

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000799-MR

ALAN L. STANDIFER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN BAILEY SMITH, JUDGE
ACTION NO. 16-CR-002765

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, JONES, AND LAMBERT, JUDGES.

JONES, JUDGE: The Appellant, Alan Standifer, brings this appeal to challenge his convictions on (1) one count of possession of a handgun by a convicted felon; (2) tampering with physical evidence; (3) one count of receiving a stolen firearm; (4) one count of illegal possession of a controlled substance, marijuana, while in possession of a firearm; (4) one count of carrying a concealed deadly weapon; and (5) one count of use or possession of drug paraphernalia. Standifer's convictions

and sentences were entered by the Jefferson Circuit Court after Standifer agreed to a conditional guilty plea. Under the terms of the agreement, Standifer pleaded guilty subject to his right to appeal the circuit court's denial of his motion to suppress.¹ After careful review, we affirm.

I. Background

During the early evening hours of August 13, 2016, Louisville Metro Police Officers Baker and Crawford were patrolling the area in and around a Kroger parking lot, an area of known drug trafficking. According to Officer Baker, they were looking for any suspicious activity indicative of drug trafficking such as vehicles coming and going, hand to hand transactions, or a vehicle remaining stationary for an unusual amount of time. While surveilling the area, the officers focused their attention on a vehicle occupied by Standifer. The vehicle was legally parked with Standifer in the driver's seat. While the officers did not see anyone approach the vehicle or other outward signs indicative of a drug transaction, they found it odd that vehicle remained in the same spot for over fifteen minutes without anyone exiting or entering the vehicle. Eventually, the officers decided to approach the vehicle on foot.

¹ Pursuant to Kentucky Rules of Criminal Procedure ("RCr") 8.09, a defendant may enter a conditional guilty plea, reserving in writing the right to appeal the adverse determination of any specified pretrial motion.

Officer Baker made his way to the driver's side of the vehicle where he saw Standifer seated behind the wheel smoking a cigarette. The vehicle was not running, and the window was partially rolled down. Through the window, Officer Baker saw a pair of scissors with marijuana flakes on them sitting in Standifer's lap. At this point, Officer Baker asked Standifer to exit the vehicle. While still occupying the driver's seat with the scissors in his lap, Standifer refused Officer Baker's directive. Standifer told Officer Baker that he did not have to exit the vehicle without a warrant. During the seconds to follow, Officer Baker reached in the vehicle and grabbed Standifer's shoulder. Officer Crawford, who was on the passenger side of the vehicle, observed Standifer quickly turn and place something in the back seat, which he identified as a firearm. Officer Baker proceeded to remove Standifer from the vehicle and place him in handcuffs on the pavement outside the vehicle. A search of the vehicle revealed a 9mm handgun and marijuana. Standifer was subsequently placed under arrest.

On October 13, 2016, Standifer was indicted on one count of possession of a handgun by a convicted felon;² one count of tampering with physical evidence;³ one count of receiving a stolen firearm;⁴ one count of illegal

² Kentucky Revised Statute ("KRS") 527.040.

³ KRS 524.100.

⁴ KRS 514.110(3)(c).

possession of a controlled substance, marijuana, while in possession of a firearm;⁵ one count of carrying a concealed deadly weapon;⁶ and one count of illegal use or possession of drug paraphernalia.⁷

The trial court appointed counsel to represent Standifer. Thereafter, counsel moved the trial court to suppress all evidence seized from the search of Standifer's vehicle. In the motion, defense counsel asserted the officers had no valid reason to approach Standifer's vehicle or look in its windows. Defense counsel also argued that the marijuana residue on the scissors did not provide the officers with cause to order Standifer out of his vehicle or place him under arrest. To this end, counsel asserted that the officers were permitted only to issue a citation to Standifer.

Following a hearing, the trial court orally denied the motion to suppress. Rather than proceeding to trial, Standifer entered a conditional plea of guilt, reserving his right to appeal the trial court's denial of his motion to suppress. On March 12, 2018, a final judgement was entered, in which Standifer was sentenced to a total of seven years' imprisonment for all six counts in the indictment. This appeal followed.

⁵ KRS 218A.1422; KRS 218A.992.

