[Cite as *State v. Jennings*, 2013-Ohio-2736.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	No. 12AP-179 (C.P.C. No. 09CR-11-6683)
v.	:	(REGULAR CALENDAR)
Rommel E. Jennings,	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on June 27, 2013

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

Cecily L. Ferris, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} The State of Ohio, plaintiff-appellant, appeals from a judgment of the Franklin County Court of Common Pleas, in which the court granted the motion to suppress evidence filed by Rommel E. Jennings, defendant-appellee.

{¶2} At one o'clock in the morning on August 6, 2009, Officer Ryan Steele of the Columbus Police Department was patrolling an area as part of a summer gang initiative. Officer Steele saw a vehicle at an apartment complex with its hood up, and appellee was standing near the vehicle. Another person was also standing near the vehicle. Upon seeing the police cruiser, appellee displayed a panicked look, walked to the vehicle, and made a tossing or reaching gesture toward the open hood. Officer Steele drove his cruiser into the parking lot, approached appellee and the vehicle, and asked appellee to sit on the sidewalk

and talk to him. Appellee attempted to shut the hood of the car. Officer Steele stopped him from doing so once, but then appellee succeeded in shutting the hood on his second effort. Appellee then sat down on the sidewalk. Officer Steele opened the hood and found a crack pipe and bag of crack cocaine in the engine compartment. Officer Steele then arrested appellee.

{¶3} Appellee was charged with possession of cocaine, which is a fifth-degree felony. On August 11, 2011, appellee filed a motion to suppress evidence, arguing the cocaine was illegally seized. The court held an evidentiary hearing on January 18, 2012. On February 22, 2012, the trial court entered a decision and entry granting appellee's motion to suppress evidence. The state appeals the judgment of the trial court, asserting the following assignments of error:

> [I.] THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN MAKING VARIOUS MISSTATEMENTS ABOUT THE LEGAL POSITION TAKEN BY THE PROSECUTION AND POLICE.
>
> [II.] THE TRIAL COURT ERRED IN FAILING TO RULE ON THE QUESTION OF WHETHER DEFENDANT HELD A REASONABLE EXPECTATION OF PRIVACY IN THE AREA SEARCHED.
>
> [III.] THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FINDING THAT A DETENTION OCCURRED, THAT THE DETENTION WAS UNSUPPORTED BY REASONABLE SUSPICION, AND THAT THE UNLAWFUL DETENTION JUSTIFIED SUPPRESSION.
>
> [IV.] THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT FAILED TO FULLY ADDRESS OR APPLY THE GOOD-FAITH EXCEPTION TO THE FEDERAL EXCLUSIONARY RULE.

{¶4} We will address the state's third assignment of error first. The state argues in its third assignment of error that the trial court erred when it found that the detention was unsupported by reasonable suspicion and that the unlawful detention justified suppression. An appellate review of a ruling on a motion to suppress evidence presents mixed questions of law and fact. *State v. Long*, 127 Ohio App.3d 328, 332 (4th Dist.1998). During a suppression hearing, the trial court assumes the role of the trier of fact and is,

therefore, in the best position to resolve questions of fact and evaluate witness credibility. *State v. Mills*, 62 Ohio St.3d 357, 366 (1992); *State v. Hopfer*, 112 Ohio App.3d 521, 548 (2d Dist.1996). As a result, an appellate court must accept a trial court's factual findings if they are supported by competent and credible evidence. *State v. Guysinger*, 86 Ohio App.3d 592, 594 (4th Dist.1993). The reviewing court must then review the trial court's application of the law de novo. *State v. Russell*, 127 Ohio App.3d 414, 416 (9th Dist.1998).

