

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2012-CA-000185-MR

PLEAS KAVANAUGH

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE PAMELA R. GOODWINE, JUDGE  
ACTION NO. 10-CR-00727

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CAPERTON, LAMBERT, AND VANMETER, JUDGES.

LAMBERT, JUDGE: Following a conditional guilty plea, Pleas Lucian Kavanaugh appeals from the Fayette Circuit Court's order denying his motion to suppress. For the reasons stated herein, we affirm the trial court's denial of the motion.

On March 6, 2010, at approximately 3:40 a.m., Officer Richard Rice of the Lexington Police Department was in his cruiser patrolling the 500 block of

North Upper Street, when he noticed a dark-colored car parked on the side of the road with its headlights illuminated. Based on his experience, Officer Rice knew this part of Lexington was a high crime area. Officer Rice drove by the car and did not see anyone inside.

Officer Rice became suspicious because “you don’t see cars just sitting there with headlights on.” Based on his observations and experience, Officer Rice determined the car was possibly stolen; someone might be conducting illegal drug activity in the car; prostitution or loitering for prostitution could be occurring; or a burglary could be in progress. Because of these concerns, Officer Rice drove around the block and pulled in behind the vehicle. He radioed the dispatcher the tag number of the car, and while waiting for that report, he noticed two people sitting inside the car and became more suspicious. Officer Rice wondered why the individuals were sitting in the car at 3:40 a.m.

Officer Rice turned on his rear lights and directed his spot light towards the rear view mirror and the inside of the car. He exited his vehicle and approached the car.<sup>1</sup> Officer Rice walked to the driver’s side door and spoke with the driver, Faith Kimeli. At this time he observed the defendant, Kavanaugh. Officer Rice explained that he was speaking with them because he was suspicious of them sitting in a high crime area in the early morning hours with the headlights on. Ms. Kimeli explained that she had just dropped a friend off after returning

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<sup>1</sup> Eventually Officer Rice would learn that the vehicle was not stolen, but at the time he approached the vehicle, he had not learned that yet.

from a club and that she was sitting in the car talking. Officer Rice asked for her identification, and she willingly gave it to him.

Officer Rice then asked Kavanaugh if he had his identification, and Kavanaugh answered that he did not. Officer Rice then asked for his name, to which Kavanaugh responded by asking why Officer Rice wanted to know. Officer Rice answered that he needed to know because he did not have identification. During this time, Officer Rice testified, Kavanaugh was not looking at him while responding and kept reaching into his coat and digging into his pocket. Both of these things raised Officer Rice's suspicions. For safety purposes, Officer Rice asked Kavanaugh to step out of the car.

Kavanaugh eventually climbed out, and as he walked toward the rear of the car, Rice saw that he had pulled a small, unidentified black item out of his pocket. At that point, Officer Rice believed Kavanaugh could have a weapon, so he ordered Kavanaugh to take his hands out of his pockets. Kavanaugh put the black item back in his pocket, so Officer Rice explained to Kavanaugh that due to the suspicious actions, he needed to conduct a *Terry* frisk to ensure officer safety.<sup>2</sup>

Officer Rice ordered Kavanaugh to turn around with his back toward him and to interlace his fingers with the palms facing outward. Kavanaugh did not comply—he took a small, black, digital recorder and spoke into it, saying something along the lines that he was being harassed. Kavanaugh was not compliant when Officer Rice tried to frisk him for weapons, and he insisted on

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<sup>2</sup> *Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

holding his recorder. Officer Rice kept asking Kavanaugh for his name, but Kavanaugh would not say who he was.

Sometime during the *Terry* frisk, Officer Rice pulled out Kavanaugh's wallet to look for some identification, and Kavanaugh started yelling for his wallet back. Shortly after the wallet was removed, Kavanaugh disengaged his hands while holding the recorder, laid the recorder on the trunk of the vehicle, spun around quickly, and grabbed Officer Rice in a "bear hug." Officer Rice decided to arrest Kavanaugh once he made physical contact.

Officer Rice regained control of the situation, and Kavanaugh turned back around, face-down towards the trunk of the car, under the threat of being tasered. Officer Rice held Kavanaugh in this position and called for additional officers. When the other officers arrived, Officer Tripp arrested Kavanaugh, conducted a search incident to arrest, and found approximately 0.5 grams of crack-cocaine in Kavanaugh's right front pocket.

Officer Rice testified that he had not violated Kavanaugh's rights in any way. He believed he was just conducting his investigation and had explained to Kavanaugh why he was conducting such an investigation. He testified that when asked, Kavanaugh had a duty to supply his identification or give his name. Because of Kavanaugh's actions, Officer Rice had to escalate his response from an investigatory stop to a *Terry* frisk to an arrest. After the arrest, Officer Rice informed Kavanaugh that if he had simply given his name in the car, "it never would have went [sic] that far."

Kavanaugh testified that he thought he had given Officer Rice his name when he stated that he did not have identification. Kavanaugh conceded that he had his hands in his pockets because it was thirty degrees outside, but denied shuffling his hands in and out of his coat. He stated that Officer Rice did not ask him to take his hands out of his pockets. Kavanaugh stated that he did not feel free to go once he was out of the car, and Officer Rice kept pushing him down to his side. Kavanaugh testified that when he turned around, Officer Rice grabbed him and tried to slam him down to the ground. Reflexively, Kavanaugh put his hands on Officer Rice's shoulders to brace himself. He admitted to turning around without permission and to breaking Officer Rice's grasp.

Kavanaugh conceded that he ultimately gave Officer Rice his old address. In fact, he was the one that lived and was being dropped off at 552 N. Upper Street, when Officer Rice observed the car with its lights on.

