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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000565-MR

RODNEY HAMILTON HIGGINS, JR. — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA GOODWINE, JUDGE
ACTION NO. 05-CR-00645

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND NICKELL, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

NICKELL, JUDGE: Rodney Hamilton Higgins, Jr. ("Higgins") appeals from a July 7, 2005, order of the Fayette Circuit Court overruling a motion to suppress evidence discovered during a patdown search for weapons. Following a suppression hearing, Higgins stood trial on February 6, 2006, wherein he was convicted by a jury of trafficking

[1] Senior Judge Daniel Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

in a controlled substance (cocaine) in the first degree ("TICS")[2] and acquitted of criminal trespass in the third degree ("trespassing").[3] During the penalty phase of the one-day trial, jurors sentenced Higgins to seven years on the TICS charge and then enhanced that term to twelve and one-half years due to his status as a persistent felony offender in the second degree ("PFO II").[4] The trial court imposed judgment consistent with the jury's verdict. Having reviewed the evidence and the trial court's ruling, we now affirm.

There is little dispute about the facts. Connie Cowan ("Cowan") resides at 527 Merino Street in Lexington, Kentucky. Illegal drugs are common in her neighborhood and the area in front of her home is widely known to police as a site for drug deals. Drug transactions have even occurred on her front porch. Cowan has repeatedly complained about the drug activity to the Lexington Division of Police and to the local newspaper, the Lexington Herald-Leader.

Around the first of April 2005, Cowan dispatched her son to ask a group of people selling drugs on a retaining wall in front of her home to leave. When her son asked them to disperse, a weapon was displayed and may have been fired at his car. In response, police increased their patrols of the area encompassing Cowan's home.

Increasingly frustrated by the continuing drug activity, Cowan placed a sign in her front window announcing, "[t]o whom it may concern. Please Do Not Be on this

[2] Kentucky Revised Statutes ("KRS") 218A.1412, a Class C felony.

[3] KRS 511.080, a violation.

[4] KRS 532.080.

porch when I am not here or on the wall, driveway or yard. No more warnings. Thanks, Connie." Cowan testified the sign's directive applied to everyone - even her own children. Since she could not control what happened on the premises in her absence, she did not want anyone there unless she was there. She did not discuss the sign with anyone; she simply placed it in the window where it was visible to everyone.

About a week after the gun incident, Higgins spent the night of April 6, 2005, in Cowan's home. Although not a biological relative of Cowan, he considered her to be his "aunt" and often slept in her home. As Cowan prepared to leave for work early the next morning, she did not stir anyone in the house but did tell her niece, Renee Cowan, to tell all the overnight guests they were to leave as soon as they awoke.

On the afternoon of April 7, 2005, Officer Gene Haynes ("Ofcr. Haynes"), a member of the Lexington Division of Police since November 2001, was patrolling Merino Street by vehicle when he noticed six men in front of Cowan's home. Some were standing and others were sitting on the retaining wall that separates Cowan's yard from the sidewalk. Knowing Cowan had requested extra patrols because of the gun incident, Ofcr. Haynes called for backup and circled the block. About fifteen minutes later, Ofcr. Haynes, Officer Kevin Duane ("Ofcr. Duane") and a third policeman arrived at the scene.

Three men were still in front of Cowan's home. Ofcr. Haynes approached Higgins and Officer Duane spoke to the two other men. At the time, Ofcr. Duane had been a member of the Special Crimes Squad of the Lexington Division of Police for nearly three years. Cowan's home was on his regular beat and he was familiar with her

concerns about loiterers and drug dealers since he had personally discussed them with her. Part of their discussions centered on police approaching suspected loiterers on her property only to be told they were her relatives and permitted to be on the premises. As a result of their conversation, Cowan told police that if she was not there no one was to be there.

As Ofcr. Haynes approached Higgins, he said Cowan was his aunt and he was allowed to be on the property. Being aware of the gun incident the prior week, Ofcr. Haynes frisked Higgins for weapons but found nothing. When Ofcr. Haynes ran Higgins' name through the police information channel for outstanding warrants he located a previous charge for fleeing and evading. Throughout this time, Higgins appeared nervous and evasive in answering the officer's questions. He also kept fidgeting as if he were trying to put his hands in his pockets. When Ofcr. Haynes learned of the fleeing and evading charge, he asked Higgins to remain seated on the wall. About this time a woman drove up to the Cowan residence, said she was Cowan's sister, and also stated Higgins was not related to Cowan.

While Ofcr. Haynes talked with Higgins, Ofcr. Duane addressed the two other men, one of whom he recognized. Both men were highly cooperative and Ofcr. Duane noticed no bulges in their pockets or anything unusual that seemed suspicious. Since there were no outstanding warrants against either of the men he permitted them to leave.

After the two men departed, Ofcr. Duane noticed Cowan's hand-lettered sign in the front window and mentioned it to Ofcr. Haynes. At that point, Ofcr. Haynes stepped away from Higgins to retrieve a digital camera from his car and Ofcr. Duane spoke to Higgins.

Ofcr. Haynes photographed Higgins sitting on the retaining wall. After stepping onto the porch of Cowan's home to take a picture of the sign in the front window, he decided to arrest Higgins for trespassing. Contemporaneously, Ofcr. Duane talked with Higgins on the sidewalk. He also noticed Higgins was very nervous and kept reaching for his pockets which were clearly bulging with something. Although Ofcr. Duane asked Higgins three or four times not to put his hands in his pockets, Higgins continued fidgeting. Finally, Ofcr. Duane, aware of the gun incident the prior week and knowing the general reputation of the area for people to be armed, asked Higgins if he could frisk him for weapons. Ofcr. Duane did not know Ofcr. Haynes had already patted him down for weapons since that occurred while Ofcr. Duane was talking with two other men. Higgins said he was unarmed and while it was okay for the officer to pat him down for weapons he could not search him. During the frisk, Ofcr. Duane felt a rock of cocaine in the front right change pocket of Higgins' jeans. Since Ofcr. Duane had made between seventy-five and eighty felony drug arrests, mostly for crack cocaine, he recognized the item inside Higgins' pocket as being a rock of cocaine by its shape and texture. No weapons were found during the second patdown.

As Ofcr. Haynes returned from photographing the sign, he saw Ofcr. Duane frisking Higgins. Ofcr. Haynes stated he was going to arrest him for trespassing to which Ofcr. Duane replied, "he's got crack anyway." Ofcr. Duane then handcuffed Higgins, placed him under arrest and conducted a search incident to arrest. The search revealed a cell phone and $2,287.00 in cash in Higgins' other pants pockets. Another $110.00 was found on his person. The money was in a variety of denominations.[5] Some of it was wadded into balls and some was folded.

Higgins was indicted by a Fayette County grand jury for TICS, trespassing and being a PFO II. On June 9, 2005, he filed a written motion to suppress evidence seized during the weapons frisk on April 7, 2005. No written response from the Commonwealth appears in the record. Citing *Minnesota v. Dickerson,* 500 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993); *Commonwealth v. Crowder*, 884 S.W.2d 649 (Ky. 1994); and *Pittman v. Commonwealth,* 896 S.W.2d 19 (Ky.App. 1995), Higgins claimed officers lacked probable cause to pat him down for weapons a second time and further lacked authority to seize evidence discovered during the second frisk because the criminal character of the contraband was not readily apparent.

A suppression hearing was held July 5, 2005. After hearing testimony from Ofcrs. Haynes and Duane and the argument of counsel, the trial court found the second patdown occurred without knowledge of the first. Furthermore, even if Ofcr. Duane had

[5] Appellant had three $100.00 bills, two $50.00 bills, seventy-five $20.00 bills, twenty-four $10.00 bills, thirty-six $5.00 bills, and seventy-seven singles.

known Higgins had already been frisked there was no prohibition on a second patdown for weapons if Ofcr. Duane feared for his safety. Ofcr. Duane was in greater danger of something going awry when Ofcr. Haynes stepped away to photograph the sign in the porch window so his personal decision to frisk Higgins for weapons for safety reasons was supported by probable cause. The "plain feel" doctrine applied since Ofcr. Duane is an experienced officer having made as many as eighty felony drug arrests, many for crack cocaine. Finally, Higgins would have been searched incident to his arrest for trespassing and the nearly six gram rock of cocaine would have been discovered at that time. Based upon these findings, the trial court overruled the suppression motion.

Higgins proceeded to trial on February 6, 2006. A jury convicted him of TICS in the first degree and being a PFO II. Jurors set his punishment at seven years for TICS, enhanced to twelve and one-half years due to his status as a PFO II. Higgins now appeals that conviction on four grounds all of which are related to Ofcr. Duane's patdown search. For the reasons that follow, we affirm.

Our standard of review on a motion to suppress is stated in *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky.App. 2002).

> [F]irst we determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive. 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.

This is consistent with Kentucky Rules of Criminal Procedure (RCr) 9.78 which directs that a trial court's ruling on a motion to suppress evidence is conclusive if supported by substantial evidence.

Having reviewed the record in its entirety, and giving great latitude to the inferences drawn from the suppression hearing testimony by the trial court, we are convinced the trial court's findings are supported by substantial evidence. *Stewart v. Commonwealth,* 44 S.W.3d 376, 380 (Ky.App., 2000), *citing Ornelas v. United States,* 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). Since Higgins has not challenged the trial court's factual findings as being clearly erroneous, and has not demonstrated them to be flawed, they are conclusive and binding upon us.

Having determined the trial court's findings of fact are supported by substantial evidence, we now turn our attention to whether the trial court correctly applied the law to those facts. *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 889 (1968) recognizes a narrowly drawn exception to the warrant requirement which allows investigatory stops and limited patdown searches for weapons. When a police officer reasonably suspects criminal activity is afoot he may briefly detain an individual even though he lacks probable cause to make an arrest. *Id.* at 30-31. An officer may also conduct a patdown search of a suspect for safety reasons when he is in close proximity to the suspect and reasonably believes that suspect is armed. A frisk for weapons under *Terry* is limited to that which is necessary to discover weapons that could be used to harm the officer or others nearby. *Terry,* 392 U.S. at 26; *Crowder,* 884 S.W.2d at 651. A

protective search that exceeds what is necessary to determine if the suspect is armed is invalid under *Terry* and its fruits will be suppressed. *Terry,* 392 U.S. at 14.

Here, as Ofcr. Duane spoke with Higgins, he noticed the pockets of his jeans were bulging. Despite being asked three or four times not to reach for his pockets, Higgins, who appeared to be very nervous, continued reaching toward them. Ofcr. Duane testified that at this point he did not know Ofcr. Haynes, who was on the porch photographing the sign, had already frisked Higgins for weapons and found nothing. However, Ofcr. Duane did know drug dealing occurred in this neighborhood, people in the area were often armed, and at this very spot just one week ago, a gun had been drawn on Cowan's son and possibly discharged. Based upon these factors, the trial court found it was entirely reasonable for Ofcr. Duane to conduct his own *Terry*-type weapons frisk. We agree. As the trial court went on to say, whether Ofcr. Duane knew of the first patdown search is inconsequential. So long as he reasonably questioned his safety, the limitations stated in *Terry* did not preclude a second frisk for weapons.

Next, we disagree with Higgins' contention that the "plain feel" doctrine discussed in *Dickerson, supra,* does not apply to the facts before us. *Dickerson* allows officers to seize nonthreatening contraband found during a *Terry*-type frisk for weapons, so long as the search is within the bounds permitted by *Terry.*

> If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would

> be justified by the same practical considerations that inhere in the plain-view context.

Dickerson, 500 U.S. at 375-6. Here, Ofcr. Duane is an experienced narcotics officer. When he encountered Higgins, he had been on special assignment for nearly three years and had made between seventy-five and eighty felony drug arrests, most of them for crack cocaine. During the weapons frisk he felt a "rock" in the right front change pocket of Higgins' jeans. Contrary to Higgins' contention, based upon the item's location, shape and texture, it was readily apparent to Ofcr. Duane that it was a rock of crack cocaine. Based upon the totality of the circumstances, the trial court correctly applied the "plain feel" doctrine in overruling the suppression motion.

Finally, even without applying *Terry* or *Dickerson,* the cocaine would have been discovered anyway because Higgins was arrested for criminal trespassing in the third degree and searched incident to that arrest. Thus, with or without the second weapons frisk, it was inevitable that the cocaine, weighing nearly six grams, was going to be discovered. Higgins makes much of the fact that criminal trespassing in the third degree is a violation under KRS 511.080. As such it carries no jail time and is punishable only by imposition of a fine. What he fails to mention is that KRS 431.015(2) permits one charged with violating KRS 511.080 to be placed under arrest. Under the facts of this case, police officers were well aware of Connie Cowan's desire to rid her property of loiterers and drug dealers. Ofcr. Duane had specifically discussed these concerns with her and knew that if she was not at home, no one, not even her children, was to be on the

premises. The hand-lettered sign Cowan had recently placed in her front porch window served to punctuate her concern. Since Cowan was not at home at the time in question, and Higgins was on the premises, his arrest for criminal trespassing in the third degree was proper. Furthermore, since the contraband would have been discovered anyway during the search incident to his arrest, suppression would not have been justified under *Nix v. Williams,* 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984) and *Hughes v. Commonwealth,* 87 S.W.3d 850, 852-3 (Ky. 2002).

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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