[Cite as *State v. Ross*, 2015-Ohio-1182.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
MARION COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 9-14-33**

v.

WILLIAM T. ROSS, **O P I N I O N**

DEFENDANT-APPELLANT.

Appeal from Marion County Common Pleas Court
Trial Court No. 2014 CR 0073

Judgment Affirmed

Date of Decision: March 30, 2015

APPEARANCES:

Robert C. Nemo **for Appellant**

Matthew Frericks **for Appellee**

PRESTON, J.

{¶1} Defendant-appellant, William T. Ross ("Ross"), appeals the July 21, 2014 judgment entry of sentence of the Marion County Court of Common Pleas. He argues that the trial court erred in denying his motion to suppress. For the reasons that follow, we affirm.

{¶2} On March 5, 2014, the Marion County Grand Jury indicted Ross on one count of possession of cocaine in violation of R.C. 2925.11(A), (C), a fifth-degree felony. (Doc. No. 1). The indictment stemmed from a March 2, 2014 incident in which Ross was stopped and frisked by Officer Shane Gosnell ("Officer Gosnell") of the Marion City Police Department as part of the Marion City Police Department's investigation of an alleged altercation involving a gun at 182 West Columbia Street, Marion, Ohio. (Apr. 28, 2014 Tr. at 5, 28). Officer Gosnell discovered a cellophane bindle containing crack cocaine through his pat-down search of Ross. (*Id.* at 8-9).

{¶3} On March 10, 2014, Ross appeared for arraignment and entered a plea of not guilty. (Doc. No. 7).

{¶4} On March 25, 2014, Ross filed a motion to suppress, arguing that the "arresting officer lacked sufficient grounds to stop" him and that "the arresting officer, even if he had a right to conduct a weapons search, thereafter, conducted a search of [Ross's] body without a warrant and without [Ross's] consent." (Doc.

No. 18). Ross filed a memorandum in support of his motion to suppress on April 22, 2014. (Doc. No. 27).

{¶5} After a hearing on April 28, 2014, the trial court overruled Ross's motion to suppress on May 15, 2014. (Doc. No. 31).

{¶6} On May 23, 2014, Ross withdrew his not-guilty plea and entered a no-contest plea to the indictment. (Doc. No. 33). On July 21, 2014, the trial court accepted Ross's no-contest plea, found him guilty as to the indictment, and sentenced Ross to two years of community control. (July 21, 2014 JE, Doc. No. 36).

{¶7} Ross filed his notice of appeal on August 15, 2014. (Doc. No. 50). He raises one assignment of error for our review.

Assignment of Error

The trial court erred when it denied Appellant's motion to suppress.

{¶8} In his sole assignment of error, Ross argues that the trial court erred in overruling his motion to suppress. Specifically, Ross argues that Officer Gosnell did not have reasonable suspicion to conduct a *Terry* stop and frisk of Ross. Ross further argues that even if the *Terry* stop was lawful, Officer Gosnell's pat-down search of Ross exceeded the scope of a *Terry* stop and frisk.

{¶9} A review of the denial of a motion to suppress involves mixed questions of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-

5372, ¶ 8. At a suppression hearing, the trial court assumes the role of trier of fact and, as such, is in the best position to evaluate the evidence and the credibility of witnesses. *Id. See also State v. Carter*, 72 Ohio St.3d 545, 552 (1995). When reviewing a ruling on a motion to suppress, deference is given to the trial court's findings of fact so long as they are supported by competent, credible evidence. *Id.*, citing *State v. Fanning*, 1 Ohio St.3d 19 (1982). With respect to the trial court's conclusions of law, however, our standard of review is de novo; and therefore, we must decide whether the facts satisfy the applicable legal standard. *Id.*, citing *State v. McNamara*, 124 Ohio App.3d 706, 710 (4th Dist.1997).

