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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2024-CA-1404-MR

DELRICO MCKISSICK — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE ANDREW SELF, JUDGE
ACTION NO. 23-CR-00217

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CETRULO, L. JONES, AND LAMBERT, JUDGES.

CETRULO, JUDGE: Pursuant to a conditional guilty plea, Delrico McKissick ("McKissick") appeals the denial of his motion to suppress. McKissick argues that evidence of his offense was illegally obtained as the result of an unconstitutional pat-down and search. After review, we reverse and remand for further proceedings.

FACTUAL BACKGROUND

In January 2023, the Christian County grand jury indicted McKissick for one count of receiving stolen property (firearm). McKissick moved to suppress the evidence obtained from the search of his bag during a traffic stop. In October 2023, the Christian Circuit Court held a suppression hearing. The only witness was Hopkinsville Police Officer Alonzo Sanders ("Officer Sanders").

During the hearing, Officer Sanders testified that he stopped a vehicle for having an expired registration. Upon approaching the vehicle, Officer Sanders saw the driver, and only the driver, smoking a tobacco product. McKissick was in the front passenger seat. The officer stated that while he was talking to the driver, he noticed tobacco products "throughout the car" and upon questioning, both occupants admitted they were under the age of 21. Officer Sanders stated that the tobacco products possessed by the driver were of the kind often used to smoke marijuana. Officer Sanders ordered both occupants to exit the vehicle so he could "search the vehicle for even more tobacco products."

McKissick was wearing a black bag across his chest when he exited the vehicle. Officer Sanders testified that he conducted a pat-down frisk of the driver while a second police officer ("Officer Cuellar") searched McKissick. Given that no testimony, citation, or police report, nor body or dash camera footage from Officer Cuellar was introduced at the hearing, the only evidence

concerning the nature of Officer Cuellar's search of McKissick came from Officer Sanders, who testified that his focus was on the driver at this point in the stop. A review of the suppression hearing reveals that the court, counsel, and the sole witness proceeded under the assumption that Officer Cuellar had conducted a pat-down frisk and that during and/or after the frisk, Officer Cuellar searched McKissick's bag and found a gun (that police later identified as stolen). For instance, McKissick's legal counsel asked Officer Sanders, "[Officer] Cuellar patted down McKissick before she went into the bag?" Officer Sanders answered, "Yes, I believe so." However, Officer Sanders also testified that to the best of his knowledge, Officer Cuellar removed McKissick's bag, *then* frisked McKissick's person, *then* "after the pat down, [Officer Cuellar] looked in the bag." The Commonwealth asked Officer Sanders what led to Officer Cuellar searching McKissick's bag, but the officer admitted he did not know how or why Officer Cuellar came to search McKissick's bag.

On cross-examination, Officer Sanders stated that a week prior, a citizen told him "there was two males that got into a vehicle, and one had an extended clip hanging out his pocket, and the car smelled like weed, so that's what drew my eyes to that vehicle." However, Officer Sanders did not testify that McKissick or the driver were identified in this tip, much less if the tip described the two men or their vehicle with any specificity. Concerning the stop of the

vehicle, Officer Sanders stated he did *not* detect a smell of marijuana in the vehicle and admitted he saw no contraband other than the tobacco products. The officer did not apply for a search warrant. He did not obtain consent from the driver or McKissick to do a pat-down or search. Officer Sanders did not assert that the driver or McKissick were acting nervous, combative, or rude; to the contrary, his testimony implied both occupants were cooperative and calm.

Despite this testimony, the circuit court denied McKissick's motion to suppress the gun evidence. McKissick then entered a conditional guilty plea, reserving his right to challenge the denial of his suppression motion, and the circuit court sentenced him to three years of incarceration. McKissick appealed.

STANDARD OF REVIEW

Our standard of review for a suppression motion has two parts:

> First, we review the trial court's findings of fact under a clearly erroneous standard. Under this standard, the trial court's findings of fact will be conclusive if they are supported by substantial evidence. We then conduct a *de novo* review of the trial court's application of the law to the facts to determine whether its decision is correct as a matter of law.

