

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002558-MR

REGINALD CRAIG BRANCH

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 06-CR-00106

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: KELLER, LAMBERT, AND STUMBO, JUDGES.

KELLER, JUDGE: Reginald Craig Branch (Branch) entered a conditional guilty plea to Possession of a Firearm by a Convicted Felon and received a sentence of two years' imprisonment. Prior to entering his guilty plea, Branch filed a motion to suppress evidence that he believed had been unlawfully seized. Following a hearing, the circuit court denied Branch's motion. It is from the circuit court's order denying his motion to suppress that Branch appeals. For the reasons set forth below, we affirm.

FACTS

On November 9, 2005, at 5:00 a.m., Officers Shannon and Davis were patrolling an area in Lexington noted for illegal drug activity and prostitution. They saw a parked car facing the wrong direction and stopped to investigate. When she shined the cruiser's spotlight into the car, Officer Shannon saw Branch and an unnamed passenger¹ sitting in the front seat.

Because of the late hour and the location, Officers Shannon and Davis got out of their cruiser and approached the car, Officer Davis on the driver's side and Officer Shannon on the passenger's side. While Officers Shannon and Davis were questioning Branch and the passenger, Officers McBride and Breslin arrived on the scene. Shortly after the two other officers arrived, Officer Shannon saw a digital scale on the floorboard between the passenger's legs. Officer Shannon then advised the other officers that this was "an arrest situation" and they removed Branch and the passenger from the car. Officer Davis performed a "pat down" of Branch, placed him under arrest, and handcuffed him. Officer Davis then searched Branch and found a digital scale and razor blade in one of Branch's pockets. According to Officer Davis, there was residue of a cocaine-like substance on those items. Officer McBride then searched the interior of the car and found a handgun under the driver's seat.

Branch, who was ultimately charged with several offenses, filed a motion to suppress all evidence seized as a result of the search of the car. At the suppression hearing, Officers Davis, Shannon, and McBride testified consistent with the above.

¹ The passenger, who was not charged with a crime, is not identified in the record.

Branch testified that Officer Shannon did not see the scale before taking Branch and the passenger out of the car. According to Branch, the scale was under the passenger seat and Officer Shannon could not have seen it from outside the car. Branch testified that Officer Shannon reached under the passenger seat and pulled it out when she began searching the interior of the car.

After hearing testimony from the officers and Branch, the circuit court found that Officers Shannon and Davis had sufficient reason to approach the car and to ultimately arrest Branch and search the car. Branch then entered into a conditional guilty plea to Possession of a Firearm by a Convicted Felon and appealed the circuit court's order denying his motion to suppress.

STANDARD OF REVIEW

The standard of review on a suppression motion is twofold. First the factual findings are conclusive if supported by substantial evidence. RCr 9.78; *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky.App. 2002). Second, when the findings of fact are supported by substantial evidence, the question is "whether the rule of law as applied to the established facts is or is not violated." *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998) quoting *Ornelas v. United States*, 517 U.S. 690, 697, 116 S.Ct. 1657, 1662, 134 L.Ed.2d 911 (1996).

ANALYSIS

Branch's complaints regarding his arrest and subsequent prosecution are primarily twofold. First, Branch argues Officers Shannon and Davis had no lawful

reason to approach the car. Second, Branch argues that the officers had no reason to place him under arrest or to subsequently search the interior of the car. For the reasons set forth below, we disagree.

At the outset, we note that the trial judge made no written findings of fact. Furthermore, although he ruled from the bench following the suppression hearing in addition to preparing a written order, the trial judge did not make any specific oral findings of fact either. He simply stated that "[b]ased upon the testimony, I think the officers could approach to investigate what may have been going on." Therefore, it is difficult for us to determine what specific facts the trial judge relied upon in denying the motion to suppress. That being said, we hold that the testimony of Officers Shannon, Davis, and McBride was evidence of substance "that would permit the fact-finder to reasonably find as [he] did." *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). Therefore, the trial court's finding that the officers were justified in approaching the car is supported by substantial evidence.

We must next determine if, given the testimony at the suppression hearing, the trial court correctly applied the law. There is no dispute that Officers Davis and Shannon had no warrant when they approached the car or when they arrested Branch. Therefore, "the Commonwealth . . . bear[s] the burden of justifying the search and seizure under one of the exceptions to the warrant requirement." *Commonwealth v. Erickson*, 132 S.W.3d 884, 887 (Ky.App. 2004).

Branch argues that the officers had no reasonable basis for approaching the car; therefore, any actions taken by the officers following that approach were likewise not justified. We disagree. A police officer may make an investigatory stop if he possesses a reasonable suspicion that criminal activity is afoot. *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 1884, 20 L.Ed.2d 889 (1968). Reasonable suspicion must be measured by what the officer knew before the stop. *Id.* The officer “must have a particularized and objective basis for suspecting the particular person stopped of criminal activity” based on the totality of the circumstances. *U.S. v. Cortez*, 449 U.S. 411, 417-18, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981). An “officer need not be absolutely certain that the individual is engaged in an unlawful enterprise; ‘the issue is whether a reasonably prudent man in the circumstances would be warranted in his belief that the suspect is breaking, or is about to break, the law.’” *Williams v. Commonwealth*, 147 S.W.3d 1, 5 (Ky. 2004) *citing Terry*, 392 U.S. 1, at 27, 88 S.Ct. at 1868 (1968).

The fact that the car was parked facing the wrong way in a neighborhood with a reputation for criminal activity and that Branch and the passenger were sitting in the car at 5:00 a.m. gave the officers a reasonable suspicion of criminal activity sufficient to support an investigative stop. *See Dockstader v. Commonwealth*, 802 S.W.2d 149, 150 (Ky.App. 1991). Therefore, we hold that the officers had reasonable grounds to support their approach of the car and their questioning of Branch and his passenger.

Having determined that the officers had valid reasons for approaching the car and questioning its occupants, we must determine if they had valid reasons for

arresting Branch. As noted above, since the officers did not have a warrant, the Commonwealth bears the burden of justifying Branch's arrest. Officer Shannon testified that she advised the other officers that they had an "arrest situation" when she saw the digital scale in plain view on the floorboard of the passenger side of the car. KRS 218A.500 provides as follows:

(1) "Drug paraphernalia" means all equipment, products and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this chapter. It includes, but is not limited to:

(e) Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances[.]

Possession of drug paraphernalia is a Class A misdemeanor for a first offense and a Class D felony for any subsequent offenses. KRS 218A.500(5). There is no indication that any of the officers on the scene had information that Branch or his passenger had any prior convictions. Therefore, it appears that Officer Shannon advised Officer Davis to arrest Branch based on her view of the digital scale, which would have been a misdemeanor possession of drug paraphernalia.

The appropriate analysis to determine if a misdemeanor arrest was lawful is whether a reasonable officer could conclude from all the facts that a misdemeanor is being committed in his presence. *Commonwealth v. Mobley*, 160 S.W.3d 783, 786 (Ky.

2005); *Maryland v. Pringle*, 540 U.S. 366, 372, 124 S.Ct. 795, 800-01, 157 L.Ed.2d 769 (2003). Based on her observation of the digital scale, Officer Shannon could have reasonably concluded that a misdemeanor was taking place.

However, our analysis cannot stop there. We must determine whether Officer Shannon's observation of the digital scale was lawful. The Commonwealth argues that the arrest was justified because the digital scale Officer Shannon observed was in plain view. In order for the plain view doctrine to apply, the officer must be lawfully located in a place from which the object can be plainly seen and he or she must have a lawful right of access to the object. *Hazel v. Commonwealth*, 833 S.W.2d 831, 833 (Ky. 1992); *Commonwealth v. Hatcher*, 199 S.W.3d 124, 126 (Ky. 2006). As noted above, Officers Shannon and Davis were justified in approaching the car and questioning Branch and the passenger. In connection with their questioning of Branch and the passenger, Officers Shannon and Davis were justified in looking into the interior of the car. Therefore, the digital scale, which falls within the definition of drug paraphernalia and was in plain view, justified Branch's arrest.

Finally, we must determine if the search of the passenger compartment of the car was valid. When an officer makes a lawful custodial arrest of an automobile's occupant, the officer is permitted to search the passenger compartment as a contemporaneous incident of arrest. *New York v. Belton*, 453 U.S. 454, 460, 101 S.Ct. 2860, 2864, 69 L.Ed.2d 768 (1981); *Commonwealth v. Ramsey*, 744 S.W.2d 418, 419 (Ky. 1987). Because we have held that Officers Shannon and Davis were justified in

approaching the car and in arresting Branch, their search of the passenger compartment of the car incident to that arrest was lawful.

CONCLUSION

Based on the above, we discern no error in the trial court's order denying Branch's motion to suppress. Therefore, we affirm the judgment of the Fayette Circuit Court.

ALL CONCUR.

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