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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001315-DG

COMMONWEALTH OF KENTUCKY — APPELLANT

ON DISCRETIONARY REVIEW FROM MARION CIRCUIT COURT
v. HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NO. 04-XX-00017

GABRIEL SPALDING — APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: BARBER, KNOPF, AND MINTON, JUDGES.

MINTON, JUDGE: Gabriel Spalding entered a conditional guilty plea in district court, and he was convicted of second-offense driving under the influence (DUI).[1] The circuit court reversed this conviction on appeal, holding that the district court erred by denying Spalding's motion to suppress evidence against him obtained during a traffic stop. On discretionary review, we reverse the circuit court because we believe that the circuit court erred by substituting its judgment as to the credibility of witnesses and by misapplying the law.

[1] Kentucky Revised Statutes (KRS) 189A.010 (1)(a).

Late in the evening on July 31, 2004, the dispatcher at the Lebanon Police Department received a call from an unidentified female reporting that she had heard a female screaming and there was an abandoned car on Hazy Downs Road, a narrow rural road in Marion County. Deputy Sheriff Tony Belcher drove to the area, followed at some distance by Kentucky State Police Trooper David Smith. As he approached the end of Hazy Downs Road, Deputy Belcher met a car coming from the opposite direction. As that car, driven by Spalding, passed him, Deputy Belcher radioed Trooper Smith and asked him to stop that car to inquire if the driver had any information about the abandoned car or the screaming.

Trooper Smith testified that he flagged down the approaching vehicle without activating his siren or emergency lights. Belcher testified similarly. But on cross-examination, the trooper admitted that he "could have very possibly" activated his emergency lights. And Spalding testified that Trooper Smith did, indeed, activate his lights. Regardless, all witnesses agree that as the vehicles passed on the road, the trooper stopped Spalding; that each driver rolled down their window; and that Trooper Smith asked Spalding if he had seen an abandoned vehicle in the area. Spalding gave a negative response. According to Trooper Smith, Spalding's speech was slurred and his eyes were bloodshot. So the trooper asked Spalding to step out of his vehicle, and he performed several field sobriety tests. Spalding failed those tests; and he was

charged with DUI, second offense, as well as several traffic offenses.

Spalding filed a motion to dismiss the charges, contending that Trooper Smith did not have probable cause to arrest. The district court conducted an evidentiary hearing on Spalding's motion, which it apparently deemed a motion to suppress, after which it entered a well-written order finding that Spalding's Fourth Amendment rights were not violated. Spalding then entered a conditional guilty plea to second-offense DUI, reserving his right to appeal the district court's denial of the motion to suppress. On appeal, the circuit court reversed, finding that "the information supplied by the caller lacked sufficient indicia of reliability to justify this investigatory stop." We granted the Commonwealth's motion for discretionary review. We now reverse the circuit court's decision.

KRS 23A.080 states that a final order of a district court may be appealed to the circuit court. In the exercise of its appellate jurisdiction, the scope of the circuit court's review of the district court is circumscribed by the rule that "[t]he circuit court[,] acting as an appellate court[,] cannot reevaluate the evidence or substitute its judgment as to the credibility of a witness for that of the trial court and the jury."[2] By analogy, when we review a decision on a motion to suppress, we first determine if the trial court's findings of

[2] Commonwealth v. Bivins, 740 S.W.2d 954, 956 (Ky. 1987).

fact are supported by substantial evidence. If they are, then those findings are conclusive.[3] Based on those findings, we then conduct a de novo review of the trial court's application of the law to the facts to ascertain whether the trial court's decision is correct as a matter of law.[4] Similarly, the task of the circuit court, when reviewing a district court's suppression ruling on appeal, is to determine if the district court's findings of fact are supported by substantial evidence. If they are, then those findings are conclusive. Then the circuit court must ascertain whether the district court applied the law correctly to those facts.

Spalding has consistently argued his Fourth Amendment right to be free from unreasonable searches and seizures was violated when he was stopped by Trooper Smith. But in order for the Fourth Amendment to apply, there must first be a seizure because "[t]here are three types of interaction between police and citizens: consensual encounters, temporary detentions[,] . . . and arrests. The protection against search and seizure provided by the Fourth Amendment to the United States Constitution applies only to the latter two types."[5] Our first task, then, is to determine if a seizure occurred when Trooper Smith first stopped Spalding's vehicle.

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[3] Commonwealth v. Neal, 84 S.W.3d 920, 923 (Ky.App. 2002).

[4] *Id.*

[5] Baltimore v. Commonwealth, 119 S.W.3d 532, 537 (Ky.App. 2003). *See also* Florida v. Bostick, 501 U.S. 429, 434 (1991).

Generally, "[a] police officer may approach a person, identify himself as a police officer[,] and ask a few questions without implicating the Fourth Amendment."[6] A seizure occurs "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen[.]"[7] The focus is on whether a reasonable person in the defendant's position would feel that he was not free to disregard the officer's request and terminate the encounter.[8]

In the case at hand, the district court found that no seizure occurred because a reasonable person in Spalding's position would have felt free to leave. Specifically, the district court found that "[Trooper] Smith merely extended his arm and motioned for [Spalding] to stop so that he could inquire if [Spalding] knew anything about a parked vehicle in the roadway or a female in distress. At that point, [Spalding] was still free to continue traveling." Conversely, the circuit court found that Trooper Smith "activated his lights to stop . . . [Spalding]."

We agree with the circuit court that a seizure would likely have occurred if Trooper Smith had stopped Spalding by activating his emergency lights before the stop.[9] And the record

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[6] Baltimore, 119 S.W.3d at 537.

[7] Terry v. Ohio, 392 U.S. 1, 20 (1968).

[8] Baltimore, 119 S.W.3d at 537; Bostick, 501 U.S. at 439.

[9] *See* Poe v. Commonwealth, 169 S.W.3d 54, 58 (Ky.App. 2005) ("when Officer Marszalek stopped Poe using his emergency lights he effectively seized him. That is, any reasonable person in Poe's situation would not have felt free to walk, or drive, away.").

contains conflicting testimony regarding whether Trooper Smith activated his emergency lights. But the district court, who had direct contact with the witnesses, expressly found that Trooper Smith merely extended his arm to motion for Spalding to stop. Based on the testimony in the record, the district court's finding is supported by substantial evidence, meaning that that finding was, and is, conclusive on appeal.[10] Thus, the circuit court's holding that Trooper Smith activated his emergency lights is an error because the circuit court may not substitute its evaluation of the evidence for that of the district court.

So we are faced with a situation where an officer who was responding to a call regarding an abandoned vehicle and a possible screaming female in a remote area late at night met another vehicle on the narrow road coming from the area under investigation. The officer does not activate his emergency lights, nor is there any indication that he used any indicia of authority or force (such as standing in the middle of the road waving his badge or brandishing his weapon) to get the other vehicle to stop.[11] Indeed, the vehicles passed so close to each other that Trooper Smith and Spalding each remained in his vehicle when the initial conversation took place. Under these

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[10] Neal, 84 S.W.3d at 923.

[11] *See* United States v. Mendenhall, 446 U.S. 544, 554 (1980) ("[e]xamples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be 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."); Baker v. Commonwealth, 5 S.W.3d 142, 145 (Ky. 1999).

unique facts, we do not believe that Trooper Smith seized Spalding when he flagged him down for brief questioning. Rather, this case falls under the general rule that the Fourth Amendment is not implicated if, in a public setting, an officer asks a citizen routine questions.[12]

Once Trooper Smith, hearing Spalding's slurred speech and seeing his bloodshot eyes, asked him to step out of his vehicle and to perform field sobriety tests, the consensual encounter unquestionably became a seizure.[13] But at that point, Trooper Smith had at least a reasonable suspicion to detain Spalding, based upon the trooper's own observations, under the plain view exception[14] to the general prohibition against warrantless searches and seizures. The plain view doctrine also encompasses an officer's sense of hearing.[15] When Spalding

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[12] Baltimore, 119 S.W.3d at 537.

[13] Baltimore, 119 S.W.3d at 537, n.12 ("[a] consensual encounter maybe transformed into a seizure implicating the Fourth Amendment when the detainee no longer reasonably feels at liberty to leave.").

[14] Clark v. Commonwealth, 868 S.W.2d 101, 106 (Ky.App. 1993) ("[a]s its name indicates, the 'plain view' exception validates searches and seizures when evidence is visible to the officer, provided the officer has not violated the constitution in getting to where he can view the evidence; the officer has lawful access to the object itself; and the object's incriminating character is immediately apparent.").

[15] *See, e.g.*, United States v. Williams, 822 F.2d 1174, 1183 (D.C. Cir. 1987), *overruled on other grounds by* United States v. Caballero, 936 F.2d 1292 (D.C. Cir. 1991) ("[a]nother recognized analogue of the plain view doctrine, which might be termed 'plain hearing,' is the venerable principle whereby statements overheard without the benefit of listening devices by police officers stationed at a lawful vantage point are admissible for proper purposes at trial.").

failed the field sobriety tests, then Trooper Smith clearly had probable cause to arrest Spalding.

Even if we assume, for the sake of argument, that Trooper Smith seized Spalding when he stopped his car, that stop did not violate the Fourth Amendment. When confronted with a warrantless seizure, a reviewing court must decide whether the seizure was reasonable. "Whether a seizure is reasonable requires a review of the totality of the circumstances, taking into consideration the level of police intrusion into the private matters of citizens and balancing it against the justification for such action."[16] We believe the district court properly concluded that under the facts of this case, particularly the possibility that the purported screaming indicated a female in distress, "[a]t worst, this [stop by Trooper Smith] was a very minimal intrusion of [Spalding's] privacy when balanced against the need to discover if someone's life was in danger." Thus, we agree with the district court's conclusion that Trooper Smith did not violate Spalding's Fourth Amendment rights.

For the foregoing reasons, the Marion Circuit Court's opinion is reversed; and the judgment of conviction and sentence is reinstated.

ALL CONCUR.

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[16] Baker, 5 S.W.3d at 145.

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