The trial court denied Kavanaugh's motion to suppress the evidence seized from the above encounter. The court found that based on the totality of the circumstances, Officer Rice did have a reasonable articulable suspicion to approach this vehicle and eventually to ask Kavanaugh to step out of the car. At that point, all Kavanaugh had to do was to give Officer Rice his name, address, or show him some identification so he could determine if Kavanaugh had any existing outstanding warrants. Officer Rice let the driver go, as she was cooperative.

Shortly after the trial court denied his motion to suppress, Kavanaugh entered a conditional guilty plea to one count of criminal attempt to possession of a

controlled substance and one count of menacing. He received a sentence of twelve months for the attempted possession and thirty days for the menacing. He was placed on conditional discharge for one year. He now appeals as a matter of right.

Kavanaugh's only argument on appeal is that the trial court erred by denying his motion to suppress the evidence seized at his arrest. This Court's standard of review of a trial court's ruling on a motion to suppress requires us to first determine if the trial court's findings of fact are supported by the evidence. *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky. App. 2002). If supported by substantial evidence, the trial court's factual findings are conclusive and will not be disturbed by an appellate court. *Id.* Then this Court conducts a *de novo* review of the trial court's application of the law to the facts. *Id.* See also *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998).

Finding substantial evidence to support the trial court's findings of fact, we turn to a *de novo* review of the trial court's application of the law. Kavanaugh argues that Officer Rice did not have a reasonable, articulable suspicion that criminal activity was afoot in order to justify an investigatory stop. However, reasonable suspicion is not required to approach parked vehicles on publicly accessible property. *United States v. Dyson*, 639 F.3d 230, 232 (6<sup>th</sup> Cir. 2011). See also *United States v. Williams*, 413 F.3d 347, 352 (3d Cir. 2005).

*Williams* involved police officers who had approached a parked van in which a man was bagging marijuana. Williams succeeded in his motion to suppress in the district court on the ground that the officers did not have reasonable

suspicion that criminal activity was afoot when they approached the van. The Third Circuit reversed, explaining that the district court had skipped a step: “Before even addressing whether the police had reasonable suspicion to approach the van, the District Court should have inquired into whether Williams had been ‘seized’ by the police.” Similarly here, because the Maxima was parked in a publicly accessible location, the officers were free to approach it with or without reasonable suspicion, so long as no detention was involved.

*Dyson*, 639 F.3d at 232. Similarly, as there was no detention involved here when Officer Rice first approached the vehicle, there is no requirement that he must have a reasonable, articulable suspicion that criminal activity was being conducted.

When Officer Rice initially noticed the car, he did not see anyone inside it, and therefore thought it strange that a car was parked in a high crime area at 3:40 a.m. with its lights on and no one inside the vehicle. Thus, he pulled behind the car, and ultimately observed two people inside the vehicle. When Officer Rice initially questioned the driver, Ms. Kimeli, she cooperated and gave her identification. Officer Rice noticed that Kavanaugh was reaching into his coat and looking away from him. This, coupled with Kavanaugh’s refusal to provide any identification, justified Officer Rice’s then reasonable, articulable suspicion that criminal activity was afoot.

At this point, Officer Rice was conducting an investigatory stop, as discussed in *Terry v. Ohio*, *supra*. The Court recognized in *Terry* that the police officer making a reasonable investigatory stop should not be denied the

opportunity to protect himself from attack by a hostile suspect. *Terry*, 392 U.S. at 24. “When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or others,” he may conduct a limited protective search for concealed weapons. *Id.*

Even though Officer Rice did not technically stop the vehicle before asking Kavanaugh to exit the car, he had a reasonable, articulable suspicion that criminal activity was afoot, specifically drug activity or prostitution. Additionally, the fact that Kavanaugh would not look at Officer Rice, was digging in his pockets, and refused to give his name, gave rise to Officer Rice’s reasonable suspicion that Kavanaugh had a weapon in his coat. Moreover, when Kavanaugh exited the car, he pulled a small, black object from his coat. While Kavanaugh stated that he immediately identified the recorder, the presence of that item indicated he could have had something else, like a small weapon, there as well. Further, Officer Rice testified that he only saw the tail end of the black item, and believed that Kavanaugh could have had a weapon and was concerned for his safety and the safety of Ms. Kimeli. This justified a pat down or *Terry* frisk.

During the *Terry* frisk Kavanaugh became physically combative. Officer Rice was not able to properly frisk Kavanaugh because Kavanaugh refused to submit to his authority. *See Brendlin v. California*, 551 U.S. 249, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007). Instead, Kavanaugh physically attacked Officer Rice, and the subsequent search that revealed the drug evidence in this case was incident



to a lawful arrest. Kavanaugh argues for the first time on appeal that Officer Rice exceeded the scope of a *Terry* frisk by removing his wallet from his pocket.

However, Kavanaugh did not present this argument to the trial court. Accordingly, we will not now address it for the first time on appeal. *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976) (overruled on other grounds).

In summation, although Officer Rice did not initially stop Kavanaugh's vehicle, his questioning of Ms. Kimeli and Kavanaugh turned into a stop when Officer Rice developed a reasonable, articulable suspicion that criminal activity was afoot, based on Kavanaugh's actions. Because Officer Rice observed Kavanaugh repeatedly digging in his pockets, Officer Rice had a reasonable belief that Kavanaugh might have a weapon, and it was appropriate to frisk him at that point. When Kavanaugh's actions prevented a frisk and turned into an assault on a police officer, Officer Rice appropriately decided to arrest Kavanaugh. The evidence seized in the search incident to arrest was not tainted, and should not have been suppressed.

We find no error with the trial court's denial of Kavanaugh's motion to suppress the crack-cocaine seized from his person in a search incident to a lawful arrest. Accordingly, we affirm the trial court's December 15, 2010, order.

ALL CONCUR.

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