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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000320-MR

DESMOND BARBER — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 09-CR-00396

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND NICKELL, JUDGES; ISAAC,[1] SENIOR JUDGE.

NICKELL, JUDGE: Desmond Barber was convicted following a jury trial in the Kenton Circuit Court on charges of trafficking in a controlled substance in the first

[1] Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

degree[2] and being a persistent felony offender in the first degree (PFO I).[3] The Commonwealth dismissed a charge of possession of a controlled substance in the first degree.[4] He received a sentence of five years' imprisonment for the trafficking charge, enhanced to fifteen years by virtue of the PFO I conviction. He appeals from the denial of his pretrial motion to suppress the evidence seized at the time of his arrest. We affirm.

The trial court's order denying Barber's suppression motion recited the facts, legal arguments and its conclusions as follows:

> The facts presented are undisputed. A tip was received by police dispatch that there were drugs and fire arms (sic) at 1410 Holman Street, Covington, Kentucky. Officers Mangus and Warner arrived at that location and were invited into the house by the occupants. Officer Mangus asked for consent to search and the occupant gave consent and signed a waiver. Officer Mangus proceeded to the kitchen and Officer Warner and Ewell remained in the front part of the house. While Officer Mangus was in the kitchen an unknown individual and the defendant entered the house through the side door. Officer Mangus welcomed them at which point the defendant turned and ran out of the house and down the walkway toward the street. Officer Mangus alerted the other officers to the defendant who was then intercepted by Officer Warner. The defendant fought and his hands were cuffed behind his back. He was initially detained face down on the ground but shortly thereafter was brought to a standing position and placed with his face against a wall. The defendant was wearing boxers with his outer pant slung low over the middle to the end of this

[2] KRS 218A.1412, a class C felony.

[3] KRS 532.080.

[4] KRS 218A.1415, a class D felony.

> (sic) "buttock" area. The officers testified that they could not see anything in this area. The undisputed testimony of the officers was that through out (sic) the detention the defendant was adjusting something at the back of his pants and kept his legs together to prohibit the police from checking the area between his legs. Once the officers were able to force the defendant to spread his legs, Officer Winship pulled the defendants boxers out and down so the area could be viewed. It was at this point that the officers saw a plastic bag. The bag contained eight grams of crack cocaine.
>
> The parties have framed these facts from two different perspectives. Defense counsel argues that the police only had "articulable suspicion" that the defendant was engaged in criminal activity so the stop merely allowed them to pat the defendant down for safety concerns. The Court in *Terry* [*v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)] stated that a pat down must be "confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police office. (sic)" The Commonwealth's attorney argues that the police had probable cause to believe the defendant was engaged in criminal activity and thus an arrest was justified which allows the police officers to conduct a full search. The Court in *Illinois v. Gates*, [462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527(1983),] announced a "totality of the circumstances" test to determine if probable cause existed and thus permitted a search.
>
> While at first blush this search appears offensive to the Fourth Amendment the Court reviewing the "totality of the circumstances" objectively finds the police officers reasonably believed that the defendant was fleeing them because he was involved in criminal activity and thus had probable cause. The police officers acted correctly and the items retrieved as a result of this search will not be suppressed.

Barber proceeded to a jury trial where he was convicted and received the sentence noted above. This appeal followed.

Barber first contends the trial court erred in denying his motion to suppress the crack cocaine that was retrieved from his buttocks. He claims the search went beyond the scope of a *Terry* pat down and amounted to an improper strip search. We disagree.

"When reviewing a trial court's denial of a motion to suppress, we utilize a clear error standard of review for factual findings and a *de novo* standard of review for conclusions of law." *Jackson v. Commonwealth,* 187 S.W.3d 300, 305 (Ky. 2006) (citing *Welch v. Commonwealth,* 149 S.W.3d 407, 409 (Ky. 2004)). The trial court's statement of the facts is borne out by the record and therefore supported by substantial evidence. RCr 9.78; *Canler v. Commonwealth,* 870 S.W.2d 219, 221 (Ky. 1994). Discerning no error, and therefore no clear error, the facts, as stated by the trial court, are deemed conclusive.

We owe no deference to a trial court's application of the law to the facts. *Roberson v. Commonwealth,* 185 S.W.3d 634, 637 (Ky. 2006). Therefore, it is incumbent upon us to determine whether the warrantless search was violative of Barber's constitutional right to be free from unreasonable searches and seizures. We hold it was not.

It is well settled that warrantless searches are improper unless supported by probable cause, *Baltimore v. Commonwealth*, 119 S.W.3d 532 (Ky. App. 2003), with various narrow exceptions depending upon the circumstances and the government interest that is involved.

> Probable cause involves whether the known facts provide reasonable grounds or a fair probability that a circumstance exists supported by less than prima facie proof but more than mere suspicion. 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. Similarly, probable cause for arrest involves reasonable grounds for the belief that the suspect has committed, is committing, or is about to commit an offense.

Id. at 538-39 (internal footnotes omitted).

Our review of the record reveals the police officers had probable cause to conduct a search of Barber's person. Barber arrived at a location being investigated by police for suspected narcotics activity in the early hours of the morning. Immediately upon seeing the police officers he turned and fled. Barber was observed shoving an object down the back of his pants as he attempted to run and continued to adjust the back of his pants as the officers were attempting to gain control of the situation. He actively impaired the officers' ability to perform a protective pat down of his mid-section by clenching his muscles and legs together. Under the totality of the circumstances, and based on the experience and training of the officers, we hold the officers were reasonable in their belief Barber was concealing a weapon or contraband and that he was engaged in criminal activity. Thus, as the trial court correctly found, the officers had probable cause to conduct the search of his person. Contrary to Barber's contention, *Terry* has no application to the facts at bar as this search was conducted based upon probable cause rather than articulable suspicion.

We do not believe that Barber was subjected to a "strip search" as urged upon us in his brief. Officer Winship testified that when he lifted Barber's shirt he could see a portion of Barber's "crack" above his boxer shorts. Officer Winship stated that when he pulled the boxer shorts "out and down" just a bit he was able to see the plastic baggie containing narcotics. At no point was Barber made to disrobe, nor were any body parts manipulated or cavities probed. The search was visual in nature. Although the term is not expressly defined by statute or case law, under any common definition, Barber cannot be said to have been subjected to a "strip search."

Finally, Barber contends the trial court erred in allowing the Commonwealth to make comments in its closing argument regarding Barber's failure to testify. In its closing, the Commonwealth made the statement that there was "zero evidence and zero testimony" regarding whether Barber had ever used cocaine. Barber contends this statement, repeated approximately four times during closing statements, constituted an improper comment on his exercise of the right to remain silent. Again, we disagree.

The Commonwealth is free to comment upon the evidence during closing statements. Commenting that a defendant has failed to rebut the Commonwealth's proof does not improperly shift the burden of proof. *Tamme v. Commonwealth*, 973 S.W.2d 13, 38 (Ky. 1998). The Commonwealth's theory in the instant case was that Barber possessed a large quantity of crack cocaine with intent to sell or distribute it, not for personal use. It presented expert testimony that

5.95 grams of crack cocaine equated to approximately thirty "hits" or doses, and that when coupled with the sizeable amount of cash found on Barber's person, was indicative of trafficking rather than personal use.

Conversely, the thrust of Barber's defense was that he could have been an extremely heavy user who had built up a tolerance to the drug and thus needed to use excessive quantities to obtain his high. Defense counsel attempted to portray Barber as an addict, but presented no witnesses attesting to that theory. Prosecutors "may properly comment on the defendant's failure to introduce witnesses on a defensive matter." *Weaver v. Commonwealth*, 955 S.W.2d 722, 728 (Ky. 1997) (internal citation and quotation marks omitted). Comments regarding unrebutted evidence "are improper only if the defendant was the only person who could have rebutted the evidence." *U.S. v. Snook*, 366 F.3d 439, 444 (7th Cir. 2004). Barber has failed to show he was the only person who could have rebutted the Commonwealth's evidence or testified regarding his drug addiction. We discern no error in the prosecutor's comments.

Therefore, for the foregoing reasons, the judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gene Lewter
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky