

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000002-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 05-CR-00328

LEE SCALF

APPELLEE

OPINION REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: THOMPSON AND WINE, JUDGES; KNOPF,¹ SENIOR JUDGE.

KNOPF, SENIOR JUDGE: The single question in this appeal is whether the Kenton Circuit Court erred in suppressing evidence obtained in an investigatory stop of appellee Lee Scalf. After a hearing, the trial court concluded that the officers involved in the stop did not possess the requisite level of suspicion to justify a search and seizure and granted Scalf's motion to suppress evidence of contraband found in his pocket. Because we are

convinced that the conduct of the officers falls within the parameters of investigative

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

stops set out in well-established caselaw, the order suppressing the evidence obtained from Scalf must be reversed and the case remanded for further proceedings.

Scalf was indicted for first-degree possession of heroin which was discovered after he was stopped as he walked down a Covington city street in an area known to be a “high drug area.” He subsequently moved to suppress the evidence obtained in that search alleging that his detention and search violated his Fourth Amendment protections against unreasonable searches and seizures.

Testifying at the hearing conducted on the motion were Officer Aaron Mears, who did the primary interrogation during the stop, and Scalf. The officer testified that he and another officer were standing on the sidewalk watching a car being towed when Scalf approached on foot. Officer Mears testified that he recognized Scalf from previous encounters and engaged him in conversation as he passed. Officer Mears stated that he asked Scalf where he was headed and he responded that he was going to a friend's house but that he could not immediately give a name or address. The officer acknowledged that Scalf did eventually say that his friend's name was Alex and pointed in the general direction of the friend's home. Officer Mears stated that because Scalf appeared to be “tap dancing around answers,” he became suspicious and asked him if he “had anything on him” and for permission to search him. Mears stated that after Scalf consented to a search, he discovered in Scalf's back pocket the substance which lead to the indictment.

Scalf's depiction of the events diverges widely from that given by the officer. Scalf testified that as he walked down the street, the officers jumped out of a squad car and started searching him without engaging him in conversation or asking for consent. After hearing this evidence, the trial judge entered an order which contained the following summary of the evidence adduced:

At approximately 7:49 p.m. on March 10, 2005, Officer Aaron Mears and Officer Rose of the Covington Police Department stopped Defendant Lee Scalf on East 11th Street in the Jacob Price low-income housing development located in Covington, Kentucky. Officer Mears testified at the suppression hearing that he and Officer Rose were standing on the sidewalk watching a vehicle being towed away and the Defendant walked past them. The Defendant testified that he was walking down the street when Officer Mears drove down the street in the on-coming lane, stopped his car, got out, and ran up to him. Officer Mears testified that he recognized the Defendant because of prior contacts and asked him where he was headed. He testified that Defendant told him he was going to a friend's house but he could not provide the name of the friend or the friend's address. Defendant testified that he told the officer the name of his friend, Alex, and told the officer that he was going to Alex's home and pointed to the general area of the home. Officer Mears testified that he became suspicious of why Defendant was over in the East 11th Street Area when Defendant appeared to be unsure of where he was going. The officer testified that he then asked Defendant if he had anything illegal on him, asked for a consent to search, and Defendant consented. The officer found heroin in the Defendant's pocket. The Defendant was charged with one count of First Degree Possession of a Controlled Substance/Heroin. Office Mears testified that he had already run the Defendant's name through NCIC for warrants when the Defendant walked by him. [Citations to the hearing tape omitted.]

On the basis of those facts, the trial court concluded that Scalf's detention amounted to "seizure" triggering his right to the protections against unreasonable searches and seizures afforded by the Fourth Amendment. He was also of the opinion that the officers involved were unable to demonstrate "specific and articulable facts which gave rise to reasonable suspicion" justifying the detention. In explaining his decision that the evidence should be suppressed, the trial judge emphasized that the officers who confronted Scalf were aware that he had no outstanding warrants and continued their interrogation after he responded to Officer Mears' question as to where he was going. Citing *Florida v. Bostick*, 501 U.S. 429, 437, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991), the trial court reasoned that taking into consideration all the circumstances surrounding the stop "a reasonable person would not feel that he could leave when confronted by Mears, who continued his questioning after being given a reasonable answer, with Officer Rose seemingly providing backup." We cannot agree.

The Court in *Baltimore v. Commonwealth*, 119 S.W.3d 532, 537 (Ky.App. 2003), clearly sets out the proper standard of review of decisions on a suppression motions:

Kentucky has adopted the standard of review set out by the United States Supreme Court in *Ornelas v. United States*. Under that approach, the decision of the circuit court on a motion to suppress based on an alleged illegal search following a hearing is subject to a two-part analysis. First, factual findings of the court involving historical facts are conclusive if they are not clearly erroneous and are supported by substantial evidence. Second, the ultimate issue of the existence of reasonable suspicion or probable cause is a mixed question of law and fact subject to de novo review. In

conducting this analysis, the reviewing court must give due weight to inferences drawn from the facts by the trial court and law enforcement officers and to the circuit court's findings on the officers' credibility. [Citations omitted.]

Applying those criteria to this case, we are convinced that the trial court's ultimate conclusion regarding the lack of reasonable suspicion to justify a investigatory stop cannot be sustained.

It is the Commonwealth's position that the trial court erred as a matter of law when it concluded that the encounter between the officers and Scalf constituted a “seizure” within the meaning of the Fourth Amendment. The Commonwealth maintains that police officers are entitled to “approach anyone in public, engage them in conversation, ask a limited number of routine questions followed by a question about possession of contraband and a request to search.” It challenges as error the determination that a reasonable person in Scalf's situation would feel that he was not free to disregard the officer's request and terminate the encounter. We agree.

A review of the trial court's opinion makes clear that its primary focus was Scalf's perception that he was not at liberty to ignore the police presence and go about his business. Implicit in the trial court's analysis is a finding that it accepted Officer Mears' version of the events surrounding the encounter, as Scalf maintained that no questions were asked and that he was immediately pounced upon and searched. However, other than the fact that the officers continued to question Scalf after receiving a response to their initial questions, the trial court cites no facts to support its conclusion that a

reasonable person in Scalf's position would have felt that he was not at liberty to end the questioning and leave.

In *Bostick*, the United States Supreme Court considered whether police could constitutionally board a bus, ask routine questions and request consent to search a passenger's luggage. Concluding that the officers' conduct did not *per se* implicate the Fourth Amendment, the Court offered the following explanation as to what constitutes a "seizure:"

Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free "to disregard the police and go about his business," the encounter is consensual and no reasonable suspicion is required. The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature. The Court made precisely this point in *Terry v. Ohio*: "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. **Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred.**"

Since *Terry*, we have held repeatedly that mere police questioning does not constitute a seizure. In *Florida v. Royer*, for example, we explained that "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions."

501 U.S. at 434, citations omitted, emphasis added. Applying this analysis to Scalf's encounter with the officers in this case, it is clear that no "seizure" within the meaning of

the Fourth Amendment was established. Noteworthy in this regard are the following examples of coercive measures impacting “seizure” set out in *U.S. v. Drayton*, 536 U.S. 194, 204, 122 S.Ct. 2105, 2112, 153 L.Ed.2d 242 (2002):

There were ample grounds for the District Court to conclude that “everything that took place between Officer Lang and [respondents] suggests that it was cooperative” and that there “was nothing coercive [or] confrontational” about the encounter. There was no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not even an authoritative tone of voice. **It is beyond question that had this encounter occurred on the street, it would be constitutional.** [Emphasis added.]

Having concluded that Officer Mears' investigatory stop did not constitute a seizure, we turn to the question of whether Scalf was subjected to an unreasonable search, i.e., a search that exceeded the scope of his consent. Scalf argues that, assuming that he had initially consented to the warrantless search (which he denies), he effectively withdrew that consent when he attempted to stop Officer Mears' from searching his back pocket. Review of the Scalf's testimony, however, refutes his current contention as he specifically stated that he never reached for his pocket in the course of the search. Nevertheless, as the Commonwealth stated at the suppression hearing, Scalf was not contesting the voluntariness of the search, but propriety of the initial investigatory stop. As a result, the trial court did not address this new contention in his order and any issue regarding consent to search has not been preserved for our review.

Accordingly, the judgment of the Kenton Circuit Court is reversed and the case remanded for further proceedings.

ALL CONCUR.

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