

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-001689-MR

EUGENE MCCARTY, JR.

APPELLANT

v.

APPEAL FROM FLEMING CIRCUIT COURT  
HONORABLE JOHN W. MCNEILL, JUDGE  
INDICTMENT NO. 02-CR-00039

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

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BEFORE: BUCKINGHAM, DYCHE, AND SCHRODER, JUDGES.

DYCHE, JUDGE: Eugene McCarty, Jr., appeals from a jury verdict finding him guilty of three counts of drug possession. McCarty argues that his conviction should be overturned because the discovery of drugs in his car by police was the result of a stop that was not supported by reasonable suspicion. He also argues that a self-incriminating statement that he made to the police after he allegedly had invoked his right to remain silent should have been suppressed. We affirm.

Randy Sergeant, a Flemingsburg police officer, pulled McCarty over very early in the morning on August 21, 2002. Sergeant had observed McCarty's vehicle speeding, crossing the center line, and driving on the shoulder. Sergeant testified that he thought the driver might be intoxicated. McCarty explained to Sergeant that he was rushing his passenger, Sue Brannen, to the hospital because she was suffering from a panic attack. Sergeant asked McCarty to take a preliminary Breathalyzer test. The test result was negative and the officer told McCarty he would follow him to the hospital (which was about 200 yards away) where he was going "to talk to him a little bit more." The officer accompanied McCarty and his companion to the hospital. When they arrived, Sergeant directed Brannen to the patients' entrance. He then asked McCarty if he was on any medication, and also asked him to step out of the vehicle in order to perform some more sobriety tests. Sergeant testified that McCarty's eyes were red and glassy, and that he seemed very tired. The officer administered the horizontal gaze test and as a result believed that McCarty was "under the influence of something." Subsequent urine tests showed neither drugs nor alcohol in McCarty's system, however. When McCarty got out of his car, Sergeant spotted a pill on the driver's seat. He picked it up and asked McCarty what it was. McCarty replied that it was a stomach pill. The officer examined the pill and

saw that it was a tablet of OxyContin. Sergeant then arrested McCarty and searched him. He found a plastic baggy in his watch pocket containing a white powder that was later proved to be cocaine. After handcuffing McCarty and placing him in his cruiser, Sergeant searched the car and found under the driver's seat a large baggy of cocaine, some empty prescription bottles, two large plastic bags containing over one hundred Fabophen pills and a set of small silver scales.

Sergeant also arrested Brannen, and then drove McCarty and Brannen to the dispatch office. When they arrived, he read McCarty his Miranda rights from a prepared card. He asked McCarty if he understood. McCarty nodded. Sergeant testified that he did not coerce, threaten, or force McCarty to talk, nor did he promise him leniency in exchange for talking. He also testified that McCarty did not seem confused, was not injured, and was not deprived of food or sleep. Sergeant asked McCarty if he wanted to talk about the drugs found in his car. McCarty responded, "there's nothing to talk about." Sergeant then asked him about the ownership of the empty prescription bottles found in the car. A lengthy interrogation ensued. The officer testified that, during the course of the questioning, McCarty stated that he "had the stuff [the drugs] to get girls."

Before his trial, McCarty made a motion to suppress his remark that he "had the stuff to get girls." The motion was

denied. McCarty was found guilty of two counts of possession of a controlled substance, in the first and second degree; and possessing prescription drugs not in a proper container. He was sentenced to five years in prison.

McCarty's first argument is that his encounter with Sergeant in the hospital parking lot that resulted in the discovery of the OxyContin pill was an illegal stop. McCarty acknowledges that the initial stop, when Sergeant pulled him over for speeding and weaving on the road, was legal because it was motivated by reasonable suspicion. He argues that once the officer had administered the Breathalyzer test and allowed him to return to his car, however, the stop was over. The subsequent stop in the hospital parking lot, he insists, was not motivated by reasonable suspicion because McCarty had already passed the Breathalyzer test and thereby dispelled Sergeant's suspicion.

McCarty acknowledges that the legality of this "second stop" was not challenged by objection or motion of trial counsel, and that therefore the issue is not properly preserved for appeal. He urges that it be considered under RCr 10.26, the rule that permits this Court to review such an unpreserved issue if it is determined that it may be a palpable error affecting the substantial rights of the party, and thereby resulting in manifest injustice. We agree with McCarty that the RCr 10.26

standard applies because the "second stop" led to the discovery of the evidence on which his conviction was based.

We are not convinced, however, that a "second stop" occurred. McCarty acknowledges that the initial stop, when Sergeant pulled him over and administered the Breathalyzer test, was legal under the standard established in Terry v. Ohio, 392 U.S. 1 (1968). Terry provides that "a police officer can subject anyone to an investigatory stop *if* he is able to point to some specific and articulable fact which, together with rational inferences from those facts, support 'a reasonable and articulable suspicion' that the person in question is engaged in illegal activity." Simpson v. Commonwealth, Ky. App., 834 S.W.2d 686, 687 (1992). We believe, however, that the stop did not end when Sergeant allowed McCarty to drive his passenger a mere 200 yards to the nearby hospital. Sergeant informed McCarty that he was going to talk to him a little bit more after his passenger was delivered to the hospital. McCarty was given absolutely no indication that he was free to leave at that point. Furthermore, there is no rule that the administration of a Breathalyzer test that provides a negative result automatically dispels a reasonable suspicion and means that a detainee is free to leave.

The U.S. Supreme Court has noted that:

[O]ur cases impose no rigid time limitation on Terry stops. While it is clear that "the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion," . . . we have emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes. . . . Much as a "bright line" rule would be desirable, in evaluating whether an investigative detention is unreasonable, common sense and ordinary human experience must govern over rigid criteria.

United States v. Sharpe, 470 U.S. 675, 685 (1985)(citations omitted). When determining whether police have detained an individual for too long, a court should consider "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly" and that "[a] court making this assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing." Id. at 686.

In this case, Sergeant held a reasonable suspicion that McCarty was under the influence of either drugs or alcohol, but he had to balance dispelling this suspicion against his concern for the condition of McCarty's passenger. He took the reasonable course of quickly administering a Breathalyzer test, then permitted McCarty to drop his passenger off at the nearby

hospital, before resuming his investigation of McCarty's condition. McCarty argues that Officer Sergent saw no evidence of wrongdoing after he released McCarty to operate the vehicle after the initial stop and Breathalyzer test. The circumstances in this case suggest, however, that the Breathalyzer did not fully dispel Sergent's reasonable suspicion that McCarty was driving under the influence of drugs or alcohol. The entire episode constituted one stop, punctuated by the short detour to the hospital. Under the circumstances, the stop was of reasonable duration. There was no palpable error, therefore, in admitting the evidence found during the search of McCarty's vehicle.

McCarty's second argument concerns the trial court's denial of his motion to suppress the statement he had made to Sergent that the reason he had "all the stuff [drugs] was to get girls." McCarty argues that he invoked his right to remain silent when he told Sergent that "there was nothing to talk about." McCarty has drawn our attention to the case of McGraw v. Holland, 257 F.3d 513 (6<sup>th</sup> Cir. 2001), in which the Sixth Circuit Court of Appeals held that the defendant's Miranda rights were violated when a detective continued to question her after she said "I don't want to talk about it." Id. at 517. McCarty argues that her statement is almost identical to his "there's nothing to talk about."

In denying McCarty's motion to suppress the statement, the trial court explained as follows:

In the first place, the Court finds that the defendant's remark "that he had nothing to say about [the drugs]" was simply an assertion that the drugs found in the car speak for themselves and there was nothing to elaborate on. Based on the testimony, there was no intent on the part of the defendant to withdraw his consent to conversation based upon his Miranda rights. Secondly, the defendant volunteered his remark about using the drugs to "get girls" inasmuch as the comment was not in response to a question. Since it was made after the Miranda warning, it is competent evidence.

We agree with the trial court's interpretation of McCarty's statement. McCarty has pointed out that "no ritualistic formula or talismanic phrase is essential in order to invoke the privilege against self-incrimination. All that is necessary is an objection stated in language that [the interrogator] may reasonably be expected to understand as an attempt to invoke the privilege." Emspak v. U.S., 349 U.S. 190, 194 (1955). In this case, however, the comment that "there was nothing to talk about" could not reasonably be expected to lead the interrogator to understand that he was asserting his right to remain silent.

McCarty further argues that Sergeant failed to observe the factors set forth in Michigan v. Mosley, 423 U.S. 96 (1975), and relied upon in Mills v. Commonwealth, Ky., 996 S.W.2d 473,

482-3 (1999)(reh'g denied) for ensuring that a police officer has honored a suspect's right to remain silent. He has cited the following passage from Mills enumerating the relevant factors:

(1) Mosley was carefully advised of his rights prior to his initial interrogation, he orally acknowledged those rights, and signed a printed notification-of-rights form; (2) the detective conducting the interrogation immediately ceased questioning Mosley after he invoked his right to remain silent and did not resume questioning or try to persuade Mosley to reconsider his decision; (3) Mosley was questioned about a different crime more than two hours later at a different location by a different officer; and (4) Mosley was given a fresh set of Miranda warnings prior to the second interrogation.

Mills at 482-83 (citation omitted).

We note that the Mills court also cautioned that "[t]he *Mosley* Court did not state that these factors were exclusive or exhaustive. Nor did it elevate any single factor above the others. Thus, we approach the *Mosley* analysis on a case-by-case basis." Id.

As to the first factor, McCarty claims that Sergeant failed to obtain a written waiver of his Miranda rights, and that McCarty nodding his head was insufficient to indicate that he understood those rights. We disagree. There is no requirement for a written waiver of Miranda rights, and nodding one's head can clearly indicate understanding and assent. As we

have already determined that McCarty did not invoke his right to remain silent when he stated that there was nothing to talk about, we disagree with McCarty that Sergeant improperly continued the questioning after he had invoked his right to remain silent. Finally, McCarty argues that Sergeant failed to satisfy the third and fourth factors of Mosley because the brief pause in questioning lasted only as long as the trip to the dispatch station. The record indicates that the Miranda warning was not administered and the questioning did not begin until after the arrival of Sergeant and his passenger at the dispatch station. Mosley stands for the proposition that if a lengthy period passes between two interrogations, the suspect must be Mirandized again prior to the second interrogation. There was no second interrogation here.

The judgment of the Fleming Circuit Court is affirmed.

ALL CONCUR.

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