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RENDERED: NOVEMBER 18, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000656-MR

JUAN JOHNSON — APPELLANT

V.

ON APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
NO. 07-CR-00153

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Juan D. Johnson, was convicted by a Franklin County Circuit Court jury of first degree possession of a controlled substance, tampering with physical evidence, fleeing or evading police in the second degree, resisting arrest, and being a persistent felony offender. Appellant received a sentence totaling twenty years for the crimes. He now appeals as a matter of right. Ky. Const. § 110(2)(b).

I. Background

On June 27, 2007, at approximately 2:30 a.m., Lieutenant Sutton and Officer Curtsinger of the Frankfort Police Department were separately dispatched to investigate a disturbance call in an apartment complex in Indian Hills. Sutton testified that this location is a high crime area, with the police

frequently receiving drug and theft complaints. On the night in question, there was a late-night party with excessively loud music playing.

Once the officers arrived and parked approximately one block from the apartment complex, they both could hear loud music originating from the parking lot in the apartment complex. The officers approached the source of the music on foot. As they neared the source of the music, the officers observed twenty to thirty people milling around and drinking alcohol in the parking lot area. One of the party-goers observed the approaching officers and screamed "Police!" which prompted some to set down their beer bottles and flee the area. Although there were several cars in the parking lot, only one was occupied—the car playing the piercingly loud music. Officer Curtsinger smelled the odor of marijuana as he approached the vehicle.

Sutton approached the passenger's side of the subject vehicle and Curtsinger approached the driver's side. Appellant and the driver were the vehicle's only occupants. The driver consented to Curtsinger's requests to search the car and his person, and both occupants were asked to exit the vehicle for officer safety purposes.

Sutton testified that as he was speaking with Appellant, he smelled the odor of alcohol emanating from Appellant's breath. Sutton next testified that he asked Appellant whether he had any weapons or contraband on his person,

to which Appellant replied in the negative. According to Sutton, Appellant consented to a search of his person.[1]

Prior to exiting the vehicle, Appellant reached into the left, front pocket of his shorts, apparently attempting to place an item next to the seat. This movement prompted Sutton to instruct him to remove his hands from his pockets. While getting out of the vehicle, Sutton testified that Appellant disobeyed his prior request and again stuck his hand in his left, front pocket. Sutton testified that he became concerned for his safety because he did not know whether Appellant was reaching in his pocket to retrieve a "cigarette lighter or a gun." As a result, Sutton performed a pat down.

During this pat down, Sutton stated that he felt a bulge, approximately the size of ping-pong ball, in Appellant's left-side front pocket (the same pocket Appellant repeatedly reached into), which he believed was contraband. Once Sutton felt the bulge, Appellant attempted to jump over the roof of the car. Sutton was able to tackle him; however, a struggle ensued when Appellant attempted to flee. During this struggle, Curtsinger testified that he was struck, from behind, with a plastic lawn chair. The officers were able to eventually subdue and arrest Appellant approximately two car lengths away from the point of original contact.

Once in handcuffs, a search incident to arrest of Appellant revealed that the bulge in his left, front pocket was no longer there. However, a white

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[1] Sutton gave this testimony at the suppression hearing; the trial court did not make any factual findings relating to consent.

substance wrapped in plastic, approximately the size of a ping-pong ball, was found in plain view within arm's length of the area where Appellant struggled to free himself from Sutton. The substance in the plastic wrapper was later determined to be cocaine.

A jury convicted Appellant of possession of a controlled substance in the first degree, tampering with physical evidence, fleeing or evading police in the second degree, resisting arrest, and being a persistent felony offender.

Appellant now raises two allegations of error: 1) that the trial court erred when it denied his motion to suppress evidence of the cocaine as the police did not have a reasonable suspicion to stop and frisk him; and 2) that double jeopardy prohibited him from being found guilty of both fleeing or evading police in the second degree and resisting arrest.

For the reasons that follow, we affirm Appellant's convictions.

II. Analysis

A. Suppression Hearing

Prior to trial, Appellant moved to suppress the cocaine found in plain view in the parking lot. Although using the phrase "probable cause," Appellant essentially argued that the police had no reasonable suspicion to stop and search him; therefore, the contraband is fruit of the poisonous tree and must be suppressed.

The trial court found that the loud noise, the crowd gathering around the site of the noise, and the odor of marijuana indicated the presence of illegal

activity, thus warranting further police investigation. The court also found that Appellant had a noticeable bulge in his left front pocket, and attempted to flee when Sutton's pat down revealed it. Next, the court concluded that Appellant's attempt to escape from the police justified his arrest and subsequent search incident to arrest. Finally, the court noted that the cocaine was found in plain view in the parking lot, which implicated no privacy interests.

