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Supreme Court of Kentucky

2020-SC-0279-DG

COMMONWEALTH OF KENTUCKY — APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
NO. 2019-CA-1364
ANDERSON CIRCUIT COURT NO. 18-CR-00141

JAMES PERRY — APPELLEE

OPINION OF THE COURT BY JUSTICE HUGHES

AFFIRMING

The Anderson Circuit Court granted Appellee James Perry's motion to suppress evidence, concluding the evidence was the fruit of an illegal seizure. After the Court of Appeals in a split decision affirmed the trial court, this Court granted the Commonwealth's motion for discretionary review. Like the Court of Appeals, upon review, we conclude that substantial evidence supported the trial court's findings of fact and that the trial court's conclusions of law were legally sound. Accordingly, we affirm both the trial court and the Court of Appeals.

FACTUAL AND PROCEDURAL BACKGROUND

Perry and a friend were walking down Lawrenceburg's Main Street, on their way to an area nursing home, when Officer Doty, on patrol that morning, saw them. Officer Doty pulled into the nursing home parking lot, exited his

vehicle, and approached them. Officer King, in a separate cruiser, arrived shortly after Officer Doty. A search of Perry and his backpack resulted in Perry being indicted on two counts of first-degree possession of a controlled substance (heroin and methamphetamine), possession of drug paraphernalia, and possession of a legend drug (gabapentin) which had not been prescribed for him. Perry moved to suppress the evidence against him and, in the ensuing suppression hearing, Officer Doty and Officer King testified, but Perry did not.

Officer Doty testified that there was nothing remarkable about Perry and his companion walking down the sidewalk and that he was familiar with Perry, having previously arrested him under warrants and for drug possession. He testified that he decided to stop and approach the two because Perry usually had outstanding arrest warrants and narcotics on his person and his companion also was known to possess and traffic narcotics. In fact, Perry had no outstanding warrants at that time.

Officer Doty stated that when speaking with Perry, he noticed that Perry had pinpoint pupils and was unsteady on his feet. Officer Doty asked the two what they were doing and asked Perry if he had any weapons, illegal drugs or paraphernalia on his person or in his backpack. Officer Doty testified that Perry stated that he had not used drugs in about two weeks. He did not perform a field sobriety test. According to Officer Doty, Perry and his friend, whose purse was also searched, were cooperative, were never restrained, and never expressed a desire to not speak with him. Upon Officer Doty's request, Perry consented to a search, which produced the aforementioned drug

paraphernalia and substances confirmed to be heroin, methamphetamine, and gabapentin.

Officer King testified that he heard over his radio that Officer Doty was exiting his cruiser to approach Perry on foot. He arrived to back up Officer Doty. Officer King got out of his vehicle and was present when Officer Doty asked Perry, a known drug user, for consent to search. Officer King further testified that he did not recall anything about Perry's appearance or speech that struck him.

The trial court granted Perry's suppression motion. The circuit court's suppression order, after recounting the suppression hearing testimony, stated:

> Law enforcement may "briefly stop or seize an individual for an investigative purpose if the police possess a reasonable suspicion that the individual is involved in criminal activity." *Terry v. Ohio*, 392 U.S. 1 (1968). The Commonwealth argues that Officer Doty did not "stop" Perry, rather he engaged him in conversation. The Court finds that Officer Doty "stopped" Perry to investigate him and did so because he "usually" had warrants and narcotics on his person, his purpose was to detain and investigate him. Based on the totality of the evidence and the Court's perception of the interaction between Perry and Officer Doty, the Court does not believe that Perry would have been voluntarily allowed to wish Officer Doty a "good morning" and continue on his way and the interaction would not be classified as a voluntary conversation. The Court finds that Officer Doty stopped Perry. There was no reasonable suspicion that Perry was involved in criminal activity prior to his stop on August 28, 2018 [at approximately 8:20 a.m.]. Officer Doty testified that there was nothing remarkable about Perry and his companion walking down the street. Officer Doty had on prior occasions arrested Perry for warrants or narcotics, however, these facts accompanied only by the fact that Perry was observed walking down a public street does not create a "reasonable suspicion" that Perry was involved in criminal activity. Perry's consent to search was obtained after his illegal stop, and is the fruit of that illegal stop.

