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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001809-MR

EARL THOMAS MCCANN — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN E. REYNOLDS, JUDGE
ACTION NO. 17-CR-00345

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, MAZE, AND L. THOMPSON, JUDGES.

MAZE, JUDGE: Appellant, Earl Thomas McCann, appeals the Fayette Circuit Court's judgment sentencing him to five years in prison on a conditional guilty plea of being a convicted felon in possession of a handgun and violating an emergency protective order/domestic violence order (EPO/DVO). Under the conditional guilty plea, McCann preserved his right to challenge the denial of his motion to suppress evidence. For the following reasons, we affirm.

BACKGROUND

On February 1, 2017, the police were dispatched to a gas station after a Pepsi delivery driver called 911 to report a black man had assaulted a black woman. The Pepsi driver reported the black man was wearing a black toboggan and a black vest.

Officer James Dellacamera and Officer Rebecca McAllister, with the Lexington Police Department, arrived at the gas station around 10:08 a.m. Officer Dellacamera testified he saw McCann, who fit the caller's description, inside the gas station at the cash register. As Officer Dellacamera entered the gas station, McCann had finished making his purchase of coffee and was walking toward the bathroom at the back of the store. Officer Dellacamera said, "Sir, Sir, Sir . . . Stop," and began running toward McCann, thinking McCann was trying to exit out the back of the gas station.

McCann stopped. Officer Dellacamera grabbed McCann by the wrists, questioned what he was doing, and felt the outside pockets of McCann's vest. The police officers asked McCann if he had assaulted a woman, which he denied. They also asked if he had a weapon, which he denied, and if he had been drinking, which he admitted. McCann stated he worked next door, he came to the gas station to get coffee, and had just been dropped off by his wife.

Officer Dellacamera asked McCann for identification and obtained McCann's wallet from his back pocket. While the police continued speaking with McCann, Officer McAllister ran McCann's information. Officer Dellacamera asked McCann with whom he had been fighting and, in response, McCann suggested he call his wife to ask her about the situation and gave Officer Dellacamera his wife's phone number and name.

Officer McAllister discovered McCann's wife had an EPO/DVO against him and asked McCann about it. While still speaking with the police officers, McCann received a call on his Bluetooth earpiece, apparently from his wife. McCann got his phone out in an apparent attempt to show the officer where his wife just called and, during this time, he appeared to call his wife's number twice. Officer McAllister told Officer Dellacamera that the EPO/DVO was a "no contact" order and, by having contact with his wife, McCann violated that order.

The police handcuffed McCann and asked him if he had any weapons or anything else that could cause harm while searching him. McCann eventually told Officer Dellacamera he had a weapon, and Officer Dellacamera retrieved a gun from McCann's hip.

The encounter was captured on Officer Dellacamera's bodycam, starting with the police officers entering the gas station and ending with McCann being placed in the police cruiser. The police charged McCann with (1) being a

convicted felon in possession of a handgun,[1] (2) violating a Kentucky EPO/DVO,[2] and (3) carrying a concealed deadly weapon.[3]

After being indicted, McCann entered a not-guilty plea. He subsequently filed a motion to suppress incriminating statements he may have made when the police officers interviewed him because they failed to warn him of his *Miranda*[4] rights in violation of the Fifth, Sixth, and Fourteenth Amendments of the Constitution, as well as Sections Two and Eleven of the Kentucky Constitution.

On December 21, 2017, the trial court held a suppression hearing. Officer Dellacamera testified and admitted he did not give a *Miranda* warning to McCann at any time. Officer McAllister did not testify at the hearing but no evidence was introduced that she gave a *Miranda* warning to McCann. The Commonwealth argued a *Miranda* warning was not necessary until McCann was arrested, and the public safety exception applied to at least McCann's statement about the gun. Notably, during the hearing, the trial court asked if McCann was seeking to suppress statements or the seizure of finding the gun. McCann responded that, if the statements were suppressed, then the issue is whether the

[1] Kentucky Revised Statute (KRS) 527.040.

[2] KRS 403.763.

[3] KRS 527.020.

[4] *Miranda v. Arizona*, 384 U.S. 436, 478-79, 86 S.Ct. 1602, 1630, 16 L.Ed.2d 694 (1966).

police had probable cause to arrest and search him at all. McCann further argued that a weapon was never mentioned before the police approached him, so the public safety exception to *Miranda* should not apply. Both parties agreed the trial court should review Officer Dellacamera's bodycam footage before ruling.

On February 16, 2018, the trial court issued its findings of fact and conclusions of law. The trial court found that a *Miranda* warning was not given and McCann was in custody after he submitted to Officer Dellacamera's command to "stop" because "no reasonable person would have believed he was free to leave" at that time. The trial court also found the public safety exception to *Miranda* did not apply because "at the best[,] officers eventually learned [McCann] may have been guilty of violation of an outstanding EPO/DVO. There was no indication at first that [McCann] might have had a weapon on him or was a danger to the officer or the public." The trial court concluded that *Smith v. Commonwealth*, 312 S.W.3d 353 (Ky. 2010),[5] controlled and required the suppression of McCann's un-Mirandized answer that he had a weapon on him in response to Officer Dellacamera's interrogation. The order only suppressed this one statement and neither party appealed this ruling.

[5] In *Smith*, the Court held defendant was in custody and not Mirandized when interrogated by the police in her apartment and asked if she had any weapons or drugs on her. She stated she had something in her pocket and the police found drugs in her pocket. The Court held her statement should have been suppressed and the public safety exception to *Miranda* did not apply because, if a gun or drugs were present, they posed no danger to the public at large. *Id.* at 359-60.

Five months later, while preparing for trial, McCann's attorney realized that the February 16, 2018, order only suppressed McCann's statement that he had a gun on him. So, on July 26, 2018, McCann filed a second motion to suppress "ALL" statements, as well as the gun found on him. McCann claimed the February 16, 2018, order already held he was in custody when the police commanded him to "stop" and that he should have been read his *Miranda* rights before being questioned. Thus, all his statements should have been suppressed, not just the statement that he had a weapon on him, and the gun should be suppressed as "fruit of the poisonous tree," pursuant to *Wong Sun v. United States*, 371 U.S. 471, 484-86, 83 S.Ct. 407, 415-17, 9 L.Ed.2d 441 (1963). McCann reasoned that the police would have had no cause to arrest and search him if they had not interrogated him. The Commonwealth filed no written response to McCann's motion.

At motion hour, the trial court asked if the second motion to suppress was really a motion to clarify the February 16, 2018, order. McCann's counsel seemed to agree but noted the motion also sought to suppress the gun.[6] The trial court arranged to meet *in camera* to review the bodycam footage and the parties agreed that another suppression hearing was unnecessary.

[6] Confusion regarding the previous order was complicated by the fact that Judge Ishmael, who issued the February 16, 2018 order, had retired by this time and Judge Reynolds presided over the case.

On August 1, 2018, the trial court denied McCann's second motion to suppress, finding the handgun was admissible because McCann was stopped pursuant to a lawful *Terry*[7] stop, during which police could pat him down for safety. The trial court further held that, even if McCann had not told the police he had a gun, the police would have, inevitably, discovered it. As to McCann's request for clarification of the February 16, 2018, order, the trial court agreed that McCann's statement that he had a gun should be suppressed because the police did not provide a *Miranda* warning to him.

After this ruling, McCann entered a conditional guilty plea reserving his right to appeal. McCann pled guilty to one count of being a convicted felon in possession of a handgun and one count of violating a Kentucky EPO/DVO. He was sentenced to five years and twelve months, respectively, to run concurrently, for a total of five years. This appeal followed.

STANDARD OF REVIEW

Kentucky Rules of Criminal Procedure (RCr) 8.27 sets out the procedure for conducting a suppression hearing. When the trial court conducts a hearing, our standard of review is two-fold. *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998). First, the factual findings of the trial court are conclusive if they are supported by substantial evidence. *Id.* Second, based on those findings

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

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." *Payton v. Commonwealth*, 327 S.W.3d 468, 471-72 (Ky. 2010) (citation omitted).

ANALYSIS

McCann argues the police lacked a reasonable suspicion to conduct a *Terry* stop of him. Consequently, he contends any evidence obtained from that stop, including from the subsequent arrest, should have been suppressed.

The police have three types of interactions with citizens: consensual encounters, temporary detentions (referred to as *Terry* stops), and arrests. *See Baltimore v. Commonwealth*, 119 S.W.3d 532, 537 (Ky. App. 2003). The protection against unreasonable searches and seizures, provided by the Fourth Amendment, applies only to the last two encounters: *Terry* stops and arrests. *Id.* "Generally, under the Fourth Amendment, an official seizure of a person must be supported by probable cause, even if no formal arrest of the person is made." *Id.* However, the courts recognize several exceptions to that requirement depending on the nature and extent of the intrusion and the government interest involved. *Id.*

Here, the trial court held McCann's encounter with the police was a lawful *Terry* stop. A *Terry* stop originates from the seminal case, *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). In that case, the Supreme Court

held that a brief investigative stop and frisk for weapons does not violate the Fourth Amendment, if the stop is supported by reasonable suspicion. *See Baltimore*, 119 S.W.3d at 537. Reasonable suspicion is a far lighter standard than probable cause. *Id.* at 539. So, a police officer may approach a person, identify herself or himself as a police officer, and ask a few questions without implicating the Fourth Amendment. *Id.* at 537. The police must have "a reasonable suspicion grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony" before making a *Terry* stop to investigate that suspicion. *Id.* at 538; *see also Fletcher v. Commonwealth*, 182 S.W.3d 556, 559 (Ky. App. 2005).

Determining the legitimacy of a *Terry* stop involves a two-step analysis. *Baltimore*, 119 S.W.3d at 538. The first step asks: is there a proper basis for the stop based on the police officer's awareness of specific and articulable facts giving rise to reasonable suspicion? *Id.* The second step asks: is the degree of intrusion reasonably related in scope to the justification for the stop? *Id.*

In this case, the police officers were responding to a 911 call from the Pepsi driver who reported that a man had assaulted a woman. Officer Dellacamera testified that McCann fit the description of the suspect, as he was a black man wearing a black toboggan and black vest, who was still present at the gas station. The police had a sufficient reasonable and articulable suspicion to stop McCann to

investigate the reported assault and check McCann's identification, which they did. Thus, the trial court's findings are supported by substantial evidence to justify the stop of McCann.

Although the trial court found the *Terry* stop to be justified, it also found the *Terry* stop to be custodial. This means that McCann was in custody in the gas station, as he did not believe he was free to leave. Thus, the police should have given him a *Miranda* warning before questioning him. Because the police did not Mirandize McCann, the trial court held McCann's statements should be suppressed. McCann argues that, in the absence of his statements, the police lacked probable cause for his arrest and, because no valid probable cause for arrest existed, there would be no inevitable discovery of the gun, contrary to the trial court's holding.

The "inevitable discovery rule" was adopted by the United States Supreme Court in *Nix v. Williams*, 467 U.S. 431, 435-37, 104 S.Ct. 2501, 2505, 81 L.Ed.2d 377 (1984). In that case, a victim's body was initially discovered as a result of an unlawfully obtained statement from the defendant. However, the body was found within an area already being searched by two hundred volunteers who inevitably would have discovered it in short order, so the body was held to be admissible evidence. *Id.* Under this rule, "evidence unlawfully obtained upon proof by a preponderance of the evidence that the same evidence would have been

inevitably discovered by lawful means" is permitted. *Hughes v. Commonwealth*, 87 S.W.3d 850, 853 (Ky. 2002). This rule has been applied to the fruits of illegal searches as well as to the fruits of illegally obtained confessions. *See id.*

Based on a careful review of the record, the trial court's conclusion that the gun would have inevitably been found is proper. As stated, Officer Dellacamera testified that McCann fit the description of the suspect described by the Pepsi driver. And, when he entered the store, Officer Dellacamera thought McCann was trying to flee out the back, which prompted him to run after McCann yelling, "Sir, Sir, Sir . . . Stop." As the trial court held, Officer Dellacamera had a lawful basis for stopping McCann. During this stop, the police properly checked his identification and discovered that McCann had an EPO/DVO against him. Even ignoring McCann's statement that his wife had just dropped him off at the gas station or McCann's statements about his relationship with his wife, the police officers were responding to the Pepsi driver's report of an assault by someone who fit McCann's description and then witnessed McCann speak with his wife on the phone. The evidence supports the finding that the police officers knew McCann openly violated the EPO/DVO in front of them, which created sufficient probable cause to arrest him. The police could then search McCann, where they would have inevitably found the gun incident to the valid arrest.

The Kentucky Supreme Court has held that the police are permitted to search a person incident to an arrest. *McCloud v. Commonwealth*, 286 S.W.3d 780, 785 (Ky. 2009). "A police officer in Kentucky is statutorily authorized to conduct a warrantless arrest if the officer either observes the arrestee commit a felony or misdemeanor in the officer's presence or when the officer has probable cause to believe the arrestee has committed a felony." *Id.* (footnote omitted); *see also* KRS 431.005 (allowing a police officer to make an arrest without a warrant when he has probable cause to believe a person being arrested has committed a felony). Because the police had probable cause to arrest McCann and the gun was found in the search incident to his arrest, the trial court did not err in denying McCann's motion to suppress. "[I]t is well-settled that an appellate court may affirm a lower court for any reason supported by the record." *McCloud*, 286 S.W.3d at 786 n.19 (citation omitted).

Finally, in his reply brief, McCann argues for the first time that the Commonwealth did not prove his arrest was based on probable cause because the actual EPO/DVO was never produced. He claims that Officer Dellacamera's testimony that his partner ran a check of McCann's information and discovered an active "no contact" EPO/DVO is not substantial evidence to allow the court to find probable cause to justify his arrest. However, McCann never questioned Officer Dellacamera at the suppression hearing about the validity or nature of the

EPO/DVO. McCann also failed to call Officer McAllister as a witness at the suppression hearing to question her about the EPO/DVO she discovered while checking McCann's information. McCann even had a second chance to raise this issue when he filed his second motion to suppress but failed to do so. An appellate court is without authority to review issues not raised in or decided by the trial court. *See Commonwealth v. Steadman*, 411 S.W.3d 717, 724 (Ky. 2013). Accordingly, we will not consider this argument.

CONCLUSION

For the foregoing reasons, we affirm.

ALL CONCUR.

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