RENDERED: MARCH 4, 2016; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000411-MR

ROBERT E. JACKSON — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 14-CR-00218

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; J. LAMBERT AND MAZE, JUDGES.

LAMBERT, J., JUDGE: Robert Jackson appeals from a conditional guilty plea to trafficking in a controlled substance, tampering with physical evidence, possession of marijuana, and resisting arrest. Jackson's plea was conditioned upon his right to appeal the trial court's denial of his motion to suppress evidence seized during his arrest. After careful review, we affirm.

The incident giving rise to this case occurred on March 23, 2014, when Jackson was riding as a passenger with two other males in a vehicle traveling southbound on the Edward T. Breathitt Pennyrile Parkway. At approximately 4:22 p.m., Trooper Jeffrey Ayers stopped the vehicle for traveling 72 miles per hour in a 70 miles per hour zone. Prior to stopping the vehicle, Trooper Ayers had received a text message from Trooper Sean Wint with information from an informant. Trooper Ayers testified at the suppression hearing that he received text messages with a description of the vehicle, the vehicle license number, a picture of the rear of the vehicle and a time window for when the vehicle would be traveling. The tip stated that Jackson and other occupants of the vehicle were returning from Chicago after obtaining narcotics there. Trooper Ayers also indicated that Jackson was specifically identified as one of the occupants of the vehicle, along with two other male subjects.

When Trooper Ayers approached the vehicle, he observed Jackson sitting in the right front passenger seat. Trooper Ayers first spoke to the driver, Marion Robinson, and asked for his driver's license and registration. Because Jackson was talking while Trooper Ayers was questioning Robinson, Trooper Ayers asked Robinson to exit so he could speak to him without interruption. Trooper Ayers spoke to each of the subjects individually, and each had different stories regarding the purpose of the trip, how far they had driven, and where they had traveled from.

While Trooper Ayers was outside the vehicle speaking to Jackson, Deputy Casey Green arrived with his K9 dog to conduct a sniff around the vehicle. The dog indicated on the front driver's side door. Trooper Ayers and Deputy Green began to search the vehicle. At this point, Trooper Ayers smelled the odor of marijuana and found rolling papers on the floorboard of the front seat. Deputy Green found a white chalky residue in a backpack in the trunk. During Deputy Green's search of the trunk, he made the comment that Jackson might have narcotics between his buttocks, because another trooper, Trooper Palmer, stated that Jackson acted very nervous when Deputy Green brought the K9 by him. Jackson remained with Trooper Palmer at the front right tire of Trooper Ayers' police cruiser while they were searching the vehicle.

After searching the vehicle, Trooper Ayers told Jackson that the dog had made a positive indication of narcotics in the vehicle and that they needed to search his person. Trooper Ayers searched Jackson's upper body, his shoes, pockets, and the areas associated with his pockets. Trooper Ayers asked Jackson to lower his pants, which were already halfway down his buttocks, and Jackson complied. Trooper Ayers asked Jackson to pull out the front of his boxers. Jackson complied and pulled his genitals to the side.

Trooper Ayers then walked around to Jackson's back and asked him to lower his boxers. At this point, Jackson was still standing at the right front tire of Trooper Ayers' vehicle, leaning over the hood toward the roadway. Jackson complied and lowered his boxers to the bottom of his buttocks. As Jackson

lowered his boxers, Trooper Ayers observed Jackson place his hand underneath his buttocks like he was trying to catch something. Trooper Ayers did not know what Jackson was reaching for and asked him to bend over. At this point, Jackson clinched up, and Trooper Ayers pushed Jackson against the hood of the car. Jackson would not place his hands behind his back. Deputy Green observed that Jackson had begun resisting and trying to pull away from Trooper Ayers. Deputy Green took Trooper Ayers' taser and told Jackson he was going to dry stun him. Deputy Green told Jackson to stop resisting, but Jackson said no. At this point Jackson was tasered.

When Trooper Ayers got Jackson on the ground, he saw the end of a sandwich bag sticking out from between Jackson's buttocks. Trooper Ayers put on gloves and recovered the package. Jackson was lying face down on the ground at the right front tire of the police vehicle when Trooper Ayers recovered the baggie. Trooper Ayers' cruiser was between the roadway and Jackson, and Trooper Ayers testified that Jackson could not be seen from the roadway when he was lying down. The bag that Trooper Ayers recovered contained a small amount of marijuana and six or seven grams of heroin.

