

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-001499-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT  
v. HONORABLE BARRY WILLETT, JUDGE  
ACTION NOS. 01-CR-001630 AND 01-CR-001896

LAVELLE NEAL

APPELLEE

OPINION  
AFFIRMING IN PART, REVERSING IN PART  
AND REMANDING

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BEFORE: GUIDUGLI, JOHNSON AND MINTON, JUDGES.

JOHNSON, JUDGE: The Commonwealth has filed an interlocutory appeal from an order of the Jefferson Circuit Court entered on June 25, 2003, which granted Lavelle Neal's motion to suppress evidence against him, and sua sponte dismissed both of the indictments pending against him. Having concluded that the trial court did not err by determining that the plain-feel doctrine did not justify the removal of a brown paper bag from Neal's person, we affirm that portion of the trial court's

order. Having further concluded that the trial court made clearly erroneous findings with respect to the issue of whether Neal consented to the removal of the bag from his person, and that the trial court erred by sua sponte dismissing both of the indictments against Neal, we reverse and remand for further proceedings.

On July 10, 2001, Neal was indicted by a Jefferson County grand jury on one count of trafficking in a controlled substance in the first degree.<sup>1</sup> Approximately one month later, on August 8, 2001, a Jefferson County grand jury indicted Neal for being a persistent felony offender in the second degree.<sup>2</sup> Neal entered pleas of not guilty to both of the charges.

On October 15, 2001, Neal filed a motion to suppress evidence, arguing that the crack cocaine found on his person had been seized pursuant to an unconstitutional search. On June 18, 2003, the morning of the scheduled trial, the trial court conducted an evidentiary hearing regarding Neal's motion to suppress. Our review of the record of that hearing reveals the following.

On January 4, 2000, Detective Barron Morgan and Officer Steve Colebank of the Louisville Police Department were dispatched to a domestic disturbance call involving Neal and

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<sup>1</sup> Kentucky Revised Statutes (KRS) 218A.1412.

<sup>2</sup> KRS 532.080(2).

Tiffany Edmonds, Neal's girlfriend at the time. Both Det. Morgan and Officer Colebank testified that upon entering Edmonds's apartment, they noticed Neal sitting on a couch with his back turned toward the officers and his hands concealed in front of him. Both Det. Morgan and Officer Colebank stated that Neal did not acknowledge their presence after they entered the apartment.

After determining that there was no grounds upon which to arrest Neal, Det. Morgan testified that he informed Neal that he should leave Edmonds's apartment. Det. Morgan stated that as Neal got up and walked toward the door, he noticed a bulge sticking out from underneath Neal's jacket. Det. Morgan testified that he was concerned that Neal could have been concealing a weapon, so he stopped Neal and conducted a Terry<sup>3</sup> pat-down.<sup>4</sup> Det. Morgan further stated that upon feeling the bulge, he immediately recognized that the object was crack cocaine.

Det. Morgan asked Neal what the object was, and according to Det. Morgan's testimony, Neal stated that it was money. Det. Morgan testified that he then asked Neal if he could remove the object from his jacket. Det. Morgan stated

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<sup>3</sup> Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

<sup>4</sup> Det. Morgan stated that he did not want Neal to leave the apartment armed out of concern that he might either ambush the officers outside or return to the apartment and harm Edmonds.

that Neal told him he could remove the object from his jacket. Consequently, Det. Morgan removed the object from Neal's jacket, which turned out to be a brown paper bag containing crack cocaine. Neal was then immediately placed under arrest. Officer Colebank's testimony corroborated the testimony given by Det. Morgan.

After considering the evidence presented at the suppression hearing, the trial court granted Neal's motion to suppress evidence. The trial court found based on Det. Morgan's testimony that Det. Morgan had removed the bag from underneath Neal's jacket without his consent. The trial court further "reject[ed] the argument asserted by the Commonwealth that the 'plain feel' rule" justified the removal of the bag. Finally, the trial court sua sponte dismissed both of the indictments against Neal. This appeal followed.

We first address the Commonwealth's claim that the trial court erred by concluding that the plain-feel doctrine did not justify the removal of the bag from underneath Neal's jacket. The seizure of contraband pursuant to the plain-feel doctrine requires, inter alia, a determination that the illegal nature of the object felt during the Terry pat-down was "immediately apparent" to the investigating officer.<sup>5</sup> If the

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<sup>5</sup> Commonwealth v. Whitmore, Ky., 92 S.W.3d 76, 80 (2002)(holding that "[i]n Kentucky, in determining whether a 'plain feel' or 'plain touch' rule is applicable, it has been concluded that a narrowly drawn exception to the

object was in a container shielding its identity, or if the officer manipulated the object prior to determining its identity, the plain-feel doctrine will not justify the seizure of the object.<sup>6</sup>

In the case at bar, the trial court found that "the brown paper bag would have shielded the identity of the drugs," and that "it [was] not likely that the officer could have immediately known that the suspect object was contraband without [ ] excessive further manipulation" prior to removing the bag from Neal's person. These findings are supported by substantial evidence in the record. Det. Morgan testified that the crack cocaine was located in a brown paper bag underneath Neal's jacket. Hence, there was substantial evidence to support the trial court's determination that Det. Morgan was unable to identify the object in the bag as being crack cocaine without improperly manipulating the object beyond what is allowed in a Terry pat-down. Accordingly, since the trial court's findings

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requirement for a warrant is appropriate when the requirements of Terry, supra, are otherwise met and the nonthreatening contraband is immediately apparent from a sense of touch" [citations omitted]).

