

Commonwealth Of Kentucky

Court of Appeals

NO. 2007-CA-000430-MR

EDWARD LAMONT HARDY

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 06-CR-00264

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; CAPERTON AND MOORE, JUDGES.

COMBS, CHIEF JUDGE: Appellant Edward Hardy appeals his conviction following a jury trial for possession of a controlled substance; promoting contraband; operating on a suspended/revoked operator's license; a variety of traffic charges; and persistent felony offender, second degree. He argues that allegedly expert testimony was improperly allowed, that evidence obtained from a strip search was erroneously admitted despite his motion to suppress, and that the court erred in denying him the opportunity to present

testimony concerning the FBI's acquisition of the strip search recording. After our review of the record, we affirm the judgment of conviction.

Our recitation of the facts is derived from our review of the video record of two suppression hearings (April 17, 2006 and November 7, 2006) and the trial on December 18, 2006.

At approximately 4:00 a.m. on December 14, 2005, Lexington Metro Police Officer Ronnelius Arnold was routinely patrolling the area near the Coolavin Apartments on Sixth Street. Officer Arnold testified that the area has a reputation for a high volume of drug trafficking. The weather was very cold. It was early in the morning when Officer Arnold observed individuals meandering about the parking lot. He considered the behavior to be "suspicious activity." Officer Arnold continued watching until he saw an individual get into a car; he then left the location where he had parked his patrol car.

At approximately 4:10 a.m., on Delcamp Street, about one and one-half blocks from the parking lot, Officer Arnold noticed a car that did not have its rear license plate illuminated. He initiated a traffic stop. Hardy, the driver of the car, awkwardly pulled the car over, stopping partially in a driveway and partially in the street. Although Officer Arnold first believed that Hardy was attempting to flee, Hardy stopped to answer questions. Officer Arnold discovered that Hardy was not carrying identification and that his driver's license was suspended. At that point, Officer Arnold arrested Hardy for driving on a suspended license.

As part of routine arrest procedures, Officer Arnold performed a pat-search on Hardy. He later testified that the search was not thorough because Hardy wore extremely baggy clothing. The pat-search revealed a large amount of cash in Hardy's

front pocket. He did not count the money, but Officer Arnold observed two large bills. During the arrest, the officer also noticed Hardy exhibiting signs of extreme nervousness – broken speech, repeated flatulence (a clinically recognized manifestation of distress),¹ and a quivery voice.

Officer Arnold placed Hardy in the patrol wagon in line with his rear-view mirror. During the transport to the Fayette County detention facility, Officer Arnold observed that Hardy was constantly moving and that he was manipulating the waistband of his pants with his hands, which were hand-cuffed behind him. He moved from the back of the patrol wagon to the front and back again to the rear area, scooting in a way that caused Officer Arnold to suspect that he had a weapon. During this display of erratic behavior, Officer Arnold decided that a strip search would be appropriate. He was convinced that Hardy was hiding something, and he thoroughly searched the wagon after removing Hardy at the detention center.

Before Hardy entered booking at the detention center, Officer Arnold warned him of the consequences of promoting contraband and gave him the opportunity to reveal any items that he might have been concealing. Hardy denied possessing any contraband.

While Hardy was being booked, Officer Arnold submitted a request form for a strip search and verbally conferred with a booking officer concerning his reasons for the request. The request was approved, and when Hardy was informed of the impending search, he became resistant and refused to cooperate. Therefore, officers decided to

¹ A website (http://harvardatoz.demo.staywellsolutionsonline.com/71,AZ_s0011) indicates that some people swallow a lot of air when they are nervous, and since that air needs an escape route, flatulence results.

videotape the procedure. When Hardy refused to separate his legs, officers forced them apart. A bag containing nine grams of crack cocaine fell onto the ground. Hardy was charged with narcotics trafficking.

Hardy first claims his conviction should be overturned because the Commonwealth improperly employed an expert witness in his trial. However, since the expert witness testified as to the trafficking charge and Hardy was convicted for possession, the allegation of error as to the expert witness is a moot point not meriting our review.

Hardy more importantly argues that the strip search was illegal, rendering the evidence inadmissible at trial. The trial court disagreed and ruled that it was admissible in two separate suppression hearings.

Kentucky Rule of Criminal Procedure (RCr) 9.78 sets forth our standard of review for a motion to suppress: “If supported by substantial evidence the factual findings of the trial court shall be conclusive.” In construing that rule, the Supreme Court of Kentucky has provided a guideline: “When the findings of fact are supported by substantial evidence ... the question necessarily becomes ‘whether the rule of law as applied to the established facts is or is not violated.’” *Adcock v. Commonwealth*, 967 S.W.2d 6 (Ky. 1998), citing *Ornelas v. United States*, 517 U.S. 690, 697 (1996). In *Ornelas*, the Court held that Fourth Amendment “reasonable suspicion issues” should be reviewed *de novo*. *Id.* at 699.

The Operational Orders for the Lexington-Fayette County Detention Center define *unclothed search* as “a search that requires the inmate to remove all clothing and

includes a visual search of the inmate's body.” Trial Record 91. The Operational Orders provide the criteria for such searches, which include:

In those situations in Intake where a law enforcement officer from an outside agency has *reasonable suspicion* that an unclothed search is appropriate for an individual having initial custodial contact, he shall prepare a written request for an unclothed search stating the rationale which would justify such action, specifically referencing those portions of this order as are applicable. The Intake commander shall have the authority to approve or disapprove the request.

