

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001237-MR

WILLIAM MICHAEL OLIVER

APPELLANT

v. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NOS. 01-CR-00022 AND 01-CR-00022-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: BUCKINGHAM, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. This is an appeal from a judgment pursuant to a conditional guilty plea to one count of receiving stolen property. Appellant maintains that the trial court should have granted his motion to suppress because the police did not have sufficient cause to conduct an investigatory stop and the resulting search was illegal. Given the evidence adduced at the suppression hearing, we reject appellant's arguments and, thus, affirm.

At 1:49 a.m. on January 24, 2001, Barbourville police officers Winston Tye and James Gray were driving in an area where numerous burglaries had recently occurred and observed appellant, William Oliver, and another male, Jeffrey Vaughn, walking down the middle of Allison Avenue "carrying something". The officers then turned off their lights, drove through a furniture store parking lot and cut over to where the individuals were headed so as not to scare them off. When the officers came upon the individuals, they were running up to the edge of the road and looked to be out of breath. Upon seeing the officers, the individuals stopped running. The officers then approached the individuals and asked why they were out of breath. The two denied that they were out of breath. Officer Tye asked if they had anything on them, to which they responded, "no, you can search us." Upon conducting a patdown search of appellant, a remote control was found in his pants pocket. Officer Tye then walked down the road in the direction from which the individuals had come and found a keyboard and a VCR laying in the ditch.

At the suppression hearing, it was adduced that one week prior to Oliver and Vaughn being stopped in the present case, Officer Gray and another officer stopped Oliver and Vaughn and discovered a crowbar on one of the men. The next morning, one of the officers was cleaning out his cruiser and discovered

a slim jim, an instrument used to pop locks on car doors, in the back of the cruiser. Officer Tye testified that he was aware of this incident at the time of the January 24 stop of the individuals. However, there was no evidence as to whether Officer Gray or Officer Tye recognized Oliver or Vaughn from the prior incident in deciding to stop them on the night in question.

Oliver was indicted for second-degree burglary and theft by unlawful taking under \$300. Oliver subsequently filed a motion to suppress all evidence seized as a result of the investigatory stop. After a full suppression hearing, the trial court denied the motion. Thereafter Oliver entered a conditional guilty plea to an amended charge of receiving stolen property over \$300, reserving the right to appeal the denial of the suppression motion. On July 23, 2001, final judgment was entered sentencing Oliver to one year in prison. This appeal followed.

Oliver first argues that the trial court erred in finding that the police had cause to conduct an investigatory stop of him and Vaughn. A trial court's findings on a suppression motion will not be overturned unless they are clearly erroneous, and the defendant has the burden of proving that the trial court so erred. RCr 9.78; Clark v. Commonwealth, Ky. App., 868 S.W.2d 101 (1993). It has been held that the

police can conduct an investigatory stop of a defendant if the police have reasonable suspicion based on specific articulable facts that criminal activity is afoot. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); Stewart v. Commonwealth, Ky. App., 44 S.W.3d 376 (2000). In determining whether reasonable suspicion exists, courts must look at the totality of the circumstances. Taylor v. Commonwealth, Ky., 987 S.W.2d 302 (1998), cert. denied, 528 U.S. 901, 120 S. Ct. 239, 145 L. Ed. 2d 200 (1999). Reasonable suspicion requires specific objective facts which would lead an officer, based on his experience, to conclude that criminal activity might be in progress. Spear v. Sowders, 71 F.3d 626 (6th Cir. 1995).

In the instant case, Oliver and Vaughn were observed walking down the street carrying something at 1:49 a.m. in an area that had recently experienced numerous burglaries. At that time, both officers were aware of suspects being previously stopped by police in that vicinity with instruments commonly used to gain illegal entry into cars/buildings. When the officers next saw the individuals, they were running up the edge of the road and stopped when they saw the police. Upon approaching the two, the officers noticed that they were out of breath.

An individual's presence in a high crime area is a legitimate factor to be considered by police in deciding whether

to conduct a Terry stop of that individual. See Simpson v. Commonwealth, Ky. App., 834 S.W.2d 686 (1992); Baker v. Commonwealth, Ky., 5 S.W.3d 142 (1999). The fact that an individual's conduct is just as consistent with innocent activity as with criminal activity does not preclude an officer from considering that activity in deciding whether to conduct an investigatory stop. Baker, 5 S.W.3d at 146.

In considering the totality of the circumstances - the individuals' presence late at night in an area experiencing frequent burglaries, combined with the fact that they were carrying something and appeared to be running from something - we believe the officers had sufficient articulable facts to suspect that Oliver and Vaughn had stolen something in a burglary and were fleeing the scene of the crime. Accordingly, the police were justified in conducting an investigatory stop of Oliver.

Oliver next argues that the ensuing search of his person which yielded the remote was unlawful. It is undisputed that once stopped and asked by police if they had anything on them, Oliver and Vaughn replied that they did not and further specifically told the officers that they could go ahead and search them. It is well settled that valid consent is one of the exceptions to the requirement for a search warrant. Stewart

v. Commonwealth, Ky. App., 44 S.W.3d 376 (2000). Accordingly,
the search of Oliver's person was proper.

For the reasons stated above, the judgment of the Knox
Circuit Court is affirmed.

ALL CONCUR.

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