RENDERED: APRIL 24, 2020; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001457-MR

ROBERT D'ANTE CONSTANT — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 17-CR-01429

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GOODWINE, JONES, AND KRAMER, JUDGES.

JONES, JUDGE: The Appellant, Robert D'Ante Constant ("Constant"), pleaded guilty to two attempts to commit third-degree assault, fleeing or evading police in the first degree, possession of a controlled substance in the first degree, and giving an officer false identifying information. Constant conditioned his guilty plea on

the right to appeal the Fayette Circuit Court's denial of his motion to suppress.[1] The trial court sentenced Constant to serve twelve months for each of the attempted third-degree assault charges; one year enhanced to eleven years for fleeing or evading police in the first degree; one year for possession of a controlled substance in the first degree; twelve months for resisting arrest; and 90 days for giving an officer false identifying information, to be served concurrently.

On appeal, Constant asserts that the trial court erred in failing to suppress the evidence gathered from his initial detention in an apartment where a pickup order of a juvenile was ongoing. Constant argues that Officers Bueno and Johnson did not have reasonable suspicion that Constant was violating any laws when Officer Bueno initially detained him, and so any evidence stemming from that detention must be suppressed. Additionally, Constant alleges that the trial court erred in imposing court costs because he is an indigent. After reviewing the record and applicable legal authorities, we affirm.

I. FACTS AND PROCEDURAL HISTORY

On November 2, 2017, Lexington police officers Jamie Johnson and Lorenzo Bueno[2] were dispatched to an apartment on Cross Keys Road to execute a

[1] Kentucky Rule of Criminal Procedure ("RCr") 8.09 provides: "With the approval of the court a defendant may enter a conditional plea of guilty, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified trial or pretrial motion. A defendant shall be allowed to withdraw such plea upon prevailing on appeal."

[2] Both officers are now retired.

pickup order for B.P., a seventeen-year-old minor. Body camera footage and Officer Johnson's testimony reveal that the officers were uncertain as to the basis of the pickup order, but offenses of disorderly conduct, habitual truancy, and habitually running away were all mentioned in the apartment and in a later hearing.

Upon their arrival, Officer Bueno knocked on the door of B.P.'s third-floor apartment, where she resided with her family, and Officer Johnson stood behind him on the landing. An older man who identified himself as Pedro answered the door. Pedro and Officer Bueno conversed in Spanish, from which Officer Johnson ascertained that B.P. was present in the apartment. B.P.'s mother and sister then arrived, having returned from the grocery store. When the officers explained to B.P.'s mother why they were there, she complained that she had taken B.P. to the Court Designated Workers' ("CDW") office earlier that day for B.P. to answer for a disorderly conduct offense. B.P.'s mother told Officers Bueno and Johnson that it was only after she and B.P. were on their way home that a CDW worker called and said that B.P. should turn herself in that day or else she would be picked up and remain in custody. B.P.'s mother insisted to the officers that B.P. had not yet been given the opportunity to turn herself in.

At this point, B.P.'s mother went to B.P.'s bedroom door and attempted to convince B.P. to come out of her bedroom. B.P. initially refused, and B.P.'s mother unsuccessfully tried to open the bedroom door, which was locked.

At this point, Officer Johnson went to watch B.P.'s window in case she tried to climb out and escape, while Officer Bueno remained on the landing outside the open apartment door. Four minutes later, Officer Bueno told Officer Johnson over the radio that B.P. had come out of her room.

When B.P. emerged from her bedroom, the officers discovered Constant, a thirty-year-old man, also locked in the bedroom with B.P. B.P.'s mother was not previously aware of Constant's presence in her daughter's bedroom.

During the short time it took to place B.P. in handcuffs, the officers asked a nervous-looking Constant to identify himself. Constant told Officer Bueno that his name was Kevin Smith and provided him with a Social Security number and birthdate. Constant contradicted himself several times, however, and the information proved to be false. Officer Bueno told Constant that he was not being honest.

According to Officer Bueno's report, he needed Constant's identifying information so that he could provide the CDW with information relevant to B.P.'s associations. Officer Johnson testified that they frequently asked for bystanders' identifications when picking up juveniles with habitual truancy or runaway offenses so that they would know where to look in the future. Officer Johnson also stated that he was concerned about B.P., whose age was then

unknown, being locked in a bedroom with a grown man who was obviously several years older than B.P.

