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Commonwealth v. Shively

COMMONWEALTH OF PENNSYLVANIA v. MICHAEL GLENN SHIVELY, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,

Franklin County Branch
Criminal Action, No. 288 of 2002

Motion to suppress evidence of intoxication

1. A police officer may detain a citizen only where he has reasonable and articulable grounds to believe that the citizen is engaged in criminal activity.
2. A police-citizen encounter becomes an investigative detention or seizure requiring reasonable suspicion or probable cause once the police's actions are such that a reasonable citizen would not believe he or she is free to leave the scene.
3. The court must consider all the surrounding circumstances in determining whether a reasonable citizen would feel free to leave the police's presence and/or decline to answer questions or provide information.
4. Where two police officers approached a vehicle idling in a parking lot and were eventually able to rouse the driver who was slumped in his seat, and then detected signs of intoxication once the driver regained consciousness, prompting them to direct him to step from the vehicle, the encounter did not rise to the level of an investigative detention or seizure simply because the officers initially surrounded the vehicle and banged on the window for several minutes as they tried to determine whether the driver was dead, alive, or in need of medication attention.

Appearances:

Todd R. Williams, *Esq.*, Assistant District Attorney

Patrick J. Redding, *Esq.* Counsel for Defendant

MEMORANDUM OF DECISION

Herman, J., August 7, 2002

Introduction

The defendant in this driving under the influence prosecution has filed with the court a motion to suppress evidence of his intoxication. He argues the trooper conducting the investigation detained him without reasonable suspicion or probable cause and therefore the evidence subsequently obtained should be suppressed. The Commonwealth takes the position that no seizure occurred and the evidence was properly obtained pursuant to a lawful police-citizen encounter. The court held a hearing on defendant's motion on July 2, 2002 and subsequently considered the written arguments of counsel. The matter is now ready for decision.

Summary of the Evidence

On November 7th, 2001 Trooper Craig Finkle was dispatched to the Sunoco station located at the intersection of state routes 997 and 30 in Franklin County. He was sent to investigate a report from the sole female employee of the Sunoco station that a "suspicious" vehicle was located on the premises. The

dispatch contained information that the vehicle was a truck and had been at the Sunoco station parking lot earlier but departed and then returned. The trooper was aware that this Sunoco station had been the victim of a robbery just one week prior.

Trooper Finkle testified that he arrived at the Sunoco station about 1:00 A.M. along with another trooper both of whom were in full uniform. He observed one truck in the parking lot and pulled his marked car alongside the driver's side of the truck. Trooper Finkle testified the truck had its headlights on and the engine was running. He approached the driver's side window and the other trooper went to the passenger side. The lone occupant was in the driver's seat slouched down in the seat. The trooper thought the occupant was sleeping or passed out but he could not tell if he was alive or dead.

At this point Trooper Finkle testified he began knocking on the driver's side door with his knuckles in an attempt to get the driver's attention. The other trooper remained at the passenger side door. As the occupant of the vehicle was nonresponsive to this point, Trooper Finkle began to yell in what he described as a loud voice. After about three minutes he was able to arouse the occupant of the car who then attempted to open the window of the truck but was unable to figure out how to operate the window. The occupant finally opened the door and Trooper Finkle asked him if he was O.K. The occupant responded that he was and he was just resting.

It was at this point Trooper Finkle smelled the odor of alcohol and noticed the defendant was unsteady in that he was swaying side to side in his seat. The trooper also observed that the defendant was slurring his words "real bad" and he had trouble understanding the defendant. Trooper Finkle testified he then asked the defendant to step from the vehicle.

Discussion of the Evidence and the Applicable Law

The defendant argues that Trooper Finkle's actions amounted to an investigative detention which was unlawful because it was not supported by sufficient information that criminal activity was afoot. Specifically it is argued that a detention occurred during the trooper's encounter with the defendant and therefore any evidence developed by this encounter should be suppressed. While we agree with the defendant that initially Trooper Finkle did not have sufficient information that criminal activity was ongoing, eventually sufficient evidence of intoxication developed such that it would support an investigative detention. The question is: did this evidence develop subsequent to a detention or before? The defendant seems to argue that he was seized at the moment the troopers arrived. He argues he was "surrounded" by two troopers and a police cruiser and one of the troopers was banging on his window and yelling. These actions, he claims, were sufficient to cause a reasonable person to believe he or she was under the control of the troopers and not free to leave. For the reasons that follow we disagree.

