

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-002301-MR

JEROME REGINALD OLDHAM

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE LEWIS G. PAISLEY, JUDGE  
INDICTMENT NO. 02-CR-00498

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION

### AFFIRMING

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BEFORE: BUCKINGHAM, GUIDUGLI AND SCHRODER, JUDGES.

BUCKINGHAM, JUDGE: Jerome Reginald Oldham appeals from a judgment of the Fayette Circuit Court wherein he was convicted of crimes and sentenced to ten years in prison. Oldham's convictions were the result of conditional guilty pleas to the offenses. On appeal, he argues that the trial court erred in denying his motion to suppress evidence. Finding no error, we affirm.

At approximately 1:00 a.m. on March 9, 2002, while on routine patrol at the intersection of Eastland Parkway and New

Circle Road in Lexington, Kentucky, Sergeant Tommy Curtsinger of the Lexington Police Department was approached by an individual who informed him that two vehicles, a white mini-van and a red or brown Oldsmobile, were parked in the rear parking lot of the Continental Inn motel. The individual told the officer that the occupants of the two vehicles appeared to be engaged in an argument and that one of the occupants of the Oldsmobile, a black male, had a gun tucked in the back waistband of his pants.

Sergeant Curtsinger proceeded to the Continental Inn and drove to the rear parking lot. He testified that upon seeing him approach, the two vehicles began pulling away from each other in opposite directions. As the Oldsmobile approached him, Sergeant Curtsinger activated his emergency equipment and initiated a stop of the vehicle. As the officer exited his vehicle, he saw the black male, Oldham, reach his right hand toward the small of his back and make a move toward the center console of the Oldsmobile. Sergeant Curtsinger immediately ordered Oldham and his passenger to show their hands.

Sergeant Curtsinger instructed Oldham to exit his vehicle, hold up his hands, and lift his shirt. He also instructed Oldham to turn around so that he could visually check him for weapons. After observing no weapons on Oldham, Sergeant Curtsinger conducted a frisk search. This search also failed to produce weapons on Oldham's person.

After the frisk was completed, Sergeant Curtsinger informed Oldham of the informant's observations. Thereafter, he asked Oldham if he was armed and if he possessed a weapon in the Oldsmobile. Oldham denied having a weapon on him. The officer then asked him what he did with the gun. Oldham replied that it was in his car.

While Sergeant Curtsinger was talking with Oldham, another police officer brought the passenger, a white male, to the rear of the Oldsmobile. The officer watched Oldham and the passenger while Sergeant Curtsinger searched Oldham's vehicle for the gun. Sergeant Curtsinger found a loaded, .25-caliber, semi-automatic handgun between the driver's seat and the console. After finding this weapon, Sergeant Curtsinger asked Oldham if he had any prior felony convictions. When Oldham replied that he did, the officer arrested him and advised him of his rights.

A Fayette County grand jury indicted Oldham for possession of a handgun by a convicted felon, carrying a concealed deadly weapon, and being a second-degree persistent felony offender. Oldham filed a motion to suppress all evidence obtained by the Commonwealth as a result of the stop. A suppression hearing was conducted, and the trial court denied Oldham's motion.

Oldham subsequently entered conditional guilty pleas pursuant to Kentucky Rules of Criminal Procedure (RCr) 8.09 to an amended charge of possession of a firearm by a convicted felon, carrying a concealed deadly weapon, and being a second-degree persistent felony offender. On October 18, 2002, the trial court rendered a final judgment sentencing Oldham to ten years in prison. Oldham's appeal followed.

Oldham argues that the trial court erred in denying his motion to suppress the evidence obtained by Sergeant Curtsinger during the search and seizure. He contends that Sergeant Curtsinger's actions violated the protections afforded by the Fourth Amendment of the United States Constitution. We disagree.

Our standard of review of an order on a suppression motion was set forth in Stewart v. Commonwealth, Ky. App., 44 S.W.3d 376 (2000). "First, the factual findings of the court are conclusive if they are supported by substantial evidence. The second prong involves a *de novo* review to determine whether the court's decision is correct as a matter of law." Id. at 380.

Generally, "the police may not search an individual without a warrant unless it can be shown that the search falls within one of the recognized exceptions to the rule." Id. at 379. However, there are exceptions to the warrant requirement.

In Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), "the United States Supreme Court balanced individual liberty interests with the public safety interest in recognizing a limited exception to the warrant requirement by sanctioning both investigatory stops and restricted pat-down searches of suspects." Stewart, 44 S.W.3d at 379.

The rule regarding investigatory stops is that "[p]olice officers may briefly detain an individual on the street, even though there is no probable cause to arrest him, if there is a reasonable suspicion that criminal activity is afoot." This court in the Stewart case further held that "[t]he existence of a reasonable articulable suspicion or probable cause is based on an analysis of all the facts in the totality of the circumstances." Id. at 379-80.

In accordance with these standards, Oldham's first argument is that the stopping of his vehicle by Sergeant Curtsinger was an unlawful investigatory stop. Oldham contends that the information the officer received from the informant and his observations as he entered the rear parking lot of the Continental Inn did not allow him to form a reasonable suspicion that criminal activity was afoot. Oldham notes that Sergeant Curtsinger did not observe anyone out of their vehicles, did not sense an argument or confrontation taking place, and observed nothing more than two vehicles that had been parked next to each

other drive away. Therefore, Oldham maintains that since the investigatory stop was unlawful, the fruits of the subsequent search should have been suppressed as evidence.

