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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001959-MR

RANDY C. COLSON

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 16-CR-00019

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, COMBS, AND JONES, JUDGES.

JONES, JUDGE: Randy C. Colson appeals the judgment and sentence entered by the Campbell Circuit Court following his conditional guilty plea. Colson argues the evidence obtained by the police should have been suppressed because it was seized illegally under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). After careful review, we affirm.

I. BACKGROUND

On November 11, 2015, a caller known only as “Kayla” telephoned police dispatch to report seeing a black male with a gun in his waistband at the Speedway on Monmouth Street in Newport, Kentucky. Kayla described the suspect as wearing a black sweatshirt and jeans but did not give his name. Kayla gave dispatch a phone number so the police could call her back but the police did not attempt to corroborate this number or obtain Kayla’s last name.

Officer Robert Sewell of the Newport Police Department and another police officer were dispatched to the Speedway and arrived at the scene approximately four minutes later. Upon arrival, Officer Sewell saw Colson, who was wearing a black sweatshirt and jeans, in front of the Speedway carrying two gym bags. Officer Sewell parked his police cruiser about twenty feet away from where Colson was standing and both officers approached him. Officer Sewell then identified himself and informed Colson that the police had received a complaint about someone matching his description with a gun at the Speedway. Colson initially denied having a gun but admitted to having a handgun in his waistband after Officer Sewell informed him that possessing a gun was not necessarily illegal. Officer Sewell then asked Colson for permission to search his person. Colson consented to the search and Officer Sewell discovered the handgun.

After discovering the handgun, Officer Sewell asked Colson if he had

ever been arrested. Colson stated he had been in previous trouble but did not elaborate further. Officer Sewell then asked Colson if he had a permit to carry a concealed deadly weapon, and Colson admitted he did not. Following a background check, Officer Sewell learned Colson had previously been convicted of a felony. Colson was then arrested for possession of a handgun by a convicted felon and transported to the Campbell County Detention Center. Upon arrival, Colson was strip searched and a small plastic bag of heroin was discovered on his person. A set of digital scales was also discovered in one of the bags he was carrying. The Campbell County grand jury eventually indicted Colson for possession of a handgun by a convicted felon, promoting contraband in the first degree, possession of a controlled substance in the first degree (heroin), possession of drug paraphernalia, being a persistent felony offender in the first degree, and bail jumping.

Colson then moved to suppress the evidence, arguing it was seized following an illegal *Terry* stop. Colson contended Kayla was an anonymous informant and the information she provided to dispatch lacked sufficient indicia of reliability to create the reasonable suspicion necessary to support a *Terry* stop. The trial court held a suppression hearing, at which time Officer Sewell testified to the above facts. Although the Commonwealth initially stipulated Colson was subject to a *Terry* stop, the trial court found his encounter with Officer Sewell was

consensual and did not implicate the Fourth Amendment's protections against unreasonable searches and seizures. The trial court therefore denied the motion to suppress and Colson entered a conditional guilty plea reserving his right to appeal the trial court's suppression ruling.

On appeal, Colson argues the trial court erred by finding his encounter with Officer Sewell was consensual because it was directly contradicted by the stipulation of the parties and the testimony that Officer Sewell continued to question him after he initially denied possessing a gun. Therefore, Colson contends that we must reverse the trial court's denial of his suppression motion because the evidence was seized pursuant to a stop that was not supported by reasonable suspicion.

II. STANDARD OF REVIEW

A trial court's decision on a motion to suppress is subject to a two-part analysis. First, the trial court's findings of fact are conclusive if they are not clearly erroneous and are supported by substantial evidence. *Payton v. Commonwealth*, 327 S.W.3d 468, 471 (Ky. 2010). Second, the trial court's application of those facts to the law is reviewed *de novo*. *Id.*

III. ANALYSIS

“There are three types of interaction between police and citizens: consensual encounters, temporary detentions generally referred to as *Terry* stops,

and arrests.” *Baltimore v. Commonwealth*, 119 S.W.3d 532, 537 (Ky. App. 2003) (footnote omitted). The Fourth Amendment’s protection against search and seizure does not apply to consensual encounters. *Id.* “[A] police officer may walk up to an individual, identify himself as a police officer, and ask the individual questions without implicating the Fourth Amendment.” *Piercy v. Commonwealth*, 303 S.W.3d 492, 496 (Ky. App. 2010). A seizure occurs only when the “police detain an individual under circumstances where a reasonable person would feel that he or she is not at liberty to leave.” *Baltimore*, 119 S.W.3d at 537. “So long as a reasonable person would feel free to disregard the police and go about his business, the encounter is consensual and no reasonable suspicion is required.” *Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 2386, 115 L. Ed. 2d 389 (1991) (internal citation and quotations omitted).

We agree with the trial court’s finding that Colson’s initial encounter with the police was consensual. The undisputed evidence is that Officer Sewell questioned Colson in a public place and did not attempt to restrain his movement through physical force. Rather, Officer Sewell parked his police cruiser approximately twenty feet from where Colson was standing and told him he matched the description of a suspect identified through a call to dispatch. Although questioning continued after Colson denied possessing a gun, Officer Sewell did not respond with a threat or ultimatum but merely informed Colson that

carrying a gun was not necessarily illegal. There was no evidence that Colson's initial denial was met with any type of coercive police behavior or show of authority indicating he was not free to ignore Officer Sewell's inquiries and go about his business. Accordingly, the trial court correctly denied the motion to suppress. Because we hold the evidence obtained in this case flowed from a consensual encounter, there is no need to determine if Kayla was an anonymous informant who provided sufficient indicia of reliability for the police to have reasonable suspicion to conduct a *Terry* stop.

IV. CONCLUSION

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

ALL CONCUR.

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