As noted, the Court of Appeals, in a split decision, upheld the trial court's order. This Court then granted the Commonwealth's motion for discretionary review.

ANALYSIS

The Commonwealth expresses two reasons for reversing the trial court and the Court of Appeals. First, the Commonwealth contends that Officer Doty's approach and conversation with Perry "on a public sidewalk" was not a *Terry* stop. Second, the Commonwealth claims that even if a *Terry* stop occurred, it did not begin until the second officer arrived, at which point Officer Doty had an articulable basis for reasonable suspicion that Perry was engaged in criminal activity. While the Commonwealth asserts that the evidence in this case does not support the trial court's findings otherwise, we must disagree.

When reviewing a ruling on a suppression motion, an appellate court generally employs a two-step process. First, findings of fact are reviewed and will not be set aside unless they are clearly erroneous. CR[1] 52.01; *Simpson v. Commonwealth*, 474 S.W.3d 544, 547 (Ky. 2015). Findings of fact are not clearly erroneous if they are supported by substantial evidence. *Commonwealth v. Deloney*, 20 S.W.3d 471, 473 (Ky. 2000). Substantial evidence is "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Owens–Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998) (citations omitted).

[1] Kentucky Rule of Civil Procedure.

Also, due regard is given to the opportunity of the circuit court to judge the credibility of the testifying officer and to assess the reasonableness of the officer's inferences. *Commonwealth v. Whitmore*, 92 S.W.3d 76, 79 (Ky. 2002). Second, the circuit court's application of the law to conclusive facts is reviewed de novo. *Simpson*, 474 S.W.3d at 547.

The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." The landmark United States Supreme Court decision, *Terry v. Ohio*, 392 U.S. 1 (1968), established that while the brief detention of a person by a police officer may be an unconstitutional seizure, a detention is nevertheless proper as long as the police officer has a reasonable suspicion based upon objective, articulable facts that criminal activity is afoot. "The Fourth Amendment's requirement that . . . seizures be founded upon an objective justification, governs all seizures of the person, 'including seizures that involve only a brief detention short of traditional arrest.'" *United States v. Mendenhall*, 446 U.S. 544, 551 (1980) (citations omitted). Of course, not all interactions between police officers and a citizen involve seizures of that person. *Id.* at 552. The Fourth Amendment's safeguards may be invoked only when a person's freedom of movement is restrained by means of physical force or a show of authority. *Id.* at 553 (citing *Terry*, 392 U.S. at 19 n.16). "The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy

and personal security of individuals.'" *Id.* at 553–54 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976)). As explained by the United States Supreme Court in *Mendenhall*, *id.* at 551-52, and this Court in *Strange v. Commonwealth*, 269 S.W.3d 847, 851 (Ky. 2008), if a citizen was seized when the officer approached and asked questions, the officer's conduct in doing so was constitutional only if the citizen was reasonably suspected of wrongdoing based on objective, articulable facts.[2]

The Commonwealth argues that the trial court erred by classifying Officer Doty's approach of Perry as a *Terry* stop and then ruling that the stop was improper because the officer had no reasonable suspicion that Perry was involved in criminal activity just prior to the stop. Citing *Mendenhall*, 446 U.S. at 553, the Commonwealth contends that the trial court and the Court of Appeals improperly considered Officer Doty's subjective intent in approaching Perry despite "[p]olice officers [being] free to approach anyone in public areas for any reason," *Commonwealth v. Banks*, 68 S.W.3d 347, 350 (Ky. 2001), and failed to properly consider that a seizure does not occur "as long as the person to whom questions are put remains free to disregard the questions and walk away," *Mendenhall*, 446 U.S. at 554. The Commonwealth maintains that the Court of Appeals misconstrued *Mendenhall*, 446 U.S. 544 (1980),[3] and *United*

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[2] *Mendenhall*, 446 U.S. at 552, references *Terry* as a case whose facts illustrate the distinction between an intrusion amounting to a "seizure" of the person and an encounter that intrudes upon no constitutionally protected interest.