Id at 93. [Emphasis added]

In *Terry v. Ohio*, 392 U.S. 1, 21-2 (1968), the Supreme Court held:

. . . in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together from rational inferences from those facts, reasonably warrant the intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment, it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search “warrant a man of reasonable caution in the belief” that the action taken was appropriate?

Citations omitted. Though *Terry* did not involve a strip search, the United States Supreme Court elaborated upon its *Terry* reasoning in *Bell v. Wolfish*, 441 US 520, 558 (1979), holding that strip searches of prisoners and detainees do not violate the Fourth Amendment as long as they are reasonable. It provided a balancing test:

The test of reasonableness under the Fourth Amendment is not capable of precise definition of mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal

rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Citations omitted. The Court further explained that since corrections facilities have inherent risks of inmates' smuggling contraband and weapons in body cavities, the need for stringent security measures must be weighed in assessing the reasonableness of strip searches.

The Supreme Court elaborated on the guidelines for reasonable searches in *US v. Cortez*, 499 U.S. 411 (1981), holding that trained law enforcement officers can draw inferences and make deductions based on objective observations and “patterns of operation of certain kinds of lawbreakers.” *Id.* at 418. The Court refreshingly reverted to a common-sense analysis as to the probabilities made predictable by virtue of human nature itself, concluding that:

[L]ong before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; jurors as factfinders are permitted to do the same and so are law enforcement officers.

Id.

Masters v. Crouch, 872 F.2d 1248 (6th Cir. 1989), applies to this case.

Masters also involved a defendant detained for a traffic offense who was subjected to a strip search while in custody. The court held that “a person charged only with a traffic violation or nonviolent minor offense may not be subjected to a strip search **unless there are reasonable grounds for believing that the particular person might be carrying or concealing weapons or other contraband.**” *Id.* at 1257 [Emphasis added].

In the case before us, the record indicates that the trial judge relied on the totality of the circumstances in determining whether the police officer and the jail

officials had reasonable grounds for believing that Hardy might be carrying or concealing weapons or other contraband. She listed the following factors in her decision to deny the motion to suppress the evidence obtained from the strip search:

- 1) the traffic stop was legitimately based on lack of illumination of the license plate;
- 2) Hardy was driving on a suspended license;
- 3) Hardy pulled his car over in an erratic manner, leaving part of his car in the roadway, thus causing Officer Arnold to expect him to flee;
- 4) Officer Arnold found a large amount of cash in Hardy's pocket;
- 5) Hardy's extreme and bizarre bodily movements during transport caused Officer Arnold to fear that Hardy had a weapon or that he was hiding drugs, prompting Officer Arnold to search the patrol wagon following transport;
- 6) the time of day and proximity to the suspicious individuals in the area with a reputation for drug activity aroused suspicion that criminal activity might be afoot.²

We have considered the *Bell* factors (scope of the particular intrusion, the manner in which it was conducted, the justification for initiating it, and the place in which it was conducted). We also note that Officer Arnold gave Hardy the opportunity to surrender any contraband, but Hardy declined. The search was a visual strip search rather than the more invasive body-cavity search. It was conducted in private (away from the general population) in the jail facilities. We conclude that the totality of the

² The U.S. Supreme Court has held being in a high crime location is a legitimate *Terry* factor. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).

circumstances provided the law enforcement officer with reasonable suspicion that Hardy was concealing something illegal; therefore, the search was justified.

Hardy's next argument is that the trial court improperly denied an opportunity for testimony concerning the FBI's confiscation of the original copy of the videotape recording of the strip search. Hardy hoped to cause jurors to suspect the jail officials of wrongdoing by showing that they were undergoing federal investigation at the time of their handling of his case.

The Internal Affairs department provided the Commonwealth a copy of the strip search. The captain explained that the search was originally recorded on a digital camera and then saved to a computer. He saved the file on a CD with other files. In order to satisfy the Commonwealth's discovery request, the captain copied the file onto a CD by itself. Under Kentucky Rule of Evidence (KRE) §1001(3), this CD qualifies as an original: "If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an 'original.'" Thus, Hardy cannot characterize the CD as an inadmissible copy regardless of the fact that the parties did not receive what he argues should constitute an original.

Additionally, the trial court did not err in denying testimony concerning the FBI's confiscation of the videotape on relevancy grounds. The officer whose testimony Hardy sought did not have any actual knowledge of the FBI's investigation. Any conjecture on this point is speculative and irrelevant. KRE § 401 defines relevant evidence as that evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it

would be without the evidence.” The issue in this case is the justification for undertaking the strip search itself rather than anything that occurred during the strip search.

In light of the standards underlying reasonable searches as defined by case law, the totality of the circumstances of this case, and the principles defined by the Kentucky Rules of Evidence, we hold that the trial judge did not err in denying the motion to suppress the evidence or in disallowing additional testimony.

We affirm the judgment of the Fayette Circuit Court.

ALL CONCUR.

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