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Commonwealth v. Miller

COMMONWEALTH OF PENNSYLVANIA v. KENNETH L. MILLER, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Criminal Action No. 1150-2002

Investigative Detention, Mere Encounter, Objective Circumstances; Witnesses, Credibility

1. An investigative detention becomes a mere encounter when the objective circumstances demonstrate to a reasonable citizen that he is no longer subject to domination by the police.
2. The factors to consider when evaluating the objective circumstances include the number of police officers present at the scene, the physical contact between the police officers and the defendant, the existence and character of the initial investigative detention, the demeanor of the police officers, the location of the confrontation, the manner of expression used by the officers in addressing the citizen and the content of the interrogatories.
3. Evidence that Trooper Trees did not act aggressively, did not threaten Mr. Barlow, did not draw his weapon, never raised his voice, never made physical contact with Mr. Barlow or the defendant, informed them that they were free to go, and that his demeanor was professional demonstrate that Mr. Barlow and the defendant were no longer subject to domination by the police.
4. The number of times a suspect is asked about the content of his vehicle is a factor that should be considered by the Court when it determines the coercive nature of the conversation.
5. The Court cannot determine the credibility of a witness by a blanket test of who will lose the most by falsely testifying.
6. The Commonwealth must establish a clear, identifiable endpoint to the first encounter before the second encounter begins.

Appearances:

John F. Nelson, Esq., *District Attorney*

Andrew J. Benchoff, Esq., *Counsel for Defendant*

OPINION

Walker, P.J., March 14, 2003

Factual Summary

On November 14, 2002, Defendant Kenneth Miller filed a motion to suppress evidence seized by Trooper Trees of the Pennsylvania State Police, stemming from a traffic stop conducted by Trooper Trees on or about February 23, 2002.

Defendant Miller is charged with one count of possession of a small amount of marijuana for personal use and one count of possession of paraphernalia stemming from a traffic stop.[1] During the stop, Trooper Trees collected the necessary driver's information from Mr. Barlow, the driver of the vehicle in which the defendant was riding. After Trooper Trees checked Mr. Barlow's information, he went back to the

vehicle.[2] Upon returning to the vehicle, he smelled an odor of marijuana emanating from the vehicle. He returned Mr. Barlow's paperwork and stated to Mr. Barlow, "be careful and go ahead and take off." He paused and then asked Mr. Barlow if there was anything illegal in the vehicle. It is at this point that the defendant and the Commonwealth disagree as to what happened.

The Commonwealth argued that Mr. Barlow responded to Trooper Trees' question by stating that there was nothing illegal in the vehicle and Trooper Trees could check for himself. The defendant argues that the Trooper Trees asked if he could search the vehicle, for which Mr. Barlow never responded.

The defendant also argued that although Trooper Trees informed him that he was free to go, Mr. Barlow and he did not reasonably feel free to go because Trooper Trees had his hands on their vehicle. Defendant Miller also argued that he did not feel free to go because he was trapped in Mr. Barlow's vehicle, Trooper Trees was standing too close to the vehicle and Trooper Trees kept asking them questions. For these reasons, Defendant Miller argued that the Court should grant his motion to suppress the evidence seized by Trooper Trees on February 23, 2002.

A hearing was conducted on January 6, 2003 on this matter. At the hearing, the Court heard testimony from Trooper Trees and Kevin Barlow. Trooper Trees testified that Mr. Barlow voluntarily consented to the search of his vehicle. He testified that when he asked Mr. Barlow if there was anything illegal in the vehicle, Mr. Barlow responded that "there was not anything illegal in their vehicle, and he (Trooper Trees) could search the vehicle to see for himself." Trooper Trees asked Mr. Barlow and Defendant Miller to step out of the vehicle. As a result of the search, Trooper Trees found the marijuana and paraphernalia and charged Defendant Miller with the above stated charges.

Trooper Trees also testified that both Mr. Barlow and Defendant Miller were extremely nervous after he returned Mr. Barlow's driver's information. He stated that their hands were trembling. In addition, upon approaching the vehicle, he sensed a strong odor of marijuana emanating from the vehicle. For these reasons, Trooper Trees asked Mr. Barlow if there was anything illegal in the vehicle. Trooper Trees also testified that he purposefully waited to ask the question of illegality until after Mr. Barlow was informed that he was free to go because he wanted to win in Court.

