[Cite as *State v. Greene*, 2015-Ohio-2060.]

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

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 26138
	:	
v.	:	T.C. NO. 13CR3114
	:	
KEITH D. GREENE	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the ___29th___ day of ____May____, 2015.

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FROELICH, P.J.

{¶ 1} After the trial court overruled his motion to suppress evidence, Keith D. Greene pled no contest in the Montgomery County Court of Common Pleas to possession of heroin (less than one gram), a fifth-degree felony. The trial court found him guilty, sentenced him to nine months in prison, suspended his driver's license for one

year, and ordered him to pay court costs. For the following reasons, the trial court's judgment will be affirmed.

{¶ 2} Greene's original appellate counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), stating that after thoroughly examining the record and the law, he found no potentially meritorious issues for appeal. Counsel set forth four potential assignments of error, all relating to the trial court's denial of Greene's motion to suppress. By entry, we informed Greene that his attorney had filed an *Anders* brief on his behalf and granted him 60 days from that date to file a pro se brief. No pro se brief was filed. However, after an independent review of the record, we found that at least one potentially meritorious claim existed, and we appointed new counsel to represent Greene on appeal.

{¶ 3} Greene now raises one assignment of error, claiming that the trial court erred in denying his motion to suppress evidence.

{¶ 4} The State's evidence at the suppression hearing established that at approximately 8:52 p.m. on September 30, 2013, Dayton Police Officer Zachary Williams, an officer with one and one-half years of experience, was dispatched to the intersection of East Third and South Philadelphia Streets on a report of a fight involving approximately five people. The caller stated that a firearm might be present, but the caller had not seen it. Williams had the caller's name, but did not have a description of the caller or the participants in the fight.

{¶ 5} Officer Williams, in uniform and driving a marked cruiser, arrived approximately five to seven minutes later, parked partially in the intersection, and activated his red and blue emergency lights. Williams exited his vehicle and looked

around. Multiple people were in the area, but there was no sign of a fight. Officer Williams observed "normal" behavior at the gas station, located at one corner of the intersection. As he looked over toward a tattoo parlor across the street, he saw Greene "walk up towards [a] female, he saw us [the officer], had a short conversation with the female and then walked away in a very fast pace." Williams thought Greene's behavior was unusual.

{¶ 6} Officer Williams walked toward Greene and asked him, "Hey, do you mind talking to me real quick?" or something similar. Williams testified that he used a conversational tone of voice; he did not use his cruiser to stop Greene and he did not have his weapon drawn. Williams "asked him [Greene] what his name was" and said, "hey do you mind if I pat you down real quick." Williams testified, "[T]hat's what I always say to people if I don't have a reason to – to go and talk to them." Williams stated that his main concern was for firearms or knives, and that gun crime was common in that area. Greene responded, "Sure."

{¶ 7} Officer Williams patted down Greene with an open hand, beginning with the waistband and then the side pockets. While patting down the left front pocket, he felt a baggie with multiple gel capsules with heroin. Williams stated that gel caps with heroin have a distinctive sound when they move, and that it was immediately apparent to him what the items were. Officer Williams asked Greene if Greene minded if he (Williams) went into the pocket. Greene stated that he did not mind. Williams handcuffed Greene and retrieved the gel caps and Greene's wallet, which was in the same pocket. When Williams retrieved the drugs, Greene yelled, "You put that on me."

{¶ 8} Officer Williams put Greene in the cruiser. Williams ran Greene's identification through the on-board computer and informed Greene of his *Miranda* rights using a card provided by the prosecutor's office. Greene stated that he understood his rights.

{¶ 9} Williams asked Greene if the heroin was his, and Greene responded no. Greene stated that the wallet in his pocket was his, but he claimed that the pants belonged to someone else. Greene would not tell the officer where the pants came from, stating that he "was not going to snitch on somebody."

{¶ 10} Greene testified at the suppression hearing that he saw Officer Williams as he (Greene) was walking westbound on West Third Street, crossing South Philadelphia Street to the gas station. Greene stated that, when he got to the gas station parking lot, Officer Williams called to him, told him to stop, and said, "Can I talk to you?" Greene testified that Williams "pushed up on me and said something about a fight and next thing I know he got behind me and was patting me down and grabbed – scuffed me up." Greene acknowledged that Williams asked for permission to pat him down, but Greene denied consenting to the pat down. Greene testified that Officer Williams held his (Greene's) arms behind his (Greene's) back and patted him down with a flat hand. Greene denied giving consent for the officer to go into his left front pocket. Greene described the encounter as lasting approximately 60 seconds. He stated that he did not feel free to walk away while he was standing with the officer.

{¶ 11} Greene stated that Williams read him his *Miranda* rights after he was placed in the cruiser; Greene stated that he "told him I understood the rights." Upon

questioning from the court, Greene stated that Williams was not lying when the officer testified that Greene had heroin in his pocket.

{¶ 12} The trial court found that the interaction between Officer Williams and Greene began as a consensual encounter; it reasoned that Williams did not draw a weapon, did not block Greene with his vehicle, and asked Greene in a conversational tone if he would mind talking. The court further found, by clear and convincing evidence, that Officer Williams did not touch Greene prior to asking whether he could pat Greene down and that Greene consented to the pat down. The court concluded that Officer Williams patted Greene down with a flat hand, that Williams did not manipulate items in Greene's pockets, and that he immediately recognized the gel caps in Greene's pocket as contraband. As to Greene's statements after his arrest, the court concluded that Greene was provided and waived his *Miranda* rights and that there was no evidence that the statements were made involuntarily.

{¶ 13} Greene asserts that the trial court's ruling was erroneous in several ways. First, he claims that his interaction with Officer Williams was a *Terry* stop, rather than a consensual encounter, and that Officer Williams lacked a reasonable suspicion of criminal activity to justify an investigatory detention. Greene next claims that the trial court erred in finding that Greene consented to the pat down. Greene further argues that Officer Williams did not have a reasonable individualized suspicion that Greene was armed and dangerous to justify a pat down, absent consent. Greene does not challenge the trial court's ruling regarding his statements to the police after his arrest.

{¶ 14} Both the Fourth and Fourteenth Amendments to the United States Constitution and Section 14, Article I of the Ohio Constitution protect citizens against

unreasonable searches and seizures. *Delaware v. Prouse*, 44 U.S. 648, 662, 99 S.Ct. 1391, 59 L.Ed.2d 66 (1979); *State v. Robinette*, 80 Ohio St.3d 234, 238-39, 685 N.E.2d 762 (1997). However, the Fourth Amendment is not implicated every time a police officer has contact with a citizen. *State v. Crum*, 2d Dist. Montgomery No. 22812, 2009-Ohio-3012, ¶ 12, citing *California v. Hodari D*., 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991). We have distinguished between consensual encounters and investigatory detentions, stating:

> "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." *[State v.] Lewis*, [2d Dist. Montgomery No. 22726, 2009-Ohio-158,] at ¶ 21, citing *United States v. Mendenhall*, 446 U.S. 544, 553, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). "The Fourth Amendment guarantees are not implicated in such an encounter * * *." *State v. Taylor*, 106 Ohio App.3d 741, 747-749, 667 N.E.2d 60 (2d Dist.1995), citing *Mendenhall* at 554. They are implicated, though, in an investigatory detention. "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 is compelled to respond to questions." *Lewis* at ¶ 22, citing *Mendenhall* at 553, and *Terry [v. Ohio*, 392 U.S. 1,] 16, 19, [88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)]. A police officer telling a person to stay in a particular place constitutes an investigatory detention. *State v. Sturtz*, 5th Dist. Coshocton No. 09 CA 02,

> 2009-Ohio-6937, ¶ 46 (finding that though the officer testified that he was just talking to the defendant, he also testified that, at one point, he told the defendant to "stay over there" while he talked with other officers).

State v. Hawkins, 2d Dist. Montgomery No. 25712, 2013-Ohio-5458, ¶ 9.

