

RENDERED: MARCH 24, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001638-MR

BRANDY SUE STEPHENS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 05-CR-00440

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: GUIDUGLI AND SCHRODER, JUDGES; MILLER, SENIOR JUDGE.¹

MILLER, SENIOR JUDGE: Brandy Sue Stephens (Stephens) brings this appeal from a final judgment and sentence of probation of the Fayette Circuit Court, entered July 7, 2005, arising from a conditional guilty plea.² Having concluded that the trial court

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

² The July 7, 2005, final judgment and sentence of probation was amended to reflect that the guilty plea was conditional (Kentucky Rules of Criminal Procedure 8.09) by amended final judgment and sentence of probation entered July 28, 2005. This amended order, however, has no effect on the timing of the final judgment, which remained July 7, 2005. See generally United Tobacco Warehouse, Inc. v. Southern States Frankfort Cooperative, Inc., 737 S.W.2d 708, 709-10 (Ky.App. 1987).

erred in denying Stephens' motion to suppress, we reverse and remand.

Following an investigative stop by a police officer in a high drug traffic area, Stephens was arrested on charges of possession of drug paraphernalia, giving a police officer a false name, and first-degree possession of a controlled substance, first offense. Claiming no basis for the initial investigative stop, Stephens moved to suppress evidence obtained following the stop.

At the hearing on the suppression motion, Lexington Police Officer Darren Larrabee testified that the afternoon of the arrest he was in uniform in his police car surveilling the area of Coolavin Park, specifically monitoring the first two breezeways of the first apartment building that were known to be a place where young men would congregate to sell narcotics. Each breezeway contained two apartments up and two apartments down.

That evening the officer observed young men gather at the first breezeway only to disperse and run into an apartment when they noticed him. While there he also observed Stephens slowly walk into the second breezeway. She had no contact or communication with the young men he had been watching. She glanced at the officer as she was walking, but the officer lost sight of her after she entered the breezeway.

While Stephens was out of sight, a lady and her daughter pulled up in a car alongside the officer's car to ask the officer directions. While talking to the lady, the officer observed Stephens leave the second breezeway and walk toward the parking lot exit. She had been in the breezeway for approximately three minutes. As she exited the breezeway, Stephens again glanced at the officer and acted "real nervous." She came up to the passenger side of the car of the lady that the officer was talking to and spoke to the lady's daughter. The lady confirmed to the officer that Stephens was looking for her sister. After talking to the lady's daughter, Stephens walked off. The officer thought it odd that Stephens approached the lady's car instead of the police car to ask a question. The lady and her daughter left in their car.

By the time the officer parked his car and exited, Stephens had walked thirty yards away. The officer asked Stephens "ma'am can I talk to you for a second?" Although trying to keep the situation consensual, the officer testified that he would have detained Stephens if she had refused to talk to him. Stephens turned around and they approached one another. He asked Stephens what she was doing and she answered that she was looking for her sister. The officer asked for identification. Stephens had none. He then asked for her name, date of birth, and social security number. Stephens gave him

the name Sheena Lorena Tolsca, an age, and a date of birth. The age was three years off from the date of birth. When questioned about the discrepancy, Stephens corrected the age given. He ran a records check on the information and it came back "no record on file" which meant there was no record in the system. He told Stephens that it was a crime to give a false name, and asked her again. She gave the same information. When asked if she had a driver's license, Stephens replied that she had one from Florida. A check of Florida databases also returned "no record found." He asked if she had any drugs or drug paraphernalia on her and she said no. He asked to search for drugs and she consented. A pat down search revealed a crack pipe in an inner pocket of her coat. Stephens was thereafter arrested and charged with possession of drug paraphernalia. On the arrest slip the officer indicated that Stephens was "seen loitering in an area known for drug activity." She was also charged with giving a police officer a false name. On the arrest slip the officer noted the age and date of birth discrepancy, and that her name was possibly Brandy S. Stephens. Three rocks of crack cocaine were found secreted on Stephens during a search at the jail, and she was additionally charged with first-degree possession of a controlled substance, first offense.

