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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000900-MR

MORRIS BRYANT — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN BAILEY SMITH, JUDGE
ACTION NO. 17-CR-001438

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, KRAMER, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Morris Bryant brings this appeal from a May 15, 2018, judgment of the Jefferson Circuit Court pursuant to a jury verdict finding him guilty of being a convicted felon in possession of a handgun. We affirm.

During the afternoon of March 30, 2017, Louisville Metro Police Department Detectives Jordan Settle (sometimes referred to as Settles in the

record) and Joseph Vidourek were in an unmarked car in the Russell neighborhood of Louisville, an area Settle described as being known for burglaries and thefts. During their drive through the neighborhood, the detectives observed Morris Bryant walking between houses. Suspicious, the detectives, who were wearing vests bearing the word "Police," briefly activated their emergency equipment and exited their car to try to talk to Bryant. Detective Settle told Bryant to either "stop" or "come here," and Bryant responded that he lived at the residence in whose yard he was standing before fleeing from the detectives. Detective Settle gave chase on foot.

During the chase Detective Settle saw Bryant extend his arm, though the detective admitted he did not actually see Bryant discard any object. Eventually, Detective Settle caught up to Bryant and ordered him to get on the ground. Bryant complied, and Detective Settle performed a patdown search for weapons but discovered none. Detective Vidourek quickly arrived and Settle retraced his steps to look for anything discarded by Bryant during the chase. Detective Vidourek, who believed Bryant was under arrest for fleeing the police, searched Bryant and found a bullet in one of his pockets. Meanwhile, Detective Settle discovered a loaded handgun near where he had seen Bryant extend his arm during the chase. The bullet in Bryant's pocket was the same type as those found in the handgun.

Bryant was indicted for several offenses, including, *inter alia*, possession of a handgun by a convicted felon. Bryant filed a motion to suppress, arguing there was no reasonable suspicion to support the initial stop and no probable cause for the arrest or search. The trial court conducted a hearing on the motion on November 2, 2017, at which Detective Settle was the only witness. Because the main thrust of Bryant's motion to suppress involved the bullet, the trial court believed Detective Vidourek needed to testify and thus conducted a second phase of the hearing on December 13, 2017.

Bryant's post-hearing brief asked the trial court to suppress the bullet and to find that his arrest was without probable cause. In short, Bryant did not meaningfully contest the propriety of his initial encounter with the detectives. In its response, the Commonwealth contended the search which yielded the bullet was proper as a search incident to arrest since the detectives had probable cause to believe Bryant had at least committed criminal trespass in either the second or third degree.

In March 2018, the trial court denied the motion to suppress. The court found Bryant could not have been arrested for criminal trespass or evading the police because "[t]here were no posted signs warning against trespass or yards that were enclosed" and "[t]here was no testimony from either detective that he had reason to believe that a crime had been committed" at the time Bryant fled. March

15, 2018, Order at 3. However, the court held the bullet would have been inevitably discovered because there was probable cause to arrest Bryant for carrying a concealed deadly weapon and tampering with physical evidence once Settle discovered the discarded gun.

The possession of a handgun by a convicted felon charge proceeded to a jury trial. In March 2018, a jury found Bryant guilty[1] and in May 2018, in accordance with the jury's recommendation, the trial court sentenced Bryant to eight-years' imprisonment, probated for five years. The remaining charges were dismissed without prejudice. This appeal follows.

Bryant contends the circuit court erred by denying his motion to suppress. Upon a denial of a motion to suppress we review a trial court's findings of fact under the clearly erroneous standard. *Whitlow v. Commonwealth*, 575 S.W.3d 663, 668 (Ky. 2019). We review *de novo* the trial court's application of the law to the facts. *Id.*

The bulk of Bryant's brief is devoted to arguing he "was illegally seized when Detective Settle activated his emergency equipment and commanded Appellant to 'come here' when he had no reasonable suspicion to seize him." Bryant's brief at 5. But the United States Supreme Court held in *California v.*

[1] The parties do not dispute that the jury found Morris Bryant guilty and recommended eight-years' imprisonment, but the written record presented to us does not contain a verdict form completed and signed by the foreperson.

Hodari D., 499 U.S. 621 (1991) that, under the United States Constitution, "for a seizure to occur, there must either be physical force or, absent that, submission to the assertion of authority." *Hunter v. Commonwealth*, 587 S.W.3d 298, 304 (Ky. 2019) (construing *Hodari D.*). Therefore, under *Hodari D.*, Bryant was not seized until after his flight ended. Cognizant of the impact of *Hodari D.* on this appeal, Bryant asks us to join the states that have declined to follow *Hodari D.* on state law grounds.[2]

Though it was rendered after briefing was completed in this appeal, Bryant's argument is foreclosed by our Supreme Court's holding in *Hunter*, 587 S.W.3d 298. Because *Hunter* resolves Bryant's sundry arguments regarding *Hodari D.* and the Kentucky Constitution, we quote from it at length:

> Hunter argues that as soon as the officers exited their car and ordered him to stop, he was seized. This, however, is counter to the United States Supreme Court's holding in *California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991). The United States Supreme Court in *Hodari* held that in order for a seizure to occur, there must either be physical force or, absent that, submission to the assertion of authority. *Id.* at 626, 111 S. Ct. 1547. In other words, "[a] seizure does not occur . . . if in response to a show of authority, the subject does not yield. In that event, the seizure occurs only when the police physically subdue the subject." *Taylor v. Commonwealth*, 125 S.W.3d 216, 219-20 (Ky. 2003).

[2] Preservation of this issue is questionable, given Bryant's focus below on suppressing the bullet and failure to inform us as to when/how he argued against applying *California v. Hodari D.*, 499 U.S. 621 (1991). Regardless, Bryant's argument fails.

Hunter urges this Court to break from *Hodari* and its previous decision in *Taylor* to find that the Kentucky Constitution provides greater protection than does the United States Constitution. Hunter cites to approximately fifteen (15) other states which have declined to follow *Hodari*, finding that their state constitutions provide greater protection than the Fourth Amendment. The Commonwealth, on the other hand, cites to approximately eleven (11) other states that *have* followed *Hodari.* How other states have dealt with this issue, however, is only marginally relevant to our analysis, as we must examine how our Court has traditionally viewed the protection our constitution provides in relation to that provided by the Fourth Amendment of the United States Constitution.

Hunter notes that this Court has recognized that the original Kentucky Bill of Rights "was borrowed almost verbatim from the Pennsylvania Constitution of 1790." *Commonwealth v. Wasson*, 842 S.W.2d 487, 492 (Ky. 1992) (quoting Ken Gomley & Rhonda G. Hartman, *The Kentucky Bill of Rights, A Bicentennial Celebration*, 80 Ky. L.J. 1 (1991)). Hunter argues that because Pennsylvania rejected *Hodari* based on its constitution, and our constitution was modeled after Pennsylvania's, this Court should follow Pennsylvania's lead in rejecting *Hodari.* However, in *Wasson,* we were not analyzing Section 10 of our constitution, as we are today. This Court has held time and again that "Section 10 of the Kentucky Constitution provides no greater protection than does the federal Fourth Amendment." *LaFollette v. Commonwealth*, 915 S.W.2d 747, 748 (Ky. 1996), overruled on other grounds by *Rose v. Commonwealth*, 322 S.W.3d 76 (Ky. 2010); *see also Cobb v. Commonwealth*, 509 S.W.3d 705, 712 (Ky. 2017). We see no reason to ignore that precedent today, and therefore explicitly hold, as we previously did in *Taylor*, that under both the United States Constitution and the Kentucky Constitution, "[a] seizure does not occur . . . if

> in response to a show of authority, the subject does not yield. In that event, the seizure occurs only when the police physically subdue the subject." *Taylor*, 125 S.W.3d at 219-20.
>
> Having determined the appropriate legal framework, we must now apply the law to the facts of Hunter's case. It is undisputed that when the police officers exited their car and ordered Hunter to stop, he ran. A chase ensued until Hunter was eventually caught. Following *Hodari*, Hunter was not seized until he was physically apprehended by the police following the chase. "Thus, the police officer's justification for initially attempting to stop [Hunter] is immaterial." *Id.* at 220. The gun that was found along Hunter's flight path, therefore, was admissible, as it was not the fruit of any illegal police conduct, and Hunter's motion to suppress the gun was properly denied by the trial court.

