

MUNICIPAL COURT,
CITY OF AURORA, STATE OF COLORADO
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PEOPLE OF THE CITY OF AURORA,
Plaintiff,
v.
DARSEAN KELLEY,
Defendant.

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Case Number: J205471

Div.: Ctrm:

**MOTION TO DISMISS OR IN THE ALTERNATIVE SUPPRESS EVIDENCE
RESULTING FROM DETENTION AND ARREST NOT SUPPORTED BY
PROBABLE CAUSE OR REASONABLE SUSPICION**

The Defendant, Darsean Kelley, by and through his attorneys Daniel Recht and Megan Downing of Recht Kornfeld, P.C. and in cooperation with the ACLU of Colorado, hereby moves this Court to dismiss the charge of failure to obey a lawful order or in the alternative suppress any evidence, observations, and statements because the charges, evidence, observations and statements arose from an unlawful seizure not supported by probable cause or reasonable suspicion.

I. FACTS:

1. On February 19, 2016, Officers with the Aurora Police Department were dispatched to a weapon offense. Dispatch had provided extremely limited information regarding the suspect to responding officers, indicating only that a report was received that a male step-father had pulled a gun on a six-year-old female at 1445 N. Dallas Street, which is an apartment complex. The caller did not indicate or provide the suspect's age, race, or any other physical description, nor did the caller provide the location of the suspect.

2. Police reports indicate that there was no description of the male party in the notes of the call.

3. As officers drove toward the apartment complex, Officer Claude Burns noticed two black males walking along the sidewalk on Fourteenth Avenue, around the block from the apartment complex. The officer observed that the male parties appeared to be upset and yelling at each other.

4. Without any probable cause or reasonable suspicion to believe that these individuals had engaged in any criminal conduct whatsoever or were armed or dangerous, the officer stopped, got out of his patrol car, and ordered both parties to stop.

5. Because police had been provided no description of the possible suspect, they had no information suggesting that either individual was the potential suspect. The two men were merely engaged in a verbal, non-physical argument while walking down the sidewalk on the next block from where the complained-of incident occurred. The officers observed no conduct that could conceivably support a reasonable belief that either individual had committed any crime, had a plan to commit a crime, or was armed or dangerous.

6. Indeed, the officer who initiated the stop did not attempt to justify the stop as one based on reasonable suspicion that either man was a suspect. In Officer Burns' police report, the entirety of the justification for the stop is noted as follows: "I ordered both subjects to stop so I may talk to them to see if they were involved in the call on Dallas (very short distance from the original call)."

7. The detention that ensued was not a short investigatory stop to determine identification. Shortly after the detention began, two other officers arrived at the scene. Mr. Kelley was detained by these officers in what rose to the level of a custodial detention. During the arrest, police yelled orders at Mr. Kelley, demanding his compliance while pointing a taser at him.

8. Officers ordered both parties to sit down and wait on the curb for additional officers to arrive. Two additional officers arrived. Mr. Kelley explained he could not sit down because of a groin injury, but he did place his hands in the air, thus demonstrating to the police that he was not armed and posed no threat to the officers. As directed by the police, he also turned around, turning his back to the officers with his hands into the air.

9. Unable to understand on what grounds officers were detaining him in this fashion, knowing that he had committed no crime, Mr. Kelley asked repeatedly – as was his right – whether he was being detained. Officers orally confirmed he was being detained.

10. As the police yelled orders at Mr. Kelley, he repeatedly responded “for what?” He understandably wanted to know why he was being taken into police custody and why he was not free to continue on his way. Mr. Kelley yelled to the officers “I know my rights” and continued to legitimately assert his rights and to question the reason for the custodial encounter. Officers yelled back at him affirming that he was being detained and shouting commands. One officer offered a single justification for the orders: “I want to make sure you don’t have any weapons.” Officers had no reason to believe, suspect, or even conjecture that Mr. Kelley was armed.

