[Cite as *State v. Montgomery*, 2010-Ohio-5047.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23870
v.	:	T.C. NO. 09CR1654
ANDWELE L. MONTGOMERY	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 15th day of October, 2010.

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FROELICH, J.

{¶ 1} Defendant-appellant Andwele Montgomery appeals from his conviction for Possession of Crack Cocaine. Because we conclude that the trial court did not err in denying Montgomery's motion to suppress, the judgment of the trial court will be affirmed.

I

{¶ 2} On the evening of May 20, 2009, Dayton Police Officer Rodrigues was driving when he observed Montgomery and two other men standing in front of a convenience store. Officer Downing, who was following Rodrigues, advised Rodrigues that he had seen a hand-to-hand exchange between Montgomery and one of the other men. The officers decided to go back to investigate.

{¶ 3} When Rodrigues returned to the store, one of the men was gone, and Montgomery and the other man were walking away. Rodrigues parked his cruiser across the street from the store, near the men. The officer got out of his cruiser and asked the men for their names. Montgomery asked, "Me?", then he dropped the bicycle he was holding and ran. Rodrigues chased Montgomery into an alley. As Rodrigues ran several feet behind Montgomery, he saw Montgomery reach into his right, front pants pocket and pull out a small plastic bag, which he held clenched in his fist.

{¶ 4} A couple seconds later, Officer Downing drove his cruiser into the alley and stopped in front of Montgomery, who tried to jump over the hood of the cruiser. Rodrigues approached Montgomery with his taser drawn and ordered Montgomery to remain on the ground. Rodrigues saw a baggie containing crack cocaine laying on the ground by Montgomery's head.

{¶ 5} Montgomery was placed under arrest. When he was searched incident to that arrest, the officers recovered a cigarette package containing marijuana. Montgomery spontaneously admitted that the marijuana was his, but denied ownership of the cocaine.

{¶ 6} Montgomery was indicted on one count of Possession of Crack Cocaine. He filed a motion to suppress, which the trial court overruled following a hearing on the motion. Montgomery pled no contest to the charge. The trial court sentenced Montgomery to one year in prison but stayed execution of the sentence pending the outcome of this appeal.

II

{¶ 7} Montgomery's Assignment of Error:

{¶ 8} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND PREJUDICIALLY ERRED BY OVERRULING THE DEFENDANT'S MOTION TO SUPPRESS IN FINDING THAT THE 'INVESTIGATORY STOP' OF THIS DEFENDANT WAS IN CONFORMITY WITH THE FOURTH AMENDMENT TO THE FEDERAL CONSTITUTION AND ARTICLE I, SECTION 14 OF THE OHIO CONSTITUTION."

{¶ 9} In his sole assignment of error, Montgomery argues that the trial court should have granted his motion to suppress the cocaine officers found on the ground by his head as well as the statements that he made to the officers upon his arrest. His argument centers on his belief that the officers lacked reasonable, articulable suspicion of criminal activity to justify stopping him. He insists that "[t]he only justification for seizing this Defendant-Appellant was his running from the sidewalk by the store." (emphasis in original). Without explanation, he also maintains that his statements to the officers should have been suppressed. We disagree.

{¶ 10} When deciding a motion to suppress evidence, an appellate court is

bound to accept the trial court's factual findings if they are supported by competent and credible evidence, and the appellate court must then independently determine as a matter of law if the minimum constitutional standard has been met. *State v. Williams* (1993), 86 Ohio App.3d 37, 41, 619 N.E.2d 1141.

{¶ 11} "The protections afforded by the Fourth Amendment are not implicated in every situation of police/citizen conduct. *California v. Hodari D.* (1991), 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690. The test for determining whether a person has been seized, which triggers the protections of the Fourth Amendment, is whether, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. *United States v. Mendenhall* (1980), 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497. That generally occurs when 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. Id." *State v. DeCaminada,* 148 Ohio App.3d 213, 2002-Ohio- 2917, ¶34.

{¶ 12} In denying Montgomery's motion to suppress, the trial court stated in a footnote that "absent any evidence that either the Defendant, the convenience store location or the neighborhood were known for high crime/drug activity, the Court holds that a stop prior to Defendant's flight was not justified." In light of the cursory testimony by Officer Rodrigues regarding another officer's observation of a hand-to-hand sale, we cannot disagree with the trial court's conclusion in this regard. Nevertheless, the trial court held that because Montgomery ran from the officers, there was neither physical force used by the officers, nor compliance by

Montgomery, and therefore, there was no stop until Montgomery fell next to the police cruiser, ending the chase. The trial court also found that Montgomery had discarded or abandoned the baggie of crack cocaine prior to the seizure.

{¶ 13} In a case such as this, where Montgomery ran away from Officer Rodrigues, there has been no seizure. "[U]ntil a police officer's attempt to effect the investigatory stop succeeds, no seizure has taken place, and therefore no Fourth Amendment review of the reasonableness of the officer's decision to intrude on the suspect's privacy is warranted." *State v. Bailey,* Montgomery App. No. 22760, 2009-Ohio-2317, ¶25, citing *Hodari D.,* supra. In a similar case, the defendant ran from the police in a situation where the police had observed no conduct giving rise to a reasonable suspicion of criminal activity. *State v. Stafford,* Montgomery App. No. 20230, 2004-Ohio-2200. We held that no seizure had taken place until an officer's attempt to effect an investigatory stop succeeds, and no Fourth Amendment review of the reasonableness of the officer's decision to intrude on the suspect's privacy is appropriate. Id. at ¶16. Because Montgomery fled from the officers, he was not seized for Fourth Amendment purposes until after he fell during his flight and heeded Officer Rodrigues's warning that he would use his taser if Montgomery moved.

{¶ 14} Officer Rodrigues saw the baggie of cocaine laying on the ground next to Montgomery after he fell. The trial court concluded that Montgomery had abandoned the bag of cocaine. When a person abandons his property, he lacks standing to challenge the admissibility of that property. *Bailey,* supra, at ¶28, citing *State v. Freeman* (1980), 67 Ohio St.2d 291. We note also that the defendant

denied that the cocaine was his. "A person who denies ownership of an item does not possess an expectation of privacy in the item to which he or she disclaimed ownership." *State v. Carter,* Portage App. No. 2003-P-0007, 2004-Ohio-1181, ¶31 (internal citations omitted). Therefore, the trial court properly denied Montgomery's motion to suppress the cocaine.

{¶ 15} Finally, we also conclude that the trial court did not err in denying Montgomery's motion to suppress statements that he made to the officers. The statements were not elicited in response to any questions from the officers; they were made spontaneously. A suspect who volunteers information, and who is not even asked any questions, is not subject to a custodial interrogation and is not entitled to warnings pursuant to *Miranda v. Arizona* (1966), 384 U.S. 436, 478, 86 S.Ct. 1602, 16 L.Ed.2d 694. *State v. McGuire* (1997), 80 Ohio St.3d 390, 401, citing *State v. Roe* (1989), 41 Ohio St.3d 18, 22. In other words, "*Miranda* does not affect the admissibility of '[v]olunteered statements of any kind.'" Id., citing *Miranda*, supra, at 478. Montgomery's spontaneous, voluntary statements need not have been suppressed.

{¶ 16} Because the trial court properly denied Montgomery's motion to suppress, his sole assignment of error is overruled.

III

{¶ 17} Having overruled Montgomery's sole assignment of error, the judgment of the trial court is Affirmed.

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DONOVAN, P.J. and FAIN, J., concur.

Copies mailed to:

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