[Cite as *State v. Scales*, 2006-Ohio-3946.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 87023

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	JOURNAL ENTRY
	:	
vs.	:	and
	:	
	:	OPINION
JOSEPH SCALES	:	
	:	
Defendant-Appellant	:	

DATE OF ANNOUNCEMENT
OF DECISION: August 3, 2006

CHARACTER OF PROCEEDING: Criminal appeal from
Court of Common Pleas
Case No. CR-467017

JUDGMENT: JUDGMENT REVERSED,
CONVICTION VACATED, AND
CASE REMANDED

DATE OF JOURNALIZATION: _____

APPEARANCES:

For Plaintiff-Appellee: WILLIAM D. MASON
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DANIEL CLEARY, Assistant
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526 Superior Avenue, Suite 940

Cleveland, Ohio 44114

[Cite as *State v. Scales*, 2006-Ohio-3946.]

COLLEEN CONWAY COONEY, P.J.:

{¶ 1} Defendant-appellant, Joseph Scales ("Scales"), appeals the trial court's decision denying his motion to suppress. Finding merit to the appeal, we vacate his conviction.

{¶ 2} In 2005, Scales was charged with possession of drugs and criminal tools. He moved to suppress the evidence found on his person when the police searched him. The trial court denied his motion, and Scales subsequently pled no contest to the charges. He was sentenced to one year community control sanctions.

{¶ 3} The following evidence was presented at the motion to suppress hearing. Officer Vowell ("Vowell") was conducting surveillance with his partner in a high drug activity area at East 71st Street and St. Clair Avenue. Officer Cornell ("Cornell") and his sergeant were also patrolling the area. At 11:10 p.m., the officers observed Scales "wave down" a car. Scales walked toward the vehicle, which had stopped in the middle of the street.

{¶ 4} As the officers approached Scales and the vehicle, the car drove away, and Scales walked back to the sidewalk. Vowell approached Scales and another male and inquired about their activities. At that time, Cornell seized Scales and took him to the police car to conduct a pat-down search. After asking Scales about any weapons on his person, Scales admitted that he had a bag of marijuana. Cornell then recovered the marijuana from Scales' pants pocket, as well as a bag containing two rocks of crack cocaine.

{¶ 5} Scales testified that he did not "wave down" a passing car nor did he feel free to leave the scene when Cornell conducted the pat-down search. He further testified that the marijuana was in his right pocket, whereas the crack cocaine was in his "hoodie" pocket. He stated that the officer went inside his pocket and found the crack cocaine.

{¶ 6} Scales appeals, arguing in his sole assignment of error that the trial court erred in denying his motion to suppress.

{¶ 7} At a suppression hearing, the trial court, as the trier of fact, is in the best position to weigh the evidence by resolving factual questions and evaluating the credibility of the witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 582 N.E.2d 972. On review, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Harris* (1994), 98 Ohio App.3d 543, 546, 649 N.E.2d 7. After accepting such factual findings, the reviewing court must independently determine as a matter of law whether the applicable legal standard has been satisfied. *State v. Lloyd* (1998), 126 Ohio App.3d 95, 709 N.E.2d 913.

{¶ 8} In *Terry v. Ohio*, the United States Supreme Court explained that the Fourth Amendment allows a police officer to stop and detain an individual if the officer possesses a reasonable suspicion, based upon specific and articulable facts, that criminal activity "may be afoot." *Terry v. Ohio* (1968), 392 U.S. 1, 9, 20 L.Ed.2d 889, 88 S.Ct. 1868; see, also, *State v. Andrews* (1991), 57 Ohio St.3d 86, 565 N.E.2d 1271.

{¶ 9} A valid investigative stop must be based on more than a mere "hunch" that criminal activity is afoot. *United States v. Arvizu* (2002), 534 U.S. 266, 151 L.Ed.2d 740, 122 S.Ct. 744; *Terry*, supra at 27. However, reviewing courts should not "demand scientific certainty" from law enforcement officers. *Illinois v. Wardlow* (2000), 528 U.S. 119, 125, 145 L.Ed.2d 570, 120 S.Ct. 673.

{¶ 10} In deciding whether reasonable suspicion exists, courts must examine the "'totality of the circumstances' of each case to determine whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." *Arvizu*, supra, quoting, *United States v. Cortez*

(1981), 449 U.S. 411, 417-418, 66 L.Ed.2d 621, 101 S.Ct. 690; *State v. Bobo* (1988), 37 Ohio St.3d 177, 524 N.E.2d 489, at syllabus, paragraph one, citing, *State v. Freeman* (1980), 64 Ohio St.2d 291, 414 N.E.2d 1044.

{¶ 11} Under the totality of the circumstances approach, police officers are permitted to "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.'" *Arvizu*, quoting *Cortez*, supra at 418. Thus, a court reviewing an officer's reasonable suspicion determination must give due weight to the officer's trained eye and experience and view the evidence through the eyes of law enforcement. Id. See, also, *Andrews*, supra at 87-88.

{¶ 12} In the instant case, two officers testified that they were conducting surveillance in a high drug activity area around 11:10 p.m., when they observed Scales "wave down" a car that was traveling down the street. According to the officers, individuals who engage in drug activity will commonly wave to a passing car to alert the driver that the person is selling drugs. After Scales "waved down" the car, he walked toward the vehicle, which had stopped in the middle of the street.

{¶ 13} As the officers approached Scales and the vehicle, the car drove away, and Scales started to walk toward the sidewalk. Vowell testified that, but for their presence, he believed a drug transaction would have occurred. However, he further testified that Scales did not get close enough to the car to make an exchange or to speak to the vehicle's occupants. Vowell admitted that he was not certain if Scales possessed any illegal contraband, although he suspected it.

{¶ 14} Based on the totality of the circumstances, Vowell's "hunch" was not sufficient to create reasonable suspicion to stop and detain Scales. The act of "waving down" one car did not culminate in anything other than an attempt to approach a stopped car. Moreover, Vowell's "hunch"

that Scales might possess illegal contraband does not pass constitutional muster despite the officer's training and experience in drug-related cases. Although Scales' actions may have attracted the officer's attention, the officers must have more than a vague suspicion to justify an investigatory stop. *Terry*, supra; *Bobo*, supra. Under *Terry* and *Bobo*, the officers must have reasonable suspicion that criminal activity is imminent and they must be able to point to specific facts to justify the conclusion that the defendant is engaged in criminal activity.

{¶ 15} Had Scales engaged in a pattern of "waving down" cars and approaching them, reasonable suspicion might have been established. Moreover, had the officers actually observed Scales approach the vehicle and engage in a hand-to-hand transaction or, at the very least, a conversation, then reasonable suspicion might have been established.

{¶ 16} However, that is not the case before us. Instead, we have a single incident of Scales "waving down" a car and walking toward it. Prior to reaching the stopped vehicle, the police approached, the vehicle drove away, and Scales walked back to the sidewalk. There was nothing more to generate reasonable suspicion to justify the officers' stop and detention of Scales. In fact, no testimony was elicited from either officer that Scales made any furtive movements while approaching the car to support the officers' suspicions that a drug transaction was imminent.

{¶ 17} "A person's mere presence in an area of high crime activity does not suspend the protections of the Fourth and Fourteenth Amendments to the United States Constitution." *State v. Chandler* (1989), 54 Ohio App.3d 92, 560 N.E.2d 832, paragraph two of the syllabus. Moreover, this court has previously held that an individual's walking toward an occupied car and then, upon observing the police, retreating from the scene, is not sufficient to justify an investigative stop, even in an area of high drug activity. *State v. Fincher* (1991), 76 Ohio App.3d 721, 603 N.E.2d 329. See,

also, *State v. Crosby* (1991), 72 Ohio App.3d 148, 151, 594 N.E.2d 110; *State v. Hewston* (Aug. 2, 1990), Cuyahoga App. No. 59095; *State v. Arrington* (1990), 64 Ohio App.3d 654, 582 N.E.2d 649.

{¶ 18} Therefore, we cannot say that the officers had reasonable suspicion to stop and detain Scales because no specific or articulable facts exist to support the officer's contentions that a criminal activity was "afoot." Because the stop was unjustified, the search of Scales was also unjustified. The trial court erred in denying Scales' motion to suppress the evidence found on his person.

{¶ 19} Accordingly, we sustain the assignment of error.

Judgment reversed, conviction vacated, and case remanded.

It is, therefore, ordered that said appellant recover of said appellee the costs herein.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. McMONAGLE, J. CONCURS

SEAN C. GALLAGHER, J. DISSENTS (SEE SEPARATE DISSENTING OPINION)

review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 87023

STATE OF OHIO	:	
	:	DISSENTING
	:	
Plaintiff-Appellee	:	OPINION
	:	
vs.	:	
	:	
JOSEPH SCALES	:	
	:	
	:	
Defendant-Appellant	:	
	:	

DATE: August 3, 2006

SEAN C. GALLAGHER, J., DISSENTING:

{¶ 20} I respectfully dissent from the majority's decision and would uphold the search in this case. I believe that the initial intrusion was justified under these facts. Although the majority cites a line of cases that stand for the proposition that an individual's walking toward an occupied car and then retreating upon observing the police is not sufficient to justify an investigative stop in a high drug area, this case is distinguishable.

{¶ 21} In this instance, *the police saw the defendant wave down the car* before approaching it. They then observed the appellant retreat after realizing the police were present. In addition, the

vehicle, which had been stopped in the middle of the road, suddenly pulled away when the presence of the police was realized by the occupants. The cases from this district cited by the majority in support of suppressing this investigative stop do not involve defendants waving down vehicles. They are limited to circumstances where the suspects are observed at a vehicle and the police presence results in their retreating. Although I agree with the majority that individual acts, such as merely being present at a location, walking up to a vehicle, or simply waving at a vehicle, are not enough independently to justify a stop, the presence of all three, at the same time, with all the other factors known to the officers under the totality of circumstances, is enough to justify an investigatory stop.

{¶ 22} The Supreme Court of Ohio previously set forth guidelines for determining the reasonableness of an investigatory stop. The factors cited include the following: (1) the area was characterized by high drug activity; (2) it was nighttime; (3) the police officer was experienced; (4) the police officer knew how drug transactions took place; (5) the officer saw the defendant do something suspicious; (6) the officer's experience led him to recognize the suspicious act of defendant as the type of act usually done when a suspect is involved in an illegal activity; (7) the police officers were away from the protection of their vehicle. *State v. Bobo* (1988), 37 Ohio St.3d 177.

{¶ 23} In *State v. Kinds* (Oct. 28, 1993), Cuyahoga App. No. 65243, the detective noticed Kinds making motions to several cars from the street corner, "indicative of an attempt to flag down vehicles." The detective stopped to investigate. Applying the factors set forth in *Bobo*, this court found an investigative stop was reasonable because Kinds flagged down a vehicle in a high crime area at 8:30 in the evening. The detective had six years of experience with the Cleveland police and

observed the same type of activity of flagging down cars more than three thousand times. This court found that "[u]nder the totality of these circumstances, [the detective] was reasonable to make an investigatory stop of [Kinds]. [The detective] possessed a reasonable suspicion that appellant 'was engaged in or was about to engage in criminal activity.'" Id., quoting *State v. Williams* (1990), 51 Ohio St.3d 58, 61, certiorari denied (1990), 498 U.S. 961.

{¶ 24} As the majority points out, under the totality of the circumstances, police officers are permitted to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them. And this court must give due deference to the officer's trained eye and experience and view the evidence through the eyes of the officer.

{¶ 25} In the present case, the area was known to the officers as a "hot spot" for drug activity and the officers testified that they collectively made over one hundred arrests for drug activity at this location. The incident occurred at night, shortly after 11 p.m. Further, the officers testified, based on years of experience, that drug dealers wave at vehicles to get the attention of potential buyers and then approach the stopped vehicle to make a sale. In addition, the testimony revealed that drug dealers and buyers are keenly familiar with the Cleveland undercover vice cars and scatter upon seeing them approach. Finally, the vehicle in this instance stopped in the middle of the roadway as a direct result of appellant's conduct. It then quickly pulled off after the realization that the police had arrived. These observations were specific, articulable facts, offered by the police to support their contention that criminal activity was "afoot."

{¶ 26} Having established a reasonable, articulable suspicion for the initial intrusion, the police also had a reasonable basis to conduct a pat-down for weapons. Under *Terry v. Ohio* (1968),

392 U.S. 1, 24, a limited protective search of the detainee's person for concealed weapons is justified only when the officer has reasonably concluded that "the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others * * *." "The purpose of the limited search is not to discover evidence of a crime, but to allow the officer to pursue his investigation without fear of violence. *Adams v. Williams* (1972), 407 U.S. 143, 146, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612, 617. Where a police officer, during an investigative stop, has a reasonable suspicion based on the totality of the circumstances that an individual is armed, the officer may initiate a protective search for the safety of himself and others. *State v. Bobo* (1988), 37 Ohio St.3d 177, 524 N.E.2d 489, paragraph two of the syllabus." *State v. Evans* (1993), 67 Ohio St.3d 405.

{¶ 27} Here, Officer Vowell testified that once he came in contact with the appellant to investigate a possible drug sale, he recognized him as an individual he had "checked" for drugs on previous occasions. The officer testified that he recovered marijuana from the appellant on at least one prior occasion. Both officers testified that in many instances, those arrested for drugs in that area were found to be carrying weapons. In addition, the testimony established that the appellant was wearing a hooded sweatshirt and that it was after 11 p.m., in what the officers described as a "hot spot" for drug activity. Based on the totality of the circumstances, the officers were justified in conducting a pat-down for safety.

{¶ 28} Furthermore, upon initiating the pat-down for weapons, Officer Cornell asked the appellant if "he had any weapons, any needles or anything sharp or any drugs on him." The appellant responded that he did have a bag of marijuana. The officer testified that, based on his experience, he could feel the bag of marijuana through the outside of appellant's clothing. The officer indicated he

recovered the two rocks of cocaine in a plastic bag from the appellant's pants pocket, but it is not clear if this was a result of a search or a pat-down recovery. In my view, under these limited facts, it makes no difference.

{¶ 29} Appellant's admission that he possessed marijuana, coupled with the officers' beliefs that they foiled a felony drug transaction, gave the officers probable cause to arrest appellant. As a result, the officers were justified in searching appellant, because it has long been held that a search may precede the arrest so long as the fruits of the search are not used to support probable cause for the arrest. *Rawlings v. Kentucky* (1980), 448 U.S. 98, 111.

{¶ 30} Under these facts, the investigative stop, the pat-down, and the search of appellant were proper. Therefore, I would find that the trial court properly denied appellant's motion to suppress.