

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002072-MR

TONY HABLER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JUDGE
ACTION NO. 05-CR-01585-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: HOWARD, JUDGE; GUIDUGLI AND KNOPF, SENIOR JUDGES.¹

KNOPF, SENIOR JUDGE: Tony Habler appeals from a judgment of the Fayette Circuit Court that sentenced him to three years' imprisonment after he was found guilty of possession of a controlled substance in the first-degree, possession of marijuana, and carrying a concealed deadly weapon. Habler contends that the trial court erred in failing

¹ Senior Judges Daniel T. Guidugli and William L. Knopf sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

to grant his motion to suppress evidence found on his person during an investigatory stop. For the reasons stated below, we affirm.

On November 2, 2005, Officer Kevin Duane and Officer Jerome Bean of the Lexington Police Special Assignment and Narcotics Unit met with an unidentified informant in the neighborhood of Pine Street and Patterson Street, an area known for drug trafficking. The informant participated in a drug transaction with cash given to her by the officers. After the transaction was over, the informant notified the officers of the suspect who sold her drugs.

The officers then proceeded to look for the man whom the informant described. Officers Duane and Bean saw two men standing on the sidewalk, near the intersection of Pine Street and Patterson Street. One of the men was Ricky Johnson, who fit the informant's description. The other man was Habler. After stopping and frisking Johnson, which led to the discovery of the photocopied currency the police had given the informant, Officer Duane asked Habler if he had any weapons. Habler failed to respond. Officer Duane again asked if Habler had a gun, and Habler responded by lifting his shirt to reveal a 9 mm handgun in his waistband. Officer Bean seized the weapon. Another officer, Officer Shirley, arrested Habler and charged with him carrying a concealed deadly weapon.

After his arrest, Officer Shirley found 1.8 grams of crack cocaine and 6.5 grams of marijuana in the pocket of Habler's sweatshirt. The officers then charged

Habler with trafficking in a controlled substance in the first degree, with a firearm, and possession of marijuana in the first degree.

On December 12, 2005, the Fayette County Grand Jury indicted Habler on a series of offenses: one count of possession of a controlled substance in the first degree with a firearm; one count of possession of marijuana with a firearm; and one count of carrying a concealed deadly weapon. On January 20, 2006, Habler, appearing with counsel, entered a “not guilty” plea to the charges.

On March 22, 2006, Habler filed a motion to suppress evidence, arguing that the police officers lacked reasonable suspicion to conduct the initial stop. A suppression hearing was conducted on April 18, 2006. Officers Duane, Bean and Shirley testified at the hearing, as well as, Habler. At the conclusion of the lengthy hearing, the trial judge denied Habler’s motion to suppress, finding that the officers had a reasonable and articulable suspicion to initially question Habler based on the totality of the circumstances. The trial judge also found that Habler was not in custody and had not been detained or apprehended. In fact, Habler was free to walk away from the officers, whether or not he knew that or was comfortable doing so, as indicated by the trial court. The officers’ questioning of whether Habler had a gun was found to be a reasonable inquiry justified by the importance of police safety. Finally, the trial court found that Habler’s voluntary act of lifting his shirt to reveal the handgun gave the officers probable cause to arrest him and further search him for other weapons and illegal contraband.

On July 26, 2006, Habler was tried before a jury in the Fayette Circuit Court, which found him guilty on all three charges and fixed a total sentence of three years. On September 7, 2006, the Fayette Circuit Court entered judgment against Habler, sentencing him to three years' imprisonment. From these convictions, Habler now appeals.

On appeal, Habler contends that the trial court erred in denying his suppression motion.

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. 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). In conducting our review, our proper task is to review findings of fact only from clear error while giving due deference to the inferences drawn from those facts by the trial judge. *Commonwealth v. Whitmore*, 92 S.W.3d 76, 79 (Ky. 2002) (citation omitted). After reviewing the record, we conclude that the trial court's findings of fact are supported by substantial evidence. Thus, our attention is focused solely upon whether the court properly applied the law to the facts as found. *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998) (citation omitted).

Both the Fourth Amendment to the United States Constitution and Section Ten of the Kentucky Constitution prohibit unreasonable searches and seizures by the

government. *Id.* These protections “extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest,” which are typically referred to as “Terry stops.” *United States v. Arvizu*, 534 U.S. 266, 273, 122 S.Ct. 744, 750, 151 L.E.2d 740 (2002). The term “Terry stop” is derived from the seminal U.S. Supreme Court case of *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.E.2d 889 (1968), in which the Court held that “a brief investigative stop, detention and frisk for weapons short of a traditional arrest based on reasonable suspicion does not violate the Fourth Amendment.” *Baltimore v. Commonwealth*, 119 S.W.3d 532, 537 (Ky. App. 2003). The *Terry* holding explains that a significant justification for such police action is “effective crime prevention.” *Terry*, 392 U.S. at 22.

[I]t is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.

Id.

In the course of a *Terry* stop, a police officer may conduct a limited search of the person to discover weapons in order to insure his or her own safety rather than to uncover evidence of a crime. *Baltimore*, 119 S.W.3d at 538. An officer need only have reasonable suspicion rather than the heightened standard of probable cause as justification for the investigatory search. *Id.*

In this case, the questioning by the officers of Habler does not rise to the level of a search and seizure as outlined in the *Terry* case. Habler was, at best, a party to

a brief investigatory *Terry* stop, but the officers did not actually “stop and frisk” him as the *Terry* case even allows. The officers were well within the limit of inquiry the *Terry* holding grants to officers in similar situations because there was actually no search and seizure of Habler’s person until Habler voluntarily lifted his shirt to reveal a handgun. At that point, the officers no longer needed a reasonable and articulable suspicion to do a weapons search of Habler because the officers had probable cause to detain him at that point and arrest him for the handgun. The crack cocaine found on Habler’s person was found as the result of a valid arrest.

At the suppression hearing, the officers testified that Habler’s close proximity to Johnson, within five to six feet, the time of night, and Habler being in an area notorious for drug activity, made the officers suspect that Habler might have been dangerous, and the trial court agreed. We also agree and find that these beliefs were objectively reasonable, particularly in light of the due deference that we must give to factual inferences drawn by trial courts in these matters. *Whitmore*, 92 S.W.3d at 79 (citation omitted).

Therefore, we hold that the stop in this case did not violate the Fourth Amendment. Both the drugs and the handgun found on Habler’s person at the time of his arrest were admissible, and the trial court did not err in denying Habler’s motion to suppress.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Angela Evans
Lexington, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Perry T. Ryan
Assistant Attorney General
Frankfort, Kentucky