ELECTRONICALLY FILED
2016 Feb 25 AM 9:16
CLERK OF THE APPELLATE COURT
CASE NUMBER: 111282

No. 14-111282-A

IN THE
COURT OF APPEALS OF THE
STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs.

GERALD E. CLEVERLY
Defendant-Appellant

BRIEF OF APPELLANT

Appeal from the District Court of Butler County, Kansas
Honorable Jan Satterfield, Judge
District Court Case No. 12 CR 45

Randall L. Hodgkinson, #15279
Kansas Appellate Defender Office
Jayhawk Tower
700 Jackson, Suite 900
Topeka, Kansas 66603
(785) 296-5484
(785) 296-2869 Fax
adoservice@sbids.org
Attorney for the Appellant

Table of Contents

Nature of the Case 1

Statement of Issues 1

Statement of Facts 1

Argument and Authorities 2

Issue #1: Officers detained Mr. Cleverly without reasonable suspicion. Officers obtained consent to search Mr. Cleverly's personal effects during this illegal detention. Because the search was the fruit of an illegal detention, the district court should have suppressed the results of that search. 2

State v. Woolverton, 284 Kan. 59, 159 P.3d 985 (2007) 2
State v. Porting, 281 Kan. 320, 130 P.3d 1173 (2006). 3
State v. Coleman, 292 Kan. 813, 257 P.3d 320 (2011). 3
Terry v. Ohio, 392 U.S. 1 (1968). 3
Florida v. Royer, 460 U.S. 491 (1983). 3
State v. DeMarco, 263 Kan. 727, 952 P.2d 1276 (1998) 3
United States v. Garcia, 459 F.3d 1059 (10th Cir.2006). 4
State v. Hogan, 45 Kan. App. 2d 715, 252 P.3d 627 (2011) 5
State v. Thompson, 284 Kan. 763, 166 P.3d 1015 (2007) 5
State v. Smith, 286 Kan. 402, 184 P.3d 890 (2008) 6
State v. Wendler, 47 Kan. App. 2d 182, 274 P.3d 30 (2012) 6
State v. Hayes, 35 Kan. App. 2d 616, 133 P.3d 146 (2006). 6
State v. Reno, 260 Kan. 117, 918 P.2d 1235 (1996) 7

Conclusion 7

Nature of the Case

After a bench trial on stipulated facts, the district court convicted Gerald Cleverly of possession of methamphetamine. The district court imposed a fifteen-month prison sentence and granted probation. This is Mr. Cleverly's direct appeal from conviction.

Statement of Issues

Issue #1: **Officers detained Mr. Cleverly without reasonable suspicion. Officers obtained consent to search Mr. Cleverly's personal effects during this illegal detention. Because the search was the fruit of an illegal detention, the district court should have suppressed the results of that search.**

Statement of Facts

Officer Buckley stopped a car driven by Chris Jones at approximately 1:15 a.m. for failure to wear seat belts. (R.1, 26). Officer Buckley asked for consent to search the car, and Gerald Cleverly, the passenger, was asked to step out of the car. (R.1, 26). Officer Humig patted down Mr. Cleverly, found no weapons or contraband, and then told Mr. Cleverly to wait at the front of the car until the search was over. (R.1, 26). While waiting, Mr. Cleverly asked to make a phone call, but officers refused permission. (R.5, 44-45). Officers found suspicious items in the car for which the driver was charged. (R.1, 26; R.5, 31). Officers again searched Mr. Cleverly's person finding nothing. (R.5, 34). Officers then asked to search a cigarette pack and discovered a small amount of methamphetamine. (R.1, 26).

The state charged Mr. Cleverly with one count of possession of methamphetamine. (R.1, 4). After the district court denied Mr. Cleverly's motion to suppress evidence, the parties submitted the matter for a bench trial on stipulated facts; and the district court convicted Mr. Cleverly of possession of methamphetamine. (R.1,

26-27). The district court imposed a fifteen-month prison sentence and granted probation. (R.1, 29). Mr. Cleverly filed a timely direct appeal. (R.1, 28).

Argument and Authorities

Issue #1: Officers detained Mr. Cleverly without reasonable suspicion. Officers obtained consent to search Mr. Cleverly's personal effects during this illegal detention. Because the search was the fruit of an illegal detention, the district court should have suppressed the results of that search.

Reviewability

Mr. Cleverly filed a motion to suppress "the results of the search of Mr. Cleverly's person and property." (R.1, 20). Specifically, the motion to suppress noted that the search of Mr. Cleverly's property in this case violated the Fourth Amendment because it took place without a warrant and that "the detention was illegal, as there was no reasonable suspicion to justify the detention." (R.1, 21-23). After an evidentiary hearing, the district court denied the motion to suppress. (R.5, 80). Both in the written stipulation of facts and on the record during the bench trial on stipulated facts, defense counsel renewed the objections based on the suppression motions. (R.1, 26; R.6, 4). Therefore, this issue is properly before this Court.

