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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-002343-MR
AND
NO. 2005-CA-000730-MR

THOMAS GILLESPIE

APPELLANT

v. APPEALS FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
INDICTMENT NOS. 03-CR-01226 & 03-CR-01241

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: COMBS, CHIEF JUDGE; BUCKINGHAM AND KNOPF, JUDGES.
KNOPF, JUDGE: On October 13, 2003, a Fayette County grand jury returned Indictment No. 03-CR-1226, charging Thomas Gillespie with trafficking in a controlled substance in the first degree¹ and being a first-degree persistent felony offender.² The charges arose out of an arrest which occurred on August 2, 2003.

¹ KRS 218A.1412. First-degree trafficking in a controlled substance is a class C felony for the first offense, and a class B felony for subsequent offenses. KRS 218A.1412(2).

² KRS 532.080.

On October 14, 2003, the grand jury returned Indictment No. 03-CR-01241, charging Gillespie with the same offenses but arising out of another arrest on July 31, 2003.

On November 19, 2003, Gillespie filed a motion to suppress evidence seized following the August 2 arrest. Following an evidentiary hearing, the trial court denied the motion. The charges in Indictment No. 03-CR-1241 proceeded to trial, but the jury was unable to reach a verdict and the trial court declared a mistrial. Thereafter, the charges in both indictments were consolidated. On September 10, 2004, Gillespie entered a conditional guilty plea to the charges in Indictment No. 03-CR-1226, and to an amended count of facilitation to first-degree trafficking in a controlled substance in Indictment No. 03-CR-1241. In Indictment No 03-CR-1226, the trial court sentenced Gillespie to five years on the trafficking charge, enhanced to ten years by virtue of his status as a PFO I. In Indictment No. 03-CR-1241, the court sentenced Gillespie to twelve-months' imprisonment, to be served concurrently with the ten-year sentence in Indictment No. 03-CR-1226. This appeal followed.

RCr 9.78 sets out the procedure for conducting suppression hearings and establishes the standard of appellate review of the determination of the trial court. Our standard of review of a circuit court's decision on a suppression motion

following a hearing is twofold: first, the factual findings of the court are conclusive if they are supported by substantial evidence; and second, this Court conducts a *de novo* review to determine whether the trial court's decision is correct as a matter of law.³

The facts surrounding Gillespie's arrest on August 2, 2003, are not in dispute. Lexington Police Officer Bart Morse testified that at about 1:30 a.m., he observed a black Jeep Cherokee begin to park on Charles Avenue. Officer Morse testified that this area, and this street in particular, were known for heavy illegal drug trafficking. Morse further testified that he had made arrests in this area before.

Gillespie approached the Jeep on foot and spoke with the passenger for a while. As Officer Morse's vehicle approached, Gillespie started to walk away from the Jeep. Officer Morse asked to speak with Gillespie. Gillespie produced his identification and agreed to allow Officer Morse to pat him down for weapons.

During that pat-down search, Officer Morse felt what appeared to be a small plastic bag containing a hard substance in Gillespie's right front pants pocket. Officer Morse testified that it was consistent with the packaging of cocaine, and he was

³ Commonwealth v. Whitmore, 92 S.W.3d 76, 79 (Ky. 2002)), *citing Ornelas v. United States*, 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996).

"75 or 80 percent sure" that it was crack cocaine. However, Officer Morse did not seize the bag at that time. Rather, Officer Morse directed Gillespie to be seated so he could investigate further. As backup officers arrived, Morse asked the driver of the Jeep to exit. The driver told Officer Morse that the passenger, later identified as Kenneth Hughes, had asked him to stop the Jeep so he could talk to Gillespie. The driver did not have a license. Questioned separately, Hughes told Officer Morse that he did not know why the driver had stopped. Hughes also admitted that the Jeep belonged to him.

Officer Morse then asked Hughes for permission to frisk him and to search the Jeep. Officer Morse found a steak knife in Hughes's rear pants pocket. The search of the Jeep revealed a glass crack pipe in the passenger side map pocket and a plastic bag containing marijuana in the console. At that point Officer Morse arrested Hughes and charged him with possession of drug paraphernalia and marijuana.

Based upon this investigation, Officer Morse conducted a second search of Gillespie. He retrieved the plastic bag from Gillespie's front pants pocket, the contents of which tested positive for crack cocaine. About \$57 in cash was also seized from Gillespie.

