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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001718-MR

DANAIRRAL EVERETTE — APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 13-CR-00131

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; KRAMER AND THOMPSON, JUDGES.

ACREE, CHIEF JUDGE: Appellant Danairral Everette appeals from the Boyd Circuit Court's June 26, 2013, order denying his motion to suppress evidence. The limited question presented is whether an illegal seizure occurred when the police, without reasonable suspicion of wrongdoing, activated their vehicle's emergency lights, followed by Everette's departure from the immediate vicinity. We agree with the trial court that no seizure occurred at this particular point. The circuit

court concluded that evidence subsequently abandoned by Everette prior to his physical seizure need not be suppressed. We affirm.

I. Facts and Procedure

Law enforcement officers in Eastern Kentucky suspected that narcotics and illegal prescription drugs were being ferried into Kentucky from Detroit, Michigan, through the Greyhound bus station in Ashland, Kentucky. During the early-morning hours of March 27, 2013, several Kentucky State Police troopers, including Detectives Jeffrey Kelley and Jim Goble, were positioned around the bus station conducting surveillance. Their task was to engage in conversation with members of the public disembarking certain buses. The detectives were wearing plain clothes and bulletproof tactical vests with the words "STATE POLICE" across the chest.

A south-bound bus arrived at the station at roughly 5:30 a.m. Everette got off the bus and left the station on foot carrying a backpack. Detectives Kelley and Goble, driving an unmarked car, discretely followed Everette to see if he got in a vehicle with another person or met with someone. After some time, when neither of these events occurred, the officers decided to make contact with Everette.

Detective Kelley testified they merely wanted to speak with him. He maneuvered his vehicle to the curb next to Everette and activated the car's blue lights; the detectives explained that they did so because their car was unmarked and it was in the wee hours of the morning. The detectives exited the vehicle, identified themselves as "state police," and asked Everette if they could talk to

him. They did not tell Everette to stay where he was; they did not display their weapons; and they did not state or otherwise indicate Everette was under arrest. Everette uttered an obscenity and ran away. The officers pursued Everette on foot and, during the chase, the detectives observed Everette throw an object to his left and his backpack to his right. After the detectives apprehended Everette, they recovered the object, which turned out to be a plastic baggie containing 200 oxycodone pills.

Everette was subsequently indicted for first-degree trafficking in a controlled substance, second-degree fleeing or evading police, and resisting arrest. Everette filed a motion to suppress the drug evidence, and a suppression hearing was held. After eliciting testimony from Detectives Kelley and Goble, Everette argued that activating the cruiser's blue lights elevated the contact from a voluntary interaction to an illegal *Terry*[1] stop, and that the police had no reasonable, articulable suspicion to effect such a stop.

The circuit court entered an order on June 26, 2013, denying Everette's suppression motion. The circuit court found that Everette's own conduct in departing from the officers after they activated the vehicle's blue lights demonstrated he had not been seized at that point, and that no search occurred because Everette abandoned the baggie of pills while fleeing.

Everette then entered a conditional guilty plea to the amended charge of first-degree possession of a controlled substance. The remaining charges were

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

dismissed. The circuit court sentenced Everette to three years' imprisonment. This appeal followed.

II. Standard of Review

Our review of a trial court's decision on a motion to suppress is two-fold. First, we must determine whether the trial court's findings of fact are supported by substantial evidence. If so, then they are conclusive. Kentucky Rules of Criminal Procedure (RCr) 9.78. Second, we review *de novo* the trial court's application of the law to those facts. *Brown v. Commonwealth*, 416 S.W.3d 302, 307 (Ky. 2013).

III. Analysis

Neither party contests the circuit court's factual findings. In any event, those findings are clearly supported by the detectives' suppression-hearing testimony. We move on to the circuit court's application of the law to the facts.