After the hearing at which the above evidence was presented, the trial court denied Jackson's motion to suppress. The court found that based upon the positive K9 reaction on the car and the suggestion of another law enforcement officer that recent experience indicated concealment of illegal controlled substances in suspected drug dealers' private areas, Trooper Ayers reasonably

made a decision to do a more intrusive search. The trial court noted that Jackson placed his hands under his buttocks as if he was trying to catch something and that Jackson clenched up and was less than cooperative. The court observed that this was when Jackson was put on the ground and the corner of the edge of the baggie was observed. The court found that while the examination occurred on the side of the highway beside the police car, Jackson was not visible from the highway.

The trial court concluded that based upon the evidence, the stop was valid. The court found that the police were justified in relying on the information provided by the confidential informant and that this information supported reasonable suspicion, if not probable cause, to investigate the vehicle in question, because the investigating officers believed that criminal activity was afoot. Jackson subsequently entered a conditional guilty plea to a term of imprisonment for fifteen years on the charges, and the trial court's order reflects that he was sentenced to an additional two years that was not conditioned on the plea, for a total of seventeen years' imprisonment. This appeal now follows.

On appeal, Jackson makes two central arguments. First, he argues that the trial court erred in denying his motion to suppress when it found that law enforcement had probable cause to perform a strip search of his person. Next, Jackson argues that the trial court erred when it denied Jackson's motion to suppress when it held that the strip search of his person was conducted in a reasonable manner and not in violation of the protections as guaranteed by the fourth amendment.

> 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). Kentucky has adopted the standard of review approach expressed by the United States Supreme Court in *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). *See Commonwealth v. Banks*, 68 S.W.3d 347 (Ky. 2001). *Ornelas*, *supra*, states in part as follows:

> [A]s a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal. Having said this, we hasten to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.

517 U.S. at 699.

Jackson argues that the trial court did not make any finding that there was probable cause to perform a strip search of his person and that this failure is fatal to the trial court's order denying his motion to suppress. Jackson notes that in its Findings of Fact and Conclusions of Law entered February 13, 2015, the court stated that the officers had "reasonable suspicion, if not probable cause to investigate the vehicle in question as law enforcement officers believed that criminal activity was afoot." Jackson argues that there was therefore no finding

that probable cause existed to justify the warrantless strip search of his person, and all evidence resulting from the aforementioned search should be suppressed.

The Commonwealth concedes that the trial court made this statement in its order, but urges this Court to affirm the trial court's order for an alternative reason, citing *Commonwealth v. Fields*, 194 S.W.3d 255, 257 (Ky. 2006). In *Fields*, the Supreme Court of Kentucky stated, "[t]his Court has affirmed a judgment or decision of the trial court even if that court reached the right result for the wrong reason." *See also Hodge v. Commonwealth*, 116 S.W.3d 463 (Ky. 2003) and *Noel v. Commonwealth*, 76 S.W.3d 923 (Ky. 2002). Based on these cases, we are permitted to consider the Commonwealth's arguments in this regard and will do so accordingly.

Specifically, the Commonwealth points out that the trial court concluded that the information obtained from a reliable confidential informant supported reasonable suspicion, if not probable cause, to investigate the vehicle in question and the search of Jackson was appropriate under the totality of the circumstances. The Commonwealth contends that while this conclusion was pretty general, it was also correct. The Commonwealth argues that the officers had probable cause to search Jackson's person based upon the alerting by the K9, the smell of marijuana in the car, and the white substance found in the trunk. We agree. A review of the record indicates that the trial court's factual findings were supported by substantial evidence, and there was no error in this regard.

