

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-000903-MR

MYREE MARSHALL

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
INDICTMENT NO. 02-CR-00300

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: HENRY, TACKETT, AND VANMETER, JUDGES.

HENRY, JUDGE: Myree Marshall entered a conditional plea of guilty pursuant to RCr¹ 8.09, to one count of First Degree Trafficking in a Controlled Substance-Cocaine², and to one count of Second Degree Persistent Felony Offender³. He was sentenced to ten years' imprisonment on the trafficking count and fifteen years on the persistent felony offender count. The fifteen-year

¹Kentucky Rules of Criminal Procedure.

²Proscribed by Kentucky Revised Statutes (KRS) 218A.1412; see also KRS 218A.010(15)(e) and (28); KRS 218A.070(1)(d).

³Proscribed by KRS 532.080.

sentence was imposed in lieu of the ten-year sentence. He appeals from the order of the McCracken Circuit Court overruling his motion to suppress the introduction in evidence of a quantity of crack cocaine seized from his person after a pat-down search. We vacate and remand for further proceedings.

In reviewing suppression orders, we first review the trial court's factual findings using a clearly erroneous standard, and then review the court's application of the law to those facts de novo. Welch v. Commonwealth, 149 S.W.3d 407, 409 (Ky. 2004), citing Ornelas v. United States, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996).

The only witness who testified at the suppression hearing held on January 17, 2003, was Kentucky State Trooper Harvey Baxter. In 2002, Trooper Baxter was an officer of the Paducah City Police Department. According to Baxter's videotaped testimony, on August 14, 2002, Baxter and Officer Rundles, also a Paducah police officer, were patrolling together. They saw Charles Huff, the Defendant Myree Marshall and another man known to Officer Baxter only as Sierra, walking together. Officer Rundles believed that a bench warrant had been issued for Huff's arrest. The officers stopped the car and approached the three men. While Officer Rundles talked to Huff, Officer Baxter talked to Sierra and Marshall. Baxter had had previous interactions with Marshall concerning alcohol and

Marshall's having been barred from the property where the officers encountered the men. Officer Rundles noticed Huff talking oddly, without opening his mouth, and saw him swallow something. Officer Rundles made Officer Baxter aware that Huff had swallowed something and said something to the effect that Baxter should see if the other two men had anything. Baxter noticed that Marshall appeared nervous and kept putting his hands in his pockets. Baxter asked Marshall if he could search him for drugs, and Marshall replied that he did not have any drugs and did not want to be searched. Baxter then told Marshall that his life had been threatened in that neighborhood, and asked Marshall if he could pat him down for weapons. Marshall denied that he had weapons, but consented to the pat-down. Baxter patted Marshall down from the front, then turned him around to pat him down from the back. When he did so the rear pocket of Marshall's baggy pants gaped open and Baxter could see a prescription pill bottle in Marshall's open pocket. Baxter asked Marshall what was in the pill bottle and Marshall said that the bottle did not belong to him, it belonged to Huff, and told Baxter to take the bottle out and give it to Huff. When Baxter removed the bottle he could see that it contained what appeared to be rocks of crack cocaine. A field test confirmed that the rocks were cocaine. Marshall was then placed under arrest.

The trial court's Findings of Fact and conclusions of Law are set out below.

FINDINGS OF FACT

1. Officer Baxter observed the Defendant walking in the company of two other individuals.
2. The officer recognized that there was an active arrest warrant for one of the other individuals.
3. The officer observed one of the Defendant's companions swallow something.
4. Defendant was acting nervous and kept putting his hands in his pockets.
5. The officer asked if anyone had weapons and Defendant raised his arms and consented to a "pat-down" search.
6. When the officer began to pat-down the Defendant the officer observed inside Defendant's open pocket a pill bottle.
7. The officer removed the bottle and discovered thirty seven (37) rocks of crack cocaine.

CONCLUSIONS OF LAW

1. Defendant's suspicious activity in the company of a person for whom the police had a search warrant authorized Defendant's brief detention.

2. During the brief detention Defendant gave a valid consent to the officer to perform a "pat-down" search.
3. When the officer viewed the pill bottle in plain view during the pat-down he was authorized by law to remove and inspect it.
4. The search and seizure of the crack cocaine was legal.