[3] Along with *Mendenhall*, 446 U.S. at 553, and *Banks*, 68 S.W.3d at 350, the Commonwealth cites other cases including *Florida v. Bostick*, 501 U.S. 429, 429 (1991), *Florida v. Royer*, 460 U.S. 491, 501 (1983), *Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2011), *Strange v. Commonwealth*, 269 S.W.3d 847, 850 (Ky. 2008), and *Beckham*

States v. Drayton, 536 U.S. 194 (2002),[4] and like the trial court, ignored and refused to apply *Banks*, 68 S.W.3d 347.[5]

As the Court of Appeals states, "[t]his case presents a question under specific facts concerning when an officer's approach of a person on the street amounts to a *Terry* stop, subject to the reasonable suspicion requirement, and when it amounts to only a permissible approach by an inquisitive officer," the resolution of that question beginning first with a deferential review of whether the trial court's findings of fact are supported by substantial evidence. *Strange*, 269 S.W.3d at 849. Thus, the first question to be addressed is whether substantial evidence supported the trial court's finding that Perry was seized.[6] Upon its review of the trial court's factual findings, the Court of Appeals concluded the officers' testimony supported the trial court's conclusions that 1) it did "not believe that Perry would have been voluntarily

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v. Commonwealth, 248 S.W.3d 547, 552 (Ky. 2008), to support its arguments that no *Terry* stop occurs when a police officer merely engages a person on the street by asking questions and the officer's subjective intent upon approach is irrelevant to the seizure analysis.

[4] The Commonwealth did not cite *Drayton* in either its brief for the trial court or its briefs for the Court of Appeals. *Drayton*, 536 U.S. 194 at 201, 204, is cited by Judge Jones in her dissent. In its brief to this Court, the Commonwealth highlights the point made by Judge Jones that nothing in the record indicates that Officer Doty brandished a weapon, spoke in a harsh tone, or dispatched any orders to Perry, circumstances which the District Court in *Drayton*, 536 U.S. at 204, considered (as referenced by *Mendenhall*) when concluding there was nothing coercive or confrontational about the encounter between the officer and the defendants.

[5] *Banks* was relied upon in the Commonwealth's brief to the trial court.

[6] As noted below, because it is undisputed that the officer did not have reasonable suspicion before approaching Perry, we do not consider whether substantial evidence supported the finding that the seizure occurred without the prerequisite reasonable suspicion of criminal activity.

allowed to wish Officer Doty a 'good morning' and continue on his way," and 2) Officer's Doty's purpose was to detain and investigate Perry. Based upon those findings, the Court of Appeals found no error in the trial court's ultimate conclusion that Perry was illegally stopped, resulting in suppression of the evidence obtained from Perry.

The Commonwealth argues that the trial court's finding that Officer Doty subjected Perry to a *Terry* stop was not supported by substantial evidence and, indeed, substantial evidence of record refutes the conclusion that the encounter was an illegal *Terry* stop. The record, the Commonwealth contends, does not reflect that Perry was prohibited from leaving the encounter, his compliance compelled, or that he was coerced, physically or otherwise. More specifically, the Commonwealth views the evidence as showing that a seizure did not occur "by means of physical force or a show of authority," *Mendenhall*, 446 U.S. at 553, because coercive factors were not involved such as "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled," *id.* at 554.

While *Mendenhall* provides the foregoing list to provide examples of circumstances which might indicate a seizure, the test for a "seizure," as formulated in *Mendenhall*, remains an objective test looking to the reasonable person's interpretation of the conduct in question, that is "in view of all of the

circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[7] *See id.*

As noted above, the trial court stated:

> Based on the totality of the evidence and the Court's perception of the interaction between Perry and Officer Doty, the Court does not believe that Perry would have been voluntarily allowed to wish Officer Doty a "good morning" and continue on his way and the interaction would not be classified as a voluntary conversation.

With this finding the trial court's order conveys that taking into account all of the circumstances surrounding the encounter, the police conduct would "have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Florida v. Bostick*, 501 U.S. 429, 437 (1991) (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988)). Unquestionably, substantial evidence supports this conclusion. Even if it were erroneous for the trial court and the Court of Appeals to consider Officer Doty's mindset when he decided to stop Perry and his companion,[8] the trial court could infer from the officers' collective testimony that a reasonable person

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[7] In fact the "coercive factors indicative of a seizure" listed in *Mendenhall*, cited by the Commonwealth and discussed by the dissent, come not from a majority opinion but rather Part II-A of *Mendenhall*, a section authored by Justice Stewart and joined only by Justice Rehnquist. While the later *Drayton* opinion considered those factors, it too recognized that the controlling test is whether under the totality of the circumstances a reasonable person would have believed he was not free to leave.