Whitlow v. Commonwealth, 575 S.W.3d 663, 668 (Ky. 2019) (quoting *Simpson v. Commonwealth*, 474 S.W.3d 544, 547 (Ky. 2015)). "Substantial evidence has been conclusively defined by Kentucky courts as that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the

mind of a reasonable person." *Bowling v. Nat. Res. & Env't Prot. Cabinet*, 891 S.W.2d 406, 409 (Ky. App. 1994) (citing *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972)).

ANALYSIS

"Citizens are protected from unreasonable government searches and seizures by the Fourth Amendment of the United States Constitution and Section 10 of the Kentucky Constitution." *Commonwealth v. Wilson*, 625 S.W.3d 252, 255 (Ky. App. 2021) (citation omitted). In construing the protection offered by Section 10 of the Kentucky Constitution, we are guided by the United States Supreme Court's interpretation of the federal Fourth Amendment. *Commonwealth v. Reed*, 647 S.W.3d 237, 254 (Ky. 2022) (Minton, C.J., concurring) (citing *Youman v. Commonwealth*, 189 Ky. 152, 224 S.W. 860, 862 (1920)). "Warrantless searches are 'per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions.'" *Robbins v. Commonwealth*, 336 S.W.3d 60, 63 (Ky. 2011) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)); *see also Warick v. Commonwealth*, 592 S.W.3d 276, 280 (Ky. 2019) (observing that evidence obtained in violation of the Fourth Amendment is not admissible).

In *Terry v. Ohio*, the United States Supreme Court established that even a brief detention of a person for questioning by a police officer, known as a

"stop and frisk[,]" constituted a "seizure" within the meaning of the Fourth Amendment. 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Under *Terry*,

> a police officer may briefly detain a person for investigative purposes if the officer has a reasonable suspicion, supported by articulable facts, that the person has engaged or is about to engage in criminal activity. And if the officer believes the detained person is armed and dangerous, the officer may also frisk for weapons.

Williams v. Commonwealth, 364 S.W.3d 65, 66-67 (Ky. 2011).

Our analysis into the constitutionality of an investigative detention first requires determining whether the officer had a reasonable, articulable suspicion to justify the stop. *Frazier v. Commonwealth*, 406 S.W.3d 448, 453 (Ky. 2013) (quoting *United States v. Davis*, 430 F.3d 345, 354 (6th Cir. 2005)). If the officer can articulate a reasonable suspicion, we then assess whether the "degree of intrusion was reasonably related in scope to the situation at hand, which is judged by examining the reasonableness of the offic[er's] conduct given [his] suspicions and the surrounding circumstances." *Id.*

On appeal, the Commonwealth asserts the police lawfully obtained the evidence.[1] In fact, the Commonwealth argues that, as the under-21 driver was in

[1] Also, the Commonwealth challenges preservation, but we find this argument inappropriate. McKissick entered a conditional plea explicitly reserving the right to challenge the circuit court's denial of his motion to suppress. Appellate courts "review issues, not arguments." *Gasaway v. Commonwealth*, 671 S.W.3d 298, 313 (Ky. 2023) (quoting *Brewer v. Commonwealth*, 478 S.W.3d 363, 368 n.2 (Ky. 2015)). Once an allegation of error (*i.e.*, an issue or claim) is properly presented, "a party can make any argument in support of that claim; parties are not limited to the

possession of a tobacco product, police were then within their rights to search his passenger *and* his passenger's bag. Conversely, McKissick argues the circuit court erred in denying his motion to suppress because the pat-down frisk and bag search were unconstitutional. Based upon well-established precedent, we agree with McKissick.

Officer Sanders originally pulled the vehicle over for expired registration. McKissick concedes on appeal that the initial traffic stop for the expired registration was lawful. *See, e.g.*, *Commonwealth v. Lane*, 553 S.W.3d 203, 205 (Ky. 2018) (citation omitted) ("A police officer is authorized to conduct a traffic stop when he or she reasonably believes that a traffic violation has occurred."). Hence, Officer Sanders did not exceed his authority by stopping the vehicle.

In the context of a *Terry* stop, an "officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions." *Berkemer v. McCarty*, 468 U.S. 420, 439, 104 S. Ct. 3138, 3150, 82 L. Ed. 2d 317 (1984). As such, Officer Sanders acted within his authority by asking the occupants' ages.

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precise arguments they made below." *Id.* (citing *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 534, 112 S. Ct. 1522, 1532, 118 L. Ed. 2d 153 (1992)).

