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Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001126-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN BAILEY SMITH, JUDGE
INDICTMENT NO. 16-CR-000275

TERRENCE HOLT

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JOHNSON,¹ D. LAMBERT, AND J. LAMBERT, JUDGES.

LAMBERT, J., JUDGE: The Commonwealth of Kentucky appeals from the Jefferson Circuit Court order granting Terrence Holt's motion to suppress. We affirm.

¹ Judge Robert G. Johnson dissented in this opinion prior to the expiration of his term of office on November 20, 2018. Release of the opinion was delayed by administrative handling.

Holt was arrested on December 9, 2015, and indicted on February 3, 2016, on charges of trafficking in heroin (less than two grams, subsequent offense) and wanton endangerment in the first degree.² He was arraigned in Jefferson Circuit Court on February 8, 2016, when he entered a plea of not guilty. Holt filed his motion to suppress on December 1, 2016. The hearing was held on May 12, 2017. Post-hearing briefs were filed by the parties simultaneously. The circuit court entered its ruling in Holt's favor on June 22, 2017, and the Commonwealth filed a timely appeal.³

The events leading to Holt's arrest are summarized in the circuit court's findings in its order granting the motion to suppress, which we repeat here:

[Officer Joe Nett of the Louisville Metro Police Department] testified that on December 9, 2015, he was patrolling in an unmarked police vehicle. He and his partner drove through the BB&T Bank parking lot located at 3450 Taylor Boulevard at 5:30 p.m., which was after business hours. He observed a white male standing by a vehicle; he described this area of town as a high drug area. A car entered the parking lot and backed into a parking space next to where the white male was standing. Off. Nett observed the white male get into the passenger side of the vehicle, remain for a short time, and then saw him exit the vehicle. Off. Nett's partner approached the white male while Off. Nett ordered the driver of the car, who is the Defendant in this case, to

² Kentucky Revised Statutes (KRS) 218A.1412 and 508.060, respectively.

³ We note that the matter remains set for jury trial in the Jefferson Circuit Court pending the outcome of this appeal. *See* KRS 22A.020(4)(a); *Parker v. Commonwealth*, 440 S.W.3d 381, 383 (Ky. 2014). The next status hearing is scheduled for October 30, 2018.

exit the vehicle. Off. Nett testified that the driver was not to leave at that time. He searched the Defendant but did not find guns, drugs, or money on him. The white male was observed dropping an item which the officers believed to be methamphetamine. After being read his rights the white male stated that he was there to buy drugs and that he paid the driver \$120.00. After detaining the Defendant, Off. Nett observed \$120.00 in the center console of the Defendant's car. Without advising the Defendant of his *Miranda*⁴ rights, Off. Nett asked him what was going on to which the Defendant replied that he was giving the other person a ride. The Defendant was handcuffed and placed in the backseat of the police car. The wanton endangerment charge was brought against the Defendant because two young children were in the backseat of his car at the time of this alleged drug transaction.

In granting Holt's motion, the circuit court held that Officer Nett

“could not see the Defendant who was sitting in the car, that he did not witness a drug transaction although he was watching the car, that he saw no criminal activity, and that he detained the Defendant before he saw him do anything.” These things, the circuit court ruled, were in “sharp contrast” to the facts in *Adkins v.*

Commonwealth, 96 S.W.3d 779 (Ky. 2003), cited by the Commonwealth in its post-hearing brief. In *Adkins*, the police, acting upon reliable information in a homicide investigation, approached the suspect, who gave a false name and, after being asked to produce identification, began cursing and then attempted to flee.

The *Adkins* court found that the police officer “had reason to believe he was

⁴ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

dealing with the only suspect to a brutal murder.” *Id.* at 787. The facts in that case supported the officer’s belief that he had sufficient cause to pat down the suspect for weapons pursuant to *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

The Commonwealth makes three arguments on appeal, namely, that Officer Nett reasonably suspected that “criminal activity was afoot,” that the circuit court ignored the totality of the circumstances, and that the circuit court erroneously applied a higher standard for reasonable suspicion.⁵ We disagree with all three arguments.

“When reviewing a trial court’s ruling on a motion to suppress, the findings of fact are reviewed under a clearly erroneous standard, and the conclusions of law are reviewed de novo. *Davis v. Commonwealth*, 484 S.W.3d 288, 290 (Ky. 2016) (citations omitted).” *Moberly v. Commonwealth*, 551 S.W.3d 26, 29 (Ky. 2018).

“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. App. 2009) (citing *Commonwealth v. Whitmore*, 92 S.W.3d 76, 79 (Ky. 2002)).

⁵ The Commonwealth does not appeal the circuit court’s suppression of Holt’s statements (made without *Miranda* warnings). Therefore, the statements remain suppressed as ordered.

“On review, the appellate court should not reevaluate the evidence or substitute its judgment of the credibility of the witnesses for that of the jury.” *Commonwealth v. Suttles*, 80 S.W.3d 424, 426 (Ky. 2002) (citing *Commonwealth v. Jones*, 880 S.W.2d 544 (Ky. 1994)). “In conducting our review, our proper role is to review findings of fact only for clear error while giving due deference to the inferences drawn from those facts by the trial judge.” *Perkins v. Commonwealth*, 237 S.W.3d 215, 218 (Ky. App. 2007) (citing *Commonwealth v. Whitmore*, 92 S.W.3d 76, 79 (Ky. 2002)).

The circuit court was correct in its assessment of Officer Nett’s lack of reasonable suspicion. By the officer’s own testimony, there had been no complaints about this particular public parking lot, and no tips had been received concerning either Holt or the white male involved. The search of Holt’s person as well as his car revealed no weapons, drugs, or contraband. Officer Nett “articulated nothing about Appellant’s behaviors, individually or collectively, to connect him to criminal behavior[.]” *Moberly v. Commonwealth*, 551 S.W.3d 26, 32 (Ky. 2018). The only evidence tying Holt to an alleged transaction with the white male was the \$120.00 found in Holt’s console. That money was confiscated after the illegal initial detention. The circuit court properly suppressed the evidence based on the officer’s lack of reasonable suspicion.

Nor did the totality of the circumstances justify the second search of Holt's vehicle. The cases cited by the Commonwealth do not support its position. A review of the circuit court's order indicates that it considered the totality of the circumstances surrounding the detention of Holt and the seizure of evidence from his vehicle. "The Commonwealth offered no evidence to prove otherwise which would compel us to overrule the decision of the trial court. Mere suspicion could not be inferred. . . . To hold otherwise would truly raise the pernicious specter of a police state." *Commonwealth v. Sanders*, 332 S.W.3d 739, 741 (Ky. App. 2011). We cannot find that the circuit court erred in its determination that the evidence should have been suppressed. Its standard for reasonable suspicion was proper.

The order of the Jefferson Circuit Court is affirmed.

D. LAMBERT, JUDGE, CONCURS.

JOHNSON, JUDGE, DISSENTS.

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