Under the United States Constitution and the Pennsylvania Constitution police officers are permitted to make inquiries of citizens in public places as long as the reasonable citizen understands that he or she is not required to cooperate. A police-citizen encounter violates constitutional provisions when the police officer, by the use of physical force or some display of authority, restrains the liberty of a citizen. Such restraints are constitutionally permissible only when the police officer has reasonable and articulable suspicion that the citizen is engaging in criminal activity. As noted, in this case, the troopers did not have reasonable suspicion or probable cause when they arrived but the defendant was ultimately detained. The critical determination is when did the seizure occur?

In Commonwealth v. Boswell, 721 A.2d 336 (Pa. 1997), the Pennsylvania Supreme Court applied the following well known objective test in determining when a seizure has occurred:

To decide whether a seizure has occurred, we apply the following objective test: "a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." Bostick, 501 U.S. at 439, 111 S.Ct. 2382. In applying this test, it is necessary to examine the nature of the encounter. Commonwealth v. Lewis, 535 Pa. 501, 508, 636 A.2d 619, 623 (1994). Circumstances to consider include, but are not limited to, the following: the number of officers present during the interaction; whether the officer informs the citizen they are suspected of criminal activity; the officer's demeanor and tone of voice; the location and timing of the interaction; the visible presence of weapons on the officer; and the questions asked. Terry v. Ohio, *supra*; Jermaine, 399 Pa.Super. at 508-509, 582 A.2d at 1060-61. See also United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). "[O]therwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person."

Mendenhall, at 555, 100 S.Ct. 1870.

Boswell, at 340.

Applying this analysis to the instant case causes the court to conclude that the defendant was detained when he was asked to step from the vehicle. It was not until then that he could have reasonably believed he was being detained and could not leave. Trooper Finkle's subjective intentions, stated at the suppression hearing, are of no moment since he did not advise the defendant at the time of the stop that the defendant was going to be detained until the trooper "made sure what was going on." To say that a detention occurred prior to the time the defendant was asked to step from the vehicle would effectively eliminate police-citizen encounters. The troopers' actions to that point were consistent with a noncoercive request for information and routine check on the well-being of a citizen. The evidence shows that the defendant was not aware of the presence of the troopers or their car until he awoke. At that time he attempted to communicate with them, first by opening the window, then the door of the car. It was at that moment Trooper Finkle observed the evidence of intoxication which gave rise to reasonable suspicion. The police car was not blocking the defendant's car and the troopers did not attempt to restrain the defendant in any way until he was asked to get out of the car. By that time they had the odor of alcohol and the other indicia of intoxication. Immediately thereafter Trooper Finkle detained the defendant by asking him to get out of the car. To say that the presence of a police vehicle and uniformed officers who are attempting to arouse a sleeping or intoxicated citizen rises to the level of an unlawful detention is contrary to the objective test set out in Commonwealth v. Boswell, *supra*. As in Boswell the defendant, by attempting to roll down the window and get out of the car, indicated his willingness to communicate with the troopers. Nothing in the troopers' questions about the defendant's welfare was accusatory or demanding. The encounter was not made formal or authoritative by the announcement of some suspicion or charges. There were no directives to comply with police procedures until after probable cause developed.

Based on these findings and conclusion of law the defendant's motion to suppress evidence will be denied by way of separate order filed herewith.

ORDER OF COURT

Now this 7th day of August 2002, the court having held a hearing on the defendant's Omnibus Pre-trial Motion to Suppress Evidence on July 2, 2002 and having made certain findings of fact and conclusions of law as discussed in the attached Memorandum of Decision; the court hereby denies the defendant's motion.