Similarly, "a police officer may, as a matter of course, order the driver of a lawfully-stopped vehicle to exit the vehicle." *Carlisle v. Commonwealth*, 601 S.W.3d 168, 179 (Ky. 2020) (citing *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977)). Again, Officer Sanders did not exceed his authority by ordering the driver and McKissick to exit the vehicle.

Kentucky Revised Statute ("KRS") 438.350 permits law enforcement to confiscate tobacco products in plain view that are in the possession of people under the age of 21. If Officer Sanders had requested the occupants to hand over the plain view tobacco products for confiscation, that too would have been within his authority. However, KRS 438.350 does *not* authorize police – after finding an under-age tobacco violation – to conduct *Terry* pat-down frisks and/or warrantless searches in order to hunt for additional tobacco products.[2]

It is unclear from the record if, during the suppression hearing, the Commonwealth was arguing that the bag search was proper due to the "plain feel" exception (to the frisk) or because the police had probable cause based on the

[2] At the time of this incident, KRS 438.350 did not include any penalty other than confiscation; underage possession of tobacco was/is not a crime. Effective June 2025, the statute was altered to include a possible penalty of community service or a tobacco cessation program.

improper tobacco possession, but regardless, their argument falls short and clearly lacks evidentiary support.[3]

An officer's reasonable suspicion justifying a traffic stop does not in and of itself extend to authorize a pat-down search for weapons. *Nunn v. Commonwealth*, 461 S.W.3d 741, 746 (Ky. 2015). The scope of an officer's authority to search under *Terry* is narrow and does not permit a "cursory search for weapons" or even a frisk *without the requisite reasonable suspicion* targeted at the person to be searched. *Id.* (quoting *Ybarra v. Illinois*, 444 U.S. 85, 93-94, 100 S. Ct. 338, 343, 62 L. Ed. 2d 238 (1979)). "A reviewing court determines whether an officer had a reasonable and articulable suspicion that criminal activity is afoot . . . by 'examin[ing] the totality of the circumstances to see whether the officer had a particularized and objective basis for the suspicion.'" *K.H. v. Commonwealth*, 610 S.W.3d 320, 327 (Ky. App. 2020) (alteration in original) (quoting *Commonwealth v. Marr*, 250 S.W.3d. 624, 627 (Ky. 2008)). This reasonable suspicion need not rise to the level of probable cause, but a mere "hunch" is not enough. *Marr*, 250 S.W.3d at 627 (quoting *United States v. Arvizu*, 534 U.S. 266, 274, 122 S. Ct. 744, 751, 151 L. Ed. 2d 740 (2002)). Similarly, a pat-down supported only by a general claim of "officer safety" lacks sufficient justification to establish

[3] A review of the record indicates that body camera footage from the officers was available, but had not been provided to the defense. It is unclear why the Commonwealth did not attempt to introduce it during the suppression hearing.

reasonable suspicion. *Bennett v. City of Eastpointe*, 410 F.3d 810, 824 (6th Cir. 2005).

Moreover, a reviewing court assesses the totality of circumstances existing "at the time of the investigatory stop[.]" *K.H.*, 610 S.W.3d at 327 (quoting *Boyle v. Commonwealth*, 245 S.W.3d 219, 220 (Ky. App. 2007)). If police improperly extend a stop, they "cannot create reasonable suspicion *during* the course of the frisk." *Id.* (citing *Frazier*, 406 S.W.3d at 457).

Reasonable suspicion may be established through a *combination* of actions, such as nervousness, combativeness, and uncooperativeness. *See Baker v. Commonwealth*, 5 S.W.3d 142, 146 (Ky. 1999) (finding reasonable suspicion existed where officers suspected that a defendant may be armed after he refused to remove his hands from his pockets); *Adkins v. Commonwealth*, 96 S.W.3d 779, 787-88 (Ky. 2003) (finding reasonable suspicion existed where a defendant gave false names to officers, appeared to be nervous, *and* responded with loud profanities); *Frazier*, 406 S.W.3d at 455 (holding that reasonable suspicion did *not* exist where a defendant was acting nervous but was otherwise cooperative); *Strange v. Commonwealth*, 269 S.W.3d 847, 851-52 (Ky. 2008) (holding reasonable suspicion did *not* exist when it was based on defendant's presence in a high crime area at night and defendant walked away upon seeing police).

