[Cite as *State v. Forrest,* 2012-Ohio-280.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 11AP-291 (C.P.C. No. 09CR-07-3935)
Al E. Forrest,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on January 26, 2012

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellant.

Michael Siewert, for appellee.

ON MOTION

TYACK, J.

{¶1} The State of Ohio has filed a compound application and motion entitled: "Plaintiff-Appellant's Application for Reconsideration, Plaintiff-Appellant's Application for En Banc Consideration, Plaintiff-Appellant's Motion for Review of this Application for En Banc Consideration by all Eight Judges, [and] Plaintiff-Appellant's Motion to Certify a Conflict."

{¶2} The case involves the warrantless seizure of the person of Al E. Forrest, followed by a search of the motor vehicle in which he was present. A trial court judge

conducted an evidentiary hearing in which she found the State of Ohio had not justified the warrantless seizure and search. As a result, she ordered suppression of the evidence.

{¶3} The State of Ohio appealed and a panel of this court remanded the case for additional findings and additional clarity as to the trial court's rulings.

{¶4} The trial judge conducted a second hearing and again ordered suppression of the evidence.

{¶5} The State of Ohio appealed once again and a different panel of this court affirmed the trial court's ruling.

{¶6} The State of Ohio wants to argue again that the police officer who seized Forrest had the right to do so under the stop and frisk rights granted to police under *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868.

{¶7} This is not a stop and frisk situation. Forrest was in the driver's seat of a parked vehicle. The police did not stop him. They did not frisk him. Instead, a police officer opened the door of the vehicle, reached across Forrest's body, grabbed Forrest's arm which was the closest to the center of the vehicle and pulled Forrest from the vehicle. The officer acknowledged during the evidentiary hearing on the motion to suppress that he had seen no illegal activity when he first ordered Forrest to get out of the vehicle and then seized Forrest. The officer's actions went far beyond stopping a citizen on a public sidewalk and patting the citizen down for weapons, the facts in *Terry*. Again, this was not a stop and frisk situation and *Terry* does not apply. The State of Ohio's discussion of a reasonable articulable suspicion of criminal activity all assumes a *Terry* stop occurred. No such stop occurred.

{¶8} The State's argument at times seems to imply that persons who live in a minority neighborhood have fewer rights under the Fourth Amendment to the United States Constitution than persons who live elsewhere if a police officer calls the neighborhood a "high crime neighborhood" or asserts that other persons have been arrested in the area. The Fourth Amendment applies throughout the nation. The strong preference for requiring police to get a warrant before seizing a person has been the law of the land for over 40 years, at least since the decision in *Katz v. United States* (1967), 389 U.S. 347, 88 S.Ct. 507.

{¶9} The Fourth Amendment jurisprudence has not proceeded to the point that a police officer can pull a citizen out of a parked vehicle merely because the citizen is parked in a minority neighborhood and acts surprised when he or she suddenly sees a police officer standing right outside his or her vehicle.

{¶10} The State of Ohio also, asserts once again, that the decision of the United States Supreme Court in States in *Herring v. United States* (2009), 555 U.S. 135, 129 S.Ct. 695 somehow worked a major change in Fourth Amendment law. It did not.

{¶11} In *Herring,* police officers made an arrest based upon an assertion from a nearby police agency that an active warrant existed. In fact, unbeknownst to the arresting officers and at least some officers of the nearby district, the warrant had been recalled. The United States Supreme Court found that the fruits of the arrest should not be suppressed under the circumstances.

{¶12} The differences from Forrest's case are striking. The officers here knew they had no warrants. They claimed they were approaching the vehicle to check on the

well-being of the occupants. They made no claim to having seen any illegal activity until after they had seized Forrest.

{¶13} The good-faith exclusionary rule claimed by the State of Ohio exists only in the context of searches and arrests where police believe they have a valid warrant. The rule does not apply to situations where no warrants exist or are believed to exist. The rule does not apply to Forrest's factual situations, which involves a deliberate seizure of the person, not negligent record keeping.

{¶14} The cases alleged by the State of Ohio as being in conflict with our decision in this case all involve stop and frisk situations. As noted above, the seizure of Forrest was not a stop or a frisk. No conflict exists such that a conflict should be certified.

{¶15} We do not find that two or more decisions of this appellate court are in conflict, so the requirements of App.R. 26(A)(2) are not met and en banc consideration is not permitted.

{¶16} As a result of the foregoing analysis, the State of Ohio's application for reconsideration is denied. The State's application for en banc consideration and related motions are denied. The motion for certification of a conflict is also denied.

Motions denied.

BROWN, P.J., concurs in judgment only.
BRYANT, J., concurs separately.

BRYANT, J., concurring separately.

{¶17} Although I agree with the majority that the state's motions be denied, I disagree to some extent with the majority opinion and so write separately.

{¶18} The majority points out that this case does not involve a stop and frisk. I do not interpret the state's motion to suggest the case involves a stop and frisk as the officers approached defendant's vehicle. Rather, the state contends that the officers, on arriving at the vehicle, developed a reasonable suspicion that defendant was engaged in criminal activity. Our prior decision addressed that contention and found it unpersuasive.

{¶19} The state's motion for reconsideration does not raise issues this court failed to address in deciding the state's appeal. Accordingly, I would deny the state's motion for reconsideration. For the reasons the majority states, I, too, would deny the state's motions related to en banc consideration and its motion to certify a conflict.

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