

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-03-092
- vs -	:	<u>OPINION</u>
	:	11/9/2009
MICHAEL KELLEY,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2008-10-1764

Robin N. Piper, Butler County Prosecuting Attorney, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45012-0515, for plaintiff-appellee

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HENDRICKSON, J.

{¶1} Defendant-appellant, Michael Kelley, appeals a decision of the Butler County Court of Common Pleas overruling his motion to suppress evidence seized in connection with a traffic stop. For the reasons outlined below, we affirm the decision of the trial court.

{¶2} In the early hours of September 28, 2008, Officer Dennis Jordan of the Middletown Police Department was on routine patrol in the vicinity of Yankee Road and Eighth Avenue in Middletown. Officer Jordan was familiar with the area, describing it as

an "open air drug market" in which dealers engaged in hand-to-hand drug transactions through car windows. Officer Jordan had personally made hundreds of drug-related arrests in the area. He noted that there were a number of known drug dealers hanging about the area on the evening in question.

{¶13} At approximately 12:10 a.m., Officer Jordan observed appellant's light blue sport utility vehicle approach a stop sign. Appellant glanced in Officer Jordan's direction and then looked quickly away, his hands locked rigidly on the steering wheel. Appellant then swiftly accelerated away from the intersection. Finding appellant's behavior unusual, Officer Jordan turned his cruiser around and returned to the stop sign. Having already run appellant's license plate and finding appellant out of sight, Officer Jordan proceeded to appellant's residence a few blocks away.

{¶14} Around this time, Sergeant Kent Hall, a deputy with the Butler County Sheriff's Office, was en route to a reported disturbance in Madison Township. Sergeant Hall observed appellant's vehicle run through a red light at an intersection at an estimated speed of 55 to 60 miles per hour.

{¶15} While Sergeant Hall was questioning appellant, Officer Jordan arrived on the scene. After speaking with Sergeant Hall, Officer Jordan took over the traffic stop to allow Sergeant Hall to pursue his disturbance call. Officer Jordan asked appellant to exit the vehicle and performed a pat-down search, which yielded no weapons. Officer Jordan then conducted a field interview with appellant. When asked where he was going, appellant stated he was heading home. Officer Jordan found this to be odd because appellant was not traveling by way of a direct route to his residence. Rather, appellant was using an indirect route which took him through a bad neighborhood at a late hour. This route also doubled the amount of time it took appellant to get home from his prior destination. When appellant informed Officer Jordan that he was simply "out

joyriding," the officer questioned whether appellant was telling the truth in light of the high gas prices consumers were experiencing at the time. When directly asked whether he thought driving in a high crime area late at night was abnormal, appellant agreed that these circumstances were abnormal. At the conclusion of the field interview, appellant acknowledged that he had had prior contacts with the police involving marijuana and cocaine.

{¶16} It was at this point that Officer Jordan searched appellant's vehicle and discovered 0.20 grams of crack cocaine between the driver's seat and the center console. Officer Jordan then placed appellant under arrest.

{¶17} Appellant was indicted on one count of possession of cocaine in violation of R.C. 2925.11, a fifth-degree felony. Appellant filed a motion to suppress the evidence seized by Officer Jordan, which was denied by the trial court. Appellant subsequently pled no contest to the charge and was convicted and sentenced accordingly. Appellant timely appeals, raising one assignment of error.

{¶18} Appellate review of a ruling on a motion to suppress evidence presents a mixed question of law and fact. *State v. Long* (1998), 127 Ohio App.3d 328, 332. The trial court, as the trier of fact, is in the best position to resolve questions of fact and evaluate witness credibility. *State v. Mai*, Greene App. No. 2005-CA-115, 2006-Ohio-1430, ¶9. A reviewing court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *Id.* The appellate court then determines as a matter of law, without deferring to the trial court's conclusions, whether the trial court applied the appropriate legal standard. *Id.* We are mindful of these considerations in addressing appellant's sole assignment of error.

{¶19} Assignment of Error No. 1:

{¶10} "THE TRIAL COURT ERRED IN FAILING TO SUPPRESS EVIDENCE

OBTAINED FROM THE UNCONSTITUTIONAL SEARCH OF KELLEY'S VEHICLE."

{¶11} Appellant argues that the circumstances surrounding his stop and detention failed to establish probable cause that he was engaging in criminal activity. Consequently, appellant maintains, the warrantless search of his vehicle was unlawful and the cocaine seized as a result of the search should have been suppressed.

{¶12} The Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution protect individuals against unreasonable government searches and seizures. Warrantless searches are per se unreasonable unless one of the well-delineated exceptions applies. *Katz v. United States* (1967), 389 U.S. 347, 357, 88 S.Ct. 507.

{¶13} Appellant contends that the trial court applied the wrong legal standard in rendering its decision. However, appellant confuses the standards for detention and arrest. As explained more fully below, an officer need only have a reasonably articulable suspicion that criminal activity is afoot in order to justify an investigative stop. See *Terry v. Ohio* (1968), 392 U.S. 1, 21, 88 S.Ct. 1868. The same standard applies to a continued detention. *State v. Myers* (1990), 63 Ohio App.3d 765, 771. When an officer actually places a suspect under arrest without a warrant, the officer must have probable cause to reasonably believe that the suspect has committed a felony offense. *State v. Scruggs*, Clinton App. No. CA2006-11-042, 2007-Ohio-6416, ¶6.

{¶14} We observe that there are two types of traffic stops, each requiring a different constitutional standard. *State v. Moeller* (Oct. 23, 2000), Butler App. No. CA99-07-128, at 4. One is a typical noninvestigatory stop where an officer directly observes a traffic violation, giving rise to probable cause to stop the vehicle. *Whren v. United States* (1996), 517 U.S. 806, 810, 116 S.Ct. 1769. Here, it is undisputed that Sergeant Hall's initial noninvestigatory stop of appellant's vehicle was supported by probable cause that

appellant committed a traffic violation by speeding through a red light. Therefore, the initial stop is not at issue.

{¶15} The second type of stop is an investigative or "*Terry*" stop, which occurs where an officer has a reasonable suspicion based upon specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the conclusion that an individual is or has been engaged in criminal activity. *Terry* at 21. Here, appellant acknowledges that Officer Jordan was justified in asking him to exit his vehicle and in conducting a pat-down to search for weapons. Where the parties diverge is whether Officer Jordan could lawfully continue the investigation, including the search of appellant's vehicle, after the pat-down did not yield any weapons or contraband.

{¶16} If during the scope of the initial stop an officer encounters additional specific and articulable facts which give rise to a reasonable suspicion of criminal activity beyond that which prompted the stop, the officer may detain the vehicle and driver for as long as the new articulable and reasonable suspicion continues. *Myers*, 63 Ohio App.3d at 771. In the case at bar, other facts arose during the stop that justified Officer Jordan's continued detention of appellant. First, we note that Officer Jordan had been a Middletown police officer for ten years, three of which were spent as a detective in the narcotics unit. Officer Jordan testified that he had personally made hundreds of drug arrests in the high crime area where appellant's vehicle was first observed. Upon questioning, appellant acknowledged that he was driving home by a highly circuitous route, saying he was "out joyriding." This explanation aroused Officer Jordan's suspicions in view of the bad neighborhood, time of night, and high gas prices. When Officer Jordan asked whether such actions comported with what a normal person would do or what appellant would normally do, appellant replied in the negative. In addition, appellant admitted that he had been caught with marijuana and cocaine when asked

whether he had any prior contacts with law enforcement.

{¶17} Furthermore, we find that the totality of the circumstances supported Officer Jordan's search of appellant's vehicle. In *Michigan v. Long* (1983), 463 U.S. 1032, 103 S.Ct. 3469, the United States Supreme Court held that an officer may search the passenger compartment of a vehicle during an investigative stop when the officer has a reasonable suspicion that an individual is dangerous and might access the vehicle to gain immediate control of a weapon. *Id.* at 1049-50. Conversely, where a traffic stop does not involve facts which arouse a reasonable suspicion that an individual is dangerous and may immediately access a weapon in his vehicle, officer safety is not a legitimate concern and the warrant exception contained in *Michigan v. Long* is not applicable. See *id.*

{¶18} The circumstances surrounding the investigative stop in this case align with the reasoning in *Michigan v. Long*. Appellant acted evasively when first observed by Officer Jordan at the stop sign. His midnight joyride through a known "open air drug market" was peculiar, which he admitted when questioned by Officer Jordan. Appellant also acknowledged that he was previously involved with drugs and the police. Following an investigatory stop where an individual is not ultimately arrested, the individual will be permitted to return to his vehicle. Considering the aforementioned facts, viewed in conjunction with Officer Jordan's testimony that weapons often accompany drugs, it was reasonable for Officer Jordan to be concerned for his safety. Such concerns substantiated the search of appellant's vehicle under *Michigan v. Long*.

{¶19} Appellant's sole assignment of error is overruled.

{¶20} Judgment affirmed.

POWELL, P.J., and YOUNG, J., concur.