Hunter, 587 S.W.3d at 304-05.

Under the plain holding of *Hunter*, Bryant was not seized until after his flight ceased. The detectives' reasons for attempting to stop Bryant are immaterial, and the gun found along Bryant's flight path while fleeing from police was admissible as he abandoned the gun during the chase. *See Watkins v. Commonwealth*, 307 S.W.3d 628, 630 (Ky. 2010) (holding that "abandoned property is outside of constitutional protection" and "[l]eaving property behind, when in flight from apprehension by law enforcement, must be considered in and of itself an abandonment of that property").

We now turn to Bryant's argument that the bullet should have been suppressed because "[a]t the time that Detective Settle seized [Bryant], he did not

have reasonable suspicion that [Bryant] was engaged in criminal activity." Bryant's brief at 20. Once Detective Settle caught up to Bryant, Bryant was arrested. Indeed, Detective Vidourek testified that he searched Bryant pursuant to what he thought was an arrest. "Among the recognized exceptions to the warrant requirement is a search incident to arrest" whereby "an officer is permitted to search the person arrested and the area within the arrestee's immediate control." *McCloud v. Commonwealth*, 286 S.W.3d 780, 785 (Ky. 2009) (footnotes omitted). The question thus is whether the arrest was supported by probable cause. We conclude it was.

Probable cause is "a flexible, common-sense standard[,]" *Williams v. Commonwealth*, 147 S.W.3d 1, 7 (Ky. 2004), which requires an examination of "the events leading up to the arrest" to determine "whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause." *Patton v. Commonwealth*, 430 S.W.3d 902, 907 (Ky. App. 2014) (citation omitted). In determining whether probable cause for an arrest exists, "the officer's subjective intention is irrelevant" because the determination rests upon whether there was objective justification for the officer's actions. *Lamb v. Commonwealth*, 510 S.W.3d 316, 322 (Ky. 2017). *See also Morton v.*

Commonwealth, 232 S.W.3d 566, 571 (Ky. App. 2007).[3] Finally, it is "immaterial" whether Vidourek searched Bryant slightly prior to arresting him, so long as probable cause existed for the arrest. *Williams*, 147 S.W.3d at 8. *See also Lamb*, 510 S.W.3d at 323-24.

There was unrebutted testimony from the detectives that they saw Bryant walk and/or run between private houses and through private yards both before and during his flight. Criminal trespass in the third degree only requires a person to "knowingly enter[] or remain[] unlawfully in or upon premises." Kentucky Revised Statutes (KRS) 511.080(1). Accordingly, though they perhaps had probable cause to believe he had committed other offenses (a question which we need not definitively resolve), it is beyond serious debate that the detectives had probable cause to believe Bryant had at least committed criminal trespass in the third degree—as cogently argued by the Commonwealth in its response to the motion to suppress. Criminal trespass in the third degree is classified as a violation under KRS 511.080(2), but KRS 431.005(1)(e) nonetheless specifically permits a peace officer to arrest a person without a warrant for a third-degree trespass committed in the officer's presence.

[3] Thus, the fact that Bryant was not charged with criminal trespass in the third degree is irrelevant, though we note that Detective Joseph Vidourek testified that Bryant could have been so charged. Suppression hearing video, 12/13/17 at 2:51:35 *et seq.*

In short, the detectives had probable cause to arrest Bryant for, at minimum, criminal trespass in the third degree and were thus permitted to search him incident to arrest. Because the search was permissible, there was no cause to suppress the bullet discovered in the search. Consequently, though our rationale differs, we affirm the trial court's denial of Bryant's motion to suppress, as an appellate court may affirm a lower court for any reason supported by the record. *See, e.g.*, *McCloud*, 286 S.W.3d at 786 n.19.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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