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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001470-MR

MARLENE JETT — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 04-CR-00072

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HENRY, TACKETT, AND VANMETER, JUDGES.

VANMETER, JUDGE: This is an appeal from the Kenton Circuit Court's judgment and order sentencing appellant, Marlene Jett, to three years' pretrial diversion, ninety days conditional discharge for two years, and a $250 fine pursuant to Jett's conditional guilty plea to charges of possession of a controlled substance in the first and third degrees. On appeal, Jett contends that the circuit court erred in not granting her motion to suppress. For the following reasons, we affirm.

Jett was indicted on February 13, 2004, of first-degree and third-degree possession of a controlled substance. After entering a not guilty plea, Jett moved to suppress evidence obtained from her person and car as fruits of an unlawful search and seizure.

During a suppression hearing, Covington City police officer Christopher Gangwish testified that he routinely patrolled the alley behind Funny Farm Bar in Covington because of complaints of narcotics use and trafficking there, but that he had not received any complaints while patrolling the area on the evening of August 29, 2003. During one pass down the alley, Gangwish noticed a group of six to eight people standing outside of the bar but did not observe any illegal activity. Nevertheless, Gangwish decided to circle around the block and pass through the alley a second time. By that time the group was gone but Gangwish saw Jett and a companion walk to and enter her car.

Gangwish testified that he then drove past Jett's car, got out of his police cruiser without turning on the lights or siren, approached Jett's car, and smelled burnt marijuana upon reaching the open driver's side window. Gangwish asked Jett whether she had any drugs or other contraband, and he asked her to get out of her car. He testified that when Jett got out of her car, he requested and was given her consent to search her

person. Jett, on the other hand, denied giving consent to Gangwish's search request, and she testified instead that he patted her down as soon as she stepped out of her car. In any event, Gangwish placed Jett under arrest after finding on her person a tablet of what was later determined to be generic Xanax. Gangwish testified that upon searching Jett's car pursuant to her further consent,[1] he found a silver pipe with cocaine residue as well as a cigarette pack containing a small marijuana cigarette.

The circuit court overruled Jett's motion to suppress, finding that Gangwish did not err in his initial act of approaching Jett's car and that he did not "stop" Jett in doing so. The court further found that when Gangwish smelled burnt marijuana, it is reasonable to believe that he asked for Jett's consent to search her person. Ultimately, the circuit court accepted Gangwish's testimony that Jett consented to the search of both her person and her car.[2]

On June 16, 2004, Jett entered a conditional guilty plea, reserving the right to appeal the circuit court's denial of her motion to suppress. Jett was sentenced to three years'

[1] Jett denied giving consent to the search of her car.

[2] Despite Jett's contention in her reply brief, RCr 9.78 does not require the circuit court to make written findings of fact and conclusions of law. Moreover, while the video of the suppression hearing stops while the circuit judge is talking, the video captures the circuit court's findings of fact and conclusions of law and is adequate for our review. In any event, this issue was not raised in Jett's initial brief, so it is not properly preserved for our review. *Clark v. Clark*, 601 S.W.2d 614, 616 (Ky.App. 1980).

pretrial diversion as well as ninety days conditional discharge for two years, and a $250 fine. This appeal followed.

Jett proffers on appeal that the circuit court erred in denying her suppression motion, because when Gangwish initially approached her car, he "stopped" her without any articulable suspicion. Thus, Jett argues, the ensuing search was illegal and any fruits must be suppressed. We disagree.

Our role on appeal is set forth as follows:

> An appellate court's standard of review of the trial court's decision on a motion to suppress requires that we first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive. Based on those findings of fact, we must then conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law.[3]

The only disputed testimony at the suppression hearing regarded whether Jett consented to the search of her person and car. As stated by our supreme court,

> [w]hether a consent to search was voluntarily given is a question of fact to be determined by a preponderance of the evidence from the totality of all the circumstances. The issue is a preliminary question to be decided by the trial judge, KRE 104(a), whose factual findings are

[3] *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky.App. 2002) (internal citations omitted).

> conclusive if supported by substantial evidence.[4]

As Gangwish's testimony substantially supported the circuit court's findings that Jett consented to both searches, those findings are conclusive.

With regard to the law of this case, Jett's brief focuses almost entirely on whether Gangwish's initial act of exiting his cruiser and walking to her car was supported by a reasonable, articulable suspicion. However, since not all encounters between police and citizens constitute seizures,[5] the correct analysis is first to determine whether Gangwish's initial act may be characterized as a seizure for Fourth Amendment purposes.[6] More specifically, "a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained."[7] Here, as there was no application of physical force when Gangwish initially approached Jett's car, our analysis turns to whether Gangwish submitted a show of authority which restrained Jett's freedom of movement.

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[4] *Talbott v. Commonwealth*, 968 S.W.2d 76, 82 (Ky. 1998) (internal citations omitted).

[5] *Terry v. Ohio*, 392 U.S. 1, 19 n.16, 88 S.Ct. 1868, 1879 n.16, 20 L.Ed.2d 889 (1968).

[6] *Relford v. Lexington-Fayette Urban County Gov't*, 390 F.3d 452, 457 (6th Cir. 2004).

[7] *United States v. Mendenhall*, 446 U.S. 544, 553, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980).

In a show of authority case, a person is seized "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[8] The Court in *United States v. Mendenhall*[9] set forth some indicators of when a seizure might occur, including "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." With regard to Gangwish's initial approach of Jett in the matter now before us, there was no showing of these factors or any other indicia of Jett having been seized. Although it is true that the "[t]emporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of" the Fourth Amendment,[10] in the matter now before us Gangwish did not stop Jett's car. Rather, he merely parked his police cruiser near Jett's already-parked car and approached it, without

[8] *Id.*, 446 U.S. at 554, 100 S.Ct. at 1877.

[9] *Id.*

[10] *Whren v. U.S.*, 517 U.S. 806, 809-10, 116 S.Ct. 1769, 1772, 135 L.Ed.2d 89 (1996).

turning on the cruiser's sirens or lights.[11] Clearly, "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place[.]"[12]

Further, "[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--provided they do not induce cooperation by coercive means."[13] In the matter now before us, Gangwish lawfully approached Jett's car and asked for her consent to search her person. As discussed above, the circuit court believed that Jett voluntarily consented to Gangwish's request to search her person and car. Gangwish was not required to inform Jett of her right to refuse his request to search her person.[14]

Even if Gangwish's act of asking Jett to step out of her car may be characterized as a seizure, Gangwish gained a reasonable, articulable suspicion of the possibility of criminal activity when he lawfully approached Jett's car and smelled

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[11] Contrary to Jett's suggestion on appeal, the evidence does not show that Gangwish's cruiser may have blocked in Jett's car. Rather, Gangwish testified that he parked south of Jett's north-facing car.

[12] *Florida v. Royer*, 460 U.S. 491, 497, 103 S.Ct. 1319, 1324, 75 L.Ed.2d 229 (1983).

[13] *U.S. v. Drayton*, 536 U.S. 194, 201, 122 S.Ct. 2105, 2110, 153 L.Ed.2d 242 (2002).

[14] *Id.*, 536 U.S. at 206, 122 S.Ct. at 2113.

burnt marijuana. A police officer may "stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot[.]'"[15] During such a stop, the police officer may "make 'reasonable inquiries' aimed at confirming or dispelling his suspicions."[16] In the matter now before us, when Gangwish lawfully approached Jett's car and smelled burnt marijuana, he could question Jett or ask for her consent to search her person. Once again, the evidence was sufficient to support the circuit court's conclusion that Jett voluntarily consented to Gangwish's request to search her person and car.

The Kenton Circuit Court's judgment is affirmed.

ALL CONCUR.

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[15] *U.S. v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989).

[16] *Minnesota v. Dickerson*, 508 U.S. 366, 373, 113 S.Ct. 2130, 2135, 124 L.Ed.2d 334 (1993) (internal citation omitted).