11. While Mr. Kelley verbally questioned his detention, he substantially complied with officers’ commands. At officers’ requests, he placed his hands in the air and turned his back to the officers. He kept his hands in the air, with his fingers outstretched, making clear he had no weapons and was not a physical threat to the officers.

12. While he was standing with his back toward the officers (as he had been commanded to do), still orally protesting his detention, police tased Mr. Kelley.

13. Mr. Kelley immediately lost all muscular control. He fell straight backwards. His head struck the street pavement, and he suffered injury. The officer asserts that Mr. Kelley dropped his right hand toward his chest and the officer believed Mr. Kelley might have been reaching for a weapon. This alleged belief was patently unreasonable.

14. This exchange is caught on video from officers’ body camera. Mr. Kelley can be seen standing with his back to the police, his arms high in the air and his fingers outstretched. He then momentarily gestures toward his chest while explaining that he knows his rights and holding his other hand high in the air. He was wearing a thin, plain, tightfitting white tee-shirt without pockets. During the encounter, Mr. Kelley had been standing in front of the police with his arms up and a spotlight on him, giving the police a clear view of his entire body from the front and the back. No reasonable officer could have believed that when Mr. Kelley briefly gestured to his chest while verbally protesting being given orders without any explanation, that he was trying to or had the capacity to gain access to a weapon.

15. After being tased, Mr. Kelley is seen falling stiffly backwards and wailing in pain. His head struck the pavement.

16. Officers charged Mr. Kelley with disorderly conduct by failing to obey a lawful order under Aurora Municipal Code § 94-110(a)(5). The relevant portion of this ordinance states: “A person commits disorderly conduct if that person knowingly or recklessly: Fails to

obey a lawful order or command by a peace officer . . . acting under color of official authority which causes or is likely to cause harm or a serious inconvenience.”

II. LAW AND ARGUMENT: The detention of Mr. Kelley was unlawful because it was not supported by probable cause or reasonable suspicion to believe Mr. Kelley was engaged in criminal conduct or was armed or dangerous.

A. The officers lacked probable cause to arrest Mr. Kelley

17. Custodial detention must be supported by probable cause established by specific, articulable facts.

18. An objective test is used to determine whether a suspect is in custody. A custodial arrest, “for the purposes of the Fourth Amendment, is a seizure, which occurs ‘only when, by means of physical force or a show of authority, an individual’s freedom of movement is restrained.’” *Romero v. Story*, 672 F.3d 880, 885 (10th Cir. 2012) (quoting *Fogarty v. Gallegos*, 253 F.3d 1147, 1155 (10th Cir. 2008)). Thus, a court must determine “whether a reasonable person in the suspect’s position would have considered himself deprived of his freedom of action in a significant way.” *People v. Hamilton*, 831 P.2d 1236 (Colo. 1992). Relevant criteria include the time, place and purpose of the encounter with the suspect, as well as the words and demeanor of the officer and the suspect’s response to directions provided by the police. *People v. LaFrankie*, 858 P.2d 702 (Colo. 1993); *People v. Milhollin*, 751 P.2d 43, 49 (Colo. 1988).

19. Any investigatory contact in this case progressed to a full custodial arrest during the course of the stop. Multiple police officers responded and surrounded Mr. Kelley, yelling commands, directing his movements and holding him at taser gunpoint. Officers told him outright that he was not free to leave and that he was being detained. That the police, without explanation, repeatedly yelled at Mr. Kelley to follow police directives that were clearly aimed at effecting his complete physical submission, while he was under threat of being tased, “closely resembles a traditional arrest,” and therefore cannot be justified as an investigatory detention. *Morris v. Noe*, 672 F.3d 1185, 1192 (10th Cir. 2012) (“A detention ceases to be a Terry stop and becomes an arrest if it continues for an excessive time or closely resembles a traditional arrest.”).