Once Officer Bueno had handcuffed B.P., Officer Johnson took B.P. out of the apartment and onto the breezeway, where he asked her if she had everything she needed. He allowed B.P.'s mother to come out of the apartment to tie up B.P.'s hair and fix her jacket. Meanwhile, Constant began to pace and shout inside the apartment. Officer Johnson was just about to pat down B.P. when Constant, who was now smoking a cigarette, approached the apartment door to tell B.P. that he loved her and would get her bailed out. Officer Bueno gestured for Constant to stay in the apartment and blocked him from coming out onto the landing.

Constant took another drag on his cigarette and suddenly bolted from the apartment, knocking Officer Bueno aside. Officer Johnson was forced to let go of B.P. to keep from being dragged down the stairs. Officer Johnson grabbed Constant's shirt to stop him, but Constant was running so fast that Constant's shirt began to rip and Officer Johnson let go. Officer Johnson pursued Constant down the stairs but was stopped when Constant ran through and slammed an exterior door on Johnson. Officer Johnson fell at the top of another set of steps, got up, and continued chasing Constant through traffic across Cross Keys Road, through a park, and then around a house on Maywick Street. Officer Johnson repeatedly

ordered Constant to the ground, but Constant refused to comply until Officer Johnson drew his taser. At this point, Constant became compliant. He was subdued and placed under arrest at which time he was searched and found to be in possession of fentanyl.

Although Constant had been successfully subdued and arrested, it was not without a cost. Officer Johnson had been injured, fracturing his left tibia, during the chase and was taken from the scene in an ambulance. At the time of the hearing, five months after the arrest, he was still assigned to light duty due to the injuries he sustained apprehending Constant.

Constant was arraigned on November 3, 2017, and subsequently indicted on December 19, 2017, by a Fayette County Grand Jury for two counts of assault in the third degree, fleeing or evading in the first degree, possession of a controlled substance in the first degree, resisting arrest, giving an officer a false name, and being a persistent felon in the first degree. Following his indictment, Constant filed a motion to suppress for unlawful detention and seizure.

The trial court conducted a suppression hearing on March 6, 2018, where Constant's attorney argued that the officers did not have reasonable suspicion of criminal activity in B.P.'s bedroom, that Constant was unlawfully detained when the officers blocked Constant from leaving the apartment, and that the incident would not have occurred if Officer Bueno had not interfered with

Constant's right to travel.[3] The trial court ultimately denied Constant's motion to suppress, suggesting that the officers could reasonably prevent individuals in the apartment from coming out onto the landing as they executed a lawful pickup order. The trial court noted that, regardless of whether Constant's detainment was lawful, he was not allowed to use violence in response to an unlawful stop or seizure. Even so, the trial court questioned whether Constant had to identify himself, stating that if the case went to trial, it would reconsider the false identification offense.

In its March 7, 2018, order denying Constant's motion to suppress, the trial court stated as follows:

> [T]he motion is overruled for reasons stated on the record.
>
> The Court further relies on the analysis in *Commonwealth v. Johnson*, 245 S.W.3d 821, 824-25 (Ky. Ct. App. 2008), in which the Court recognized that law enforcement officers must be protected from violence even if there was an unlawful entry or search. The same law applies to unlawful detentions. *Pulley v. Commonwealth*, 481 S.W.3d 520, 528 (Ky. Ct. App. 2016).

Record ("R.") at 46.

Thereafter, on September 28, 2018, Constant entered conditional guilty pleas to all of the charges – with an amendment of the two third-degree

[3] Officer Bueno did not testify. Only Officer Johnson was present at the suppression hearing.

assault charges to attempts to commit third-degree assault – and reserved the right to appeal the trial court's ruling on his motion to suppress. The trial court sentenced Constant to serve twelve months for each of the attempted third-degree assault charges; one year enhanced to eleven years for fleeing or evading police in the first degree; one year for possession of a controlled substance in the first degree; twelve months for resisting arrest; and 90 days for giving an officer false identifying information, to be served concurrently. The trial court also ordered Constant to pay $300.00 restitution to Officer Bueno and $165.00 in court costs. Final judgment was entered on October 2, 2018.

This appeal followed.

