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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002739-MR

MARK RILEY — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
ACTION NO. 03-CR-00275

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM, DYCHE, AND GUIDUGLI, JUDGES.

BUCKINGHAM, JUDGE: Mark Riley appeals from a final judgment of the Kenton Circuit Court wherein he was convicted of first-degree trafficking in a controlled substance (second offense) and was sentenced to fifteen years in prison. The charge and conviction arose after Riley was apprehended by police officers with nineteen rocks of crack cocaine and $200 in cash in his possession. The sole issue in this appeal is whether the trial court properly denied Riley's motion to suppress the evidence. We conclude that it did, and we thus affirm.

Several days prior to Riley's arrest, an incident occurred that has relevance to this situation. Officer Bill Conrad, with the Covington Police Department, was on routine patrol when he noticed four or five African-American males gathered near the front steps of a vacant house located at 220 East Robbins Street in Covington. Officer Conrad testified at the suppression hearing that the owner of the house had previously asked police to watch the house for trespassers.

As Officer Conrad stopped his patrol car and exited in front of the house, the group of men stood up. As the officer approached them, one or more of the men taunted one subject into running away. Officer Conrad gave chase but failed to catch the subject, although he stated that he got a good look at the subject's face and noted that the subject was wearing a distinctive tan and brown sweatshirt. He also broadcasted a description of the sweatshirt over the police radio. When Officer Conrad returned to the house, the remaining men had dispersed.

Several days later, on April 17, 2003, Officer Robert Auton, who was on routine patrol in his car, observed an African-American male wearing a sweatshirt that matched the description given by Officer Conrad during his pursuit. Officer Auton contacted Officer Conrad, who drove to the location and recognized Riley, both by his face and by his sweatshirt, as

being the subject who had fled from him a few days earlier. Both officers stopped, exited their vehicles, and began to approach Riley. Riley, who had been walking down the street, immediately began backing away. Officer Conrad testified that, although he directed Riley not to run, Riley ran. Both officers pursued the subject, but Riley was eventually tackled and apprehended by Officer Jeff Hamblin who had driven ahead of the subject. As Officer Hamblin tackled Riley, a package of nineteen individually wrapped rocks of crack cocaine he had been trying to stick in his mouth flew to the ground. A subsequent search of Riley's pocket led to the discovery of ten $20 bills.

Based on the contraband recovered and based on Riley's prior record, he was indicted on one count of first-degree trafficking in a controlled substance, second offense. He filed a motion to have the evidence suppressed, and an evidentiary hearing was held pursuant to RCr[1] 9.78. Officer Conrad and Officer Auton testified as to the facts related above, and Riley testified for the limited purpose of establishing that a popular rap musician developed the sweatshirt and that it was popular with young African-American men. The trial judge denied Riley's motion to suppress the evidence, and Riley was convicted of the offense by a jury. Pursuant to the jury's recommendation, the

[1] Kentucky Rules of Criminal Procedure.

court sentenced Riley to fifteen years in prison. This appeal followed.

Our standard of review of a denial of a motion to suppress evidence contains a two-part analysis:

> First, factual findings of the court involving historical facts are conclusive if they are not clearly erroneous and are supported by substantial evidence. Second, the ultimate issue of the existence of reasonable suspicion or probable cause is a mixed question of law and fact subject to de novo review.

Baltimore v. Commonwealth, 119 S.W.3d 532, 539 (Ky. App. 2003). See also Ornelas v. United States, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996).

Riley argues that he was subjected to an unreasonable search and seizure which is prohibited by the Fourth Amendment of the U.S. Constitution and by Section 10 of the Kentucky Constitution. He claims that he was "seized" once the two officers approached him and told him not to run. He maintains that his being seized by the officers was not based on their suspicion of any wrongdoing on his part but was based on his not acceding to the officers' demand for identification, which, he argues, did not require a response from him.

A police officer may stop and detain a citizen when the officer observes unusual conduct leading him or her to reasonably conclude, in light of experience, that criminal

activity is afoot. Terry v. Ohio, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). We further explained in the Baltimore case that:

> There are three types of interaction between police and citizens: consensual encounters, temporary detentions generally referred to as *Terry* stops, and arrests. The protection against search and seizure provided by the Fourth Amendment to the United States Constitution applies only to the latter two types. Generally, under the Fourth Amendment, an official seizure of a person must be supported by probable cause, even if no formal arrest of the person is made. However, there are various narrow exceptions based on the extent and type of intrusion of personal liberty and the government interest involved. In the seminal case of Terry v. Ohio, the Supreme Court held that a brief investigative stop, detention and frisk for weapons short of a traditional arrest based on reasonable suspicion does not violate the Fourth Amendment. Terry recognized that as an initial matter, there must be a "seizure" before the protections of the Fourth Amendment requiring the lesser standard of reasonable suspicion are triggered. A police officer may approach a person, identify himself as a police officer and ask a few questions without implicating the Fourth Amendment. A "seizure" occurs when the police detain an individual under circumstances where a reasonable person would feel that he or she is not at liberty to leave.

119 S.W.3d at 537.

In Illinois v. Wardlow, 528 U.S. 119, 123, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000), the U.S. Supreme Court stated:

> While "reasonable suspicion" is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making a stop. [Citation omitted.] The officer must be able to articulate more than an "inchoate and unparticularized suspicion or 'hunch'" of criminal activity.

In Commonwealth v. Banks, 68 S.W.3d 347 (Ky. 2001), the Kentucky Supreme Court stated that "the level of articulable suspicion necessary to justify a stop is considerably less than proof of wrongdoing by preponderance of the evidence." Id. at 351.

In applying the two-part analysis set forth by the U.S. Supreme Court in the Ornelas case, our first determination is whether the trial court's factual findings are not clearly erroneous and are supported by substantial evidence. See Baltimore, 119 S.W.3d at 539. The testimony of the officers at the suppression hearing was uncontradicted. Because the court's findings were based on this substantial evidence, we cannot say that they were clearly erroneous.

Our final determination is whether the officers were acting on a reasonable articulable suspicion that criminal activity was afoot when they stopped Riley and then chased him down after he fled. Riley argues that a police officer's desire to obtain someone's identity is insufficient to support a *Terry* stop. See Brown v. Texas, 443 U.S. 47, 52, 99 S.Ct. 2637, 61

L.Ed.2d 357 (1979). On the other hand, the Commonwealth argues that we must consider the totality of the circumstances when evaluating the validity of an investigative stop. See United States v. Cortez, 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981). The Commonwealth also maintains that an individual's nervous, evasive behavior is a pertinent factor in determining reasonable suspicion. See Wardlow, 528 U.S. at 124.

The totality of circumstances as set forth above gave the officers reasonable suspicion to stop and question Riley. First, Riley had been observed trespassing on private property just a few days prior to this stop, and he had fled from the scene when the police approached. Second, as the officers approached Riley, who had been identified by Officer Conrad as the person fleeing the scene a few days earlier, he immediately began backing away and again attempted to flee. Under the aforementioned authorities, we conclude that the officers had a reasonable suspicion that "criminal activity was afoot." Thus, the trial court properly denied Riley's motion to suppress the evidence.

The judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

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