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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000654-MR

CALDWELL TRE SMITH, III — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 05-CR-00911

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: STUMBO AND VANMETER, JUDGES; PAISLEY,[1] SENIOR JUDGE.

VANMETER, JUDGE: Caldwell Tre Smith, III appeals from the Fayette Circuit Court's judgment sentencing him to ten years' imprisonment, probated for five years. Smith argues that the circuit court erred by failing to grant his motion to suppress certain physical evidence as being the result of an unlawful seizure. For the following reasons, we affirm.

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

In July 2005, Smith was indicted for the following counts: trafficking in a controlled substance within 1,000 yards of a school, third-degree burglary, second-degree fleeing/evading police, and first-degree persistent felony offender (PFO). Smith moved to suppress certain physical evidence as having been obtained in violation of his Fourth Amendment rights.

At a hearing on the matter, Officer Matthew Greathouse with the Lexington Metro Police Department testified that on May 20 at about 9:00 a.m., he, Sergeant Eddie Hart, and Officer Steven Cobb were on bike patrol after complaints were made regarding narcotics activity in the Etawa Drive-Augusta Drive area. From a vantage point behind an apartment complex in the high-crime area, the officers observed Smith standing outside the driver's side of a maroon Expedition which was parked on the street. On at least four occasions, Smith placed his hand in his pocket, passed something to the driver with his closed fist, took something from the driver, and then returned his closed fist to his pocket. Several other people approached and then walked away from the Expedition during the officers' fifteen minutes of observation.

At Hart's direction, Greathouse and Cobb approached the Expedition from the rear, dropped their bikes, and informed those around the vehicle to put their hands on it. When Greathouse told Smith to put his hands behind his back, Smith ran, and Greathouse chased him approximately 100-150 yards, jumping a couple of fences. Smith ran into an apartment building, and Greathouse went to the front of the building. When Smith tried to exit an upstairs window, he saw Greathouse and went back into the

building. Greathouse heard the sounds of loud banging, like someone beating on a door, and men yelling. Greathouse entered the building, where the building's maintenance man told him that someone had kicked in an apartment door and run inside.

Greathouse ran back outside. When a window was raised, Hart yelled for Smith to come out with his hands up. Smith complied, and Greathouse arrested Smith.[2] Upon searching the apartment which Smith had entered, Greathouse found 3.8 grams of marijuana and ten alprazolam (generic Xanax). The building's maintenance man informed Greathouse that the apartment was vacant and contained no illegal narcotics or substances.

Based on this evidence, the circuit court denied Smith's suppression motion. Thereafter, Smith moved to enter a conditional guilty plea, in which the Commonwealth agreed to dismiss the trafficking and fleeing/evading police charges, and to recommend one year imprisonment on the burglary count, enhanced to ten years by the PFO count. The circuit court accepted Smith's conditional guilty plea, wherein he reserved the right to appeal the denial of his suppression motion. The court sentenced Smith to a total of ten years' imprisonment, probated for five years. This appeal followed.

Smith argues that the circuit court erred by failing to suppress evidence of the marijuana and ten white pills. We disagree.

On an appeal from a trial court's determination following a motion to suppress

[2] The trial court erroneously found that Smith was not arrested until he was taken back to the Expedition.

> we first 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.

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

A seizure occurs when a police officer, "by means of physical force or show of authority, has in some way restrained the liberty of a citizen[.]" *Terry v. Ohio*, 392 U.S. 1, 19 n.16, 88 S.Ct. 1868, 1879 n.16, 20 L.Ed.2d 889 (1968). As the United States Supreme Court has further explained, "[a]n arrest requires *either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority." *California v. Hodari D.*, 499 U.S. 621, 626, 111 S.Ct. 1547, 1551, 113 L.Ed.2d 690 (1991). Here, a seizure did not occur when Greathouse biked near Smith and dropped his bike, as officers "do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place[.]" *Florida v. Royer*, 460 U.S. 491, 497, 103 S.Ct. 1319, 1324, 75 L.Ed.2d 229 (1983).

Next, even assuming that Greathouse presented a "show of authority" when he told Smith to put his hands on the vehicle and/or behind his back, Smith was not seized at that time since he ran and therefore did not comply with Greathouse's request. *Hodari D.*, 499 U.S. at 629, 111 S.Ct. at 1552 (assuming that the officer's chase of Hodari "constituted a 'show of authority' enjoining Hodari to halt, since Hodari did not comply with that injunction he was not seized until he was tackled"). Instead, Smith was not seized until he submitted to Greathouse's show of authority, i.e., when he came out of the

apartment building with his hands up and was arrested. *See id.*; *Taylor v. Commonwealth*, 125 S.W.3d 216, 219-20 (Ky. 2003).

The question then becomes whether Greathouse had probable cause to arrest Smith when he came out of the apartment building and surrendered. *Beck v. Ohio*, 379 U.S. 89, 96, 85 S.Ct. 223, 228, 13 L.Ed.2d 142 (1964) (inquiry is "whether the facts available to the officers at the moment of the arrest would 'warrant a man of reasonable caution in the belief' that an offense has been committed"). Here, complaints had been made that drug trafficking was occurring in the high-crime area in which Smith was first observed. *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S.Ct. 673, 676, 145 L.Ed.2d 570 (2000) (fact that stop occurred in a "high-crime area" relevant). Further, Greathouse observed Smith behaving in a way which led him, as a trained officer, to believe that Smith was engaged in drug trafficking; moreover, Smith fled from Greathouse, 528 U.S. at 124, 120 S.Ct. at 676 (unprovoked flight a factor to consider). Notwithstanding these circumstances, after Greathouse followed Smith into an apartment building, he heard a loud banging, like someone beating on a door, and men yelling. The building's maintenance man told Greathouse that someone kicked in the door to an apartment and ran inside. Under these circumstances, Greathouse had probable cause to believe an offense had been committed and to arrest Smith.

A different result is not compelled by the fact that Greathouse testified at the suppression hearing that when he initially approached Smith on his bike, he intended to take Smith into custody for either dealing narcotics or criminal trespass. The Court in

United States v. Mendenhall, 446 U.S. 544, 553, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980), reiterated that "a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained." The Court further held that an officer's subjective intent is irrelevant except insofar as it may have been conveyed to the detainee. 446 U.S. at 554 n.6, 100 S.Ct. 1877 n.6; *see also Poe v. Commonwealth*, 169 S.W.3d 54, 59 (Ky.App. 2005) ("officer's subjective explanation for stopping or detaining a driver does not control Fourth Amendment analysis"). Here, there was no testimony that Greathouse conveyed to Smith his intent to take Smith into custody when he initially approached him.

The Fayette Circuit Court's judgment is affirmed.

ALL CONCUR.

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