A warrantless search that is more extensive or intrusive than a pat-down for weapons incident to a *Terry*[1] stop is illegal unless it is supported by probable cause. *Baltimore v. Commonwealth*, 119 S.W.3d 532 (Ky. App. 2003). There, this Court stated:

> There are three types of interaction between police and citizens: consensual encounters, temporary detentions generally referred to as *Terry* stops, and arrests. The protection against search and seizure provided by the Fourth Amendment to the United States Constitution applies only to the latter two types. Generally, under the Fourth Amendment, an official seizure of a person must be supported by probable cause, even if no formal arrest of the person is made. However, there are various narrow exceptions based on the extent and type of intrusion of personal liberty and the government interest involved. In the seminal case of *Terry v. Ohio*, the Supreme 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. *Terry* recognized that as an initial matter, there must be a "seizure" before the protections of the Fourth Amendment requiring the lesser standard of reasonable suspicion are triggered. A police officer may approach a person, identify himself as a police officer and ask a few questions without implicating the Fourth Amendment. A "seizure" occurs when the police detain an individual under circumstances where a reasonable person would feel that he or she is not at liberty to leave. Where a seizure has occurred, 'if police have a reasonable suspicion grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, then they may make a *Terry* stop to investigate that suspicion. Evaluation of the legitimacy of an investigative stop involves a two-part analysis. First, whether there is a proper basis for the stop based on the police officer's awareness of specific and articulable facts giving rise to reasonable suspicion. Second, whether the

[1] *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

> degree of intrusion was reasonably related in scope to the justification for the stop.

Id. at 537-38. (Internal citations and footnotes omitted). Probable cause for a search exists when the facts are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found. *Id*. "[R]easonable suspicion 'is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence.'" *Williams v. Com*., 147 S.W.3d 1, 5 (Ky. 2004) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S.Ct. 673, 675–76, 145 L.Ed.2d 570 (2000)).

In *Maryland v. Pringle*, 540 U.S. 366, 371, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003), the United States Supreme Court stated, "[t]he probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances." *See Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). And, the Court stated in *Texas v. Brown*, 460 U.S. 730, 742, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983):

> [P]robable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief,' *Carroll v. United States*, 267 U.S. 132, 162, 45 S.Ct. 280, 288, 69 L.Ed. 543 (1925), that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A 'practical, nontechnical' probability that incriminating evidence is involved is all that is required. *Brinegar v. United States*, 338 U.S. 160, 176, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879 (1949). Moreover, our observation in *United*

> *States v. Cortez*, 449 U.S. 411, 418, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981), regarding 'particularized suspicion,' is equally applicable to the probable cause requirement:
>
> > 'The process does not deal with hard certainties, but with probabilities. Long 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. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.'

In this case, the officers initially had a reasonable suspicion that criminal activity was afoot. Based on the tip from the confidential informant, the officers observed the suspected vehicle speeding on the roadway it was reported to be traveling. Further, the occupants inside matched the descriptions given by the informant, and Jackson was acting strangely and answering for the driver, Robinson. The officers smelled marijuana and saw rolling papers in the front seat. They also found residue which was suspected to be from drugs in the trunk. Finally, the K9 alerted to the portion of the car in which Jackson was located, and Jackson behaved strangely when the K9 was close to him. This, in addition to the strange way Jackson behaved when the officers were performing the *Terry* frisk, gave the officers probable cause to search Jackson. We find no error in the trial court's conclusion that the search was warranted under the circumstances.

Next, Jackson argues that the strip search was not conducted in a reasonable manner and that the trial court did not make appropriate findings regarding the reasonableness of the strip search. Jackson notes that the trial court only found that Trooper Ayers testified that he was not visible from the roadway while he was being strip searched. The Commonwealth does not concede that there was an actual strip search of Jackson in this case. The Commonwealth notes that Trooper Ayers testified that Jackson's pants were already half down and his buttocks and boxers were showing. The Commonwealth contends that when Jackson acted strangely and placed his hands under his buttocks, Trooper Ayers then asked Jackson to lower his pants, but since the pants were already down halfway, the Commonwealth argues that the search did not amount to a full strip search. In the alternative, the Commonwealth argues that if this Court concludes that a strip search was performed, the search was conducted in a reasonable manner.

The trial court's order, while brief, concluded that the strip search was performed out of sight of the public because a car was between the highway and Jackson. We agree that the search of Jackson amounted to a strip search, despite the Commonwealth's arguments to the contrary. In *Commonwealth v. Marshall*, 319 S.W.3d 352 (Ky. 2010), the Supreme Court of Kentucky articulated that in order to be appropriate, strip searches must be reasonable under the circumstances.