Stephens also testified at the suppression hearing. She identified herself for the court as Brandi Sue Stephens and

the change was noted for the record. Stephens testified that she knew that a lot of black guys stood in the breezeway at that apartment building but what they did was not her business. That afternoon she walked up to an apartment door in the second breezeway, knocked, and asked the male who answered the door if Amber Brown (her sister) and Malachi (her sister's boyfriend) were there. Seventeen year-old Amber was in Stephens' custody. She was informed that the two had just left, possibly going to Stephens' home. She asked that Amber be told that Stephens had been there looking for her to come home.

While in the breezeway Stephens could not see the officer's car. When she left the breezeway she saw his police car alongside the lady's car. Stephens walked up to the lady's car and asked the lady's daughter if they lived in the area. When she replied affirmatively, Stephens identified Amber and Malachi's apartment and asked the lady's daughter if she would tell Amber that her sister was looking for her and that she needed to come home. Stephens then walked off. The officer asked what she was doing and at that point, Stephens did not feel free to leave. She gave another sister's name (Sheena Lorena Tolsca) to the officer, believing that there was an outstanding warrant in Scott County in her correct name.

Following this testimony the trial court made the following findings:

The court's going to find based on the testimony of Darren Larrabee, the officer who arrested Ms. Stephens, that he had probable cause. He had a reasonable articulable suspicion to be in the area of Coolavin Park being a high traffic area. He observed Ms. Stephens going into the breezeway of a particular area that he had under his watch; saw her come out and walked up to her and talked to her believing that she may have been engaged in drug activity; asked for her consent to search her person; she gave that consent; wherein he found drug paraphernalia and arrested her based on that finding. Drugs were also found on her at the jail pursuant to a strip search. The court is going to overrule the motion to suppress finding first that the officer had reasonable articulable suspicion to be where he was and then probable cause to search. There was some intimation or at least I thought Mr. Lewter that you were arguing that because she was not free to go that the officer perhaps failed to Mirandize her at that particular time. But again he indicated that he was trying to keep this consensual and testified that she did in fact consent to search. She has testified here under oath that Sheena Lorena Tolsca is not in fact her true name and that she gave a false name to the officer although she stated that it was because she thought there was an outstanding warrant for her arrest in Scott County. That was not corrected immediately upon finding out perhaps that there was not. The court is going to overrule the motion to suppress and set this matter for status. . . .

Further my ruling isn't going to change but just for further explanation, even assuming arguendo that she was looking for her sister, she may have been looking for her sister and doing drugs at the same time so it doesn't matter that she was - granted she may have been looking for her sister and that's what she asked the lady and she asked the - told the officer that as well and that

could have very well been one of her reasons for being there but that certainly doesn't mean that she didn't engage in criminal activity at the same time. But again I believe that the officer did have a reasonable articulable suspicion to conduct an investigative stop. He did that. She gave him false information at that time which he verified was false, thereby increasing his suspicion, at which time he asked for consent to search. She gave him that consent and as a result of that search he found drug paraphernalia for which he placed her under arrest. So again I'm going to overrule the motion to suppress.

An order overruling the suppression motion was entered on May 11, 2005.

Following denial of her suppression motion Stephens entered a conditional guilty plea, specifically reserving her right to appeal the findings and conclusions of the trial court as to the legality of the initial investigative stop. Stephens pleaded guilty to the charges of first-offense first-degree possession of a controlled substance,³ first-offense possession of drug paraphernalia,⁴ and giving an officer a false name.⁵ As a condition of the plea, the charge of first-degree promoting contraband⁶ was dismissed. On July 7, 2005, final judgment was entered, sentencing Stephens pursuant to her plea to one-and

³ Kentucky Revised Statutes 218A.1415, class D felony.

⁴ Kentucky Revised Statutes 218A.500, class A misdemeanor.

⁵ Kentucky Revised Statutes 523.110(1), class B misdemeanor.

⁶ Kentucky Revised Statutes 520.050, class D felony.

one-half years, twelve months, and ninety days, respectively, for a total term of imprisonment of one and one-half years, and probating said sentence for a period of three years.

