

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000663-MR

JOSEPH KNIGHT

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 06-CR-00228

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: STUMBO AND WINE, JUDGES; GUIDUGLI,¹ SENIOR JUDGE.

WINE, JUDGE: Joseph Knight (“Joseph”) was convicted in the Muhlenberg Circuit Court pursuant to a conditional guilty plea on the charges of possession of a controlled substance first degree, two counts, possession of drug paraphernalia, and persistent felony offender second degree. The trial court imposed an eight-year prison sentence. Prior to his plea, Joseph moved to suppress evidence seized during a traffic stop on November 29, 2006. The trial court denied his motion.

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

On appeal, Joseph argues that any evidence seized or obtained as a result of the traffic stop should be suppressed. Finding no reversible error, we affirm.

Joseph first contends that the trial court erred by denying his motion to suppress the evidence obtained as a result of the traffic stop. RCr 9.78 sets out the procedure for conducting suppression hearings and establishes the standard of appellate review of the determination of the trial court. Our standard of review of a circuit court's decision on a suppression motion following a hearing is twofold: first, the factual findings of the court are conclusive if they are supported by substantial evidence; and second, this Court conducts a *de novo* review to determine whether the trial court's decision is correct as a matter of law. *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998).

At the suppression hearing Trooper Jeff McWhorter ("Trooper McWhorter") of the Kentucky State Police Department testified that on November 29, 2006, he and Trooper Lloyd Ray ("Trooper Ray") responded, in separate police cruisers, to Joseph's residence on a complaint of a possible drug overdose and shots being fired. Upon arrival, the troopers were advised that there was no problem and told to leave the premises. The officers still believed that a problem existed so they remained in the general area, but approximately one mile away from Joseph's residence. A short time later, Trooper McWhorter observed a vehicle leave Joseph's residence and appear to be weaving in its lane down the road. Trooper McWhorter followed the vehicle for a mile or so before observing the driver make a left turn into a driveway without using a turn

signal. Trooper McWhorter then turned on his emergency lights and stopped the vehicle. Trooper Ray assisted Trooper McWhorter and the two determined that the driver was Herman Knight (“Herman”), Joseph’s father. Joseph was a passenger in the front seat of the vehicle.

Trooper McWhorter asked Herman to step out of the vehicle, at which time Herman became angry and at some point pulled a pill bottle from his pocket and attempted to conceal it in his hand. Herman was placed under arrest for possessing prescription drugs not in a proper container. Trooper McWhorter secured Herman in his police cruiser while Trooper Ray remained at the vehicle next to Joseph. Upon returning to the vehicle, Trooper McWhorter patted down Joseph looking for weapons. Trooper McWhorter noticed a bulge in Joseph’s pants in the groin area. When he patted the area, Trooper McWhorter heard a noise which sounded similar to paper being crinkled and felt a hard object which he believed could possibly be a knife. Trooper McWhorter removed the bulge which was an envelope containing the hard object, a glass pipe, and methadone pills. Trooper McWhorter arrested Joseph.

Rebecca Canary testified for Joseph and stated she was at Herman’s residence where his car was pulled over. She testified that she was standing outside and saw Herman use his left turn signal on the night in question. Joseph also called Brenda Ward to testify that she saw Herman use his turn signal. However, the Commonwealth stipulated that Ward and Joseph’s two other witnesses would all testify that they saw Herman use his left turn signal the night he was pulled over.

Joseph argues the police had no reason to stop the vehicle because Herman properly used his turn signal when he pulled into the driveway. In addition, Joseph points out that Herman never received a citation for swerving. Joseph also argues there was no valid reason for him to be searched. Further, Joseph contends that he was already searched by Trooper Ray, who found nothing, and therefore the second search by Trooper McWhorter was not permissible.

However, based on the evidence and issues presented at the suppression hearing, the trial court was clearly within its discretion to accept Trooper McWhorter's testimony that Herman did not use his turn signal. The trial judge is in the unique position to observe witnesses and judge their credibility. *Lawson v. Loid*, 896 S.W.2d 1 (Ky. 1995). Furthermore, the troopers did not have a duty to charge Herman with the swerving violation. The Commonwealth was not required to prove the swerving violation to justify the stop. Rather, an officer must only have probable cause to believe that a traffic violation has occurred in order to stop a suspected vehicle. *Wilson v. Commonwealth*, 37 S.W.3d 745 (Ky. 2001); *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S. Ct. 1391, 1401, 59 L. Ed. 2d 660, 673 (1979). Moreover, despite witness testimony to the contrary, Herman pleaded guilty in a separate proceeding to failing to give a proper turn signal on the night of November 29, 2006. Under the circumstances, the court was justified in choosing to believe Trooper McWhorter's testimony that Herman did not use his turn signal.

Joseph also contends that the evidence found on his person should have been suppressed based on the fact that Trooper Ray searched him first and found nothing. Therefore, Joseph asserts there was no justification for Trooper McWhorter to do an additional search. At the suppression hearing, Herman testified that he observed Trooper Ray pat-down Joseph from where he was being detained in Trooper McWhorter's police cruiser. However, Trooper McWhorter testified that he had no knowledge of whether Trooper Ray searched Joseph as he was confining Herman in his police cruiser at the time. The trial court noted that the only evidence of an initial search by Trooper Ray was given in the testimony of Joseph's father, Herman. The trial court did not find his testimony to be credible. We give deference to the trial court's determination of the credibility of the witnesses in this case.

A brief investigative stop, detention, and frisk for weapons does not violate the defendant's rights as long as the initial stop was supported by reasonable suspicion. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). A *Terry* pat-down is limited to a search for weapons. *See Terry*, 392 U.S. at 24, 88 S. Ct. at 1881-82, 20 L. Ed. 2d at 908. *See also Commonwealth v. Crowder*, 884 S.W.2d 649 (Ky. 1994). However, an officer is entitled to seize non-threatening contraband if its nature is immediately apparent from the sense of touch during an otherwise lawful pat-down. *See Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993); *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983). Trooper McWhorter testified that the hard object he felt along with the paper could have been a

knife. But, even if the trial court did not believe that a person would conceal a knife in paper and put it down his pants, the more important question becomes whether the illegal nature of the object which Trooper McWhorter felt was “immediately apparent.” The circumstances being that Joseph had a huge bulge in his pants that made the sound of crinkling paper with a hard object inside, it is reasonable that the officer could have believed it “immediately apparent” that the contents of the paper was illegal contraband.

Accordingly, the judgment of the Muhlenberg Circuit Court is affirmed.

ALL CONCUR.

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