{¶5} In the present case, the trial court addressed the application of *Terry v. Ohio*, 392 U.S. 1 (1968). The Fourth Amendment to the United States Constitution prohibits warrantless searches and seizures, rendering them per se unreasonable unless an exception applies. *Katz v. United States*, 389 U.S. 347 (1967). One exception is an investigative stop. *Terry* at 20. A police officer may make a brief, warrantless, investigatory stop of a person where the officer reasonably suspects that the individual is or has been involved in criminal activity. *Id*. at 21. In reaching that conclusion, the officer must be able to point to specific and articulable facts that, taken together with rational inferences from those facts, reasonably warrant the intrusion. *State v. Andrews*, 57 Ohio St.3d 86, 87 (1991), citing *Terry*. Whether an investigatory stop is reasonable depends upon the totality of the circumstances surrounding the incident. *State v. Williams*, 51 Ohio St.3d 58, 60 (1990). A court evaluating the validity of a *Terry* stop must consider the totality of the circumstances as "viewed through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold." *Andrews* at 87-88. "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." *State v. Jones*, 70 Ohio App.3d 554, 556-57 (2d Dist.1990), citing *Terry* at 27. The officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984).

{¶6} Here, the trial court concluded Officer Steele had no reasonable, articulable suspicion. The court found there was no evidence presented that demonstrated the officer believed criminal activity was afoot. The court also found that the only rationale the officer provided was that he had received numerous complaints regarding criminal

activity in the area, he had made numerous arrests based on tips about criminal activity, the car next to appellee had its hood up, and appellee had a panicked look when Officer Steele approached him. The court termed Officer Steele's basis for the stop as merely a hunch.

{¶7} The testimony at the suppression hearing revealed the following. Officer Steele testified that he had been a Columbus police officer for six years, an officer with Perry Township for one year, and a military police officer in the Air Force for six years. The place of the present incident was within his normal precinct. He stated that, based upon his experience, those involved in criminal activity turn away from police after seeing them. He said it is usually the eye contact plus some other action that raises his suspicions about a person's activities. On the night in question, Officer Steele said he was driving around the areas known to have a lot of narcotic and gang activity. He had been informed that drugs were being sold at the apartment complex where the present incident took place. He said most drug dealers in this neighborhood carry guns. He stated that, when he is in a high-crime area, like the apartments in question, and someone is evasive or appears to hide something, he is suspicious that the person has a gun or drugs.

{¶8} Office Steele stated that, when he pulled into the apartment complex, it was one o'clock in the morning, and he noticed a vehicle with its hood up. Appellee was standing several feet away from the hood. Another man was standing near the car as well. Appellee saw the cruiser, gave a "panicked" look, and immediately began walking "nervously" toward the vehicle. Officer Steele testified that appellee then made a "tossing" or a "pitching" motion toward the open hood. He admitted that he described appellee's motion as a "reaching" motion in the police report, but said, in his mind, "reaching," "tossing," and "pitching" are all the same motion. Officer Steele said he did not see an actual item being tossed under the hood.

{¶9} Officer Steele exited the cruiser and began talking to appellee. Appellee leaned against the driver's side quarter panel, the same area toward which he had made the hand motion. Officer Steele asked appellee to step away from the vehicle and sit on the sidewalk because the officer did not know what appellee had put in the engine compartment. Based on his experience, he thought appellee might have put a weapon under the hood. Appellee quickly tried to shut the hood, and Officer Steele stopped it from

closing. Appellee then tried to shut it again, and Officer Steele pulled his hands away to avoid injury. After appellee closed the hood, he sat on the sidewalk. Officer Steele opened the hood and discovered a bag of crack and a crack pipe on top of the air vent in the engine compartment, which is near the driver's side quarter panel.

{¶10} Before addressing whether Officer Steele had a reasonable and articulable suspicion that criminal activity was afoot, it is important to first determine at what point the encounter between the officer and appellee implicated Fourth Amendment guarantees, as not all encounters between law enforcement officers and citizens do so. *See State v. Taylor*, 106 Ohio App.3d 741, 747 (2d Dist.1995). A police officer may approach a citizen in a public place, engage him in conversation, request information, or even request permission to examine his identification or belongings, all without implicating the citizen's Fourth Amendment rights, so long as the person is free not to answer the police officer's questions or respond to his requests. *Id*. Any voluntary responses given by the person during these types of "consensual" police citizen encounters may be used against him in a subsequent criminal prosecution. *Id*. at 749.

