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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000805-MR

RASHAD BROWN — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE TIMOTHY KALTENBACH, JUDGE
ACTION NO. 15-CR-00473

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: JONES, D. LAMBERT, AND THOMPSON, JUDGES.

JONES, JUDGE: Rashad Brown appeals from the McCracken Circuit Court's orders entered February 18, 2016, and February 24, 2016, denying his motion to suppress. In this appeal, we address whether police exceeded the scope of a *Terry*[1] frisk by reaching into Brown's sweatshirt pocket and retrieving several items. After careful review, we conclude that police did exceed the scope of a *Terry* frisk

[1] *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

and consequently reverse and remand with instructions to grant Brown's suppression motion.

I. BACKGROUND

A little after 5:00 A.M. on September 25, 2015, Officer Chris Bolton ("Officer Bolton") of the Paducah Police Department received a dispatch report of an individual allegedly pointing a firearm at a passing vehicle. The report described the suspect as a black male, wearing a baseball cap and a University of Alabama hooded sweatshirt. Several minutes later, approximately four blocks from the site of the alleged incident, Officer Bolton spotted Rashad Brown ("Brown") walking on the sidewalk.

Brown matched the description of the individual in the report, and Officer Bolton testified that he observed a bulge in Brown's sweatshirt pocket. Believing that the bulge may have been the firearm from the report, Officer Bolton approached Brown and asked him for permission to frisk him for weapons. Brown refused, prompting Officer Bolton to inform Brown that he was being detained. When Officer Bolton attempted to pull Brown's hands behind his back, to place him in handcuffs for officer safety, Brown pulled his hands away from him. Officer Bolton testified that he believed Brown was moving his hands toward his sweatshirt pocket. Officer Bolton wrapped his arms around Brown and tackled him to the ground. Other officers arrived and assisted Officer Bolton in placing Brown in handcuffs.

At this point, Officer Bolton reached into Brown's sweatshirt pocket and retrieved several items: Brown's cellular phone and two bags containing methamphetamine and a small amount of marijuana. No firearm was discovered on Brown's person.

As a result of this incident, Brown was indicted for first-degree possession of a controlled substance, possession of marijuana, and possession of drug paraphernalia. Brown filed a motion to suppress the fruits of the search, which the circuit court denied. Ultimately, Brown entered a conditional guilty plea to the charges, and received a pair of concurrent 18-month prison terms, probated for two and one-half years. This appeal followed.

II. STANDARD OF REVIEW

Brown challenges the circuit court's denial of his suppression motion. "Our standard of review of the trial court's denial of a suppression motion is twofold. First, the trial court's findings of fact are conclusive if they are supported by substantial evidence; and second, the trial court's legal conclusions are reviewed *de novo*." *Milam v. Commonwealth*, 483 S.W.3d 347, 349 (Ky. 2015) (citations omitted). Because the facts of this case are largely undisputed, our review of the circuit court's application of the law is *de novo*.

III. ANALYSIS

Although "[t]he scope of the intrusion permitted [in a *Terry* stop and frisk] will vary to some extent with the particular facts and circumstances of each case[,]" courts have recognized that "the investigative methods employed [during a

Terry stop and frisk] should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319, 1325-26, 75 L.Ed.2d 229 (1983). The pertinent questions in this case, therefore, are (1) what was the least intrusive means Officer Bolton could have used to verify or dispel his suspicion that Brown was in fact the individual described in the report pointing a firearm at a vehicle and (2) "whether [Officer Bolton] acted unreasonably in failing to recognize or to pursue it." *United States v. Sharpe*, 470 U.S. 675, 686–87, 105 S.Ct. 1568, 1576, 84 L.Ed.2d 605 (1985) (internal citation omitted).

In this case, Officer Bolton decided to detain Brown because Brown matched the description of an individual alleged to have been pointing a firearm at a passing vehicle. But when Officer Bolton tried to detain Brown, Brown moved his hands toward a bulge in his sweatshirt pocket. In response, Officer Bolton tackled Brown and placed him in handcuffs. Once Brown was secured, Officer Bolton reached into Brown's sweatshirt pocket to search for a firearm and removed, instead, Brown's cellular phone along with two bags containing methamphetamine and a small amount of marijuana.