20. Particularly given that the officers had no reason to believe that Mr. Kelley was armed or dangerous, the threatened and actual use of the taser was unreasonable and, standing alone, transformed any investigative detention into an arrest that required probable cause. *Id.* (“[A]n unreasonable level of force transforms a *Terry* detention into an arrest requiring probable cause.”) (quoting *United States v. Shareef*, 100 F.3d 1491, 1507 (10th Cir. 1996)).

21. It is beyond dispute that the officers lacked probable cause to believe Mr. Kelley had committed a crime.

B. The officers lacked reasonable suspicion to detain Mr. Kelley

22. Even if the detention were viewed as an investigatory stop, it was not legally justified.

23. At the time of his detention and arrest, no reasonable suspicion existed to believe that Mr. Kelley was, or had been, involved in any criminal activity, and thus his detention was illegal.

24. In order to lawfully detain an individual for questioning: (1) a police officer must have a reasonable suspicion that the individual has committed, or is about to commit, a crime; (2) the purpose of the detention must be reasonable; and (3) the character of the detention must be reasonable when considered in light of the purpose. *People v. Stevens*, 183 Colo. 399 (1973).

25. The police may detain and require identification of a person if they have a reasonable suspicion, based on objective facts, that the person is involved in criminal conduct. *People v. Archuleta*, 616 P.2d 977 (Colo. 1980). Specifically, C.R.S. § 16-3-103 authorizes a peace officer to stop any person who he reasonably suspects is committing, has committed, or is about to commit a crime and may require him to give his name and address, identification if available, and an explanation of his actions.

26. Without any articulable facts to support probable cause or reasonable suspicion to believe that Mr. Kelley or his cousin were engaged in any criminal conduct whatsoever or were armed or dangerous, the officer ordered both black men to stop.

27. No even arguable grounds to subject Mr. Kelley to this type of custodial encounter are asserted in discovery. Police reports concede that when the officers detained Mr. Kelley, they had no information about the suspect besides the fact that he was a male. “A police officer cannot legally detain a person simply because criminal activity is afoot. The particular person that is stopped must be suspected of criminal activity.” *Romero v. Storey*, 672 F.3d 880, 888 (10th Cir. 2012) (quoting *United States v. Fisher*, 597 F.3d 1156, 1158-59 (10th Cir. 2010)).

28. Mr. Kelley and his friend were walking down the sidewalk in plain view of officers, engaging in no evasive behavior. See *United States v. Dell*, 487 F. App’x 440, 445 (10th Cir. 2012) (finding no reasonable suspicion or arguably evasive behavior when defendants were “[w]alking down a public sidewalk, in the same direction as and in plain view of a patrolling officer”).

29. Any suspicion that Mr. Kelley was engaged in criminal conduct was seemingly and illegally based on his being a black man at a location in the general area to which police were called. Officer Burns concedes as much when he indicated in his report that the only reason for the stop was “to see if they were involved in the call on Dallas” because they were a “very short distance from the original call”.

30. It is already well-established that a defendant’s “temporal and geographic proximity to the crime alone is not sufficient . . . to provide Defendants with reasonable suspicion” to support an investigatory stop. *Romero v. Story*, 672 F.3d 880, 887-88 (10th Cir. 2012). In *Romero*, the Tenth Circuit considered whether officers had reasonable suspicion to conduct a *Terry* stop when: (1) a Hispanic male was viewed at the location of the crime (a

parking lot where a car was vandalized), (2) within an extremely short time of the crime having been committed (victim heard loud noise, walked outside to parking lot, and saw Hispanic male in parking lot), and the Hispanic male was then viewed entering a specific apartment. Based on this information, officers argued they had reasonable suspicion to initiate an investigative detention. The Tenth Circuit disagreed, finding “Defendants lacked reasonable suspicion to detain Plaintiff in connection with the vandalism,” because “[a] person of a particular race standing in a parking lot where a crime occurred is not enough to create reasonable suspicion.” *Id.* at 888.

