RENDERED: AUGUST 8, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001965-MR

JANA ERVIN — APPELLANT

v.

APPEAL FROM GARRARD CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 07-CR-00002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: VANMETER AND WINE, JUDGES; LAMBERT,[1] SENIOR JUDGE.

VANMETER, JUDGE: Jana Ervin appeals from a judgment of the Garrard Circuit Court after the court denied her motion to suppress evidence and she entered a conditional guilty plea. We affirm.

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

In November 2006, Ervin was standing near a pay phone outside a laundromat in Lancaster, Kentucky when she was approached by Garrard County Sheriff's Deputy Keith Addison. Addison pulled his cruiser near the pay phone, where he asked Ervin if she needed assistance. Ervin replied in the negative and said she was using the phone to try to get a ride. At that point Addison drove away, parking within viewing distance of the pay phone in order to observe Ervin. After several minutes Addison became suspicious, so he pulled up beside the pay phone again and asked Ervin if she was having any luck finding a ride. She said she was not. Addison then requested Ervin's identification, which she provided, and asked whether she had any warrants out for her arrest. Ervin stated that she did not think so, and Addison checked, confirming that no warrants were out for Ervin. After returning her identification, Addison asked Ervin if she had ever been arrested, to which she admitted a previous arrest for possession of drug paraphernalia. At this time Addison exited his cruiser and asked Ervin if she would consent to a search of her person. She gave her consent and Addison conducted a search, finding no contraband. Addison then requested and was granted Ervin's permission to search her purse. As Addison was opening the purse, Ervin admitted that it contained a crack pipe. Addison then found the crack pipe, two brillo pads, and a metal antenna, all of which were confiscated. After Ervin agreed to cooperate with the police, Addison left without arresting her.

A warrant was later issued for Ervin, and she was arrested three weeks after the night in question. Ervin was arraigned in February 2007 and subsequently

filed a motion to suppress the evidence found in the purse. The trial court denied the motion after conducting a hearing and reviewing memoranda from defense counsel and the Commonwealth. Ervin later entered a conditional guilty plea preserving the suppression issue, and she was sentenced to five years' imprisonment. This appeal followed.

The standard of review for a trial court's suppression decision requires us initially to

> 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.

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

Ervin claims that the trial court erred by failing to find that her encounter with Addison constituted a seizure for Fourth Amendment purposes. The United States Supreme Court has held that not every encounter between an individual and a police officer rises to the level of a seizure. *Terry v. Ohio*, 392 U.S. 1, 19 n.16, 88 S.Ct. 1868, 1879 n.16, 20 L.Ed.2d 889 (1968). Instead, "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may [a court] conclude that a 'seizure' has occurred." *Id*. In *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980), the Court elaborated on what activities might constitute a

seizure, stating that examples of such circumstances, "even where the person did not attempt to leave," would include

> 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. In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

466 U.S. at 554-55, 100 S.Ct. at 1877 (internal citations omitted). While such examples do not provide an exhaustive list, they do indicate the level of contact between an officer and a citizen which transforms a mere encounter into a seizure.

The evidence presented at the suppression hearing supported the trial court's finding that there was no point at which the conversation between Addison and Ervin escalated into a seizure. Addison was by himself, and he remained in his police cruiser throughout most of the questioning. No evidence showed that Addison used an aggressive tone with Ervin, touched her person without permission, or went beyond asking her questions and, eventually, requesting her identification and consent to search.

Ervin urges us to decide that a seizure occurred when Addison asked for and took her identification. However, according to the evidence presented below, Addison's request did not rise to the level of a seizure under *Drayton v. Ohio*, 536 U.S. 194, 202, 122 S.Ct. 2105, 2111, 153 L.Ed.2d 242 (2002), which states that "[e]ven when law enforcement officials 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." Moreover, a seizure occurs only when a reasonable person, given the surrounding circumstances, would not feel free to leave. *Mendenhall*, 446 U.S. at 554, 100 S.Ct. at 1877. Here, no evidence of coercion or inability to leave was introduced at the suppression hearing. The trial court did not err by finding that Addison's request for Ervin's identification did not amount to a seizure.

Finally, Ervin argues that the trial court erred in finding that she voluntarily consented to the search of her person and purse. The voluntariness of a consent to search "is a question of fact to be determined from the totality of all the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S.Ct. 2041, 2048, 36 L.Ed.2d 854 (1973). Additionally, "[t]he Commonwealth must prove, by a preponderance of the evidence, that the appellant voluntarily consented to the search[.]" *Anderson v. Commonwealth*, 902 S.W.2d 269, 271-72 (Ky.App. 1995) (citing *Cook v. Commonwealth*, 826 S.W.2d 329 (Ky. 1992)). Whether consent was intelligently given is not a factor in the determination. *See Cook*, 826 S.W.2d at 331. Here, no facts were adduced during the suppression hearing to show that Addison coercively obtained Ervin's consent to the searches. The trial court did not err by finding that Ervin's consent was voluntary, and by denying her motion to suppress evidence.

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

ALL CONCUR.

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