{¶10} At the suppression hearing, Officer Gosnell testified that he has been a police officer with the Marion City Police Department for 12 years. (Apr. 28, 2014 Tr. at 4). Officer Gosnell testified that he was dispatched to 182 West Columbia Street at 3:30 a.m. on March 2, 2014 after the Marion City Police Department received a 911 call reporting a fight with a gun at that location. (*Id.* at 5, 28). When Officer Gosnell arrived at the scene, other law enforcement officers had already stopped two vehicles. (*Id.* at 5-6). Officer Gosnell provided backup for one of the stopped vehicles. (*Id.* at 6). As Officer Gosnell was approaching the passenger-side window of that vehicle, he testified that he observed a man, whom he was "99.9% sure who he was" exit a silver Cadillac that was parked in a parking lot adjacent to 182 West Columbia Street, where criminal activity was

reported to have occurred, and begin walking toward that location. (*Id.* at 7). Because it was cold out and the windows were "frosted over," Officer Gosnell was not aware that the silver Cadillac was occupied. (*Id.*).

{¶11} According to Officer Gosnell, because the law enforcement officers were not "sure who had a gun, if there was a gun, [or] where the gun was," he instructed Ross to stop so that he could continue his search for the gun. (*Id.* at 7-8). Ross stopped and returned to the silver Cadillac at Officer Gosnell's instruction. (*Id.* at 8). At the back of the silver Cadillac, Officer Gosnell "frisked [Ross] for weapons." (*Id.*). While Officer Gosnell did not locate any weapons on Ross, he felt "some kind of lump in his watch pocket of his pants he was wearing" and "heard the crackling of cellophane." (*Id.* at 8). Officer Gosnell stated, "from my experience being on the street most – a lot of times people who use and/or carry drugs will carry them in cellophane, like for instance a cigarette wrapper or something like that. And they commonly put it in that pocket because of the fact it doesn't fall out, it's small." (*Id.*). Officer Gosnell testified that he did not manipulate the cellophane bindle, "just felt it as [he] was running [his] hand up" and heard the noise from the cellophane. (*Id.*).

{¶12} Officer Gosnell asked Ross "what it was" and Ross responded that "he wasn't sure." (*Id.* at 8-9). At that point, Officer Gosnell asked Ross if he minded if Officer Gosnell removed the cellophane bindle from his pants, to which

Ross responded that he did not. (*Id.* at 9). Officer Gosnell suspected the cellophane bindle to be crack cocaine, and Ross "admitted that it was crack and that he smoked crack from time to time." (*Id.*).

{¶13} On cross-examination, Officer Gosnell testified that he instructed Ross to stop because he knew that Ross was going to enter 182 West Columbia Street since he was walking up "a little rise that leads to [the house], where the front porch area is for that building." (*Id.* at 13). According to Officer Gosnell, he "wanted to find out what his purpose of going towards the house was." (*Id.*). At the time that Officer Gosnell instructed Ross to stop walking toward the house and return to the silver Cadillac, Officer Gosnell testified that Ross was not free to continue walking away because Officer Gosnell wanted to "check him for weapons" since "he was walking toward the front of the house and [law enforcement officers] were not sure who and/or if a weapon at that point was still in that area." (*Id.* at 19-20).

{¶14} Officer Gosnell testified that he recognized Ross "[f]rom previous dealings" with him related to drugs. (*Id.* at 14). However, Officer Gosnell testified that he could not "be a hundred percent sure" whether any of his previous dealings with Ross involved weapons. (*Id.*). He testified, "A lot of the time guns and drugs go hand in hand." (*Id.* at 24). In response to whether Officer Gosnell wanted to "check" Ross for weapons because he recognized him from his prior

encounters with him, Officer Gosnell averred, "I wanted to check him because he exited a vehicle right next to where we had a possible gun call and that he was walking towards the front of the house where the gun call was at." (*Id.* at 20). Officer Gosnell confirmed that he asked Ross to stop because:

> [I]t was the fact that we – like I said we did not know – we had very little preliminary information at that point in time. As I'm approaching the other vehicle he comes out of his vehicle and starts making a move towards the front of the [house] where we had just had this supposed fight with a possible gun.

(*Id.* at 15).

{¶15} However, Officer Gosnell testified that prior to searching Ross, he was advised that the person that could have the gun was a subject with the last name of "Anderson." (*Id.* at 16). Nonetheless, Officer Gosnell confirmed that his search of Ross "was more of an officer safety issue. We had two cars occupied by numerous subjects and two officers at that point available for the two vehicles, and the subjects that we were trying to figure out what was going on from." (*Id.* at 17). Officer Gosnell also confirmed that Ross consented to Officer Gosnell removing the cellophane bindle from his pocket. (*Id.* at 25).

{¶16} He testified that he learned after the incident that the tipster did not actually see a gun or hear a gunshot when the tipster made his or her initial report to the Marion City Police Department. (*Id.* at 22-23).

{¶17} On redirect-examination, Officer Gosnell testified that, because there was not a lot of "foot traffic" in that area at that time of the morning, "we had reason to believe at that point pulling up that anyone in that area could have likely been involved in this." (*Id.* at 29). He testified that the Marion City Police Department takes all reports involving guns seriously. (*Id.*). Regarding the report that "Anderson" was the last name of the subject possessing the gun, Officer Gosnell testified that he did not recall whether that information was relayed to him by dispatch or "mentioned after the fact." (*Id.*). Nonetheless, Officer Gosnell testified, "We would check anyone for the pure and simple fact that a gun is so easily handed off to different people. Obviously we weren't there the whole time so we wouldn't know if the gun could have been passed off to another individual." (*Id.* at 30).

{¶18} The Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution generally prohibit warrantless searches and seizures, and any evidence that is obtained during an unlawful search or seizure will be excluded from being used against the defendant. *State v. Steinbrunner*, 3d Dist. Auglaize No. 2-11-27, 2012-Ohio-2358, ¶ 12, citing *Mapp v. Ohio*, 367 U.S.

643, 649 (1961). An investigative stop, or *Terry* stop, is a common exception to the Fourth Amendment warrant requirement. *State v. Morlock*, 3d Dist. Allen No. 1-12-21, 2013-Ohio-641, ¶ 22, citing *Terry v. Ohio*, 392 U.S. 1 (1968). "Because the 'balance between the public interest and the individual's right to personal security' tilts in favor of a standard less than probable cause in such cases, the Fourth Amendment is satisfied if the officer's action is supported by reasonable, articulable suspicion to believe that criminal activity 'may be afoot.'" *State v. Shepherd*, 5th Dist. Coshocton Nos. 2014CA0003 and 2014CA0009, 2014-Ohio-4611, ¶ 19, quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975) and *United States v. Sokolow*, 490 U.S. 1, 7 (1989). "In *Terry*, the Supreme Court held that a police officer may stop an individual if the officer has a reasonable suspicion based upon specific and articulable facts that criminal behavior has occurred or is imminent." *Shepherd* at ¶ 19, citing *State v. Chatton*, 11 Ohio St.3d 59, 61 (1984). "Reasonable articulable suspicion exists when there are 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion.'" *State v. Klose*, 3d Dist. Hancock No. 5-10-12, 2010-Ohio-5674, ¶ 19, quoting *State v. Stephenson*, 3d Dist. Union No. 14-04-08, 2004-Ohio-5102, ¶ 16, quoting *State v. Bobo*, 37 Ohio St.3d 177, 178 (1988).

{¶19} "Under *Terry* and its progeny, the police may search only for weapons when conducting a pat down of the suspect." *State v. Evans*, 67 Ohio St.3d 405, 414 (1993). "Obviously, once the officer determines from his sense of touch that an object is not a weapon, the pat-down frisk must stop." *Id.* "The officer may not manipulate an object previously determined not to be a weapon in order to determine its incriminating nature." *State v. Olding*, 3d Dist. Shelby No. 17-09-13, 2010-Ohio-4171, ¶ 10, citing *Minnesota v. Dickerson*, 508 U.S. 366 (1993) and *Evans* at 415. "Such a limited search is not intended to discover evidence of a crime, but to allow the officer to pursue his duties 'without fear of violence.'" *State v. Moorer*, 10th Dist. Franklin No. 14AP-224, 2014-Ohio-4776, ¶ 11, quoting *Adams v. Williams*, 407 U.S. 143 (1972).

