

**COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT**

STATE OF OHIO	:	JUDGES:
	:	Hon. Julie Edwards, P.J.
	:	Hon. William Hoffman, J.
Plaintiff-Appellee	:	Hon. Sheila Farmer, J.
	:	
-vs-	:	
	:	Case No. 01-CA-00026
FRANK WILLIAMS	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal Appeal from Licking County Court of Common Pleas Case 00-CR-479

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: December 12, 2001

APPEARANCES:

For Plaintiff-Appellee

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Edwards, P. J.

Defendant- appellant Frank Williams appeals the January 25, 2001, Judgment Entry of denial by the Licking County Court of Common Pleas of defendant-appellant's Motion to Suppress. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

On October 10, 2000, the Bailiff/Process Server [hereinafter Bailiff] for the Licking County Municipal Court arrived at 368 Executive Court, Newark, Ohio, to do a “set out” as a result of an eviction at the apartment.¹ The Bailiff was accompanied by the landlord of the apartment complex and two Newark Police Officers. The Bailiff had asked the Police Department to provide at least one officer for the Bailiff’s safety.

The Bailiff knocked on the door several times but there was no response. The Bailiff asked the landlord to unlock the door. As the door was being opened, Patrolman Bline, of the Newark Police Department advised the Bailiff and the other Newark Police Officer, Patrolman Hopkins, that they should be careful because the apartment was suspected of being a “crack house.” Once the door was unlocked, the Bailiff began to open the door. However, someone on the inside attempted to push the door closed again. The officers then forced the door open. The Bailiff

¹A “set out” is the process by which any property remaining in a residence subject to the eviction is removed from the residence.

announced that he was there to evict the persons at the premises. The occupants were told by the Bailiff to “start getting their stuff together because we were going to move them out.” Tr. 12-13. The officers then entered the apartment.

There were many people in the apartment and these people were upset over the eviction. Defendant-appellant [hereinafter appellant] was seen leaving the living room and going into the bathroom. A minute or two later, appellant left the bathroom and re-entered the living room. The officers noticed a purple water bong, approximately one to two feet tall, sitting on the coffee table in the living room. Appellant began to gather what appeared to be his belongings from the living room, including picking up items that were located on the coffee table, near the bong. Appellant placed the items he gathered into a bag that he had with him. No one else was in the living room.

Officer Bline asked appellant if he knew what the bong was or if it belonged to appellant. Appellant said he had no idea it was there, he did not know anything about it and that it was not his. The officer then asked appellant for identification. Appellant responded that he did not live there and he was just getting his stuff. Upon further request, appellant stated that he had no identification on him but that it was in his car. Officer Bline then asked appellant for his social security number. By this time, appellant had put on a heavy, black leather jacket and placed his hand in his coat pocket. Appellant appeared very nervous. Bline testified that appellant was “extremely nervous, more nervous than a normal person dealing with the police, which heightened my awareness about what he was doing.” Tr. 45. The officer asked appellant not to put his hand in his pocket and appellant complied. Appellant

proceeded to give the officer his social security number but did so so fast that it was a blur to the officer. Officer Bline asked appellant to repeat the number.

At that point, appellant started to push Officer Bline, possibly to get past the officer. Again, appellant placed his hand in his pocket. Officer Bline described appellant as appearing “way too nervous.” TR 45. Bline feared that appellant may have a weapon and grabbed appellant’s arm. Appellant was asked to remove appellant’s hand from his pocket and Office Bline asked appellant to turn around so the officer could put handcuffs on appellant in case appellant had a weapon. A scuffle ensued. Officer Hopkins then assisted in attempting to control appellant. However, appellant tried to pull his arms away. After about a minute and a half of struggle, the officers decided to take appellant down to the floor where they could control him better and place the handcuffs on him. Appellant was taken down onto a mattress that was lying on the floor. Despite repeated requests to stop resisting, appellant continued to struggle with the officers. During the struggle, several people began to gather and stand around the officers.