⁶ KRS 527.020.

⁷ KRS 218A.500(2).

II. Standard of Review

“Our standard of review of a circuit court’s decision on a suppression motion following a hearing is twofold.” *Stewart v. Commonwealth*, 44 S.W.3d 376, 380 (Ky. App. 2000). It first requires a factual finding that the decision of the circuit court is supported by substantial evidence. *Id.* So long as the court’s order is supported by substantial evidence, it is conclusive. *Id.* Second, we conduct a *de novo* review to determine if the circuit court’s decision is correct as a matter of law. *Id.*

III. Analysis

We begin our analysis with the officers’ approach of Standifer’s vehicle. Up to this point, the officers had only the knowledge that the vehicle was legally parked in the Kroger parking lot, a high crime area. They were suspicious because no one exited or entered the vehicle for over fifteen minutes. Standing alone, these facts would not have given officers reasonable cause to detain Standifer or to search his person or car. The fact that the officers did not have cause to detain or search, however, does not mean that the officers could not engage with the parked vehicle and its occupants. “Police officers are free to approach anyone in public areas for any reason.” *Commonwealth v. Banks*, 68 S.W.3d 347, 350 (Ky. 2001). “[A] police officer may approach a person, identify himself as a police officer, and ask a few questions without implicating the Fourth

Amendment.” *Fletcher v. Commonwealth*, 182 S.W.3d 556, 559 (Ky. App. 2005). The officers did not violate the Fourth Amendment by approaching Standifer’s vehicle in a public parking lot. *See Henson v. Commonwealth*, 245 S.W.3d 745, 747-48 (Ky. 2008) (“When Officer Turner approached Henson’s vehicle parked on a public street and made inquiries he did not conduct a ‘seizure’ or in any way violate the Fourth Amendment.”).

We now turn to the observations made by Officer Baker when he came near the vehicle. According to Officer Baker, upon approaching the vehicle he observed what he believed to be flakes of marijuana on a pair of scissors in Standifer’s lap. He testified that he saw the scissors with marijuana flakes on them through an open window of the car. Although he could not recall the specifics at the hearing, Officer Baker testified that he was certain the substance he saw on the scissors was marijuana. He testified at the hearing that (1) that the substance he saw was consistent with marijuana; (2) he was aware based on his experience and training that scissors were often used to cut up or break up marijuana before rolling it; and (3) residual marijuana often sticks to the blades because marijuana is sticky.

A warrant is not required when “the object seized is plainly visible, the officer is lawfully in a position to view the object, and the incriminating nature of the object is immediately apparent.” *Kerr v. Commonwealth*, 400 S.W.3d 250, 266 (Ky. 2013). Officer Standifer was lawfully standing outside Standifer’s car in

a public parking lot. There is nothing to indicate he had to put himself inside the car to see the scissors. To the contrary, he testified the scissors were visible from his vantage point outside the car. The question is whether the incriminating nature of the flakes Officer Baker saw on the scissors was immediately apparent to him such that Officer Baker was entitled to detain Standifer for further investigation.

Standifer relies on *Commonwealth v. Hatcher*, 199 S.W.3d 124 (Ky. 2006), to support his argument that the scissors and flakes were insufficient to allow Officer Baker to order Standifer out of his vehicle. In *Hatcher*, the Paducah Police Department received an anonymous report of an allegedly abandoned minor. Officers were dispatched to the residence and knocked on the door. Hatcher's adolescent son eventually answered the door. Through the open door one of the officers observed a pipe sitting on a table. The officer asked the minor if he could step inside. Once inside the home, the officer picked up the pipe and smelled it; the officer detected the odor of marijuana on the pipe. Thereafter, Hatcher returned home. She admitted the pipe belonged to her. The officers then placed Hatcher under arrest and charged her with possession of drug paraphernalia, second offense. Hatcher moved to suppress the pipe claiming it had been seized in violation of her rights under the Fourth and Fourteenth Amendments to the United States Constitution and Section Ten of the Kentucky Constitution. In its order denying Hatcher's motion, the trial court determined that seizure of the pipe fit

within the “plain view” exception to the prohibition against warrantless searches.