{¶20} "In determining whether reasonable articulable suspicion exists, a reviewing court must look to the totality of the circumstances." *Steinbrunner*, 2012-Ohio-2358, at ¶ 14, citing *State v. Andrews*, 57 Ohio St.3d 86, 87-88 (1991). "Under this analysis, a court should consider 'both the content of the information possessed by police and its degree of reliability.'" *Id.*, citing *Maumee v. Weisner*, 87 Ohio St.3d 295, 299 (1999), quoting *Alabama v. White*, 496 U.S. 325, 330 (1990). "A police officer's testimony alone is sufficient to establish reasonable articulable suspicion for a stop." *State v. McClellan*, 3d Dist. Allen No. 1-09-21,

2010-Ohio-314, ¶ 38, citing *State v. Claiborne*, 2d Dist. Montgomery No. 19060, 2002-Ohio-2696.

{¶21} Based on the totality of the circumstances of this case, Officer Gosnell had reasonable suspicion to stop Ross and conduct a pat-down search of him for the gun. Officer Gosnell was informed through a Marion City Police Department dispatch that there was an altercation involving a gun at 182 West Columbia Street. "An officer does not have to have personally observed a traffic violation or criminal activity to justify detaining someone; rather, an officer can rely on information transmitted to him through a dispatch or a flyer." *Steinbrunner* at ¶ 15, citing *Maumee* at 297, citing *United States v. Hensley*, 469 U.S. 221, 231 (1985). "'A telephone tip can, by itself, create reasonable suspicion justifying an investigatory stop where the tip has sufficient indicia of reliability.'" *Id.*, citing *Maumee* at paragraph two of the syllabus.

> [T]he admissibility of the evidence uncovered during * * * a stop does not rest upon whether the officers *relying upon a dispatch or a flyer* "were themselves aware of the specific facts which led their colleagues to seek assistance." It turns instead upon "whether the officers who *issued* the flyer" or dispatch possessed reasonable suspicion to make the stop.

(Emphasis sic.) *Id.*, quoting *Maumee* at 297, quoting *Hensley* at 231.

{¶22} Because the identity of the tipster is unclear from the record, we are unable to ascertain the class of the tipster to assess the informant's reliability. However, the content of the tip coupled with Officer Gosnell's training, experience, and observations at the scene provided him reasonable suspicion to stop and frisk Ross even if the tipster was anonymous. *See Shepherd* at ¶ 23-24 (anonymous tipsters are typically unreliable and require independent police corroboration), citing *Maumee* at 299-300, citing *White*, 496 U.S. at 329.

{¶23} First, the content of the tip relayed information that criminal behavior occurred or was imminent. That is, unlike an anonymous tip of a suspicious individual or vehicle, the tip relayed that a gun was involved in an altercation within the vicinity of 182 West Columbia Street. *Compare Shepherd* at ¶ 25 (anonymous tip of suspicious blue van in driveway does not support a reasonable suspicion of criminal activity); *State v. Anderson*, 11th Dist. Geauga No. 2003-G-2540, 2004-Ohio-3192, ¶ 13 (anonymous tip of a suspicious vehicle, absent any observation of criminal activity, does not support a reasonable suspicion of criminal activity); *City of Bowling Green v. Tomor*, 6th Dist. Wood No. WD-02-012, 2002-Ohio-6366, ¶ 11 (anonymous tip of a suspicious vehicle coupled with the time of night and an officer's knowledge of break-ins in the neighborhood does not rise to the level of reasonable suspicion).

{¶24} Second, the tip was sufficiently corroborated through Officer Gosnell's training, experience, and observations at the scene, which guided him to believe that Ross could be carrying a weapon. *See Shepherd* at ¶ 24 ("As we have observed, a stop is lawful if the facts relayed in the tip are 'sufficiently corroborated to furnish reasonable suspicion that [the defendant] was engaged in criminal activity.'"), quoting *State v. Williams*, 5th Dist. Stark No. 2004CA00354, 2005-Ohio-3345, ¶ 21, citing *Maumee* at 300. *See also Klose*, 2010-Ohio-5674, at ¶ 20 (a law enforcement officer's training and experience will support a reasonable articulable suspicion of criminal activity), citing *State v. Freema*n, 64 Ohio St.2d 291, 295 (1980). Officer Gosnell witnessed Ross exit a vehicle that was parked in the parking lot adjacent to 182 West Columbia Street, where it was reported that there was an altercation with a gun, and walk toward that house as if he were going to enter it. The silver Cadillac was apparently parked in the parking lot for a period of time since it was there prior to the time Officer Gosnell arrived at the scene and because the windows of the vehicle were "frosted over." (Apr. 28, 2014 Tr. at 7). Likewise, Ross was stopped around 3:30 a.m. in an area, according to Officer Gosnell, that does not receive "much foot traffic." (*Id.* at 28).

{¶25} Aside from that, Officer Gosnell testified that he was "99.9% sure" of Ross's identity and was aware that Ross was previously involved in drug-related activity based on his prior experience with him. (*Id.* at 7). Officer Gosnell

further testified that, through his experience, "guns and drugs go hand in hand." (*Id.* at 24). Likewise, Officer Gosnell testified that his intent for stopping and frisking Ross was not to find drugs, but to ensure his own safety and the safety of others at the scene by confirming that Ross did not possess the gun. Thus, Officer Gosnell's training, experience, prior experience with Ross, and observations at the scene provided him with reasonable suspicion that Ross may be armed. *See State v. Cuffman*, 3d Dist. Crawford Nos. 3-11-01 and 3-11-02, 2011-Ohio-4324, ¶ 19 ("The Ohio Supreme Court, relying on *Terry*, similarly held that '[w]here a police officer, during an investigative stop, has a reasonable suspicion that an individual is armed based on the totality of the circumstances, the officer may initiate a protective search for the safety of himself and others.'"), quoting *Bobo*, 37 Ohio St.3d 177, at paragraph two of the syllabus.

{¶26} Moreover, while Officer Gosnell testified that he learned that the subject with the gun had the last name of "Anderson," he described that the gun could have easily been "passed off" by that individual to another individual at the scene. As a result, Officer Gosnell was acting diligently when he stopped and frisked Ross under the circumstances enumerated above. In addition, that Officer Gosnell testified that it was later discovered that the anonymous tipster did not see a gun or hear gunfire, is inconsequential to the outcome of this case.

{¶27} Therefore, we conclude that Officer Gosnell had a reasonable articulable suspicion to stop and frisk Ross for the gun. We also conclude Officer Gosnell's pat-down search of Ross did not exceed the scope permitted under *Terry* because he did not manipulate the cellophane bindle. Moreover, Ross does not argue that he did not consent to Officer Gosnell seizing the cellophane bindle, and the evidence in the record demonstrates that Ross consented to that seizure.

{¶28} In conducting his pat-down search of Ross, Officer Gosnell testified that he did not manipulate the cellophane bindle; rather, he averred that he simply felt it and heard the crinkle of the cellophane as he ran his hand over it during his frisk of Ross. Officer Gosnell testified that, when he felt the cellophane bindle and heard it crinkle, he asked Ross what it was to which Ross responded that he did not know. However, Officer Gosnell testified that he knew from his experience that people carry drugs in cellophane in the watch pocket of pants. Even so, Officer Gosnell did not at that time seize the cellophane bindle from Ross. Thus, Officer Gosnell's pat-down search of Ross did not exceed the scope permitted under *Terry*.

{¶29} Once Officer Gosnell completed his *Terry* stop and frisk of Ross, Ross consented to Officer Gosnell removing the cellophane bindle from his pocket. Officer Gosnell testified that he asked Ross for his permission to remove the cellphone bindle and Ross consented to Officer Gosnell removing the

cellophane bindle. "A search by law enforcement does not implicate the Fourth Amendment when officers have obtained a voluntary consent to search." *State v. Robinson*, 9th Dist. Wayne No. 10CA0022, 2012-Ohio-2428, ¶ 21, citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *State v. Comen*, 50 Ohio St.3d 206, 211 (1990). The trial court was in the best position to evaluate the veracity of Officer Gosnell's testimony. *Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶ 8. Thus, because there is no evidence in the record that Ross did not consent to Officer Gosnell removing the cellophane bindle from his pocket, and Ross does not argue that there is, Officer Gosnell lawfully seized the cellophane bindle from Ross's pocket.

{¶30} As such, the trial court did not err in overruling Ross's motion to suppress.

{¶31} Ross's assignment of error is, therefore, overruled.

{¶32} Having found no error prejudicial to the appellant herein in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed

SHAW and WILLAMOWSKI, J.J., concur.

/jlr