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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001937-MR

MIGUEL DWAYNE SHEARER — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE, KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 13-CR-01185

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, STUMBO AND TAYLOR, JUDGES.

ACREE, JUDGE: Miguel Dwayne Shearer entered a conditional plea of guilty to one count of first-degree criminal attempt to possess a controlled substance, reserving his right to appeal the trial court's denial of his motion to suppress statements he made as well as other physical evidence obtained during an encounter with police. After careful review, we affirm.

I. Factual and Procedural Background

At approximately 9:00 a.m. on September 1, 2013, Lexington police officer Thomas Richards was patrolling an area in the city's East End when he observed a vehicle sitting in front of a house on Elm Tree Lane. That particular house was known to police as a hub for drug dealers and prostitutes. As he passed, Officer Richards made note of the vehicle's license plate and proceeded down the one-way street in order to find a place where he could safely turn around and come back to the vehicle. However, when Officer Richards returned, the vehicle was gone.

Officer Richards continued driving and a few minutes later he noticed the vehicle pull to the left hand side of the road on Ohio Street and park in front of a home. The home was later discovered to be Miguel Shearer's residence. As the three occupants of the vehicle—Shearer and two female friends—exited the vehicle, Officer Richards pulled in behind them, without turning on his lights or siren, and exited his patrol car.

At the suppression hearing, Officer Richards testified that when the two female occupants exited the driver's side of the vehicle onto the sidewalk, he approached them. Officer Richards asked to see everyone's IDs, but did not recall if Shearer gave him his ID at that time.[1] Officer Richards did recall that Shearer had exited the vehicle on the passenger's side and was standing in the roadway as

[1] Shearer testified that he immediately gave Officer Richards his ID and went back and stood beside the passenger's side of the vehicle.

several cars passed.[2] Concerned for Shearer's safety, Officer Richards ordered Shearer to get out of the street. Shearer, however, did not respond to Officer Richards' request, but instead continued to stand in the roadway seemingly dazed. Officer Richards repeated his request several times to no avail.

Meanwhile, a second officer, Officer Burnett, pulled up. Officer Burnett testified that when he arrived at the scene, he observed his partner ask Shearer several times to get out of the road. Officer Burnett joined in Officer Richards' pleas to Shearer, but stated that Shearer was unresponsive and appeared to be a little unsteady on his feet. As he got closer to Shearer, Officer Burnett noticed open beer cans in the vehicle and could smell the odor of alcohol on Shearer's person. He also noticed that Shearer had a glazed-over look, and that his eyes were bloodshot and watery. In Burnett's opinion, the physical indicators coupled with Shearer's refusal to get out of an open roadway where there was traffic, indicated that Shearer was under the influence of some type of intoxicant.[3] Officer Burnett decided to arrest Shearer for public intoxication as he presented a danger to himself and others by continuing to stand in the roadway.

As Officer Burnett and Officer Shearer moved to arrest Shearer, Officer Burnett observed that Shearer kept his hand clenched in a fist as if he were attempting to conceal something in it. When the officers handcuffed Shearer, Shearer refused to open his fist. After the officers forced Shearer's hand open,

[2] Officer Richards testified that Shearer was a few feet from the vehicle, while Shearer testified that he was not in the road, but instead leaning on the vehicle.

[3] Shearer testified that he had been drinking all night and was very intoxicated.

they located a crumpled one dollar bill with a white powdery substance inside of it that the officers suspected was cocaine. Officer Richards testified that when he and Officer Burnett found the cocaine, he heard Shearer mumble to himself "should have thrown it" and "shouldn't have held it for Lenora."

When Shearer was in custody, Officer Richards returned to his conversation with the two females. One of the women—the owner of the vehicle—confessed to possessing cocaine in her front pocket and gave the officers permission to search her vehicle. During the search of the vehicle, the officers located a small piece of paper containing drugs, which the owner of the vehicle admitted was hers. They also found a crack pipe in a purse in the car, which, according to Officer Burnett, Shearer admitted was his. Shearer was arrested and charged with first-degree possession of a controlled substance, possession of drug paraphernalia, and public intoxication.

As Shearer's case proceeded toward trial, Shearer requested a suppression hearing due to what he claims was an illegal stop and search. Specifically, Shearer claimed that Officer Richards lacked reasonable suspicion to seize his person, and that all evidence obtained as a product of the illegal seizure should be excluded as "fruit of the poisonous tree." He also requested that the court suppress all of his statements because they were obtained in violation of *Miranda*.[4] A hearing was held on August 7, 2014, after which the trial court found that the initial approach and subsequent arrest of Shearer was proper, and that the mumbling statements

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

Shearer made just after his arrest were not in response to any questioning. The court sustained Shearer's motion as to his statement that the crack pipe was his, but overruled the motion on the remaining evidence and statements. The trial court orally made the following factual findings based on the testimony at the hearing:

> I think it was completely lawful for the police to come up and talk to these . . . folks—and ask them for their ID maybe. The officer's didn't make any notation of it, but I don't have reason to doubt that. Now, both of these officer's were, I would go, *adamant*, that they were directing Mr. Shearer to get out of the road. I think they gave a combined command though, "get out of the road and come here." Or, "come here, get out of the road." Or maybe just, "get out of the road." Or just, "come here." Now, Mr. Shearer did not have to "come here," I agree with that. Okay. However, they were both very clear in their testimony that Mr. Shearer was not responding to them so I'm not sure that Mr. Shearer's testimony that he in fact gave them his ID, that is completely inconsistent with the officer's testimony that he wasn't responding, that he was looking straight ahead. And they both had concern for his personal safety whether it was one foot or three feet of him being in the roadway and that he needed to get out of the roadway. And he was refusing to do so. And so, when the second officer arrives, and gets up closer to him and starts making those first impressions that I think Mr. Shearer even agrees that he was under the influence, he was drunk. And so the officer didn't want a drunk guy standing in the road, whether it's one foot, three feet, if he loses his balance and takes a step back, and if there is a vehicle coming by that happens to be close, bad things can happen and nobody wanted that to happen. And so he arrests him. He starts cuffing him, and the officer's own statement says he's got a fist, and they open up the fist, there's a crumpled dollar, and there's the cocaine. So I am going to overrule the motion to suppress the other issues, but I am going to suppress the statements regarding the possession of drug paraphernalia.

(VR: 08/07/2014; 3:40:35-43:08).

Following the denial of his motion to suppress, Shearer entered a conditional plea of guilty to one count of first-degree criminal attempt to possess a controlled substance, reserving his right to appeal the court's ruling. On October 31, 2014, the trial court sentenced Shearer to six-months' imprisonment, but probated the sentence for one year. Shearer now appeals the denial of his motion to suppress. Additional facts will be discussed as necessary.

II. Standard of Review

Our review of a trial court's decision on a motion to suppress is two-fold. First, we must determine whether the trial court's findings of fact are supported by substantial evidence. If so, then they are conclusive. Kentucky Rules of Criminal Procedure (RCr) 9.78. Second, we review *de novo* the trial court's application of the law to those facts. *Brown v. Commonwealth,* 416 S.W.3d 302, 307 (Ky. 2013).

III. Analysis

On appeal, Shearer first argues that because the initial seizure of his person was inconsistent with the requirements of the Fourth Amendment, the trial court erred by failing to suppress the cocaine evidence. We disagree.

The Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution provide protection from unreasonable searches and

seizures by the government.[5] Evidence obtained, either directly or indirectly, from an illegal seizure "is not admissible against the accused." *Wilson v. Commonwealth*, 37 S.W.3d 745, 748 (Ky. 2001). "The basic purpose of [the Fourth] Amendment, as recognized in countless decisions of [the United States Supreme Court] is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Singleton v. Commonwealth*, 364 S.W.3d 97, 101 (Ky. 2012) (quoting *Wolf v. Colorado*, 338 U.S. 25, 27, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949); *see also INS v. Delgado,* 466 U.S. 210, 216, 104 S.Ct. 1758, 1762, 80 L.Ed.2d 247 (1984).

An arrest is not the only contact between police and citizens that implicates the Fourth Amendment. The United States Supreme Court, in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), observed that even a "brief detention of a person by a police officer may constitute a seizure within the meaning of the Fourth Amendment of the United States Constitution, and as such may properly be undertaken only if the police officer has a reasonable suspicion based upon objective, articulable facts that criminal activity is afoot." *Strange v. Commonwealth*, 269 S.W.3d 847, 850 (Ky. 2008). Reasonable, articulable suspicion must be present at the moment a person is seized. *Terry*, 392 U.S. at 21–22, 88 S.Ct. at 1880, 20 L.Ed.2d 889.

[5] The Fourth Amendment is applicable to the states through the Fourteenth Amendment. *Mapp v. Ohio,* 367 U.S. 643, 655, 81 S.Ct. 1684, 1691, 6 L.Ed.2d 1081 (1961).

However, neither the Fourth Amendment nor Section 10 prohibits or limits all contact between police and citizens.[6] "[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place[.]" *Florida v. Royer*, 460 U.S. 491, 497, 103 S.Ct. 1319, 1324, 75 L.Ed.2d 229 (1983). Indeed, "[e]ven when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage . . . ." *U.S. v. Drayton,* 536 U.S. 194, 201, 122 S.Ct. 2105, 2110, 153 L.Ed.2d 242 (2002). Only upon "a show of official authority such that 'a reasonable person would have believed he was not free to leave'" has a seizure within the meaning of the Fourth Amendment occurred. *Royer*, 460 U.S at 502, 103 S.Ct at 1326; *see also Baker v. Commonwealth,* 5 S.W.3d 142, 145 (Ky. 1999).

On review to determine whether a person has been seized within the meaning of the Fourth Amendment, the test is whether considering all of the circumstances surrounding the incident, a reasonable person would have believed he or she was free to leave. *Smith v. Commonwealth*, 312 S.W.3d 353, 358 (Ky. 2010). Some of the factors that should be considered when applying the totality of the circumstances test include: the threatening presence of several officers; the display of 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

[6] The Kentucky Supreme Court has held that "Section 10 of the Kentucky Constitution provides no greater protection than does the federal Fourth Amendment." *LaFollette v. Commonwealth*, 915 S.W.2d 747, 748 (Ky. 1996).

request would be compelled. *Id.* (citing *Mendenhall*, 466 U.S 544, 100 S.Ct. 1870, 64 L.Ed. 497 (1980)).

In this case, the Fourth Amendment was not implicated when the officers first approached Shearer and the two other individuals and asked them for their identification. There was not a sufficient display of authority to transform the consensual encounter into a seizure. Officer Richards pulled behind the vehicle without activating his emergency lights, as Shearer and the two other individuals were already exiting their vehicle in front of Shearer's house. There were only two officers on the scene with three individuals. Neither officer on the scene brandished his weapon. Nor did either officer block the entrance to Shearer's house. While Officer Richards did ask to see all of the individuals ID's, questions concerning one's identity or a request for identification by the police do not by themselves constitute a Fourth Amendment seizure. *I.N.S. v. Delagado*, 466 U.S. 210, 216, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984).

Shearer cites *Commonwealth v. Sanders,* 332 S.W.3d 739 (Ky. App. 2011) for the proposition that "'stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity' is not permitted by the Fourth Amendment." *Id*. at 740 (quoting *Brown v. Texas*, 443 U.S. 47, 52, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979)). However, *Sanders* is distinguishable from the instant matter.

In *Sanders*, a police officer observed the defendant late at night walking down the street alone in a neighborhood known for drug activity. The

officer approached the defendant and asked her name and why she was in the area. The defendant gave her a name that, after the officer searched for it, turned out to be false. After the defendant gave the officer a false social security number, the officer advised the defendant that it is a crime to give the police false information. The defendant continued to give the officer the false name until the officer told her that she was committing identity theft (a felony). She then gave the officer her correct name. The Court found that "after [the officer] did not find a license for the name that [the defendant] initially provided, the encounter became a detention." *Sanders,* 332 S.W.3d at 741. The Court further determined that the reasons leading up to the detention were not sufficient to provide reasonable suspicion of criminal activity. *Id.* Therefore, the seizure of the defendant violated the Fourth Amendment. However, the Court in *Sanders* did not find that a seizure occurred when the officer initially asked the defendant for identification. It specifically found that the seizure occurred when the officer, after not finding a license for her name, did not allow the defendant to leave.

Contrary to the circumstances of *Sanders*, here Officer Richards did not detain Shearer in order to see his identification or demand to see his ID under the threat of detention or arrest. He merely asked Shearer in a consensual encounter to see his identification.[7] The United States Supreme Court in *Delgado*, observed:

> What is apparent from *Royer* and *Brown* is that police questioning, by itself, is unlikely to result in a Fourth Amendment violation. While most citizens will respond

[7] Shearer testified that he gave Officer Richards his ID, however, the court found that Shearer did not comply with the officer's request to see his ID.

> to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response. Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment. But if the person refuses to answer and the police take additional steps—such as those taken in *Brown*—to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure.

Delgado, 466 U.S. at 216-17, 104 S. Ct. 1758.

Here, in view of all the circumstances surrounding the encounter, the situation was not so intimidating that a reasonable person would believe he was not free to leave. "Police officers are free to approach anyone in public areas for any reason[.]" *Strange v. Commonwealth*, 269 S.W.3d 847, 850 (Ky. 2008) (quoting *Commonwealth v. Banks*, 68 S.W.3d 347, 350 (Ky. 2001). "No '*Terry*' stop occurs when police officers engage a person on the street in conversation by asking questions." *Strange*, 269 S.W.3d at 850 (citing *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983)).

Further, Officer Richards' command for Shearer to get out of the road was insufficient to transform the encounter into a seizure. Shearer was standing in the middle of a roadway seemingly under the influence of an intoxicant. Officer Richards, realizing Shearer was a danger to himself, reasonably ordered him out of the roadway. In these circumstances, the officers' conduct would communicate to a reasonable person an attempt to get Shearer into a position of safety, not an

attempt to intrude upon his Fourth Amendment right. "Citizens are encouraged to comply with reasonable police directives, and the police should be permitted to expect reasonable compliance with reasonable demands." *Strange*, 269 S.W.3d at 851. This interaction between the officers and Shearer does not rise to the level of a seizure within the meaning of the Fourth Amendment.

As Officer Richards and Officer Burnett approached Shearer in an attempt to get him to safety, they observed several things about Shearer that along with Shearer's refusal to leave the roadway, gave them probable cause to believe that Shearer was in a public place manifestly under the influence of alcohol to a degree that he was a danger to himself or other persons or property, or unreasonably annoying to others in his vicinity. *See* Kentucky Revised Statutes (KRS) 222.202. As a result, the officers then placed Shearer under arrest for alcohol intoxication. The search of Shearer's person after he was detained was proper as a search incident to a lawful arrest. For the above stated reasons, the trial court did not err by denying Shearer's motion to suppress the cocaine evidence.

Shearer next argues that his statements to Officer Richards should have been suppressed because he was in custody at the time, and neither officer had advised him of his rights pursuant to *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Again, we disagree.

Warnings pursuant to *Miranda* are required when an accused is subjected to a custodial interrogation. *Miranda*, 384 U.S. at 479, 86 S.Ct. 1602, 16 L.Ed.2d 694; *see also Watkins v. Commonwealth,* 105 S.W.3d 449 (Ky. 2003). Custody

occurs when the police, by some show of authority, restrain the liberty of an individual. *Commonwealth v. Lucas*, 195 S.W.3d 403, 405 (Ky. 2006). "Interrogation" means the express questioning or "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis,* 446 U.S. 291, 301, 100 S.Ct. 1682, 1689–90, 64 L.Ed.2d 297 (1980). "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by [*Miranda*]." *Miranda*, 384 U.S. at 478, 86 S.Ct. at 1630.

"Pursuant to Kentucky Rules of Criminal Procedure (RCr) 9.78, a trial court must conduct an evidentiary hearing when a defendant files a motion to suppress a confession." *Grady v. Commonwealth,* 325 s.W.3d 333, 350 (Ky. 2010). At the hearing, the Commonwealth bears the burden of demonstrating "by a preponderance of the evidence" that the defendant's confession or incriminating statement was voluntary. *Galloway v. Commonwealth*, 424 S.W.3d 921 928 (Ky. 2014). The defendant is then entitled to rebut that evidence. *Grady*, 325 S.W.3d at 350. To prove by the preponderance of the evidence, the Commonwealth "must introduce evidence which affords a reasonable basis for the conclusion . . . . A mere possibility . . . is not enough." *Kentucky Bar Ass'n v. Craft*, 208 S.W.3d 245, 262 (Ky. 2006).

Shearer alleges that the Commonwealth did not meet its burden of proving that his statements were voluntary. However, at the evidentiary hearing, when

asked by the Commonwealth's attorney if he at any point heard Shearer make a statement, Officer Richards responded, "after we effected the arrest on him, he sort of mumbled, 'should have thrown it' and 'shouldn't have held it for Lenora.'" Officer Burnett later testified, "Officer Richards told me that he heard Shearer sort of mutter to himself as he was sitting on the curb, 'should have thrown it' and 'shouldn't have held it for Lenora.'" The trial court concluded that the statements Shearer made after he was arrested were spontaneous utterances not made in response to any questioning by the police.

The officers' testimony at the evidentiary hearing provides a reasonable basis for the trial court's decision. The testimony at the hearing was that Shearer "muttered to himself." It was clear the statements were not made in response to any questioning, but were volunteered by Shearer. The trial court did not err in denying Shearer's motion to suppress the statements.

IV. Conclusion

For the foregoing reasons the Fayette Circuit Court order denying Shearer's motion to suppress is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Molly Mattingly
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Tami Allen Stetler
Assistant Attorney General
Frankfort, Kentucky