

Affirmed and Memorandum Opinion filed April 8, 2010.



In The

Fourteenth Court of Appeals

NO. 14-09-00253-CR

KEVIN NDIFON HERD, Appellant

V.

STATE OF TEXAS, Appellee

**On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause No. 1192275**

MEMORANDUM OPINION

Appellant Kevin Ndifon Herd was arrested and convicted of possession of less than one gram of cocaine. He moved to suppress the physical evidence on the grounds that the officer who searched and arrested him did not suspect criminal activity when he initially approached appellant as he stood on a street corner. Because a police officer need not suspect criminal activity before approaching a person in a public place, we affirm the trial court's judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

At approximately 8:20 p.m. on November 18, 2008, Houston police officer Nadeem Ashraf was patrolling his assigned beat in a marked patrol car when he observed appellant standing near a gas station driveway and “just constantly” looking left and right. Ashraf drove past appellant and watched him for a while, then entered the gas station driveway, parked near appellant, and approached him from behind. Ashraf later testified that when appellant saw the police car, appellant “immediately put both of his hands inside of his pants.” Ashraf observed appellant moving his hands inside of his pants, and because the gas station was located in “a high crime, high narcotic area” in which two aggravated robberies recently had taken place, the officer was concerned that appellant was attempting to conceal something or to retrieve a weapon. Ashraf approached to within approximately one foot of appellant and asked where he lived, and although appellant answered, he kept his back to the officer and his hands in his pants. Ashraf then asked if appellant had anything in his possession, and appellant said he did not. According to Ashraf, he told appellant several times to remove his hands from his pants before appellant complied. Ashraf then instructed appellant to put his hands on the patrol car. As Ashraf performed a “pat down” search, he saw a small bag containing a white substance fall from the left side of appellant’s pants. Officer Chris Huhn, who arrived on the scene during the search, collected the bag and field-tested its contents. The substance tested positive for the presence of cocaine, and appellant was arrested.

Appellant was subsequently indicted for possession of less than one gram of cocaine. He moved to suppress all evidence obtained from his detention and search on the grounds that such evidence was obtained through an unlawful search and seizure. The trial court denied the motion, and the jury found him guilty as charged. Based upon a plea of true to a previous conviction, appellant was sentenced to seven years’ confinement in the Texas Department of Criminal Justice, Institutional Division.

II. ISSUE PRESENTED

In the sole issue presented in this appeal, appellant contends that the trial court erred in denying his motion to suppress evidence because Ashraf lacked reasonable suspicion to detain him.

III. STANDARD OF REVIEW

We apply a bifurcated standard of review to a trial court's ruling on a motion to suppress evidence. *Amador v. State*, 221 S.W.3d 666, 673 (Tex. Crim. App. 2007). We afford almost total deference to the trial court's determination of the historical facts supported by the record, as well as to mixed questions of law and fact if the resolution of such questions requires the evaluation of a witness's credibility and demeanor. *Id.* We review de novo questions of law and mixed questions of law and fact that are not based on an evaluation of credibility and demeanor. *Id.*

IV. ANALYSIS

Appellant's arguments are based on the assumption that he was detained at the moment that Ashraf parked near him. Appellant does not contend that Ashraf lacked reasonable suspicion for a search when appellant put his hands in his pants upon sighting a police officer and answered questions while continuing to keep his back to the officer; to the contrary, appellant asserts that "[t]he initial stop by Officer Ashraf is the key – not when he started ordering Mr. Herd to comply with his requests." He argues that Ashraf "had no reason to come upon Mr. Herd who was standing at a gas station and looking around" and "[m]erely standing at a gas station and looking up and down the street was not sufficient cause for Officer Ashraf to even approach Mr. Herd, let alone search him."

But not every encounter between a citizen and a police officer implicates the protections of the Fourth Amendment. *State v. Garcia-Cantu*, 253 S.W.3d 236, 242 (Tex. Crim. App. 2008). Mere contact without detention does not violate the Constitution. *Herrera v. State*, 665 S.W.2d 497, 502 (Tex. App.—Amarillo 1983, pet. ref'd). A

detention occurs only “when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.” *Terry v. Ohio*, 392 U.S. 1, 19 n.16, 88 S. Ct. 1868, 1879 n.16, 20 L. Ed. 2d 889 (1968). If a reasonable person would feel free to terminate the encounter then no detention has occurred. *United States v. Drayton*, 536 U.S. 194, 202, 122 S. Ct. 2105, 2110, 153 L. Ed. 2d 242 (2002).

Moreover, it is well-established that police officers may approach individuals in public places and ask them questions without reasonable suspicion to do so. *Id.* at 200–01, 122 S. Ct. 2105, 2110; *Garcia v. State*, 704 S.W.2d 512, 516 (Tex. App.—Houston [14th Dist.] 1986, pet. ref’d). In particular, a police officer may drive a patrol car alongside a person standing outside in a public place and ask questions of that person even though the officer does not suspect that criminal activity has occurred or is about to occur. *Lopez v. State*, 681 S.W.2d 788, 790 (Tex. App.—Houston [14th Dist.] 1984, no pet.) (explaining that the defendant, who was pacing outside a motel, was not detained when an officer drove his patrol car alongside the defendant and asked him questions).

Because Ashraf did not detain appellant merely by parking near him and approaching him, the reasonable-suspicion requirement does not apply. Appellant does not contend that Ashraf lacked reasonable suspicion for a search when appellant put his hands in his pants upon sighting a police officer and answered questions while continuing to keep his back to the officer. We therefore overrule appellant’s sole issue on appeal and affirm the trial court’s judgment.

/s/ Tracy Christopher
Justice

Panel consists of Chief Justice Hedges and Justices Anderson and Christopher.

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