[Cite as *State v. Dennis*, 2012-Ohio-4877.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2012-01-004
	:	O P I N I O N
- vs -		10/22/1012
	:	
TOMMY DENNIS III,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 11CR27522

David P. Fornshell, Warren County Prosecuting Attorney, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

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S. POWELL, P.J.

{¶ 1} Appellant, Tommy Dennis III, appeals his conviction in the Warren County Court of Common Pleas for trafficking in heroin. For the reasons stated below, we affirm.

{¶ 2} On July 11, 2011, appellant was indicted for trafficking in heroin, a fourth-degree felony and trafficking in cocaine, a fifth-degree felony. The charges stemmed from a drug transaction that was arranged by a confidential informant. Prior to trial, appellant moved

to suppress the evidence and to disclose the confidential informant's identity. On November 15, 2011, the trial court held an evidentiary hearing regarding the motion to suppress.

{¶ 3} Dan Schweitzer, an officer with the Warren County Sheriff's Office, testified at the hearing regarding his involvement with the drug transaction. Schweitzer, a police officer of 15 years who is assigned to the Warren County Drug Task Force, stated that he worked with a confidential informant to set up the drug transaction. Schweitzer testified that he has worked with the informant in over 50 cases and many of these cases have resulted in apprehensions and convictions. The information he has received from the informant has always been accurate and reliable.

{¶ 4} On February 22, 2011, the informant arranged to purchase crack-cocaine and heroin from an individual that went by the name of "Red." During the transaction, the informant was not wired for audio or video tape and therefore communicated to both Red and Schweitzer via a cellular phone. Schweitzer explained that during the transaction the informant would speak with Red and then immediately call Schweitzer and inform him of the conversation. On that day, the informant called Schweitzer and told him that he was to meet Red in a Burger King parking lot and Red was on his way to the location. The informant was unable to provide a physical description of Red, a description of the car he would be driving, or a license plate number. Officer Schweitzer and other Drug Task Force police officers then left to the location.

{¶ 5} Officer Schweitzer and the other officers arrived at the location and noticed that the Burger King was directly in front of a Bigg's grocery store. Schweitzer then circled both the Burger King and Bigg's parking lots to get a visual of the area. Soon after, the informant called Schweitzer and told him that Red had arrived at the Bigg's parking lot. Schweitzer then circled the Bigg's lot a second time and noticed a silver Ford that just arrived in the far corner of the lot. The Ford was very close to the Burger King parking lot and three men were

inside the vehicle. Schweitzer maintained surveillance on the Ford and noticed that the men never left the vehicle. Thereafter, Schweitzer called the informant and told him to exchange the drugs. The silver Ford then exited the Bigg's parking lot and went to the back side of the Burger King lot. The Ford parked perpendicular to the informant's vehicle. After the informant left his vehicle to approach the Ford, Schweitzer and the other officers surrounded the Ford.

{¶ 6} In surrounding the Ford, Schweitzer approached appellant, who was sitting in the driver's side of the vehicle. Schweitzer looked down into the floorboards of the Ford to ensure officer safety and immediately recognized a bag that appeared to contain cocaine in the rear passenger floor board. At the hearing, Schweitzer testified that the Ford's windows were "very tinted" but that upon approaching the Ford, he immediately saw what appeared to be cocaine or crack-cocaine. Schweitzer explained that he believed that the rear passenger window or door was open so that he could see the drugs. Thereafter, the drugs were seized and the Ford was searched. Subsequently, appellant and the second passenger, identified as Red, were charged regarding their participation in the transaction. The third passenger was not charged with any offense.

{¶ 7} After the suppression hearing, the trial court denied appellant's motion to suppress and to disclose the confidential informant's identity. Subsequently, appellant pled no contest to both trafficking in heroin and trafficking in cocaine. The court merged the counts and the state elected to pursue the trafficking in heroin count for sentencing. Appellant was sentenced to three years of community control and received a one-year license suspension.

{¶ 8} Appellant now appeals, raising two assignments of error.

{¶ 9} Assignment of Error No. 1:

{¶ 10} THE TRIAL COURT ERRED BY FAILING TO GRANT APPELLANT'S MOTION

TO SUPPRESS.

{¶ 11} In appellant's first assignment of error, he argues that the trial court erred when it failed to grant his motion to suppress the evidence. Specifically, appellant contends that the investigatory stop of the Ford was not supported by reasonable and articulable suspicion. Appellant also challenges the search of the Ford and the seizure of the drugs located in the vehicle.

{¶ 12} Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. When considering a motion to suppress, the trial court, as the trier of fact, is in the best position to weigh the evidence in order to resolve factual questions and evaluate witness credibility. *State v. Eyer*, 12th Dist. No. CA2007-06-071, 2008-Ohio-1193, ¶ 8. In turn, the appellate court must accept the trial court's findings of fact so long as they are supported by competent, credible evidence. *State v. Lange*, 12th Dist. No. CA2007-09-232, 2008-Ohio-3595, ¶ 4. After accepting the trial court's factual findings as true, the appellate court must then determine, as a matter of law, and without deferring to the trial court's conclusions, whether the court applied the appropriate legal standard. *State v. Forbes*, 12th Dist. No. CA2007-01-001, 2007-Ohio-6412, ¶ 29.

{¶ 13} The Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution protect individuals from unreasonable searches and seizures. Generally, "[f]or a search or seizure to be reasonable under the Fourth Amendment, it must be based on probable cause and executed pursuant to a warrant." *State v. Moore*, 90 Ohio St.3d 47, 49 (2000). However, there are several exceptions to the warrant requirement. *See Terry v. Ohio*, 392 U.S. 1, 27, 88 S.Ct. 1868 (1968); *California v. Carney*, 471 U.S. 386, 390, 105 S.Ct. 2066 (1985).

{¶ 14} Initially, appellant argues that the trial court erred by denying his motion to

suppress because the investigatory stop of the vehicle was not supported by reasonable and articulable suspicion. It is well-established that a police officer may briefly stop and detain an individual without an arrest warrant or probable cause for an arrest in order to investigate the officer's reasonable suspicion of criminal activity. *Terry* at 27; *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391(1979). In conducting this investigatory stop, the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry* at 21-22. "The propriety of an investigative stop by a police officer must be viewed in light of the totality of the surrounding circumstances." *State v. Freeman*, 64 Ohio St.2d 291 (1980), paragraph one of the syllabus. The circumstances surrounding the stop must "be viewed through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training." *State v. Bobo*, 37 Ohio St.3d 177, 179 (1988).

{¶ 15} Information received from an informant may provide an officer with reasonable suspicion for an investigatory stop. *Alabama v. White*, 496 U.S. 325, 110 S.Ct. 2412 (1990); *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921 (1972). However, the information from the informant must be shown to be reliable and credible. *Adams* at 147. In assessing an informant's reliability, courts look to the totality of the circumstances and consider the informant's veracity and basis of knowledge. *Illinois v. Gates*, 462 U.S. 213, 230, 113 S.Ct. 2317, 2328 (1983). The testimony of an officer that he has received reliable information from the confidential informant in the past may be sufficient to establish that new information provided by the informant is credible. *State v. Koueviakoe*, 4th Dist. No. 04CA11, 2005-Ohio-852, ¶ 20. If a tip lacks sufficient indicia of reliability, the tip may nonetheless provide reasonable suspicion to justify an investigative stop where it is sufficiently corroborated through independent police work. *Id.*; *White* at 330-331. However, "the simple corroboration of neutral details describing the suspect or other conditions existing at the time of the tip,

without more will not produce reasonable suspicion for an investigatory stop." *State v. Handley*, 12th Dist. No. CA98-04-028, 1999 WL 5568, *3 (Feb. 1, 1999).

{¶ 16} We find that the investigatory stop of appellant was supported by reasonable and articulable suspicion. First, the confidential informant's information was shown to be reliable and credible. Officer Schweitzer testified that he had previously worked with the informant in several cases and that the information from the informant is always reliable. Second, the information provided by the informant was corroborated by Officer Schweitzer's observations. The Ford's locations during Schweitzer's surveillance were suspicious as the vehicle was parked in a very far corner of the Bigg's parking lot, which was close to the Burger King and then moved to the Burger King parking lot, perpendicular to the informant's car. The arrival of the Ford in the Bigg's parking lot and the movement into the Burger King lot also corresponded with the informant's phone calls. Finally, the behavior of the individuals in the Ford was suspicious as they all remained in the vehicle even though it was parked in a store parking lot. Therefore, because the informant's information was reliable and corroborated by independent police work, the investigatory stop of appellant was supported by reasonable and articulable suspicion.

{¶ 17} Appellant next argues that even if the police had reasonable and articulable suspicion to detain him, the evidence should be suppressed because the police unconstitutionally searched the Ford and seized the drugs. The United States Supreme Court has long recognized that a police officer need not obtain a warrant before conducting a search of an automobile. *California v. Carney*, 471 U.S. 386, 390, 105 S.Ct. 2066 (1985); *Maryland v. Dyson*, 527 U.S. 465, 466, 119 S.Ct. 2013 (1999). Instead of obtaining a warrant, a police officer may search a validly stopped motor vehicle once the officer has probable cause to believe the vehicle contains contraband. *Carney* at 390.

{¶ 18} A police officer has probable cause to search a vehicle when the officer

observes evidence in plain view that is incriminating. *State v. Buckner*, 2d Dist. No. 21892, 2007-Ohio-4329, ¶ 9. Evidence in plain view is subject to seizure when the initial intrusion leading to the items' discovery was lawful and the incriminating or illegal nature of the items was "immediately apparent." *Horton v. California*, 496 U.S. 128, 110 S.Ct. 2301 (1990), syllabus. The "immediately apparent" requirement of the plain view doctrine is satisfied when police have probable cause to associate an object with criminal activity. *State v. Halczyszak*, 25 Ohio St.3d 301 (1986), paragraph three of the syllabus. The requisite probable cause may arise from the character of the property itself or the circumstances in which it is discovered, and police officers may rely on their specialized knowledge, training, and experience in establishing probable cause to identify items as contraband. *Id.* at 304-305.

{¶ 19} Officer Schweitzer had probable cause to search the Ford because the drugs were in plain view. As discussed above, the intrusion leading to the discovery of the drugs was lawful as Schweitzer had reasonable and articulable suspicion to detain appellant. The evidence established that as Schweitzer was approaching the Ford, he noticed a baggie in the rear passenger floorboard and immediately recognized the bag as containing cocaine or crack-cocaine. Appellant asserts that the drugs were not in plain view because the Ford's windows were tinted. Although Schweitzer admitted at the hearing that appellant's windows were "very tinted," he maintained that he could plainly see the drugs. Schweitzer explained that either the passenger side door or window was open so that he could see into the vehicle. Thus, we find that the trial court did not err in denying appellant's motion to suppress because the drugs were in plain view which established probable cause to search the entire vehicle.

{¶ 20} Because the investigatory stop was supported by reasonable suspicion and probable cause existed to search the vehicle, appellant's first assignment of error is overruled.

{¶ 21} Assignment of Error No. 2:

{¶ 22} THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO DISCLOSE THE IDENTITY OF THE CONFIDENTIAL INFORMANT.

{¶ 23} In appellant's second assignment of error, he argues that the trial court erred when it denied his motion to disclose the identity of the confidential informant as the informant's identity and subsequent testimony would be helpful in preparing his defense.

{¶ 24} A trial court's decision regarding the disclosure of a confidential informant's identity is reviewed under an abuse of discretion standard. *State v. Stevenson*, 12th Dist. No. CA2003-08-085, 2004-Ohio-4783, ¶ 8. An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. *Id.*

{¶ 25} The determination of whether to disclose the identity of a confidential informant involves the balancing of competing interests. *State v. Williams*, 4 Ohio St.3d 74, 75 (1983), citing *State v. Phillips*, 27 Ohio St.3d 294 (1971). A trial court must balance a defendant's constitutional right to confront accusers against him with the public's interest in protecting the flow of information to the government. *Id.* When "the testimony of the informant is vital to establishing an element of the crime or would be helpful or beneficial to the accused in preparing or making a defense to criminal charges" an accused is entitled to disclosure of the identity of the confidential informant. *Williams* at syllabus. The defendant bears the burden of establishing the need for disclosure. *State v. Pointer*, 12th Dist. No. CA2010-03-003, 2010-Ohio-5067, ¶ 8.

{¶ 26} In general, courts have compelled disclosure when the informant helped set up the commission of the crime and was the sole witness to its occurrence. *Roviaro v. United States*, 353 U.S. 53, 64-65, 77 S.Ct. 623 (1957); *Phillips* at 298-299; *State v. Gales*, 143 Ohio App.3d 55, 63 (8th Dist.2001). However, when another individual also witnesses the

crime's occurrence, courts have not compelled disclosure. This is the case even when the informant has arranged the commission of the crime. *Williams* at 76; *State v. Mahan*, 12th Dist. No. CA2002-10-262, 2003-Ohio-5430, ¶ 23; *State v. Moon*, 74 Ohio App.3d 162 (9th Dist.1991). The presence of a co-defendant during the commission of a crime does not obviate the need for disclosure of the confidential informant when no other witnesses are present. *State v. Pope*, 8th Dist. No. 81321, 2003-Ohio-3647, ¶ 26.

{¶ 27} Appellant first argues that the informant's identity and testimony would be helpful to show whether the informant arranged the drug transaction with appellant or appellant's co-defendant. We disagree with this assertion because the informant was not the sole witness to the transaction. During the drug transaction, appellant, appellant's co-defendant, and a third individual were in the vehicle that pulled next to the informant's car that was eventually stopped by police. Officer Schweitzer testified that the informant communicated with Red regarding the drug transaction via a cellular phone while the Ford was in the Bigg's parking lot. Schweitzer stated that three individuals remained in appellant's vehicle during the drug transaction. Consequently, in addition to appellant's co-defendant, a third individual in the Ford heard the conversation between the informant and Red and heard all other conversations in the Ford. Therefore, the confidential informant was not the sole witness to the offense eliminating the need to disclose the identity of the informant.

{¶ 28} Second, appellant argues that the informant's identity would be helpful to his defense to show whether the informant had a previous history with appellant or the co-defendant. We also disagree with this proposition. Disclosing the informant's identity for purposes of understanding appellant's prior experience with the informant would not be helpful to appellant. If appellant had prior experience with the informant, he would certainly be aware of the informant's identity. Moreover, the informant's prior experience with appellant's co-defendant is not relevant to appellant's case. Appellant's charges involved the

transportation of drugs when he knew the drugs were to be sold to the informant. The informant's experience with the co-defendant does not negate appellant's participation in the offense nor does it provide appellant a defense to the charges. Thus, the informant's identity should not be disclosed because the informant's testimony regarding his or her prior experience with appellant or appellant's co-defendant is not helpful to appellant's defense.

{¶ 29} Therefore, the trial court did not abuse its discretion in denying appellant's motion to disclose the confidential informant's identity. Appellant's second assignment of error is overruled.

{¶ 30} Judgment affirmed.

PIPER and YOUNG, JJ., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.