[8] As the officer's mindset could set the tenor of the interaction, consideration of that fact would appear to be in harmony with *Mendenhall*'s examples of circumstances which might suggest that a seizure has occurred. *See Mendenhall*, 446 U.S. at 544 n.6 ("We agree with the District Court that the subjective intention of the DEA agent in this case to detain the respondent, had she attempted to leave, is irrelevant except insofar as that may have been conveyed to the respondent."). Nevertheless, the issue need not be decided here.

would have believed he was not free to leave when encountering first Officer Doty and then Officer King who arrived in his vehicle shortly after Officer Doty had exited his own patrol car. Furthermore, while it may be true that no evidence suggested that Officer Doty brandished a weapon at Perry, made demands of Perry that demonstrated he was exercising any sort of substantial control over Perry's person, or limited Perry's freedom of movement, those "facts" are not the trial court's findings of fact which an appellate court must consider first. Simply put, an appellate court must begin with the trial court's findings, assessing whether they are supported by substantial evidence, not the reviewing court's own independent factual findings.

Here, Perry was walking down the town's main street toward a nursing home, accompanied by a person also known to be a drug offender. When they reached the nursing home parking lot, Officer Doty pulled up in his patrol car, exited, and approached Perry and his companion. Perry was not unfamiliar with Officer Doty, having a history of being arrested by him under warrant and for narcotics possession. When Officer Doty began asking questions about where they were going and Perry's recent drug usage, Perry stated he had not used anything within the past two weeks. During this time, Officer King also pulled up and got out of his own police vehicle. With Officer King present, Officer Doty asked to search Perry's backpack and his person. Given their history, Officer Doty pulling up in his car and approaching Perry to ask questions could be viewed as a show of authority sufficient to cause a reasonable person to believe that he was not free to ignore Officer Doty and go

about his business. In any event, when Officer King pulled up at about the same time as backup, that additional circumstance would have put to rest the question of whether Perry reasonably believed he was not free to leave. The totality of the circumstances supported the trial court's conclusion that Perry was seized by Officer Doty. As it is undisputed that Officer Doty did not possess a reasonable suspicion that criminal activity was afoot when he approached Perry, the trial court's ultimate conclusion that Perry was illegally stopped prior to his consent to the search is also not erroneous.

The Commonwealth views this case as one in which the facts lead to a conclusion similar to *Banks*, 68 S.W.3d at 350, that Officer Doty was able to approach Perry in a public area for any reason and that Officer Doty developed reasonable suspicion of Perry's criminal activity while talking with Perry, resulting in Perry being lawfully detained at that later point. The Commonwealth contends that the trial court's findings of fact were erroneous because the trial court failed to consider or address evidence supporting reasonable suspicion to "stop" Perry. Indeed, the trial court did not make a finding of fact about Perry's appearance or his behavior indicative of Perry being under the influence of narcotics, and accordingly, the trial court did not conclude that Officer Doty developed a reasonable suspicion, thus allowing Perry to be legally stopped. Without an express finding regarding Perry's appearance and behavior, the Commonwealth argues that the trial court erroneously failed to consider or address the entirety of Officer Doty's testimony. We disagree. Given the conflicting evidence, we can infer that the

trial court did not find Officer Doty's testimony on this issue credible. As noted, Officer King expressly testified that he noticed nothing unusual about Perry's appearance. Based upon the trial court's controlling findings of fact, that court did not err in concluding that Officer Doty's and Perry's interaction went beyond a normal, routine encounter and that Officer Doty illegally detained Perry without reasonable suspicion.

CONCLUSION

For the foregoing reasons, the trial court's grant of the suppression motion and the Court of Appeals' decision upholding the trial court's order are affirmed.

All sitting. Minton, C.J.; Keller and Nickell, JJ., concur. Lambert, J., dissents by separate opinion, in which Conley and VanMeter, JJ., join.

LAMBERT, J., DISSENTING: Respectfully, I dissent. I disagree that Officer Doty's initial stop of Perry was a Fourth Amendment seizure, and I do not believe the trial court made findings of fact sufficient to support its ruling that a seizure occurred. I would therefore reverse and remand for further proceedings.

As the Majority correctly states, this Court reviews a trial court's ruling on the suppression of evidence by utilizing a two-step process. We review its findings of fact under the "clearly erroneous" standard, meaning that "we defer to the trial court's findings to the extent that they are supported by substantial

evidence."[9] We then conduct a "*de novo* [review] to determine whether the decisions of the trial court and the Court of Appeals are correct as a matter of law[.]"[10] In this case, the trial court found that the suppression of the evidence was proper because Officer Doty's initial stop of Perry was a Fourth Amendment seizure that was not supported by reasonable suspicion. The trial court's finding that a Fourth Amendment seizure occurred was a conclusion of law and is therefore entitled to no deference by this Court.[11]

I agree that the trial court's findings of fact, such as they are, were supported by substantial evidence. However, I submit the facts found were insufficient to provide a basis for the trial court to conclude that a Fourth Amendment seizure occurred as a matter of law. Therefore, because the trial court's application of the law to the facts is entitled to no deference by this Court, I would reverse that finding and hold that Officer Doty's initial stop was not a "seizure."

The trial court's findings of fact, in their entirety, were as follows:

> This Court has considered the parties' briefs, the testimony from the suppression hearing, and the record of this action in rendering its decision. On August 28, 2018, Officer Doty was on patrol along Main Street in Lawrenceburg at approximately 8:20 a.m. when he observed Perry and Joyce Waford walking down the street in the vicinity of Heritage Hall Rehab & Wellness Center, a nursing home facility. Officer Doty was familiar with Perry as he had previously arrested him on prior arrest warrants and for drugs. Officer Doty testified that there was nothing remarkable about Perry and his

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[9] *Strange v. Commonwealth*, 269 S.W.3d 847, 849 (Ky. 2008).

[10] *Id.*

[11] *See, e.g.*, *Commonwealth v. Love*, 334 S.W.3d 92, 93 (Ky. 2011) ("[O]ur review is de novo; and the conclusions reached by the lower courts are entitled to no deference.").

> companion walking down the street. Officer Doty stopped Perry and his companion in the parking lot of Heritage Hall, and testified that he stopped Perry because he "usually" has warrants and narcotics on his person. Perry did not have any active warrants against him on August 28, 2018. Officer Doty asked Perry where he was going, and Perry stated that they were going to visit someone at Heritage Hall. Officer Doty requested Perry's consent to search his backpack, Perry consented, and contraband was located in the search of Perry's person and backpack.
>
> Law enforcement may "briefly stop or seize an individual for an investigative purpose if the police possess a reasonable suspicion that the individual is involved in criminal activity." *Terry v. Ohio*, 392 U.S. 1 (1968). The Commonwealth argues that Officer Doty did not "stop" Perry, rather he engaged him in conversation. The Court finds that Officer Doty "stopped" Perry to investigate him and did so because he "usually" had warrants and narcotics on his person, his purpose was to detain and investigate him. Based on the totality of the evidence and the Court's perception of the interaction between Perry and Officer Doty, the Court does not believe that Perry would have been voluntarily allowed to wish Officer Doty a "good morning" and continue on his way and the interaction would not be classified as a voluntary conversation. The Court finds that Officer Doty stopped Perry. There was no reasonable suspicion that Perry was involved in criminal activity prior to his stop on August 28, 2018. Officer Doty testified that there was nothing remarkable about Perry and his companion walking down the street. Officer Doty had on prior occasions arrested Perry for warrants or narcotics, however, these facts accompanied only by the fact that Perry was observed walking down a public street does not create a "reasonable suspicion" that Perry was involved in criminal activity. Perry's consent to search was obtained after his illegal stop, and is the fruit of that illegal stop.

