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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000870-MR

JOHN HEGER

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
INDICTMENT NO. 05-CR-00003

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI AND HENRY, JUDGES; KNOPF,¹ SENIOR JUDGE.

HENRY, JUDGE: John Heger entered a conditional plea of guilty² to one count of First Degree Possession of a Controlled Substance³ and was sentenced to one year in prison, probated for five years. He appeals from the trial court's denial of his motion to suppress a quantity of cocaine seized from his person,

¹ Senior Judge William L. Knopf 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 The plea was entered pursuant to the provisions of Kentucky Rule of Criminal Procedure (RCr) 8.09.

³ Proscribed by KRS 218A.1415.

claiming that the cocaine was illegally seized because he was unlawfully detained and questioned.⁴

Heger contends that the police lacked a reasonable articulable suspicion that criminal activity was afoot within the meaning of Terry v. Ohio, 392 U.S.1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), such as would justify a brief investigative detention; and also that he was interrogated in violation of the requirements of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) prior to admitting that he had drugs on his person. Because we agree with the trial court that Heger's detention was lawful and that he was not in custody when he was questioned, we affirm.

FACTS

Late at night after concluding a domestic violence call in a high-crime area, Covington police officers saw four men including Heger near a house known for drug activity. After seeing the police, the men began walking toward the house. Ignoring the officers' repeated directions to stop, the men split up and headed around the back of the house, "walking

⁴The Commonwealth indicated in a footnote in its brief that the appealed issue is not reserved in writing, citing Lovett v. Commonwealth, 103 S.W.3d 72, 84 (Ky. 2003); but stated that the Commonwealth would nevertheless address the issue on the merits, citing Gabbard v. Commonwealth, 887 S.W.2d 547 (Ky. 1994). The Commonwealth did not otherwise address this "issue". Although there is no specific written reservation of the issue, the guilty plea form indicates that the plea is conditional and that the right to appeal is preserved. Our review of the record clearly shows that the court and counsel understood that the plea was conditional and that the court's ruling on the suppression issue would be the subject of the appeal. See Gabbard at 550.

fast." The officers rounded the men up and asked them if they had "weapons or anything on them." At that point no one was handcuffed, nor were any of the men told that they were not free to leave. The men were standing together when questioned. Heger responded that he did have something illegal on him. When asked what it was, Heger admitted that he had drugs in his right front pocket. Officer Robert Bacon then removed a package containing crack cocaine from Heger's pocket. Bacon then took Heger into custody. Bacon later learned that there was an active warrant for Heger's arrest.

Heger was indicted by the Kenton County Grand Jury on one count of Illegal Possession of a Controlled Substance, First Degree. His appointed counsel filed a motion to suppress the seized cocaine. When the motion was denied, Heger entered a conditional plea of guilty, then filed this appeal.

STANDARD OF REVIEW

In reviewing suppression orders we review the trial court's findings of fact for clear error and then review the court's application of the law to the facts *de novo*. Welch v. Commonwealth, 149 S.W.3d 407, 409 (Ky. 2004), citing Ornelas v. United States, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). As noted by the trial court, Officer Bacon's testimony pertaining to the facts of the case was undisputed. The factual findings of the trial court are supported by substantial

evidence and are not clearly erroneous. RCr 9.78; Taylor v. Commonwealth, 987 S.W.2d 302, 305 (Ky. 1999).

PROBABLE CAUSE FOR INVESTIGATIVE DETENTION

Heger and his companions were observed by the police late at night in an area known for criminal activity, near a house known to be the site of illegal drug transactions. When the police directed them to stop they split up and headed around the back of the house. The police had to tell them to stop several times before they obeyed. In a similar factual situation the United States Supreme Court found that a brief investigative detention was permissible. In Illinois v. Wardlow, 528 U.S. 119, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000), the Court held that while “[a]n individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime”, the police are “not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation.” Id. at 528 U.S. 124, 120 S.Ct. 676. Wardlow’s “unprovoked flight upon noticing the police” and his “nervous, evasive behavior” were also “pertinent factor[s] in determining reasonable suspicion.” Id. As aptly stated in Wardlow, “the determination of reasonable suspicion must be based on commonsense judgments and inferences about human

behavior." Id. at 528 U.S. 125, 120 S.Ct. 676. Just as Wardlow's unprovoked flight in a high-crime area provided sufficient justification for an investigative stop, Heger's refusal to stop and his evasive behavior justified such a stop in this case. See also Commonwealth v. Banks, 68 S.W.3d 347 (Ky. 2001).

CUSTODIAL INTERROGATION

In ruling upon Heger's suppression motion the trial court said:

The Defendant was not restrained in any physical way and was standing with others. In addition, the officer did not tell him he was detained and not free to go nor was there testimony that the defendant was (sic) threatened in any way. The Court finds that the Defendant could have exercised his right to leave and thus was not in custody as envisioned by Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), thus requiring that constitutional rights be recited to him.

In a recent case our Supreme Court unanimously held that a defendant "was not in custody for Miranda purposes simply because he was handcuffed and detained in order to prevent his flight until the investigation was completed" in a high-crime area with multiple escape routes. Taylor v. Commonwealth, 182 S.W.3d 521, 524 (Ky. 2006). While Taylor differs factually from this case because Taylor was not interrogated *per se*, it seems to us that if Taylor was not in custody while in handcuffs,

Heger was a *fortiori* not in custody under the undisputed facts related in this case. Thus, we conclude that because Heger was not in custody during his brief detention, Miranda warnings were not required, and the seized cocaine may be properly admitted in evidence. See also United States v. Foster, 376 F.3d 577 (6th Cir. 2004).

CONCLUSION

The police had a reasonable articulable suspicion of criminal activity which justified a brief investigative detention of Heger and his companions. Heger was not in custody within the meaning of Miranda when he was asked whether he "had weapons or anything" in his possession. We therefore affirm the ruling of the Kenton Circuit Court denying suppression of the cocaine seized from the defendant.

KNOPF, JUDGE, CONCURS.

GUIDUGLI, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

GUIDUGLI, JUDGE, DISSENTING. I respectfully dissent. While I believe the majority opinion correctly states the law as to non-custodial interrogations, I believe the totality of the circumstances as set forth at the suppression hearing clearly indicate that the initial stop of Heger was deficient and that he was in custody during Officer Bacon's interview. At the hearing, Officer Bacon testified that Heger was not free to leave once he began to interview the four individuals stopped.

Officer Bacon also testified that he would have stopped anyone in that area because it was known for high drug activity. The officer also admitted that he had not read Heger his Miranda warnings prior to asking him if he had anything illegal in his possession.

On appeal, Heger first contends that the initial stop violated his Fourth Amendment right to be free from unreasonable searches and seizures. Pointing to Officer Bacon's testimony that he would have stopped anyone in the area that night, Heger contends that there was no basis for the initial investigative stop. Heger claims that this statement demonstrates the absence of a reasonable and articulable suspicion, and thus the stop and detention were improper. Heger further contends that his presence in an area known for high drug activity did not support a reasonable suspicion for Bacon to conduct an investigatory stop.

I find Heger's argument persuasive. In Terry v. Ohio, the United States Supreme Court determined that an officer may, consistent with the Fourth Amendment, conduct a brief investigatory stop when the officer has a reasonable articulable suspicion that criminal activity is afoot.⁵ However, "[a]n individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable,

⁵ 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

particularized suspicion that the person is committing a crime.”⁶ Therefore, an individual’s presence in a “high crime” area may be considered as a factor among the totality of circumstances.⁷ Based on Officer Bacon’s statement that he would have stopped anyone in the area that night, it is apparent that the officers did not have a constitutional basis for stopping Heger. Four men who are in an area known for high drug activity is not enough to establish a reasonable suspicion for conducting an investigatory stop. I believe that there was no basis for the officer’s initial investigatory stop.

Heger further contends that the circuit court erred by failing to suppress the evidence obtained pursuant to his un-Mirandized interrogation by Officer Bacon. Heger claims that he was in custody when Officer Bacon began questioning him, and was therefore entitled to Miranda warnings. Because the warnings were not given before the questioning, he contends that the evidence obtained during this period should be excluded.

While the police are not required to give Miranda warnings to everyone they question, Miranda warnings must be administered when “there has been such a restriction on a

⁶ Illinois v. Wardlow, 528 U.S. 119, 124, 120 S.Ct. 673, 676, 145 L.Ed.2d 570 (2000).

⁷ Id.

person's freedom as to render him 'in custody.'"⁸ "[W]henver a police officer accosts an individual and restrains his freedom to walk away; he has 'seized' that person."⁹ The test is whether the surrounding circumstances would induce a reasonable person to believe he or she was not free to leave.¹⁰

In view of the surrounding circumstances, not only would a reasonable person believe that he or she was not free to leave, but Officer Bacon stated that Heger was not free to leave. Under the facts of this case, I conclude that Heger was in custody when Officer Bacon began questioning him. Therefore, Heger's Miranda¹¹ rights were violated. Furthermore, the circuit court's order makes it almost impossible for this Court to conclude that Heger's constitutional rights were not violated. While the majority picks a specific portion of the trial order, I believe the following statement by the trial court to be most revealing and relevant:

The Officer's statement that the Defendant "was not free to go" is alarming. These are magic words and convey a situation of "custody" and "custody" demands a protocol to ensure that a person's constitutional rights are not violated. It is also alarming that a general order would issue to

⁸ Oregon v. Mathiason, 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L.Ed.2d 714 (1977).

⁹ Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

¹⁰ United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497(1980); Baker v. Commonwealth, 5 S.W.3d 142, 145 (Ky. 1999).

¹¹ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

"stop" persons without a constitutional basis. The Court would hope this was either a misunderstanding of the police officer or that the police administration will correct such an unwarranted and unconstitutional order.

Having concluded that the stop was deficient and that Heger was in custody during Officer Bacon's interview, I believe that all evidence flowing from the stop and questioning is tainted and inadmissible. The circuit court erred in failing to grant Heger's motion to suppress. I would therefore reverse the order of the Kenton Circuit Court and remand the matter for additional proceedings.

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