Before us, Stephens argues that the trial court erred in overruling her motion to suppress, arguing that the officer did not have a reasonable articulable suspicion for the initial investigative stop. We review questions of fact under the clearly erroneous standard of Kentucky Rules of Civil Procedure (CR) 52.01 and questions of law *de novo*. See generally Brown v. Commonwealth, 40 S.W.3d 873, 875 (Ky.App. 1999). Although we conclude that the findings of the trial court are supported by substantial evidence and are therefore not an abuse of discretion or clearly erroneous, we do conclude that the court incorrectly applied the law. Thus, we reverse and remand.

The proper standard of appellate review on a suppression issue is provided in Commonwealth v. Neal, 84 S.W.3d 920, 923 (Ky.App. 2002):

An appellate court's standard of review of the trial court's decision on a motion to suppress requires that we first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive. Kentucky Rules of Criminal Procedure (RCr) 9.78. Based on those findings of fact, we must then conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law. Adcock v. Commonwealth, Ky., 967 S.W.2d 6, 8

(1998); and Commonwealth v. Opell, Ky.App.,
3 S.W.3d 747, 751 (1999).

There is no dispute as to the factual findings of the trial court as to the initial investigative stop: while surveilling the building for drug activity the officer saw Stephens enter the second breezeway of the building; remain out of sight for three minutes; come out of the breezeway; approach the lady's car that was pulled alongside the police car; converse with the lady's daughter regarding the whereabouts of her sister; walk away from the lady's car; and return at the officer's request; and, in answer to the officer's initial question as to what she was doing, answer that she was looking for her sister. As the trial court's findings are supported by substantial evidence, defined as "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men," they are conclusive. Owens-Corning Fiberglas Corp. v. Golightly, 976 S.W.2d 409, 414 (Ky. 1998), *citing* Kentucky State Racing Commission v. Fuller, 481 S.W.2d 298, 308 (Ky. 1972).

Having found that the trial court's findings are conclusive, we next address whether the trial court correctly applied the law, or "'whether the rule of law as applied to the established facts is or is not violated.'" Adcock v. Commonwealth, 967 S.W.2d 6, 8 (Ky. 1998), *quoting* Ornelas v.

United States, 517 U.S. 690, 697, 116 S.Ct. 1657, 1662, 134 L.Ed.2d 911 (1996). As stated in Gray v. Commonwealth, 150 S.W.3d 71, 74 (Ky.App. 2004):

The presence or absence of "reasonable suspicion" is determined on appeal under a *de novo* standard of review. Kotila v. Commonwealth, Ky., 114 S.W.3d 226, 232 (2003) citing Ornelas v. United States, 517 U.S. 690, 698-99, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911 (1996) and [Commonwealth v. Banks, 68 S.W.3d at 349.

The question before us is, therefore, whether the trial court correctly applied the law when it concluded that the officer had a reasonable articulable suspicion, pursuant to Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), to conduct an initial investigative stop of Stephens based on her presence and actions in a high drug traffic area.

The Commonwealth compares our case to Simpson v. Commonwealth, 834 S.W.2d 686, 687-88 (Ky.App. 1992), wherein the court applied a "totality of the circumstances" test in concluding that there was a reasonable articulable suspicion in the stop of Simpson. See generally United States v. Cortez, 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981). The fact that Simpson was standing on a street corner in a high crime area was, however, only one factor. As stated in Illinois v. Wardlow, 528 U.S. 119, 124, 120 S.Ct. 673, 676, 145 L.Ed.2d 570 (2000), "(a)n individual's presence in an area of expected

criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime. Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979)," although "the fact that the stop occurred in a 'high crime area' [is] among the relevant contextual considerations in a Terry analysis. Adams v. Williams, 407 U.S. 143, 144, 147-148, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972)." What differentiates Simpson from the case before us is that Simpson was not only in a high crime area, but was "meandering back and forth, both on the sidewalk and in the grocery parking lot, with no apparent reason," for fifteen minutes, trespassing and loitering, in disregard of a large "No Trespassing, no loitering" sign in the parking lot, and when approached by officers and asked why he was in violation of the sign, the officers testified that "if [Simpson] had asked to leave he would have been able to do so." A divided court in Simpson found under the totality of those circumstances that the stop was legal.