{¶11} The protections of the Fourth Amendment are only implicated when a police officer restrains a person's liberty by physical force or by a show of authority that would cause a reasonable person to believe that he was not free to decline the officer's request or otherwise walk away. *Id*. at 747-48. When a person's liberty is so restrained, he has been "seized" for purposes of the Fourth Amendment. Any evidence obtained from the person seized during the encounter will be inadmissible in a subsequent criminal trial, unless the officer possessed the requisite level of suspicion at the time the seizure occurred. *See id*. at 749.

{¶12} Officer Steele's initial contact with appellee was a consensual encounter. Officer Steele testified that he drove his police cruiser into the apartment parking lot, walked up to appellee, and began to talk to him. Other than the fact that Officer Steele and his partner were driving a police cruiser and wearing their tactical vests emblazoned with "police," there was no specific show of force or authority upon their initial engagement with appellee. At this point, it was a consensual encounter.

{¶13} Officer Steele testified that he then requested appellee step away from the vehicle and have a seat on the sidewalk. Officer Steele specifically testified that he "asked"

appellee to sit down, and it was not a command. Although such a statement would be more in line with a mere request, even if it were an order that a reasonable person in appellee's position would not have believed he was free to ignore, such is immaterial because appellee did not immediately comply. Instead, appellee attempted to shut the hood. When a person does not submit to a show of authority, he has not been "seized" for purposes of the Fourth Amendment. *State v. Goss*, 2d Dist. No. 98-CA-43 (May 28, 1999), citing *California v. Hodari D.*, 499 U.S. 621, 626 (1991). Thus, at this point, no seizure had yet taken place here.

{¶14} Although it could be argued that Officer Steele's attempt to prevent appellee from shutting the hood began a new seizure because the officer was restraining appellee's liberty using physical force, appellee then again failed to comply with Officer Steele by attempting to shut the hood a second time; thus, no seizure had taken place at this point. Officer Steele was then forced to remove his hands from under the hood to avoid injury. Appellee was successful in shutting the hood on the second attempt. At this point, no reasonable person would have felt he was free to do as he wished or free to leave the area. It was clear that Officer Steele had attempted by physical force to restrain appellee from shutting the hood twice, and appellee could not have believed he was free to leave. *See Goss* (by repeatedly asking the defendant to hang up the telephone despite his attempts to ignore them, the detectives made it clear that they were not going to take "no" for an answer, and no reasonable person would have felt free to ignore the detectives' repeated requests to hang up the telephone), citing *United States v. Jerez*, 108 F.3d 684, 692 (7th Cir.1997) (defendant was "seized" when police knocked on his motel window for three minutes, since no reasonable person would have felt free to leave under the circumstances). After he was able to shut the hood, appellee finally complied with the police officer's request that he sit on the sidewalk. Thus, appellee was not "seized" for purposes of the Fourth Amendment until after Officer Steele tried to prevent appellee from shutting the vehicle's hood for the second time, and appellee finally complied by sitting on the sidewalk. Accordingly, the question becomes whether Officer Steele had reasonable, articulable suspicion at this juncture that criminal activity was afoot.

{¶15} After a review of the testimony presented at the hearing and a de novo review of the legal questions at issue in the present case, we find the trial court erred when

it found Officer Steele lacked reasonable, articulable suspicion and granted appellee's motion to suppress. When reviewing the issue of reasonable, articulable suspicion, the trial court did not consider all of the circumstances to which Officer Steele testified and failed to consider them in totality. The trial court narrowed its summary of the state's argument regarding reasonable, articulable suspicion to three grounds: (1) the area was known for citizen complaints and arrests, (2) the area was known for high crime and gang and narcotics activity, and (3) appellee was nervous.

{¶16} The trial court found that "in and of itself," these circumstances did not provide sufficient indicia that appellee was engaged in criminal activity. The court also discounted the above circumstances by pointing out that appellee lived in the apartments at that address; the officer's basis was no more than a hunch based upon past patrols; there were no reports of criminal activity at that location that night; there were no other sources of information about criminal activity; the officer's testimony did not support that he saw something tossed into the vehicle; the officer only approached appellee because his hood was up; Officer Steele did not see any weapons; and appellee had not committed any criminal violations. The court then summed up its conclusion by stating that "[t]o find an officer in the instant case had a reasonable, articulable suspicion to initiate this stop would mean that anyone who stood outside of their residence, for any period of time or for any reason during a patrol in this area, could possibly be subjected to inquiry and search, just because the area in which they live or visit has a negative reputation."

{¶17} However, Officer Steele initiated the stop here for many reasons beyond the fact that appellee was standing outside his residence in an area with a negative reputation. There also existed several more bases for suspecting criminal activity than just the three cited by the trial court. In light of the fact that the "seizure," for purposes of the Fourth Amendment, did not occur until after appellee complied with the officer's request that he step away and sit on the sidewalk, Officer Steele's following testimony supported his investigative stop: (1) the area was known to have a lot of narcotic and gang activity, (2) he had been informed in the past that drugs were being sold at the apartment complex, (3) most drug dealers in this neighborhood carried guns, (4) it was one o'clock in the morning, (5) the vehicle had its hood up, (6) when appellee saw the cruiser, he gave a "panicked" look, (7) after seeing the police, appellee immediately began walking nervously

toward the vehicle, (8) appellee made a "tossing," "pitching," or "reaching" motion toward the open hood, (9) Officer Steele thought appellee might have put a weapon under the hood when he reached toward it, (10) when Officer Steele asked appellee to step away from the vehicle and sit on the sidewalk based upon appellee's prior hand motion, appellee quickly tried to shut the hood of the car, and (11) after Officer Steele caught the closing hood the first time, appellee succeeded in shutting it, almost striking Officer Steele's hand.

{¶18} None of the trial court's or appellee's arguments challenging the above bases is convincing. Although it is well-established that several of the above bases, standing alone or with few other supporting grounds, could not support reasonable and articulable suspicion, it is equally well-established that they are all relevant considerations and may contribute to the reasonable and articulable suspicion analysis. Police officers are entitled to consider personal knowledge that the area was a site of frequent criminal activity, including drug sales. *See Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (finding an individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime, but officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation). Furthermore, this court has recognized that, in assessing the totality of the circumstances, we "generally consider factors such as the time of day, the experience of the officers involved, and suspicious activities by the defendant, both before and during the stop." *State v. Broughton*, 10th Dist. No. 11AP-620, 2012-Ohio-2526, ¶ 19, citing *State v. Bobo*, 37 Ohio St.3d 177, 179 (1988). A defendant's movements, such as furtive gestures, can also be considered in analyzing whether police officers had reasonable suspicion. "A furtive gesture may be defined as a situation where 'police see a person in possession of a highly suspicious object or some object which is not identifiable but which because of other circumstances is reasonably suspected to be contraband and then observe that person make an apparent attempt to conceal that object from police view.' " *State v. Allen*, 2d Dist. No. 23738, 2010-Ohio-3336, ¶ 31, quoting 2 LaFave, Search and Seizure (1987) 58, Section 3.6(d). Although furtive movements alone would not be sufficient to justify a search, they can be considered in making a totality of the circumstances determination.

Id. In addition, "[a]lthough some degree of nervousness during interactions with police officers is not uncommon, *State v. Ely*, Cuyahoga App. No. 86091, 2006-Ohio-459, at ¶ 20, nervousness can be a factor to weigh in determining reasonable suspicion." *State v. Atchley*, 10th Dist. No. 07AP-412, 2007-Ohio-7009, ¶ 14, citing *State v. Grant*, 9th Dist. No. 06CA0019-M, 2007-Ohio-680, ¶ 11; *State v. Williams*, 5th Dist. No. 01-CA-00026 (Dec. 12, 2001).

{¶19} In the present case, as mentioned above, although we agree that several of Officer Steele's bases for reasonable, articulable suspicion would be insufficient alone, here there exist numerous grounds to support his reasonable suspicion of criminal activity when viewed in totality. That it was one o'clock in the morning, the area was known for narcotic activity, Officer Steele was familiar with the area and apartments based upon his experience, appellee had a panicked look on his face when he saw the police cruiser, and appellee walked immediately and nervously toward the vehicle upon seeing the police all contribute reasonable bases for his suspecting appellee was engaged in criminal activity. Appellee also made a suspicious, furtive reaching motion toward the vehicle's open hood as if he were tossing something into the engine compartment, and then he made apparent attempts to conceal that object from police view by trying to shut the hood twice. We caution that a person shutting their hood is not indicative of an intent to conceal something in every situation, but when combined with the other indicia of suspicious activity, particularly a hand motion toward the hood seconds before, forms a reasonable basis for suspecting criminal activity. For these reasons, based upon the totality of the circumstances, we find that Officer Steele had specific and articulable facts that, taken together with rational inferences from those facts, reasonably warranted an investigatory stop.

{¶20} Notwithstanding, appellee argues that, even if the initial detention was lawful pursuant to *Terry*, Officer Steele had no right to search the vehicle unless he had probable cause to believe that contraband or evidence of a crime could be found therein. However, the trial court never reached the issue of the propriety of the search inside the closed hood because it found the stop was unlawful pursuant to *Terry*. It is axiomatic that issues that are not reached by the trial court will not be passed upon by this court in the first instance. *In re Mitchell*, 60 Ohio St.2d 85, 90 (1979); *Moats v. Metro. Bank of Lima*,

40 Ohio St.2d 47, 49-50 (1974). Thus, because the trial court has not yet passed upon whether the search of the engine compartment was lawful, we will not address this for the first time in this appeal.

{¶21} Therefore, we find the trial court erred when it granted appellee's motion to suppress based upon its finding that the stop was unlawful pursuant to *Terry*, and we sustain the state's third assignment of error. Having sustained this assignment of error, the state's first, second, and fourth assignments of error are rendered moot for purposes of this appeal.

{¶22} Accordingly, the state's third assignment of error is sustained, its first, second, and fourth assignments of error are rendered moot, and the judgment of the Franklin County Court of Common Pleas is reversed. The matter is remanded to determine, in the first instance, whether the police officer's search of the engine compartment subsequent to his lawful stop pursuant to *Terry* was proper on any basis.

Judgment reversed;
cause remanded.

KLATT, P.J., concurs
TYACK, J., dissents.

TYACK, J., dissenting.

{¶23} I respectfully dissent.

{¶24} The problem with the majority of this panel's analysis is that it assumes that the police officer was accurately relating what occurred during his encounter with Rommel Jennings.

{¶25} This was a warrantless search and seizure. The burden was on the State of Ohio to demonstrate an exception to the requirement that a police officer have a warrant when conducting a search or seizure. The trial court judge did not believe an exception was proved by the State of Ohio during the evidentiary hearing on the motion to suppress.

{¶26} The majority of this panel seems to accept the police officer's testimony about why he conducted a warrantless search, including the officer's claim that Jennings had a "panicked look" and the allegation that the officer thought Jennings' extending his arm toward the motor vehicle was a tossing or pitching of something when nothing was

seen which was supposedly tossed or pitched. This panel is not in the position to re-weigh credibility.

{¶27} The trial court judge clearly understood the applicable law of search and seizure. The trial court judge applied that law. The trial court judge, based upon the testimony presented before her, reached a different set of factual conclusions than that reached by the majority of this panel. Again, we are not in a position to reach such different factual conclusions. We did not see the officer testify and cannot say he was believable. As noted earlier, the burden of proof was on the State of Ohio. We should not conclude that, because the officer said it on the witness stand, it must be so. Police officers make mistakes and sometimes testify in a way to justify what they have done earlier.

{¶28} The crux of the issue before us still is the fact the burden of proof was on the State to demonstrate the existence of a clearly delineated exception to the requirement that police obtain a search warrant before conducting a search. The State of Ohio failed to carry that burden. We should affirm the trial court's finding on that issue because it is in reality a finding grounded in the facts demonstrated or not demonstrated during the evidentiary hearing before the trial court judge.

{¶29} Again, I respectfully dissent.