31. Indeed, a finding of reasonable suspicion under these facts, taken to its logical conclusion, would have justified the police to detain with force **any male**, black white, or Hispanic, in the general vicinity of the apartment complex.

C. Dismissal is warranted or, in the alternative, suppression of all observation, evidence, or statements resulting from the illegal detention.

32. Because the officers lacked probable cause to arrest Mr. Kelley, nor reasonable suspicion to detain him, the charge against him for failure to obey a lawful order must be dismissed. Aurora Municipal Code § 94-110(a)(5) requires compliance only with a “lawful order” of the police. Without a legal basis to detain or arrest Mr. Kelley, any orders given by law enforcement to carry out that detention were *unlawful* and, therefore, do not fall within the ambit of § 94-110(a)(5). *See, e.g., Enright v. Groves*, 560 P.2d 851 (Colo. Ct. App. 1977) (“We conclude that [the officer’s] demand for Mrs. Enright’s driver’s license was not a lawful order and that refusal to comply therewith was not therefore an offense in and of itself.”); *see also Storey v. Taylor*, 696 F.3d 987 (10th Cir. 2012) (finding that because police had “no basis on which to order Storey out of his house”, “the order [to exit] was not lawful – and Storey’s refusal to obey could not justify his arrest”).

33. “A citizen has the constitutional right to walk away from a law enforcement officer who lacks probable cause or reasonable suspicion to detain or seize him or her.” *Romero v. Storey*, 672 F.3d 880, 889 (10th Cir. 2012). For example, in *Romero*, the police charged the plaintiff with evasion when he turned and began to walk away from their attempts to detain him in order to investigate a nearby act of vandalism. As discussed above, the Tenth Circuit found the police lacked reasonable suspicion to believe the plaintiff had committed vandalism and, thus, had no right to detain the plaintiff. Without reasonable suspicion for the detention, the court held there could be no legal basis to charge the defendant with evasion. *Id.* (“Because we hold Defendants lacked reasonable suspicion to detain Plaintiff for the vandalism, Defendants lacked probable cause to arrest Plaintiff for flight or evasion.”). In so concluding, the court relied in part on the principle that individuals have a “constitutional right to walk away from a law enforcement officer who lacks probable cause or reasonable suspicion to detain or seize him or her.” Mr. Kelley also had that constitutional right to walk away from the Aurora police officers who had no probable cause to arrest him and no reasonable suspicion to detain him. The police cannot rob Mr. Kelley of that right simply by giving him a series of orders meant to

prohibit him from walking away from an encounter from which he had a right to walk away, and then charging him with failure to obey those orders.¹

34. Based on the foregoing, Mr. Kelley did not fail to obey a *lawful* order. The charge against him should, therefore, be dismissed.

35. In the alternative, any observation, evidence, or statements resulting from that illegal detention must be suppressed. *Terry v. Ohio*, 392 U.S. 1 (1968); *Stone v. People*, 485 P.2d 495 (Colo. 1971).

WHEREFORE, Mr. Kelley respectfully requests that the Court dismiss the charges or, in the alternative, suppress any and all evidence resulting from his illegal detention and arrest.

Respectfully submitted,

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IN COOPERATION WITH THE ACLU Foundation OF COLORADO

¹ Certainly Mr. Kelley did not have a right to physically resist even an unlawful detention, but that is not at issue here. Mr. Kelley did not physically resist the encounter and is not charged with resistance. All that is at issue here is that Mr. Kelley need not follow orders that are intended to effectuate an unlawful detention.

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of August, 2016, a true and correct copy of the foregoing **MOTION TO DISMISS OR IN THE ALTERNATIVE SUPPRESS EVIDENCE RESULTING FROM DETENTION AND ARREST NOT SUPPORTED BY PROBABLE CAUSE OR REASONABLE SUSPICION** was forwarded via fax, email and United States Mail, correct postage prepaid, to the following:

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