II. STANDARD OF REVIEW

The standard of review of a motion to suppress is twofold. First, an appellate court may only reverse a trial court's findings of fact if those findings are clearly erroneous. *Simpson v. Commonwealth*, 474 S.W.3d 544, 546-47 (Ky. 2015) (citing *Adcock v. Commonwealth*, 967 S.W.2d 6 (Ky. 1998)). The second prong is a *de novo* examination of the trial court's application of the law to the facts. *Id.*

III. ANALYSIS

Constant appeals the issue of suppression regarding evidence of fleeing or evading, possession of a controlled substance, and giving an officer false

identifying information. Constant concedes that the trial court correctly denied his motion to suppress with regard to evidence of third-degree assault and resisting arrest under *Commonwealth v. Johnson*, 245 S.W.3d 821, 824 (Ky. App. 2008) (citation omitted) ("[T]he exclusionary rule does not extend to suppress evidence of independent crimes taking place as a reaction of an unlawful arrest or search."); and *Pulley v. Commonwealth*, 481 S.W.3d 520, 528-29 (Ky. App. 2016) (holding that the exclusionary rule does not apply to suppress evidence of independent crimes committed while unlawfully detained). However, Constant argues that his initial detention in B.P.'s home was unlawful, and so any evidence supporting the above charges produced before the independent crimes occurred should be suppressed.

Despite relying on *Johnson* and *Pulley* to deny Constant's motion to suppress, the trial court did not actually determine whether Constant's initial detention was lawful. As such, we find it necessary to determine whether Constant was initially lawfully detained. A review of Kentucky case law reveals that there is no direct authority on temporarily detaining bystanders to a lawful arrest. Subsequently, we turn to the federal courts for guidance. After a careful review of federal case law, we accept the Sixth Circuit's interpretation of the Fourth Amendment[4] to provide law enforcement with the limited authority to briefly

[4] The Fourth Amendment to the United States Constitution provides:

detain all individuals at the scene of an arrest, even innocent bystanders. *Cherrington v. Skeeter*, 344 F.3d 631, 638 (6th Cir. 2003); *Burchett v. Kiefer*, 310 F.3d 937, 942-43 (6th Cir. 2002); *see Michigan v. Summers*, 452 U.S. 692, 705, 101 S. Ct. 2587, 2595, 69 L. Ed. 2d 340 (1981).

"The Fourth Amendment is implicated when an individual's freedom to leave is restricted." *Thacker v. City of Columbus*, 328 F.3d 244, 257 (6th Cir. 2003) (citing *Dunaway v. New York*, 442 U.S. 200, 207 n.6, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979)). Neither party disputes that Constant was detained, or seized, for purposes of the Fourth Amendment from the moment he was asked to sit down on the couch in the apartment by Officer Bueno. A seizure occurs when a reasonable person would not feel free to decline an officer's request or otherwise terminate the encounter. *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497 (1980); *Wilson v. Commonwealth*, 199 S.W.3d 175, 180 (Ky. 2006).

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 10 of the Kentucky Constitution provides the same protections as the Fourth Amendment.

Not all seizures are the equivalent of arrests necessitating probable cause. *Summers*, 452 U.S. at 697, 101 S. Ct. at 2591. Because seizures are less intrusive than traditional arrests, their reasonableness is measured by "weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Brown v. Texas*, 443 U.S. 47, 51, 99 S. Ct. 2637, 2640, 61 L. Ed. 2d 357 (1979). "Generally, the Fourth Amendment requires at least a 'reasonable suspicion' that an individual has committed a crime before the individual may be seized." *Bletz v. Gribble*, 641 F.3d 743, 755 (6th Cir. 2011) (citing *United States v. Palomino*, 100 F.3d 446, 449 (6th Cir. 1996); *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)).

Under Kentucky law, detentions for the purpose of identification must be based on "objective criteria" that criminal activity is afoot. *Strange v. Commonwealth*, 269 S.W.3d 847, 851 (Ky. 2008). Here, Officer Bueno had a legitimate basis for detaining Constant. Under § 14-47 of the Lexington-Fayette Urban County Government Code of Ordinances, it is a finable offense to "interfere with or obstruct a police officer in the discharge of his duty[.]" The delay in B.P. unlocking and emerging from her bedroom certainly obstructed Officer Bueno from executing the pickup order for B.P., and more evidence was needed to determine whether B.P. or Constant caused the interference. Officer Bueno was

justified in briefly detaining Constant to gather more information regardless of his subjective intention. *Commonwealth v. Kelly*, 180 S.W.3d 474, 479 (Ky. 2005) ("[T]he subjective intentions of police officers are irrelevant to judicial determinations of reasonableness."); *Morton v. Commonwealth*, 232 S.W.3d 566, 569 (Ky. App. 2007) (an officer's subjective motivation for pat-down was inadequate, but objectively he had probable cause to search a suspect for drugs).

The Sixth Circuit has interpreted *Michigan v. Summers* to support temporary detentions even without reasonable suspicion when necessary to execute a valid arrest warrant. In *Michigan v. Summers*, police detained a homeowner, preventing him from leaving, for the duration of the execution of a search order for that house. *Summers*, 452 U.S. at 693, 101 S. Ct. at 2589. The Supreme Court reasoned that such a detention was permissible because it involved a limited and minimally intrusive detention at the individual's own residence, and the detention served several important police interests. *Id*., 452 U.S. at 702, 101 S. Ct. at 2594. Providing the police with such authority prevented flight, minimized the risk of harm to officers and bystanders, and "facilitated the orderly completion of the search." *Burchett*, 310 F.3d at 943 (citing *Summers*, 452 U.S. at 702-03, 101 S. Ct. 2587). Both the Ninth and Sixth Circuits have extended this limited authority to the execution of arrest warrants. *Cherrington*, 344 F.3d at 638; *United States v. Enslin*, 327 F.3d 788, 797 n.32 (9th Cir. 2003) (finding that *Summers* also applies

in the context of arrest warrants). According to the Sixth Circuit, "even absent particularized reasonable suspicion, innocent bystanders may be temporarily detained where necessary to secure the scene of a valid search or arrest and ensure the safety of officers and others." *Bletz*, 641 F.3d at 755.

Kentucky case law acknowledges that law enforcement regularly detains individuals at the scene of a search or arrest for bystander and officer safety. *Dunlap v. Commonwealth*, 435 S.W.3d 537, 596 (Ky. 2013), *as modified* (Feb. 20, 2014). In *Dunlap*, the Supreme Court held that an individual detained for the purposes of bystander and officer safety during the execution of a search warrant was "in custody" for *Miranda*[5] purposes when a detective asked a question likely to elicit an incriminating response. *Id*. at 598. However, the Court acknowledged that the exception under *Miranda* for "booking questions" such as those "'reasonably related to the police's administrative concerns,' such as the defendant's name, address, height, weight, eye color, date of birth and current address" would still apply under the circumstances. *Id.* at 599 (quoting *United States v. Pacheco-Lopez*, 531 F.3d 420, 423 (6th Cir. 2008) (internal citation omitted)).

With the support of federal case law, we extend this logic to arrest warrants. As the trial court acknowledged, the police are entitled to ensure their

[5] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

own safety as well as any individuals they are placing under arrest. Constant was detained for a few minutes at most while Officer Johnson was taking B.P. into custody on the landing outside of the apartment. Before Officer Johnson had the opportunity to pat down B.P., Constant told Officer Bueno that he wanted to speak to B.P. Although the officers allowed B.P.'s mother to tend to her daughter on the landing, they denied Constant, and he began to yell to her from the apartment. While B.P.'s mother facilitated the arrest, straightening her daughter's jacket and tying up her hair, Constant distracted and diverted attention from the arrest taking place. Although Constant posed no obvious threat to the officers, "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Summers*, 452 U.S. at 702-03, 101 S. Ct. at 2594. We hold that detaining Constant in the apartment for the purpose of streamlining B.P.'s arrest was valid and in keeping with federal precedent. *Summers*, 452 U.S. at 697-98, 101 S. Ct. at 2591; *Cherrington*, 344 F.3d at 638; *Enslin*, 327 F.3d at 797 n.32.

We note that, even if Constant's initial detention in B.P.'s home had been unlawful, evidence of his fleeing or evading and possession of a controlled substance would not be suppressed. In *Johnson*, our Court held that "the exclusionary rule does not extend to suppress evidence of independent crimes taking place as a reaction of an unlawful arrest or search." *Johnson*, 245 S.W.3d at

824 (quoting *State v. Boilard*, 488 A.2d 1380 (Me. 1985)). "Whether or not an officer's actions constitute an illegal search, arrest or detention, our courts reject applying the exclusionary rule to prohibit evidence of a crime that takes place after such a prior illegality." *Pulley*, 481 S.W.3d at 528. In *Pulley*, our Court applied the same law to unlawful detentions. *Id.*

The officers had probable cause to detain and arrest Constant for assault in the third degree of Officers Bueno and Johnson. Constant argues that evidence of the other counts should be suppressed because he had the right to leave, did not have to abide by the officers' order to stop, and it was unlawful to detain and search him. However, Constant's flight from the police and the discovery of fentanyl on his person did not occur until after the first assault on Officer Bueno. The first instance of assault constituted an independent crime separate from Constant's temporary confinement to the apartment. Furthermore, Constant possessed fentanyl before, during, and after he committed the other new offenses, and it was properly seized from him during the course of his arrest after he assaulted Officers Bueno and Johnson. Any evidence of crimes following thereafter would not be suppressed by the exclusionary rule.

