[Cite as *State v. Newland*, 2015-Ohio-2358.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 14AP-959 (C.P.C. No. 14CR-02-969)
Richard Newland, II,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on June 11, 2015

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellant.

Robert B. Barnhart, for appellee.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} The State of Ohio is appealing from the trial court's granting of a motion to suppress. The words of their assignment of error are:

> The Trial Court Committed Reversible Error in Sustaining Newland's Motion to Suppress.

{¶ 2} The motion to suppress filed on behalf of Richard Newland, II was the subject of an evidentiary hearing. The evidence indicated that two Columbus Police Officers were on patrol when they saw a group of people outside a public library. The officers parked their cruiser and approached the group.

{¶ 3} One of the officers asked part of the group if they had any weapons. That part of the group denied being armed. The other officer started frisking some members of the group. The officer who initially asked the one part of the group if they were armed

then asked Newland if he had any weapons. Newland responded that he did not, but then ran away.

{¶ 4} Despite having no warrant for an arrest and no probable cause to arrest Newland, the two officers chased Newland down and grabbed him. Newland was then handcuffed, frisked and placed in a police cruiser. During the frisking, no weapons were detected.

{¶ 5} The trial court judge, after hearing this evidence, stated in open court:

> THE COURT: All right. This case, I think, presents some interesting facts. I think from a Fourth Amendment perspective, the Court has to view the case in light of constitutional guarantees here, not only in the federal constitution, but also in the state constitution.
>
> This case, the officers testified that they observed a group in front of the library. They were doing nothing wrong. They observed nothing wrong going on. They had received no calls.
>
> There was nothing to cause them to, from a law enforcement -- I don't want to say from a law enforcement, but from a violation perspective, to approach the folks that were in front of the library.
>
> Upon approaching them, the first officer testified that he was just talking to them. The second officer stated that he was frisking them -- I won't say frisking, patting them down, and the Defendant in this case, then, broke and ran.
>
> The officers agree that there was no basis for him to stay there, based upon their conversation with him, based upon their approaching him.
>
> So given that, that there was no reason for him to stay and he was free to leave, depart, once he departed, did anything occur that would cause them to have the ability to apprehend or to seize him? Because after he left, if they stopped him, if they detained him, it would have constituted a seizure. And if he's seized, then that brings in even greater protection requirements.
>
> And I think the initial thing that the Court has to wrestle with is once he left, whether he ran, whether he walked, or

> whether he low-crawled, as Mr. Brown kept stating, did he have the right to do that?
>
> And I think he did. He had the right to depart. The officers have no basis of stopping him or preventing him from departing.
>
> Therefore, I think, based upon that, if he had to go, to depart and leave, unless something intervened to cause them to have the ability to say he couldn't leave, and they did not have that ability to do that, they stated it themselves, once he departed, he was free to go. Anything after that is suppressed.
>
> So the motion to suppress will be granted. And the Court will put a short entry on stating that the motion to suppress will be granted.

(Tr. 82-85.)

{¶ 6} We note that the police officers had no warrant for the arrest of Richard Newland, II, and no search warrant at the time they encountered him. The case law from the Supreme Court of the United States has held for many years that warrantless arrests and searches are per se unreasonable for purposes of the Fourth Amendment to the United States Constitution which bars unreasonable searches and seizures. *See Katz v. United States*, 389 U.S. 347 (1967). Katz further states that the only exceptions to the warrant requirement are well-delineated and well-defined. The government, in this case, the State of Ohio, has the burden of proving the existence of the well-delineated exception in a given case or faces the loss of the use as evidence of items obtained by police as a result of their warrantless activity.

{¶ 7} As evidenced by the trial court judge's statements in open court, the prosecution did not prove to the judge the existence of an exception to the warrant requirement.