<sup>6</sup> Id. (stating that "[w]e are persuaded by those federal circuit court decisions that hold that evidence can be properly seized under the plain feel doctrine unless the officer doing the pat down manipulated the object in some way before determining it to be contraband or if the contraband is in a container, thus, making its identity not immediately apparent").

are supported by substantial evidence in the record,<sup>7</sup> we affirm its determination that the plain-feel doctrine did not justify the removal of the bag from Neal's person.

We next address the Commonwealth's claim that the trial court "clearly erred" by finding that Det. Morgan testified that he removed the bag from underneath Neal's jacket without his consent. Factual findings made by the trial court regarding a motion to suppress will be upheld on appellate review unless they are found to be clearly erroneous.<sup>8</sup> A factual finding is not clearly erroneous if it is supported by substantial evidence.<sup>9</sup>

In the case sub judice, the trial court found in part that "[Det.] Morgan further testified that without consent he physically retrieved the drugs from [Neal's jacket], revealing a brown paper bag containing crack cocaine." We agree with the Commonwealth and hold that this finding by the trial court was clearly erroneous.

On three occasions during Det. Morgan's testimony, he stated that after feeling the bulge in Neal's jacket pursuant to

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<sup>7</sup> See Baltimore v. Commonwealth, Ky.App., 119 S.W.3d 532, 539 (2003)(holding that factual findings "are conclusive if they are not clearly erroneous and are supported by substantial evidence").

<sup>8</sup> Hughes v. Commonwealth, Ky., 87 S.W.3d 850, 852 (2002). See also Kentucky Rules of Criminal Procedure (RCr) 9.78.

<sup>9</sup> See Baltimore, 119 S.W.3d at 539.

the Terry pat-down, he asked Neal if he could remove the object from Neal's jacket:

I asked Mr. Neal what was it. He said it was his money. I knew he was lying. I told him it was crack cocaine. He said "No, it's my money." I then asked him could I retrieve the bag from his jacket. He said, "Yes."

. . .

I asked [Mr. Neal] what it was. He said it was money. I told him no, it was crack cocaine. He said, "No, it's my money." Then I asked could I take it out of his jacket. He said, "Yes."

. . .

After I felt the bag, I don't remember if I held on to it or not, but I remember asking him could I get the bag and he said, "Yes." After he said it was his money, I asked him if I could retrieve the bag. He said, "Yes."

Simply stated, there is nothing in the record to support the trial court's finding that "[Det.] Morgan testified that without consent he physically retrieved the drugs from [Neal's jacket]." On the contrary, Det. Morgan stated three times during his testimony that he asked Neal for his consent to remove the bag from his jacket, and that Neal answered in the affirmative.<sup>10</sup> Accordingly, we reverse this portion of the trial court's order, and remand with instructions to reconsider the

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<sup>10</sup> In addition to Det. Morgan's testimony, Officer Colebank also testified that Neal consented to the removal of the object from his jacket.

officers' testimony concerning the issue of consent. Since the trial court made erroneous findings with respect to this issue, it will be necessary on remand for the trial court to make additional findings regarding whether Neal voluntarily consented to the search of his person. In other words, the record is clear that Det. Morgan claimed that Neal voluntarily consented to the search, but the trial court must make a finding as to whether it accepts Det. Morgan's version of the events.

We next turn to the Commonwealth's argument that the trial court erred by sua sponte dismissing both of the indictments against Neal. In Commonwealth v. Isham,<sup>11</sup> our Supreme Court discussed the authority of a trial court to dismiss an indictment against a criminal defendant:

The Commonwealth also contends that the Court of Appeals erred by concluding that the district court had the authority to dismiss the criminal complaint against Isham. It is argued that the authority to dismiss a criminal complaint before trial may only be exercised by the Commonwealth, and the trial court may only dismiss via a directed verdict following a trial. We agree.

RCr 9.64 provides that "[t]he attorney for the Commonwealth, with the permission of the court, may dismiss the indictment, information, complaint or uniform citation prior to the swearing of the jury or, in a non-jury case, prior to the swearing of the first witness."

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<sup>11</sup> Ky., 98 S.W.3d 59, 62 (2003).

Hence, the trial court lacked the authority to sua sponte dismiss the indictments against Neal. Accordingly, we reverse that portion of the trial court's order dismissing the indictments against Neal, and remand this matter for further proceedings.

Finally, we note that Neal claims in his brief that the trial court erred by determining that the initial Terry pat-down was justified. Neal's argument with respect to this issue is in the nature of a cross-appeal. However, while KRS 22A.020(4) allows the Commonwealth to appeal from an interlocutory order granting a motion to suppress, "there is no comparable provision for an appeal by the defendant."<sup>12</sup> Therefore, if on remand the trial court denies Neal's motion to suppress, this is an issue which may be preserved for later appellate review.

Based on the foregoing, the order of the Jefferson Circuit Court is affirmed in part, reversed in part, and this matter is remanded for further proceedings consistent with this Opinion.

ALL CONCUR.

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<sup>12</sup> Evans v. Commonwealth, Ky., 645 S.W.2d 346, 347 (1982).

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