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NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2002-CA-001398-MR

TERRY LAMONT JONES

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE THOMAS L. CLARK, JUDGE  
INDICTMENT NO. 02-CR-00180

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION

### AFFIRMING

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BEFORE: EMBERTON, Chief Judge; BAKER and HUDDLESTON, Judges.

HUDDLESTON, Judge: Terry Lamont Jones appeals from a final judgment and sentence of imprisonment entered on his conditional plea of guilty, adjudging him guilty of the amended charge of possession of a firearm by a convicted felon, a Class D felony, and the charge of possession of a defaced firearm, a Class A

misdemeanor, and sentencing him to a maximum term of one year's imprisonment in jail on the former count and a definite term of twelve months on the latter count, to be served concurrently.

At 12:54 a.m. on January 8, 2002, Officer Robert Morse of the Lexington-Fayette Urban County Police Department and his partner received a 911 call from their dispatcher relaying that a complainant located at 517 Bright Street in Lexington, Kentucky, had reportedly heard shots being fired and observed three men on the street in front of his home. According to the caller,<sup>1</sup> one of the unidentified men had gotten into the front seat of a blue car parked in front of a Buick Skylark at that address while the other two had fled the scene. Morse and his partner responded to the call, arriving at the scene approximately six to eight minutes after the call originated.

Upon his arrival, Morse observed a man, later identified as Jones, slumped down in the driver's seat of a blue Chevrolet Cavalier with no lights on parked directly in front of a Buick Skylark located in front of the residence at 517 Bright Street. By communicating with the dispatcher, Morse was able to confirm that he had correctly identified the person and the car,

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<sup>1</sup> Fearing retaliation, the caller did not want to be contacted. Although he was later identified, Morse conceded that he did not speak directly to him either prior to or following the arrest of Jones.

both of which also matched the description provided by the caller.<sup>2</sup> Having received verification, Morse approached the car, ordered Jones to exit the car with his arms raised and performed a frisk of his person to search for weapons as authorized by Terry v. Ohio.<sup>3</sup> The search did not reveal any weapons.

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<sup>2</sup> Apparently, the caller observed the actions of Morse through his window while simultaneously communicating with the dispatcher.

<sup>3</sup> 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968). In Terry, the United States Supreme Court upheld the validity of a protective search for weapons in the absence of probable cause to arrest because it "would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm" when he possesses an articulable suspicion that an individual is armed and dangerous. Id., 392 U.S. at 24, 20 L. Ed. 2d at 908. In so doing, the Court emphasized that each case of this sort must be decided on its own facts. However, the Court did not specifically address whether such a protective search for weapons could extend to an area beyond the person in the absence of probable cause to arrest.

We merely hold today that where a police officer observes unusual conduct which leads him to reasonably conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is reasonable under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken. Id., 392 U.S. at 30, 20 L. Ed. 2d at 911.

Jones was then escorted to the front of the car by Morse's partner where he was detained while Morse performed what he called a "frisk" or limited search of the car for weapons.<sup>4</sup> As a result of this search, Morse discovered a kitchen knife under the driver's seat where Jones had been seated upon their arrival as well as a loaded handgun located under the passenger seat. At that point, Morse inquired as to whether Jones had a permit to carry a concealed deadly weapon and, upon learning that he did not, placed Jones under arrest for carrying a concealed deadly weapon. Subsequent to the search of his person and car, Jones acknowledged that he was a convicted felon. Morse later learned that the handgun had been defaced, i.e., the serial number had been removed. Based on this information, Jones was also charged with possession of a defaced firearm and possession of a handgun by a convicted felon.

In a motion filed on February 22, 2002, Jones moved "to suppress the use at trial of any evidence seized from [Jones] at or about the time of his stop and arrest," because the evidence in question "was seized as the result of an illegal stop, search and seizure in violation of the Fourth Amendment of the United States Constitution and Section 10 of the Kentucky Constitution." On March 5, 2002, the court held a suppression

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<sup>4</sup> At that time, Jones had not yet been questioned or placed under arrest.

hearing on the matter. At the suppression hearing, the Commonwealth relied solely upon the testimony of Morse which was consistent with the foregoing summary of events.

According to Morse, he considered a frisk of Jones's person to be necessary for safety purposes since gunshots had reportedly been fired thereby increasing the likelihood of a weapon being present, particularly given the fact that Jones fit the description of one of the subjects allegedly involved in the earlier incident. Because Morse had a "reasonable suspicion" that Jones might have weapons in the car, he also conducted a limited search of the passenger compartment which, in turn, led to the discovery of the kitchen knife and loaded handgun, both of which were within reach of where Jones had been sitting.

Morse also testified that he did not request permission from Jones to search the automobile since he was sitting in a parked car with the engine turned off late at night in an area known for having a high rate of drug-related crimes, circumstances he considered inherently suspicious,<sup>5</sup> and, further, because he had to open the door to get inside the car while Jones stood nearby. Upon entering the vehicle, however, Morse restricted his search to those areas within the immediate control of Jones whose removal from the car was initially

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<sup>5</sup> According to Jones, he had dropped off a friend named Bruce to visit his cousin and was awaiting his return.

motivated by his concern about the presence of weapons. Morse conceded that no gunshots were fired after he arrived on the scene at approximately 1:00 a.m.

At the conclusion of Morse's testimony, Jones told the court that he did not have a complaint regarding either the investigation which ensued pursuant to the complainant's tip or his initial detention by the police during the course of that investigation. Rather, he argued that even a limited search of his car was unconstitutional because the probable cause required to qualify for the automobile exception to the warrant requirement was lacking under the totality of the circumstances, particularly since he was outside the car when the search was conducted.

In the Commonwealth's view, even if the tip at issue is considered "anonymous" in nature, the search was justified because Morse had independently verified its content and, further, the limited search of Jones's car was justified as a protective search for weapons under the authority of Michigan v. Long.<sup>6</sup> In an order entered on March 5, 2002, the court denied Jones's motion to suppress the evidence seized during the search in question.<sup>7</sup>

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<sup>6</sup> 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983).

<sup>7</sup> In support of its decision, the court made oral findings on the record, beginning with the determination that probable cause

On April 10, 2002, the designated trial date, the parties appeared in open court and the Commonwealth offered to amend Count 1 of the indictment to possession of a firearm by a convicted felon, a Class D felony, and dismiss Count 2 of the indictment, carrying a concealed deadly weapon, a Class A misdemeanor. Jones filed a "waiver of further proceedings with petition to enter plea of guilty" on the same day, reserving his right to appeal the court's denial of his motion to suppress the incriminating evidence. On April 11, 2002, the court accepted the proposed plea agreement after questioning Jones. Consistent with the Commonwealth's recommendation, the circuit court imposed a sentence of one year on Count 1 as amended and twelve months on Count 3, in a final judgment and sentence of imprisonment entered on June 5, 2002.

Appealing from the court's denial of his motion to suppress, Jones argues that the circuit court abused its discretion in failing to "suppress evidence procured in

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rather than reasonable suspicion was the correct standard. Emphasizing the factually specific nature of such inquiries, the court went on to find that the tip in question was not anonymous since the caller identified himself and he could be located, a protective search was justified on the facts presented, particularly considering that the alleged offense constituted wanton endangerment at a minimum and Morse independently verified the reliability of the tip in the manner described and people have a lessened expectation of privacy with respect to automobiles. Therefore, Morse did not act outside the constraints of the Fourth Amendment in conducting a limited search for weapons.

violation of the Fourth Amendment." More precisely, he contends that the "tip from 'Jackson' lacked sufficient indicia of reliability" or, in the alternative, that the searches were not justified under the test articulated in Michigan v. Long."<sup>8</sup> In his view, the "officers exercised no prudence" since Jones had been removed from the car and was being restrained by another officer during the relevant time period. By extension, then, Morse would have to doubt the ability of his armed partner to "restrain the unarmed and yet unquestioned [Jones]" in order to believe that Jones could access a weapon located inside the car. According to Jones, "[t]his does not pass the smell test" and a "prudent man would confirm the illegality before seeking to conduct a warrantless search." Further, any contention that Jones would have returned to the car upon being released "is pure speculation and conjecture." Therefore, Morse "violated constitutional protocol" when he searched Jones's car absent a "reasonable basis to believe that Jones was dangerous or was a threat to take immediate control of the vehicle's passenger compartment while being restrained by an armed officer."

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<sup>8</sup> As correctly observed by Jones, the relevant inquiry is "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." Long, supra, n. 6, 463 U.S. at 1050, 77 L. Ed. 2d at 1220 (citation omitted).

In response, the Commonwealth argues that the circuit court did not abuse its discretion in denying Jones's motion to suppress the evidence against him as "[t]he tip upon which [Morse] made his original detention of [Jones] was constitutionally sufficient under Terry and its Kentucky progeny, and, in any event, any objection to such was effectively waived and not preserved for appellate review." Likewise, "[t]he limited search of [Jones's] automobile for weapons was constitutionally justified under applicable Terry principles."

Because Jones explicitly waived any argument regarding the constitutionality of the initial investigation and detention below, we need not address that issue on appeal.<sup>9</sup> As correctly observed by the Commonwealth, an argument must be precisely identified and preserved in the lower court in order to be raised on appeal.<sup>10</sup> Equally unpersuasive is Jones's contention that "he offered a story that was never investigated or negated by the Commonwealth." Standing alone, the fact that Jones's

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<sup>9</sup> Pursuant to Ky. R. Civ. P. (CR) 76.12(4)(v), the argument section of an appellant's brief "shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." By negative implication, then, unpreserved arguments cannot be reviewed.

<sup>10</sup> Powell v. Commonwealth, Ky. App., 843 S.W.2d 908, 909 (1992).

activity may have been as consistent with innocent activity as with illegal activity did not deprive the police of the right to entertain a reasonable suspicion that criminal activity had, in fact, occurred.<sup>11</sup> Accordingly, the narrow question presented for review is whether the protective search of Jones's car for weapons was constitutionally valid.<sup>12</sup>

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<sup>11</sup> Simpson v. Commonwealth, Ky. App., 834 S.W.2d 686, 688 (1992).

<sup>12</sup> Because both parties addressed this issue in their briefs, however, we offer the following analysis by way of clarifying the law regarding this threshold inquiry. Contrary to Jones's assertions, the tip at issue is, by definition, not anonymous since the caller identified himself by name and, further, remained in communication with the dispatcher while Morse verified the accuracy of his complaint. In any event, even when an unverified tip would be insufficient to establish probable cause for an arrest or search warrant, as long as the information supplied carries sufficient "indicia of reliability," the tip supports a forcible investigatory stop under Terry. Stewart v. Commonwealth, 44 S.W.3d 376, 380 (2000). It stands to reason, therefore, that a verified tip is sufficient to support an investigatory stop. Such is the case here.

In Stewart, the Supreme Court emphasized that the information must be viewed "based on the personal observation and independent investigation of the police that would tend to corroborate significant, but not necessarily all, of the facts supplied by the [complainant]." Id. Here, as in Stewart, "there was sufficient corroboration of significant facts to create reasonable suspicion" that Jones was in possession of a weapon since the tip "included several specific details and predictive information that under the totality of the circumstances," the tip "exhibited sufficient indicia of reliability to satisfy the lesser reasonable suspicion standard to justify an investigatory stop." Id. at 382. Significantly, the Court distinguished Stewart from Florida v. J.L., 529 U.S. 266, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000), relied upon

In relevant part, Kentucky Rules of Criminal Procedure (RCr) 9.78 provides:

If at any time before trial a defendant moves to suppress, or during trial makes timely objection to the admission of evidence consisting of . . . the fruits of a search, the trial court shall conduct an evidentiary hearing outside the presence of the jury and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling. If supported by substantial evidence the factual findings of the trial court shall be conclusive.

When reviewing a circuit court's decision on a suppression motion following a hearing, we must first determine whether the factual findings of the circuit court are supported by substantial evidence.<sup>13</sup> Substantial evidence is "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men."<sup>14</sup> Second, we must

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almost exclusively by Jones in support of his position as to this issue.

<sup>13</sup> Id. (citations omitted).

<sup>14</sup> Owens-Corning Fiberglas Corp. v. Golightly, Ky., 976 S.W.2d 409, 414 (1998)(citation omitted).

conduct a de novo review to determine whether the court's decision is correct as a matter of law.<sup>15</sup>

The testimony of the arresting officer in an investigation undertaken to corroborate an informant's tip, if internally consistent and taken as true, as is the case here, constitutes substantial evidence to support factual findings in the context of a suppression hearing. This is particularly true on the unique facts presented, i.e., Morse remained in constant, albeit indirect, contact with the caller via the dispatcher thereby enabling him to independently substantiate the caller's allegations. Jones's argument in this vein amounts to an attack on Morse's credibility and, therefore, must fail. Resolving factual disputes and assessing the credibility of witnesses are functions uniquely within the province of the circuit court.<sup>16</sup>

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<sup>15</sup> Stewart, supra, n. 13, at 380.

<sup>16</sup> In its entirety, Jones's argument consists of the following:

The trial court's ruling was not based on substantial evidence. When the trial court was told that its assumption that [Morse] was alone, a fact which the court believed when it made its factual findings and legal conclusions, was not correct, the court failed to make further findings, choosing instead to summarily overrule the motion.