First, Officer Sanders did not have a reasonable, articulable suspicion that McKissick was involved in any criminal activity. Officer Sanders testified to receiving the tip of two males, one of whom appeared to have an extended clip, in a vehicle smelling of marijuana. Officer Sanders did not describe the tip (either the vehicle or the men) in detail nor explain any connection between that tip and McKissick. Officer Sanders stated that the tobacco products possessed by the driver were the kind often used to smoke marijuana, but he admitted he did not smell marijuana in the vehicle. Officer Sanders did not run background checks on either of the vehicle's occupants, nor testify that he had prior knowledge of either occupant. Officer Sanders did not articulate how or why he believed the driver and/or McKissick was engaged in or was about to engage in criminal activity; he did not state *any* objective, articulable facts that criminal activity was afoot. The totality of the circumstances did not show the probability of criminal conduct, and Officer Sanders did not have a reasonable suspicion, supported by articulable facts, that the driver and/or McKissick were engaged in or about to engage in criminal activity.

Second, the police did not have a reasonable, articulable suspicion that McKissick was armed and dangerous. In fact, there are *absolutely no facts* – let alone specific and articulable facts – to support a reasonable suspicion that McKissick was armed and dangerous. "Under *Terry*, an officer must have

reasonable suspicion to believe the suspect is armed and dangerous . . . before conducting a weapons search for a protective purpose." *Pulley v. Commonwealth*, 481 S.W.3d 520, 526 (Ky. App. 2016). Yet, Officer Cuellar did not testify, and the Commonwealth did not enter any body camera footage into evidence. Again, there were no background checks, previous interactions, or detailed connections between the tip and McKissick. Officer Sanders did not testify that McKissick was acting in a suspicious manner, reaching into his bag, being combative, aggressive or non-compliant. In fact, Officer Sanders had no personal knowledge of McKissick's conduct or of the circumstances of the search of the bag.

Third, the pat-down frisk was not reasonably related in scope to the situation at hand. More specifically, *McKissick's* pat-down frisk, even if we assume that is when the bag was searched, was not reasonably related to *the driver's* expired registration and tobacco product possession.[4] Only the driver was using the tobacco products, not McKissick. Again, KRS 438.350 does not

[4] We note, the search of McKissick's bag was ***not*** *a search incident to an arrest*; police were *not effectuating an arrest*. The pat-down and search occurred *before* the police had cause to arrest McKissick. Under certain circumstances, a search incident to a lawful arrest may encompass a search of any bags found within reach of the arrestee. *See Commonwealth v. Bembury*, 677 S.W.3d 385, 389 (Ky. 2023) (citing *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009)). However, those are not the facts before us. At the time the police ordered McKissick out of the car, frisked him, and searched his bag, they had *no cause to arrest McKissick* (or the driver). At that time, the police only had cause to cite the driver for expired registration and confiscate the tobacco products.

authorize a pat-down frisk or search for tobacco products; it only authorizes confiscation of those tobacco products in plain view.

Fourth, "officers are required to use the 'least intrusive means reasonably available to verify or dispel the officer's suspicion . . . .'" *Hampton v. Commonwealth*, 231 S.W.3d 740, 747 (Ky. 2007) (quoting *Florida v. Royer*, 460 U.S. 491, 500, 103 S. Ct. 1319, 1325-26, 75 L. Ed. 2d 229 (1983)). Even assuming Officer Cuellar was authorized to pat down and/or search for tobacco products (which she was not), it is unclear how the least intrusive means available to verify or dispel the suspicion that the *driver* had additional tobacco products would somehow encompass a pat-down of the *passenger*. Thus, the pat-down of McKissick's person was unconstitutional.

Fifth, in the context of a *Terry* stop, even if the officers had possessed sufficient reasonable suspicion to justify the frisk, the intrusion into McKissick's bag was constitutionally invalid. "If a pat-down search for weapons goes beyond what is necessary to determine if the suspect is armed, it is no longer valid and any evidence obtained will be suppressed." *Frazier*, 406 S.W.3d at 453 (citing *Adkins*, 96 S.W.3d at 786-87).

