

**COMMONWEALTH OF KENTUCKY
NEWTOWN CIRCUIT COURT
CASE NO. 11-CR-1993**

COMMONWEALTH OF KENTUCKY

PLAINTIFF

vs.

JOHN R. GAITHER

DEFENDANT

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS

The above-named defendant was charged with violation of KRS 218A.1415 (possession of a controlled substance in the first degree: cocaine). Defendant filed a motion to suppress evidence obtained following a search of his person conducted on April 2, 2011. The parties have submitted briefs and a hearing was conducted on July 14, 2011, at which Detective Lance Emerson testified.

FINDINGS OF FACT

1. Defendant was arrested on April 2, 2011 for possession of a controlled substance (cocaine).
2. At the time he was arrested, Defendant was at the auto body shop of Nick Miller.
3. Detective Emerson provided credible, uncontroverted testimony that Newtown Police Department had been conducting undercover surveillance of Miller's business for about three weeks. The NPD had received an anonymous tip that illegal drugs were being sold from the back offices of the business. The tipster stated that, in addition to Miller, a white male in his mid-20s with brown hair was also selling cocaine.
4. During his surveillance, Detective Miller observed a high volume of traffic coming in and out of the business, making short visits. In Detective Miller's experience, the traffic pattern is consistent with drug trafficking.
5. Detective Emerson had observed Defendant visiting the business on numerous occasions during the three weeks of surveillance. Defendant is a white male, aged 22, with brown hair.
6. On April 1, 2011, Detective Emerson pulled over a vehicle after it had left the Miller residence for failure to stop at a stop sign. Upon approaching the vehicle, Detective Emerson smelled marijuana. A search of that vehicle yielded seven ounces of marijuana in the trunk.
7. In Detective Emerson's experience as a narcotics detective, seven ounces of marijuana is a large volume typically indicating that someone is dealing in marijuana.

8. Detective Emerson and Officer Lynn Bailey entered Miller's business on April 2, 2011 and found Miller at the front desk of the business. Miller seemed nervous. When asked, Miller told the officers that there was no one else in the shop. However, the officers heard voices and noises coming from the back room of the business.
9. Detective Emerson called into the back room for anyone to come out. Defendant came out and also seemed nervous.
10. In Detective Emerson's experience, people engaged in drug trafficking often carry weapons and/or firearms.
11. Based on these circumstances, Detective Emerson conducted a pat-down search of Defendant. During the pat-down, Detective Emerson felt what he described as a "small rock" in Defendant's pocket. He also heard the sound of a plastic bag and concluded that the small rock was in a plastic baggie. In Defendant's other pocket, Detective Emerson felt a large amount of cash.

CONCLUSIONS OF LAW

1. The Court has proper jurisdiction over the subject matter and parties in this controversy.
2. A police officer may, for his protection, conduct a pat-down search of a person when the officer has a "reasonable and articulable suspicion that criminal activity is afoot." *Terry v. Ohio*, 392 U.S. 1 (1968). When determining whether the officer's suspicion is reasonable, this court must look to the totality of the circumstances.
3. In addition to a suspicion that criminal activity is afoot, the officers must also believe that the suspect may be armed and dangerous. *Commonwealth v. Banks*, 68 S.W.3d 347 (2001).
4. This Court does not believe that the circumstances gave rise to a reasonable belief that the Defendant, John Gaither, was engaged in criminal activity or that he was armed.
5. Detective Emerson arrested another person who was leaving Miller's business with a large quantity of marijuana. However, no testimony has been presented that connects that suspect with Mr. Gaither.
6. Detective Emerson testified that Miller lied and told him that no one was in the back of the business, when in fact Gaither was in the back office. While this may reasonably raise the detective's suspicion of Miller, Miller's lie cannot be attributed to Gaither. In fact, Gaither came out to the front when asked to appear.
7. Detective Emerson also testified that Gaither seemed nervous talking to the officers. However, it is common for the average citizen to be nervous or anxious when confronted with law enforcement officers.
8. Detective Emerson testified that he received an anonymous tip that drugs were being sold in Miller's business. However, this tip did not specifically identify Gaither. It generally identified a white male in his early 20s with brown hair. This tip is too general.
9. When viewed in their totality, these circumstances do not rise to the level of a "reasonable and articulable suspicion" that Gaither was engaged in criminal activity or that he was armed. Under *Terry v. Ohio*, Detective Emerson was not permitted to stop and frisk Gaither.
10. Even if Detective Emerson was authorized to perform a *Terry* stop of Gaither, the type of "stop and frisk" permitted is only for weapons. Detective Emerson testified that he did not feel any

weapons on Gaither's person. He did feel a small plastic bag with a hard rock-like substance in it. Based on this feeling alone, he could not reasonably have concluded that the object was illegal narcotics. *Minnesota v. Dickerson*, 508 U.S. 366 (1993).

11. In conclusion, the search of Gaither's person was unlawful under *Terry v. Ohio*. It was not based on reasonable and articulable suspicion. Further, Detective Emerson exceeded the scope of the search, which should have been a pat-down search for weapons only. He could not reasonably have believed that the item in Gaither's pocket was illegal drugs based only on the pat-down search. The evidence must be suppressed.

JUDGEMENT

Defendant's motion to suppress the evidence obtained from the search of his person on April 2, 2011 is hereby GRANTED.

This is a final and appealable order.

Entered this 16th day of July, 2011.

Melinda B. Crowley, Judge

Newtown Circuit Court

Testimony of Detective Lance Emerson

Direct Examination

Q: Please state your name for the Court.

A: Lance Emerson.

Q: Where are you currently employed Mr. Emerson?

A: As a Detective with the Newtown Police Department.

Q: How long have you been employed with the NPD?

A: Eighteen years. I have been a detective for eleven years, and I've been on the narcotics force for nine.

Q: Detective Emerson, where you employed with the NPD on April 2, 2011?

A: Yes, I was.

Q: And were you working that day?

A: Yes, I was conducting undercover surveillance of an auto body shop that day.

Q: Could you provide us with the circumstances that gave rise to this operation?

A: I had received a phone call from an anonymous tipster that there was some drugs being sold from Miller's Auto Body and Repair Shop, located on Route 24.

Q: Did the tipster provide any further details?

A: The tipster said that Miller was dealing in all kinds of drugs – pot, cocaine, pills. Also, that there was another guy there who also was selling – a white male in his 20s with brown hair.

Q: So you decided to conduct some surveillance of the shop?

A: Yes sir. Well, not based solely on the tip. To be honest, we have heard before that there is drug dealing going on at Miller's shop from other suspects. That place was already on our radar, so to speak. But yes, when we received this tip, myself and the Chief decided it was time to go check things out.

Q: How long did you conduct the surveillance?

A: About three weeks.

Q: And what did you notice during this surveillance?

A: A high volume of traffic coming and going from the shop. People would park, go into the shop for a few minutes, and leave. It didn't seem that they were leaving any vehicles there for repair.

Q: In your professional experience as a narcotics detective, is this type of traffic pattern consistent with drug trafficking?

A: Absolutely. It is consistent with a major drug dealer with multiple purchasers.

Q: Detective Emerson, on April 1, 2011, did you arrest anyone leaving Miller's shop?

A: Yes, we noticed one of the cars leaving the business was driving very erratically. We pulled him over after he blew threw a stop sign and nearly ran over a kid on a bike.

Q: Was the driver charged with any additional violations?

A: Yes, when we approached the vehicle we smelled the distinct sent of burning marijuana. We got the driver out of the vehicle and searched the car. We found seven pounds of marijuana in the trunk.

Q: Did the driver tell you where he got the marijuana?

A: Yeah, he told us that he had just purchased it from Miller.

Q: The following day you decided to enter Miller's business, correct?

A: Yes.

Q: Why?

A: Because we were nervous that the arrest the day before was going to blow our cover. So we went in – Officer Lynn Bailey and myself.

Q: And what happened when you entered Miller's shop?

A: We found Miller at the front desk. He immediately stopped what he was doing and looked real shocked, kind of nervous that we were there. We asked him if anyone else was in the shop, and he said no, but he kept looking towards the back hall. Then we heard a noise in the back room, like a chair moving across the floor.

Q: Did you go investigate?

A: No, Officer Bailey stayed with Miller while I went to the hall to the back room and I called out. I shouted for anyone back there to come out.

Q: Did anyone come out?

A: Yes, the defendant, Mr. Gaither.

Q: How did he appear?

A: Also very very nervous. He was very fidgety and kept looking around, shifting from foot to foot.

Q: Did you conduct a pat-down search of Miller?

A: Yes, we frisked him and found a hand gun in his pocket.

Q: Did you frisk Gaither?

A: Yes, after we found the gun on Miller, we needed to frisk Gaither too. Also because he was acting so nervous and the fact that he was at Miller's shop, in the back room. We had already confirmed through the arrest the prior day that there was drug dealing going on in that business.

Q: Did you find anything during that frisk?

A: Yes, I felt a small plastic bag in his pocket. It contained a hard, rock-like substance. From my extensive experience as a narcotics officer, I recognized that this was probably crack cocaine. I also know that people typically keep crack cocaine in plastic bags.

Q: What happened next?

A: At that point, we arrested Gaither and I sent the substance to the lab. They confirmed that it was cocaine.

Q: No further questions.

Cross Examination

Q: Detective Emerson, you say that you began the surveillance of Miller's shop because you received an anonymous tip?

A: Right, yes.

Q: And that tip was just generally saying that there was drug dealing going on at the shop?

A: Right.

Q: But you didn't know who the person was, so you don't know if they were reliable or anything?

A: No, it was anonymous.

Q: And the person just provided a general description of a white male in his twenties with brown hair. That is pretty general, right?

A: I suppose.

Q: Detective Emerson, let's talk about the person that you arrested on April 1, 2011. You interviewed that suspect after the arrest, correct?

A: Yes I did.

Q: And that suspect told you that he had purchased the seven pounds of marijuana at Miller's shop, right?

A: Yes, he did.

Q: At any point during that interview, did the suspect mention Mr. Gaither?

A: No, he did not.

Q: Did that suspect ever say that anyone other than Miller sold him the marijuana?

A: He mentioned the "guys" at Miller's shop, but he wouldn't name names. That's typical. No one wants to be a rat.

Q: So the next day you entered the business.

A: Right.

Q: You say that Miller appeared nervous?

A: Very.

Q: Aren't most people a little nervous when two police officers confront them?

A: Some are, some aren't.

Q: And you say that Miller told you that no one else was in the business?

A: Right, but that was a lie.

Q: When you called into the back room, Mr. Gaither came out, didn't he?

A: Yes he did.

Q: He didn't try to run out the back door or anything?

A: No he came out to the front area where we were.

Q: Did he act in a threatening manner?

A: No he didn't. He seemed nervous too.

Q: So you frisked Mr. Miller and found a gun, correct?

A: Yes.

Q: And then you frisked Mr. Gaither. What did you feel?

A: I felt a plastic bag in his pocket. I could hear it as I felt the outside of his pocket. And it contained a hard, rock-like substance.

Q: Did you feel any weapons?

A: No.

Q: So you felt the hard substance in his pocket. Did you have to manipulate the outside of Mr. Gaither's pocket to conclude that it was illegal narcotics.

A: No I could just tell from the outside of his pocket. From feeling the outside of his pocket.

Q: So just from a quick pat down of the outside of Mr. Gaither's pocket, you felt a hard substance and concluded that it was illegal drugs?

A: Yes.

Q: No further questions, your honor.

Court: Any further questions from the Commonwealth? Okay, hearing none, Detective Emerson, you may be excused.

I hereby certify that this is a true and accurate transcript of the proceedings.

April 23, 2011

/s/ Allison WhiteCase