Having viewed the videotape of the hearing, we disagree with this characterization. Although the court did initially express uncertainty as to whether Morse had been alone during the critical time period, upon clarifying that Morse had been accompanied by his partner, the court did not hesitate to continue verbalizing its findings. A more plausible and

We find no error in the court's reliance on Morse's uncontroverted testimony. Thus, the remaining inquiry is whether Morse acted properly in conducting a limited search of Jones's car for weapons under the circumstances.

In Long,<sup>17</sup> the United States Supreme Court conclusively resolved this dispositive legal issue in favor of the Commonwealth. Beginning its analysis with a review of previous holdings applying Terry, the Court again recognized that "investigative detentions involving suspects in vehicles are especially fraught with danger" and "suspects may injure police officers and others by virtue of their access to weapons, even though they may not themselves be armed."<sup>18</sup> Of particular significance here, the Court also reiterated its holding that "articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not

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consistent explanation is that neither the court's assessment of Morse's testimony or its implications were affected by this detail.

<sup>17</sup> *Supra*, n. 6. Although the instant case differs factually from Long, the cases parallel each other in several key respects including the involvement of two officers, the suspect's location outside (at the rear as opposed to the front) the car at the time of the search and the absence of weapons on his person.

<sup>18</sup> Id. at 1047, 77 L. Ed. 2d at 1218.

inevitably," in the area within the immediate control of an arrestee into which he might reach to grab a weapon.<sup>19</sup>

Consistent with the foregoing, the Court observed that its prior cases indicated that self-protection and protection of others can "justify protective searches when police have a reasonable belief that the suspect poses a danger, that roadside encounters between police and suspects are especially hazardous, and that danger may arise from the possible presence of weapons in the area surrounding a suspect."<sup>20</sup> Accordingly, the Court concluded that the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible "if the officer possesses a reasonable belief based on 'specific and articulable facts which, when taken together with the rational inferences from those facts, reasonably warrant' the officer in believing that the suspect is dangerous and may gain immediate control of his weapons."<sup>21</sup> Further, if a suspect is "dangerous," as Jones was reasonably perceived to be here, he is no less dangerous because he is not arrested.<sup>22</sup>

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<sup>19</sup> Id. at 1048, 77 L. Ed. 2d at 1219 (citation omitted).

<sup>20</sup> Id. at 1049, 77 L. Ed. 2d at 1219.

<sup>21</sup> Id. at 1049, 77 L. Ed. 2d at 1220 (citation omitted).

<sup>22</sup> Id. at 1050, 77 L. Ed. 2d at 1220.

As in Long, the officer (Morse) did not act unreasonably in taking preventive measures to ensure that there were no weapons within [the suspect's] immediate grasp before permitting him to reenter his automobile, particularly given the potential for violence inherent in the type of complaint being investigated. Therefore, the balancing required by Terry clearly weighed in favor of allowing Morse to conduct a search of the passenger compartment of Jones's car to uncover weapons given his objectively reasonable basis for suspecting that Jones was potentially dangerous.<sup>23</sup>

In determining that a limited, protective search of the passenger compartment of an automobile is permissible during an investigative detention if the specified conditions are met, the Court engaged in the following analysis which refutes Jones's argument regarding the reasonableness of Morse's fear:

During any investigative detention, the suspect is "in the control" of the officers in the sense that he "may be briefly detained against his will . . . ." Just as a Terry suspect on the street may, despite being under the brief control of a police officer, reach into his clothing and retrieve a weapon, so might a Terry suspect in [Jones's] position break away from police

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<sup>23</sup> Id. at 1051, 77 L. Ed. 2d at 1221.

control and retrieve a weapon from his automobile. In addition, if the suspect is not placed under arrest [Jones was not at the time], he will be permitted to reenter his automobile, and he will then have access to any weapons inside. Or, [], the suspect may be permitted to reenter the vehicle before the Terry investigation is over, and again, may have access to weapons. In any event, we stress that a Terry investigation, such as the one that occurred here, involves a police investigation "at close range," when the officer remains particularly vulnerable in part because a full custodial arrest has not been effected, and the officer must make a "quick decision as to how to protect himself and others from possible danger . . . ." <sup>24</sup>

This reasoning is equally determinative on the current facts.

Because the testimony of Morse constitutes substantial evidence to support the circuit court's factual findings and the court reached a result dictated by both state and federal

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<sup>24</sup> Id. (internal citations omitted). In Dockstader v. Commonwealth, Ky. App., 802 S.W.2d 149, 151 (1991), this Court specifically adopted this reasoning from Long, observing that an officer who has detained an individual may have the "upper hand in such encounters" but the "tables can be quickly turned."

authority, its denial of Jones's motion to suppress is affirmed as is the judgment that resulted.

ALL CONCUR.

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