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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-002077-MR

ROBERT PENNINGTON

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 04-CR-00149

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: ABRAMSON AND GUIDUGLI, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

ABRAMSON, JUDGE: Robert Pennington appeals from a September 15, 2005, judgment of the McCracken Circuit Court convicting him pursuant to his guilty plea of first-degree trafficking in cocaine, in violation of KRS 218A.1412. The court sentenced Pennington as a second-degree persistent felony offender to thirteen years in prison. Pennington contends that the court erred when it refused to suppress the cocaine evidence, which,

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

according to Pennington, a police officer seized unlawfully during a warrantless search of Pennington's person. Convinced that the search was lawful, we affirm.

During the late morning of February 23, 2004, Officer Matt Wentworth of the Paducah Police Department was patrolling an area near downtown Paducah known as the "Set." Apparently the "Set" is notorious as a venue for drug transactions and has been the scene of numerous shootings and other acts of drug-related violence. Near the intersection of Seventh Street and Adams Street, the officer observed a pedestrian approach a white Chevy Caprice, exchange something with the driver, and walk away in what the officer believed was a nervous and excessively vigilant manner. The officer also noticed that the Caprice bore an expired temporary license. Accordingly, when the Caprice pulled away a moment later, the officer followed and near the intersection of Adams Street and Walter Jetton Blvd. effected a traffic stop. He notified his dispatcher of the stop, and in response to his description of the white Caprice a supervisor radioed back and advised him to use caution because the driver might be Pennington, clearly implying that the supervisor was familiar with Pennington and believed him to be dangerous.

Before proceeding, therefore, Officer Wentworth requested backup and within five minutes was joined by two other officers. He then approached the Caprice's driver, confirmed

that the driver was indeed Pennington, and asked him to exit his vehicle. According to Officer Wentworth's suppression hearing testimony, Pennington appeared excessively nervous. After handing Pennington a citation for the expired license, the officer asked him if he was in possession of any drugs or weapons. Pennington denied being in possession of those items, whereupon the officer asked if he might search Pennington's person and his car. Pennington said no, grew even more agitated, and asserted that his lawyer had advised him not to consent to any searches. According to the officer, Pennington's demeanor became alarmingly defensive. His voice became loud, he attempted to back away, and he gesticulated with his hands. Concerned for his safety, the officer informed Pennington that he was going to pat him down for weapons. At first Pennington vociferously objected, but assured that the pat down was just for weapons, he finally allowed the officer to approach him. Officer Wentworth testified that he felt a lighter in Pennington's jacket pocket and that when he patted one of Pennington's pants pockets he felt what he immediately recognized was crack cocaine.

When Officer Wentworth confronted Pennington with this discovery, telling him that he had drugs in his pocket, Pennington became combative. He jerked away from the officer and swore at him. One of the other officers intervened and

attempted to help Officer Wentworth complete the weapons pat down, but Pennington resisted them. He flailed his arms and shouted that they were violating his rights. When Officer Wentworth then informed Pennington that he was under arrest for disorderly conduct, Pennington broke away from the officers and attempted to flee. The officers soon subdued him, and Officer Wentworth seized eight pieces of crack cocaine from his pants pocket. That cocaine is the evidence at issue here. Pennington contends that its seizure was illegal because the officer did not have adequate grounds either to detain him once the traffic stop was concluded or to frisk him for weapons. We disagree.

As Pennington notes, the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution prohibit unreasonable searches and seizures, and generally a search or seizure is unreasonable absent probable cause and a warrant. *Williams v. Commonwealth*, 147 S.W.3d 1 (Ky. 2004). It is now well established, however, that in circumstances giving rise to a reasonable suspicion that a crime has been or is about to be committed, police officers may briefly detain suspected individuals in order to investigate, and may take reasonable steps to maintain the status quo and to protect themselves while they do so. *Michigan v. Summers*, 452 U.S. 692, 101 S. Ct. 2587, 69 L.Ed.2d 340 (1981); *Adams v. Williams*, 407 U.S. 143, 92 S. Ct. 1921, 32 L.Ed.2d 612 (1972);

Terry v. Ohio, 392 U.S.1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968); *Baker v. Commonwealth*, 5 S.W.3d 142 (Ky. 1999). To justify this lesser intrusion upon an individual's privacy interests, the officer's suspicion must be more than a mere hunch. Although it need not amount to probable cause, the suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, *supra*, at 21, 88 S. Ct. at 1880. Determining whether a detention or a frisk is reasonable thus requires "a review of the totality of the circumstances, taking into consideration the level of police intrusion into the private matters of citizens and balancing it against the justification for such action." *Baker v. Commonwealth*, 5 S.W.3d at 145. This Court reviews the trial court's suppression rulings under a dual standard. We must uphold the court's findings of historical fact if supported by substantial evidence, deferring in particular to the trial court's credibility determinations, but we review its application of the constitutional balancing test *de novo*. *Commonwealth v. Whitmore*, 92 S.W.3d 76 (Ky. 2002).

