[Cite as *State v. Cajka*, 2011-Ohio-2080.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio	Court of Appeals No. WD-10-042
Appellee	Trial Court No. 10CRB00696
v.	
Rudy F. Cajka	**DECISION AND JUDGMENT**
Appellant	Decided: April 29, 2011

* * * * *

Matthew L. Reger, Bowling Green City Prosecuting Attorney, for appellee.

LeAnn R. Schemrich, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Rudy F. Cajka, appeals from his conviction in the Bowling Green Municipal Court for possessing drug abuse instruments in violation of R.C. 2925.12(A), a misdemeanor of the first degree. For the reasons that follow, we reverse.

{¶ 2} Appellant was arrested for possession of drug abuse instruments on January 10, 2010. On May 18, 2010, he filed a motion to suppress. Following an evidentiary hearing, his motion was denied. Appellant then entered a no contest plea to the charge

and was sentenced to 180 days in jail, suspended, and a $200 fine. Appellant now appeals setting forth the following assignments of error:

{¶ 3} "I. The trial court erred by finding reasonable suspicion to approach the appellant's vehicle.

{¶ 4} "II. The trial court erred by finding the appellant's continued detainment was reasonable after the purpose of the stop no longer existed.

{¶ 5} "III. The trial court erred in denying the motion by incorrectly finding that the appellant's consent was voluntary without examining whether there was an unequivocal break in the chain of illegality to dissipate the taint of the illegal search."

{¶ 6} At the suppression hearing, Patrolman Brian K. Houser of the Bowling Green Police Department testified he was on duty at approximately 2:00 a.m. on January 10, 2010, when he noticed appellant, sitting in a running car, in a municipal parking lot. As Houser passed the car, he noticed that appellant appeared to be "fumbling with something." Houser continued driving. He returned to the same parking lot five minutes later and observed that appellant was still sitting in the car. Houser testified that he then parked his cruiser and approached the driver's side of the car. As he approached, he saw appellant place something under his right leg. Appellant rolled down his window. When Houser asked him what he was doing, appellant replied "nothing." When Houser asked him what he had put under his right leg, appellant replied "nothing."

{¶ 7} Two other Bowling Green police officers, Sergeant Mancuso and Patrolman Nathaniel Schiffel, arrived on the scene. Houser testified that he then asked appellant to

step out of his car. Houser testified that he noticed that appellant's eyes were very blood shot. Schiffel asked appellant if he had any drugs or weapons in the car and appellant stated that he did not. Houser testified that he asked appellant if he could search the vehicle and that appellant responded "go ahead." No contraband was found in the car.

{¶ 8} Schiffel testified he asked appellant if he could search his person for drugs or weapons. Both Houser and Schiffel testified that appellant responded "go ahead" and then proceeded to take things out of his own pockets. One item, a spoon, fell to the ground. Appellant explained that he had the spoon because he had been eating at a friend's house. Schiffel testified that the spoon had white powder residue on it. Because he believed the spoon to be drug paraphernalia, Schiffel confiscated the spoon. Test results later revealed that the spoon contained trace amounts of the narcotic oxycodone.

{¶ 9} Appellant testified that on January 10, 2010, he was supposed to drive his friends home from a bar. He parked the car in the lot and went to look for his friends. When he could not find them, he returned to his car alone. When Patrolman Houser spotted appellant sitting in his car, appellant had just returned and was warming his car up before proceeding home. As appellant attempted to back up, he saw Patrolman Houser approaching. Houser told him to get out of the car. He asked appellant if he had been drinking and he asked him why his eyes were red. Appellant testified that he told Houser that he had not been drinking and that his eyes were probably red because he had been smoking cigarettes.

{¶ 10} Appellant testified that he did not remember giving the officers consent to search his car. He only remembered them asking him if there was anything in the car they should be aware of and appellant told them no. Next, Schiffel asked appellant if he had any drugs or weapons on his person as he was patting appellant down. The officers then told appellant to empty his pockets which he did. Appellant denied emptying his pockets of his own accord. He also denied giving Schiffel consent to search his body.

{¶ 11} An appellate review of a ruling on a motion to suppress evidence presents mixed questions of law and fact. *United States v. Martinez* (C.A.11, 1992), 949 F.2d 1117, 1119; *State v. Long* (1998), 127 Ohio App.3d 328, 332. During a suppression hearing, the trial court assumes the role of the trier of fact and is, therefore, in the best position to resolve questions of fact and evaluate witness credibility. *State v. Mills* (1992), 62 Ohio St.3d 357, 366; *State v. Hopfer* (1996), 112 Ohio App.3d 521, 548. As a result, an appellate court must accept a trial court's factual findings if they are supported by competent and credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594; *City of Bowling Green v. Cummings*, 6th Dist. No. WD-07-084, 2008-Ohio-3848, ¶ 9. The reviewing court must then review the trial court's application of the law de novo. *State v. Russell* (1998), 127 Ohio App.3d 414, 416; *State v. Klein* (1991), 73 Ohio App.3d 486, 488; *State v. McNamara* (1997), 124 Ohio App.3d 706; *State v. Anderson* (1995), 100 Ohio App.3d 688, 691.

{¶ 12} In his first assignment of error, appellant contends that Patrolman Houser lacked reasonable suspicion to approach appellant's vehicle.

{¶ 13} 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, 20 L .Ed.2d 889. Under *Terry*, police officers may briefly stop and/or temporarily detain individuals in order to investigate possible criminal activity if the officers have a reasonable, articulable suspicion that criminal activity may be afoot. *State v. Martin*, 5th Dist. No. 20270, 2004-Ohio-2738, ¶ 10, citing *Terry*, supra. 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 was compelled to respond to questions. *United States v. Mendenhall* (1980), 446 U.S. 544, 553, 100 S.Ct. 1870, 64 L.Ed.2d 497; *Terry*, 392 U.S. at 16, 19.

{¶ 14} Although Houser testified that at all times during his encounter with appellant, he was free to leave, we agree with the trial court's conclusion that a reasonable person would not have believed he was free to leave given the fact that he was surrounded by three uniformed officers.

{¶ 15} An investigative stop, or *Terry* stop, is a common exception to the Fourth Amendment warrant requirement. *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. It is well recognized that officers may briefly stop and detain an individual, without an arrest warrant and without probable cause, in order to investigate a reasonable and articulable suspicion of criminal activity. Id.; see, also, *State v. Bobo* (1988), 37 Ohio St.3d 177, 524 N.E.2d 489.

{¶ 16} In order to effectuate a *Terry* stop, the police need not witness the suspect actually engaged in criminal activity. Otherwise, there would be probable cause to arrest. Rather, it is sufficient that the police witness the suspect engaged in activity that, although not illegal in itself, is sufficient to give rise to a reasonable suspicion that the suspect is engaged in criminal activity. *Toledo v. Penn* (2000), 109 Ohio Misc.2d 1. A *Terry* stop is investigatory. It requires only that the police have "reasonable suspicion" that criminal activity is afoot. "Reasonable suspicion" is a term of art that is not "'readily, or even usefully, reduced to a neat set of legal rules.'" *United States v. Sokolow* (1989), 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1, quoting *Illinois v. Gates* (1983), 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527. The term connotes something less than probable cause, but something more than "inchoate and unparticularized suspicion or 'hunch.' " *Terry*, at 27.

{¶ 17} Whether a police officer had "an objective and particularized suspicion that criminal activity was afoot must be based on the entire picture-a totality of the surrounding circumstances." *State v. Andrews* (1991), 57 Ohio St.3d 86, 87, (citing *United States v. Cortez* (1981), 449 U.S. 411, 417-18, 101 S.Ct. 690, 66 L.Ed.2d 621; *State v. Bobo*, supra. "[The] circumstances are to be viewed through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold." *Andrews*, supra, at 87-88. "A court reviewing the officer's actions must give due weight to his experience and training and view the evidence as it would be understood by those in law enforcement." Id. at 88. Officers may "draw on their own

experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" *United States v. Arvizu* (2002), 534 U.S. 266, 273, 122 S.Ct. 744, 151 L.Ed.2d 740 (quoting *United States v. Cortez* (1981), 449 U.S. 411, 418, 101 S.Ct. 690, 66 L.Ed.2d.) Furthermore, "'[t]he reputation of an area for criminal activity is an articulable fact upon which a police officer may legitimately rely' in determining whether an investigative stop is warranted." *Bobo*, supra, at 179, (quoting United States v. Magda (C.A. 2, 1976), 547 F.2d 756, 758.)

{¶ 18} Here, Houser testified he had particular experience with the parking lot where he encountered appellant. The parking lot is close to numerous bars and therefore, at 2:00 a.m., the lot consists mainly of bar patrons. He testified that many times, he has found people sitting in their cars in the parking lot after the bars have closed, either drinking alcohol or smoking marijuana. It is for this reason that he found appellant's conduct somewhat suspicious, especially when he returned to the lot a second time and appellant was still sitting in a running car. When he spoke to appellant, he immediately noticed that appellant's eyes were bloodshot and he saw appellant attempting to conceal something under his leg. The trial court in this case correctly concluded that Houser articulated specific, objective facts which, taken together with rational inferences from those facts, reasonably warranted an investigatory stop of appellant's car. Accordingly, appellant's first assignment of error is found not well-taken.

{¶ 19} An investigative stop, however, must be temporary and last no longer than is necessary to effectuate the purposes of the stop. See *Florida v. Royer* (1983), 460 U.S. 491,103 S.Ct. 1319, 75 L.Ed.2d 229. Furthermore, "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." Id. In his second assignment of error, appellant contends that Patrolman Houser unreasonably detained appellant after he had determined that appellant was not drinking or using illegal drugs in his parked car. We agree.

{¶ 20} Appellant relies upon the rule set forth in *Royer* to argue that law enforcement officers are prevented from conducting "fishing expeditions" for evidence of a crime. *State v. Gonyou* (1995), 108 Ohio App.3d 369, 372. In *Gonyou*, the court summarized the circumstances under which the continued detention may constitute an illegal "fishing expedition": "[V]arious activities, including following a script, prolonging a traffic stop in order to 'fish' for evidence, separating an individual from his car and engaging in 'casual conversation' in order to observe 'body language' and 'nervousness,' have been deemed (depending on the overall facts of the case) to be manipulative practices which are beyond the scope of '* * * the purpose for which the stop was made.' citing *State v. Correa* (1995), 108 Ohio App.3d 362."

{¶ 21} After the officers searched appellant's car and found no contraband, Houser no longer maintained a reasonable suspicion that appellant was consuming alcohol or drugs in his car. The only suspicious fact that remained was that appellant's eyes were blood shot. Houser did not, however, see, hear or smell anything suspicious, particularly

alcohol or marijuana, to warrant further detention of appellant. Appellant's blood shot eyes, with nothing more, did not justify his further detention and he should have been free to go once the search of his car was complete. Accordingly, we find that the trial court erred in denying appellant's motion to suppress and appellant's second assignment of error is found well-taken.

{¶ 22} In his third assignment of error, appellant contends that the court erred in finding that appellant consented to a search of his person. Having already determined that the trial court erred in denying appellant's motion to suppress, we find appellant's third assignment of error to be moot.

{¶ 23} On consideration whereof, the judgment of the Bowling Green Municipal Court is reversed, and the cause is remanded for further proceedings consistent with this decision. Costs of this appeal are assessed to appellee pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE