

[Cite as *State v. Lewis*, 2010-Ohio-4156.]

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY**

STATE OF OHIO	:	Appellate Case No. 23643
Plaintiff-Appellee	:	Trial Court Case No. 09-CR-1599/1
v.	:	(Criminal Appeal from Common Pleas Court)
JAMES A. LEWIS, II	:	
Defendant-Appellant	:	

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OPINION

Rendered on the 3rd day of September, 2010.

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DINKELACKER, J.

{¶ 1} In his sole assignment of error, defendant-appellant James A. Lewis, II claims that the trial court erred in overruling his motion to suppress. For the reasons set forth below, we disagree and affirm.

{¶ 2} On May 11, 2009, Dayton Police dispatch received a call that there was a large group of individuals around a blue Suburban on Hughes Place, an area

known for heavy drug activity and weapon issues. In particular, Police Officer Amy Simpson testified that “we had actually had numerous violent shootings in the area in recent history, including some shootings involving assault rifles, which had been described in that vehicle during previous instances.” The caller said that some of the individuals had guns in their waistbands.

{¶ 3} Simpson, the officer who received the dispatch, was very familiar with that vehicle. She testified there had been “several incidents” connecting that vehicle to weapons. Simpson testified that, two months before, police received a call that people in the vehicle had automatic weapons. When police attempted to stop the vehicle, it fled at such a high rate of speed, law enforcement was forced to cancel the chase due to concerns for public safety. She also testified that, one month before, there was a report that guns were being unloaded from the vehicle. Additionally, a few days before the events involved in this case, the vehicle had been stopped by police, and it was being operated by an individual with an extensive history of gun-related offenses.

{¶ 4} Due to this history, Simpson contacted seven other officers to coordinate their approach to the vehicle. The vehicle was parked near an apartment complex, into which the caller said that the individuals would flee if police came. Simpson’s patrol car was the first to arrive, with the others arriving almost immediately thereafter. As the cruiser approached the group, Simpson began scanning the crowd, looking for any movement that would indicate concealment of a weapon or an attempt to flee.

{¶ 5} Almost immediately, Simpson made eye contact with Lewis. Lewis then immediately began walking away from the group, heading for one of the

apartments. As Lewis walked, he did so in such a way that the right side of his body was always hidden from Simpson's view. The awkward way he was attempting to move away concerned Simpson, and Simpson ordered Lewis to stop.

Lewis repeatedly ignored Simpson's commands to stop and he eventually reached the apartment and attempted to enter. By this time, Simpson had reached Lewis. Since the apartment entryway was confining, Simpson removed Lewis from the confined space and ordered him to keep his hands away from his person. When she patted Lewis down, she immediately felt a large handgun in his waistband on his right side. The owner of the apartment that Lewis attempted to enter told police that Simpson did not have permission to enter the apartment.

{¶ 6} Simpson was arrested for carrying a concealed weapon. Upon a search incident to that arrest, police also found a rock-like substance that field-tested as containing cocaine. He was indicted on one count of carrying a concealed weapon<sup>1</sup> and one count of possession of cocaine.<sup>2</sup> Lewis filed a motion to suppress, alleging that the stop and frisk were improper. The trial court denied the motion to suppress, and Lewis pleaded no-contest to the cocaine possession charge, in exchange for an agreed prison term of two years and the state's agreement to drop the weapon charge. Lewis was sentenced accordingly.

{¶ 7} During a motion to suppress, the trial court acts as the finder of fact and the arbiter of witness credibility.<sup>3</sup> Matters as to the credibility of evidence are for the trier of fact to decide.<sup>4</sup> This is particularly true regarding the evaluation of

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<sup>1</sup> R.C. 2923.12(A)(2).

<sup>2</sup> R.C. 2919.25.11(A).

<sup>3</sup> *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, at ¶64.

<sup>4</sup> *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, at ¶116.

witness testimony.<sup>5</sup> In this case, while Lewis argues that some of Simpson's testimony should be discounted because it conflicted with the testimony that the defense provided, the trial court specifically concluded that "[t]o the extent the conflict in testimony is on material facts between Officer Simpson on the one hand and Michael Ward [a friend of Lewis] and the Defendant on the other, the Court finds the testimony of Officer Simpson credible as to those conflicts in material fact." A review of all of the testimony in this case reveals no cause for faulting the trial court for reaching that conclusion.

{¶ 8} "[A] police officer may, in appropriate circumstances and in an appropriate manner, approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest."<sup>6</sup> If the stop is supported by an officer's reasonable suspicion of criminal activity, it does not violate the Fourth Amendment.<sup>7</sup> Reasonable suspicion requires that the officer "point to specific, articulable facts which, together with rational inferences from those facts, reasonably warrant the intrusion."<sup>8</sup>

{¶ 9} In making a determination of reasonable suspicion, the relevant inquiry is the "degree of suspicion that attaches to particular types of noncriminal acts."<sup>9</sup> Reasonable suspicion can arise from information that is less reliable than that required to show probable cause.<sup>10</sup> The reasonableness of a police officer's

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<sup>5</sup> Id.

<sup>6</sup> *Terry v. Ohio* (1968), 392 U.S. 1, 22, 88 S.Ct. 1868.

<sup>7</sup> Id.

<sup>8</sup> *Terry*, 392 U.S. at 21.

<sup>9</sup> *State v. Lungs*, Montgomery App. No. 22704, 2008-Ohio-4928, at ¶17, quoting *State v. Taylor* (1995), 106 Ohio App.3d 741, 752; see also *United States v. Sokolow* (1989) 490 U.S. 1, 10, 109 S.Ct. 1581.

<sup>10</sup> *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, at ¶35.

actions in making an investigative stop must be evaluated in light of the totality of the circumstances.<sup>11</sup> Officers may “draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that ‘might well elude an untrained person.’”<sup>12</sup> Further, an officer may conduct a pat down search of the person “for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.”<sup>13</sup>

{¶ 10} When making the decision to conduct an investigative stop and subsequent pat down of Lewis, Officer Simpson had the following information: (1) the police had received information that a particular blue Suburban was parked in an area known for drug and weapon offenses, (2) the caller indicated that some of the individuals had guns in their waistbands, (3) the caller indicated that, if police came to the scene, the individuals would attempt to flee into the nearby apartments, (4) the particular vehicle had a significant, recent history involving weapons—including automatic weapons, (5) the area where the vehicle was located had recent history of shootings, including shootings with automatic weapons like those connected to the Suburban, (6) when she arrived, she made

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<sup>11</sup> *State v. Freeman* (1980), 64 Ohio St.2d 291, at paragraph one of the syllabus.

<sup>12</sup> *United States v. Arvizu* (2002), 534 U.S. 266, 273, 122 S.Ct. 744, quoting *United States v. Cortez* (1981), 449 U.S. 411, 418, 101 S. Ct. 690.

<sup>13</sup> *Terry*, 392 U.S. at 27.

eye contact with Lewis, who immediately attempted to leave the scene, maintaining eye contact with her, and began moving toward one of the apartments, (7) while Lewis was walking away, he positioned his body in an awkward manner so that his right side was constantly concealed from Simpson's view, (8) Lewis refused to stop after Simpson gave him several commands to do so, (9) Lewis did not have permission to enter the apartment he was attempting to enter.

{¶ 11} Based upon the facts in this case, taken in their totality, we conclude that Simpson's suspicion that Lewis had a weapon, concealed on his person, was a reasonable one. Therefore, Simpson properly detained Lewis to investigate this, and properly conducted a pat down search of his person for weapons to protect herself and others. Therefore, we overrule the sole assignment of error.

{¶ 12} The judgment of the Montgomery County Common Pleas Court is affirmed.

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BROGAN, J. and FAIN, J., concur.

(Hon. Patrick T. Dinkelacker, First District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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