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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000042-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM HARRISON CIRCUIT COURT
HONORABLE ROBERT W. MCGINNIS, JUDGE
ACTION NO. 09-CR-00034

REESE GARRISON

APPELLEE

OPINION REVERSING AND REMANDING

** ** * * * * *

BEFORE: CLAYTON AND NICKELL, JUDGES; ISAAC,¹ SENIOR JUDGE.

NICKELL, JUDGE: The Commonwealth of Kentucky has appealed from the Harrison Circuit Court's December 8, 2009, order which granted Reese Garrison's motion to suppress the evidence seized during his arrest and dismissed all charges

¹ Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

levied against him. For the following reasons, we reverse and remand this matter for further proceedings.

The facts surrounding Garrison's arrest are relatively simple and undisputed. On July 31, 2009, Kentucky State Police (KSP) Detective Lance Hutchinson received a phone call from a known cooperating witness regarding the whereabouts of Steve Alexis, a person of interest in an ongoing criminal investigation regarding illegal drug sales. Det. Hutchinson knew Alexis to have outstanding arrest warrants and to have completed several "controlled buys" of illicit drugs with law enforcement investigators. The caller informed Det. Hutchinson that Alexis was planning on leaving town for an extended period of time, he was currently at a residence in Harrison County known for drug trafficking, and was in possession of a firearm.

Det. Hutchinson decided to attempt to serve the outstanding warrants on Alexis. Determining the situation to be potentially dangerous, Det. Hutchinson requested assistance from the Harrison County Sheriff's Office and the KSP Special Response Team (SRT). Upon arrival at the residence, Det. Hutchinson and Detective Paul Olin, a Harrison County Deputy Sheriff, observed Alexis and Garrison exit the home and get into a vehicle. Det. Hutchinson did not know Garrison but recognized Alexis. With Garrison at the wheel, the pair left the area. Detectives Hutchinson and Olin followed in an unmarked police vehicle, hoping back-up would arrive.

After traveling some distance, but before other officers could arrive, Garrison stopped and parked his vehicle between two apartment buildings. Based on the circumstances, Det. Hutchinson believed it was necessary to attempt to apprehend Alexis without waiting for the back-up officers to arrive. He and Det. Olin exited their vehicle and, following the procedure for a dangerous felony stop, did not approach Garrison's vehicle but gave verbal commands to Garrison and Alexis while remaining behind the protective barrier of the car doors. As the driver of the vehicle, Garrison was first ordered to exit the vehicle and walk backwards toward the officers with his hands raised.

Once he reached the officers, Det. Hutchinson patted Garrison down for weapons. Det. Hutchinson then placed Garrison in handcuffs for the safety of all involved and turned him around to escort him toward the rear bumper of the police cruiser. Upon seeing Garrison's face for the first time immediately after placing the handcuffs on him, Det. Hutchinson noticed Garrison was sweating profusely and his eyes were noticeably drooped as if he were "half-asleep." Garrison was placed on the curb while Det. Hutchinson returned his attention to Alexis. Other officers soon arrived and noticed Garrison's appearance and condition after being alerted to same by Det. Hutchinson. Those officers summoned a KSP trooper who was specially trained in administering field sobriety tests for individuals suspected of being impaired by a substance other than alcohol. Garrison was determined to be intoxicated and he was placed under arrest for driving under the influence (DUI).

Following his arrest, officers requested permission to search the vehicle, but Garrison denied the request. A canine unit was called to the scene and arrived a short time later. The canine alerted on the driver's side door of Garrison's vehicle indicating the presence of drugs. Subsequently, officers searched the vehicle and discovered multiple pills and drug paraphernalia containing marijuana residue under the driver's seat and in the center console. A Harrison County grand jury indicted Garrison on one count each of trafficking in a controlled substance in the first degree,² possession of a controlled substance in the first degree,³ possession of a controlled substance in the third degree,⁴ possession of drug paraphernalia,⁵ and operating a motor vehicle while under the influence, second offense.⁶

Garrison moved the trial court to suppress all of the evidence seized alleging the warrantless search of the vehicle violated the mandates of *Arizona v. Gant*, ___ U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009),⁷ regarding searches

² KRS 218A.1412, a Class C felony.

³ KRS 218A.1415, a Class D felony.

⁴ KRS 218A.1417, a Class A misdemeanor.

⁵ KRS 218A.500(2), a Class A misdemeanor.

