RENDERED: May 2, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000745-DG

CHARLES ALLEN PRUITT — APPELLANT

v.

ON DISCRETIONARY REVIEW FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN A. HAYDEN, JUDGE
ACTION NO. 01-XX-00005

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: DYCHE, HUDDLESTON, AND KNOPF, JUDGES.

KNOPF, JUDGE: On September 12, 2001, Charles Allen Pruitt entered a conditional guilty plea in the Henderson District Court to one count of possession of marijuana.[1] He reserved his right to appeal from the district court's denial of his motion to suppress evidence seized as a result of a pat-down search.

[1] KRS 218A.1422. Possession of marijuana is a class A misdemeanor.

On appeal, the Henderson Circuit Court affirmed, finding that the police officer acted reasonably in conducting the search, and that the search did not exceed its reasonable scope. We find that there was no evidence of any reasonable, articulable basis for the search, and that the trial court and the circuit court erred in finding that the pat-down search was justified. Hence, we vacate the conviction and remand for further proceedings.

The underlying facts of this action are not in dispute. On November 6, 2000, Officers McKinney and Troutman of the Henderson City Police spotted a vehicle with expired license plates. The automobile was being driven by Daniel Craig and Pruitt was a passenger. After stopping the vehicle, the officers determined that Craig's driver's license had been suspended and he was driving without automobile insurance. The officers arrested Craig, and then proceeded to search him incident to the arrest. They found no weapons or contraband on him.

After the officers placed Craig in the patrol car, they returned to Craig's automobile, where Pruitt remained seated in the front seat. Officer McKinney asked Pruitt to get out of the automobile, and Pruitt complied. Officer McKinney then proceeded to frisk Pruitt for weapons. Pruitt was wearing loose-fitting sweat pants which were tapered at the bottom by an

elastic band, but there was no tension around the bottom portion of the ankle. While Officer McKinney was running his hand down Pruitt's leg, he heard a "crinkling" sound. Officer McKinney later testified that he knew that the object which caused the sound was not a weapon, but he suspected that it might be contraband. As Officer McKinney ran his hand back over the area where the sound came from, a piece of cellophane fell to the ground from Pruitt's pants leg. Upon determining that the cellophane package contained marijuana, Officer McKinney placed Pruitt under arrest.

Thereafter, Pruitt was charged in Henderson District Court with possession of marijuana. He filed a motion to suppress all evidence seized, arguing that the police lacked any reasonable suspicion to justify a "stop and frisk" search. Following a hearing at which Officer McKinney testified, the trial court entered an order denying Pruitt's motion to suppress. Thereafter, Pruitt entered a conditional guilty plea, reserving the right to appeal from the court's ruling on the suppression motion. The court sentenced Pruitt to 365 days in jail, which was probated for a period of two years, and imposed a $250.00 fine. The circuit court affirmed the district court's ruling in a memorandum opinion rendered on March 21, 2002. This Court accepted discretionary review on June 11, 2002.

RCr 9.78 sets out the procedure for conducting suppression hearings and establishes the standard of appellate review of the determination of the trial court. Our standard of review of a circuit court's decision on a suppression motion following a hearing is twofold: First, the factual findings of the court are conclusive if they are supported by substantial evidence; and second, this Court conducts a *de novo* review to determine whether the trial court's decision is correct as a matter of law.[2] In this case, the evidence introduced by the Commonwealth was uncontroverted. Therefore, we must assume that those were the facts upon which the trial court based its order. Thus, our task is to decide whether the trial court properly applied the rule of law to the established facts.[3]

The Fourth Amendment of the United States Constitution guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[4] In Terry v. Ohio,[5] the United States Supreme Court recognized an exception to the warrant requirement by sanctioning both investigatory stops and limited pat-down

[2] Adcock v. Commonwealth, Ky., 967 S.W.2d 6, 8 (1998).

[3] Id. (*quoting* Ornelas v. United States, 517 U.S. 690, 697, 116 S.Ct. 1657, 1662, 134 L. Ed. 2d 911 (1996)).

[4] U.S. Const. amend. IV.

[5] 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968).

searches of suspects. When there is a reasonable suspicion that criminal activity is afoot, a police officer may briefly detain an individual on the street, even though there is no probable cause to arrest him.[6]

Terry also held that "[w]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others," the officer may conduct a pat-down search "to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm."[7] Frisking a suspect during a Terry stop is strictly limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby.[8] Furthermore, in Ybarra v. Illinois,[9] the United States Supreme Court cautioned that the narrow scope of the Terry exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized narcotics search is taking place. "Nothing in Terry can be understood to allow a

[6] Id. at 30-31, 20 L. Ed. 2d at 911.

[7] Id. at 24, 20 L. Ed. 2d at 908.

[8] Commonwealth v. Crowder, Ky., 884 S.W.2d 649 (1994), *citing* Terry, *supra*.

[9] 444 U.S. 85, 62 L. Ed. 2d 238, 100 S. Ct. 338 (1979).

generalized 'cursory search for weapons' or indeed, any search whatever for anything but weapons."[10] The Fourth Amendment requires some minimum level of objective justification for the officer's actions measured in light of the totality of the circumstances.[11]

Pruitt first argues that Officer McKinney, by his own admission, had no reason to believe that Pruitt was armed. In response, the Commonwealth takes the position that Craig's arrest provided a reasonable suspicion of criminal activity sufficient to support the pat-down search of Pruitt. The evidence clearly supports Pruitt on this matter. At the suppression hearing, Officer McKinney testified that he had no reason to believe that Pruitt might be armed. Craig, the driver of the vehicle, was arrested for three non-violent offenses. The officers had searched Craig and found no weapons on him. Pruitt was sitting calmly in the car during Craig's arrest. He showed no nervousness and complied with all of the officers' requests. Officer McKinney also conceded that he had no reason to believe that there were weapons in the car, or that Pruitt

[10] Id. at 93-94, 62 L. Ed. 2d at 247.

[11] *See* United States v. Sokolow, 490 U.S. 1, 104 L. Ed. 2d 1, 109 S. Ct. 1581 (1989); Eldred v. Commonwealth, Ky., 906 S.W.2d 694 (1994).

was involved in any criminal activity.[12] In fact, Officer McKinney stated that he intended to allow Pruitt to leave the scene, as he was going to have Craig's car towed.

We recognize that maintaining the safety of police officers is a legitimate and significant concern. Under the circumstances, Officer McKinney was entirely justified in ordering Pruitt to get out of the car.[13] However, to justify a pat-down search for weapons, the officer "must be able to point to specific and articulable facts which, taken together with

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[12] Specifically, Officer McKinney testified as follows:
Mr. Polk (Pruitt's counsel): O.K. Before you searched the car, and before you got Mr. Pruitt out of the car, did you have any information that there may be a weapon in the car?
Officer McKinney: No sir.
Mr. Polk: O.K. Now Mr. Pruitt was sitting in the car that Mr. Craig had driven and he was not acting up in any manner, was he?
Officer McKinney: Not at that point, no
Mr. Polk: And you came up to him and told him to get out of the car, correct?
Officer McKinney: Yes, sir.
Mr. Polk: And he complied, correct?
Officer McKinney: Yes, sir.
Mr. Polk: And then when he got out of the car, you commenced to pat him down, frisk him for weapons, correct?
Officer McKinney: Yes, sir.
Mr. Polk: And up to that point, you had no indication that he was actually armed with any weapon or any dangerous instrument did you?
Officer McKinney: No.
Mr. Polk: And, up to that point, you had no, no reasonable basis to believe that he might have, he might have committed a crime, did you?
Officer McKinney: I had no idea up to that point.

[13] Maryland v. Wilson, 519 U. S. 408, 413, 137 L. Ed. 2d 41, 47, 117 S. Ct. 882 (1997).

rational inferences from those facts, reasonably warrant that intrusion."[14] Officer McKinney admitted that he had no reason to believe that Pruitt was armed. Moreover, mere proximity to persons independently suspected of criminal activity is not sufficient to support a generalized search for weapons.[15]

Finally, the purpose of a pat-down for weapons is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence.[16] The threat to officer safety is considerably diminished in situations involving a brief traffic stop involving neither an arrest nor an investigation.[17] Officer McKinney's stated intention to release Pruitt further undercuts any basis for the search.

Given the absence of any articulable basis for the search, we conclude that the trial court and the circuit court clearly erred in finding that the pat-down search was justified.

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[14] Terry, 392 U.S. at 21, 20 L.Ed.2d at 906. *See also* Docksteader v. Commonwealth, Ky App., 802 S.W.2d 149 (1991): "We believe that whether the officer suspects the individual to be involved in a misdemeanor or felony offense is not the subject of our query. In the final analysis, the test is whether the facts available to the officer at the moment of the search, would warrant a person of reasonable caution to believe the suspect may have a weapon." Id. at 150.

[15] Ybarra, 444 U.S. at 92-93, 62 L. Ed. 2d at 246-47.

[16] Adams v. Williams, 407 U.S. 143, 146, 32 L. Ed. 2d 612, 617, 92 S. Ct. 1921 (1972).

[17] Maryland v. Wilson, 519 U.S. at 412, 137 L. Ed. 2d at 46.

Consequently, Officer McKinney's pat-down search of Pruitt was unreasonable and constitutionally invalid. Thus, the trial court erred in denying Pruitt's motion to suppress the evidence seized as a result of that search.

Accordingly, the order of the Henderson Circuit Court which affirmed Pruitt's conviction by the Henderson District Court is reversed. This matter is remanded to the Henderson District Court with instructions to grant Pruitt's motion to suppress, and if there is no other evidence against him, to dismiss the charge of possession of marijuana.

ALL CONCUR.

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