Under the Fourth and Fourteenth Amendments to the United States Constitution and Section 10 of the Kentucky

Constitution, unreasonable searches and seizures by the police are unlawful and, as a general rule, warrantless searches and seizures are unreasonable.⁴ Several exceptions to this general rule have evolved, however. In Terry v. Ohio,⁵ the United States Supreme Court held that a brief investigative stop, detention, and frisk for weapons do not violate the Fourth Amendment as long as the initial stop was supported by reasonable suspicion, a far lighter standard than probable cause.⁶

Furthermore, when a police officer lawfully pats down the outer clothing of a suspect and feels an object whose contour or mass makes its identity immediately apparent, there is no violation of privacy beyond that already permitted by the pat-down search for weapons.⁷ However, the plain feel rule is a narrowly drawn exception to the warrant requirement, appropriate only when the elements of Terry are otherwise met and the non-threatening contraband is immediately apparent from a sense of touch.⁸

⁴ Katz v. United States, 389 U.S. 347, 356-58, 88 S. Ct. 507, 514-15, 19 L.Ed.2d 576 (1967); Clark v. Commonwealth, 868 S.W.2d 101, 105 (Ky.App. 1993).

⁵ 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

⁶ Id. at 27, 88 S. Ct. at 1883.

⁷ Minnesota v. Dickerson, 508 U.S. 366, 274-75, 113 S. Ct. 2130, 2135-36, 124 L. Ed. 2d 334 (1993).

⁸ Commonwealth v. Whitmore, *supra* at 80.

Gillespie conceded that Officer Morse's initial pat-down search was lawful.⁹ He notes, however, that Officer Morse did not immediately seize the baggie. Rather, Officer Morse left Gillespie to focus on investigating the occupants of the Jeep. Since that investigation did not reveal any evidence which specifically incriminated him, Gillespie argues that Officer Morse's second search and seizure of the baggie exceeded the bounds of Terry and was not otherwise supported by probable cause.

Inherent in our review is the reality that police officers may draw inferences of illegal activity from facts that may appear innocent to a lay person. Accordingly, we must give due deference to the trial court in assessing the credibility of the officers and the reasonableness of their inferences.¹⁰ The trial court accepted Officer Morse's testimony that he was reasonably certain that the baggie in Gillespie's pocket contained crack cocaine. Clearly then, Officer Morse could have

⁹ In his brief on appeal, Gillespie attempts to argue that the initial Terry pat-down was without reasonable suspicion. But at the suppression hearing Gillespie's trial counsel admitted that Gillespie was not challenging the validity of the stop or the Terry pat-down. Rather, Gillespie only argued that the subsequent seizure of the baggie was outside of the scope of the plain feel exception. Consequently, any issue relating to the first search is not preserved for appeal.

¹⁰ Ornelas *supra* at 699, 116 S. Ct. at 1663.

immediately seized it. Nevertheless, we agree with the trial court that the brief delay following Officer Morse's discovery of the baggie does not take the seizure outside the scope of the plain feel exception.

Furthermore, a warrantless search more extensive or intrusive than a pat-down for weapons is permissible if it is supported by probable cause.¹¹ Probable cause involves whether the known facts provide reasonable grounds or a fair probability that a circumstance exists supported by less than prima facie proof but more than mere suspicion.¹² Probable cause for a search exists when the facts are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found.¹³

After Officer Morse identified the baggie in Gillespie's pocket, the further investigation confirmed his suspicions that Gillespie was engaged in drug trafficking. Consequently, Officer Morse had probable cause to conduct the second search of Gillespie. Therefore, even if the second search exceeded the scope of the plain feel exception, the seizure of

¹¹ Baltimore v. Commonwealth, 119 S.W.3d 532, 538 (Ky.App. 2003).

¹² Id. citing Smith v. Thornburg, 136 F.3d 1070, 1074 (6th Cir. 1998); United States v. Padro, 52 F.3d 120, 122-23 (6th Cir. 1995).

¹³ Id. citing Ornelas supra at 695, 696, 116 S. Ct. at 1661.

the baggie containing crack cocaine was justified under the circumstances.

Accordingly, the judgment of conviction by the Fayette Circuit Court is affirmed.

ALL CONCUR.

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