So, the only facts the trial court found regarding the stop itself were that at approximately 8:20 a.m. "Officer Doty stopped Perry and his companion in the parking lot of Heritage Hall," a public place, and "asked Perry where he was going, and Perry stated that they were going to visit someone at Heritage Hall." For the reasons provided below, these are insufficient facts to support a finding

that a seizure occurred. The remainder of the facts only concern whether Officer Doty lacked reasonable suspicion for the stop:

> Officer Doty was familiar with Perry as he had previously arrested him on prior arrest warrants and for drugs. Officer Doty testified that there was nothing remarkable about Perry and his companion walking down the street. . . . [He]testified that he stopped Perry because he "usually" has warrants and narcotics on his person. Perry did not have any active warrants against him on August 28, 2018. . . . Officer Doty "stopped" Perry to investigate him and did so because he "usually" had warrants and narcotics on his person. . . . There was no reasonable suspicion that Perry was involved in criminal activity prior to his stop on August 28, 2018 [at approximately 8:20 a.m.] Officer Doty testified that there was nothing remarkable about Perry and his companion walking down the street. Officer Doty had on prior occasions arrested Perry for warrants or narcotics, however, these facts accompanied only by the fact that Perry was observed walking down a public street does not create a "reasonable suspicion" that Perry was involved in criminal activity.

The trial court's finding that Officer Doty lacked reasonable suspicion for the stop is more than supported by substantial evidence and I agree with that conclusion. However, that puts the cart before the horse. Because, as discussed in more detail *infra*, our case law is clear that an officer does not need reasonable suspicion for a stop *unless* that stop is a seizure. Therefore, because the initial stop was not a seizure, the fact that Officer Doty lacked reasonable suspicion is irrelevant.

It is a long-standing rule of both the United States Supreme Court and of this Commonwealth that "not all personal intercourse between policemen and

citizens involves 'seizures' of persons."[12] As the Court of Appeals succinctly stated in *Baltimore v. Commonwealth*,

> [t]here are three types of interaction between police and citizens: consensual encounters, temporary detentions generally referred to as *Terry* stops, and arrests. The protection against search and seizure provided by the Fourth Amendment to the United States Constitution applies only to the latter two types. . . . *Terry* recognized that as an initial matter, there must be a "seizure" before the protections of the Fourth Amendment requiring the lesser standard of reasonable suspicion are triggered. A police officer may approach a person, identify himself as a police officer and ask a few questions without implicating the Fourth Amendment.[13]

"[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[14] *United States v. Mendenhall*, *supra*, is illustrative of this rule and comparable to the facts of this case.

In *Mendenhall*, two DEA agents at an airport approached Mendenhall as she exited an airplane because they believed she exhibited characteristics of a narcotics trafficker.[15] The agents approached Mendenhall in the airport's

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[12] *United States v. Mendenhall*, 446 U.S. 544, 552 (1980) (quoting *Terry*, 392 U.S. at 19 n.16); *accord Strange*, 269 S.W.3d at 850 ("[N]ot every interaction on the streets between a police officer and a private citizen rises to the level of an investigatory stop with all of its Constitutional ramifications.").

[13] 119 S.W.3d 532, 537 (Ky. App. 2003) (internal footnotes and quotation marks omitted). *See also Strange*, 269 S.W.3d at 850 ("No '*Terry*' stop occurs when police officers engage a person on the street in conversation by asking questions.").

[14] *Mendenhall*, 446 U.S. at 554; *accord Baltimore*, 119 S.W.3d at 537 ("A 'seizure' occurs when the police detain an individual under circumstances where a reasonable person would feel that he or she is not at liberty to leave.").

[15] *Mendenhall*, 446 U.S. at 547.

concourse, identified themselves as federal agents, and asked to see her identification.[16] Their interactions with Mendenhall increased their suspicions of her, so they asked her to come with them to a private office for further questioning.[17] While in the private office, Mendenhall consented to a search of her person and purse, and small packages of heroin were found on her person.[18] The government conceded that the agents did not have probable cause to believe Mendenhall was carrying narcotics on her person when the search was conducted.[19]

The United States Supreme Court began its analysis by discussing what constitutes a Fourth Amendment seizure:

> [w]e adhere to the view that a person is "seized" only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards. The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals. As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification.[20]

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[16] *Id.* at 547-48.

[17] *Id.* at 548.

[18] *Id.* at 548-49.

[19] *Id.* at 550.

[20] *Id.* at 553-54 (internal quotation marks and citation omitted).

