possessed a level of intimate knowledge of the individual to be searched, which the Court found to be sufficient indicia of reliability. [*White*, 496 U.S. at 332, 110 S.Ct. at 2417]. The Supreme Court of Kentucky cited both *J.L.* and *White* in *Collins v. Commonwealth*, 142 S.W.3d 113 (Ky. 2004). The Court concluded that a tip from an unknown 911 caller, which described a dispute between two patrons of a gas station, where they began throwing bottles at each others’ vehicles, was unreliable and therefore did not rise to the level of creating a reasonable suspicion. *Id.* at 117. Even though the tip in *Collins* was corroborated by the officer later, the Court found the tip lacked reliability because “the investigating officer did not independently observe any illegal activity, or any other indication that illegal conduct was afoot.” *Id.* at 116.

Brooks, 488 S.W.3d at 22.

In the present case, the tip was anonymous. It lacked sufficient indicia of reliability because it did not predict any future behavior on the part of Perkins, nor did Officer Baker independently observe any illegal activity before walking up to Perkins’s car. Therefore, Officer Baker had no basis for conducting a *Terry* stop at the point in time when he was walking up to Perkins’s car.

Officer Baker did not, however, conduct a *Terry* stop based on the anonymous tip. Rather, he parked his police cruiser behind Perkins's car, which was parked on the street. Officer Baker then walked up to Perkins, who was getting into his car, to ask him some questions.

A police officer may approach a person, identify himself as a police officer and ask a few questions without implicating the Fourth Amendment. A "seizure" occurs when the police detain an individual under circumstances where a reasonable person would feel that he or she is not at liberty to leave.

Baltimore v. Commonwealth, 119 S.W.3d 532, 537 (Ky. App. 2003) (footnotes omitted). Perkins contends that he was not free to leave because Officer Baker walked up to his car and stood between Perkins (who was seated in the driver's seat) and the driver's door, which was open at the time he approached. Once Officer Baker approached Perkins's car, he saw the drugs in the open-door compartment in plain view.

The Fourth Amendment of the United States Constitution and Section Ten of the Kentucky Constitution protect citizens from unreasonable searches and seizures without a warrant. A search conducted without a warrant is unreasonable unless it falls within one of the few exceptions to the warrant requirement. . . . [One such] exception provides that evidence found in "plain view" may be seized without a warrant.

Hallum v. Commonwealth, 219 S.W.3d 216, 221 (Ky. App. 2007) (internal citations omitted). Thus, once Officer Baker saw the drugs in the door

compartment in plain view, he had a reasonable suspicion that criminality was afoot, justifying his further search and seizure of Perkins and of the drugs in the door.

Before evidence discovered in “plain view” may be admitted at trial, the following elements must be present:

First, the law enforcement officer must not have violated the Fourteenth Amendment in arriving at the place where the evidence could be plainly viewed. Second, not only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must have a lawful right of access to the object itself. Finally, the object’s incriminating character must also be immediately apparent.

Hallum, 219 S.W.3d at 223 (internal quotation marks, citation and footnote omitted). Pursuant to our analysis *supra*, Officer Baker did not violate Perkins’s constitutional rights. The bag was in the open compartment of the car door in plain view, and Officer Baker attested that the incriminating character of the drugs in the torn corner of the clear plastic bag was immediately apparent. Therefore, the plain view exception to the warrant requirement applied in this case; Perkins was not seized before Officer Baker discovered the contraband; and the drugs found in plain view were admissible. Consequently, the circuit court properly denied Perkins’s motion to suppress.

C. WAS CONTRABAND IN PLAIN VIEW

Finally, Perkins contends that the court erred in finding that the contraband was in plain view. However, as we discussed *supra*, the court properly found that the contraband was in plain view. Therefore, this claim lacks merit.

Accordingly, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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