The totality of the circumstances surrounding the stop herein, however, falls far short of Simpson. The stop herein was based on Stephens' presence and actions in a high drug traffic area. Unlike Simpson, it is undisputed that Stephens was in the area for only three minutes, and while there, she was continually moving appropriately and purposefully, activity not

generally likened to "loitering." Unlike Simpson, it is undisputed that at that time Stephens was not trespassing or in apparent violation of any law. Additionally, it is undisputed that Stephens was never close in proximity to the suspected drug dealers, and before the officer decided to stop her, he knew that Stephens had a purpose in the area.

In addition to being in the high crime area, the officer's articulable suspicion was based on his assessment that Stephens glanced at him and acted "real nervous." While as stated in Wardlow, *supra*, "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion. United States v. Brignoni--Ponce, 422 U.S. 873, 885, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); Florida v. Rodriguez, 469 U.S. 1, 6, 105 S.Ct. 308, 83 L.Ed.2d 165 (1984) (*per curiam*); United States v. Sokolow, [490 U.S. 1], 8-9, 109 S.Ct. 1581," by her actions Stephens never acted in any evasive or suspicious manner. While under Ornelas, *supra*, on review we are to give due weight to inferences drawn from the facts by law enforcement, the inferences from the mere presence of a person in a high drug traffic area, that person's glance at a patrol car, and the officer's testimony that the person acted nervous with the person's actions conflicting with that testimony, fail to support a reasonable articulable suspicion to support an investigative stop. Additionally, we are not bound by the

factual findings of the trial court on this issue, as the court never made any findings relative to Stephens' acting nervously, evasive, or suspicious.

We further find no merit, under the facts of this case, in the Commonwealth's argument that that Stephens was not "seized" until she was patted down, which occurred after the officer had asked her for identification, age, and date of birth; and twice checked her criminal history, raising a suspicion that she was giving him a false name and relying on Baker v. Commonwealth, 5 S.W.3d 142, 145 (Ky. 1999), *citing* Florida v. Royer, 460 U.S. 491, 497, 103 S.Ct 1319, 1324, 75 L.Ed.2d 229 (1983). Pursuant to Gray, *supra*, at 74:

Police officers may briefly detain an individual on the street, even though there is no probable cause to arrest him, if there is a reasonable suspicion that criminal activity is afoot. Terry [v. Ohio], 392 U.S. [1] at 20-23, 88 S.Ct. [1868] at 1878-81; Taylor v. Commonwealth, Ky., 987 S.W.2d 302 (1998), *cert. denied*, 528 U.S. 901, 120 S.Ct. 239, 145 L.Ed.2d 200 (1999).

"[W]henver a police officer accosts an individual and restrains his freedom to walk away; he has 'seized' that person." Terry, 392 U.S. at 16, 88 S.Ct. at 1877, 20 L.Ed.2d 889.

See also Commonwealth v. Banks, 68 S.W.3d 347, 349-50 (Ky. 2001), which provides that "[a] seizure requires an articulable suspicion that criminal activity is afoot." These findings of fact by the trial court are conclusive: Stephens was in the

high drug traffic area for a few minutes with a stated non-criminal purpose when the officer asked her what she was doing and she responded, cooperatively, that she was looking for her sister. It is undisputed that had Stephens refused to answer the officer's initial inquiry, *he would have detained her*. Further, Stephens testified that she did not feel free to leave. At that point, all evidence points to Stephens' presence for a few minutes in a high drug traffic area with a stated non-criminal purpose, and cooperative attitude toward the officer. In view of the surrounding circumstances, not only would a reasonable person have believed that he was not free to leave, Baker, *supra* at 145, but the officer said he would have detained her. As such, under the facts of this case the initial investigative stop occurred when the officer called to Stephens and asked what she was doing, and not when she was patted down.

Having concluded that the stop was deficient, we hold that all evidence flowing from the illegal stop, beginning with the officer's inquiry as to what Stephens was doing, is tainted and inadmissible, and the trial court erred in failing to grant Stephens' motion to suppress. Therefore, we reverse the final judgment and sentence of probation of the trial court, and remand this case to allow withdrawal of the guilty plea and any other proceedings consistent with this opinion.

For the foregoing reasons, the judgment of the Fayette Circuit Court is reversed and remanded.

ALL CONCUR.

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