{¶ 15} Officer Williams approached Greene because he found Greene's behavior to be suspicious. Regardless of this belief, the trial court found that Officer Williams approached Greene and simply asked if Greene would mind talking with him. Greene agreed. Greene testified that Williams first told him (Greene) to stop, but the trial court expressly found the officer to be credible and it did not find that the officer required Greene to stop. "[W]e must accept the trial court's sufficiently supported findings of fact." *Lewis*, 2d Dist. Montgomery No. 22726, 2009-Ohio-158, at ¶ 17. Accepting the trial court's supported findings of fact, the trial court did not err in concluding that Officer Williams and Greene engaged in a consensual encounter when Williams approached Greene.

{¶ 16} As part of the consensual encounter, Officer Williams was permitted to ask Greene if he would voluntarily agree to a pat down. "[N]either a request to check the person's identification nor a request to pat-down his person or to search his possessions makes the encounter non-consensual, so long as the request is not coercive." *State v. Thomas*, 2d Dist. Montgomery No. 23979, 2011-Ohio-1292, ¶ 10. *See also Florida v. Bostick*, 501 U.S. 429, 434-435, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991) ("When officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; * * * ask to examine the individual's identification; * * * and request consent to search * * * -- as long as the police do not convey a message that compliance with their

requests is required.").

{¶ 17} As we stated in *State v. George*, 2d Dist. Montgomery No. 25945, 2014-Ohio-4853:

> Consent is an exception to the warrant requirement, and requires the State to show by clear and positive evidence that the consent was freely and voluntarily given. *[State v.] Black*[, 2d Dist. Montgomery No. 23524, 2010-Ohio-2916,] at ¶ 34. Whether a consent to search was voluntary or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all of the facts and circumstances. *Ohio v. Robinette,* 519 U.S.33, 39, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996). Six factors are generally considered in Ohio to determine this question:
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> 1) whether the defendant's custodial status was voluntary;
>
> 2) whether coercive police procedures were used;
>
> 3) the extent and level of the defendant's cooperation;
>
> 4) the defendant's awareness of his or her right to refuse consent;
>
> 5) the defendant's education and intelligence;
>
> 6) the defendant's belief that no incriminating evidence would be found.

George at ¶ 28.

{¶ 18} Officer Williams and Greene both testified that Williams asked Greene if he would consent to a pat down. The encounter was a consensual one, and Greene was cooperative. The trial court credited Officer Williams's testimony that Greene consented, and there is no evidence that Greene's consent was coerced.

{¶ 19} In his brief, Greene asserts that it "defies logic and common sense" to conclude that Greene would voluntarily stop to speak with the officer and voluntarily consent to a pat down, knowing that he had drugs in his pocket. Greene argues that it "makes more sense" that Officer Williams did not give Greene a choice and that Williams's testimony to the contrary was not credible. "When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8; *State v. Koon*, 2d Dist. Montgomery No. 26296, 2014-Ohio-1326, ¶ 13. The fact that Greene had heroin in his pocket was a factor for the trial court to consider in evaluating whether Greene consented to the pat down. And, whether the testimony of Officer Williams and Greene "made sense" was a matter for the trial court to consider in assessing their credibility.

{¶ 20} Greene testified that he complied with Officer Williams's requests because "[t]hat's an area [of town] you're not going to not do what the police say * * * [o]r you're going to get in trouble." We understand that, for any number of reasons, a person may feel intimidated when interacting with the police and in saying "no" to a request from a police officer. However, the case law is clear that an individual's subjective apprehension in refusing a police officer's request does not, by itself, render the consent involuntary.

{¶ 21} Greene and Officer Williams both testified that the officer patted down Greene with a flat hand. Williams testified that he felt a baggie of gel caps with heroin in Greene's front left pocket and that it was immediately apparent to him, without manipulation, what the objects were. Under the plain feel doctrine, Officer Williams was

justified in reaching into Greene's pocket (with or without consent) and retrieving the gel caps.

{¶ 22} The trial court did not err in denying Greene's motion to suppress. Accordingly, Greene's assignment of error is overruled, and the trial court's judgment will be affirmed.

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FAIN, J. and HALL, J., concur.

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