When reviewing the trial court's denial of a motion to suppress, we take a two-step approach. We first review the trial court's factual findings under a clearly erroneous standard. *Commonwealth v. Banks*, 68 S.W.3d 347 (Ky. 2001). The trial court's factual findings are conclusive if supported by substantial evidence. *Adcock v. Commonwealth*, 967 S.W.2d 6, 9 (Ky. 1998); RCr 9.78. We next undertake a *de novo* review of the trial court's conclusions of law. *Ornelas v. U.S.*, 517 U.S. 690, 691 (1996).

After reviewing the record, we conclude that the trial court's factual findings were supported by substantial evidence, and thus are conclusive. We next conduct a *de novo* review of the law as applied to the trial court's findings of fact.

1. *De Novo* Review of the Alleged Seizure, Pat Down, and Search Incident to Arrest.

Appellant contends that the trial court erred when it denied his motion to suppress the cocaine discovered as a result of the allegedly illegal search. Appellant claims that the stop and frisk, conducted by Sutton and Curtsinger, violated his Fourth Amendment right to be free from unreasonable seizures.

Appellant asserts that before seizing an individual, the police officer must have a reasonable suspicion based on specific and articulable facts. According to Appellant, Sutton and Curtsinger approached the vehicle only in response to a noise complaint; no other suspicious behavior was occurring at the time of the approach. Appellant further contends that the officers had no reasonable fear that Appellant was armed, until after the illegal search began. Accordingly, Appellant claims that the officers had no "right" to stop and frisk him.

The Commonwealth responds by contending that the odor of marijuana alone is enough to create reasonable suspicion to justify the stop of Appellant. Next, the Commonwealth argues that the pat down did not violate the Fourth Amendment since Appellant twice stuck his hands in his pocket leading Sutton to fear that Appellant may be armed. Furthermore, the Commonwealth points out that Appellant consented to the pat down.

We hold that the *Terry* stop and frisk, and the search incident to arrest were valid. *Terry v. Ohio*, 392 U.S. 1 (1968).

a. *Terry* "Stop"

The Fourth Amendment and Section 10 of the Kentucky Constitution proscribe unreasonable seizures. However, a police officer may "stop" an individual, without implicating any constitutional protections, if, objectively, "the police officer [can] point to specific and articulable facts" which lead him to reasonably conclude "that criminal activity *may be* afoot." *Terry*, 392 U.S. at 21, 30 (emphasis added). As this Court characterized the relevant inquiry, "[i]n

other words, would the facts available to [the] [police] [o]fficer at that moment convince a reasonable person that the action taken was appropriate." *Baker v. Commonwealth*, 5 S.W.3d 142, 145 (Ky. 1999).

Both this Court and the Supreme Court of the United States have clarified the minimal burden necessary for a constitutional stop. The Supreme Court of the United States has stated that "[the] level of suspicion [required for the stop] is considerably less than proof of wrongdoing by a preponderance of the evidence." *United States v. Sokolow*, 490 U.S. 1, 7 (1989). Moreover, the Court also acknowledged that the underlying activity giving rise to reasonable suspicion could actually be *legal*: "there could, of course, be circumstances in which *wholly lawful conduct* might justify the suspicion that criminal activity was afoot." *Reid v. Georgia*, 448 U.S. 438, 441 (1980) (per curiam) (emphasis added). Finally, this Court has held that a "police officer may constitutionally conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion," which "is more than an "unparticularized suspicion or 'hunch.'" *Bauder v. Commonwealth*, 299 S.W.3d 588, 590-91 (Ky. 2009) (quoting *Terry*, 392 U.S. at 27).

Thus, we must determine whether the Commonwealth carried its minimal burden by introducing specific and articulable facts indicating that criminal activity may be afoot thereby justifying the stop of Appellant. We have no difficulty concluding that objectively, Sutton and Curtsinger had "specific and articulable facts" justifying the brief seizure.

As stated above, both officers' presence on the scene was in response to a disturbance call and upon arrival at the late-night party, Curtsinger smelled the odor of marijuana emanating from the vehicle playing illegally loud music—a reason for the disturbance call. Although the stop was the result of multiple circumstances, this Court has previously stated that "[t]he odor of marijuana *alone* can justify the warrantless search of an automobile." *King v. Commonwealth*, 302 S.W.3d 649 (Ky. 2010) (emphasis added) (citing *Cooper v. Commonwealth*, 577 S.W.2d 34, 37 (Ky. App. 1979), (overruled on other grounds by *Mash v. Commonwealth*, 769 S.W.2d 42 (Ky. 1989))). Thus, if the odor of marijuana alone can justify a *search*, it follows that the odor of marijuana, in addition to the other factors indicating the potential presence of illegal activity, enables the officer to make a brief stop *to investigate*. Therefore, after a *de novo* review, we conclude that excessively loud music, the presence of twenty to thirty people partying and drinking alcohol in public well into the early morning hours, and the odor of marijuana (all in a high crime area) are specific and articulable facts which would objectively lead an officer to believe that criminal activity *may be* afoot, thereby justifying the *Terry* "stop."

