

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87735

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RICHARD SMITH

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-466302

BEFORE: Gallagher, J., Celebrezze, A. J., and Blackmon, J.

RELEASED: January 25, 2007

JOURNALIZED:

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SEAN C. GALLAGHER, J.:

{¶1} Appellant, Richard Smith, appeals from his conviction and sentence in the Cuyahoga County Court of Common Pleas, claiming that the court erred by denying his motion to suppress. For the reasons stated herein, the judgment of the trial court is affirmed.

{¶2} Smith was indicted on May 27, 2005 with one count each of possession of drugs in violation of R.C. 2925.11, drug trafficking in violation of R.C. 2925.03, and

resisting arrest in violation of R.C. 2921.33. At his arraignment, Smith entered a plea of not guilty to all counts.

{¶3} Smith filed a motion to suppress evidence. The matter proceeded to a hearing on the motion. At the hearing, Officer John Franko testified that on April 25, 2005, he and his partner, Officer Kevin McClain, observed a car that was in the middle of East 72nd Street impeding the flow of traffic. He stated that when he arrived on the scene, the car appeared to be exiting a driveway from Gordon Park and the speed of the car was “crawling.” There was a male in the driver’s seat of the car, and there was a female trying to reach into the car. The car came to a stop directly in front of the street divider in a southbound lane. The female was screaming and flagging the officers down. She was saying, “This is my car. My car.”

{¶4} The officers activated the lights on their marked zone car. Officer Franko stated that he initially thought it was possibly a stolen vehicle, but as he started approaching, he thought it could be a domestic dispute. As the officers were exiting their zone car, the man exited the vehicle and began to flee. Officer Franko yelled for the man to stop, but he did not.

{¶5} Officer Franko began to chase the man, and as the chase ensued up a hill, he observed the man spit something out of his mouth. Officer Franko described the object as “white or yellow” and “wrapped in plastic.” The man’s cell phone also flew out of his hand at the same time. Eventually, Officer Franko tackled the man to the ground. The man kept resisting, but the officer was able to secure him in

handcuffs after approximately forty-five seconds. Officer Franko initially testified he arrested the man for fleeing and eluding.

{¶6} Officer Franko stated that Officer McClain went to retrieve the man's cell phone and to look for the object the man had spit out of his mouth. Both were recovered. The object was suspected to be crack cocaine. Officer Franko then advised the man he was under arrest for violation of state drug law and read him his *Miranda* rights.

{¶7} The officers cited the man for fleeing and eluding and certain other traffic charges. However, they did not cite him with impeding the flow of traffic. At the suppression hearing, Officer Franko positively identified Smith as the person he was chasing.

{¶8} Following the hearing, the trial court denied Smith's motion to suppress. Thereafter, Smith withdrew his not guilty plea and entered a plea of no contest to all counts. The trial court accepted Smith's plea and proceeded to sentence Smith. The court sentenced Smith to sixty days in prison for resisting arrest, which sentence was suspended, merged the other two counts, and sentenced Smith to eight months in prison with credit for time served.

{¶9} Smith filed this appeal, raising one assignment of error for our review that provides as follows: "The trial court erred when it overruled the appellant's motion to suppress the contraband seized without probable cause to arrest."

{¶10} The Ohio Supreme Court has set forth the standard of review for a motion to suppress as follows:

“Appellate review of a motion to suppress presents a mixed question of law and fact. 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. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972. Consequently, an appellate court must accept the trial court’s findings of fact if they are supported by competent, credible evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19, 1 Ohio B. 57, 437 N.E.2d 583, 1 Ohio St.3d 19, 1 OBR 57, 437 N.E.2d 583. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard.”

State v. Roberts, 110 Ohio St.3d 71, 82, 2006-Ohio-3665, quoting *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372.

{¶11} In this case, Smith argues that there was no reasonable suspicion to stop and pursue him. He claims that the officers had no indication that any crime had occurred, that it could have been a simple dispute over who was going to take the car, and that the act of fleeing in and of itself was not sufficient to justify the stop.

{¶12} 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. To justify an investigative stop, the officer must be able to articulate specific facts which would warrant a reasonably prudent police officer to believe that the person stopped has committed or is committing a crime. See, *Terry*, 392 U.S. at 27.

{¶13} In this case, Officer Franko testified that Smith was in a vehicle, in the middle of the street, impeding the flow of traffic. There was also a woman reaching into the car who was flagging down the officers and screaming “this is my car.” After the officers activated their zone car’s overhead lights and began to approach, Smith fled on foot.

{¶14} We first consider the officer’s testimony that he believed Smith was impeding the flow of traffic. The Ohio Supreme Court has recognized that “where an officer has an articulable reasonable suspicion or probable cause to stop a motorist for any criminal violation, including a minor traffic violation, the stop is constitutionally valid regardless of the officer’s underlying subjective intent or motivation for stopping the vehicle in question.” *City of Dayton v. Erickson*, 76 Ohio St.3d 3, 11-12, 1996-Ohio-431. Reasonable suspicion, based on specific and articulable facts, to conduct an investigatory stop after a police officer observes a traffic violation is not negated by the fact an officer elects not to issue a citation for the offense. *State v. Arms* (Mar. 6, 1998), Lucas App. No. L-97-1282. Thus, the question is whether Officer Franko articulated specific facts upon which a reasonable suspicion could be based that Smith had violated the law. See *State v. Frank* (Feb. 18, 2000), Hamilton App. C-990079, C-990080, C-990081.

{¶15} In this case, Officer Franko stated that Smith was stopped in a southbound lane of traffic on a four-lane street. Smith had the car angled right up against the divider. Officer Franko stated that there was some traffic going both ways, although “not major traffic,” and a couple of cars had passed as they were

pulling up. Apparently, as the officers pulled up to investigate, some drivers were “rubbernecking” to see what was going on. While the testimony may be somewhat questionable as to being sufficient to establish that the flow of traffic was being impeded, there were other specific and articulable facts that supported a finding that the officer had a reasonable suspicion that criminal activity may be afoot.

{¶16} The car in the middle of the street, coupled with the woman reaching in and screaming “this is my car,” supports a finding that the officer had a reasonable suspicion that the car was being stolen. Also, the officer testified that the woman “looked frightened, extremely flamboyant with her arms. She was screaming.” In addition, Smith began to flee once he noticed the police.

{¶17} In *Illinois v. Wardlow*, 528 U.S. 119, 120 S.Ct. 673, 145 L.Ed.2d 570, the United States Supreme Court noted: “Our cases have also recognized that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion. [Citations omitted.] Headlong flight -- wherever it occurs -- is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such. In reviewing the propriety of an officer’s conduct, courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior. [Citation omitted.]” *Id.* at 124.

{¶18} Thus, in this case, while Smith's act of flight from the officers in and of itself may have been insufficient to create a reasonable suspicion, this act combined with the other specific and articulable facts noted above were sufficient to give the officers reasonable suspicion that Smith was involved in criminal activity.

{¶19} Upon our review of the record, we find the trial court's finding that the officers had reasonable suspicion to support an investigatory stop was supported by competent, credible evidence. Further, as soon as the officers discovered Smith had discarded crack cocaine, they had probable cause to arrest him.

{¶20} Smith's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

SEAN C. GALLAGHER, JUDGE

FRANK D. CELEBREZZE, JR., A. J., and
PATRICIA ANN BLACKMON, J., CONCUR