

[Cite as *State v. Williams*, 2010-Ohio-4277.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23667
v.	:	T.C. NO. 2009CR01118/1
CHARLES WILLIAMS, III	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

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OPINION

Rendered on the 10th day of September, 2010.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Charles Williams III, filed September 30, 2009. On April 13, 2009, Williams was indicted on three counts of felonious assault (peace officer/deadly weapon), in violation of R.C. 2903.11(A)(2), felonies of the first degree; one count of failure to comply with an order or signal of a police officer, in

violation of R.C.2921.331(B) and 2921.331(C)(5), a felony of the third degree; one count of vandalism (government property/ \$5000 or more), in violation of R.C. 2909.05(B)(2), a felony of the fourth degree; and two counts of criminal damaging, in violation of R.C. 2909.06(A)(1), misdemeanors of the second degree.

{¶ 2} Williams pled not guilty on April 21, 2009, and on May 6, 2009, he filed a motion to suppress. The State filed a motion to dismiss, and Williams filed a memorandum in opposition. After a hearing, the trial court overruled Williams' motion to suppress. On August 31, 2009, Williams withdrew his pleas of not guilty, and he pled no contest to the charges against him. Williams was then found guilty and sentenced as follows: to seven years for each felonious assault offense, to two years for failure to comply with an order or signal of a police officer; to eighteen months for vandalism, and to time served for the criminal damaging offenses. The sentences for felonious assault and vandalism were ordered to be served concurrently with each other and consecutively to the sentence for failure to comply with an order or signal of a police officer, for a total term of nine years.

{¶ 3} At the hearing on the motion to suppress, Officer Matthew Heiser, of the City of Dayton Police Department, testified. According to Heiser, who is an eight-year veteran of the police force, the events giving rise to this matter began on April 1, 2009, at approximately 7:10 p.m., while Heiser was on routine patrol in a marked cruiser. Heiser and other officers from the Fifth District received multiple dispatches regarding an ongoing shooting and homicide, involving multiple shooters, at the Cricket store located on North Main Street. The officers were advised that a red Tahoe was seen fleeing the scene eastbound on Siebenthaler Avenue, heading toward Riverside Drive. Heiser headed in the direction of the red vehicle, and he

observed a red GMC Yukon, with a flat front tire, that he and other responding officers then stopped at the intersection of Ernst and Riverside Drive. The driver of the Yukon advised the officers that the victim of the shooting at the Cricket store had been transported in the Yukon to another location, and one of the other officers proceeded to that location. Heiser and the remaining officer secured the scene and waited for an evidence crew to arrive.

{¶ 4} All southbound lanes on Riverside Drive were closed to traffic due to the developing circumstances, and as cars “rolled” through the nearby stop sign, Heiser observed the driver of a red Toyota pause for 15 to 20 seconds and watch the police activity near the Tahoe. A passenger in the Toyota “was hunched down with his baseball cap pulled down like he was trying to conceal who he was.” The Toyota proceeded past the officers and then returned to Ernst and Riverside about two minutes later, and the driver again paused for 15 to 20 seconds to observe the officers.

{¶ 5} Heiser decided to stop the red Toyota and conduct a field interview of the occupants, due to his concern that they may have some connection to the shooting. Heiser followed the vehicle west on Ernst and then North on Theodore. Another crew radioed Heiser that a red Toyota had been observed on Parkwood. Upon arrival at Parkwood, Heiser observed a red Toyota parked at the curb. Heiser recognized the two occupants who were outside of the vehicle, and he approached the driver, told him he needed to speak with him, patted him down for weapons and placed him in his cruiser. Officer Sue Bengé arrived to assist Heiser, and Heiser then approached the passenger of the red Toyota, patted him down for weapons and placed him in the back of Bengé’s cruiser. Bengé’s cruiser was parked in the middle of the street between parked cars on both curbs.

{¶ 6} Other neighborhood citizens appeared on Parkwood, and the officers spoke to them. Bengé then advised Heiser that the male driver of a legally parked white Tahoe next to Bengé's cruiser was talking to the individual in the rear of her cruiser. The driver's side window of the Tahoe was down, and Heiser approached it, identified himself, and told the driver that he would like to talk with him. Heiser believed that the driver may have had some connection to the people in the cruisers and, potentially, the shooting on North Main Street. The Tahoe had large, after-factory tires, and Heiser was unable to see into the vehicle. As Heiser approached, the driver, later identified as Williams, ducked down and reached to his right. Heiser could only see Williams' shoulder and the top of his head. Given the nearby shooting, Heiser was concerned that Williams may have been reaching for a weapon, and so he opened the door of the Tahoe and told Williams to show him his hands.

