

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001136-MR

DERWIN WAYNE FIELDS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 03-CR-00025

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** *

BEFORE: JOHNSON, TAYLOR AND VANMETER, JUDGES.

JOHNSON, JUDGE: Derwin Wayne Fields has appealed from a final judgment and sentence of the Fayette Circuit Court entered on April 30, 2003, which, following Fields's conditional guilty pleas to possession of a controlled substance in the first degree,¹ possession of drug paraphernalia,² and to being a persistent felony offender in the first degree (PFO I),³

¹ Kentucky Revised Statutes (KRS) 218A.1415.

² KRS 218A.500.

³ KRS 532.080(3).

sentenced Fields to ten years' imprisonment. Having concluded that probable cause was not a sufficient basis to justify Fields's warrantless arrest for criminal trespass in the third degree,⁴ and that the crack pipe and cocaine seized during the search incident to his arrest should have therefore been suppressed, we reverse and remand.

On January 7, 2003, Fields was indicted by a Fayette County grand jury on one count of possession of a controlled substance in the first degree, one count of possession of drug paraphernalia, one count of criminal trespass in the third degree, and for being a PFO I. The grand jury charged that on or around November 12, 2002, Fields was unlawfully trespassing on property owned by the Lexington Housing Authority, while in possession of a crack pipe and cocaine.

On January 31, 2003, Fields filed a motion to suppress the evidence found on his person, i.e., the cocaine and the crack pipe, arguing that the items had been seized in violation of the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution. A suppression hearing was held on February 5, 2003, after which the trial court denied Fields's motion to suppress.

Following the denial of his motion to suppress, Fields accepted the Commonwealth's plea offer and entered conditional

⁴ KRS 511.080.

guilty pleas to the possession of a controlled substance in the first degree charge, the possession of drug paraphernalia charge, and the PFO I charge, while preserving his right to appeal the denial of his motion to suppress. In exchange for Fields's conditional guilty pleas, the Commonwealth agreed to recommend dismissal of the charge of criminal trespass in the third degree. In addition, the Commonwealth agreed to recommend that Fields be given the minimum one-year sentence on his conviction for possession of a controlled substance in the first degree, and 12 months on his conviction for possession of drug paraphernalia, which would then be enhanced to ten years' imprisonment pursuant to the PFO I conviction.

On April 30, 2003, after a pre-sentence investigation had been completed, the trial court followed the Commonwealth's recommendation and sentenced Fields to 12 months in jail for the conviction for possession of drug paraphernalia, and one year imprisonment for the conviction for possession of a controlled substance in the first degree, which was then enhanced to ten years' imprisonment pursuant to the PFO I conviction.⁵ This appeal followed.

As we mentioned above, a suppression hearing was held on February 5, 2003, to determine the legality of the seizure of

⁵ Fields's sentence for the conviction for possession of drug paraphernalia was ordered to run concurrently with his other sentence, which resulted in a total sentence of ten years' imprisonment.

the contraband found on Fields's person. Detective Keith Ford of the Lexington Police Department was the only witness to testify at this hearing. Det. Ford testified that on or around November 12, 2002, he and other officers from the Lexington Police Department were in the Arbor Grove area looking for a suspect who had previously sold drugs to an undercover officer.⁶ Det. Ford stated that as he drove by an apartment complex owned by the Lexington Housing Authority, he observed Fields abruptly turn and walk away from his police cruiser. Det. Ford testified that Fields repeated these 180° turns twice more in what Det. Ford described as attempts to avoid police contact.

Det. Ford stated that Fields eventually approached him after Det. Ford had twice called out to Fields. Although Fields told Det. Ford that he was at the apartment complex visiting his "peoples," Det. Ford testified that Fields could not provide a name or address of anyone who lived at the apartment complex. Det. Ford stated that he then placed Fields under arrest for criminal trespassing, based upon the fact that the apartment complex was marked "no trespassing," "no loitering," and "residents and guests only." During the ensuing search of Fields's person incident to his arrest, Det. Ford found and seized the cocaine and the crack pipe.

⁶ There has been no allegation that Fields was the individual who had sold the drugs to the undercover officer.