When a trial court's findings of fact resulting from a suppression hearing are supported by substantial evidence, they are conclusive. RCr 9.78; Commonwealth v. Neal, 84 S.W.3d 920, 923 (Ky.App. 2002). The findings of fact made in this case, as far as they go, are supported by substantial evidence in the record and are therefore not clearly erroneous. For instance, as an initial matter we find no error in the trial court's Conclusion of Law No. 1. The Conclusion is justified by the court's factual findings, which are in turn supported by substantial evidence in the record. We agree with the Commonwealth that under all the circumstances a brief detention of Marshall was justified. See Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

The problem is that the court's factual findings do not go quite far enough. Applying the law to only those facts found by the trial court as we must in the second, de novo

portion of our review, we are unable to agree with Conclusion of Law No. 3. Although no legal authority was cited in support of that Conclusion, it seems that the court approved the seizure based on the "plain view" exception to the search warrant requirement. We cannot agree that the conclusion is justified.

In Hazel v. Commonwealth, 833 S.W.2d 831 (Ky. 1992) the Kentucky Supreme Court discussed the elements which must exist before evidence seized pursuant to the "plain view" exception may be admitted:

First, the law enforcement officer must not have violated the Fourteenth Amendment in arriving at the place where the evidence could be plainly viewed. Second, "not only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must have a lawful right of access to the object itself." Finally, the object's "incriminating character must also be 'immediately apparent.'"

Id. at 833 (Citations omitted). The findings of the trial court, supported by substantial evidence in the record, satisfy the first two elements of the "plain view" exception. Our difficulty with the application of the doctrine to the facts as found by the trial court, is that the court did not find that the incriminating character of the pill bottle was immediately apparent to Officer Baxter when he saw it, nor did our review of the hearing reveal any testimony that would support such a finding.

Predictably, determining whether the "incriminating character" of a seized object was "immediately apparent" to the officer has presented reviewing courts with significant difficulty. See, e.g., People v. Champion, 452 Mich. 92, 549 N.W.2d 849 (1996) (approving the seizure of a pill bottle containing drugs found in a pat-down search); and Ex Parte Warren, 783 So.2d 86 (Ala. 2000) (suppressing a Tic-Tac box containing crack cocaine found in a pat-down search). The United States Court of Appeals for the Sixth Circuit visited the issue in U.S. v. McLevain, 310 F.3d 434 (6th Cir. 2002). In that case officers serving a search warrant for a missing prisoner saw, in plain view, a twist tie, a cut cigarette filter, a spoon with possible drug residue and a prescription bottle containing a clear liquid. Holding that the items should not have been admitted under the "plain view" exception the court said that "'upon viewing the object, the officer must *at that moment* have probable cause to believe the object to be contraband or evidence of illegal activity.'" Id. at 442, quoting United States v. Tucker, 305 F.3d 1193, 1198, n.3 (emphasis in original). The court went on to note that "'when an item appears suspicious to an officer but further investigation is required to establish probable cause as to its association with criminal activity, the item is not immediately incriminating.'" Id. at 443, quoting United States v. Byrd, 211 F.3d 1270, 2000

WL 491511 (6th Cir. 2000) (unpublished opinion). Because the trial court made no finding of fact regarding whether the incriminating nature of the bottle was immediately apparent we cannot approve the seizure of the bottle under the "plain view" exception. We note that on the videotape of the hearing, Officer Baxter testified that when he saw the bottle in Marshall's pocket he asked Marshall what was in the bottle, which suggests that although the bottle may have been suspicious, further investigation was needed to determine whether it was indeed connected with any criminal activity.

Officer Baxter testified that when he asked Marshall what was in the bottle, Marshall denied ownership of it and asked the officer to take it out of his pocket and give it to Huff. The circuit court did not make any reference to this exchange either in its Findings of Fact or Conclusions of Law. Whether Marshall's statement provided Baxter with legal authorization to remove the bottle from his pocket is a preliminary question of the kind that must be answered by the trial court. KRE⁴ 104(a); Commonwealth v. Neal, 84 S.W.3d at 925.

Accordingly, the Order of the McCracken Circuit Court denying Marshall's motion to suppress evidence is vacated, and the case is remanded to that court for a review of the existing

⁴Kentucky Rules of Evidence.

record and entry of new Findings of Fact, Conclusions of Law and a new Order consistent with this opinion.

ALL CONCUR.

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