Constant contends that the trial court further erred in imposing court costs on him as an indigent defendant. Constant's indigence was established by the trial court's appointment of counsel and its order allowing him to appeal *in*

forma pauperis pursuant to KRS[6] 453.190. Constant admits that this issue is unpreserved, and as such, should be reviewed for palpable error. "A palpable error which affects the substantial rights of a party may be considered . . . by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error." RCr 10.26.

Under KRS 23A.205(2), the imposition of court costs is mandatory "unless the court finds that the defendant is a poor person as defined by KRS 453.190(2) and that he or she is unable to pay court costs and will be unable to pay the court costs in the foreseeable future." A "poor person" is defined as

> a person who has an income at or below one hundred percent (100%) on the sliding scale of indigency established by the Supreme Court of Kentucky by rule or is unable to pay the costs and fees of the proceeding in which he is involved without depriving himself or his dependents of the necessities of life, including food, shelter, or clothing.

KRS 453.190(2). The fact that a criminal defendant is "adjudged to be indigent does not foreclose the ability of the court to impose court costs." *Nunn v. Commonwealth*, 461 S.W.3d 741, 752 (Ky. 2015). "[A] person may qualify as 'needy' under KRS 31.110 because he cannot afford the services of an attorney yet not be 'poor' under KRS 23A.205 as it has existed since 2002 unless he is also

[6] Kentucky Revised Statute.

unable to pay court costs without 'depriving himself or his dependents of the necessities of life, including food, shelter or clothing.'" *Maynes v. Commonwealth*, 361 S.W.3d 922, 929 (Ky. 2012).

Our Supreme Court addressed an almost identical factual situation in *Spicer v. Commonwealth*, 442 S.W.3d 26 (Ky. 2014), wherein a criminal defendant appealed the trial court's imposition of court costs despite his having qualified as "needy" under KRS 31.110, been appointed a public defender, and been permitted to proceed on appeal *in forma pauperis*. In rendering its decision, our Supreme Court held:

> The assessment of court costs in a judgment fixing sentencing is illegal *only* if it orders a person adjudged to be "poor" to pay costs. Thus, while an appellate court may reverse court costs on appeal to rectify an illegal sentence, we will not go so far as to remand a facially-valid sentence to determine if there was in fact error. If a trial judge was not asked at sentencing to determine the defendant's poverty status and did not otherwise presume the defendant to be . . . [a] poor person before imposing court costs, then there is no error to correct on appeal. This is because there is no affront to justice when we affirm the assessment of court costs upon a defendant whose status was not determined. It is only when the defendant's poverty status has been established, and court costs assessed contrary to that status, that we have a genuine "sentencing error" to correct on appeal.

Id. at 35.

In the present case, as in *Spicer*, the trial court did not assess Constant's financial status outside of the appointment of his public defense counsel

and his appeal *in forma pauperis*. Although Constant did agree on the record to pay $300.00 in restitution, stating that "God will take care of that," he was not aware of court costs until the trial court entered its final judgment. Constant argues that because court costs were not referenced in his motion to enter a guilty plea or in the trial court's judgment on his conditional guilty plea, they should be reassessed. However, contrary to Constant's contention, the assessment of court costs was mandatory absent a specific finding that he was a "poor person" under KRS 23A.205.

Constant additionally argues that his case is distinguishable because the trial court did not provide for deferred payment as it did in *Nunn*, 461 S.W.3d at 752. This distinction is ultimately inconsequential, as the validity of the imposition of court costs hinges on the adjudication of a criminal defendant's poverty status, which did not happen in Constant's case. Constant had the opportunity to request that his status be assessed before his judgment was rendered. Therefore, the assessment of court costs was valid and does not constitute error.

IV. CONCLUSION

In light of the foregoing, we AFFIRM the trial court's judgment.

ALL CONCUR.

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