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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000884-MR

CECIL GREEN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY BUNNELL, JUDGE
ACTION NO. 13-CR-00920

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: DIXON, JONES AND NICKELL, JUDGES.

JONES, JUDGE: This case comes to us following an order from the Fayette Circuit Court denying the Appellant Cecil Green's motion to suppress. The circuit court rejected Green's assertion that he was subjected to an unlawful seizure when a police officer spotlighted his parked car. Following the circuit court's denial of

Green's suppression motion, he entered a guilty plea conditioned on his right to bring this appeal. For the reasons set forth below, we affirm.

II. Factual and Procedural Background

Lexington Police Sergeant Jonathan Bastian was working the third shift on the evening of July 17, 2013. He was assigned to patrol the Central Sector, which covers a portion of the downtown area in Lexington, Kentucky. While patrolling the Central Sector, at around 10:30 p.m., Sergeant Bastian observed a white Cadillac turn from Hickory Street onto West Third Street. The Cadillac pulled over and parked along the curb on West Third Street. Officer Bastian testified that no houses were in the immediate area of where the car parked and that none of the businesses in the area appeared to open at that time in the evening.

This activity aroused Officer Bastian's suspicions so he decided to circle the block. He testified that he drove down about three blocks and circled back up to West Third Street, which took about one to two minutes. After seeing that the Cadillac was still parked on the street, Sergeant Bastian pulled his marked cruiser about fifteen feet behind the Cadillac. Because it was dark, Sergeant Bastian could not see inside the Cadillac and therefore, could not ascertain whether it was occupied. While still in his cruiser, Sergeant Bastian turned on his spotlight and directed it toward the Cadillac. Sergeant Bastian described the spotlight as a manual five to six inch white light that is attached to the driver's side of the cruiser.

With the spotlight, Sergeant Bastian was able to see two individuals sitting in the front seat of the car. Sergeant Bastian testified that the two

individuals were making furtive movements, "rapidly and repeatedly" reaching towards the center console and underside of the seats. The presence of the parked car on this portion of the street, the fact that the occupants had not exited the car, and the furtive movements made Sergeant Bastian suspect that a prostitution deal might be in progress. As a result, he walked up to the driver's side of the car to investigate further. Upon reaching the car, Sergeant Bastian asked Green what they were doing. Green pointed to a cellular phone in his lap and said that he had stopped to make a phone call.

Sergeant Bastian asked the female passenger, Antoinette Coleman, to step out of the car. Ms. Coleman told Sergeant Bastian that she was in a relationship with Green and he was taking her home. While speaking with Ms. Coleman, Officer Bastian observed Green, who was still inside his car, making furtive movements towards the console and seat. Sergeant Bastian instructed Green to keep his hands where he could see them. Green complied momentarily, but began reaching toward the console again. At that time, Sergeant Bastian instructed Green to exit the car and then placed Green and Coleman in handcuffs until backup arrived.

Once the additional officers arrived, Green and Coleman were released from the cuffs. By this time, Sergeant Bastian suspected that a drug transaction was taking place, instead of a prostitution deal. He asked Green if he could search his car, but Green refused. A canine dog then did a sniff test. After the dog alerted, Green's car was searched. The search revealed two grams of

cocaine, a digital scale with suspected cocaine residue, a utility knife blade, rubber gloves, and cash of approximately \$850.

Green was indicted on three counts: 1) trafficking in controlled substance 1st degree (less than 4 grams cocaine); 2) promoting contraband-first degree; and 3) being a persistent felony offender. He pled not guilty. Green then moved the trial court to suppress the evidence seized from him on the night of his arrest. Green asserted that he was seized without reasonable suspicion when Sergeant Bastian shined his search light into his parked car. The circuit court overruled Green's motion. The circuit court concluded that the mere act of shining a spotlight on the car did not constitute a seizure for which probable cause was required. The court then determined that the furtive movements inside the car, which the spotlight revealed, gave Sergeant Green reasonable suspicion to conduct a *Terry* stop.¹ *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Thereafter, Green entered into an agreement with the Commonwealth whereby he agreed to plead guilty, but reserved his right to appeal the circuit court's denial of his suppression motion. On appeal, Green asserts that Sergeant Bastian's use of the spotlight was an unlawful seizure. Accordingly, he maintains that the evidence seized during the remainder of the night's events is fruit of the poisonous tree.

II. Standard of Review

¹ Police may make a *Terry* stop if they have reasonable suspicion that criminal activity is afoot. *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989).

This Court reviews a trial court's decision on a motion to suppress by applying a two-step analysis. *Goncalves v. Commonwealth*, 404 S.W.3d 180, 189 (Ky. 2013). First, we must determine if the trial court's findings of fact are supported by substantial evidence. *Id.* (citing *Adcock v. Commonwealth*, 967 S.W.2d 6 (Ky. 1998); *Peyton v. Commonwealth*, 253 S.W.3d 504 (Ky. 2008)). If so, the factual findings are conclusive. *Id.* Next, we conduct a *de novo* review of the trial court's application of the law to the facts to determine if the suppression decision was correct as a matter of law. *Goncalves*, 404 S.W.3d at 189.

III. Analysis

The Fourth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, and Section Ten of the Kentucky Constitution, prohibits unreasonable searches and seizures. However, "[n]ot all personal intercourse between policemen and citizens involves 'seizures' of persons." *Baker*, 5 S.W.3d at 145. "Law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions." *Florida v. Royer*, 460 U.S. 491, 497, 103 S. Ct. 1319, 1324, 75 L. Ed. 2d 229 (1983). "Nor would

the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification." *Id.*

"To constitute a seizure, there must be either the application of physical force, however slight, or submission to an officer's show of authority to restrain the subject's liberty." *Baker v. Commonwealth*, 5 S.W.3d 142, 145 (Ky. 1999). "The test is whether, considering the surrounding circumstances, a reasonable person would have believed he or she was free to leave." *Turley v. Commonwealth*, 399 S.W.3d 412, 420 (Ky. 2013). "The United States Supreme Court has identified several factors that suggest a seizure has occurred and that a suspect is in custody: the threatening presence of several officers; the display of a weapon by an officer; the physical touching of the suspect; and the use of tone of voice or language that would indicate that compliance with the officer's request would be compelled." *Id.* (citing *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)). The test for deciding whether someone has been seized by a show of authority is an objective one. *Id.*

The question in this case is whether Sergeant Bastian's use of the spotlight constituted a seizure. In other words, we must determine whether the spotlight, standing alone, constituted such a show of authority that a reasonable person in Green's situation would have objectively believed he was compelled to submit to the officer at that moment. We disagree with Green that a reasonable person would have believed himself to be under the officer's authority simply because the officer used a spotlight.

Green was parked on a public street. Sergeant Bastian pulled in behind him, but still some fifteen feet away and shined a white spotlight on Green's car. Sergeant Bastian did not turn on his sirens or flashers, did not use a loudspeaker or microphone to speak to Green, and did not block Green's car so that Green could not leave. Indeed, other than the fact that he was in a marked police car, Sergeant Bastian, did not indicate that he was a police officer in any manner until after he used the spotlight.

Had the officer spoken to Green, turned on his sirens and/or blue lights, blocked Green's passage or taken some other action consistent with a show of police authority and an intent to make a stop, we might agree with Green. However, in this case, the only show of authority was the officer's use of a spotlight at night to illuminate a dark street. We hold that such conduct is not sufficient to constitute a seizure for purposes of the Fourth Amendment.²

IV. Conclusion

For the reasons set forth above, we affirm the Fayette Circuit Court.

ALL CONCUR.

² We further observe that while no appellate case in Kentucky appears to have addressed this exact issue, several other state and some federal courts have done so and reached the same result as we reach today. *See United States v. Clements*, 522 F.3d 790, 794–95 (7th Cir 2008); *State v. Steeves*, 158 N.H. 672, 676, 972 A.2d 1033, 1037 (N.H. 2009); *People v. Luedemann*, 222 Ill. 2d 530, 565-66, 857 N.E.2d 187, 208 (Ill. 2006); *State v. Baker*, 141 Idaho 163, 167, 107 P.3d 1214, 1218 (Idaho 2004); *State v. O'Neill*, 148 Wash.2d 564, 62 P.3d 489, 497 (Wash. 2003); *State v. Clayton*, 309 Mont. 215, 221, 45 P.3d 30, 35 (Mont. 2001).

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