

RENDERED: OCTOBER 27, 2006; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2005-CA-001801-MR

ANTHONY WAYNE RICHIE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE GEOFFREY P. MORRIS, JUDGE  
ACTION NOS. 04-CR-003030 & 05-CR-001127

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: SCHRODER, JUDGE; KNOPF,<sup>1</sup> SENIOR JUDGE; MILLER,<sup>2</sup> SPECIAL JUDGE.

SCHRODER, JUDGE: Anthony Wayne Richie appeals from a judgment of the Jefferson Circuit Court convicting him of possession of cocaine, possession of marijuana, disorderly conduct, and first-degree persistent felony offender. Having concluded that the

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<sup>1</sup> Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

<sup>2</sup> Retired Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

trial court did not err in denying appellant's motion to suppress, we affirm.

Officers Rodman and Hale of the Louisville Metro Police testified at the suppression hearing, as follows. On January 29, 2004, at approximately 10:15 p.m., the two officers were in the vicinity of Fourth Street and Heywood, near Churchill Downs. The officers saw appellant walking in an alley that runs parallel to Fourth Street. The officers described appellant as "looking around", or "bobbing back and forth" as if he was looking for someone or trying to avoid someone. The officers deemed appellant's behavior to be suspicious, and decided to approach him. The officers stopped the police car, got out of the vehicle, and identified themselves as police officers. Appellant then began yelling and screaming at the officers, "What the fuck do you want?", "What the fuck you want? Leave me alone.", "What? What the fuck am I doing? What do you want?", "I'm not bothering nobody. Leave me the fuck alone." People came out of their homes because of the noise. Appellant was placed under arrest for disorderly conduct. After the arrest, Rodman searched appellant's person and retrieved six baggies of crack cocaine, three baggies of marijuana, and rolling papers from appellant's pants pocket.

The trial court denied the motion to suppress. A jury found appellant guilty of first degree possession of a

controlled substance (cocaine), possession of a controlled substance (marijuana), disorderly conduct, and persistent felony offender, first degree. This appeal followed.

Appellant contends that the trial court erred in denying his motion to suppress, on grounds that the evidence was the product of an unlawful arrest. Specifically, appellant contends that he had the right to resist the police officers verbally as they had no lawful basis to stop him in the alley.

Our standard of review of a trial court's ruling on a suppression motion is as follows. "First, the factual findings of the court are conclusive if they are supported by substantial evidence. The second prong involves a *de novo* review to determine whether the court's decision is correct as a matter of law." Stewart v. Commonwealth, 44 S.W.3d 376, 380 (Ky.App. 2000)(citations omitted).

The facts of this case are not in dispute. Our analysis therefore turns to whether the trial court's denial of the motion to suppress is correct as a matter of law. The trial court found that appellant's conduct, the way he was bobbing his head, gave the officers articulable suspicion to stop him, which thereafter turned to probable cause to arrest for disorderly conduct when he began shouting and screaming.

Although we agree that the trial court correctly denied the motion to suppress, we disagree with the court's

reasoning, in part. The undisputed facts are that appellant was walking down an alley at 10:15 p.m., and that he was "looking around" or "bobbing", as if he was looking for someone or trying to avoid someone. It was not alleged that appellant was hiding or looking into any buildings. The officers acknowledged that appellant was doing nothing illegal. We cannot say that appellant's conduct at that point was sufficient to provide reasonable, articulable suspicion that criminal activity may be afoot as would justify an investigative stop. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). To the contrary, looking around while walking could describe the conduct of a number of people walking, particularly those walking alone at night. See Garcia v. Commonwealth, 185 S.W.3d 658, 665 (Ky.App. 2006) (Driver's nervousness, lane change upon seeing police car near, failure to make eye contact when trooper pulled alongside his vehicle, and "death grip" on the steering wheel describe a substantial number of drivers on the highways. Such routine driving habits do not justify an investigatory stop under Terry.) Further, when the officers stopped their car, appellant did not try to flee, made no furtive movements nor tried to pitch anything away.

However, our analysis does not end at this point. Not all personal encounters between police and citizens constitute a seizure. Baker v. Commonwealth, 5 S.W.3d 142, 145 (Ky. 1999),

citing Terry v. Ohio, 392 U.S. 1, 19 n.16, 88 S. Ct. 1868, 1879 n.16, 20 L. Ed. 2d 889 (1968). Police officers “do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place . . . .” Baker, 5 S.W.3d at 145, quoting Florida v. Royer, 460 U.S. 491, 497, 103 S. Ct. 1319, 1324, 75 L. Ed. 2d 229 (1983). See also Commonwealth v. Banks, 68 S.W.3d 347, 350 (Ky. 2001) (“Police officers are free to approach anyone in public areas for any reason. Officers are entitled to the same freedom of movement that the rest of society enjoys.”) “A police officer may approach a person, identify himself as a police officer and ask a few questions without implicating the Fourth Amendment.” Baltimore v. Commonwealth, 119 S.W.3d 532, 537 (Ky.App. 2003). This is precisely what occurred in the present case. Appellant was walking in a public area. The officers stopped their car, got out and identified themselves as police officers. At this point, no seizure had occurred. See, Baker, 5 S.W.3d 142; Banks, 68 S.W.3d 347. Immediately thereafter, however, appellant began screaming and yelling so loudly as to cause people to come out of their homes, thus changing the dynamics of the encounter.

KRS 525.060 provides, in pertinent part:

(1) A person is guilty of disorderly conduct when in a public place and with intent to cause public inconvenience,

annoyance or alarm, or wantonly creating a risk thereof, he:

. . . .

(b) Makes unreasonable noise;

. . . .

(2) Disorderly conduct is a Class B misdemeanor.

Content, volume, and surrounding circumstances may be considered together in determining what is unreasonable noise.

Commonwealth v. Jones, 880 S.W.2d 544, 546 (Ky. 1994). A police officer may make a warrantless misdemeanor arrest when he can reasonably conclude from the facts that a misdemeanor is being committed in his presence. Commonwealth v. Mobley, 160 S.W.3d 783, 787 (Ky. 2005). In the present case, we conclude that appellant's yelling and screaming so loudly that people came out of their homes was sufficient for the officers to reasonably believe that he was committing the offense of disorderly conduct in their presence. Id. Accordingly, we conclude the trial court properly found that the arrest was lawful, and the subsequent search lawful as a search incident to arrest. Stewart, 44 S.W.3d at 379. Accordingly the trial court did not err in denying the motion to suppress.

Appellant's argument that the Louisville Metro Police lacked the statutory authority to approach him is unpreserved and without merit.

For the aforementioned reasons, the judgment of the  
Jefferson Circuit Court is affirmed.

ALL CONCUR.

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