

RENDERED: October 29, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001123-MR

JOSHUA E. SOWDER

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JULIA HYLTON ADAMS, JUDGE
ACTION NO. 02-CR-00179

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JOHNSON AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.¹

EMBERTON, SENIOR JUDGE: Joshua Sowder entered a conditional plea of guilty to one count of possession of a methamphetamine precursor, reserving for appeal the denial of his motion to suppress the evidence against him. We affirm.

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

At the suppression hearing² it was established that when Berea City Police Officers Thompson and Pennington responded to a call from Rite Aid Pharmacy concerning suspicious activity of three unidentified people related to the purchase of pseudoephedrine, as well as possible shoplifting. At the time Officer Pennington arrived at the store parking lot, Sergeant Thompson was in the process of detaining two young men who had been identified by store employees as persons who had aroused their suspicions and set off an alarm as they left the store. One of these individuals was still inside a gold Mazda vehicle and the other was being searched by Sergeant Thompson. Officer Pennington told the person inside the car to remain in the vehicle and keep his hands on the wheel in plain sight. The store employees also informed the officers that another person who had been part of the suspicious activity was still inside. Officer Pennington then entered the store and store employees pointed out appellant and a female companion. Officer Pennington testified that when he made eye contact with appellant, appellant moved away and headed for the door where Officer Pennington stopped him and asked him to step outside.

² Although appellee argues in its brief that the record on appeal does not contain the suppression hearing, we have determined that the tape of that hearing had been properly designated by counsel for appellant but inadvertently omitted in the preparation of the record. Accordingly, the court on its own motion obtained a supplemental certification of the record to include the omitted tape. We are thus able to review this case on the basis of a complete record of proceedings.

He stated that he advised appellant that he intended to search him as an officer safety measure. In the course of that search, a black pouch containing three pills and a wadded piece of aluminum foil containing burnt residue was discovered.

Sergeant Thompson testified that he observed the person in the Mazda was moving around suspiciously and was not keeping his hands on the wheel as directed. He subsequently asked that person to step out of the car and, as he did so, the officer noticed several blister packs of pills lodged between the door jam and the seat. The officers suspected that the pills found on appellant and the blister packs in the car were precursors to the manufacture of methamphetamine. A search of the vehicle revealed a significant number of pills also believed to be precursors.

Appellant's motion to suppress the evidence against him was predicated upon the theory that he was subjected to an unconstitutional search because Officer Pennington had no articulable suspicion that he was armed or dangerous. In rejecting that contention, the trial court noted that the officers were at the scene to investigate activity related to the purchase of over-the-counter drugs sufficiently suspicious to alarm store employees, as well as probable shoplifting. The officers were confronted with a situation of having three separate suspects in different locations, with a reasonable

suspicion that drug activity was involved. Appellant had been specifically identified by store personnel as being involved in the activity that precipitated the call to police. Based upon these facts, the trial court concluded that the officer had a reasonable concern for his safety and that of Sergeant Thompson and thus the search fell within the safety exception to the warrantless search prohibition. We find no error in that determination.

As recently reaffirmed by the Supreme Court of Kentucky in Hughes v. Commonwealth,³ "the 'clearly erroneous' standard of review applies to a trial court's findings on a motion to suppress evidence obtained during a search." The factual determinations of the trial court are conclusive if supported by substantial evidence.⁴ Our review of the testimony of the officers convinces us that there is ample evidentiary support for the findings in this case and we thus find no basis for setting them aside. Furthermore, the trial court's rationale concerning officer safety is, in our opinion, entirely appropriate. Two officers were confronted with specifically identified suspects in three different locations, two of whom were acting in a suspicious manner. There can be little doubt that, under these circumstances, the search of appellant fits

³ Ky., 87 S.W.3d 850, 852 (2002).

⁴ Kentucky Rules of Criminal Procedure (RCr) 9.78.

precisely within the analysis of stop and frisk searches set out in Commonwealth v. Banks:⁵

However, the test for a Terry stop and frisk is not whether an officer can conclude that an individual is engaging in criminal activity, but rather whether the officer can articulate reasonable facts to suspect that criminal activity may be afoot and that the suspect may be armed and dangerous. . . . The totality of the circumstances must be evaluated to determine the probability of criminal conduct, rather than the certainty. (Citations omitted, emphasis in original.)

Because we have concluded that appellant was not subjected to an unconstitutional search, we need not address the "inevitable discovery" issue which relates to admission of evidence unlawfully obtained.

The judgment is affirmed.

ALL CONCUR.

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⁵ Ky., 68 S.W.3d 347,350-51 (2001).