The Court of Appeals reversed the trial court, holding that the officer’s testimony at the suppression hearing did not satisfy the elements of the “plain view” exception to warrant requirement because the pipe’s status as drug paraphernalia was not immediately apparent to the officer. The Kentucky Supreme Court affirmed. It held as follows:

Officer Carr was certainly authorized to knock on Hatcher’s door to respond to the report of an allegedly abandoned minor. Further, Hatcher’s Fourteenth Amendment rights were not violated when Officer Carr looked into her house through the opened door. Nevertheless, we conclude, as did the Court of Appeals, that the search in this case must fail under the second two elements of the “plain view” analysis.

Officer Carr did not have a warrant authorizing his entry into Hatcher’s residence. As such, his entrance must have been precipitated by some exigent circumstance, such as threat of injury or destruction of evidence. Officer Carr’s presence at Hatcher’s residence was to validate the anonymous report of an abandoned minor. Yet, Officer Carr did not attempt to corroborate the report by asking the minor if he was okay or if he was even, in fact, alone. Rather, upon viewing the pipe, Officer Carr simply asked the minor if he could come in.

...

Officer Carr testified that he observed a pipe sitting on the table that, based on his experience and training, was predominantly used to smoke marijuana. *Officer Carr conceded, however, that he did not observe any marijuana or other drug paraphernalia, nor could he see any residue in the pipe from his vantage point.*

Officer Carr further testified that the particular type of pipe was legal to purchase and could be used to smoke tobacco. Importantly, at the time Officer Carr observed the pipe, he had not spoken with Hatcher and was unaware of her prior conviction for possession of drug paraphernalia. Thus, Officer Carr had no probable cause to believe the pipe was drug paraphernalia until he picked it up and smelled the odor of marijuana. However, such is analogous to the search condemned in *Arizona v. Hicks*.^[8] We find no distinction between the manipulation of a pipe to discern the odor of marijuana and the manipulation of stereo components to retrieve serial numbers. Although the pipe appeared suspicious to Officer Carr, further investigation was required to establish probable cause as to its association with criminal activity, and thus it simply was not immediately incriminating.

Id. at 126-28 (emphasis added).

The facts in this case are quite different. Officer Baker testified he saw the scissors through the vehicle's open window before he ever spoke with Standifer. He also testified the flakes he saw on the scissors were visible through the window and he was certain they were marijuana flakers. Officer Baker did reach into the vehicle but did not manipulate the scissors or order Standifer to manipulate the scissors in any way. He was emphatic in his testimony that the

⁸ *Arizona v. Hicks*, 480 U.S. 321, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987) (holding that the officers manipulation of a record player in order to find the serial number and discover that the record player was stolen was improperly obtained because the physical manipulation placed the serial number outside of the plain view exception to the warrant requirement).

scissors had flakes of marijuana stuck to them, and that he was able to make this determination from his vantage point outside the vehicle.

The trial court accepted Officer Baker's testimony, which was its prerogative. Based on facts established by Officer Baker's testimony the trial court was correct in concluding that the plain view exception was applicable to allow Officer Baker to further detain Standifer and to seize the scissors. *See Kerr v. Commonwealth*, 400 S.W.3d 250, 266 (Ky. 2013) ("The plain-view exception to the warrant requirement applies when the object seized is plainly visible, the officer is lawfully in a position to view the object, and the incriminating nature of the object is immediately apparent.").

At this point, Officer Baker ordered Standifer out of his vehicle. Standifer argues that Officer Baker exceeded his authority in doing so and arresting him since the possession of paraphernalia is a misdemeanor, which in most instances requires the officer to issue a citation instead of making an arrest. *See* KRS 431.005. What Standifer fails to recognize, however, is that Officer Baker's observations did not lead him to immediately place Standifer under arrest. Instead, Officer Baker ordered Standifer to exit the vehicle. This was an entirely appropriate directive given the fact that Standifer still had the scissors, which could have been used as a weapon against the officer, sitting in his lap. The officer was entitled to make sure he was in a safe environment while writing a citation. *See*

Maryland v. Wilson, 519 U.S. 408, 412, 117 S. Ct. 882, 885, 137 L. Ed. 2d 41 (1997) (“[O]nce a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment’s proscription of unreasonable seizures.”).