Pennington contends that once Officer Wentworth had issued a traffic citation for the expired license the legitimate purpose of the stop concluded and he, Pennington, should have been allowed to go on his way. He concedes that at the

conclusion of even routine traffic stops police officers may request permission to search persons or vehicles. *Ohio v. Robinette*, 519 U.S.33, 117 S. Ct. 417, 136 L.Ed.2d 347 (1996). But he correctly notes that citizens may deny permission and that no suspicion of wrongdoing attaches to the denial as such. *Illinois v. Wardlow*, 528 U.S. 119, 120 S. Ct. 673, 145 L.Ed.2d 570 (2000); *United States v. Hunnicutt*, 135 F.3d 1345 (10th Cir. 1998). He further notes that unless something happens or comes to light during a *Terry* stop to justify further detention, when the stop's initial purpose is satisfied the detainee must be released. *Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138, 82 L.Ed.2d 317 (1984); *United States v. Heath*, 259 F.3d 522 (6th Cir. 2001). He insists, therefore, that his traffic citation and his refusal to allow Officer Wentworth to search should have put an end to the encounter, for otherwise the officer lacked the reasonable suspicion of wrongdoing required to prolong his detention.

Pennington's argument ignores the fact that Officer Wentworth had two reasons for stopping him, not only the expired license but also what the officer regarded as Pennington's suspicious encounter with the pedestrian near Seventh and Adams. Taking place at a location notorious for drug transactions, that encounter had all the earmarks of a drug sale: it was brief, involved a small item or items, and at least one of the

participants appeared nervous and unusually wary. The officer's suspicions were reasonably aroused, and he was thus justified in detaining Pennington briefly beyond the issuance of the citation to attempt to find out if drug-related criminal activity was afoot. During that detention the officer's suspicions were further aroused by Pennington's demeanor. Although a person's mere nervousness when confronted by the police is normal and does not by itself suggest wrongdoing, excessive nervousness or evasive behavior, particularly in conjunction with other suspicious circumstances, such as Pennington's suspicious transaction here, "is a pertinent factor in determining reasonable suspicion." *Illinois v. Wardlow*, 528 U.S. at 124, 120 S. Ct. at 676. In these circumstances, Pennington's excessive nervousness when asked about drugs and his belligerent attempts to distance himself from Officer Wentworth could reasonably be deemed suspicious, and so further justified Pennington's continued detention.

Pennington's agitation, moreover, was a significant factor justifying the officer's decision to pat him down. Under *Terry*, a pat down is justified if there are articulable facts giving rise to a reasonable suspicion that the officer "is dealing with an armed and dangerous individual." *Terry v. Ohio*, 392 U.S. at 27, 88 S. Ct. at 1883. Officer Wentworth testified that already that morning two shootings had been reported in

Paducah, which, together with the warning to be cautious with Pennington and his awareness that drug dealers operating in the "Set" had at times engaged in violence, made him suspect that Pennington might be armed. We agree with Pennington that the shootings that morning, which occurred in other parts of the city and which the officer apparently had no reason to associate with Pennington, did not contribute to a reasonable suspicion that Pennington might have a weapon. Nevertheless, it is common knowledge that drug dealers are often armed, and officers are "entitled to rely on their experience and training in concluding that weapons are frequently used in drug transactions." *United States v. Heath*, 259 F.3d at 530. The officer's observation of Pennington's possible drug transaction; the fact that the transaction occurred in a high-crime area associated with drug-related gun violence; the radioed warning to proceed cautiously with Pennington; and Pennington's unusual agitation, which was increasingly directed against the officer, all contributed to the officer's reasonable suspicion that Pennington was dangerous and might be armed. The officer's pat down of Pennington was therefore justified.

Pennington does not dispute that the officer's discovery and seizure of the cocaine flowed properly from the pat down, either as a result of the officer's "plain feel" of the cocaine, *Commonwealth v. Whitmore, supra*, or as a result of

the search incident to Pennington's arrest for disorderly conduct. Accordingly, we affirm the September 15, 2005, judgment of the McCracken Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Angela Johnson
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky