

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2015-CA-001536-MR

ERRICK DUNCAN

APPELLANT

v. APPEAL FROM MEADE CIRCUIT COURT  
HONORABLE BRUCE T. BUTLER, JUDGE  
ACTION NO. 14-CR-00210

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING IN PART, VACATING IN PART,  
AND REMANDING

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BEFORE: CLAYTON, MAZE AND STUMBO, JUDGES.

STUMBO, JUDGE: Errick Duncan appeals from his conviction of first-degree trafficking in a controlled substance, second offense and of being a first-degree persistent felony offender (PFO). Duncan raises multiple evidentiary issues on appeal and also argues the PFO enhancement was illegal. We find no error as it pertains to the evidentiary issues, but vacate his PFO conviction.

On November 17, 2014, Detective James Terry of the Meade County Sheriff's Department received a tip from a confidential informant that a black male was driving a gold SUV with NZV on the license plate. The informant stated that the driver would be delivering cocaine to Dodge's Chicken in Muldraugh, Kentucky. The informant also provided the time, within an hour, that the vehicle would be in the area and also stated the driver might have a firearm. Detective Terry testified during a suppression hearing<sup>1</sup> that he had used this informant before and that the informant was reliable.

Detective Terry eventually spotted a vehicle matching the informant's description being driven by a black male. The vehicle was driving slowly in the fast lane so Detective Terry initiated a traffic stop for impeding the flow of traffic. After pulling over the vehicle, the driver was identified as Duncan. In response to a question from Detective Terry, Duncan stated he was on his way to meet someone at Dodge's Chicken. Detective Terry testified that Duncan was acting nervous.

Detective Terry asked Duncan to get out of the vehicle. Although Duncan did not initially comply, he did eventually exit the vehicle. Detective Terry then patted Duncan down for weapons and drugs. During this pat down, Detective Terry felt a large bulge in Duncan's right pocket. Detective Terry testified that he "felt it to be narcotics". Detective Terry then removed the object from Duncan's pocket and it was revealed to be 15 baggies of individually

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<sup>1</sup> The evidence described in this recitation of facts is derived primarily from the testimony of Detective Terry during a suppression hearing held on July 20, 2015.

wrapped crack cocaine. Detective Terry then handcuffed Duncan, patted him down again, and found 6 more bags of crack cocaine and one bag of marijuana.

Prior to trial, Duncan moved to suppress the evidence recovered from the search of his person, but the court overruled his motion. The Commonwealth chose not to pursue any charges related to the marijuana. After a jury trial, Duncan was convicted of trafficking in a controlled substance, second offense and was given a ten-year sentence. He was also convicted of first-degree PFO and his sentence was enhanced; however, the PFO enhancement did not add any years to his sentence. This appeal followed.

Duncan's first argument on appeal is that the search of his person by Detective Terry violated his Fourth Amendment rights and any evidence recovered should have been suppressed. We disagree and find the search of Duncan to be legal.

“[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions.” *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967). One such exception was recognized in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Under *Terry v. Ohio*, 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) (footnote and citation omitted). “[T]he level of articulable suspicion necessary to justify a stop is considerably less than proof of wrongdoing by preponderance of the evidence.”

*Id.* at 69 (footnote and citation omitted).

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) (footnotes omitted).

“[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.” *Ornelas v. United States*, 517 U.S. 690, 699, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911 (1996).

Duncan argues that the circumstances in this case were not sufficient for Detective Terry to initiate a *Terry* stop and frisk. We disagree. The trial court overruled the motion to suppress because it found the informant to be reliable. This finding is supported by substantial evidence. The informant gave detailed information regarding the vehicle and its location. Detective Terry also testified that he had used this informant in the past and that his information had been reliable. A detailed tip from a known and reliable informant which is corroborated

by the police provides reasonable suspicion to initiate a *Terry* stop. *Williams v. Commonwealth*, 147 S.W.3d 1, 5 (Ky. 2004). Detective Terry received information from a reliable informant that the driver of the vehicle he pulled over, who turned out to be Duncan, was dealing drugs. The informant also stated Duncan might be armed. Detective Terry also testified that Duncan was acting nervous. Detective Terry was justified to search for weapons.

Duncan also argues that the “plain feel exception” did not justify Detective Terry’s removal of the drugs found in Duncan’s pocket.

Frisking a suspect during a *Terry* stop is strictly limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby. However, the plain feel exception to this rule allows for the discovery of non-threatening contraband if the contraband is immediately apparent from the sense of touch while the suspect is lawfully frisked. Thus, if non-threatening contraband is immediately apparent to the officer from the sense of touch while the officer is conducting a lawful pat-down search, the officer is not required to ignore the contraband and can lawfully seize it.

*Commonwealth v. Banks*, 68 S.W.3d 347, 351 (Ky. 2001) (citations omitted).

We believe the “plain feel exception” does apply. Detective Duncan has been in law enforcement for 24 years and testified as to the bulge in Duncan’s pocket that, based on his experience as an officer, he “felt it to be narcotics”. Furthermore, he was acting on a tip from a reliable informant that Duncan would be carrying drugs. The trial court found the “plain feel exception” to be applicable and we agree.

Duncan's next argument on appeal is that he was denied a fair trial when Detective Terry testified that Duncan was guilty of trafficking. During the Commonwealth's questioning of Detective Terry at trial, the following exchange occurred:

Commonwealth: Okay detective, we talked at length about your experience in dealing with trafficking of crack cocaine and other drugs, let's talk about how that applies here. Those bindles, in Commonwealth's exhibit 2, I'm gonna hold them back here, you can just look at this. In Commonwealth's exhibits there are multiple bindles. Is that consistent or inconsistent with packaging for trafficking based on your experience?

Detective Terry: This is trafficking in crack cocaine because it's all individually wrapped.

Defense Counsel: Objection judge.

Trial Court: Overruled.

Citing to *Stringer v. Commonwealth*, 956 S.W.2d 883, 889-90 (Ky. 1997),

Duncan argues that Detective Terry's testimony spoke to the ultimate issue of guilt, which is not permitted. Duncan is correct that testimony regarding the ultimate issue of a defendant's guilt is impermissible; however, such did not happen in the case *sub judice*. Detective Terry did not testify that Duncan was guilty of trafficking, he testified that based on his experience, the way the drugs were packaged was consistent with trafficking. This type of testimony is permissible. *Sargent v. Commonwealth*, 813 S.W.2d 801, 802 (Ky. 1991); *Kroth v. Commonwealth*, 737 S.W.2d 680, 681 (Ky. 1987).

Duncan also argues that he was denied a fair trial when the Commonwealth shifted the burden of proof during closing arguments. At trial, Duncan's defense was that the drugs found on his person were for personal use. During closing arguments, the Commonwealth stated that there was no evidence or witnesses presented to suggest the drugs were for personal use. The Commonwealth also stated that the SUV did not contain items suggesting personal use like pipes, bits of foil, spoons, or any other paraphernalia. The defense objected, but was overruled.

On appeal, Duncan claims the Commonwealth shifted the burden of proof to force him to prove the drugs were for personal use even though it is the Commonwealth's burden to prove the elements of the crime. This argument is without merit. The Commonwealth did not impermissibly shift the burden of proof to Duncan. "A prosecutor may comment on tactics, may comment on evidence, and may comment as to the falsity of a defense position." *Slaughter v. Commonwealth*, 744 S.W.2d 407, 412 (Ky. 1987). "A prosecutor may properly comment on the defendant's failure to introduce witnesses on a defensive matter." *Id.* at 413 (citation omitted). Here, the Commonwealth was refuting the defense's theory by stating that Duncan had presented no evidence that the drugs were for personal use.

Duncan also claims on appeal that the Commonwealth failed to provide sufficient evidence of Duncan's prior trafficking offense. Duncan was charged with trafficking in a controlled substance, second offense. In order to prove the second offense aspect of the charge, the Commonwealth elicited testimony from

Ron Maxwell, an employee from Probation and Parole. Maxwell testified that an Errick Duncan had been convicted of a prior trafficking charge in 2001. Duncan claims this was insufficient to prove he was the same Errick Duncan.

This claim is also without merit. “Kentucky courts have long ago determined that identity of name is *prima facie* evidence of identity of a person.” *Skimmerhorn v. Commonwealth*, 998 S.W.2d 771, 777 (Ky. App. 1998). Once the Commonwealth made a *prima facie* showing that Errick Duncan was convicted in 2001, the defense was then required to rebut. The defense presented no evidence that the Errick Duncan convicted in 2001 was not the same Errick Duncan in the case at hand. We find no error.

Duncan’s final argument on appeal is that he was subject to an illegal double enhancement. The Commonwealth concedes this occurred and asks that the PFO conviction be vacated. We agree with Duncan and the Commonwealth and vacate Duncan’s PFO conviction.

Based on the foregoing, we affirm all aspects of the trial court’s judgment except Duncan’s PFO conviction; therefore, we remand with instructions to vacate the PFO conviction.

ALL CONCUR



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