

NOT DESIGNATED FOR PUBLICATION

No. 101,668

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

CHRISTY M. SHAFFER,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; REBECCA L. PILSHAW, judge. Opinion filed June 11, 2010. Reversed.

Katie M. Whitsitt, legal intern, and *Randall L. Hodgkinson*, of Kansas Appellate Defender Office, for appellant.

Matt J. Maloney, assistant district attorney, *Nola Tedesco Foulston*, district attorney, and *Steve Six*, attorney general, for appellee.

Before CAPLINGER, P.J., PIERRON, J., and BRAZIL, S.J.

Per Curiam: Christy M. Shaffer was charged with possession of cocaine. She filed a motion to suppress evidence seized after a search of her person. Specifically, Shaffer claimed (1) the stop of her person was unreasonable because it was done without a reasonable suspicion that a crime had been or was about to be committed, and (2) the search of her person was conducted without a reasonable fear for officer safety.

The district court denied her motion and she appeals. We reverse the denial of the suppression and vacate Shaffer's conviction.

At the hearing, police officer Ann Mackey testified she was riding with Officer Tricia Tiede when she observed Shaffer crossing the street. Shaffer was not in a crosswalk. Officer Mackey noticed that an oncoming vehicle had to come almost to a complete stop to avoid striking Shaffer. Officer Mackey testified the vehicle was forced to apply its brakes hard and the front of the vehicle dipped down. She stated "[T]his is why we contacted her for pedestrian violation." On cross-examination, she agreed that Shaffer was stopped for violating K.S.A. 8-1533(b).

Describing Shaffer's conduct, Officer Mackey testified, "Her gait was a little off, so it was just kind of an odd—." Officer Mackey stated, "[W]e had a pedestrian violation and just concern for her wellbeing, that I didn't know why she would—like I said, I didn't know why she would step out into traffic, things like that."

Officer Mackey testified she and Officer Tiede stopped Shaffer once she reached the other side of the street. When Officer Tiede asked Shaffer what was going on, she threw her arms up in the air, threw her sunglasses and an apple on the ground, and began yelling that she could not and did not want to go back to jail. Officer Mackey described her as "acting a little hysterical." Shaffer was handcuffed at that point for officer safety. According to Officer Mackey, the officers could not control her or have a conversation with her without placing her in handcuffs. Officer Tiede then conducted a pat-down and retrieved a crack pipe from Shaffer's front pocket. Officer Mackey testified she no longer feared for her safety once the handcuffs were placed on Shaffer.

Officer Tiede testified she observed Shaffer walk into traffic in front of several cars and she seemed unaware of the danger she was in. Officer Tiede wanted to check on Shaffer's welfare. After she threw the items on the ground, Officer Tiede handcuffed her

for the safety of all three people. According to Officer Tiede, Shaffer was yelling but physically compliant. She did not resist being handcuffed. When asked whether she feared for her safety at that point, Officer Tiede replied, "I'm always aware of my safety."

Officer Tiede then patted Shaffer down for officer safety. She felt a round object "which felt like a crack pipe," in Shaffer's right front pocket. As she was removing the item, she asked her if it was her crack pipe, to which Shaffer responded it was not hers. She continued the pat-down and located a rock of crack cocaine.

The court focused on the officer's responsibility to check on Shaffer's well-being:

"One of the things that you did not really address is the public safety exception. You know, law enforcement officers have many hats that they have to wear, and we often think of them mostly with the law enforcement portion of it, but there is a big portion of looking out for the public safety as well. I don't think that I would be very happy with police officers who would see someone endanger her own life by walking into traffic, and there was testimony that there was several vehicles that were driving around there, and I think that it is incumbent on the officers to at least check out the situation to find out, you know, what's going on."

The court concluded:

"Then upon stopping her, her behavior is that she starts throwing things down and she becomes pretty agitated. Now, obviously, that can be a sign that someone is just agitated because they have been stopped by the police, but it also could be something different. I wasn't there. I can't judge what was going on there. I believe that the officers had a reason to stop her. I believe that perhaps calmness on her part might have just—who knows what would have happened had she remained calm, but she sort of reinforced the strange behavior by acting out like that, throwing things on the ground, acting agitated and things, and I think that for her own safety it was the correct move to take. I just don't really see that they did anything wrong here."

The case was submitted to the court for trial on stipulated facts. Shaffer was convicted and sentenced to 18 months' probation with an underlying prison sentence of 12 months.

ANALYSIS

The Stop

Public Safety

The district court relied upon the public safety doctrine to determine that the officers were justified in stopping Shaffer once she crossed the street.

"Public safety stops fall under the police's community caretaking function, which expands beyond the police's role in investigating crime." *State v. McCaddon*, 39 Kan. App. 2d 839, 842, 185 P.3d 309 (2008). A public safety stop is "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *City of Topeka v. Grabauskas*, 33 Kan. App. 2d 210, 214, 99 P.3d 1125 (2004) (citing *Cady v. Dombrowski*, 413 U.S. 433, 441, 37 L. Ed. 2d 706, 93 S. Ct. 2523 [1973]). "Safety reasons alone may justify the stop, if the safety reasons are based upon specific and articulable facts." *State v. Ludes*, 27 Kan. App. 2d 1030, 1035, 11 P.3d 72, rev. denied 270 Kan. 902 (2000).

"Public safety stops are not to be used for investigative purposes." *McCaddon*, 39 Kan. App. 2d at 842. "[T]he detention must last no longer than is necessary to effectuate its purpose, and its scope must be carefully tailored to its underlying justification." *United States v. Garner*, 416 F.3d 1208, 1213 (10th Cir. 2005). Once an officer is assured that a citizen is no longer at peril or in need of assistance, any further actions by the officer

constitute a seizure implicating the Fourth Amendment to the United States Constitution. *State v. Gonzales*, 36 Kan. App. 2d 446, 456, 141 P.3d 501 (2006).