Eventually, the officers placed appellant in handcuffs. Appellant was taken outside to allow the officers to deal with him away from the others who had gathered. Officer Bline remained in the apartment to arrest a woman. The woman was one of the other people in the house who had not followed the officer’s order to stay back during the struggle.

Upon taking the woman outside, Bline was informed by Hopkins that Hopkins had done a cursory pat down for weapons and placed appellant in a police car. Appellant was then informed that he was under arrest for Obstructing Official

Business and asked to get out of the car. Appellant was then searched again. As the search proceeded, appellant was shaking one leg. Finally, appellant said “this is what you are looking for.” TR 49. At that point, a large bag of crack cocaine dropped out of his leg.²

On October 19, 2000, appellant was indicted on one count of possession of crack cocaine, in violation of R.C. 2925.11(A), (C)(4)(d), and one count of preparation of drugs for sale, in violation of R.C. 2925.07 (A), (C)(4)(c). After a continuation pursuant to appellant’s request, an arraignment was held on November 6, 2000. At the arraignment, appellant entered pleas of not guilty.

Appellant filed a Motion to Suppress on December 29, 2000. In the Motion, appellant contended that the State violated appellant’s state and federal constitutional rights when the police officers initially detained appellant and asked appellant to provide identification and explain his activities. Further, appellant alleged his rights were violated by the subsequent search that led to the discovery of the crack cocaine.

A hearing on appellant’s Motion to Suppress was held on January 17, 2001. Subsequently, the trial court denied appellant’s Motion to Suppress on January 25, 2001.

² Appellant was charged with possession of 17.8 grams of crack cocaine. The crack cocaine was “individually wrapped.” TR 50.

Thereafter, on January 31, 2001, appellant entered pleas of no contest to one count of possession of crack cocaine, in violation of R.C. 2925.11(A), (C)(4)(d), and one count of preparation of drugs for sale, in violation of R.C. 2925.07(A), (C)(4)(c). By judgment entry filed that same day, appellant was found guilty of the offenses. A presentence investigation was ordered.

On February 22, 2001, appellant was sentenced to a determinative sentence of 2 years in prison and a \$7,500.00 fine was imposed on the count of possession of crack cocaine. In addition, appellant's driver's license was suspended for 3 years. As to the count of preparation of drugs for sale, appellant was sentenced to a determinative prison term of 1 year and a three year driver's license suspension. The trial court ordered that these sentences be served concurrently with each other.³

It is from his conviction and sentence that appellant prosecutes this appeal, raising the following assignment of error:

THE TRIAL COURT COMMITTED HARMFUL ERROR IN DENYING THE DEFENDANT-APPELLANT'S MOTION TO SUPPRESS.

I

Appellant claims the trial court erred in denying his motion to suppress. We disagree.

There are three methods of challenging on appeal a trial court's ruling on a

³ The trial court issued a stay of execution of sentence on March 28, 2001.

motion to suppress. First, an appellant may challenge the trial court's findings of fact. In reviewing a challenge of this nature, an appellate court must determine whether said findings of fact are against the manifest weight of the evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19; *State v. Klein* (1991), 73 Ohio App.3d 486; *State v. Guysinger* (1993), 86 Ohio App.3d 592. Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. *State v. Williams* (1993), 86 Ohio App.3d 37, overruled on other grounds. Finally, assuming the trial court's findings of fact are not against the manifest weight of the evidence and it has properly identified the law to be applied, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry* (1994), 95 Ohio App.3d 93; *State v. Claytor* (1993), 85 Ohio App.3d 623; *Guysinger, supra*. As the United States Supreme Court held in *Ornelas v. U.S.* (1996), 517 U.S. 690, 698, "... as a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal."

