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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001028-MR

TERRANCE ANTHONY JONES — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 01-CR-002379

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON, KNOPF AND McANULTY, JUDGES.

JOHNSON, JUDGE: Terrance Anthony Jones has appealed from a final judgment and sentence of the Jefferson Circuit Court entered on April 16, 2003, which, following Jones's conditional guilty pleas to an amended charge of possession of a controlled substance in the first degree[1] and to being a persistent felony

[1] Kentucky Revised Statutes (KRS) 218A.1415. Possession of a controlled substance in the first degree is a Class D felony for a first offense, and a Class C felony for a second or subsequent offense.

offender in the second degree (PFO II),[2] sentenced Jones to five years' imprisonment. Having concluded that the trial court did not err by denying Jones's motion to suppress evidence, we affirm.

On October 11, 2001, Jones was indicted by a Jefferson County grand jury on one count of trafficking in a controlled substance in the first degree (cocaine),[3] and on one PFO II count. Approximately one year later, on October 24, 2002, Jones filed a motion to suppress the crack cocaine that had been seized from his person on the date of his arrest. Jones claimed that the manner in which the drugs were seized violated his rights under the Fourth Amendment to the United States Constitution, and Sections 2 and 10 of the Kentucky Constitution. Our review of the record of the suppression hearing held on December 2, 2002, reveals the following.

On June 4, 2001, Officer Jason Poston of the Louisville Police Department received a tip from a confidential informant telling him that a drug buy was going to take place "soon" in the 1400 block area of South Fourth Street in Louisville. The informant told Officer Poston that the dealer would be a large black man and that he would be driving a black

[2] KRS 532.080(2).

[3] KRS 218A.1412. Trafficking in a controlled substance in the first degree is a Class C felony for a first offense, and a Class B felony for a second or subsequent offense.

Chevrolet automobile. The informant also told Officer Poston that the man would be driving through the area slowly and that he would probably be armed.

Acting on this tip, Officer Poston, along with Lieutenant Carl Burgin and Officer Joseph Dennis, set up surveillance in the 1400 block area of South Fourth Street. After arriving on the scene, the officers observed Michael Holman, a known drug dealer and addict,[4] sitting on the steps in front of an apartment building. According to Officer Poston, Holman loitered in front of the apartment building for over an hour, despite the fact that he did not live in that immediate area.[5]

Approximately two hours after Officer Poston had received the tip from his informant, Jones appeared in the 1400 block area of South Fourth Street driving a black Chevrolet Caprice automobile. Jones, a black man standing 6'1" tall and weighing approximately 200 pounds, fit the description of the dealer in the informant's tip. Jones parked the vehicle in front of the area where Holman was loitering, got out of the car, and approached Holman. When Jones got to within a few feet

[4] During his testimony at the suppression hearing, Holman acknowledged that he had an extensive history of drug-related convictions.

[5] Holman testified that he was at the apartment building to visit a friend. However, Officer Poston testified that he never saw Holman knock on a door or attempt to enter the building.

of Holman, the officers converged on Jones and Holman, and began a search of the two individuals.[6]

Officer Poston testified that Lt. Burgin initiated a Terry[7] pat-down on Jones to search for weapons.[8] Officer Poston stated that he observed Lt. Burgin checking Jones's waistband and that shortly thereafter, Lt. Burgin was holding a baggie containing four "rocks" of crack cocaine which had been seized from Jones's person. Officer Poston stated that he did not see the exact location on Jones's person where the drugs were found, but Officer Poston testified that Lt. Burgin had told him that the drugs were found in Jones's waistband. However, both Jones and Holman testified that the drugs were pulled out from an area inside Jones's pants around his buttocks and testicles. Jones was placed under arrest and was subsequently indicted on one count of trafficking in a controlled substance in the first degree and on one PFO II count.[9]

On November 2, 2001, Jones appeared in court and entered not guilty pleas to both of the charges in his indictment. On October 24, 2002, Jones filed a motion to suppress the cocaine found on his person, arguing that it was

[6] It is not disputed that the officers did not have a warrant to search either Jones or Holman.

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

[8] Jones was not carrying a weapon at the time of his arrest.

[9] Holman was released at the scene and no charges were filed against him as a result of this incident.

the fruit of an unconstitutional search. Following a suppression hearing, the trial court entered an order denying Jones's motion to suppress on February 5, 2003.

On March 12, 2003, Jones accepted the Commonwealth's plea offer and entered conditional guilty pleas to an amended charge of possession of a controlled substance in the first degree and a PFO II charge, while preserving his right to appeal the denial of his motion to suppress. In exchange for Jones's conditional guilty pleas, the Commonwealth agreed to recommend a sentence of four years' imprisonment on the possession of a controlled substance in the first degree conviction, enhanced to a total sentence of five years' imprisonment pursuant to Jones's PFO II conviction. On April 16, 2003, after a pre-sentence investigation had been completed, the trial court followed the Commonwealth's recommendation and sentenced Jones to a total sentence of five years' imprisonment. This appeal followed.

Jones first argues that the officers lacked probable cause to conduct a full search of his person and that the drugs were therefore found and seized in an unconstitutional manner. In particular, Jones claims that while the officers did have reasonable, articulable suspicion entitling them to conduct a Terry pat-down to make sure he was unarmed, the circumstances were such that they did not have probable cause entitling them

to conduct a "full blown search."[10] We disagree and hold that the officers had probable cause to conduct a full search of Jones's person.

A full, warrantless search of an individual's person must be supported by probable cause.[11] The test for probable cause is based on a "totality of the circumstances" approach,[12] which simply asks whether "there is a fair probability that contraband or evidence of a crime will be found in a particular place."[13] In Texas v. Brown,[14] the United States Supreme Court

[10] In his brief to this Court, Jones maintains that the drugs were found inside his pants around the area of his genitals. This is contrary to Officer Poston's testimony at trial, in which he stated that Lt. Burgin had told him that the drugs were found in Jones's waistband. The trial court did not make a specific factual finding with respect to the exact location of the drugs on Jones's body. However, since we hold that the officers had probable cause which justified a full search of Jones's person, the exact location of the drugs, whether located inside his pants or around his waistband, does not change the result in this case.

[11] See Ybarra v. Illinois, 444 U.S. 85, 91, 100 S.Ct. 338, 342, 62 L.Ed.2d 238 (1979)(noting that even though the police had a valid warrant to search the bar, since the warrant did not authorize a search of Ybarra's person, the police needed probable cause "particularized with respect to Ybarra" in order to conduct a full search of his person).

[12] Illinois v. Gates, 462 U.S. 213, 230, 103 S.Ct. 2317, 2328, 76 L.Ed.2d 527 (1983). Although the Gates decision discusses probable cause in the context of search warrants issued by judges and/or magistrates, this Court has recognized that the "totality of the circumstances" test also applies when police officers conduct warrantless searches in the field. See Whisman v. Commonwealth, Ky.App., 667 S.W.2d 394, 397 (1984)(holding that "[s]urely if a judge may use the totality of circumstances approach to find probable cause in a search warrant, the police should be able to use the same approach in warrantless searches").

[13] Id. at 238.

[14] 460 U.S. 730, 742, 103 S.Ct. 1535, 1543, 75 L.Ed.2d 502 (1983). See also Dunn v. Commonwealth, Ky.App., 689 S.W.2d 23, 28 (1985)(quoting the above discussion from Brown).

discussed the basic principles and "flexible" nature of the probable cause standard:

> As the Court frequently has remarked, probable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would "warrant a man of reasonable caution in the belief," that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A "practical, nontechnical" probability that incriminating evidence is involved is all that is required. Moreover, our observation in United States v. Cortez, 449 U.S. 411, 418, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981), regarding "particularized suspicion," is equally applicable to the probable cause requirement:
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> > "The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same--and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."

Furthermore, our Supreme Court has explained that when probable cause is based in part on a tip from an informant, the "totality of the circumstances test requires a balancing of the relative indicia of reliability accompanying an informant's

tip."[15] Finally, as the United States Supreme Court noted in Gates, an informant's tip predicting future behavior, which is then corroborated by observations of the investigating officers, can result in a finding of probable cause.[16]

Applying these principles to the facts of the case sub judice, we conclude that the officers had probable cause to conduct a full search of Jones's person. Officer Poston testified that his informant had provided information to him on eight or nine previous occasions and that the informant had always provided reliable information. Officer Poston stated that although not all of the previous tips had led to arrests, the informant had never provided false information.

Further, Officer Poston stated that his informant told him that a large black man, slowly driving a black Chevrolet automobile, would be entering the 1400 block area of South Fourth Street to conduct a drug deal. Officer Poston testified that after setting up surveillance, he and the other officers observed Jones, a black man standing approximately 6'1" tall and weighing 200 pounds, slowly drive a black Chevrolet Caprice automobile into the 1400 block area of South Fourth Street. Finally, Officer Poston stated that upon exiting the vehicle, Jones approached Holman, a person who had been observed

[15] Lovett v. Commonwealth, Ky., 103 S.W.3d 72, 78 (2003)(citing Gates, 462 U.S. at 234).

[16] Gates, supra at 243-46.

loitering in the area for no apparent reason, and a person that the officers knew to be a drug dealer and addict.

Hence, based on the "totality of the circumstances," we conclude that the officers had probable cause to conduct a full search of Jones's person. Officer Poston's informant, who had always provided reliable information, gave a detailed description of future events, which was later corroborated by the officers' own observations. Coupling these facts with the officers' knowledge regarding Holman's reputation as a drug dealer and addict, and Holman's odd behavior on the date in question, could reasonably lead a police officer to the conclusion that "there [was] a fair probability that contraband or evidence of a crime [would] be found" on Jones's person. Accordingly, the officers had probable cause to conduct a full search of Jones's person, and the crack cocaine found in his possession was not seized in an unconstitutional manner.

Jones also argues that the "plain feel" doctrine did not justify the search and subsequent seizure of the cocaine found on his person.[17] However, having already concluded that the officers had probable cause to conduct a full search of Jones's person, we need not discuss this argument on appeal.

[17] See Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993)(discussing the "plain feel" doctrine, which authorizes the warrantless seizure of contraband if, during an otherwise lawful pat-down, the identity of the object is "immediately apparent" to the officer).

Based on the foregoing, the final judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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