

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001273-MR

JUAN LLOYD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 07-CR-003698

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CAPERTON AND WINE, JUDGES; LAMBERT, SENIOR JUDGE.

WINE, JUDGE: On November 15, 2007, a Jefferson County grand jury returned an indictment charging Juan Lloyd with one count each of possession of a handgun by a convicted felon (Kentucky Revised Statute (“KRS”) 527.040, a class C felony), and first-degree fleeing or evading police (KRS 520.095, a class D felony). Lloyd moved to suppress the handgun and all evidence seized from him as a result of a stop and arrest which occurred during the early morning hours of

July 25, 2007. After conducting an evidentiary hearing, the trial court denied the motion to suppress, finding that the officer had reasonable suspicion to stop Lloyd.

Thereafter, the trial court severed the charges and the matter proceeded to trial on the possession of a handgun charge. Following a trial, the jury found Lloyd guilty of possession of a handgun by a convicted felon and fixed his sentence at seven years' imprisonment. Subsequently, Lloyd entered a guilty plea to an amended charge of second-degree fleeing or evading police. The trial court sentenced Lloyd to twelve months' imprisonment on the fleeing or evading charge and five years on the possession of a handgun charge, to run concurrently for a total of five years.

Lloyd now appeals, arguing that the trial court erred by denying his motion to suppress the handgun and by excusing a juror during trial. On the first issue, the trial court conducted an evidentiary hearing on the motion to suppress the handgun. Officer Daniel Miracle of the Louisville Metro Police Department testified about the circumstances surrounding Lloyd's arrest. Prior to starting his shift at midnight, Officer Miracle was informed about an armed robbery which had occurred earlier in the day around 18th and Ormsby Streets. The robbery suspect was described as an African-American male wearing dark clothing. No other details were provided.

Around 2:30 a.m. on the morning of July 25, 2007, Officer Miracle was patrolling in the area of 18th and Dumesnil Streets in the vicinity of the reported robbery. He observed an African-American male wearing dark clothing

who was riding a bicycle. That individual was later identified as Lloyd. Officer Miracle testified that Lloyd was circling the area near the intersection, “not particularly going anywhere, just riding around.” Officer Miracle relayed his observations to Officer Roger Koofer, who was also patrolling the area in another police car. Officer Koofer also observed Lloyd’s behavior.

After observing Lloyd for about five minutes, Officer Miracle pulled his car up next to Lloyd, got out of the vehicle, put his hand up and shouted for Lloyd to stop. Lloyd immediately raced off on his bicycle. Officer Miracle pursued Lloyd in his cruiser. At some point during the chase, Lloyd abandoned the bicycle and threw a silver object. Officer Miracle continued the pursuit on foot. After Lloyd was apprehended, Officer Miracle went back to the area where the silver object was thrown and retrieved a loaded, silver .38 revolver.

Lloyd maintains that Officer Miracle lacked any reasonable suspicion for the initial stop. However, we conclude that Lloyd waived this issue by entering an unconditional guilty plea to the fleeing or evading charge. Officer Miracle did not recover the handgun as a result of the initial stop, but following the subsequent pursuit after Lloyd fled. By pleading guilty unconditionally to that charge, Lloyd waived all defenses except that the indictment charged no offense. *Centers v. Commonwealth*, 799 S.W.2d 51, 55 (Ky. App. 1990). In his guilty plea, Lloyd necessarily admitted to the elements of the offense, including that the officer giving the direction to stop “has an articulable reasonable suspicion that a crime has been committed by the person fleeing” KRS 520.100(1)(a). Thus, Lloyd

waived his claim that Officer Miracle lacked any articulable and reasonable suspicion to detain him.

Furthermore, even if this issue were not waived, we find two other grounds which would support the trial court's admission of the handgun. First, not every encounter with police officers amounts to a restraint on a person's liberty. Police officers are free to approach citizens on the street without the encounter constituting a "seizure" or violating the Fourth Amendment. *Terry v. Ohio*, 392 U.S. 1, 19 n.16, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968). "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Id.* Here, Officer Miracle merely approached Lloyd and signaled that he wanted to speak with him.

Secondly, even assuming that Officer Miracle's initial stop of Lloyd amounted to a restraint on his liberty, Lloyd fled from the attempted stop. A seizure does not occur if, in response to a show of authority, the subject does not yield. In that event, the seizure occurs only when the police physically subdue the subject. *Taylor v. Commonwealth*, 125 S.W.3d 216, 219-220 (Ky. 2003), citing *California v. Hodari D.*, 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991). Since Lloyd abandoned the gun before he was apprehended, the seizure of the handgun did not result from the allegedly improper stop. Therefore, the trial court properly denied Lloyd's motion to suppress the handgun.

Lloyd's second argument is that the trial court abused its discretion by dismissing a juror during trial. On the second day of trial one of the jurors did not appear on time as instructed. In addition, the juror could not be contacted at the phone number she had given. When the juror finally arrived over two hours later, the trial court questioned her concerning her absence. The juror explained that she awoke that morning with a very bad headache. She also told the court that she had taken some medicine and was feeling better. When asked, however, the juror admitted that she would rather go home.

The Commonwealth moved to strike the juror based on her tardiness and further alleging that this juror had been inattentive or sleeping during the previous day's proceedings. Lloyd's counsel objected, noting that dismissing the juror would leave the trial with only twelve members on the jury panel. Nevertheless, the court excused the juror on account of illness.

The trial court's decision to exclude or dismiss a juror will not be overturned absent an abuse of discretion. *Lester v. Commonwealth*, 132 S.W.3d 857, 863 (Ky. 2004). Furthermore, Kentucky Rule of Civil Procedure ("CR") 47.02¹ contemplates that a court may dismiss a juror for illness during trial as long as the number of jurors is not reduced below the number required by law. *Davis v. Commonwealth*, 795 S.W.2d 942, 949 (Ky. 1990). In this case, the juror explained that she was tardy due to a severe headache, possibly a migraine. The

¹ Pursuant to Kentucky Rule of Criminal Procedure ("RCr") 13.04, the Kentucky Rules of Civil Procedure are applicable to criminal proceedings to the extent they are not superseded by or inconsistent with the criminal procedural rules.

Commonwealth also had concerns about the juror's ability to pay attention to the trial. Finally, twelve jurors remained after the court excused this juror. Under the circumstances, we cannot find that the trial court abused its discretion.

Accordingly, the judgment of conviction by the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Annie O'Connell
Assistant Public Defender
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Christian K.R. Miller
Assistant Attorney General
Frankfort, Kentucky