⁶ KRS 189A.010(5)(b).

⁷ Garrison's motion to suppress contended that the search incident to arrest exception to the Fourth Amendment's prohibition against unreasonable searches and seizures was inapplicable to his case as he had been removed from his vehicle, could not reach into the area searched to gain possession of a weapon or destroy evidence, and officers may only search an arrestee's person and the area within his immediate control. He based his argument solely on the holding in *Gant* and his motion mimicked the language contained in that opinion.

of vehicles incident to arrest and was thus unconstitutional. Garrison did not challenge the stop of the vehicle, his detention, nor his eventual arrest. A hearing was held on the motion on December 4, 2009. After referencing an off-the-record discussion with defense counsel, the trial court orally sustained the motion. In so ruling, the court stated the officers had “arrested” Garrison when he was placed in handcuffs but at that time they had no probable cause to place him under arrest. Thus, the court found the arrest was unlawful and any resulting search was thereby rendered infirm. The trial court then *sua sponte* dismissed all of the charges pending against Garrison. In a brief written order, the trial court restated its holdings but made no factual findings. This appeal by the Commonwealth followed.

The Commonwealth first contends the trial court erred in unilaterally dismissing the indictment against Garrison. We agree.

It is well-settled in this Commonwealth that the authority to dismiss criminal indictments prior to trial rests solely with the Commonwealth. *Hoskins v. Maricle*, 150 S.W.3d 1, 13-14 (Ky. 2004) (collecting cases). *See also* RCr⁸ 9.64. Trial courts may dismiss criminal charges only via a directed verdict following trial. *Commonwealth v. Isham*, 98 S.W.3d 59, 62 (Ky. 2003). As was the case in *Isham*, the trial court here passed upon the Commonwealth’s evidence and improperly determined the case should not go forward. Such a determination prior to trial is outside the province of the trial judge. *Id.* (citing *Commonwealth v.*

⁸ Kentucky Rules of Criminal Procedure.

Hicks, 869 S.W.2d 35, 37 (Ky. 1994)). The circuit court “simply lacked the authority to dismiss the complaint prior to trial. Consequently, such dismissal was an abuse of discretion on the part of the [circuit] judge.” *Id.* Thus, reversal is required.

Next, the Commonwealth contends the search in question was not unconstitutional and the trial court erred in granting Garrison’s motion to suppress the evidence seized following his arrest. The Commonwealth argues the trial court’s ruling was completely unrelated to the arguments set forth in Garrison’s motion and was otherwise legally inaccurate. The Commonwealth takes further issue with the trial court’s failure to make adequate findings of fact.

Generally, reviewing courts defer to a trial court’s findings of fact on issues of suppression, so long as those findings are supported by substantial evidence. RCr 9.78. However, where no factual findings are made and the trial court’s ruling consists solely of legal conclusions, we review its determinations *de novo*. *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); *Commonwealth v. Pride*, 302 S.W.3d 43 (Ky. 2010); *Cummings v. Commonwealth*, 226 S.W.3d 62 (Ky. 2007). We note that here neither party requested the court make additional findings of fact; thus, we cannot take issue with the trial court’s failure to do so. *See* CR 52.04.

The trial court ruled from the bench that as a matter of law Garrison was “arrested” at the moment he was placed in handcuffs. The court further believed that since the officers did not have probable cause to effectuate an arrest

at that moment, it was an illegal arrest and any subsequent search was unlawful. The trial court stated its belief that once a person is placed in cuffs, “they know they’re under arrest and they can’t run off.” In making its ruling from the bench, the trial court stated “anything that followed after his detention, which I’m calling an arrest, because he was in cuffs and obviously couldn’t go anywhere, that, um, can’t come into the case, fruits of the poisonous tree.” We disagree with the trial court’s assessment.

Contrary to the trial court’s belief, a “seizure” and an “arrest” are not synonymous. As we observed in *Baltimore v. Commonwealth*, 119 S.W.3d 532, 537 (Ky. App. 2003), there are three types of interaction between the police and citizens: consensual encounters, temporary detentions (generally referred to as *Terry* stops), and arrests. The prohibition against unreasonable search and seizure provided by the Fourth and Fourteenth Amendments to the United States Constitution applies only to *Terry* stops and arrests. *Id.* The Fourth Amendment dictates that an official detention of a person must be supported by probable cause—even if no formal arrest of the person is made. *Id.* However, the courts have recognized several limited exceptions based upon the nature and extent of the intrusion and the government interest involved. *Id.*

In *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the United States Supreme Court held that a brief investigative stop, detention, and frisk for weapons does not violate the Fourth Amendment as long as the initial stop was supported by reasonable suspicion, a far lighter standard than probable cause.

Id. *Terry* recognized that there must be an actual “seizure” before the protections of the Fourth Amendment are triggered. *Id.* Pursuant to *Terry*, a police officer may approach a person, identify himself as a police officer, and ask a few questions without implicating the Fourth Amendment. *Id.* A “seizure” for Fourth Amendment purposes occurs only when an individual is detained under circumstances that would induce a reasonable person to believe that he or she is not at liberty to leave. *Id.*⁹

The United States Supreme Court has opined that the totality of the circumstances must be considered in determining when a temporary detention turns into an arrest, and there is no bright-line rule governing such a determination. *United States v. Sharpe*, 470 U.S. 675, 685, 105 S.Ct. 1568, 1575, 84 L.Ed.2d 605 (1985). When considering the totality of the circumstances, a reviewing court should take care not to view the factors upon which police officers rely in isolation. Courts must consider all of the officers’ observations, and give due weight to the inferences and deductions drawn by trained law enforcement officers. *United*

⁹ However, the Fourth Amendment does not automatically protect a “seized” citizen from a search by law enforcement. In *United States v. Hensley*, 469 U.S. 221, 226, 105 S.Ct. 675, 679, 83 L.Ed.2d 604 (1985), the United States Supreme Court held:

[a]lthough stopping a car and detaining its occupants constitute a seizure within the meaning of the Fourth Amendment, the governmental interest in investigating an officer’s reasonable suspicion, based on specific and articulable facts, may outweigh the Fourth Amendment interest of the driver and passengers in remaining secure from the intrusion. See *Delaware v. Prouse*, 440 U.S. 648, 653-655, 99 S.Ct. 1391, 1395-1397, 59 L.Ed.2d 660 (1979).

States v. Arvizu, 534 U.S. 266, 272-75, 122 S.Ct. 744, 750, 151 L.Ed.2d 740 (2002).

Upon even a cursory review of the above-noted decisions, it becomes clear that our jurisprudence recognizes a distinction between a temporary detention (or “seizure”) and an arrest for purposes of the Fourth Amendment. In the case *sub judice*, the totality of the circumstances do not support the trial court’s ruling that Garrison was arrested at the moment he was placed in handcuffs.

Det. Hutchinson testified at the hearing that it was not his intention to place Garrison under arrest, but rather that he was handcuffing Garrison for safety reasons. This decision was based upon the information Det. Hutchinson had received from his informant that Alexis was armed with a pistol. Because there were only two officers present at the time of the interaction, the uncertainty surrounding felony arrests, and the knowledge that back-up officers would be delayed in arriving on-scene, Det. Hutchinson believed it in everyone’s best interests to temporarily restrain Garrison to avoid the possibility of a violent or otherwise unfavorable confrontation. He testified that although he was completely unfamiliar with Garrison, Det. Olin did recognize him from previous encounters.¹⁰ Although Det. Hutchinson became suspicious of Garrison’s impairment immediately upon turning Garrison around to lead him to the rear of the police car, the decision to place Garrison under arrest was not made until further information regarding his impaired status was gleaned by other officers.

¹⁰ It is unclear from the record what those encounters were or whether Det. Hutchinson was made aware of the facts and details from such interactions.

In light of the totality of the circumstances known and observed by the officers, including Garrison's being seen leaving a residence known for illegal drug activity while accompanied by a wanted felon who was reputed to be armed, Det. Hutchinson was justified in undertaking a *Terry* stop and undertaking additional investigation. Det. Hutchinson assuredly had reasonable, articulable suspicion that criminal activity was afoot. Further, the slight intrusion was necessary for the safety of all parties involved as well as the general public under the circumstances, was reasonably related to the justification for the stop, and was not unduly prolonged. Thus, we believe the trial court erroneously found the interaction was violative of the Fourth Amendment and the exclusionary rule was improperly applied to exclude the results of the ensuing search.

In addition to our belief that Garrison's temporary detention was permissible, and contrary to the trial court's belief, we do not find Det. Hutchinson's actions were tantamount to effectuating an arrest even though Garrison was placed in handcuffs. In *Hensley*, 469 U.S. at 235, 105 S.Ct. at 683-84, the Supreme Court discussed the appropriateness of the arresting officers' actions in detaining Hensley.

When the Covington officers stopped Hensley, they were authorized to take such steps as were reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop. The Covington officers' conduct was well within the permissible range in the context of suspects who are reported to be armed and dangerous. See *Michigan v. Long*, 463 U.S. 1032, 1049-1050, 103 S.Ct. 3469, 3480-3481, 77 L.Ed.2d 1201 (1983); *Pennsylvania v. Mimms*,

In *United States v. Crittendon*, 883 F.2d 326 (4th Cir. 1989), a defendant was handcuffed before officers conducted a pat-down of his person. As Garrison does here, Crittendon argued that his being handcuffed converted his encounter with police into an arrest. In rejecting his argument, the Court held

[b]rief, even if complete, deprivations of a suspect's liberty do not convert a stop and frisk into an arrest so long as the methods of restraint used are reasonable to the circumstances. *See, e.g., United States v. Perate*, 719 F.2d 706, 708-09 (4th Cir. 1983) (fact that officers approached suspect's car with drawn weapons did not convert stop into an arrest); and *United States v. Bautista*, 684 F.2d 1286, 1289 (9th Cir. 1982) (use of handcuffs during stop and frisk does not convert encounter into a custodial arrest).

Id. at 329. Similarly, the Sixth Circuit has held that the use of handcuffs does not “exceed the bounds of a *Terry* stop, so long as the circumstances warrant that precaution.” *Houston v. Clark County Sheriff Deputy John Does 1-5*, 174 F.3d 809, 815 (6th Cir. 1999) (collecting cases). In *Houston*, the suspects were ordered out of their vehicle at gunpoint, handcuffed, searched, and placed in the rear of a police cruiser for approximately twenty minutes. Based on the totality of the circumstances, the *Houston* Court found the officer's actions to be reasonably necessary to protect their safety, reasonably related to the investigation into the underlying crime, and not tantamount to effectuating an arrest.

Likewise, we believe Det. Hutchinson acted permissibly under the circumstances in restraining Garrison to maintain control of him and preserve the

status quo. This is especially true when considering Det. Hutchinson was unaware of whether Garrison had violent tendencies, was aware that at least one weapon was believed to be in the vehicle, and a known felon was still unsecured in that vehicle. Allowing Garrison to move about freely behind the officers' backs would have been imprudent and inherently risky. "Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties." *Terry*, 392 U.S. at 23, 88 S.Ct. at 1881. The brief detention was amply supported by reasonable suspicion and driven by the strong desire to maintain safety for the officers, the parties involved, and the general public. Garrison was not arrested until officers had probable cause to believe he had been operating his vehicle while under the influence of an intoxicating substance.

Nevertheless, even if we were to believe Garrison's detention was unlawful, in *Hardy v. Commonwealth*, 149 S.W.3d 433 (Ky. App. 2004) (quoting *Baltimore*, 119 S.W.3d at 541 n.37), we noted that "a valid arrest may constitute an intervening event that cures the taint of an illegal detention sufficient to rebut the application of the exclusionary rule to evidence recovered in a search incident to an arrest." The intervening circumstances in this case dissipate any taint caused by any allegedly unlawful detention or seizure.

After personally observing Garrison operating the vehicle prior to the stop, Det. Hutchinson observed Garrison to be under the influence of an intoxicating substance other than alcohol. Police are not required to ignore violations that occur in their presence if they are involved in an investigation of

another crime or have another intent or motivation behind the stop. *Whren v. United States*, 517 U.S. 806, 813, 116 S.Ct. 1769, 1774, 135 L.Ed.2d 89 (1996). Further investigation revealed Garrison was impaired. Accordingly, officers obtained the right to arrest Garrison for DUI. Accompanying the right to effectuate his arrest came the right to conduct a search incident to an arrest. This included the right to search the passenger compartment of the vehicle as it would be reasonable to believe the vehicle contained evidence of the offense precipitating the arrest, especially in light of the canine's alert on the driver's door of the vehicle. The existence of probable cause to effectuate an arrest constituted an "intervening circumstance" that outweighed any possible misconduct or error on the part of the officers.

Therefore, for the foregoing reasons, the judgment of the Harrison Circuit Court is reversed and this cause is remanded for further proceedings not inconsistent with this opinion.

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