{¶ 8} On appeal, counsel for the State of Ohio argues that the stop and frisk exception first set forth in *Terry v. Ohio*, 392 U.S. 1 (1968) applies in this case. The state's argument is not persuasive. In the *Terry* case, Terry was viewed by Cleveland police as engaging in suspicious activity, so they stopped and frisked him without probable cause to

believe he had committed a crime. The Supreme Court of the United States ruled that the stop and frisk was constitutionally permissible but only because the Cleveland police had a reasonable, articulable suspicion that Terry had engaged, was engaging, or was about to engage in criminal activity. By contrast, Newland was one of a group of people outside a public library. With no observation of any criminal activity by any in the group, the officers approached and began questioning members of the group. One of the officers went further and immediately began frisking some members of the group.

{¶ 9} Newland initially remained and even answered a question directed at him by one of the officers. Then Newland decided to run away.

{¶ 10} Running away from a police officer does not, in and of itself, constitute a reasonable, articulable suspicion of criminal activity. As noted by the trial court judge, Newland had a right to discontinue his interaction with the police officers. The fact that he ran away, as opposed to walking away from the officers, does not make his conduct a reasonable basis for suspecting a crime had been or was about to be committed.

{¶ 11} As a result, the State of Ohio failed to carry its burden of demonstrating the existence of one of the well-delineated exceptions to the warrant requirement and the trial court judge was bound to sustain the motion to suppress.

{¶ 12} We note that the police went far beyond stopping Newland after he ran away. They handcuffed him, frisked him, and placed him in the back of a police cruiser. Such a total restraint of his liberty would normally be considered an arrest – in this case, an arrest with nothing approaching probable cause to believe he had committed a crime. Illegal arrests call for suppression of evidence obtained as fruits of the arrest. *See Wong Sun v. United States*, 371 U.S. 471 (1963). The trial court judge did not pursue this potential second reason for suppressing the evidence because the judge had already found that the officers had gone past what was constitutionally permissible.

{¶ 13} The dissent seems to assume that the testimony of the police officers was believed or believable. We live in a world where libraries contain computers, CDs and a variety of other items. People come to libraries for a variety of services other than checking out books. The fact the officers later claimed that they noticed no books or book bags among those in the area is not in the least an indication that the people outside the library were not patrons of the library.

{¶ 14} Having pursued Newland with nothing approaching probable cause, the officers had to figure out why they were justified in their warrantless activity. In their testimony, they tried to make the library sound like some location for nefarious activity. The trial court judge rejected their attempts in finding that the officers had no basis for pursuing and essentially arresting Newland when he ran away.

{¶ 15} The officers ignored other niceties of Fourth and Fifth Amendment law also. They frisked people outside the library for no good reason. They questioned people for no apparent reason other than the fact they were standing outside the library. Having chased and totally restrained Newland of his liberty, including handcuffing him and locking him in the back of a police cruiser, they questioned him without the benefit of the constitutionally required Miranda warnings.

{¶ 16} Some aspects of the dissent stand Fourth Amendment law on its head. If a police officer who has no warrant approaches you and questions you and/or frisks you, but you do not leave, the encounter is called "consensual" and therefore permissible, no matter how little you wanted to talk to the officer or interact with the officer. If you leave, your departure is viewed as being suspicious, especially if you leave quickly. Your departure is called by the dissent an "unprovoked flight," which somehow justifies your being chased down by police, handcuffed, frisked, placed in the locked back of a police cruiser and questioned.

{¶ 17} In short, the trial court appropriately sustained the motion to suppress in this case. The sole assignment of error is overruled. The ruling of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

HORTON, J., concurs.
KLATT, J., dissents.

KLATT, J., dissenting.

{¶ 18} Because I would reverse the judgment of the trial court and remand the case for consideration of whether the officers' detention of Newland exceeded the scope permitted by *Terry v. Ohio*, 392 U.S. 1 (1968), I respectfully dissent.

{¶ 19} During the suppression hearing, two Columbus Police Officers testified that they saw a large group of people gathered outside the public library on East Livingston Avenue. No one in the group appeared to have any books, book bags, or other items suggesting they were patrons of the library. Officer Pawlowski testified that in his experience, this particular location was a known "gang hangout" and the police had previously received complaints from the library's security officer concerning fights, arguments, robberies, weapons, and narcotics at this location.

{¶ 20} Officers Pawlowski and Blaine approached the group of people who were split into two subgroups. Officer Pawlowski approached one of the subgroups and asked if they had any weapons. Officer Blaine started patting down individuals in the other subgroup. Because the trial court found that these individuals were not detained and, therefore, free to leave, it effectively concluded that this initial encounter with the officers was consensual in nature.

{¶ 21} Officer Pawlowski ultimately asked Newland if he had any weapons. Newland denied he possessed a weapon, but then abruptly turned and ran from the officers. The officers pursued Newland and caught him in the parking lot. The officers put Newland in handcuffs, patted him down, and put him in the cruiser. During the pat-down, Officer Pawlowski did not feel any weapons or contraband.

{¶ 22} While in the cruiser, Officer Pawlowski asked appellant why he ran. Appellant answered that he had "pitched marijuana." However, the officers did not observe appellant throw anything. The officers then ran a warrants check on appellant and discovered he had an outstanding arrest warrant from Zanesville, Ohio. Appellant was then placed under arrest. Upon further questioning, appellant admitted that he had a gun in his pants leg. Office Blaine then recovered a loaded .380 caliber handgun from Newland's pants leg. During the transport to the jail, Newland admitted to being a member of the "Pac Squad," which is a subset of the Elaine Gangers Crips street gang.

{¶ 23} None of these facts were disputed at the suppression hearing. The main issue confronting the trial court was whether there was any justification for pursuing and detaining Newland after the initial consensual encounter. Based upon the trial court's oral remarks when he granted the motion to suppress, it appears that because Newland was free to leave the initial encounter, the trial court found that the manner in which

Newland broke off the consensual encounter could not be considered in determining whether there was reasonable, articulable suspicion of criminal activity to justify a limited stop pursuant to *Terry*. I believe that finding is error.

{¶ 24} Many courts have held that flight from a consensual encounter can, in consideration with other factors, justify a *Terry* stop. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (unprovoked flight in area of heavy narcotics trafficking can justify a *Terry* stop); *State v. Thomas*, 10th Dist. No. 10AP-557, 2011-Ohio-1191, ¶ 12 (although 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); *State v. Banks*, 10th Dist. No. 09AP-1087, 2010-Ohio-5714, ¶ 43-44 ("[o]nce appellant chose to abruptly terminate his consensual interview with police by means of flight, the arresting officers were justified in the initiating a valid stop under *Terry*"); *State v. Moyer*, 10th Dist. No. 09AP-434, 2009-Ohio-6777, ¶ 22 (flight from consensual encounter with police in high crime area justified *Terry* stop); *State v. Hull*, 11th Dist. No. 2003-A-0068, 2005-Ohio-2526, ¶ 13 (unprovoked flight from police during consensual encounter, coupled with the location of the encounter, constituted reasonable suspicion to justify the *Terry* stop).

{¶ 25} Because I believe the trial court erred by finding the manner in which Newland left the consensual encounter could not be considered as a factor in assessing the justification for a *Terry* stop, I would reverse the trial court's judgment. Newland was in a high crime area known for gang activity when he was approached by police during a consensual encounter. Officer Pawlowski asked Newland if he possessed a weapon. Newland said he did not, but immediately turned and ran away. Based on these undisputed facts, I would find that there was reasonable, articulable suspicion of criminal activity sufficient to justify a *Terry* stop. However, I would remand this matter to the trial court to determine whether the nature and duration of the detention of Newland following the *Terry* stop was lawful. Because the majority reaches a different conclusion, I respectfully dissent.