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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-002158-MR

JEFFREY R. FLANNERY

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JULIA HYLTON ADAMS, JUDGE
ACTION NO. 05-CR-00035

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, SCHRODER, AND VANMETER, JUDGES.

VANMETER, JUDGE: Jeffrey Flannery appeals from the Madison Circuit Court's judgment sentencing him to seven and one-half years' imprisonment after entry of a conditional guilty plea to first-degree attempted robbery. Flannery argues that the trial court erred by failing to suppress certain evidence found as a result of both an illegal stop and an illegal detention. For the following reasons, we affirm.

At a suppression hearing on the matter, Officer William O'Donnell and Chief Jim Wilson¹ of the Richmond Police Department testified to the following. Beginning around 8:20 a.m. on November 30, 2004, dispatches were sent regarding two 911 calls. The first call was from an employee at People's Bank of Madison County stating that a suspicious-looking white man, wearing a hooded jacket, bandana, and sunglasses, parked at the rear of the bank, walked to the front, and pulled on the door but found it locked because the bank had not yet opened. The man walked to the driver's side of the van but then got into the passenger's side of the van, which drove toward Cumberland Valley National Bank.

After a second employee at People's Bank called Cumberland Valley National Bank to inform the employees at that bank that the van was heading in their direction, a Cumberland employee called 911 and indicated that the van had circled the bank a couple of times before parking at a nearby Wendy's restaurant, facing the bank, with its headlights on. Wilson arrived at the scene and watched the van from inside the closed restaurant (which he had gained access to from its employees) until O'Donnell arrived at approximately 8:27, parked behind the van, and activated his cruiser's lights. O'Donnell approached the passenger's side and Wilson approached the driver's side of

¹ At the time of Flannery's arrest, Wilson was a patrol sergeant.

the van. Both the driver (Melany Peters) and the passenger (Flannery) indicated that Flannery was attempting to cash a check but was unable to do so because the banks were closed. Despite the officers' requests, no check was produced.

After seeing what he believed was the grip of a semi-automatic weapon under the passenger's seat, Wilson walked to the passenger's side and asked Flannery to get out of the van. Wilson asked O'Donnell to pat Flannery down for weapons at the rear of the van, and he pulled a Crossman air pistol out from under the passenger's seat. At this point, Flannery was placed in a police cruiser. Peters, who was placed in a second police cruiser, refused to consent to a search of the van. After the two suspects were taken to the police station, Peters admitted that Flannery had written a note to give to the bank teller, and that he had recently robbed five other places in the surrounding area. Flannery was formally arrested at 10:25 a.m.

As no prosecutors were immediately available to consult with the officers, a search warrant for the van was not obtained until 3:40 p.m. When the search warrant was executed at 4:14 p.m., the following items were found: a note that said "No dye packs, I have a gun, you are being robbed[,] " cigarettes that were believed to have been stolen in the other robberies, and shaving cream and razors which corroborated Peters' statement that Flannery had recently changed his appearance.

The circuit court overruled Flannery's suppression motion, finding that reasonable suspicion existed that Flannery "might be ready to rob [the] bank" based on his appearance, which clearly obstructed any identifying features, plus the "call of alarm" from the bank employees. The circuit court further found that Flannery and Peters' failure to produce a check gave the officers heightened suspicion, and that probable cause arose with the additional factor of the weapon. Finally, the court found that Flannery was "effectively detained" when he was placed in the police cruiser.

Subsequent to the court's ruling, Flannery entered a conditional guilty plea in exchange for the Commonwealth's recommendation of seven and one-half years' imprisonment. The circuit court imposed that sentence, and this appeal followed.

Flannery's first argument on appeal is that the circuit court erred by failing to suppress the evidence found as a result of the initial stop² because the stop was not supported by a reasonable, articulable suspicion. As there are no factual disputes, in reviewing the court's ruling we must

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.

² The parties do not dispute that when O'Donnell pulled behind the van, activated his lights, and approached the van, he stopped Flannery. Nor do the parties challenge O'Donnell's standing to challenge the stop.

Commonwealth v. Neal, 84 S.W.3d 920, 923 (Ky.App. 2002)

(internal citations omitted). As we conclude that the circuit court correctly applied the law to the facts, we disagree with Flannery's contention.

Police officers may make brief investigatory stops in circumstances where they "have a reasonable articulable suspicion that 'criminal activity may be afoot.'" *Williams v. Commonwealth*, 147 S.W.3d 1, 5 (Ky. 2004) (quoting *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 1884, 20 L.Ed.2d 889 (1968)). We note that

the test for a *Terry* stop and frisk is not whether an officer can conclude that an individual is engaging in criminal activity, but rather whether the officer can articulate reasonable facts to suspect that criminal activity may be afoot and that the suspect may be armed and dangerous.

Commonwealth v. Banks, 68 S.W.3d 347, 350-351 (Ky. 2001).

Further, "[t]he totality of the circumstances must be evaluated to determine the probability of criminal conduct, rather than the certainty." *Id.* at 351.

Here, we believe that there was such a reasonable articulable suspicion of criminal activity. The evidence showed that on a rainy morning, a van parked at the rear of People's Bank. Flannery walked to the front of the bank and pulled on the door, which was locked. Flannery's appearance alarmed the bank's employees in that they believed he was dressed so as to

conceal any identifying features. Although a hooded jacket may have been appropriate on the rainy November day, Flannery was also wearing a bandana which fully covered his hair and a pair of oversized sunglasses. The van then proceeded to circle the parking lot of the second bank a couple of times before it parked, facing the bank, in the parking lot of a nearby restaurant which was also closed. When O'Donnell pulled into the parking lot he saw Flannery turn around in the passenger's seat, look at the police car, and then turn back around in his seat. The totality of these circumstances gave rise to a sufficiently reasonable suspicion. We note that purely lawful actions, taken together, may amount to reasonable suspicion. *United States v. Sokolow*, 490 U.S. 1, 9, 109 S.Ct. 1581, 1586, 104 L.Ed.2d 1 (1989).

Next, Flannery argues that the circuit court erred by failing to suppress the evidence found as a result of the execution of the search warrant, as he was detained for an unreasonable amount of time prior to the search. We disagree.

While Flannery correctly notes that the United States Supreme Court has declined to adopt a bright-line test to distinguish between a *Terry* stop and a *de facto* arrest, *United States v. Sharpe*, 470 U.S. 675, 685-86, 105 S.Ct. 1568, 1575, 84 L.Ed.2d 605 (1985), the facts now before us may be reviewed under a more definite rule. That is, the Court has held that

"transportation to and investigative detention at the station house without probable cause or judicial authorization together violate the Fourth Amendment." *Hayes v. Florida*, 470 U.S. 811, 815, 105 S.Ct. 1643, 1646, 84 L.Ed.2d 705 (1985) (discussing *Davis v. Mississippi*, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969)). Thus, the issue before us is whether probable cause supported the officers' decision to transport Flannery to the police department for further questioning. We believe that the trial court correctly held that such probable cause existed.

Once O'Donnell lawfully stopped Flannery based on a reasonable articulable suspicion, he and Wilson did not err by approaching the van and posing questions to its occupants. From that lawful vantage point, Wilson saw what he believed was a weapon in plain view sticking out from beneath Flannery's seat. Considering all of the circumstances giving rise to the justifiable stop of the vehicle, combined with the weapon observed in plain view and the fact that Flannery and Peters could not produce the check which they alleged they went to the banks to cash, we believe that the circuit court correctly held that the requisite probable cause existed for taking Flannery to the police station. This *de facto* arrest eventually led to his formal arrest, which was supported not only by these facts but also by Peters' statements.

The Madison Circuit Court's judgment is affirmed.

ALL CONCUR.

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