There can be no serious argument made that Officers Mackey and Tiede were not justified in stopping Shaffer to check on her welfare and ensure that she could proceed safely. The only real precondition for a valid public safety stop is that the officer can testify to specific and articulable facts that established a concern for the individual's safety. In the present case, Officer Mackey testified that she was concerned for Shaffer's well-being and did not know why she would step out into the middle of traffic. She also testified that Shaffer's gait "was a little off." Officer Tiede testified Shaffer seemed unaware of the danger she was in when she walked into traffic and Officer Tiede wanted to check on her welfare.

The undisputed evidence clearly establishes that the officers had a valid reason to approach Shaffer and inquire into her state of mind and physical well-being. On appeal, she contends that once she made it safely to the other side of the street, she was no longer in need of assistance and should not have been stopped. This contention is without merit. Officers Mackey and Tiede were not required by "stop and frisk" principles to ignore the dangerous activity they had just witnessed and assume that Shaffer was no longer in need of assistance. As the district court insinuated, it would not have been good police work to allow Shaffer to continue on her way without confirming that he or she could do so safely.

Criminal violation

Officer Mackey testified, apparently in agreement with a report filed by Officer Tiede, that Shaffer was stopped, at least in part, for violating K.S.A. 8-1533(b). At oral argument, Shaffer's counsel argued that the State did not rely on this argument before the trial court and has raised it for the first time in its appellate brief.

Clearly, the court relied upon the public safety doctrine to justify the stop and we will not address pedestrian violation.

Use of handcuffs

Shaffer also takes exception with the use of handcuffs, claiming such use exceeded the permissible scope of a public safety stop and the officers lacked probable cause to arrest her at that point. Even assuming arguendo that the use of handcuffs changed the encounter from a public safety stop to an investigatory detention, the use of handcuffs does not automatically convert an investigatory stop into an arrest. *State v. Hill*, 281 Kan. 136, 142, 130 P.3d 1 (2006). The officers were permitted to handcuff Shaffer for everyone's safety, whether one classifies the stop as a public safety one or an investigatory stop.

The pat-down

For an officer safety search to be valid, "[t]he officer must have prior knowledge of facts, observe conduct of the detained person, or receive responses from the detained person that, in light of the officer's experience, would give rise to a reasonable suspicion that such a search is necessary." *State v. Johnson*, 42 Kan. App. 2d 799, 804, 217 P.3d 42 (2009). This is an objective standard. 42 Kan. App. 2d at 805. The reasonableness of an officer's suspicion that personal safety requires a pat-down is measured by the totality of the circumstances. *State v. Burton*, 37 Kan. App. 2d 916, 919, 159 P.3d 209 (2007). Weight must not be given to an unparticularized suspicion or hunch, but to specific reasonable inferences the officer is entitled to draw from his or her experiences. *Terry v. Ohio*, 392 U.S. 1, 27, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968).

Terry provided that a frisk may be conducted only when the officer has reason to believe that he or she is dealing with an armed and dangerous individual. 392 U.S. at 27. The protective search is "limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." 392 U.S. at 26. The issue is "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." 392 U.S. at 27.

The State contends that Officer Tiede was confronted with a hostile and belligerent individual and her decision to pat Shaffer down was a reasonable one. Officer Tiede was not required to know that Shaffer was armed in order to conduct a pat-down, the State asserts, but simply needed a reasonable belief that she was in danger.

Officer Mackey testified explicitly that once Shaffer was handcuffed, Mackey no longer had any concerns for her own safety. Officer Tiede was asked whether she was concerned for her safety when she was handcuffing Shaffer, and she responded, "I'm always aware of my safety." Officer Tiede was not asked whether she still had concerns about her personal safety after Shaffer was handcuffed. The issue then is whether under the totality of the circumstances, applying an objective standard, a reasonable person would have believed that Shaffer was armed and dangerous and should be patted down for weapons. Considering the factors set forth above, the answer to this question is in the negative.

Officer Tiede had no prior knowledge of Shaffer upon which Tiede could base an opinion that Shaffer was dangerous. Officers Tiede and Mackey stopped Shaffer, both for her own safety and to investigate a criminal violation they had witnesses. Shaffer was not suspected of or being investigated for any violent crime. There was nothing about the officers' initial observation of Shaffer that would have led a reasonable person to conclude that Shaffer was armed and dangerous.

Shaffer's conduct would certainly lead a reasonable person at the outset to have a concern for his or her own safety, but that threat was neutralized by handcuffing her. Shaffer did not resist being handcuffed, and there is no evidence in the record that she continued to be belligerent once she was restrained. In fact, Officer Mackey testified that her concerns about her own safety disappeared at that point. Most importantly, Officer Tiede did not articulate any reasonable suspicion during her testimony that Shaffer was still a threat to Officer Tiede's safety after she had been handcuffed. Her vague statement that she is always aware of her safety does not rise to the level of a specific reasonable inference that she could have drawn from any of the particular circumstances present in this case. Neither does her conclusory statement that she patted Shaffer down for officer safety provide the requisite detail or basis upon which to uphold the search.

Considering the totality of the circumstances, a reasonable person would not have felt it necessary to pat Shaffer down for weapons once she had been handcuffed. She was suspected, at the most, of illegally walking into traffic. She did behave erratically, but such behavior does not equate being armed and dangerous. The officers were justified in handcuffing Shaffer to prevent any harm, but that was the extent to which any infringements on Shaffer's Fourth Amendment rights were justified.

The denial of the suppression motion is reversed, and Shaffer's conviction is reversed.