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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001884-MR

KENNETH EDWARD BANKSTON — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 06-CR-00089

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, MOORE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Kenneth Edward Bankston brings this appeal from an August 21, 2006, judgment of the Fayette Circuit Court upon a conditional plea of guilty of robbery in the second degree, theft by unlawful taking over $300.00, criminal facilitation in the fraudulent use of a credit card under $100.00 (amended), and being a persistent felony offender in the second degree and a sentence of ten-years' imprisonment thereon. Ky. R. Crim. P. (RCr) 8.09. We affirm.

The facts of the case are largely undisputed. At approximately 8:15 p.m. on November 30, 2005, a black male approached Ellen Hollon in a Kroger store parking lot on Alexandria Drive in Lexington. The man struggled with Hollon, snatched her purse, and jumped into a black car. Hollon contacted the Lexington Metro Police Department, and when officers arrived on the scene, dispatch advised they were looking for a "possible black Chevy Cavalier, with possible license plate 173NJH."

Detective David Richardson was assigned to Hollon's case. On December 3, 2005, Detective Richardson was notified that a white female had attempted to pass one of Hollon's checks at the Paris Pike Kroger store. The woman left the store when the clerk asked for her driver's license, but she was captured on the store's surveillance camera, driving a black two-door vehicle. The woman had a noticeable black eye on the video.

Detective Richardson also learned on December 3rd that Hollon's credit cards had been used in the hours following the robbery at other locations including Meijer, Walmart, and Sears department stores. He obtained surveillance videos from Meijer and Sears. Each video showed two black males and a white female with a distinctive black eye making purchases with Hollon's stolen credit card. The detective noted the same woman appeared in all of the surveillance videos.

On December 8, 2005, Detective Richardson was driving through the Days Motel parking lot with two other detectives when he noticed a white female exiting a

black Chevy Cavalier with License Plate Number 173NWH.[1] A black male (appellant) was waiting in the passenger seat. Because the vehicle matched the description of the robbery getaway car with a similar license plate number and because he had been looking for the white female with a black eye from the videos, Detective Richardson felt there was reasonable suspicion to stop and investigate.

Upon stopping the Cavalier, one of the officers approached the female, while the other two officers asked appellant to get out of the car. The officers patted down appellant and requested his identification. In the meantime, the officer who had approached the female called out to Detective Richardson that she had a black eye. Detective Richardson immediately recognized her from the three videos he had previously viewed. He mirandized her and explained he was investigating some robberies in the area. The female, Denise Bankston, began to cry. She agreed to answer his questions but would not do so standing in the parking lot. Detective Richardson and Denise got into a police car, and she admitted her husband (appellant) had stolen Hollon's purse.

Detective Richardson returned to the Cavalier, where appellant was standing beside one of the other officers. Detective Richardson arrested appellant, who was then transported to police headquarters. Detective Richardson was unsure whether anyone mirandized appellant at the Days Motel parking lot, but he mirandized appellant before questioning him at the police station. In the course of his interview, appellant

[1] The original License Plate Number identified by Ellen Hollon was 173NJH, on a black Chevrolet Cavalier.

made incriminating statements. No evidence was recovered from his person, but a search of the Cavalier incident to arrest yielded a checkbook (stolen from Lois Skidmore).

Appellant was indicted by the Fayette County Grand Jury upon second-degree robbery (Kentucky Revised Statutes (KRS) 515.030), theft by unlawful taking over $300.00 (KRS 514.030), two counts of fraudulent use of a credit card over $100.00 (KRS 434.650), and with being a second-degree persistent felony offender (KRS 532.080). Appellant filed a motion to suppress any evidence seized at the time of his arrest and any subsequent statements made to police. Upon conducting a suppression hearing, the circuit court denied the motion. Specifically, the court found that reasonable suspicion existed to stop and conduct an investigation into appellant's involvement in the robberies. Appellant then entered a conditional plea of guilty to the offenses of robbery in the second degree, theft by unlawful taking over $300.00, criminal facilitation in the fraudulent use of a credit card under $100.00 (amended from the original charge), and being a persistent felony offender in the second degree. He was sentenced to ten years' imprisonment. This appeal follows.

Our standard of review of a circuit court's suppression order is expressed in *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky.App. 2002):

> An appellate court's standard of review of the trial court's decision on a motion to suppress requires that we first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive. Based on those findings, we must then conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law. (Citations omitted.)

Moreover, we conduct our review mindful that police officers may infer "illegal activity from facts that may appear innocent to a lay person." *Fletcher v. Commonwealth*, 182 S.W.3d 556, 558 (Ky.App. 2005). Thus, we give due deference to a trial court in its assessment of the officers' credibility and the reasonableness of their inferences. *Id.*(citing *Ornelas v. United States*, 517 U.S. 690 (1996)).

Appellant contends the circuit court erred by denying his motion to suppress. Specifically, appellant claims he was seized for Fourth Amendment purposes when the police asked him to get out of the car. He maintains that because the officers lacked probable cause to arrest him at this point in the investigation, his seizure was illegal. We disagree.

The issues raised in this appeal are whether appellant was seized prior to his formal arrest, if so, did the police have the requisite standard of suspicion to indicate the stop. In *Baltimore v. Commonwealth*, 119 S.W.3d 532 (Ky.App. 2003), we recognized three kinds of interaction between citizens and police: consensual encounters, temporary detentions generally referred to as investigatory stops under *Terry v. Ohio*, 392 U.S. 1 (1968), and arrests. Section 10 of the Ky. Constitution is coextensive with, and provides no greater protection than, the Fourth Amendment to the U.S. Constitution. *Rainey v. Commonwealth*, 197 S.W.3d 89 (Ky. 2006). These provisions protect persons against unreasonable searches and seizures in investigatory stops and arrests. *Baltimore*, 119 S.W.3d 532. Under the unique facts of this case, we do not believe the police needed probable cause to arrest in order to ask appellant to get out of the car. Rather, we believe

the police conducted an investigatory stop, which required only reasonable suspicion of criminal activity. Our analysis follows.

We first examine whether appellant was seized for Fourth Amendment purposes when he was asked to get out of the car. *Terry*, 392 U.S. 1 is the seminal case in this area. Under *Terry* and its progeny, a person is "seized" when an officer, by means of physical force or show of authority, somehow restrains the liberty of the person. *Id.* The test for determining when a seizure has occurred is whether a reasonable person, in view of the circumstances, would believe he was not free to terminate the encounter with the officer. *Florida v. Bostick*, 501 U.S. 429 (1991). But the Fourth Amendment does not prohibit all seizures, only unreasonable ones. *U.S. v. Hensley*, 469 U.S. 221 (1985). The touchstone of reasonableness in the context of seizures is whether the officer's action was justified at its inception and reasonably related in scope to the circumstances which justified the intrusion. *Terry*, 392 U.S. 1. "Whether a seizure is reasonable requires a review of the totality of the circumstances, taking into consideration the level of police intrusion into the private matters of citizens and balancing it against the justification for such action." *Baker v. Commonwealth*, 5 S.W.3d 142, 145 (Ky. 1999)(citing *Terry*, 329 U.S. 1). Generally, a seizure of a person must be supported by probable cause. *Dunaway v. New York*, 442 U.S. 200 (1979). However, the courts have long upheld temporary seizures that are mere investigative stops, despite a lack of probable cause to arrest. *Terry*, 392 U.S. 1; *U.S. v. Hensley*, 469 U.S. 221 (1985); *Adkins v. Commonwealth*, 96 S.W.3d 779 (Ky. 2003). In such detentions, the officer's suspicion of

criminal activity "must be based on 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion.'" *Botto v. Commonwealth*, 220 S.W.3d 282, 286 (Ky.App. 2006)(quoting *Terry*, 392 U.S. at 21). And the officer must work diligently to dispel his suspicions as quickly as possible, to minimize the intrusion to the detainee. *U.S. v. Place*, 462 U.S. 696 (1983); *U.S. v. Sharpe*, 470 U.S. 675 (1985). Finally, the suspected criminal activity need not be prospective. If the officers have reasonable suspicion the person encountered was involved in a "completed felony," they may conduct a stop to investigate their suspicion. *U.S. v. Hensley*, 469 U.S. 221, 229 (1985).

In the instant case, Detective Richardson conducted an investigatory stop when he approached the Bankstons. This seizure did not require the detective to have probable cause to arrest, but rather the lesser standard of reasonable suspicion of criminal activity based on the totality of circumstances known to him at the time. *Fletcher,* 182 S.W.3d 556. Based on the similar license plate number and the matching physical description of both the car and the suspects involved, Detective Richardson could rationally infer in this case that finding a white female with a black eye was essential to locating the black male who had committed the robbery. Thus, the detective did not exceed his authority by detaining appellant temporarily to investigate the matter.

Appellant was subjected to a permissible, limited pat down of his outer clothing and was asked for identification. He remained at the rear of the Cavalier, standing beside one of the officers for what Detective Richardson testified to be less than

ten minutes, while his wife, Denise, talked with the detective. Despite appellant's suppositions in his brief that he was "possibly handcuffed," no evidence was presented at the suppression hearing that appellant was handcuffed or in any way physically restrained. And while appellant emphasizes Detective Richardson admitted not knowing whether another officer questioned appellant during the minutes he was with Denise, no evidence was presented that appellant *was* questioned, either. From the evidence before us in the record, the detention bore no characteristics of formal arrest. Because the reasonable suspicion standard was satisfied at the inception of the stop, the seizure did not offend appellant's Fourth Amendment rights.

Appellant also claims the stop should have ended the moment the pat down failed to produce weapons and his identification was satisfactorily tendered. But *Terry* stops are not bound by bright line time parameters; the officers need only act with brevity so as to minimize intrusion to the detainee. *Place*, 462 U.S. at 696. "An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Johnson v. Commonwealth*, 179 S.W.3d 882, 884 (Ky.App. 2005)(quoting *Florida v. Royer*, 460 U.S. 491, 500 (1983)). The purpose of the stop in this case was not to pat down appellant and view his identification. Detective Richardson detained appellant and his wife to investigate whether the occupants of the Cavalier were connected to the robbery. The "stop" portion of the encounter with the police lasted no longer than necessary to effectuate this purpose, as probable cause to arrest appellant arose the moment Denise revealed his involvement in the robbery. Thus, the scope of the

investigatory stop was rationally related to the circumstances which justified the detention in the first place and did not violate appellant's Fourth Amendment rights.

In sum, we are of the opinion that the investigatory stop was justified at its inception, and the scope of the detention was rationally related to the circumstances under which it was initiated. Having possessed reasonable suspicion at the time of the investigatory stop, the officers' conduct did not offend appellant's rights under the Fourth Amendment. Thus, the circuit court properly denied appellant's motion to suppress.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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