[Cite as *State v. Thomas*, 2011-Ohio-1191.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee/ Cross-Appellant,	:	No. 10AP-557
	:	(C.P.C. No. 09CR09-5583)
v.		
	:	(REGULAR CALENDAR)
Robert K. Thomas,		
	:	
Defendant-Appellant/ Cross-Appellee.	:	

D E C I S I O N

Rendered on March 15, 2011

Ron O'Brien, Prosecuting Attorney, and *John H. Cousins, IV*, for plaintiff-appellee.

W. Joseph Edwards, for defendant-appellant.

APPEALS from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, Robert K. Thomas, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas. For the following reasons, we affirm that judgment.

{¶2} On the morning of September 7, 2009, Columbus Police Officer David Busy was patrolling the Franklinton neighborhood just outside of downtown Columbus, Ohio. As he drove on Town Street, he observed a new Lexus parked on the street with one

person inside. The car piqued Officer Busy's interest, as it was parked in front of a market that was not yet open for the day, so he drove around the block to come back to the car. When he returned, the car drove off down Town Street. Officer Busy followed the car, which ultimately parked in front of an apartment building one block away on State Street. The driver, later identified as appellant, got out of the car and walked towards the apartments. Appellant started to run down an alley after he looked at Officer Busy. Officer Busy turned his cruiser around and followed appellant down the alley. Officer Busy caught up to appellant and ordered him to stop. Appellant complied with the request. During the stop, the police discovered that appellant was driving a stolen car. The police also found six stolen checks in appellant's backpack.

{¶3} As a result of these events, a Franklin County Grand Jury indicted appellant with seven counts of receiving stolen property in violation of R.C. 2913.51. Count one concerned the stolen car, counts two through four concerned three checks stolen from one person, and counts five through seven concerned three checks stolen from another person. Appellant entered a not guilty plea to the charges.

{¶4} Appellant filed a motion to suppress all the evidence obtained as a result of his traffic stop. Appellant argued that the officer lacked a reasonable and articulable suspicion to stop him. After a hearing at which Officer Busy testified to the version of events described above, the trial court denied appellant's motion to suppress. In light of that ruling, appellant entered a no contest plea to the seven counts in the indictment. The trial court accepted the plea and found him guilty.

{¶5} At appellant's sentencing, the state asked the trial court to separately sentence appellant for each of the six stolen check counts in addition to the one count

concerning the car. The trial court refused and instead merged counts two through four and counts five through seven for purposes of sentencing. Accordingly, the trial court sentenced appellant to consecutive prison terms of 15 months for count one, 10 months for count two, and 10 months for count five, for a total prison term of 35 months.

{¶6} Appellant appeals and assigns the following error:

> THE TRIAL COURT ERRED WHEN IT OVERRULED APPELLANT'S MOTION TO SUPPRESS EVIDENCE THEREBY VIOLATING HIS RIGHTS UNDER THE OHIO AND FEDERAL CONSTITUTIONS.

{¶7} Additionally, the state assigns the following cross-assignment of error:

> THE TRIAL COURT ERRED BY MERGING COUNTS TWO THROUGH FOUR AND BY MERGING COUNTS FIVE THROUGH SEVEN.

{¶8} Appellant argues in his assignment of error that the trial court erred when it denied his motion to suppress because the officer conducted an investigatory detention without reasonable, articulable suspicion. We disagree.

{¶9} " 'Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard.' " *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, ¶100 (quoting *State v. Burnside,* 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8) (citations omitted). Appellant does not challenge any of the trial court's factual findings. He contends that the trial court's legal

conclusion was wrong. Thus, we must independently determine whether Officer Busy had a reasonable, articulable suspicion to stop and detain appellant.

{¶10} The Fourth Amendment to the United States Constitution, as well as Section 14, Article I, of the Ohio Constitution, protects individuals from unreasonable searches and seizures. *State v. Kinney,* 83 Ohio St.3d 85, 87, 1998-Ohio-425; *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868; *Katz v. United States* (1967), 389 U.S. 347, 351, 88 S.Ct. 507, 511. Even so, " 'not all personal intercourse between policemen and citizens involves "seizures" of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred' " within the meaning of the Fourth Amendment. *State v. Jones,* 10th Dist. No.09AP-1053, 2010-Ohio-2854, ¶11 (quoting *Terry* at fn. 16).

{¶11} Officer Busy's investigatory detention of appellant, commonly known as a *Terry* stop, constitutes a seizure for purposes of the Fourth Amendment. *Jones* at ¶16. Under *Terry,* a police officer may constitutionally stop or detain an individual without probable cause when the officer has reasonable suspicion, based on specific, articulable facts, that criminal activity is afoot. *Terry*, 392 U.S. at 21, 88 S.Ct. at 1880; *State v. Latson*, 10th Dist. No. 09AP-1212, 2010-Ohio-6297, ¶12. Accordingly, "[a]n investigative stop does not violate the Fourth Amendment to the United States Constitution if the police have reasonable suspicion that 'the person stopped is, or is about to be, engaged in criminal activity.' " *State v. Jordan,* 104 Ohio St.3d 21, 2004-Ohio-6085, ¶ 35 (quoting *United States v. Cortez* (1981), 449 U.S. 411, 417, 101 S.Ct. 690, 695). "Reasonable suspicion entails some minimal level of objective justification, 'that is, something more than an inchoate and unparticularized suspicion or "hunch," but

less than the level of suspicion required for probable cause.' " *Jones* at ¶17 (quoting *State v. Jones* (1990), 70 Ohio App.3d 554, 556-57).

{¶12} The propriety of an investigatory stop must be " 'viewed in light of the totality of the surrounding circumstances.' " *Jordan* at ¶52 (quoting *State v. Bobo* (1988), 37 Ohio St.3d 177, paragraph one of the syllabus). Here, Officer Busy testified that he encountered appellant in a high crime area. (Tr. 10.) Another officer testified that appellant initially parked in front of a market that is known for dealing in stolen property. (Tr. 80.) More importantly, Officer Busy testified that when appellant parked and got out of the car, he fled after he looked towards him. While appellant's presence in a high crime area is not, by itself, sufficient to support a *Terry* stop, that presence, when coupled with unprovoked flight from an officer, constitutes reasonable suspicion to justify a *Terry* stop. *Illinois v. Wardlow* (2000), 528 U.S. 119, 124, 120 S.Ct. 673, 676; *State v. Hull*, 11th Dist. No. 2003-A-0068, 2005-Ohio-2526, ¶13; *State v. Rowe*, 8th Dist. No. 95152, 2010-Ohio-6030, ¶19.

{¶13} Because Officer Busy had reasonable, articulable suspicion to stop and detain appellant, his investigatory detention of appellant was proper. Accordingly, the trial court did not err by denying appellant's motion to suppress. Appellant's assignment of error is overruled.

{¶14} We next address the state's cross-assignment of error, which alleges that the trial court erred when it merged the six stolen check counts for purposes of sentencing. We disagree.

{¶15} Appellant was found guilty of six counts of receiving stolen property that concerned stolen checks. The first three counts involved three checks stolen from one

person, while the next three counts involved three checks stolen from a different person. At sentencing, the state argued that appellant should be sentenced on all six counts because there were six separate checks. The trial court disagreed and sentenced appellant only for two counts of receiving stolen property.

{¶16} Where a defendant is charged with multiple counts of receiving stolen property under R.C. 2913.51, the trial court must merge the counts into a single count when it is shown that the defendant received, retained, or disposed of all of the items of property at one time in a single transaction or occurrence. *State v. Bowman*, 10th Dist. No. 10AP-403, 2010-Ohio-6351, ¶13; *State v. Wilson* (1985), 21 Ohio App.3d 171, paragraph one of the syllabus. Appellant bears the burden to prove entitlement to merger. *State v. Early*, 10th Dist. No. 01AP-1106, 2002-Ohio-2590, ¶9 (citing *State v. Mughni* (1987), 33 Ohio St.3d 65, 67).

{¶17} The record does not indicate how appellant obtained the checks, and there is also no evidence that he disposed of or attempted to dispose of the checks before the police stopped him. The only evidence connecting appellant to these checks is that he possessed all of them in his backpack when he was stopped by Officer Busy. This evidence demonstrates that appellant retained the checks at one time and in a single transaction. Having made that showing, appellant met his burden, and the trial court did not err by merging the counts for purposes of sentencing.

{¶18} In so concluding, we reject the state's argument that the General Assembly clearly intended multiple punishments for these separate counts.

{¶19} A person may be punished for multiple offenses arising from a single criminal act so long as the General Assembly intended cumulative punishment. *State v.*

Johnson, ___ Ohio St.3d ___, 2010-Ohio-6314, ¶25 (citing *State v. Rance* (1999), 85 Ohio St.3d 632, 635, overruled on other grounds by *Johnson*); *State v. Cooper*, 104 Ohio St.3d 293, 2004-Ohio-6553, ¶11. In Ohio, the primary indication of the General Assembly's intent on this issue is R.C. 2941.25. *State v. Childs*, 88 Ohio St.3d 558, 561, 2000-Ohio-425; *Cooper* at ¶12. However, other more specific legislative statements may be considered depending on the offense at issue. *Childs* (considering statute specifically addressing multiple punishments for conspiracies to address merger issue).

{¶20} The state argues that R.C. 2913.71 is a more specific statute which clearly demonstrates the General Assembly's intent to allow multiple punishments for multiple counts of receiving stolen property when those counts involve stolen blank checks. We disagree.

{¶21} The offense of receiving stolen property is normally a misdemeanor of the first degree. Pursuant to R.C. 2913.51(C), however, receiving stolen property becomes a felony of the fifth degree if the property involved is listed in R.C. 2913.71. *State v. Afshari*, 187 Ohio App.3d 151, 2010-Ohio-325, ¶16 (R.C. 2913.71 is an "enhancement provision, which categorizes certain types of 'property,' * * * into a specified degree of the offense."). One of the items of property set forth in R.C. 2913.71 is a blank check. R.C. 2913.71(B). Accordingly, by receiving, retaining, or disposing of six blank checks, appellant committed, was indicted for, and eventually was found guilty of six felonies of the fifth degree.

{¶22} R.C. 2913.71 enhances what would normally be a misdemeanor offense to a felony offense because of the type of property involved. We do not discern the intent of this statute to provide for multiple, cumulative punishments for each offense. See *State v.*

Lowman Lumber Co., 2d Dist. No. 22398, 2009-Ohio-63, ¶34 ("If the legislature had intended to impose cumulative punishments, * * * the legislature could have made the wording explicit.").

{¶23} The appellant proved entitlement to merger of his convictions for purposes of sentencing. Accordingly, we overrule the state's cross-assignment of error.

{¶24} In conclusion, we overrule appellant's assignment of error and the state's cross-assignment of error. Accordingly, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT, P.J., and FRENCH, J., concur.