We will begin our review with the question whether the officers were justified in stopping appellant and questioning him or requesting identification. In *Terry v. Ohio* (1968), 392 U.S. 1, 22, the United States Supreme Court determined that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even

though there is no probable cause to make an arrest." Under *Terry*, an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot. *Illinois v. Wardlow* (2000), 528 U.S. 119, 123-124 (citing *Terry*, 392 U.S. at 30).

* * * '[R]easonable suspicion' is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop. *United States v. Sokolow* (1989), 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1. The officer must be able to articulate more than an 'inchoate and unparticularized suspicion or "hunch" ' of criminal activity. *Terry*, 392 U.S. at 27.

An officer may briefly detain a suspicious individual in order to determine his or her identity or to maintain the status quo while obtaining more information if specific facts known to the officer indicate that a crime is occurring or is about to occur. *State v. Williams* (1990), 51 Ohio St.3d 58, 60 (citing *Terry v. Ohio* (1968), 392 U.S. 1). If during a *Terry* stop, "the suspect gives evasive or implausible answers, this conduct combined with other factors may justify continued detention and investigation." *State v. McCrone* (1989), 63 Ohio App.3d 831, 837. In other words, the investigative stop must be temporary and may last only as long as is necessary to effectuate the purpose of the stop. *Id.* (citing *Florida v. Royer* (1983), 460 U.S. 491, 500.)

Pursuant to *Terry*, the police officer involved "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21. Such an investigatory stop "must be viewed in the light of the totality of the surrounding circumstances" presented to the

police officer. *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889.

We find the officers had reasonable, articulable suspicion to stop appellant and investigate the suspicious circumstances, including asking appellant to identify himself. The apartment in which appellant was found was suspected to be a crack house. Appellant was seen leaving and returning to a room that contained drug paraphernalia, a 1 to 2 feet tall, purple bong. Appellant was gathering his belongings from that room and picking up some small items from the table that held the bong, including what the officer believed to be a watch. Although appellant picked up items from the table that were only 3 to 4 inches from the bong, and gathered other belongings from the room, when asked about the bong, appellant replied that he did not know it was there. Certainly, if the appellant was retrieving belongings from the room, there is a reasonable suspicion he had spent some time in that room and near to the bong. According to Officer Bline, after requesting appellant to identify himself, appellant appeared too nervous for the circumstances. We find that there was reasonable suspicion for the officers to instigate a *Terry* stop and to continue to investigate the suspicious circumstances.

Appellant argues that appellant was arrested as the result of a struggle between appellant and the officers. We agree. However, appellant contends that the struggle ensued when the officers attempted to stop appellant from leaving the apartment. We disagree and find that the struggle ensued because appellant refused to refrain from placing his hands in his pocket, raising concerns for the officers' safety. The record reflects that the officers felt a need to place appellant in handcuffs for their safety while investigating these circumstances.

[Cite as *State v. Williams*, 2001-Ohio-7035.]

A police officer may use handcuffs in the course of an investigatory detention, as long as the use of handcuffs is reasonable under the circumstances. *State v. Pickett* (Aug. 3, 2000), Cuyahoga App. No. 76295, unreported, 2000 WL 1060653 (citing *State v. Mays* (1995), 104 Ohio App.3d 241, 248-249; *State v. Broomfield* (Sept. 13, 1996), Clark App. No. 95-CA-0103, unreported, 1996 WL 537478; *United States v. Miller* (C.A.8, 1992), 974 F.2d 953, 956-957; *United States v. Glenna* (C.A.7, 1989), 878 F.2d 967; *United States v. Crittendon* (C.A.4, 1989), 883 F.2d 326; *United States v. Laing* (C.A.D.C.1989), 889 F.2d 281).⁴ We find that the officers were justified in placing appellant in handcuffs for their own safety. In the case *sub judice*, the apartment was suspected of being a crack house. During the *Terry* stop, the appellant attempted to place his hand in the pocket of his heavy leather jacket. Further, appellant was wearing baggy clothes and a heavy leather jacket which could easily have concealed a weapon. As the encounter continued between Officer Bline and appellant, appellant continued to become more nervous, more nervous than expected. Appellant may have answered the officer's request for a social security number, but he did so in a way that made it impossible for the officer to understand the number. When asked to repeat the number, appellant placed his hand in his pocket again and attempted to push past the officer. In addition, there were many other individuals in the apartment and the activity in the apartment was described as

