**[Cite as *State v. Winston*, 2010-Ohio-5381.]**

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

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| STATE OF OHIO | : | |
| | : | Appellate Case No. 23897 |
| Plaintiff-Appellee | : | |
| | : | Trial Court Case No. 09-CR-1764 |
| v. | : | |
| | : | |
| JAMES WINSTON | : | (Criminal Appeal from |
| | : | Common Pleas Court) |
| Defendant-Appellant | : | |
| | : | |

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O P I N I O N

Rendered on the 5th day of November, 2010.

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BROGAN, J.

**{¶ 1}** Appellant James Winston appeals from his conviction in the Montgomery County Court of Common Pleas of carrying a concealed weapon. Winston argues that the trial court erred in upholding the stop of him by a police

officer because he argues the ordinance he violated was unconstitutional and impossible to comply with. Winston also argues that the officer who performed the search on him did not have reasonable suspicion to detain and search him. For the following reasons, we affirm the judgment of the trial court.

I

**{¶ 2}** On May 28, 2009, around 11:00 p.m., Officers John Riegel and Mike Fuller of the Dayton Police Department were driving in a marked police cruiser when they approached Winston driving south on Wesleyan towards Cornell, an area known for frequent drug activity and gun arrests. Officer Riegel witnessed Winston begin to turn without engaging his turn signal, and then engage the turn signal about halfway through the turn.

**{¶ 3}** The officers stopped Winston's car and approached him. Officer Riegel asked Winston for his driver's license, which Winston never produced. Officer Riegel then asked Winston to step out of his car. Upon getting out of his car, Winston began reaching his hand down in the direction of his right pocket. Winston continued to reach for his right pocket even after Officer Riegel told him to place his hands on the police cruiser. Officer Riegel had to forcibly stop Winston's movements.

**{¶ 4}** At that point Officer Riegel conducted a pat down of Winston and felt what he recognized as a gun located in the front right pocket of Winston's pants, the same area that Winston repeatedly reached for. Officer Riegel reached into Winston's right pants pocket and found a loaded gun.

**{¶ 5}** Winston was indicted on one count of carrying a concealed weapon, in violation of R.C. 2923.21(A)(2), a felony of the fourth degree. Winston filed a motion to suppress and the trial court held a hearing on Winston's motion to suppress. On December 29, 2009, the trial court overruled the motion to suppress. On December 30, 2009, Winston pled no contest to the charge, and on January 27 he was sentenced to community control sanctions.

II

**{¶ 6}** Winston sets forth two assignments of error. The first assignment of error is as follows:

**{¶ 7}** "THE TRIAL COURT ERRED IN UPHOLDING THE STOP OF APPELLANT WAS BASED UPON PROBABLE CAUSE BECAUSE THE STATUTE HE VIOLATED IS UNCONSTITUTIONAL AND WAS IMPOSSIBLE FOR WHICH TO APPLY"

**{¶ 8}** R.C.G.O. 71.31(B) provides that "a signal of intention to turn or move right or left shall be given continuously during not less than the last 100 feet traveled by the vehicle before turning." Winston argues that the ordinance is unconstitutional because some Dayton city streets may be under one-hundred feet in length and it will sometimes be impossible to comply with the ordinance.

**{¶ 9}** In order to demonstrate facial overbreadth, the party challenging the law must show that its potential application reaches a significant amount of protected activity. Use of public streets has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. *Burson v. Freeman* (1992), 504 U.S.

191, 196, 112 S.Ct. 1846. Winston failed to offer evidence that a substantial number of Dayton city streets are under one-hundred feet in length. He thus failed to demonstrate the ordinance was facially overbroad.

**{¶ 10}** In the suppression hearing, Officer Riegel stated that he believed that the street in question was at least one hundred feet long. (Motion to Suppress Transcript, page 31). When Winston himself was asked about the length of the street, he stated that it was "about a hundred feet." (Id. at 43).

**{¶ 11}** Since the testimony of both witnesses put the length of the street at or above 100 feet, in this instance Winston would have been able to comply with R.C.G.O. 71.31. Furthermore, Officer Riegel testified that Winston began his turn without having his turn signal on, and initiated his turn signal about halfway through the turn. R.C.G.O. 71.31 is not unconstitutional as "applied" to Winston.

**{¶ 12}** Winston's first assignment of error is overruled.

III

**{¶ 13}** Winston's second assignment of error is as follows:

**{¶ 14}** "THE TRIAL COURT ERRED IN FINDING THE OFFICER HAD REASONABLE SUSPICION TO DETAIN AND SEARCH APPELLANT."

**{¶ 15}** Winston argues that he was improperly pulled over and searched because the police did not have "reasonable suspicion" that he was engaged in criminal activity.

**{¶ 16}** 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. Under the rule set forth in T*erry,* police officers may briefly stop and/or temporarily detain individuals in order to investigate possible criminal activity as long as 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; *State v. Molette,* Montgomery App. No. 19694, 2003-Ohio-5965, at ¶ 10.

**{¶ 17}** Once a lawful stop has been made by the police, they may conduct a limited protective search for concealed weapons if the officer has a reasonable belief that the suspect may be armed or poses a danger to the officer or to others. *State v. Evans* (1993), 67 Ohio St.3d 405, 408. "To justify a patdown search, 'the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" *State v. Roberts,* Montgomery App. No. 23219, 2010-Ohio-300; quoting *Terry,* 392 U.S. at 21. "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." *Terry,* 392 U.S. at 27.

**{¶ 18}** In the present case, Officer Riegel lawfully stopped Winston's vehicle for the turn violation. He had a right to order Winston out of his vehicle. *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330. He also had articulable facts that made him believe that Winston could pose a threat to Officer Riegel or someone else. After being unable to produce his driver's license, Winston was asked to get out of the car. At that point, Winston began to reach towards his right front pocket, and continued to do so even after Officer Riegel told him not to. Officer Riegel had

to eventually stop Winston from reaching in his front right pocket, and conducted a protective search of him, finding a loaded gun in the very same pocket Winston was reaching for. Officer Riegel's pat down of Winston was based on specific and articulable facts, and therefore, the trial court properly overruled Winston's motion to suppress.

**{¶ 19}** Winston's second assignment of error is overruled.

IV

**{¶ 20}** Appellant's assignments of error having been overruled, 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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