

RENDERED: JULY 14, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-002660-MR

JERRY KENNETH LESTER II

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 04-CR-00177

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AND ORDER
AFFIRMING
AND GRANTING MOTION
FOR LEAVE TO WITHDRAW

** ** * * * * *

BEFORE: BARBER AND McANULTY,¹ JUDGES; POTTER, SENIOR JUDGE.²

McANULTY, JUDGE: Jerry Kenneth Lester II entered a conditional plea of guilty to burglary in the third degree, fleeing or

¹ This opinion was completed and concurred in prior to Judge William E. McAnulty, Jr.'s resignation effective July 5, 2006, to accept appointment to the Kentucky Supreme Court. Release of the opinion was delayed by administrative handling.

² Senior Judge John W. Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

evading police in the second degree and being a persistent felony offender in the first degree. His conditional plea reserved for appeal the arguments he raised in his suppression hearing. At his suppression hearing, Lester alleged police did not have probable cause to arrest.

Lester's appointed counsel on appeal filed a motion for leave to withdraw as appointed counsel, in accordance with Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), together with a brief in support. Pursuant to Anders, an appellate counsel who believes an appeal to be wholly frivolous after conscientious examination may so advise the court and request permission to withdraw, supplemented by a brief which contains reference to anything which may support the appeal. Id., 386 U.S. at 744, 18 L. Ed. 2d at 498.

Counsel's brief in this case asserted merely that no matter was raised or otherwise preserved by motion from which to base an appeal, and that any issues as to the effectiveness of trial counsel would be for collateral attack by way of RCr 11.42 motion and not direct appeal. Lester did not file a pro se brief. The Commonwealth filed a brief setting forth the facts of the case and applicable law, and concurring with appointed counsel's evaluation that there was no basis for an appeal.

Anders further requires that this Court conduct a full examination of the proceedings before deciding the merits of the

motion to withdraw. Accordingly, this Court has reviewed the suppression hearing. We agree that there was no basis for an appeal. Lester argued in his suppression hearing that there was no probable cause to arrest. Probable cause exists when the totality of the evidence then known to the arresting officer creates a fair probability that the arrested person committed the felony. Eldred v. Commonwealth, 906 S.W.2d 694 (Ky. 1994). Lester's argument concerning probable cause was that when he was arrested he was not wearing the same clothing given in the initial description by Officer Salyer.

Having been dispatched to respond to a burglar alarm, Officer Salyer observed the two perpetrators taking off from the Cigarettes for Less store. He confronted them face to face, while shining a flashlight on them, before they fled. Lester and his co-defendant were apprehended minutes later while still in flight by other officers who had responded to the scene. Lester fit a general description given by Officer Salyer, who testified that he could not recall the exact words he used. However, Lester was not wearing a jacket which Officer Salyer had observed him wearing outside the store. After they were arrested by other officers, Officer Salyer personally identified Lester and his co-defendant as the two men he had seen in the store and who had run away from him at the scene.

The officers certainly had probable cause to believe Lester was one of the men who committed the burglary at the Cigarettes for Less store. Moreover, they had probable cause to believe that the two men they observed running away were committing the offense of fleeing or evading in the second degree. There was no genuine issue on which to base an appeal. Lester's conviction in the Fayette Circuit Court is affirmed.

Further it is hereby ordered that appointed counsel's motion for leave to withdraw is hereby granted.

ALL CONCUR.

ENTERED: July 14, 2006

/s/ William E. McAnulty, Jr.
JUDGE, COURT OF APPEALS

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