Commonwealth of Kentucky
Supreme Court

No. 2007-SC-861-DG

ROBERT PENNINGTON — **APPELLANT**

v.

Appeal from McCracken Circuit Court
Hon. Jeff Hines, Judge
Indictment No.04-CR-149

COMMONWEALTH OF KENTUCKY — **APPELLEE**

Brief for Commonwealth

Submitted by,

JACK CONWAY
Attorney General of Kentucky

COURTNEY J. HIGHTOWER
Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601
(502) 696-5342

CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for Commonwealth has been mailed this the 11th, day of January, 2008, to the Hon. Jeff Hines, Judge, 301 S. 6th St., Paducah, Kentucky 42003; Hon. Tim Kaltenbach, Commonwealth's Attorney, 301 S. 6th St., Paducah, Kentucky 42003; and to the Hon. Erin Hoffman Yang, Department of Public Advocacy, 100 Fair Oaks, Suite 302, Frankfort, Kentucky 40601, Counsel for Appellant.

Courtney J. Hightower
Courtney J. Hightower
Assistant Attorney General

INTRODUCTION

Robert Pennington, hereinafter referred to as appellant, entered a conditional guilty plea to one count of first degree trafficking in a controlled substance, cocaine, one count of resisting arrest, one count of possession of drug paraphernalia and of being a persistent felony offender in the second degree. Appellant received an enhanced sentence of thirteen (13) years in the penitentiary. On direct appeal, the Kentucky Court of Appeals unanimously affirmed appellant's conviction. This Court granted appellant's motion for discretionary review. This is the Commonwealth's brief.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth does not believe that oral argument is necessary in this appeal, as the issues are plainly set forth in the briefs. However, should this Court decide that oral argument would be helpful, the Commonwealth will gladly appear before the Court to present its case.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

On February 23, 2004, Officer Matt Wentworth, Paducah Police, was on patrol in an area of Paducah referred to as "The Set." Officer Wentworth saw a white Chevrolet Caprice approached by someone on foot. The person who approached the vehicle was unknown to the officer and this person gave someone inside the vehicle an item. The subject on foot walked away. This subject was looking around a lot as he was walking away. The white Chevy had an expired temporary tag, so Officer Wentworth pulled the car over on a traffic stop. (VR , 2/28/05, 13:41- 13:47).

Officer Wentworth gave a description of the vehicle over the radio to dispatch. (Id.). This was standard operating procedure when there was no license tag number to call in. (VR, 2/28/05, 13:48 - 13:55). The Sergeant advised Officer Wentworth to use caution because the subject might be appellant. (VR, 2/28/05, 13:41 - 13:47). Additionally, Officer Wentworth's senses were heightened because there were two incidents earlier in the shift, away from "the Set", in which shots were fired. After initiating the traffic stop, appellant identified himself for the officer and seemed extremely nervous. Because of the earlier shootings, Officer Wentworth asked appellant if he had any guns or drugs in the car. Appellant looked away while he answered that he didn't have anything like that and became even more nervous to Officer Wentworth. Since the Sergeant had advised Officer Wentworth to use caution, the officer waited for backup to continue further. (Id. At 13:43:20 - 13:44). Officer Wentworth waited a couple of minutes for Officers Hodge and Redmon to arrive. Officer Wentworth then wrote out the citation. Officer Wentworth approached appellant's car, had him get out and gave him the citation. Officer Wentworth asked again if appellant had any drugs or guns in the car. Appellant said he had

nothing like that on him. However, appellant still appeared nervous and looked away when answering the officer's questions. Officer Wentworth asked for consent to search appellant and the car. Appellant shouted loudly, "No, you cannot, my lawyer told me not to let you search anything." Appellant began backing away from the officer, shaking his head. Officer Wentworth said, "That's fine, but I am going to check you for weapons." Appellant said the officer couldn't do that. Officer Wentworth said that he could and appellant agreed to let the officer check him for weapons. (Id. At 13:41 - 13:47).

During the pat-down, Officer Wentworth felt an object in appellant's right coat pocket. Because the jacket was bulky, the officer squeezed the object and determined it to be a lighter. (Id.). In the appellant's left pants pocket, Officer Wentworth felt another item. (Id.). Officer Wentworth immediately recognized this item as contraband. (Id. At 13:47 - 13:48). The officer told appellant that this item felt like drugs. Appellant jerked away, backed up, cussing. Officer Wentworth tried to gain control of appellant because he still feared he had a weapon as appellant didn't let him finish the pat-down for weapons. Appellant kept backing away toward the open door of his car, cussing. Appellant began acting even more violently, throwing his arms in the air, yelling, "You're violating my rights, you can't do this, you can't touch me." The officers repeatedly told appellant to turn around and put his hands on the car. (Id. At 13:41 - 13:47). Appellant did not respond. In fact, appellant became even louder, saying the same things, waiving his arms in a violent manner and taking an aggressive stance against the officers. (Id.). Appellant would back up to the car and then lunge forward toward the officers. Again, the officers told appellant to turn around and put his hands on the car. Appellant did not respond. Appellant continued to yell even louder for the officers not to touch him and that they were

violating his rights. Officer Wentworth noticed there were two men across the street staring and pointing. It was at this time that Officer Wentworth informed appellant that he was under arrest for disorderly conduct. Appellant pulled away again and took off running. Appellant was apprehended a short distance away, after a brief struggle. In a search incident to arrest, twenty-three (23) grams of crack cocaine and $1205 were removed from appellant's left pants pocket. The pieces of crack field tested positive for cocaine. (Id.).

The trial court entered an order denying appellant's motion to suppress. In such order, the trial court made specific findings of fact. The trial court found that the traffic stop of the white Chevrolet Caprice was lawful as appellant had an Expired Dealer's License Plate. The Court found that Officer Wentworth's suspicions were heightened that appellant might be armed because of the warning from his sergeant, the shots fired earlier in the day and the exchange which occurred just before the traffic stop. The trial court then concluded that the Terry pat-down was lawful, that Officer Wentworth could have seized the drugs during the pat-down under the plain feel doctrine, and the drugs were ultimately seized properly pursuant to a search incident to arrest. (Transcript of the Record, hereinafter referred to as "TR", 46-48).

The Kentucky Court of Appeals affirmed the trial court's order. The Court pointed out that Officer Wentworth had two reasons for stopping appellant. The Court correctly concluded that the possible drug transaction, the high crime area, the warning to proceed cautiously and appellant's unusual agitation toward the officers contributed to Officer Wentworth's reasonable suspicion that appellant might be armed and dangerous, thus justifying the pat-down. (Slip opinion, p. 8). The Court further concluded that appellant did not dispute that the officer's discovery and seizure of the crack flowed properly from the pat-down, either as

a result of the officer's plain feel of the crack or as a result of a proper search incident to an arrest. (Slip opinion, pp. 8-9).

Any additional facts will be discussed as necessary in the Argument section of this brief.

ARGUMENT

THE KENTUCKY COURT OF APPEALS CORRECTLY AFFIRMED APPELLANT'S CONVICTION AS THERE WAS REASONABLE SUSPICION TO CONDUCT A TERRY PAT-DOWN OF APPELLANT FOLLOWING THE ISSUANCE OF A LEGITIMATE TRAFFIC CITATION.

Appellant argues that Officer Wentworth did not have reasonable suspicion to conduct a Terry pat-down in this case. More specifically, appellant argues that the Kentucky Court of Appeals gave too much credence to the officer's testimony that appellant was nervous during the traffic stop, appellant's refusal to consent to search should not have been considered by the Court in its decision and Sergeant Barnhill's warning of caution to Officer Wentworth and the fact that shots had been fired elsewhere in the city did not give rise to reasonable suspicion.

A. The standard of review is deferential to the trial court's findings of fact and conclusions of law

The standard of review is that determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal. However, the reviewing court reviews findings of fact for clear error and gives due weight to inferences drawn from those facts by residence judges and local law enforcement officers. Ornelas v. United States, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). The findings of the trial court are conclusive when

supported by substantial evidence. RCr 9.78; Taylor v. Commonwealth, *supra*. Therefore, the trial court's finding in this case that there was reasonable suspicion is entitled to due deference under RCr 9.78 and Canler v. Commonwealth, 870 S.W.2d 219 (Ky.1994).

B. Officer Wentworth had reasonable suspicion to detain appellant further and conduct a Terry pat-down.

The Fourth Amendment prohibits unreasonable searches and seizures by the Government and its protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest. United States v. Arvizu, 534 U.S. 266, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002) citing to Terry v. Ohio, 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); United States v. Cortez, 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981). In Terry, the United States Supreme Court held that an officer may conduct a brief investigatory stop when the officer has a reasonable articulable suspicion that criminal activity is afoot. While reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop. Illinois v. Wardlow, 528 U.S. 119, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000) citing to United States v. Sokolow, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989). The officer must be able to articulate more than an inchoate and unparticularized suspicion or hunch of criminal activity. Terry, *supra* at 27 , 88 S.Ct. 1868. An investigatory stop must be justified by some objective manifestation that the person stopped is or is about to be engaged in criminal activity. Cortez, *supra*. The totality of the circumstances must be evaluated to determine the probability of criminal conduct, rather than the certainty. United States v. Cortez, 449 U.S. 411, 417-418, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981). This

process does not deal with hard certainties but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as fact-finders are permitted to do the same – and so are law enforcement officers. Cortez, *supra*. This process also allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person. Cortez, *supra*. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior. Cortez, *supra*. An individual's presence in a high drug trafficking area and nervous, evasive behavior are pertinent factors in determining reasonable suspicion. Wardlow, *supra*.

In Kentucky, the standard is the same. In order to justify a brief investigatory stop, the police must have a reasonable articulable suspicion that the person is or is about to become involved in criminal activity. Taylor v. Commonwealth, 987 S.W.2d 302 (Ky. 1999) citing to United States v. Cortez, *supra*; Banks v. Commonwealth, 68 S.W.3d 347 (Ky. 2001); Darden v. Commonwealth, 52 S.W.3d 574 (Ky. 2001).

The Sixth Circuit has a published case that is similar to the case at bar. In United States v. Paulette, 457 F.3d 601 (6th Cir.2006), the Sixth Circuit affirmed the district court's order denying the appellant's motion to suppress. In Paulette, the officers saw the appellant and another individual engage in a hand-to-hand transaction. Id. At 602. The officers believed this to be a drug transaction based upon their knowledge of the area and experience with drug crimes. Id. When the appellant saw the officers approaching, he moved his hand to his pocket and began to walk away. Id. Believing that the appellant had a weapon, a pat-down was conducted and

two plastic bags of marijuana were discovered. Id. The Court concluded that the officers had reasonable suspicion that the appellant was engaged in criminal activity based upon his hand movements consistent with drug-dealing activity, efforts to evade the police, and presence in a high crime area. Id. At 606. The Court further recognized that the officers were also justified in searching the appellant for their own protection, given the frequency with which drug dealers arm themselves, the appellant's movements toward his right pocket and his presence in a high crime neighborhood. Id.

In the case at bar, Officer Wentworth also witnessed appellant exchange something with a subject on foot while in his white Chevrolet Caprice. This transaction occurred in a high drug trafficking area. The subject on foot appeared nervous as he was walking away from the vehicle, following the transaction. Officer Wentworth saw that appellant had an expired temporary tag on his car. The officer called a description in to dispatch and was told by Sergeant Barnhill to proceed with caution, that the subject in the car might be appellant. Further, there had been two incidents in which shots had been fired that morning during Officer Wentworth's shift, so his senses were heightened. During the traffic stop, when Officer Wentworth talked with appellant about any drugs or guns in the car, appellant acted nervous and looked away when he answered the officer's questions. A brief stop of a suspicious individual in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be reasonable in light of the facts known to the officer at the time. The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972). The aforementioned facts gave

Officer Wentworth reasonable suspicion to detain appellant further and do a Terry pat-down of appellant.

Appellant then consented to a pat-down for weapons. In appellant's bulky jacket, Officer Wentworth squeezed an item, discovering a lighter. In appellant's left pants pocket, Officer Wentworth felt an object which he immediately determined to be contraband. At this point, Officer Wentworth could have properly seized the contraband pursuant to the plain feel doctrine. Commonwealth v. Whitmore, 92 S.W.3d 76 (Ky.2002). However, Officer Wentworth informed appellant that the bulge in his pants pocket felt like drugs. Appellant jerked away, backed up, cussing. Officer Wentworth tried to gain control of appellant because he still feared he had a weapon as appellant didn't let him finish the search for weapons. Appellant kept backing away toward the open door of his car, cussing. Appellant began acting even more violently, throwing his arms in the air, yelling. Appellant was so loud and increasingly violent that he attracted the attention of two men across the street. When appellant was told he was being placed under arrest for disorderly conduct, he fled. This was another factor to consider, as flight is evidence of consciousness of guilt. Wellborn v. Commonwealth, 157 S.W.3d 608 (Ky. 2005). The contraband and the money were then seized from appellant pursuant to a valid search incident to arrest for disorderly conduct and resisting arrest. The Kentucky Court of Appeals correctly concluded that the seizure of the crack flowed properly from the plain feel or as a result of a search incident to arrest. This was not disputed by appellant.

Appellant argues in his brief that the Kentucky Court of Appeals gave too much credence to the officer's testimony that appellant was nervous during the traffic stop. The Court specifically concluded that Officer Wentworth's suspicions were **further** aroused by appellant's

demeanor. The very language of the opinion dispels appellant's argument and establishes that appellant's nervousness was but one of many factors the Court considered which gave rise to reasonable suspicion. Further, Illinois v. Wardlow, 528 U.S. 119, 124, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000) specifically recognizes nervous behavior, not just evasive behavior, as a pertinent factor in determining reasonable suspicion. Appellant also argues that appellant's refusal to consent to search should not have been considered by the Court in its decision. The Court did not rely on appellant's refusal to consent as a factor in determining reasonable suspicion. The Court did rely on appellant's inexplicable agitation and his nervousness as two of many factors giving rise to reasonable suspicion. Finally, appellant alleges that Sergeant Barnhill's warning of caution to Officer Wentworth and the fact that shots had been fired elsewhere in the city did not give rise to reasonable suspicion. The Court did not conclude that this fact gave rise to reasonable suspicion. The Court held that Officer Wentworth's observation of appellant's possible drug transaction; the fact that the transaction occurred in a high crime area associated with drug-related gun violence; the radioed warning to proceed cautiously with appellant; and appellant's unusual agitation, which was increasingly directed against the officer, all contributed to Officer Wentworth's reasonable suspicion that appellant was dangerous and might be armed. (Slip opinion, p. 8).

CONCLUSION

Wherefore, based upon all of the foregoing, appellant's conviction should be affirmed.

Respectfully submitted,

JACK CONWAY
Attorney General of Kentucky

Courtney J. Hightower

COURTNEY J. HIGHTOWER
Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601-8204
(502) 696-5342

Counsel for Appellee