To determine, under these circumstances, what was the least intrusive means Officer Bolton could have used to verify or dispel his suspicion that Brown was in fact the individual described in the report pointing a firearm at a vehicle, we look to *Hampton v. Commonwealth*, 231 S.W.3d 740 (Ky. 2007). In *Hampton*, a police officer handcuffed a defendant "in order to secure the safety of the officers

and other personsat the scene." *Hampton*, 231 S.W.3d at 748 (quoting the trial court's order denying the suppression motion). After receiving consent from the defendant to search him, the officer reached into the defendant's shoe to retrieve a pipe containing cocaine residue. *Id.* at 749. The Supreme Court of Kentucky upheld the officer's reaching into the defendant's shoe, instead of conducting a pat-down search, because the officer needed "to determine the nature of the object hidden there." *Id.* at 750. The officer had seen the defendant stow an object in his shoe, and that object, which could have been a weapon, could not have been revealed by a pat-down. *Id.* Therefore, the officer's broader search—his reaching into the defendant's shoe—was appropriate. *See id.*

Here, we hold that a broader search—reaching into Brown's sweatshirt pocket—was not the least intrusive means Officer Bolton could have used to verify or dispel his suspicion. Officer Bolton could have determined whether or not Brown had a firearm by patting down his outer clothing. A sweatshirt is neither as hard nor as stiff as a shoe, and objects in a sweatshirt pocket can be revealed by feel. Moreover, Officer Bolton did not observe Brown stow an object in his sweatshirt pocket. Therefore, a pat-down was the least intrusive means Officer Bolton could have used to verify or dispel his suspicion.

Next, to determine the reasonableness of Officer Bolton's actions, we look to *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972). In *Adams*, the United States Supreme Court declared that the purpose of a *Terry* frisk is protective. *See Adams*, 407 U.S. at 146. "The purpose of [a] limited search

[for concealed weapons] is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence, and thus the frisk for weapons might be equally necessary and reasonable . . . ." *Id.* Therefore, "[s]o long as the officer is entitled to make a forcible stop, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose." *Id.* In *Adams*, the court ruled that it was lawful for a police officer to grab a firearm from a suspect's waist because his grab "constituted a limited intrusion designed to insure [the officer's] safety." *Id.* at 149. The suspect had not complied with the officer's request to step out of the car, and the officer had knowledge of a report that the suspect was armed. *Id.* at 148-49. The court, therefore, concluded that the officer's grab of the firearm, without a pat-down, was reasonable. *Id.* at 149.

Here, however, we hold that Officer Bolton's reach into Brown's sweatshirt pocket was not reasonable. Once Officer Bolton tackled and handcuffed Brown, Officer Bolton insured his safety as well as the safety of the other officers with him. Accordingly, when Officer Bolton reached into Brown's sweatshirt pocket *after* putting Brown in handcuffs, he exceeded the scope of a reasonable intrusion. Officer Bolton could have easily patted down Brown and determined the nature of the object in Brown's sweatshirt pocket. He did not have to reach into Brown's sweatshirt pocket to insure anyone's safety. Brown was no longer resisting, and he could no longer reach any concealed firearm in his sweatshirt pocket. "If the protective search goes beyond what is necessary to determine if the

suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed." *Minnesota v. Dickerson*, 508 U.S. 366, 373, 113 S.Ct. 2130, 2132, 124 L.Ed.2d 334 (1993) (citing *Sibron v. New York*, 392 U.S. 40, 65–66, 88 S.Ct. 1889, 1904, 20 L.Ed. 914 (1968)). "The very premise of *Terry,* after all, is that officers will be able to detect the presence of weapons through the sense of touch . . . ." *Id.* at 376. Therefore, under these circumstances, Officer Bolton's reach into Brown's sweatshirt pocket, instead of patting down his sweatshirt pocket through the sense of touch, was unreasonable, and the fruits of Officer Bolton's search should be suppressed.

Additionally, even if Office Bolton were authorized by *Terry* to put a bare hand inside of Brown's sweatshirt, Officer Bolton should not have removed any items he located inside *unless* he had probable cause to believe what he felt was a weapon or was clearly contraband. "If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context." *Id.* at 375-76. "[H]owever, the Fourth Amendment's requirement that the officer have probable cause to believe that the item is contraband *before seizing it* ensures against excessively speculative seizures." *Id.* at 376 (emphasis added). As Brown points out in his Appellant Brief, Office Bolton never testified that the objects he felt inside of

Brown's sweatshirt were immediately identifiable to him as contraband. To the contrary, he testified that he reached inside the sweatshirt, removed the contents, and then identified the items as possibly being unlawful substances. It appears, therefore, that Officer Bolton only identified the objects inside of Brown's sweatshirt pocket as contraband *after* he had removed them from Brown's sweatshirt pocket, taken them into his own possession, and examined them further, which means that Officer Bolton did not have probable cause to seize the objects. Accordingly, we believe that Officer Bolton's search impermissibly crossed the line from protective to investigatory. *See Adams*, 407 U.S. at 146.

IV. CONCLUSION

For the foregoing reasons, we reverse and remand with instructions to grant Brown's suppression motion.

THOMPSON, JUDGE, CONCURS.

LAMBERT, D., JUDGE, DISSENTS.

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