

RENDERED: NOVEMBER 7, 2003; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002407-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v.

APPEAL FROM MASON CIRCUIT COURT
HONORABLE ROBERT MCGINNIS, JUDGE
ACTION NO. 02-CR-00060

DALE WAYNE HARBER

APPELLEE

OPINION

REVERSING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; McANULTY, JUDGE, AND HUDDLESTON,
SENIOR JUDGE.¹

EMBERTON, CHIEF JUDGE. The Commonwealth appeals from an order of the trial court granting Dale Harber's motion to suppress evidence obtained allegedly in violation of his Fourth Amendment right to be free from unreasonable search and seizure. After review of the record, we reverse.

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

The testimony at the suppression hearing was that at approximately 2:00 a.m., on April 27, 2002, Maysville police officers, T. C. Rice and Jeff Hord, noticed Harber and another male walking east on the corner of Forrest Avenue and Wood Street, an area known as a high crime area. The officers drove past the two, and approximately ten minutes later returned to the area and saw Harber and the other male walking in the same area but in the opposite direction. The officers pulled over the cruiser, exited and approached Harber. After expressing a general greeting, Officer Rice noticed Harber place his hands into the small of his back. Officer Rice asked appellee three or four times to show his hands. After he did not comply, Officer Rice testified that he placed his hand on his own weapon for fear Harber was concealing a weapon. Eventually, Officer Rice was able to grab Harber's arm at which time he smelled alcohol on him and noticed that he was unsteady, among other indications of intoxication. After placing him under arrest for intoxication, two rocks of cocaine fell from Harber's pants and he was then charged with possession of a controlled substance as well as intoxication.

Our standard of review in this case is that we are bound by the factual findings of the trial court unless they are clearly erroneous. The legal question, however, of whether

there was a reasonable suspicion to stop, or probable cause to search, is reviewed de novo.²

A police officer is free to approach an individual in public and engage in conversation. "Officers are entitled to the same freedom of movement that the rest of society enjoys."³ No seizure occurred when the officers merely approached Harber on the street and asked general questions. "Only when the officer by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a seizure has occurred."⁴

A police officer's duty is obviously fraught with danger and the mere approach of a citizen can have deadly consequences. As a safety precaution, officers are permitted to request a citizen to remove his hands from his pockets. Such a request is not a seizure within the Fourth Amendment.⁵

Harber refused to show his hands and Officer Rice testified that fearing Harber could have a weapon, grabbed Harber's arm. At this point a seizure occurred and there being no warrant or exigent circumstances, the officers were required to have a reasonable suspicion that criminal activity was afoot.

² Commonwealth v. Banks, Ky., 68 S.W.3d 347, 348 (2001).

³ Id. at 350.

⁴ Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

⁵ See Baker v. Commonwealth, Ky., 5 S.W.3d 142, 145 (1999).

Quoting from Terry, the court in Baker, supra, discussed the matter of determining whether there was a reasonable suspicion:

The determination "is a dual one - whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." Whether a seizure is reasonable requires a review of the totality of the circumstances, taking into consideration the level of police intrusion into the private matters of citizens and balancing it against the justification for such action.⁶
(Citations omitted.)

The facts now presented are similar to those in Baker where, at the time of the seizure, the defendant was in a high crime area late at night, in the company of a known prostitute, wearing clothing that could conceal a weapon, and refused to comply with the officer's request to remove his hands from his pockets. Finding there was a reasonable and articulable suspicion that the defendant was engaged in criminal activity, the court reasoned:

Although Appellant's conduct prior to the seizure may have been as consistent with innocent activity as with criminal activity, the fact in and of itself did not preclude Officer Richmond from entertaining a reasonable suspicion that criminal activity could have been occurring once Appellant failed to comply with the request to remove his hands from his pockets. When an officer is justified in believing that an individual, who is unquestionably not cooperative, may be armed, it would be

⁶ Id.

clearly unreasonable to deny that officer the authority to take necessary measures to determine whether the individual is, in fact, carrying a weapon, and to alleviate the threat of physical harm.⁷ (Citations omitted.)

Like the defendant in Baker, supra, Harber was walking in a high crime area and appeared to the officers to have no specific destination. Harber watched the officers, and after seeing their cruiser, traveled at a faster gate. The officers approached, and after Harber refused to remove his hands from the back of his waistband, the officers, as a safety precaution, were well within the ambit of Terry to seize Harber for the purpose of investigating his activities.

Having properly seized Harber, the officers smelled the odor of alcohol and observed physical manifestations of alcohol intoxication. The officers at this point had probable cause to arrest. The cocaine fell from Harber's pocket after the valid seizure and arrest. It was improperly suppressed.

The order of the trial court is reversed.

ALL CONCUR.

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⁷ Id. at 146.