⁴ The First District court of Appeals, in *State v. Jones*, noted that there has been a trend in federal circuit courts, including the Sixth Circuit, to allow the police greater latitude to use force to "neutralize" dangerous suspects during *Terry* stops. *State v. Jones* (Dec. 3, 1999), Hamilton App. No. C-990125, unreported, 1999 WL 1488937 (citing *State v. Boykins* (Oct. 29, 1999), Hamilton App. No. C-990101, unreported), 1999 WL 979168.

“chaos.” Under the circumstances herein, we find that the use of handcuffs was reasonable.

Next, this court must consider whether the subsequent search of appellant was constitutionally valid.⁵ Appellant argues that even if this court finds that the “initial seizure” of appellant was constitutionally valid, the arrest of appellant was invalid, and therefore the evidence obtained as a result of the illegal arrest must be suppressed. The State asserts that the search that resulted in the revelation of the bag of crack cocaine was valid as a search incident to arrest.

Testimony showed that appellant was arrested for Obstructing Official Business, in violation of R.C. 2921.31. Revised Code 2921.31(A) states:

No person, without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within the public official's official capacity, shall do any act that hampers or impedes a public official in the performance of the public official's lawful duties.

Probable cause to arrest exists when a reasonable prudent person would believe that the person arrested had committed a crime. *State v. Timson* (1974), 38 Ohio St.2d 122. A determination of probable cause is made from the totality of the circumstances. *Illinois v. Gates* (1983), 462 U.S. 213, 230-231. We find that the officers had probable cause to believe appellant had obstructed official business.

⁵Appellant was searched twice during this incident. We understand appellant’s challenge to be directed at the second, more thorough search which resulted in the revelation of the crack cocaine. Our analysis is focused,

therefore, on this second search.

[Cite as *State v. Williams*, 2001-Ohio-7035.]

Appellant failed to heed the officer's order to remove and keep his hand out of his jacket pocket. Further, once Officer Bline determined that it was necessary to use handcuffs for the officer's safety, appellant struggled with the officers and attempted to pull his arms away from the officers. Such acts are sufficient to cause a reasonably prudent person to believe that appellant had, with purpose to prevent, obstruct, or delay the performance by the officers of authorized acts within the officers' official capacity, hampered or impeded the officers in the performance of their lawful duties. In accord, *State v. Dieter* (Oct. 30, 1998), Seneca App. Nos. 13-98-6, 13-98-7, 13-98-9, unreported, 1998 WL 767854 (probable cause to arrest for obstructing official business exists when offender fails to heed officers' warnings to remove hands from pockets).

If the arrest was constitutionally valid, the officers were justified in conducting a search incident to arrest. In *United States v. Robinson* (1973), 414 U.S. 218, the Supreme Court of the United States held that a full search of a person conducted incident to a lawful arrest is a recognized exception to the Fourth Amendment warrant requirement and shall be considered reasonable.

The search that led to the revelation regarding the crack cocaine was conducted after the officers had probable cause to arrest appellant and had actually arrested appellant. Pursuant to *Robinson*, the officers were thereby permitted to conduct a thorough search of appellant for weapons or contraband. It was during this search incident to arrest that appellant told the officers "this is what you are looking for" and shook out the crack cocaine from his pants. TR 49. We find that the search of appellant did not violate appellant's constitutional rights.

Appellant's sole assignment or error is overruled.

The judgment of the Licking County Court of Common Pleas is affirmed.

By Edwards, P.J.

Hoffman, J. and

Farmer, J. concur

JUDGES

JAE/1017