At this point, the situation confronting the officers changed dramatically. Standifer refused to exit the vehicle. Standifer’s refusal to comply with Officer Baker’s directive gave him the authority to arrest instead of issuing a citation. *See* KRS 431.015(1)(b)(3). Even so, Standifer was not immediately placed under arrest because a far more concerning issue captured the officer’s attention. As Officer Baker was attempting to remove Standifer from the vehicle, Officer Crawford observed Standifer attempting to conceal a gun in the vehicle. During the hearing, the body camera footage of both Officer Baker and Officer Crawford was played. On the footage, Officer Crawford is clearly heard saying, “He just put something in the backseat. Cuff him up, he just ditched a gun.” Video Record: 03/06/2018; 11:34:35-11:34:45.

One of these well-established exceptions to the warrant requirement is the automobile exception, which allows the warrantless search of a vehicle based on probable cause that it contains contraband. *Carroll v. U.S.*, 267 U.S. 132, 149, 45 S. Ct. 280, 283-284, 69 L. Ed. 543 (1925). Officer Crawford saw Standifer attempt to conceal a weapon. Given the totality of the circumstances, there was

probable cause to search the vehicle for the concealed weapon. During the search, the officers seized a 9mm handgun from under the driver's seat and a bag of marijuana from between the driver's seat and center console. R. 4. A search of the gun's serial number confirmed the gun was stolen.

Once the contraband was seized, Officers Baker and Crawford had probable cause to believe several felonies had been committed. The gun had been found near the marijuana. R. 4. Under KRS 218A.992, possession of marijuana, a class B misdemeanor,⁹ shall be penalized as a Class D felony when, at the time of the offense, a person is in possession of a firearm. Additionally, Standifer attempted to hide the gun in his backseat. Under KRS 524.100, a person is guilty of tampering with physical evidence when he conceals evidence he believes would be used at trial with the intent of impairing its availability. Tampering with physical evidence is a Class D felony. KRS 524.100. Finally, after seizing the handgun, the officers discovered the firearm was stolen. R. 4. Under KRS 514.110(3)(c), receipt of a stolen firearm is a Class D felony.¹⁰ An officer may make an arrest without a warrant when he has probable cause to believe the person being arrested committed a felony. KRS 431.005(1)(c).

⁹ KRS 218A.1422.

¹⁰ Although it is unclear as to when the officers determined Standifer was a convicted felon, he was also cited for concealing a deadly weapon—a Class D felony, if it was concealed by a convicted felon pursuant to KRS 527.020—and possession of a handgun by a convicted felon, a class C felony under KRS 527.040.

Standifer argues that he was placed under arrest when he was removed from the vehicle and placed in handcuffs, approximately fifteen minutes before the arrest time on the citation. Appellant's Reply Br., p. 1. However, this argument is without merit. The length and manner of an investigatory stop should be reasonably related to the basis for the intrusion. *Williams v. Commonwealth*, 147 S.W.3d 1, 6 (Ky. 2004). As seen in the body camera footage, approximately thirty seconds elapsed between Officer Baker's initial contact with Standifer and Standifer being removed from the vehicle. Thirty seconds is not an unreasonable amount time for an investigatory stop. Additionally, the continued detention of a suspect is appropriate if it is based on probable cause. *Id.* Once the officers saw the contraband in the vehicle, they had probable cause to believe a crime was being committed and to search for contraband. *See Carroll v. U.S.*, 267 U.S. at 149, 45 S. Ct. at 283-84. Finally, "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[.]" *Williams*, 147 S.W.3d at 6. (Emphasis added). This is because there is a substantial interest in officer safety and preventing flight of the suspect. *Id.* Therefore, placing Standifer in handcuffs outside the vehicle was reasonable for officer safety and did not constitute an arrest. The arrest took place fifteen minutes later, after the officers discovered the contraband and the incriminating nature thereof.

IV. Conclusion

For the foregoing reasons, we AFFIRM the Jefferson Circuit Court denying Standifer's motion to suppress.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Christopher B. Thurman
Louisville, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky