[Cite as *State v. Johnson*, 2009-Ohio-6136.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23017
v.	:	T.C. NO. 2008 CR 2795/1
KELVIN D. JOHNSON	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 20th day of November, 2009.

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MICHELE D. PHIPPS, Atty. Reg. No. 0069829, Assistant Prosecuting Attorney, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

VIRGINIA L. CREWS, Atty. Reg. No. 0077837, 7501 Paragon Road, Dayton, Ohio 45459
Attorney for Defendant-Appellant

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FROELICH, J.

{¶ 1} Kelvin D. Johnson ("Kelvin") pled no contest to having weapons while under disability, a third degree felony, after the Montgomery County Court of Common Pleas overruled his motion to suppress evidence. The court found him guilty and sentenced him

to three years in prison, to be served consecutively to six months imposed by the parole board for violating post-release control. Kelvin appeals from his conviction, claiming that the trial court erred in overruling his motion to suppress. For the following reasons, the judgment will be affirmed.

I

{¶ 2} The evidence at the suppression hearing established the following facts.

{¶ 3} On July 20, 2008, Dayton Police Officer Willie Hooper was working with the department's gang unit, investigating problem areas where gang members "hang out." At approximately 12:43 a.m., the unit went to a motorcycle club, commonly known as "the bone yard," located in the area of West Third and Marion Streets. Hooper and Officer Zweisler exited their police vehicles and approached from the west side. The officers, who were wearing Dayton Police Department uniforms, began to walk through the parking lot. Approximately 100 people were there.

{¶ 4} Hooper and Zweisler started to approach a blue Chevy car where Kelvin Johnson, his brother, Billy Johnson, and their mother were standing. As Hooper approached from the driver's side, Billy yelled, "Police." Hooper observed both Billy and Kelvin lean forward and throw handguns under the car, although he could not identify what types of gun they were. Hooper saw both men with handguns.

{¶ 5} Hooper immediately yelled, "Gun!" Billy "tried to take off running," but Hooper grabbed his t-shirt and dragged him to the ground in front of the car. Kelvin also tried to run, but Zweisler apprehended him. Hooper asked for more crews over his radio, because the Johnsons' mother "was going toward the gun and I kept yelling to her to get

back." Numerous officers responded. One of the responding officers, Brian Spencer, secured both of the guns. Hooper walked Billy Johnson to his police van while Zweisler placed Kelvin Johnson, without handcuffs, in the back seat of his cruiser.

{¶ 6} After placing Billy in his cruiser, Hooper went to Kelvin and advised him of his *Miranda* rights by reading from a card issued by the prosecutor's office. After each right was read, Kelvin was asked if he understood that right; Kelvin stated that he did. Kelvin did not appear to be confused, he did not ask for an attorney, and he indicated that he was willing to speak with Hooper. Hooper did not inquire if Kelvin had taken any drugs, but he did not smell alcohol and Kelvin did not appear to be under the influence of drugs or alcohol. Kelvin then told Hooper that he had purchased a gun from a boy named "Little Dee" and that he purchased the gun because his girlfriend had been killed two weeks prior to that date. Kelvin stated that he threw the gun away because he was on parole. Hooper did not ask if Kelvin had a permit to carry the weapon.

{¶ 7} On August 5, 2008, Kelvin was indicted for having weapons while under disability and carrying a concealed weapon. Kelvin moved to suppress the statements he made to the police, arguing that the statements were "the fruits of an illegal arrest," were involuntary, and were made without a valid waiver of his rights under *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694.

{¶ 8} The court held a hearing on the motion, during which Officer Hooper testified. At the conclusion of the testimony, the court asked defense counsel to clarify the bases for his motion. Defense counsel stated: "Well, I think initially it was based on *Miranda*. I would still stick with *Miranda* as to whether there was true waiver of his rights

or not which requires knowing, both knowing, voluntary and intelligent waiver. ***" After a short recess, the trial court orally overruled the motion to suppress, finding that Kelvin had knowingly, voluntarily, and intelligently waived his *Miranda* rights. A written entry adopting the oral reasoning was filed on the same day. Kelvin subsequently pled no contest to having weapons while under disability with an agreed sentence of three years. In exchange, the carrying a concealed weapon charge was dismissed.

II

{¶ 9} In his sole assignment of error, Kelvin claims that the trial court erred in overruling his motion to suppress. He argues that "[t]he Dayton Police approached [him] and his family without reasonable suspicion that anything had occurred or was about to occur." Kelvin asserts that, due to this illegal detention, the court should have suppressed the evidence and his statements as "fruit of the poisonous tree." The State responds that Kelvin waived any claim that the police unlawfully stopped him because he did not raise the issue in the trial court as required by Crim.R. 47.

{¶ 10} Under Crim.R. 47, a motion, including a motion to suppress evidence, must "state with particularity the grounds upon which it is made and shall set forth the relief or order sought." Motions to suppress evidence must be made prior to trial. Crim.R. 12(C)(3). If a motion to suppress fails to state a particular basis for relief, that issue is waived and cannot be argued on appeal. E.g., *State v. Cullins*, Montgomery App. No. 21881, 2007-Ohio-5978, at ¶10; *State v. Carter*, Montgomery App. No. 21999, 2008-Ohio-2588, at ¶20. As stated by the Supreme Court of Ohio with respect to a motion to suppress evidence obtained from warrantless search:

{¶ 11} "The prosecutor must know the grounds of the challenge in order to prepare his case, and the court must know the grounds of the challenge in order to rule on evidentiary issues at the hearing and properly dispose of the merits. Therefore, the defendant must make clear the grounds upon which he challenges the submission of evidence pursuant to a warrantless search or seizure. Failure on the part of the defendant to adequately raise the basis of his challenge constitutes a waiver of that issue on appeal." (Internal citations omitted.) *Xenia v. Wallace* (1988), 37 Ohio St.3d 216, 218.

{¶ 12} Kelvin's written motion sought to suppress "all statements" to the police on the grounds that the arrest was unlawful, the statements were made involuntarily, and Kelvin had not waived his *Miranda* rights. The motion thus informed the State that Kelvin was challenging his arrest. At the hearing, however, Kelvin informed the trial court that he was relying solely on his *Miranda* argument, and the trial court's ruling was directed solely to that argument. We agree with the State that Kelvin's decision to rely solely on his *Miranda* argument at the suppression hearing constituted a waiver of the additional arguments made in his motion to suppress, including any argument that his detention or arrest was unlawful. Accordingly, Kelvin has not preserved this issue for appellate review.

{¶ 13} Even if Kelvin had not waived his challenge to his detention, we would conclude that the trial court did not err in overruling his motion to suppress.

{¶ 14} The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures. *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. Not all interactions between citizens and the police, however, constitute a seizure. Rather, the interactions between citizens and law enforcement officers can fall

within three distinct categories: a consensual encounter, an investigative detention, and an arrest. *State v. Taylor* (1995), 106 Ohio App.3d 741, 747-749.

{¶ 15} Consensual encounters occur when the police merely approach a person in a public place and engage the person in conversation, and the person remains free not to answer and to walk away. *United States v. Mendenhall* (1980), 446 U.S. 544, 553, 100 S.Ct. 1870, 1876, 64 L.Ed.2d 497, 504-505. The encounter remains consensual even if the officer asks questions, requests to examine an individual's identification, and asks to search the person's belongings, provided that the officer does not convey that compliance is required. *Florida v. Rodriguez* (1984), 469 U.S. 1, 4-6, 105 S.Ct. 308, 83 L.Ed.2d 165, 169-171; *Florida v. Bostick* (1991), 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389. "The Fourth Amendment guarantees are not implicated in such an encounter unless the police officer has by either physical force or show of authority restrained the person's liberty so that a reasonable person would not feel free to decline the officer's requests or otherwise terminate the encounter." (Citations omitted) *Taylor*, 106 Ohio App.3d at 747-48.

{¶ 16} An individual is subject to an investigatory detention when, in view of all the circumstances surrounding the incident, by means of physical force or show of authority, a reasonable person would have believed that he was not free to leave or was compelled to respond to questions. *Mendenhall*, 446 U.S. at 553; *Terry*, 392 U.S. at 16, 19. Under *Terry*, police officers may briefly stop and/or temporarily detain individuals in order to investigate possible criminal activity if the officers have a reasonable, articulable suspicion that criminal activity may be afoot. *State v. Martin*, Montgomery App. No. 20270, 2004-Ohio-2738, at ¶10, citing *Terry*, supra. "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* (1990), 70 Ohio App.3d 554, 556-557, citing *Terry*, 392 U.S. at 27. We determine the existence of reasonable suspicion by evaluating the totality of the circumstances, considering those circumstances "through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold." *State v. Heard*, Montgomery App. No. 19323, 2003-Ohio-1047, at ¶14, quoting *State v. Andrews* (1991), 57 Ohio St.3d 86, 87-88.

{¶ 17} The final category is a seizure that is the equivalent of an arrest. "A seizure is equivalent to an arrest when (1) there is an intent to arrest; (2) the seizure is made under real or pretended authority; (3) it is accompanied by an actual or constructive seizure or detention; and (4) it is so understood by the person arrested." *Taylor*, 106 Ohio App.3d at 749, citing *State v. Barker* (1978), 53 Ohio St.2d 135, at syllabus. An arrest must be based on probable cause.

{¶ 18} Officer Hooper testified that he and Officer Zweisler had parked their police vehicles and were walking, in uniform, through a parking lot where gang members hang out. A large number of people were in the parking lot, talking with each other. Hooper noticed two men and a woman standing near a blue Chevrolet. Billy was standing in front of the headlights on the driver's side talking with Kelvin, who was standing in front of him; their mother was standing by the passenger side of the car. Hooper turned on his flashlight as Billy yelled "police," and the two men threw handguns under the front of the car. At that juncture, Hooper and Zweisler had not spoken to the Johnsons or made any effort to try to

detain them. At most, Hooper and Zweisler's actions, up to that point, appeared to be prefatory to a consensual encounter.

{¶ 19} Hooper testified that he saw Billy and Kelvin with handguns, that he observed them throw the weapons under their vehicle, and that Billy and Kelvin tried to run away. At that juncture, Hooper and Zweisler had a reasonable and articulable suspicion that the two men were involved in criminal activity. In addition, because Kelvin did not inform the officers that he had a CCW permit, as he would have been required to do if he had such a permit, see R.C. 2923.12(B)(1), the officers had probable cause to believe that the gun was evidence of a carrying a concealed weapon violation. *State v. Nelson*, Montgomery App. No. 22718, 2009-Ohio-2546, at ¶46. Accordingly, the evidence adduced at the suppression hearing supported a conclusion that Kelvin's detention and arrest were lawful.

{¶ 20} The assignment of error is overruled.

III

{¶ 21} The judgment of the trial court will be affirmed.

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FAIN, J. and GRADY, J., concur.

Copies mailed to:

Michele D. Phipps
Virginia L. Crews
Hon. Timothy N. O'Connell