On appeal, Fields first argues that he was unconstitutionally seized when Det. Ford began questioning him about his reasons for being at the apartment complex. Assuming, arguendo, that Det. Ford “seized” Fields by initiating this conversation, we conclude that Det. Ford had the requisite reasonable, articulable suspicion to conduct a brief, investigatory stop.⁷

In Illinois v. Wardlow,⁸ the United States Supreme Court stated that a suspect’s unprovoked, evasive maneuvers could provide the requisite reasonable, articulable suspicion to justify a brief, Terry stop investigation:

In this case, moreover, it was not merely respondent’s presence in an area of heavy narcotics trafficking that aroused the officers’ suspicion, but his unprovoked flight upon noticing the police. Our cases have also recognized that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion. Headlong flight--wherever it occurs-- is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such. In reviewing the propriety of an officer’s conduct, courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the

⁷ See Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)(holding that officers may conduct a brief, investigatory stop if there is reasonable, articulable suspicion that criminal activity may be afoot).

⁸ 528 U.S. 119, 124-25, 120 S.Ct. 673, 676, 145 L.Ed.2d 570 (2000).

determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior [citations omitted].

Such a holding is entirely consistent with our decision in Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983), where we held that when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business. And any "refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." But unprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not "going about one's business"; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning [citations omitted].

In the case sub judice, Det. Ford testified that he and the other officers were looking for a suspect in an area where a controlled drug transaction had just taken place. Det. Ford further stated that Fields, without being provoked, thrice turned and walked away from him in what appeared to be an attempt to avoid police contact. Accordingly, if Det. Ford's initial conversation with Fields did constitute a "seizure," we hold that Det. Ford had the requisite reasonable, articulable suspicion to conduct a brief, investigatory stop.

Fields next claims that probable cause was not a sufficient basis to justify his warrantless arrest for criminal trespass in the third degree. Hence, Fields contends that the cocaine and the crack pipe seized during the search incident to his arrest should have been suppressed. We agree.

Whether a police officer is authorized to make an arrest for a particular offense depends, ordinarily, on state law.⁹ In addition, “[t]he fact of a lawful arrest, standing alone, authorizes a search” of the individual’s person.¹⁰ Pursuant to KRS 431.005(1)(e), an officer may make a lawful, warrantless arrest for criminal trespass in the third degree if the offense is committed in the officer’s presence. However, throughout the proceedings below, the Commonwealth never argued that Fields committed the offense of criminal trespass in the third degree in the presence of Det. Ford. Rather, the Commonwealth consistently maintained that Det. Ford had probable cause to believe that Fields was committing the offense of criminal trespass in the third degree, and that as such, Det. Ford was justified in arresting Fields for that offense and conducting a search of his person incident to that arrest. This is not the proper standard.

⁹ Michigan v. DeFillippo, 443 U.S. 31, 36, 99 S.Ct. 2627, 2631, 61 L.Ed.2d 343 (1979).

¹⁰ Id. 443 U.S. at 35.

In Mash v. Commonwealth,¹¹ our Supreme Court clearly held that if an individual has been arrested without a warrant for an offense which requires that it be committed in the presence of the arresting officer, probable cause that the person has committed that offense will not justify the warrantless arrest. As we stated above, the Commonwealth never pursued the theory that Fields committed the offense of criminal trespass in the third degree in the presence of Det. Ford. Consequently, the trial court never made any factual findings to that effect. Although the Commonwealth has proffered this argument for the first time on appeal, it "will not be permitted to feed one can of worms to the trial judge and another to the appellate court."¹²

Therefore, since Det. Ford was not justified in arresting Fields based solely on his probable cause belief that Fields was committing the offense of criminal trespass in the third degree, the cocaine and crack pipe were unlawfully seized and should have been suppressed. Accordingly, we reverse the trial court's order denying Fields's motion to suppress.

Based on the foregoing, the judgment of the Fayette Circuit Court is reversed and this matter is remanded to the

¹¹ Ky., 769 S.W.2d 42, 43-44 (1989).

¹² Kennedy v. Commonwealth, Ky., 544 S.W.2d 219, 221 (1976).

trial court to allow Field to withdraw his conditional pleas of guilty.

ALL CONCUR.

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