> In the course of a lawful *Terry* frisk, an officer may seize any contraband he finds provided that the illegal nature of the contraband is readily apparent to the plain feel of his hand. Simply put, once an officer, without manipulating an object, identifies it by touch as a weapon or contraband, he has the requisite probable cause to perform a more

> invasive search of the individual's person and seize the object.

Id. at 456 (citations omitted).

There was no testimony that Officer Cuellar searched the bag because she felt a hard object inside or the bag was unusually heavy, or that it was "readily apparent" that a gun was inside his bag. Without any testimony or body camera footage detailing her justification, we have no evidence the officer met the plain feel exception to the warrant requirement of the Fourth Amendment.

Notably, McKissick and the Commonwealth address the pat-down frisk and bag search as one-in-the-same. However, under these circumstances, we view those actions as legally distinct. The circuit court stated that McKissick's bag was attached to his person when Officer Cuellar found the gun. That factual finding is not supported by the testimony – *i.e.*, not supported by substantial evidence – therefore it is clearly erroneous.[5]

Regardless, the bag intrusion was improper, whether viewed as an extension of the *Terry* frisk (as stated above), or as a separate search (explained below).

[5] The circuit court appears to have misunderstood Officer Sanders' testimony. Officer Sanders testified that to the best of his knowledge, Officer Cuellar removed McKissick's bag, *then* frisked McKissick's person, *then* after the pat-down, she looked in the bag. We cannot overlook his undisputed testimony, especially considering Officer Sanders was the only witness to testify at the suppression hearing. In their totality, the circuit court's inconsistent findings are unsupported. *See Turley v. Commonwealth*, 399 S.W.3d 412, 418-20 (Ky. 2013).

"The Commonwealth bears the burden of establishing the constitutional validity of a warrantless search." *Gasaway*, 671 S.W.3d at 316 (internal quotation marks omitted) (quoting *Commonwealth v. Conner*, 636 S.W.3d 464, 471 (Ky. 2021)). The Commonwealth did not meet this burden. "In absence of consent, the police may not conduct a warrantless search or seizure without both probable cause and exigent circumstances." *Carlisle*, 601 S.W.3d at 181 (quoting *Guzman v. Commonwealth*, 375 S.W.3d 805, 808 (Ky. 2012)). The Commonwealth failed to establish any exception to the warrant requirement (including exigent circumstances) or that the police had probable cause to search McKissick's bag.

"The test for probable cause is whether, under the totality of the circumstances, a fair probability exists that contraband or evidence of a crime will be found in a particular place." *Id.* (citation omitted) (citing *Moore v. Commonwealth*, 159 S.W.3d 325, 329 (Ky. 2005)). Additionally,

> probable cause to search the driver of a vehicle does not automatically justify a search of a passenger in the same car. This is because [p]assengers in an automobile are not generally perceived to have the kind of control over the contents of an automobile as do drivers. Consequently, some additional substantive nexus between the passenger and the criminal conduct must appear to exist in order for an officer to have probable cause to either search or arrest a passenger.

Id. at 182 (internal quotation marks and citation omitted). Here, there is nothing to indicate that there was a fair probability that a gun would have been found in McKissick's bag. There was no testimony that at the time Officer Cuellar searched the bag, police had knowledge of other gun possession charges connected to McKissick, that he matched a description of someone known to be carrying a gun, or that he had previously been seen with a weapon. Again, *there was no criminal conduct*, thus no nexus (substantive or otherwise) between McKissick and criminal conduct. Hence, there was no probable cause for Officer Cuellar to search McKissick's bag. To state otherwise would be akin to saying, because a driver received a minor traffic infraction, police would have the authority (without reasonable suspicion or probable cause) to search a passenger's bag, purse, or backpack. It bears repeating, the Fourth Amendment

> protects [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. This provision means that *each* person has the right to be secure against unreasonable searches and seizures in *his own* person, house, papers, and effects. The exclusionary rule, the rule that evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure, was judicially created to safeguard that right.

Warick, 592 S.W.3d at 280 (internal quotation marks and citations omitted).

CONCLUSION

Officer Cuellar violated McKissick's constitutional search and seizure protections, and thus, the evidence was unlawfully obtained. Therefore, the circuit court erred in denying McKissick's motion to suppress. Accordingly, we REVERSE the Christian Circuit Court and REMAND for further proceedings.

ALL CONCUR.

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