{¶ 7} Williams did not comply but instead "he leaned over and shoved me back and that's when I told him he was under arrest." Williams used both hands to shove Heiser. Williams then leaned down and to the right again, and Heiser "got up into the car with him to make sure he was not pulling out a weapon." Heiser repeatedly told Williams to stop resisting. Heiser and Williams struggled for approximately 30 seconds.

{¶ 8} Bengé responded to the struggle, telling Heiser to step back so that she could deploy her taser. The officers warned Williams that he would be tased if he did not stop resisting. When Williams refused to comply, Bengé deployed her taser, and Heiser testified that, although Williams was hit with the probes, they seemed to have no effect on him as he continued to struggle with Heiser. Heiser then told Williams if he did not stop resisting, he would use pepper spray to subdue him. Williams continued to resist arrest, and Heiser used his pepper

spray, which had no effect on Williams.

{¶ 9} Bengé then yelled to Heiser that Williams was reaching for the gear shift in his car. Williams put the Tahoe in gear, and the vehicle began moving forward. Heiser's lower body was hanging out of the vehicle, with his left foot on the running board and his right foot on the pavement. His upper body was inside the Tahoe. Williams accelerated to 15 - 20 miles an hour. Heiser was able to free himself from the vehicle at a speed of about 25 miles per hour as Williams approached Main Street. Heiser rolled into the curb on Parkwood, and from there he observed Williams drive the Tahoe over the top of another cruiser that was parked at the intersection, in which there were two police officers. Williams also damaged two other unoccupied vehicles that were parked on the street.

{¶ 10} Williams asserts one assignment of error with subparts as follows:

{¶ 11} "THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS THE EVIDENCE DISCOVERED AS A RESULT OF THE UNLAWFUL SEARCH AND SEIZURE."

{¶ 12} 1. "Officer Heiser's unlawful seizure of Williams was investigatory in nature."

{¶ 13} 2. "Officer Heiser's intrusion into Williams' Fourth Amendment rights was not reasonable under the circumstances."

{¶ 14} 3. "Williams' behavior was not unusual under the circumstances."

{¶ 15} 4. "Officer Heiser used excessive and unnecessary force when unlawfully arresting Williams."

{¶ 16} 5. "All evidence obtained from the unlawful seizure of Williams should have

been suppressed as ‘fruit of the poisonous tree.’”

{¶ 17} “Appellate courts give great deference to the factual findings of the trier of facts. (Internal citations omitted). At a suppression hearing, the trial court serves as the trier of fact, and must judge the credibility of witnesses and the weight of the evidence. (Internal citations omitted). The trial court is in the best position to resolve questions of fact and evaluate witness credibility. (Internal citations omitted). In reviewing a trial court’s decision on a motion to suppress, an appellate court accepts the trial court’s factual findings, relies on the trial court’s ability to assess the credibility of witnesses, and independently determines whether the trial court applied the proper legal standard to the facts as found. (Internal citations omitted). An appellate court is bound to accept the trial court’s factual findings as long as they are supported by competent, credible evidence. (Internal citations omitted).” *State v. Purser*, Greene App. No. 2006 CA 14, 2007-Ohio-192, ¶ 11.

{¶ 18} The Fourth Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment, provides in relevant part: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” Violations of the Fourth Amendment require courts to apply the exclusionary rule, suppressing use of any evidence that was illegally obtained. *Mapp v. Ohio* (1961), 367 U.S. 643, 81 S.Ct. 1684, 6L.Ed.2d 1081.

{¶ 19} “The Fourth Amendment * * * protects individuals from unreasonable searches and seizures. *Terry v. Ohio* (1968), 392 U.S. 1, 88S.Ct. 1868, 20 L.Ed.2d 889. Not all

interactions between citizens and the police, however, constitute a seizure. Rather, the interactions between citizens and law enforcement officers can fall within three distinct categories: a consensual encounter, an investigative detention, and an arrest. *State v. Taylor* (1995), 106 Ohio App.3d 741, 747-749, 667 N.E.2d 60.

{¶ 20} “Consensual encounters occur when the police merely approach a person in a public place and engage the person in conversation, and the person remains free not to answer and to walk away. (Internal citation omitted). The encounter remains consensual even if the officer asks questions, requests to examine an individual’s identification, and asks to search the person’s belongings, provided that the officer does not convey that compliance is required. (Internal citation omitted). ‘The Fourth Amendment guarantees are not implicated in such an encounter unless the police officer has by either physical force or show of authority restrained the person’s liberty so that a reasonable person would not feel free to decline the officer’s requests or otherwise terminate the encounter.’ (Citations omitted) *Taylor*, 106 Ohio App.3d at 747-48.

{¶ 21} “An individual is subject to an investigatory detention when, in view of all the circumstances surrounding the incident, by means of physical force or show of authority, a reasonable person would have believed that he was not free to leave or is compelled to respond to questions. (Internal citations omitted). Under *Terry*, police officers may briefly stop and/or temporarily detain individuals in order to investigate possible criminal activity if the officers have a reasonable, articulable suspicion that criminal activity may be afoot. (Internal citation omitted). ‘Reasonable suspicion entails some minimal level of objective justification for making a stop - that is, something more than an inchoate and unparticularized suspicion or “hunch”” but less than the level of suspicion required for probable cause.’ (Internal citation

omitted). We determine the existence of reasonable suspicion by evaluating the totality of the circumstances, considering those circumstances ‘through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold.’ (Internal citations omitted).

{¶ 22} “The final category is a seizure that is the equivalent of an arrest. ‘A seizure is equivalent to an arrest when (1) there is an intent to arrest; (2) the seizure is made under the real or pretended authority; (3) it is accompanied by an actual or constructive seizure or detention; and (4) it is so understood by the person arrested.’ (Internal citation omitted). An arrest must be based on probable cause.” *State v. Lewis*, Montgomery App. No 22726, 2009-Ohio-158, ¶ 20-23.

{¶ 23} “When the situation involves the use of force against law enforcement officers, a private citizen may not - - in the absence of excessive or unnecessary force by an arresting officer - - use force to resist arrest by one he knows, or has good reason to believe, is an authorized police officer engaged in the performance of his duties, whether or not the arrest is illegal under the circumstances.” *State v. Fritz*, 163 Ohio App.3d 276, 284, 2005-Ohio-4736.

{¶ 24} As we have previously stated, “We must accord police officers the leeway to use their sound judgment in their discretion under trying circumstances in the field, and where evidence is adduced which provides any reasonable support for their actions we must support their good faith enforcement of the laws, and not hobble them by second guessing their actions from the calm and contemplated review that is accorded them on appeal.” *State v. Johnson* (Dec. 21, 1994), Montgomery App. No. 14485.

{¶ 25} Williams argues that Heiser’s encounter with him was for investigative purposes,

that Williams' behavior did not justify a reasonable, articulable suspicion that criminal activity was afoot, that Heiser used unnecessary force justifying Williams' response, and that the evidence obtained, including his conduct in running over the police cruiser, should have been suppressed.

{¶ 26} As the trial court noted, Heiser did not initiate a traffic stop of Williams' vehicle; it was already parked on Parkwood next to Benge's cruiser. Williams was observed speaking to an individual who was seated in the back of a police cruiser as a result of an on-going homicide investigation. These events were unfolding close in time and location to the homicide. Heiser, alone, without his gun drawn, simply approached Williams' vehicle, and identified himself, with a purpose to conduct a field interview in the course of the emergent homicide investigation. There is no Fourth Amendment violation when an officer merely approaches an individual to engage in conversation, and a "consensual encounter can occur when a police officer approaches and questions individuals in or near a parked car." (Citations omitted). *State v. Schott*, (May 16, 1997), Darke App. No. 1415. As the trial court correctly held, a seizure of Williams did not occur until after Williams made furtive movements consistent with reaching for a weapon, raising legitimate safety concerns for Heiser. After refusing to show his hands, Williams assaulted Heiser by shoving him which justified detention and arrest.

{¶ 27} As the trial court also correctly noted, even if Heiser in fact had no authority under the Fourth Amendment to seize Williams in the first instance, in the absence of excessive or unnecessary force, use of force is not permitted to avoid an unlawful arrest, and there is no evidence that the officers used any force against Williams that was excessive or unnecessary. See *Fritz*. The only force employed against Williams occurred after he shoved Heiser. Indeed,

Williams continued to reach to his right, struggling with Heiser. Before the officers tased Williams and sprayed him with pepper spray, they repeatedly warned him of the consequences of his continued resistance. Under these facts, there is no Fourth Amendment violation of Williams' rights and no physical evidence (or testimonial) to exclude.

{¶ 28} There being no merit to Williams' sole assigned error, it is overruled, and the judgment of the trial court is affirmed.

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BROGAN, J. and GRADY, J., concur.

Copies mailed to:

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