Standard of Review

Appellate courts apply a bifurcated standard of review to the district court's decision on a motion to suppress evidence. Without reweighing the evidence, appellate courts review the district court's findings to determine whether they are supported by substantial competent evidence. The ultimate legal conclusion regarding the suppression of evidence is reviewed using a de novo standard. *State v. Woolverton*, 284 Kan. 59, 70, 159 P.3d 985 (2007). When the material facts are undisputed, the question of whether to

suppress is a question of law over which appellate courts have unlimited review. *State v. Porting*, 281 Kan. 320, 324, 130 P.3d 1173 (2006).

In this case, the material facts are undisputed. The only questions before this Court are questions of law related to the lawfulness of the extended detention and resultant validity of any consent. "Whether reasonable suspicion exists is a question of law and is reviewed de novo." *State v. Coleman*, 292 Kan. 813, Syl. ¶ 4, 257 P.3d 320 (2011).

Under the Fourth Amendment, the reasonableness of an investigative detention is governed under the principles announced in *Terry v. Ohio*, 392 U.S. 1, 19-20 (1968). Even if the stop in this case was justified in its inception, the officer's actions during the detention must be reasonably related to the circumstances which justified the detention in the first place. *Terry,* 392 U.S. at 20. To satisfy this requirement the state has the burden to prove that an investigative detention is limited in both scope and duration to the extent justified by the detention's justification. *Florida v. Royer*, 460 U.S. 491, 500 (1983). "An investigative detention must last no longer than is necessary to effectuate the purpose of the stop," *State v. DeMarco*, 263 Kan. 727, 734, 952 P.2d 1276 (1998), and "the investigative methods employed should be the least intrusive means reasonably available in a short period of time." *Royer*, 460 U.S. at 500.

Illegal pat down

In this case, Officer Buckley conducted a traffic stop for failure to wear seat belts. (R.5, 14). When Officer Humig arrived to back up, he saw Buckley in contact with the driver. (R.5, 26). Buckley asked Humig to get identification from Mr. Cleverly to facilitate giving him a seat belt ticket. (R.5, 27). After Humig confirmed Mr. Cleverly's

identification, he learned that Mr. Cleverly did not have any warrants or wants. (R.5, 28). Buckley then asked the driver for permission to search the car, and upon obtaining consent, asked Mr. Cleverly to get out of the car. (R.5, 29).

Upon getting out of the vehicle, Humig conducted a pat-down search of Mr. Cleverly. (R.5, 30). His only reason for patting-down Mr. Cleverly was that he had an untucked shirt and, therefore, couldn't see his waistband. (R.5, 30, 41).

"During an investigative detention, '[p]olice officers are authorized to take reasonable steps necessary to secure their safety and maintain the status quo.' " *United States v. Garcia*, 459 F.3d 1059, 1063 (10th Cir.2006). "In some circumstances," an officer may go further and conduct a pat-down search for weapons. *Garcia*, 459 F.3d at 1063. "The purpose of the limited pat-down search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence." 459 F.3d at 1063. An officer may conduct a pat-down search "if he or she harbors an articulable and reasonable suspicion that the person is armed and dangerous." *Garcia,* 459 F.3d at 1064(quotations omitted).

In the instant case, Officer Humig's only justification for patting down Mr. Cleverly was that he could not see Mr. Cleverly's waistband. He did not see any bulges. (R.5, 42-43). He did not have any articulable suspicion that Mr. Cleverly had a weapon. As a result, the pat-down search was illegal and began an illegal interaction with Mr. Cleverly that ultimately resulted in the search of his cigarette packages.

Continued detention

Officer Humig did not find anything as a result of the illegal pat-down, but continued to detain Mr. Cleverly. After the driver consented to a search of the car,

Humig directed Mr. Cleverly to go to the front of the car and wait. (R.5, 44). At one point, Mr. Cleverly asked to make a phone call with his cell phone, but Humig denied permission until "we're done searching." (R.5, 44-45).

> Law enforcement officers are justified to detain a motorist for a traffic stop long enough to request the driver's license and vehicle registration (and proof of insurance), conduct a computer check on the driver's and automobile's information, and issue any citations. If no additional information providing reasonable suspicion is discovered during the course of the traffic stop, law enforcement must permit the motorist to leave without further delay. Thereafter, continued interaction between the motorist and law enforcement may only be justified by a consensual encounter.
>
> > "When it is alleged an investigatory traffic stop has turned into a consensual encounter, potential issues arise regarding the legality of: (1) the initial stop, i.e., whether the law enforcement officer's action was justified at its inception; (2) the detention, i.e., whether the length and scope of the detention were reasonably related in scope to the circumstances which justified the interference in the first place; and (3) the continuation of the encounter beyond the point in time when the purpose of the traffic stop was fulfilled, i.e., whether the continuation was consensual or the officer gained a reasonable and articulable suspicion of illegal activity."
>
> Whether an encounter between an individual and law enforcement may be properly viewed as a consensual encounter turns on whether the law enforcement officer's conduct, viewed within the totality of the circumstances, would have permitted a reasonable person to feel free to refuse the requests of law enforcement or otherwise terminate the encounter. Remembering that the determination whether a reasonable person would have felt free to terminate the encounter is fact driven, no list of factors is exhaustive or exclusive. And, no one factor can be legally dispositive. [*State v. Hogan*, 45 Kan. App. 2d 715, 721-22, 252 P.3d 627 (2011)(quoting *State v. Thompson*, 284 Kan. 763, Syl. ¶ 5, 166 P.3d 1015 (2007))].

A reasonable person in Mr. Cleverly's position would not have felt free to leave. He had been directed by an officer to wait in a certain place, and the officer had restricted his freedom to even make a simple phone call using his own phone. Mr. Cleverly was detained without reasonable suspicion.

Consent during an illegal detention

Although Buckley found suspicious items in the car, Humig testified that he could not point to any evidence that Mr. Cleverly had any knowledge of those items. (R.5, 47). It was at this point that Humig asked for permission to fully search Mr. Cleverly's person, which also resulted in finding no weapons or drugs. (R.5, 48, 50). At this point, Humig did not have any reasonable suspicion that would justify any continued detention. But instead of allowing Mr. Cleverly to go on his way, Humig asked for permission to search Mr. Cleverly's property, which ultimately uncovered the small amount of methamphetamine that is the subject of this case. (R.5, 50). Humig never gave Mr. Cleverly a ticket for failure to wear a seat belt. (R.5, 50).

> "An unconstitutional seizure may infect or taint the consent to search as well as any fruits of the encounter if the nature of the seizure renders the consent to search involuntary. [Citations omitted.] Conversely, a voluntary consent to search can purge the primary taint of an illegal seizure where the connection between the lawless conduct of law enforcement officers and the discovery of the challenged evidence has become so attenuated as to dissipate the taint. [Citations omitted.]" [*State v. Smith*, 286 Kan. 402, 419, 184 P.3d 890 (2008)(quoted in *State v. Wendler*, 47 Kan. App. 2d 182, 201, 274 P.3d 30 (2012))].

"Factors to be considered in determining whether consent purged the taint of an illegal detention are the proximity in time of the Fourth Amendment violation and the consent, intervening circumstances, and particularly the purpose and flagrancy of the officer's misconduct." *State v. Hayes*, 35 Kan. App. 2d 616, Syl. ¶ 11, 133 P.3d 146 (2006).

In the instant case, Mr. Cleverly was still being illegally detained at the time of the consent to search his person and then his property. Mr. Cleverly had been subjected to an unsupported pat-down search. He had been illegally detained and restricted during a consent search, including refusal to allow him to make a phone call. He was then asked

to search his person more thoroughly still resulting in no findings of drugs or weapons. Although the officer did not have suspicion that Mr. Cleverly had anything to do with the items found in the car and had found nothing on his person, he still would not allow Mr. Cleverly to go about his business. The record does not support a finding of any break or intervening circumstances that would purge the taint of the illegal detention at the point that Mr. Cleverly was asked for consent to search his property.

Because Officer Humig obtained consent from Mr. Cleverly to search his property during an illegal detention, the search was itself the fruit of that illegal detention and the district court erred by failing to suppress the evidence. *See State v. Reno*, 260 Kan. 117, 129, 918 P.2d 1235 (1996)(unlawful search taints the evidence under the fruit of the poisonous tree doctrine).

Conclusion

Because the officer illegally detained Mr. Cleverly, the resultant search violated the Fourth Amendment and the district court should have suppressed the fruits of that search.

Respectfully submitted,

/s/ Randall L. Hodgkinson
Randall L. Hodgkinson, #15279
Kansas Appellate Defender Office
Jayhawk Tower
700 Jackson, Suite 900
Topeka, Kansas 66603
(785) 296-5484
(785) 296-2869 Fax
adoservice@sbids.org
Attorney for Appellant

Certificate of Service

The undersigned hereby certifies that service of the above and foregoing brief was made by mailing two copies, postage prepaid, to Darrin Devinney, Butler County Attorney, 201 West Pine, Suite 104, El Dorado, KS 67042; and by e-mailing a copy to Derek Schmidt, Attorney General, at ksagappealsoffice@ag.ks.gov on the 24 day of November, 2014.

/s/ Randall L. Hodgkinson
Randall L. Hodgkinson, #15279