The Fourth Amendment to the United States Constitution protects citizens from unreasonable searches and seizures by the government. U.S. Const. amend IV; *see also* Ky. Const. § 10. Evidence obtained, either directly or indirectly, from an illegal search or seizure "is not admissible against the accused," *Wilson v. Commonwealth*, 37 S.W.3d 745, 748 (Ky. 2001), and "is plainly subject to exclusion." *Turley v. Commonwealth*, 399 S.W.3d 412, 424 (Ky. 2013) (citation omitted); *Hedgepath v. Commonwealth*, 441 S.W.3d 119, 125 (Ky. 2014).

Everette argues an illegal seizure occurred when the detectives activated their vehicle's blue lights, and therefore all evidence flowing from that

seizure must be suppressed. The officers did not claim they had constitutional grounds to interfere with Everette's walk or otherwise restrain his liberty.

However, Everette contends that police activation of a cruiser's blue lights "amount[s] to a universal sign to every citizen that they are not free to continue on their way and that their liberty has been constrained." (Appellant's Brief at 12).

Everette's argument has a visceral, and universal, appeal; everyone's reaction to the sight of flashing lights in his rear-view mirror is physiological. This is the beginning of what the Supreme Court of the United States calls "personal intercourse between policemen and citizens[.]" *Terry*, 392 U.S. at 19 n.16, 88 S.Ct. at 1879 n.16. Law-abiding citizens regularly, if not universally, respond by yielding to law enforcement's show of authority and purpose of duty demonstrated by the activation of lights and sirens. Criminals are less inclined to do so, but often do so nonetheless.

However, at the moment immediately preceding the decision to yield or not to yield, there is no seizure. For a seizure to occur, the police conduct must be "inevitably accompanied by future interference with the individual's freedom of movement[.]" *Terry*, 392 U.S. at 27, 88 S.Ct. at 1882. That interference can be involuntary, as when there is some form of physical force exerted by law enforcement, or voluntary, as when the citizen's conduct demonstrates submission to a show of authority by law enforcement.

In this case, it is clear that during the initial encounter the officers used no physical force of any kind. The mere activation of emergency lights is not physical force. *Taylor v. Commonwealth*, 125 S.W.3d 216, 219 (Ky. 2003). Everette's "seizure only occurred when the police physically apprehended him following the chase." *Id.* at 220.

We then must consider Everette's argument that he was "seized," despite the use of physical force, based on the show of police authority in the form of the emergency lights. We conclude that he was not seized because he never submitted to that show of authority.

"A police officer may make a seizure by a show of authority and without the use of physical force, but there is no seizure without actual submission; otherwise, there is at most an attempted seizure, so far as the Fourth Amendment is concerned." *Brendlin v. California*, 551 U.S. 249, 254, 127 S. Ct. 2400, 2405, 168 L. Ed. 2d 132 (2007); *California v. Hodari D.*, 499 U.S. 621, 626, n.2, 111 S. Ct. 1547, 1551, 113 L. Ed. 2d 690 (1991) ("The narrow question before us is whether, with respect to a show of authority . . . , a seizure occurs even though the subject does not yield. We hold that it does not."). And, "because a seizure does not occur when a mere show of authority occurs, but only when one yields to a show of authority, the fourth amendment does not apply to anything one may abandon while fleeing the police in an attempt to avoid a seizure." *United States v. Martin*, 399 F.3d 750, 752 (6th Cir. 2005).

Kentucky has fully embraced these concepts. "A seizure does not occur, however, if in response to a show of authority, the subject does not yield. In that event, the seizure occurs only when the police physically subdue the subject." *Taylor*, 125 S.W.3d at 219-20 (Ky. 2003) (citing *Hodari D.*, 499 U.S. at 626, 111 S. Ct. at 1551). In *Taylor*, a police officer turned on his cruiser's emergency lights to conduct a traffic stop. The defendant chose not to yield to the officer's display of authority, but instead led the police on a high-speed chase. The police eventually apprehended him. The Kentucky Supreme Court concluded that, because the defendant refused to yield, his "seizure only occurred when the police physically apprehended him following the chase. Thus, the police officer's justification for initially attempting to stop [the defendant] is immaterial[.]" *Id.* at 220.

Nevertheless, Everette argues that this Court's opinion in *Poe v. Commonwealth*, 169 S.W.3d 54 (Ky. App. 2005), compels a different result. We do not agree. There is a critical difference in *Poe* – that difference is submission. An officer had observed Poe:

> driving up and down the same streets around 1:30 a.m. [and] effected the stop by pulling behind Poe and activating his emergency lights. Once the stop was made the officer noticed Poe had bloodshot eyes, a carefree attitude, and was not wearing a seatbelt. Poe admitted upon questioning that he had been smoking marijuana.

Id. at 55. When, in response to a show of police authority, Poe pulled his own vehicle over and cooperated, he submitted and, for purposes of the Fourth Amendment, was seized.

Poe is consistent with all the authority cited herein despite involving a suspect driving an automobile. Closer to the facts of our case, though with the opposite result, is *Terry v. Ohio*. The Supreme Court of the United States had occasion to indicate that *Terry* itself would have had a different outcome had the officers in that case acted differently, for example, as the detectives in the case now before us had acted. The Supreme Court said:

> The distinction between an intrusion amounting to a "seizure" of the person and an encounter that intrudes upon no constitutionally protected interest is illustrated by the facts of *Terry v. Ohio*, which the Court recounted as follows: "Officer McFadden approached the three men, identified himself as a police officer and asked for their names. . . . When the men 'mumbled something' in response to his inquiries, Officer McFadden grabbed petitioner Terry, spun him around so that they were facing the other two, with Terry between McFadden and the others, and patted down the outside of his clothing." . . . Obviously the officer "seized" Terry and subjected him to a "search" when he took hold of him, spun him around, and patted down the outer surfaces of his clothing . . . . What was not determined in that case, however, was that a seizure had taken place before the officer physically restrained Terry for purposes of searching his person for weapons. The Court "assume[d] that up to that point no intrusion upon constitutionally protected rights had occurred." . . . The Court's assumption appears entirely correct in view of the fact, noted in the concurring opinion . . . that "[t]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets," . . . . Police officers enjoy "the liberty (again, possessed by

> every citizen) to address questions to other persons," . . . although "ordinarily the person addressed has an equal right to ignore his interrogator and walk away."

U.S. v. Mendenhall, 446 U.S. 544, 552-53,100 S.Ct. 1870, 1876, 64 L.Ed.2d 497 (1980) (citations omitted). Like Terry, Everette was approached by police and in response "mumbled something." At that point the facts of these cases diverge. Everette, unlike Terry, did not remain in the presence of law enforcement. Detectives Kelley and Goble, unlike Officer McFadden, did not grab their suspect. Rather, their suspect fled, abandoned his contraband which the police recovered, and continued to flee until seized by physical force. The irony will be lost on most criminals that Everette's best hope of avoiding arrest, or at least suppressing evidence in the circumstances presented by this case, would have been his submission to the detective's show of authority.

We see nothing in this record to indicate Everette was seized prior to his fleeing and abandoning evidence collected by the officers – evidence that would have been admissible at his trial. At the time Everette abandoned the baggie of pills, there was merely an attempted seizure in progress because Everette had not actually submitted to the show of police authority. *Martin*, 399 F.3d at 753 (the law "is very clear that if no seizure has occurred, abandonment can occur"). The baggie was not obtained as the result of an unconstitutional seizure, and Everette has identified no grounds upon which to suppress the abandoned contraband. The circuit court committed no error when it denied Everette's suppression motion.

IV. Conclusion

We affirm the Boyd Circuit Court's June 26, 2013 Order denying Everette's motion to suppress.

KRAMER, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

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