Justice Stewart, joined by Justice Rehnquist, further provided examples of what actions by law enforcement could potentially result in a Fourth Amendment seizure:

> [e]xamples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. **In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person**.[21]

A majority of the Court then held, *inter alia*, that the agents' initial interaction with Mendenhall was not a Fourth Amendment seizure. The Court reasoned that:

> [t]he events took place in the public concourse. The agents wore no uniforms and displayed no weapons. They did not summon the respondent to their presence, but instead approached her and identified themselves as federal agents. They requested, but did not demand to see the respondent's identification and ticket. Such conduct without more, did not amount to an intrusion upon any constitutionally protected interest. **The respondent was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket and identification, and posed to her a few questions**. **Nor was it enough to establish a seizure that the person asking the questions was a law enforcement official**. In short, nothing in the record suggests that the respondent had any objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way, and for that reason we conclude that the agents' initial approach to her was not a seizure.[22]

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[21] *Id*. at 554-55 (internal citations omitted) (emphasis added).

[22] *Id*. at 555 (internal citations omitted) (emphasis added).

The Court's holding was not affected by the fact that Mendenhall "was not expressly told by the agents that she was free to decline to cooperate with their inquiry[.]"[23]

In this case, the trial court found that Officer Doty approached Perry in a public parking lot and engaged him in conversation by asking what he was doing. The trial court made no finding that, during the initial stop, Officer Doty did anything to indicate that Perry was not free to leave, such as use a threatening tone, tell Perry that he was not free to leave, or brandish a weapon at Perry. Nor did the trial court find that Officer Doty did anything to exercise control over Perry's person or freedom of movement. For example, in *Strange*, *supra*, we held that an officer's order for Strange to move away from a van he was standing next to constituted a seizure: "the nature of the encounter between the Appellant and the officers changed at the moment Officer Hall directed Appellant to move away from the van and over to the police cruiser. At that point, Officer Hall exercised substantial control over Appellant's person, and limited Appellant's freedom of movement."[24] Similarly, in *Baker v. Commonwealth*, we held that an officer's initial request that Baker remove his hands from his pockets was not a seizure, but the subsequent **command** to do so was:

> [i]n this case, Officer Richmond's first request for Appellant to remove his hands from his pockets clearly was not a seizure. Officer Richmond acknowledged that Appellant was not under suspicion at that time, and the request was merely a safety

[23] *Id.*

[24] *Strange*, 269 S.W.3d at 850.

> precaution. Ironically, had Appellant removed his hands from his pockets, and had no illegal substances been forthcoming from that act, he would have been free to leave, having not exhibited any other criminal conduct. However, Officer Richmond's subsequent direct order for Appellant to remove his hands from his pockets must be interpreted as a show of authority which, we believe, would compel a reasonable person to believe he was not free to leave. There can be no question then, that Officer Richmond "seized" Appellant at that point in time."[25]

Finally, as evinced by its findings of fact, the court did not consider the presence of the second officer as a contributing factor for its finding that a seizure occurred.

Based on the foregoing, I would reverse the trial court's finding that Officer Doty's initial stop was a seizure. As in *Mendenhall*, "nothing in the record suggests that [Perry] had any objective reason to believe that [he] was not free to end the conversation . . . and proceed on [his] way,"[26] and the trial court made no findings to that effect. Officer Doty therefore did not need reasonable suspicion that criminal activity was afoot to conduct the stop, and the trial court suppressed the evidence against Perry in contravention of long-standing case law from both this Court and the United States Supreme Court.

Conley and VanMeter, JJ., join.

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[25] 5 S.W.3d 142, 145 (Ky. 1999) (internal citations omitted). *See also Commonwealth v. Banks*, 68 S.W.3d 347, 350 (Ky. 2001) ("[T]he seizure of Appellee did not occur when Officer Bloomfield requested him to remove his hands from his pockets, since the request was merely a safety precaution. If Appellee had not agreed to remove his hands from his pockets and the officer had ordered that Appellee remove his hands, there would have been a seizure.").

[26] *Mendenhall*, 446 U.S. at 555.

COUNSEL FOR APPELLANT:

Daniel Cameron
Attorney General of Kentucky

Lauren Rachel Lewis
Assistant Attorney General
Office of the Attorney General

COUNSEL FOR APPELLEE:

Kayla Danielle Deatherage
Assistant Public Advocate
Department of Public Advocacy