

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002109-MR

KENNETH BRAD WESTBAY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 05-CR-001044

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** *

BEFORE: NICKELL, STUMBO, AND THOMPSON, JUDGES.

NICKELL, JUDGE: Kenneth Brad Westbay (“Westbay”) entered a conditional guilty plea pursuant to Kentucky Rules of Criminal Procedure (RCr) 8.09 in the Jefferson Circuit Court to the charges of possession of a controlled substance, first degree,¹ and being a persistent felony offender in the second degree (PFO II).² He received a sentence of six years imprisonment, and was probated for a period of five years. Within the guilty plea, Westbay reserved the right to appeal the circuit court's denial of his motion to suppress. It is from this denial that he appeals and for the foregoing reasons, we affirm.

¹ Kentucky Revised Statutes (KRS) 218A.1415.

² KRS 532.080.

In the early morning hours of June 20, 2005, officers from the Louisville Metro Police Department entered Portland Beer Depot³ during a routine drug and alcohol inspection. Police had received several complaints about prostitution and drug trafficking occurring in the immediate vicinity of the bar. The officers were clearly identifiable as law enforcement personnel as they were wearing police vests and badges. When the officers entered the pool room at the rear of the bar, only two men were present, one of whom was Westbay. Upon seeing Detective Timothy Murphy (“Detective Murphy”), Westbay attempted to leave through an emergency exit. Detective Murphy attempted to stop Westbay for questioning, but Westbay physically resisted the detective. Once he was subdued, Detective Murphy placed Westbay in handcuffs.

During a subsequent pat-down for weapons, Detective Murphy felt something in Westbay's front pocket. Without prompting from the officers, Westbay spontaneously stated “it's cocaine.” Officer Derrick Payne then escorted Westbay to the front of the building where he removed a plastic baggie of suspected cocaine from Westbay's pocket. Westbay was then placed under arrest for possession of cocaine. Based upon these facts, a Jefferson County grand jury indicted Westbay on March 30, 2005, for possession of a controlled substance in the first degree and for being a persistent felony offender in the second degree.

On August 1, 2005, Westbay filed a motion to suppress the evidence seized from him on the basis that Detective Murphy did not have “articulable suspicion that

³ According to the record, Portland Beer Depot is a tavern/bar located on Pflanz Avenue in Louisville.

criminal activity may be afoot and that [Westbay] may have been armed and dangerous so as to justify a *Terry*⁴ stop and frisk.” The trial court held a hearing on the motion at which only Detective Murphy testified. His testimony regarding the incident paralleled the facts set forth above. After considering the parties' briefs on the issue, the trial court entered a written order on October 28, 2005, denying the motion to suppress. On November 2, 2005, Westbay filed a motion to reconsider the October 28, 2005, order denying suppression of the evidence, which the trial court denied by written order entered on December 12, 2005.

Pursuant to a plea agreement, Westbay entered his conditional guilty plea on July 14, 2006, specifically reserving therein the right to appeal from the denial of his suppression motion. On August 29, 2006, Westbay was sentenced, pursuant to the Commonwealth's recommendation, to three years on the possession charge, enhanced to six years by the PFO II charge, with the sentence being probated for a period of five years. Westbay timely appealed his conviction to this Court solely on the basis of the denial of his suppression motion.

The standard for our review is set forth in *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). Under that decision, the determination of a circuit court regarding a suppression motion based on an alleged illegal search is subject to a two-pronged analysis. First, historical facts should be reviewed for clear error, and the facts are deemed to be conclusive if supported by

⁴ *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

substantial evidence. Second, determinations of reasonable suspicion and probable cause are mixed questions of law and fact and are therefore subject to *de novo* review. *See also Baltimore v. Commonwealth*, 119 S.W.3d 532, 539 (Ky.App. 2003). Furthermore, we are bound to give “due weight to inferences drawn from those facts by resident judges and local law enforcement officers.” *Ornelas*, 517 U.S. at 699.

In the case at bar, Westbay contends the circuit court erred in denying his suppression motion because his interaction with the police officers was in violation of the Fourth Amendment⁵ search and seizure protections and the guidance set forth in *Terry*. Pursuant to *Ornelas*, we shall first address the historical facts for clear error and then consider the circuit court's determination of reasonable suspicion and probable cause.

Detective Murphy presented uncontroverted testimony at the suppression hearing regarding the historical facts recited herein. Upon review of the record, we find the circuit court took all of the evidence into account, including the supplemental briefs presented by the parties, prior to making a decision. If substantial evidence appears in the record to support the circuit court's findings, even if there is conflicting evidence, the decision will not be disturbed on appeal. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003); *Commonwealth v. Neal*, 84 S.W.3d 920 (Ky.App. 2002); Kentucky Rules of Civil Procedure (CR) 52.01. Moreover, “judging the credibility of witnesses and weighing

⁵ The Fourth Amendment to the United States Constitution provides: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

evidence are tasks within the exclusive province of the trial court.” *Moore, supra* at 354 (citing *Bowling v. Natural Resources & Environmental Protection Cabinet*, 891 S.W.2d 406 (Ky.App. 1994)). We find the historical facts relied upon by the circuit court were supported by substantial evidence and are therefore not clearly erroneous. Thus, the facts are conclusive.

Next we must inquire as to the propriety of the Circuit Court's determination of the existence of reasonable suspicion or probable cause. When making such a determination, the “totality of the circumstances--the whole picture--must be taken into account. Based upon that whole picture, the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.” *United States v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981). In *United States v. Arvizu*, 534 U.S. 266, 273, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002), it was held that such a “process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person” [internal quotation marks omitted] [citations omitted].

Detective Murphy testified there had been several citizen complaints made to law enforcement regarding criminal activity occurring in the immediate vicinity of the Portland Beer Depot. Based upon this information, officers decided to check the premises for such activity. Detective Murphy testified Westbay immediately attempted to flee the area when he saw the officers, thereby raising the officer's suspicions of

possible criminal activity. Further, based upon Westbay's continued efforts to vacate the premises and “get away” from the officers, Detective Murphy became fearful Westbay might be armed with a weapon of some sort. Thus the officer deemed it prudent to place Westbay in handcuffs until such time as it could be determined whether he was, in fact, armed. According to Detective Murphy, less than fifteen seconds elapsed between his first entry into the pool room and Westbay being placed in the handcuffs. Although Detective Murphy did not recognize Westbay on sight, upon learning his identity the officer immediately recalled that Westbay was wanted in connection with a separate criminal endeavor. Although not mentioned in the Commonwealth's brief, this realization further solidified Detective Murphy's suspicions. Thus, based upon these facts, the trial court found first that Westbay's actions created a reasonable suspicion of criminal activity and second that the officer acted prudently given the totality of the circumstances. We agree.

Upon our review of the record, we believe Detective Murphy did, in fact, have a particularized and objective basis for suspecting Westbay was engaged in criminal activity, in accord with *Cortez, supra*. Therefore, on the facts before us, we hold Detective Murphy was justified in his attempt to briefly detain Westbay for further investigation. Accordingly, the trial court properly refused to suppress the seized contraband.

Finally, we believe it important to note that the situation quickly ripened into probable cause to arrest when Westbay spontaneously admitted having narcotics on

his person. Upon being placed under arrest, the illicit drugs were retrieved. In *United States v. Robinson*, 414 U.S. 218, 224, 94 S.Ct. 467, 471, 38 L.Ed.2d 427 (1973), the United States Supreme Court stated that “[i]t is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment. . . . The validity of the search of a person incident to a lawful arrest has been regarded as settled since its first enunciation[.]” See also *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *Draper v. United States*, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959); *Pruitt v. Commonwealth*, 286 S.W.2d 551 (Ky. 1956); and *Johnson v. Commonwealth*, 41 S.W.2d 913 (Ky. 1931). Thus, the ultimate search of Westbay's person was incident to a valid arrest, and therefore passes constitutional muster. The Circuit Court committed no error in denying the motion to suppress the evidence obtained thereby.

Accordingly, for the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

G. Murray Turner
Mulhall, Turner, Coombs & Malone, PLLC
Louisville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Perry T. Ryan
Assistant Attorney General
Frankfort, Kentucky