RENDERED: DECEMBER 22, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001941-MR

TINA M. WEST — APPELLANT

v.

APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN A. HAYDEN, JUDGE
ACTION NO. 05-CR-00135

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING

** ** ** ** ** ** ** **

BEFORE: TAYLOR, JUDGE; ROSENBLUM, SENIOR JUDGE;[1] MILLER, SPECIAL JUDGE.[2]

MILLER, SPECIAL JUDGE: Tina West brings this appeal from a conditional guilty plea entered in Henderson Circuit Court pursuant to RCr[3] 8.09. West contends that the arresting officer

[1] Senior Judge Paul W. Rosenblum, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] Retired Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

[3] Kentucky Rules of Criminal Procedure.

did not have reasonable suspicion to conduct a "Terry stop,"[4] thus the seizure of drug-related evidence incident thereto was inadmissible. For the reasons stated below, we reverse.

There is no substantial dispute as to the facts. On February 22, 2005, Detective Matt Conley was conducting surveillance at the Target Store in Owensboro, Daviess County, Kentucky. He was watching for the purchase of products containing ingredients commonly used in the manufacture of methamphetamine; e.g., lithium batteries and cold medicine containing pseudoephedrine (such as Sudafed). Detective Conley had been a narcotics detective for just over a year and had performed similar surveillance duty during that period of time.

On the date aforesaid, West entered the store, went directly to the cold medicine aisle and selected two boxes of Sudafed.[5] Detective Conley testified that West appeared to be extremely nervous and persisted in looking at security cameras. Based upon her purchase of the Sudafed and her demeanor, Detective Conley suspected that she may be involved in the manufacture of methamphetamine. As a result, he followed her after she departed the store. He sought to determine if she went to any other stores to make additional purchases. However, West did not visit other stores, but, rather, commenced her

[4] Terry v. Ohio, 392 U.S. 1, 16-19, 88 S.Ct. 1868, 1877, 20 L.Ed.2d 889 (1968).

[5] Store policy limits the purchase of Sudafed to two boxes.

journey to Henderson County, more than twenty miles away. Detective Conley followed.

Approximately one-half hour later, West pulled into the driveway at her son's residence near the intersection of Kentucky Highway 136 and U.S. 41 South in Henderson County. Detective Conley pulled into the driveway behind her, thereby blocking her vehicle. Detective Conley's vehicle was unmarked and without emergency lights. West got out of her vehicle. Detective Conley exited his, approached her, and identified himself as a police officer. It appears that another other officer at some point arrived at the scene.

Detective Conley asked West for her driver's license, and she responded that she did not have one. Detective Conley also questioned her about her purchase of the Sudafed at the Target Store in Owensboro. West admitted to other purchases but denied that she had bought Sudafed. Detective Conley asked her for consent to search the automobile. She refused.

Detective Conley ran West's name through a computer system and determined that there were two outstanding warrants for her arrest. Based upon the outstanding warrants Detective Conley placed West under arrest, and searched her vehicle as a search incident thereto.

The search yielded a set of scales with white residue, ten boxes of Sudafed, two baggies of white powder which field-

tested positive for methamphetamine, and a baggie containing a coffee filter with white residue which appeared to have been used in manufacturing methamphetamine. Detective Conley transported West to the police station in Henderson. Appellant made incriminating statements.

As a result of the evidence gathered in connection with the stop, the Henderson County Grand Jury indicted West for Unlawful Distribution of a Methamphetamine Precursor, KRS[6] 218A.1438; First-Degree Possession of a Controlled Substance, KRS 218A.1515; and Possession of Drug Paraphernalia, KRS 218A.500.

On May 13, 2005, West filed a motion to suppress the fruits of the February 22 police stop. Following a hearing, the circuit court entered an order denying the motion.

West subsequently entered the conditional guilty plea, reserving the right to challenge the denial of her motion to suppress. Under the plea agreement she received a total of two and one-half years to serve. Final judgment was entered on September 8, 2005. This appeal followed.

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

[6] Kentucky Revised Statutes.

conclusive. RCr 9.78. Based upon those findings of fact, we must then conduct a de novo review of the trial court's application of the law. Commonwealth v. Neal, 84 S.W.3d 920, 923 (Ky.App. 2002).

West does not challenge the findings of the circuit court concerning the events surrounding the stop; and, in any event, the circuit court's findings are supported by substantial evidence.

Because of its bearing on the remainder of our review, we first consider the Commonwealth's argument that Detective Conley's encounter with West at her son's residence was not a Terry stop but, rather, was a consensual encounter not requiring reasonable suspicion.

There are three types of interaction between the 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). The Fourth Amendment, of course, "applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest." Davis v. Mississippi, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969); Terry v. Ohio, 392 U.S. 1, 16-19, 88 S.Ct. 1868, 1877, 20 L.Ed.2d 889 (1968). "'[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person,' id., at 16, 88

S.Ct., at 1877, and the Fourth Amendment requires that the seizure be 'reasonable.'" United States v. Brignoni-Ponce, 422 U.S. 873, 878, 95 S.Ct. 2574, 2578, 45 L.Ed.2d 607 (1975). It is from unreasonable searches and seizures that both the federal and state constitutions afford protection to citizens.

The prohibition against unreasonable searches and seizures provided by the Fourth and Fourteenth Amendments to the United States Constitution applies to Terry stops as well as arrests. Id. Of course, there is no such prohibition involved in consensual encounters.

