RENDERED: DECEMBER 5, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001479-MR

MICHAEL D. BURRELL — APPELLANT

v.

APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN A. HAYDEN, JUDGE
ACTION NO. 01-CR-00215

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: BARBER, GUIDUGLI AND PAISLEY,[1] JUDGES.

PAISLEY, JUDGE. This is an appeal from a judgment entered by the Henderson Circuit Court following a jury verdict convicting appellant of complicity to first degree robbery and receiving stolen property worth over $300. Appellant argues that the trial court erred by failing to grant his motion to suppress, that his convictions for both complicity to first degree robbery and receiving stolen property worth over $300 violated his constitutional right not to be twice placed in jeopardy for the same offense, and that the trial court erred by letting a

[1] This opinion was prepared and concurred in prior to Judge Paisley's retirement effective December 1, 2003.

witness testify in violation of his request for separation of witnesses. For the following reasons, we affirm.

On September 21, 2001, the Payday USA in Henderson County, Kentucky was robbed. Officers responded to the area immediately and observed appellant walking down the street about seven blocks from the location of the robbery. After the officers stopped appellant and placed him in handcuffs, they conducted a patdown search pursuant to Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), in an effort to dispel any fear that appellant was armed or otherwise dangerous. During the search, the officers located a backpack worn on appellant's chest instead of his back. They checked the backpack for weapons and immediately discovered a large sum of cash. The officers then took appellant back to the Payday USA for a show up. Although the clerk could not identify appellant as the robber, she was sure that the money was the same as that taken from the business. Appellant was placed under arrest and eventually convicted by jury of complicity to robbery in the first degree and receiving stolen property worth over $300. He was sentenced to ten years and one year respectively with the sentences to run concurrently. This appeal followed.

First, appellant argues that the trial court erred by failing to grant his motion to suppress the evidence obtained by the officers during their search of him. Specifically,

appellant claims that the officers did not have a reasonable, articulable suspicion that he had committed the robbery because he was not wearing the clothing described over the dispatch radio, and even though he was seven blocks from the scene of the crime, he was not sweating or out of breath when the officers approached him. Appellant further asserts that the officers' only reason for stopping him was that he was the same race as the robber. Therefore, he asserts that the trial court should have granted his motion to suppress the evidence. We disagree.

Generally, "[a]n investigatory stop under Terry v. Ohio is permissible on less than full probable cause to arrest where an officer has a reasonable, articulable suspicion that a particular person encountered was involved in or is wanted in connection with a completed felony." Collier v. Commonwealth, Ky. App., 713 S.W.2d 827, 828 (1986). Once a person is legitimately stopped, an officer may conduct a patdown search of the individual to check for weapons if the officer reasonably believes from the circumstances that the individual may be armed and dangerous. Id. "In some cases, the right to frisk for weapons will follow automatically from the circumstances, such as where the stop is for suspicion of a violent crime." Id. In reviewing the trial court's decision to deny appellant's motion to suppress, we must first determine if the court's factual findings are supported by substantial evidence, followed by a *de*

novo review to determine if the court's decision was correct as a matter of law. Stewart v. Commonwealth, Ky. App., 44 S.W.3d 376, 380 (2000).

Here, the trial court found that the officers observed appellant walking in the vicinity of the robbery, that appellant fit the officers' limited description of the suspect, and that when the officers approached appellant, he appeared nervous. There is no evidence which tends to show that these factual conclusions are clearly erroneous. We therefore hold that these facts created a reasonable, articulable suspicion concerning appellant's participation in the robbery which justified the stop and frisk of appellant. In addition, the fact that the officers believed that appellant might have just perpetrated a violent crime lends further support to the reasonableness of their search for weapons. See Collier, 713 S.W.2d at 828, Adkins v. Commonwealth, Ky., 96 S.W.3d 779, 787 (2003). Further, appellant's claim that he was impermissibly targeted because of his race is also without merit since race may be considered as a factor if the perpetrator's race was included in his description. United States v. Waldon, 206 F.3d 597 (6th Cir. 2000). In light of the circumstances, the officers were clearly entitled to search appellant and the backpack for weapons. See also Docksteader v. Commonwealth, Ky. App., 802 S.W.2d 149, 150

(1991). As such, the trial court's decision to deny appellant's motion to suppress is affirmed.

Next, appellant claims that his convictions for both complicity to first degree robbery and receiving stolen property over $300 violated his right not to be twice placed in jeopardy for the same offense. We disagree.

"Double 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, Ky., 947 S.W.2d 805, 809 (1996) (quoting Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932)). See also KRS 505.020. With respect to complicity,

> [a] person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:
>
> (a) Solicits, commands or engages in a conspiracy with such other person to commit the offense; or
> (b) Aids, counsels, or attempts to aid such person in planning or committing the offense; or
> (c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.

KRS 502.020(1). Conversely,

> [a] person is guilty of receiving stolen property when he receives, retains, or disposes of movable property of another knowing that it has been stolen, or having reason to believe that it has

> been stolen, unless the property is received, retained, or disposed of with intent to restore it to the owner.

KRS 514.110(1). Clearly, complicity to first degree robbery does not require receipt of stolen property and receiving stolen property does not require that an individual engage in a conspiracy to commit robbery. Since each crime involves factual circumstances which the other does not, appellant's convictions for both do not violate the prohibition against double jeopardy. Further, although appellant seems to argue that our analysis should involve evaluating the elements of first degree robbery rather than complicity to first degree robbery, such an analysis would not represent the actual crime for which appellant was convicted. Regardless, we do not believe that appellant could prevail under a comparison between the elements of receiving stolen property and first degree robbery due to our supreme court's recent finding that receiving stolen property is not a lesser included offense of robbery because each involves elements which the other does not. Roark v. Commonwealth, Ky., 90 S.W.3d 24, 38 (2002).

Finally, appellant argues that he was prejudiced by the fact that one of the Commonwealth's witnesses was present in the courtroom during the testimony of other witnesses resulting in the violation of appellant's request for separation of witnesses. However, this issue was not properly preserved for

review since appellant did not object at the time the witness was called to testify. Further, appellant has failed to show that the witness's testimony resulted in palpable error under RCr 10.26, as there is no evidence that the admission of this evidence affected appellant's substantial rights or otherwise resulted in a manifest injustice. Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996).

The judgment of the Henderson Circuit Court is affirmed.

ALL CONCUR.

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BRIEF AND ORAL ARGUMENT
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