b. *Terry* "Frisk" or Pat down

We next review the propriety of Lieutenant Sutton's pat down of Appellant. It is well-established that if a police officer reasonably believes that the person *may be* armed and presently dangerous, the officer is entitled to conduct a pat down in an attempt to discover weapons. *Terry*, 392 U.S. at 30.

The policy behind the *Terry* "frisk" is that in certain instances, a carefully limited pat down is "necessary for the protection of [the police officer] and others." *Id.* at 30. We hold that the pat down here was reasonable under the circumstances in this case.

When judging the reasonableness of a police officer's actions in this area, we must consider the facts available to the officer at that time. *Id.* at 21-22. Here, Sutton and Curtsinger were dispatched to a high crime area, at 2:30 a.m., to investigate a disturbance. The officers arrived to an overtly hostile crowd (Curtsinger was later attacked from behind), that vastly outnumbered them. After smelling marijuana on his approach to the loud vehicle, Sutton testified that while conversing with Appellant, Appellant twice reached into his pocket, despite contrary instruction. During those fleeting moments, Sutton became concerned for his safety, since he did not know whether Appellant was reaching for "a cigarette lighter or a gun." The situation forced Sutton "to take swift measures to discover the true facts and neutralize the threat of harm if it materialized." *Id.* at 30. Consequently, he executed a pat down to determine whether the object Appellant twice reached for was, in fact, a weapon.

In the context of the above circumstances, we conclude that Sutton reasonably believed Appellant *may* have been armed and dangerous, thus entitling him to conduct a pat down in an attempt to discover weapons.

c. Search Incident to Arrest

Although more of a minor point, we lastly review whether the search of Appellant, following his arrest, was a valid search incident to arrest. Following a valid arrest, a police officer may search an arrestee incident to that valid arrest. *Agnello v. U.S.*, 269 U.S. 20, 5 (1925).

As previously stated above and discussed below, Appellant attempted to escape from the police; however, he was eventually subdued and arrested. The evidence that Appellant attempted to escape from Sutton is largely uncontradicted, with Appellant conceding that he jerked away from Sutton, which led to the struggle. Therefore, as expanded below, we hold that Appellant was validly arrested for fleeing or evading police in the second degree, KRS 520.100, and thus, a search of his person incident to arrest was proper.

B. Double Jeopardy

In Appellant's final and unpreserved argument, he contends that his convictions for both resisting arrest and fleeing or evading police in the second degree violate the Double Jeopardy Clause of the Fifth Amendment, because these two crimes are "essentially the same." The resisting arrest statute, KRS 520.090, provides:

> (1) A person is guilty of resisting arrest when he intentionally prevents or attempts to prevent a peace officer, recognized to be acting under color of his official authority, from effecting an arrest of the actor or another by:
>
> > (a) Using or threatening to use physical force or violence against the peace officer or another; or
> >
> > (b) Using any other means creating a substantial risk of causing physical injury to the peace officer or another.

The statute codifying fleeing or evading police, KRS 520.100, in relevant part, states:

> (1) A person is guilty of fleeing or evading police in the second degree when:
>
> > (a) As a pedestrian, and with intent to elude or flee, the person knowingly or wantonly disobeys a direction to stop, given by a person recognized to be a peace officer who has an articulable reasonable suspicion that a crime has been committed by the person fleeing, and in fleeing or eluding the person is the cause of, or creates a substantial risk of, physical injury to any person;

The Commonwealth acknowledges that the two crimes are similar, but asserts that they are not the same. Furthermore, the Commonwealth asserts that there was testimony at trial alleging that although the arresting officer initially had control of Appellant, he may have freed himself from the officer's grip, forcing the officer to re-initiate physical contact. We agree with the Commonwealth and hold that the two crimes at issue do not violate double jeopardy.

Initially, we note that we review unpreserved issues under the palpable error standard of RCr 10.26. *Potts v. Commonwealth*, 172 S.W.3d 345 (Ky. 2005). Under that rule, an unpreserved error may be noticed on appeal only if the error is "palpable" and "affects the substantial rights of a party," and even then relief is appropriate only "upon a determination that manifest injustice has resulted from the error." RCr 10.26. In general, a palpable error "affects the substantial rights of a party" only if "it is more likely than ordinary error to have affected the judgment." *Ernst v. Commonwealth*, 160 S.W.3d 744, 762 (Ky.

2005). An unpreserved error that is both palpable and prejudicial still does not justify relief unless the reviewing court further determines that it has resulted in a manifest injustice, unless the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be "shocking or jurisprudentially intolerable." *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006). However, we generally find palpable error when a conviction is tainted by double jeopardy. *Cardine v. Commonwealth*, 283 S.W.3d 641, 650-51 (Ky. 2009).

Nonetheless, we hold that the resisting arrest and fleeing or evading police statutes do not implicate double jeopardy. KRS 520.090 & 520.100. Pursuant to the Fifth Amendment, incorporated though the Fourteenth Amendment, and Section Thirteen of the Kentucky Constitution, a person may not be twice put in jeopardy for the same offense. On the other hand, the "principles of double jeopardy do not, however, prevent a person from being charged with multiple offenses arising from the same course of conduct." *Commonwealth v. McCombs*, 304 S.W.3d 676, 687 (Ky. 2009).

In analyzing whether the criminal charges twice place the defendant in jeopardy, we adopted the *Blockburger* test, which states that "[d]ouble jeopardy does not occur when a person is charged with two crimes arising from the same course of conduct, as long as each statute 'requires proof of an additional fact which the other does not.'" *Commonwealth v. Burge*, 947 S.W.2d 805, 809 (Ky. 1996) (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).

Thus, in order to determine if Appellant was twice placed in jeopardy for the same offense, we must determine whether resisting arrest and fleeing or evading police in the second degree "requires proof of an additional fact which the other does not." *Blockburger*, 284 U.S. at 304.

After examining the elements of each offense we have no trouble finding that each offense contains an element which the other does not. At its basic level, two elements comprise resisting arrest:

> (i) the person prevents or attempts to prevent a police officer from *effecting an arrest*;
>
> (ii) by using or threatening to use physical force.

KRS 520.090. When simplified, fleeing or evading also contains two elements:

> (i) the person knowingly *disobeys a police officer's direction to stop*;
>
> (ii) while fleeing the person causes, or creates substantial risk of, physical injury.

KRS 520.100. Thus, as is evident from the above statutes, each requires proof of an additional fact which the other does not. Resisting arrest requires proof of an *arrest*. Fleeing and evading requires the Commonwealth to prove that the person disregarded the direction to *stop* and *fled*. Accordingly, resisting arrest requires an arrest, which is not an element of fleeing and evading. Conversely, fleeing and evading requires the disobedience of a police officer's order to stop and fleeing or eluding the police officer; neither element is required to sustain a conviction for resisting arrest.[2] Consequently, we do not find that Appellant

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[2] A person can resist arrest without fleeing. On the other hand, if the person is not fleeing, the police officer would not give a direction to stop. Clearly, a person cannot disregard a direction to stop if none is given. Thus each statute requires

was twice placed in jeopardy for the same offenses, as each offense required proof of a fact that the other did not. *Blockburger*, 284 U.S. at 304.

Furthermore, the official commentary to each provision bolsters the above conclusion by demonstrating the different criminal conduct each section seeks to proscribe. The official commentary for resisting arrest states that "[t]he offense of resisting arrest includes only forcible resistance and excludes other forms of nonsubmission to authority. Neither flight from arrest nor passive resistance are punishable under this section."

On the other hand, the commentary for fleeing or evading states that this provision is not to criminalize "mere flight from an officer," rather, "it is the purpose of this provision to punish eluding a peace officer when the nature of the instrumentality used to accomplish the flight inherently involves the threat of danger to peace officers." We glean from this commentary the legislature intended each provision to prohibit different conduct.[3]

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proof of a fact the other does not: arrest to sustain a resisting arrest conviction and fleeing despite an order to stop to sustain a fleeing and evading conviction.

[3] Within Appellant's double jeopardy argument Appellant concedes that the Commonwealth's evidence was sufficient to sustain a conviction for resisting arrest; however, he asserts that the evidence was insufficient for a fleeing and evading conviction. Appellant twice claims that he should not have been convicted of fleeing or evading in the second degree since he was never out of Officer Sutton's "grasp." Appellant is attempting to read a control requirement into KRS 520.100. As detailed in the double jeopardy section, the crime of fleeing or evading in the second degree contains only two elements: (i) the person knowingly disobeys a police officer's direction to stop; and (ii) while fleeing the person causes, or creates substantial risk of, physical injury. KRS 520.100. There is no control element in this statute; thus, it is irrelevant whether Officer Sutton continuously maintained a hold of Appellant's arm or clothing.

III. Conclusion

For these reasons, we affirm Appellant's conviction and sentence.

All sitting. All concur.

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