[Cite as *State v. Roark*, 2010-Ohio-2841.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23559
vs.	:	T.C. CASE NO. 09CR1071
ANTHONY L. ROARK	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 18th day of June, 2010.

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GRADY, J.:

{¶ 1} Defendant, Anthony Roark, appeals from his conviction and sentence for felonious assault on a peace officer, carrying concealed weapons, and having weapons under a disability.

{¶ 2} On March 30, 2009, at 7:20 p.m., several Dayton police

officers were dispatched to the Cornell Ridge Apartments located off of Cornell Drive in Dayton, on a call involving weapons and drugs. The dispatch indicated that there were approximately ten people in the courtyard area openly selling drugs, and some were armed with assault rifles and shotguns. The Cornell Ridge apartments is a high crime/high drug activity area that is owned and operated by Dayton Metropolitan Housing Authority ("DMHA").

{¶ 3} When Officers Wolpert, Bernstein and Beavers arrived, they saw several persons in the courtyard of the apartment complex. As the officers approached the group, Defendant Roark began to walk away at a brisk pace. Officer Wolpert knew Defendant was on the DMHA trespass list because he had personally "trespassed" Defendant off of DMHA property in November 2008. Officer Wolpert advised Officers Bernstein and Beavers that Defendant was on the trespass list and they began to approach Defendant.

{¶ 4} Officer Beavers told Defendant to "stop and come here," but Defendant took off running toward an apartment building. Officer Beavers chased Defendant, who ran into an apartment and slammed the door shut. Officer Beavers attempted to kick open the front door to the apartment. Meanwhile, Officer Bernstein, anticipating that Defendant might run out the back door, went to the rear of the apartment. As Officer Bernstein prepared to kick open the back door, Defendant opened the door and came out with a gun in his right hand holding the gun down by his side.

{¶ 5} When Defendant saw Officer Bernstein and made eye contact with him, he raised the gun up and pointed it at Officer Bernstein's chest. Officer Bernstein grabbed the gun with one hand and grabbed Defendant's throat with his other hand. The two men scuffled and fell to the ground. Defendant broke free, and got up and ran. As he ran, Defendant looked back, and after making eye contact with Officer Bernstein, pointed the gun at Officer Bernstein while he lay on the ground. Defendant subsequently tripped and fell, dropping the gun, and other officers converged on him. After a struggle with the officers, Defendant was arrested. Police recovered Defendant's gun, which was fully loaded.

{¶ 6} Defendant was indicted on one count of felonious assault on a peace officer, R.C. 2903.11(A)(2), with a three-year firearm specification, R.C. 2941.145, one count of carrying concealed weapons, R.C. 2923.12(A)(2), and one count of having weapons under disability, R.C. 2923.13(A)(3). Defendant filed a motion to suppress the evidence, challenging his stop and arrest, and the statements he later made to police. Following a hearing, the trial court concluded that the investigatory stop and subsequent arrest of Defendant did not violate his Fourth Amendment rights because police had sufficient reasonable suspicion that Defendant was trespassing on DMHA property, but that his statements to police must be suppressed because they were obtained without proper *Miranda* warnings. The trial court overruled Defendant's motion

to suppress, in part, and sustained his motion, in part.

{¶ 7} Defendant was found guilty following a jury trial, on all charges and specifications. The trial court sentenced Defendant to prison terms totaling twelve years. Defendant appealed to this court from his conviction and sentence.

FIRST ASSIGNMENT OF ERROR

{¶ 8} "THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS AS APPELLANT WAS SUBJECT TO AN UNCONSTITUTIONAL SEARCH AND ARREST."

{¶ 9} Defendant argues that the trial court erred in overruling his motion to suppress the evidence because police lacked the reasonable suspicion of criminal activity necessary to justify the investigatory stop and detention of Defendant. We disagree.

{¶ 10} When considering a motion to suppress, the trial court assumes the role of the trier of facts and, as such, is in the best position to resolve conflicts in the evidence and determine the credibility of the witnesses and the weight to be given to their testimony. *State v. Retherford* (1994), 93 Ohio App.3d 586. Upon appellate review of a decision on a motion to suppress, the court of appeals must accept the trial court's findings of fact if they are supported by competent, credible evidence in the record. *Id.* Accepting those facts as true, the appellate court must independently determine as a matter of law, without deference to the trial court's conclusion, whether they meet the applicable

legal standard. *Id.*

{¶ 11} A stop of an individual by police which involves any restraint upon that person's freedom of movement constitutes a seizure governed by the Fourth Amendment's reasonableness standard. *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject to only a few well-recognized exceptions. *Katz v. United States* (1967), 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576. One of those exceptions is the rule regarding investigative stops announced in *Terry v. Ohio, supra*.

{¶ 12} Law enforcement officers may stop and briefly detain an individual for investigation if the officers have a reasonable, articulable suspicion that criminal activity may be afoot; that is, more than an unparticularized suspicion or mere hunch but less than the level of suspicion required for probable cause. *Terry v. Ohio, supra; State v. White* (Jan. 18, 2002), Montgomery App. No. 18731. In order to conduct an investigatory stop, police must be able to point to specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant the intrusion. *Terry v. Ohio, supra; State v. White, supra*.

{¶ 13} The propriety of an investigative stop must be viewed in light of the totality of the surrounding facts and circumstances. *State v. Bobo* (1988), 37 Ohio St.3d 177. These circumstances must

be viewed through the eyes of a reasonable and prudent police officer on the scene who must react to events as they unfold. *State v. Andrews* (1991), 57 Ohio St.3d 86. Accordingly, the court must take into consideration the officer's training and experience and understand how the situation would be viewed by the officer on the street. *Id.*

{¶ 14} In this case police had a reasonable suspicion that Defendant was trespassing on DMHA property. Officer Wolpert knew Defendant was on the DMHA trespass list because, just four months earlier, Wolpert had personally trespassed Defendant off of all DMHA property for carrying concealed weapons. Officer Wolpert told Officers Bernstein and Beavers that Defendant was on the DMHA trespass list, and those officers began to approach Defendant. When Officer Beavers told Defendant to "stop and come here," Defendant put his hands down by his right pants pocket and took off running. Defendant's unprovoked flight from the officers in an area of heavy drugs and weapons activity further aroused the officers' suspicions.

{¶ 15} Evasive behavior is a pertinent factor in determining reasonable suspicion, and headlong flight is the consummate act of evasion. *Illinois v. Wardlow* (2000), 528 U.S. 119, 120 S.Ct. 673, 145 L.Ed.2d 270; *State v. Stafford,* Montgomery App. No. 20230, 2004-Ohio-2200. Furthermore, *Terry* recognized that officers may detain individuals to resolve ambiguities in their conduct.

Stafford, supra. The totality of these facts and circumstances, when viewed through the eyes of the police officers on the scene, was sufficient to give rise to reasonable suspicion of criminal activity and justified stopping and briefly detaining Defendant for further investigation. *Terry v. Ohio*, supra.

{¶ 16} We additionally note that Defendant did not heed Officer Beaver's commands to "stop and come here." Instead, Defendant ran and continued fleeing until he fell and several police officers converged on him. Until a police officer's attempt to effect an investigatory stop succeeds, no seizure has taken place and no Fourth Amendment review of the reasonableness of the officer's decision to intrude on the suspect's privacy is appropriate. *California v. Hodari* (1991), 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690. Absent submission to a show of authority by police, there is no "seizure" and no Fourth Amendment issue. *Id*. A command to Defendant to "stop," such as was given by police in this case, when not complied with, is not a Fourth Amendment seizure, *Id.*, and flight is not submission.

{¶ 17} Defendant was not seized, and no Fourth Amendment issue arose, until he fell to the ground while running from police and was physically subdued by several officers. *Stafford, supra*. By that time, police not only had sufficient reasonable suspicion of trespassing to justify a *Terry* investigative stop, they also had probable cause to arrest Defendant for felonious assault on

a peace officer, after he pointed a handgun at Officer Bernstein. The loaded handgun discovered by police near where Defendant fell to the ground provided additional probable cause for his arrest on weapons charges. There was no violation of Defendant's Fourth Amendment rights, and the trial court did not err in overruling his motion to suppress the evidence.

{¶ 18} Defendant's first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 19} "THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR ACQUITTAL PURSUANT TO RULE 29 AS APPELLANT'S CONVICTION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 20} Defendant argues that the trial court erred in not granting his Crim.R. 29 motion for acquittal, contending that the evidence the State presented was legally insufficient to support his conviction for felonious assault on a peace officer, because it failed to prove that Defendant attempted to cause physical harm to Officer Bernstein with a deadly weapon.

{¶ 21} When considering a Crim.R. 29 motion for acquittal, the trial court must construe the evidence in a light most favorable to the State and determine whether reasonable minds could reach different conclusions on whether the evidence proves each element of the offense charged beyond a reasonable doubt. *State v. Bridgeman* (1978), 55 Ohio St.2d 261. The motion will be granted only when reasonable minds could only conclude that the evidence fails to

prove all of the elements of the offense. *State v. Miles* (1996), 114 Ohio App.3d 738.

{¶ 22} A Crim.R. 29 motion challenges the legal sufficiency of the evidence. A sufficiency of the evidence argument challenges whether the State has presented evidence on each element of the offense alleged to allow the case to go to the jury or sustain the verdict as a matter of law. *State v. Thompkins,* (1997), 78 Ohio St.3d 380. The proper test to apply to such an inquiry is the one set forth in paragraph two of the syllabus of *State v. Jenks* (1991), 61 Ohio St.3d 259:

{¶ 23} "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt."

{¶ 24} Defendant was convicted of felonious assault on a peace officer in violation of R.C. 2903.11(A)(2) which provides:

{¶ 25} "(A) No person shall knowingly do either of the following:

{¶ 26} * * *

{¶ 27} "(2) Cause or attempt to cause physical harm to another

or to another's unborn by means of a deadly weapon or dangerous ordnance."

{¶ 28} Attempt is defined in R.C. 2923.02:

{¶ 29} "(A) No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense."

{¶ 30} The Ohio Supreme Court has held that one may infer from a defendant's actions under the circumstances whether the defendant possessed an intent to cause serious physical harm. *State v. Seiber* (1990), 56 Ohio St.3d 4, 15. In *State v. Woods* (1976), 48 Ohio St.2d 127, syllabus, the Ohio Supreme Court stated that criminal attempt occurs when a defendant "purposely does or omits to do anything which is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime. To constitute a substantial step, the conduct must be strongly corroborative of the actor's criminal purpose."

{¶ 31} In *State v. Brooks* (1989), 44 Ohio St.3d 185, the Ohio Supreme Court concluded that the mere act of pointing a gun at someone, without additional evidence regarding the actor's intention, is insufficient for a conviction for felonious assault. Accord: *State v. Goggans*, Cuyahoga App. No. 79578, 2002-Ohio-2249. However, the act of pointing a gun at someone when coupled with an overt act directed toward causing physical harm, such as a verbal

threat, is sufficient evidence for felonious assault. *Id; State v. Green* (1991), 58 Ohio St.3d 239.

{¶ 32} In this case the State presented sufficient evidence that Defendant took substantial steps in attempting to cause physical harm to Officer Bernstein. Defendant refused to comply with officers' commands to stop and quit running, and fled from police. When Defendant exited the back door of the apartment into which he fled, he had a loaded gun in his right hand. Upon seeing Officer Bernstein and making eye contact with him, Defendant raised the gun up and pointed it at Officer Bernstein's chest. Officer Bernstein grabbed Defendant's right (gun) hand and his throat, and attempted to apprehend him. The two men struggled and both fell to the ground. Defendant broke free, jumped up, ran two steps, then looked back, and while making eye contact with Officer Bernstein as he lay on the ground, pointed the gun at Officer Bernstein a second time. Defendant did not relinquish possession of the gun until he stumbled and fell to the ground, dropping the gun.

{¶ 33} We believe that the factual circumstances in this case, including Defendant's failure to comply with officers' commands, his physical scuffle with Officer Bernstein, his repeated act of pointing the loaded gun at Officer Bernstein while making eye contact with him, and his refusal to voluntarily surrender the gun, when viewed in a light most favorable to the State, is

sufficient to permit a rational trier of facts to find beyond a reasonable doubt all of the essential elements of felonious assault, including that Defendant attempted to cause physical harm to Officer Bernstein by means of a deadly weapon. See: *State v. Ross*, Montgomery App. No. 20031, 2004-Ohio-3093; *State v. Jackson* (Dec. 11, 1997), Cuyahoga App. No, 72014. Defendant's conviction is supported by legally sufficient evidence and the trial court properly overruled his Crim.R. 29 motion for acquittal.

{¶ 34} Defendant's second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

{¶ 35} "APPELLANT'S CONVICTION OF FELONIOUS ASSAULT OF A PEACE OFFICER IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 36} A weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive. *State v. Hufnagle* (Sept. 6, 1996), Montgomery App. No. 15563. The proper test to apply to that inquiry is the one set forth in *State v. Martin* (1983), 20 Ohio App.3d 172, 175:

{¶ 37} "[t]he court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." Accord: *State v. Thompkins*, supra.

{¶ 38} The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve. *State v. DeHass* (1967), 10 Ohio St.2d 230. In *State v. Lawson* (Aug. 22, 1997), Montgomery App.No. 16288, we observed:

{¶ 39} "Because the factfinder ... has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness."

{¶ 40} This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of facts lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

{¶ 41} Defendant argues that his conviction for felonious assault on a peace officer is against the manifest weight of the evidence because there was insufficient evidence that he attempted to cause physical harm to Officer Bernstein by means of a deadly weapon. More specifically, Defendant claims that even if he pointed a loaded gun at Officer Bernstein, that is not sufficient for felonious assault, and there is no additional evidence or overt

act in this case directed toward causing physical harm. We rejected this same claim in our disposition of the previous assignment of error and need not repeat our discussion here.

{¶ 42} By its guilty verdict, it is obvious that the jury believed Defendant attempted to cause physical harm to Officer Bernstein by means of a deadly weapon. The credibility of the witnesses and the weight to be given to their testimony were matters for the trier of facts, the jury, to determine. *DeHass*. The jury did not lose its way simply because it chose to believe the State's version of the events, which it had a right to do. Reviewing this record as a whole, we cannot say that the evidence weighs heavily against a conviction, that the trier of facts lost its way in choosing to believe the State's witnesses, or that a manifest miscarriage of justice has occurred. Defendant's conviction is not against the manifest weight of the evidence.

{¶ 43} Defendant's third assignment of error is overruled. The judgment of the trial court will be affirmed.

DONOVAN, P.J. And BROGAN, J., concur.

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