The trial court's findings of fact, which were clearly supported by substantial evidence, are conclusive. At the conclusion of a suppression hearing, the trial court made findings of fact consistent with Sergeant Curtsinger's testimony.

The trial court then determined that, based on the information received, the officer's actions were reasonable and that he had an obligation to investigate the circumstances because of the potential danger of the firearm, which might result in death or serious physical injury to a citizen. Further, the trial court determined that the observations of Sergeant Curtsinger corroborated the information given by the informant. Thus, the trial court upheld the validity of the investigatory stop.

In order to determine whether there was a reasonable articulable suspicion, this court must weigh the totality of the circumstances. See Taylor v. Commonwealth, Ky., 987 S.W.2d 302, 305 (1998). Considering the totality of the circumstances, we agree with the trial court that the officer had a reasonable articulable suspicion that criminal activity was afoot. While Oldham argues that "[w]hatever activity had taken place had

ended prior to [Sergeant Curtsinger's] arrival," we agree with the Commonwealth that the officer nonetheless had the right to make an investigatory stop. As the United States Supreme Court held in Adams v. Williams, 407 U.S. 143, 145, 92 S. Ct. 1921, 1923, 32 L. Ed. 2d 612, 616 (1972), the "Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape."

We believe the facts in the case *sub judice* are akin to those in Simpson v. Commonwealth, Ky. App., 834 S.W.2d 686 (1992). In that case, the police observed Simpson standing on a public sidewalk and in a grocery store parking lot with no apparent purpose. The officers suspected Simpson of drug dealing, and they approached him and questioned him concerning his activity. After ascertaining Simpson's identity and determining that there was an outstanding warrant for a traffic violation, the officers arrested him and conducted a search incident to the arrest. The officers discovered cocaine on Simpson's person, and he was subsequently indicted and convicted of trafficking in cocaine.

Because Simpson was "meandering back and forth" with no apparent reason on a street corner known to be frequented by drug traffickers, this court held that the officers had a

reasonable suspicion that criminal activity was afoot even though they had observed activity that was "as consistent with innocent activity as with illegal activity." Id. at 688. Likewise, in the case *sub judice*, Sergeant Curtsinger had reasonable suspicion that criminal activity was afoot.

The facts support this determination. First, the incident occurred behind a motel at 1:00 in the morning. Second, the nature of the argument or confrontation was such that it drew the attention of a passerby who then informed the police. Third, one of the participants in the argument or confrontation had a handgun. Fourth, the vehicles immediately attempted to leave the scene upon noticing the presence of the officer. See Illinois v. Wardlow, 528 U.S. 119, 124, 120 S. Ct. 673, 676, 145 L. Ed. 2d 570, 576 (2000), "[n]ervous, evasive behavior is a pertinent factor in determining reasonable suspicion." In light of the aforementioned facts, we conclude that the totality of the circumstances indicates a reasonable articulable suspicion that criminal activity was afoot.

Oldham's second argument is that the gun should have been suppressed as evidence against him because Sergeant Curtsinger did not give him his Miranda rights before asking where the gun was. The Commonwealth's first response to Oldham's argument is that Oldham was not entitled to Miranda warnings because he was not in custody when the officer inquired

as to the gun's location. See Little v. Commonwealth, Ky. App., 991 S.W.2d 141 (1999). The Commonwealth's second response to Oldham's argument is that even if Oldham was in custody, the Miranda warnings were not necessary due to the "public safety" exception. See New York v. Quarles, 467 U.S. 649, 651, 104 S. Ct. 2626, 2629, 81 L. Ed. 2d 550, 554 (1984).

As we conclude the Commonwealth's second argument is dispositive, we will address that. In the case *sub judice*, the officer suspected that Oldham had a handgun but was unaware of its exact location. In addition, the officer had observed Oldham reach his right hand toward the small of his back and make a move toward the center console of the car. Under these circumstances the officer was permitted to question Oldham concerning the gun's location prior to giving the Miranda warnings because the location of the gun was essential and relevant to the officer's safety. See United States v. Talley, 275 F.3d 560, 563 (2001), for a case involving similar facts.

Oldham's third and final argument is that the gun should have been suppressed as evidence because the search itself was illegal. Oldham notes that the officer did not ask for permission to search the vehicle for the gun and that Oldham himself did not voluntarily give consent to the search. We agree with the Commonwealth that the automobile exception to the search warrant requirement is applicable.

In Michigan v. Long, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983), the United States Supreme Court held that a police officer may conduct a search of the passenger compartment of an automobile to recover weapons if the officer has "an articulable suspicion that the suspect is potentially dangerous." 463 U.S. at 1052. In the case *sub judice*, the officer had reason to believe that Oldham was potentially dangerous because he had information from the informant that Oldham had a gun on him and because of what he had observed Oldham doing prior to exiting the vehicle. In short, we hold that the warrantless search of the vehicle for the gun was lawful pursuant to the automobile exception to the search warrant requirement.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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