Mr. Barlow testified that he never gave consent to the search because he was never asked to consent by Trooper Trees. Mr. Barlow also testified that when Trooper Trees stated that they were free to go, he had his hands on the window sill of their vehicle. Consequently, they did not feel that they were free to go.

At the conclusion of the hearing, the Court asked both parties to submit letter briefs in support of their respective positions within two weeks. Both parties timely submitted their letter briefs.

The Court has reviewed the evidence, the defendant's motion to suppress, the defendant's brief in support of his motion to suppress, the defendant's letter brief to the Court dated January 17, 2003, the Commonwealth's letter brief to the Court dated January 10, 2003, and the applicable law.

This opinion and order result from such review.

Discussion

Under Rule 581 of the Pennsylvania Rules of Criminal Procedure, the defendant may make a motion to the court to suppress any evidence alleged to have been obtained in violation of the defendant's rights. Pa. R. Crim. P. 581(a). Upon the filing of the motion, the Court shall fix a time for hearing, which the Court established as January 6, 2003 in this matter. Pa. R. Crim. P. 581(E). At the hearing, the Commonwealth bears the burden of establishing that the challenged evidence was not obtained in violation of the defendant's rights. Pa. R. Crim. P. 581(H).

Defendant Miller properly filed his motion to suppress under Rule 578 of the Pennsylvania Rules of Criminal Procedure. In his motion, Defendant Miller argued that Trooper Trees violated his rights when Trooper Trees conducted a warrantless search of Mr. Barlow's vehicle. Defendant Miller's motion to suppress, at ¶ 3 (hereinafter, "Miller"). Defendant Miller maintained that Trooper Trees' conduct was unlawful and in violation of Defendant Miller's rights under the Fourteenth Amendment of the United States Constitution and Article 8, Section 8 of the Pennsylvania Constitution. Miller, at ¶ 3. Defendant Miller also maintained that consent obtained from Mr. Barlow "was a result of an illegal seizure or detention because there existed no reasonable suspicion or probable cause to detain Mr. Barlow." Miller, at ¶ 3.

For these reasons, Defendant Miller asks this Court to suppress all evidence obtained by Trooper Trees, as a result of the search.

Defendant Miller's contentions present two issues before the Court: (1) Whether the conversation

between Trooper Trees and Mr. Barlow, after Trooper Trees told Mr. Barlow that he was "free to go," remained part of the initial investigative detention or was it a mere encounter; and (2) Whether Trooper Trees had valid consent to search Mr. Barlow's vehicle. The Commonwealth bears the burden of establishing that the conversation became a mere encounter and Trooper Trees had valid consent from Mr. Barlow.

An investigative detention becomes a mere encounter when the objective circumstances demonstrate to a reasonable citizen that he is no longer subject to domination by the police. Commonwealth v. Strickler, 757 A.2d 884, 889 563 Pa. 47, 74 (Pa. 2000). In Strickler, the Supreme Court of Pennsylvania adopted several factors to consider when evaluating the objective circumstances. Factors include the number of police officers present at the scene, the physical contact between the police officers and the defendant, the existence and character of the initial investigative detention, the demeanor of the police officers, the location of the confrontation, the manner of expression used by the officers in addressing the citizen and the content of the interrogatories. See Strickler, 757 A.2d at 897, 563 Pa. at 72, where the Pennsylvania Supreme Court adopted the factors enomored in Ohio v. Robinette, 519 U.S. 33, 117 S.Ct. 417 (1996) (Robinette II).[3]

At the hearing, the Commonwealth established that Trooper Trees did not act aggressively, he did not threaten Mr. Barlow, he did not draw his weapon, he never raised his voice, he never made physical contact with Mr. Barlow or the defendant, and his demeanor was professional.

The officer, however, did nothing following the actual endpoint of the lawful detention that would independently suggest that his subsequent requests were to be viewed as directives: The "excesses" factors emphasized in United States Supreme Court jurisprudence remained absent; the officer did not touch Strickler or direct his movements; there is no evidence of any coercive language or tone by the officer. Strickler, 757 A.2d at 900, 563 Pa. at 77.

The same could be said as to Trooper Trees' conduct in case at bar. As such, the Commonwealth has established under the factors set forth in Strickler that initial investigative detention ended and a mere encounter began at the time Trooper Trees asked Mr. Barlow if there was anything illegal in the vehicle.

The defendant argues that the Strickler case is distinguishable from the case at bar. First, Mr. Barlow and Defendant Miller were detained in their vehicle while the defendant in Strickler was outside the vehicle. The defendant concludes that the defendant in Strickler was able to move about more freely. As such, Defendant Miller did not reasonably feel that he was no longer subject to domination by the police.

The Court does not come to the same conclusion. Trooper Trees informed Mr. Barlow and the defendant that they were free to go. He told them to be careful pulling out. He returned Mr. Barlow's driver's information. The objective circumstances clearly indicate that they were free to go. In addition, while the defendant in Strickler was outside the vehicle, Mr. Barlow was in his vehicle and had the ability to drive away, as per Trooper Trees' instructions. The defendant in Strickler had to return to his vehicle before leaving the scene. Consequently, Mr. Barlow and Defendant Miller should have felt more free to leave than the defendant in Strickler.

The defendant next argues that the officer in Strickler only asked Mr. Strickler whether he had anything illegal in the vehicle once while Trooper Trees asked Mr. Barlow twice.[4] The defendant maintains that Mr. Barlow answered in the negative on both occasions, and he would remember better than Trooper Trees because Trooper Trees performs numerous traffic stops in a given week. Trooper Trees testified that he only asked Mr. Barlow if there was anything illegal in the vehicle once.

The testimony of Trooper Trees and Mr. Barlow are in apparent conflict. In essence, the defendant and the Commonwealth ask this Court to determine the credibility of Trooper Trees and Mr. Barlow. The defendant maintains that Mr. Barlow's testimony is more credible because he has a better memory. The Commonwealth maintains that Trooper Trees' testimony is more credible because "it is beyond logic that Trooper Trees would jeopardize his career by falsely testifying under oath." Commonwealth's letter brief to the Court, dated January 10, 2003, at 3.

In the Court's experience, however, it would not be the first time that an officer stretched the truth in order to convict a suspect. As a result, the Court cannot determine the credibility of a witness by a "blanket test of who will lose the most by falsely testifying." What may be better for the Court is to look at all the facts and circumstances of each witness' testimony.

With that said, the Court has no doubt that Trooper Trees' testimony is more credible than Mr. Barlow's testimony. Mr. Barlow's testimony seemed inconsistent. For instance, Mr. Barlow testified that he was stopped for pulling out in front of another vehicle. In actuality, he was stopped for failing to stop at a posted stop sign. In fact, later on in his testimony, he stated that they were stopped for failing to stop at a

posted stop sign. There is no question by Defendant Miller about the legality of the traffic stop. In addition, Mr. Barlow testified that Trooper Trees kept his hands on the window sill of the vehicle. This just does not make sense. Trooper Trees would not risk his safety or the safety of his partner, Trooper Finkle, by placing his hands inside a vehicle with unknown contents.

Finally, Mr. Barlow stated that Trooper Trees never asked him whether he (Trooper Trees) could search the vehicle, Trooper Trees just did it. Later in his testimony, Mr. Barlow stated that Trooper Trees asked if he (Mr. Barlow) would consent to a search. Again, his statements later in his testimony directly contradict what he stated earlier in his testimony. As such, the Court is more ready to believe the testimony of Trooper Trees than Mr. Barlow's conflicting testimony. As a result, the Court finds that Trooper Trees asked Mr. Barlow whether he had anything illegal in the vehicle once.

The defendant next argues that there was no break between the investigative detention and the second encounter. To support this contention, the defendant points out that the officer in Strickler walked away from the defendant and then asked the question. Here, Trooper Trees paused briefly before asking Mr. Barlow whether there was anything illegal in the vehicle. The failure to break between the encounter further evidences that coercive nature of the second encounter.

The Court in Strickler did not establish a bright-line rule about the amount of time that should elapse between the initial investigative detention and the second encounter. The Supreme Court declared that while the admonition to a motorist that he is free to leave is not a constitutional imperative, "the presence or absence of such a clear, identified endpoint to a lawful seizure remains a significant salient factor in the totality assessment." Strickler, 757 A.2d at 899, 563, Pa. 74.

The Court is hard pressed to declare a bright-line about the amount of time that should elapse between the initial investigative detention and the second encounter. Too many cases would fail or pass without looking at the totality of the circumstances. To be sure, the Court is better off declaring that the Commonwealth must establish a clear, identifiable endpoint to the first encounter before the second encounter begins.

Trooper Trees testified, which Mr. Barlow admits, that he told Mr. Barlow and the defendant that they were free to go and be careful pulling out.[5] Trooper Trees paused briefly before asking whether there was anything illegal in the vehicle. The objective circumstances surely indicate a break between the initial investigative detention and the second encounter. The Commonwealth has established that there was a clear, identifiable endpoint to the first encounter before Trooper Trees asked if there was anything illegal in the vehicle.

As to the second issue presented to the Court, the Commonwealth has established that the consent to search the vehicle was valid. Trooper Trees merely asked whether there was anything illegal in the vehicle, for which Mr. Barlow responded in the negative and volunteered "that he (Trooper Trees) could search the vehicle to see for himself." Consequently, the defendant's arguments raised in Commonwealth v. Perry, No. 185 of 2000, slip. op. (C.P. Franklin, April 19, 2000) (J. Herman), and Commonwealth v. Sierra, 723 A.2d 644 (Pa. 1999) do not apply.

For the reasons stated above, Defendant Miller's motion to suppress the evidence seized by Trooper Trees is denied.

Conclusion

After reviewing the evidence, the defendant's motion to suppress, the defendant's brief in support of his motion to suppress, the defendant's letter brief to the Court dated January 17, 2003, the Commonwealth's letter brief to the Court dated January 10, 2003, and the applicable law, the Court finds that Trooper Trees' question about whether there was anything illegal in the vehicle was a part of a mere encounter because there was a clear, identifiable endpoint to the initial investigative detention.

As a result, Defendant Miller's motion to suppress the evidence seized by Trooper Trees is denied.

ORDER OF COURT

March 14, 2003, after reviewing the evidence, the defendant's motion to suppress, the defendant's brief in support of his motion to suppress, the defendant's letter brief to the Court dated January 17, 2003, the Commonwealth's letter brief to the Court dated January 10, 2003, and the applicable law, the Court finds that Trooper Trees' question about whether there was anything illegal in the vehicle was a part of a mere encounter because there was a clear, identifiable endpoint to the initial investigative detention.

Defendant Miller's motion to suppress the evidence seized by Trooper Trees is DENIED.

[1] Defendant Miller does not contest the validity of the traffic stop. Michael Barlow was stopped based on a violation of the Pennsylvania Motor Vehicle Code for failing to stop at a posted stop sign. Defendant Miller was a passenger in the vehicle Mr. Barlow was driving. For the purposes of this Order, the traffic stop conducted by Trooper Trees is considered valid. Trooper Trees did not issue a citation for failing to stop at a posted stop sign. Instead, Trooper Trees issued a warning.

[2] Trooper Finkle was also present at the scene while Trooper Trees conducted the traffic stop. It is the Court's believe, based upon the testimony presented at the hearing, that Trooper Finkle did not directly participate in the traffic stop, or the subsequent search of Mr. Barlow's vehicle.

[3] The Ohio Court concluded on remand, based upon factors detailed in Robinette II, that the defendant in Robinette did not give voluntary consent and suppressed the evidence seized. State v. Robinette, 685 N.E.2d. 762 (1997).

[4] The Court does not, by any means, declare that an officer's asking more than once about the illegal contents of a vehicle automatically equal coercion. Instead, the number of times a suspect is asked is a factor that should be consider by the Court when it determines the coercive nature of the conversation.

[5] It is interesting to note that the officer in Strickler failed to advise the defendant that he was free to go. The Court found that the officer's turning away from the defendant prior to reinitiating contact suggested that Mr. Strickler was free to leave. Here, we have a clear, cognizable admonition by Trooper Trees that the defendant was free to leave.