The threshold issue before us is whether West was "seized." If not, then the incident was merely a consensual encounter. As the United States Supreme Court noted in Terry v. Ohio, 392 U.S. 1 at 19 n. 16, 88 S.Ct. 1868 at 1879 n. 16, 20 L.Ed.2d 889, "not all personal intercourse between policemen and citizens involves 'seizures' of persons." Moreover, 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). "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a seizure has occurred." Terry, supra. In United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980), the Court held

that a person has been seized when, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Id. at 554, 100 S.Ct. at 1877. The Mendenhall Court identified factors that might suggest that a seizure has occurred, such as the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. Id.

Here, upon West's arrival at her son's home, Detective Conley pulled in behind her, thereby blocking her egress back onto the highway. He then exited his vehicle, approached West, asked her for her driver's license, and questioned her about her purchase of Sudafed in Owensboro. Under these circumstances, a reasonable person, we conclude, would not consider themselves at liberty to leave. Upon being questioned about the Sudafed, it would have become apparent to West that Detective Conley had followed her some 20 miles. In light of police efforts in getting to this point, it is unlikely a reasonable person would have believed she could have simply replied she wasn't interested in discussing the matter and walked away. Moreover, the encounter occurred on private property and Detective Conley had blocked her exit back to the public road. Upon these factors, we conclude that there was a seizure. It is suggested

by no one that the encounter was intended as an arrest premised upon probable cause; hence, the incident was a Terry stop.

Having concluded that the stop was, in fact, a Terry stop seizure, we now consider whether the seizure was permissible.

In Terry the United States Supreme Court held that a brief investigative stop, detention, and frisk for weapons do not violate the Fourth Amendment as long as the initial stop was supported by reasonable suspicion, a far lighter standard than probable cause. It is now firmly established that in circumstances giving rise to a reasonable suspicion that a crime is in process or has been or is about to be committed, police officers may briefly detain suspected individuals in order to investigate, and may take reasonable steps to maintain the status quo and to protect themselves while they do so. Michigan v. Summers, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981); Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972); Baker v. Commonwealth, 5 S.W.3d 142 (Ky. 1999). To justify this lesser intrusion upon an individual's privacy interests, the officer's suspicion must be more than a mere hunch. Although it need not amount to probable cause, the suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry v. Ohio, supra, at

21, 88 S.Ct. at 1880. Determining whether a detention or a frisk is reasonable thus requires "a review of the totality of the circumstances, taking into consideration the level of police intrusion into the private matters of citizens and balancing it against the justification for such action." Baker v. Commonwealth, 5 S.W.3d at 145.

A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. See Delaware v. Prouse, 440 U.S. 648, 654-655, 99 S.Ct. 1391, 1396-1397, 59 L.Ed.2d 660 (1979); United States v. Brignoni-Ponce, supra, 422 U.S., at 882, 95 S.Ct., at 2580. To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers. Delaware v. Prouse, supra, at 663, 99 S.Ct., at 1401. See United States v. Martinez-Fuerte, 428 U.S. 543, 558-562, 96 S.Ct. 3074, 3083-3085, 49 L.Ed.2d 1116 (1976).

Finally, "[A]an investigative stop must cease once reasonable suspicion or probable cause dissipates," United

States v. Watts, 7 F.3d 122, 126 (8th Cir.1993), and the detention must be "reasonably related in scope" to the suspicion, U.S. v. Perez, (2006), 440 F.3d 363, 372, citing Terry, 392 U.S. at 20, and "cannot be excessively intrusive." Bennett v. City of Eastpointe, (2005), 410 F.3d 810, 836, citing Berkemer v. McCarty, 468 U.S. 420, 439, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984).

With the foregoing in mind, we believe that any suspicion Detective Conley may have had that criminal activity was afoot based upon his observances of West at the Target store in Owensboro had dissipated below a reasonable suspicion at the time of the stop at her son's residence in Henderson County some one half-hour later. The stop was impermissible and the corresponding seizure unlawful.

Factors supporting reasonable suspicion to begin with were, according to the Commonwealth, West's actions in entering the store and going directly to the medicine aisle; her lingering in the aisle for some time; her looking at the security cameras; acting "extremely" nervous; and her purchase of two boxes of Sudafed, the store limit.

However, following West after her departure from the premises, Detective Conley obtained information tending to dispel his conjecture that criminal activity was afoot. Detective Conley testified that he followed her from the

premises for the purposes of observing whether she went to any additional stores to purchase methamphetamine ingredients. West's failure to follow the predictive behavior of a methamphetamine manufacturer by purchasing additional boxes of Sudafed at other stores, but instead driving to a private residence without any known connection to the manufacturing of methamphetamine, dissipated considerably any suspicion aroused by West's initial conduct at the Target store.

At the time Detective Conley finally stopped West, the time, location, and circumstances were considerably changed from Detective Conley's initial observations. Detective Conley knew at this point that his original theory that West was on a mission to obtain Sudafed at various stores was incorrect. Rather, his additional observations of West following her departure from the Owensboro Target store disclosed only conduct inconsistent with criminal activity. In short, upon the totality of the circumstances, at the time of the stop, there were not articulable facts sufficient to support reasonable suspicion that criminal activity was afoot. As such, the stop was improper. It follows that the evidence obtained following the stop was improperly obtained, and is inadmissible against West. We accordingly reverse the order of the circuit court denying her motion to suppress the evidence.

For the forgoing reasons the judgment of the Henderson Circuit Court is reversed, and the cause is remanded for additional proceedings consistent with this opinion.

ROSENBLUM, SENIOR JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS.

BRIEF FOR APPELLANT:

Lisa Bridges Clare
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Todd D. Ferguson
Assistant Attorney General
Frankfort, Kentucky