> There exists no brightline rule to determine how invasive a search may be when conducted without a search warrant, but we again recognize that simply because 'a person is validly arrested does not mean that he is subject to any and all searches that the arresting

> officer may wish to conduct.' [*United States v. Mills*, 472 F.2d 1231, 1234 (D.C. Cir. 1972]. Different circumstances will give rise to different searches and seizures, some searches and seizures being reasonable in one circumstance and not in others; but reasonableness under the circumstances is the cornerstone. Thus, a search may be supported by probable cause, but may be conducted in a manner making it so unreasonable as to require a finding of unconstitutionality. *See Schmerber*, 384 U.S. 757, 86 S.Ct. 1826 (where the United States Supreme Court first analyzed whether the search was supported by probable cause and then determined whether the search (a blood test) was conducted in a reasonable manner); *see also Campbell v. Miller*, 499 F.3d 711, 718 (7th Cir. 2007) (holding that strip search incident to arrest was not per se unreasonable but holding that search was performed in an unreasonable manner when conducted in view of the public). In any event, we recognize that '[s]trip searches of detainees are constitutionally constrained by due process requirements of reasonableness under the circumstances.' *Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir. 1981), cert. denied, 455 U.S. 942, 102 S.Ct. 1435, 71 L.Ed.2d 653, (1982); [*Taylor v. Commonwealth,* 28 Va.App. 638, 507 S.E.2d 661, 663 (1998)].

Id. at 362. To determine reasonableness, the *Marshall* Court instructed that a court must consider the factors in *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), using them to balance the need for the particular search versus the personal rights that the search entails. These factors include: (1) the scope of the particular intrusion; (2) the manner in which the search is conducted; (3) the justification for initiating the search; and (4) the place in which it is conducted. *Id*.

Applying these to the instant case, the scope of the particular intrusion was not overly broad. Jackson's pants were in fact pulled partially down, and he appeared to consent to this by pulling his genitals aside and lowering his pants.

However, when he began to act as if he were going to catch something underneath his buttocks, he was searched further, based on the probable cause the officers had from the K9 alerting and the drug evidence already found in the vehicle. Jackson was not fully naked, and the scope of the search was limited to the location where the officers suspected Jackson had drugs hidden based upon his behaviors.

The manner in which the search was conducted was also reasonable, given the above circumstances and the testimony of the officers. Jackson has not made any argument on appeal to this Court that the testimony of the officers was invalid or not supported by the record. His only arguments have been that the trial court improperly found that the search was warranted and was reasonable. In this case, the search amounted to the lowering of Jackson's boxers, which was done by Jackson himself. The search was a visible search, and Trooper Ayers did not manipulate any part of Jackson's anatomy to conduct the search. There was very minimal, if any, pain or trauma to Jackson's body. The search consisted of the officers visibly observing the baggie sticking out from between Jackson's buttocks. We conclude that the manner of the search was also reasonable.

As stated above, the officers had several reasons for searching Jackson's buttocks for drugs. As his pants were already partially down and he was behaving strangely, the officers were justified in initiating the search based on the K9 alert and the drug residue found in the car.

Jackson takes issue with the final factor, the place in which the search was conducted. While we agree that the side of the road was not an ideal place for a strip search, the fact of the matter is that Jackson began resisting arrest and behaving erratically. Thus, the officers tased him and searched him at that point. The record indicates that Jackson was not visible from the roadway, as he was on the ground and a vehicle was blocking him from the sight of passersby. Jackson does not allege that he was visible to patrons on the highway, but instead states that he might have been observed by the two other occupants of the vehicle. Further, Jackson argues that the strip search could have been conducted privately at a detention center after the arrest.

We conclude that because Jackson was searched out of vision of the public and was not able to be seen from the roadway, the place where the search was conducted was not unreasonable under the circumstances. The search took a couple of minutes, and Jackson already had his pants down partway and consented to pulling them down himself. Furthermore, had the search been performed at a detention facility, the contraband would ultimately have been found minutes later. We cannot say that the place of the search was unreasonable.

Because the search of Jackson was supported by probable cause and was reasonable, we affirm the Christian Circuit Court's February 13, 2015, order denying Jackson's motion to suppress contraband found during his arrest.

ALL CONCUR.

BRIEF FOR APPELLANT:

Charles R. Haggard
Kenneth R. Haggard
Hopkinsville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky