[Cite as *State v. Cobbs*, 2007-Ohio-5950.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 89062

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LOVELLE COBBS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-475010

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

RELEASED: November 8, 2007

JOURNALIZED:

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ANN DYKE, J.:

{¶ 1} Defendant Lovelle Cobbs appeals from his conviction for drug possession and challenges the constitutionality of the stop which preceded his arrest. For the reason set forth below, we affirm.

{¶ 2} On October 6, 2005, defendant was arrested for possession of crack cocaine, and was later charged in a one-count indictment with drug possession. He pled not guilty and moved to suppress the evidence obtained against him, arguing that the initial stop and the search were unconstitutional. Following an evidentiary hearing, the trial court denied the motion to suppress and defendant pled no contest to the charge. The trial court found defendant guilty and sentenced him to one year of community control sanctions. Defendant now appeals and assigns the following error for our review:

{¶ 3} "Detective Meyer engaged in an unconstitutional 'Terry stop' of the appellant without reasonable and articulable suspicion that a crime had been committed."

{¶ 4} Within this assignment of error, defendant asserts that the "Terry stop" was unsupported by a reasonable suspicion that criminal activity was afoot. In opposition, the state asserts that defendant was not seized and that the encounter was consensual.

{¶ 5} In reviewing a trial court's ruling on a motion to suppress, we defer to the trial court's factual findings if competent, credible evidence exists to support

those findings. See *State v. Long* (1998), 127 Ohio App.3d 328, 332, 713 N.E.2d 1. Accepting the facts as found by the trial court as true, the appellate court must then independently determine as a matter of law, without deferring to the trial court's conclusions, whether the facts meet the applicable legal standard. *State v. Kobi* (1997), 122 Ohio App.3d 160, 701 N.E.2d 420.

{¶ 6} With regard to the initial stop of defendant, we note that:

{¶ 7} The Fourth Amendment to the United States Constitution provides in part that "[t]he right of the people to be secure in their persons * * * against unreasonable searches and seizures, shall not be violated[.]"

{¶ 8} However, not all personal intercourse between policemen and citizens involves a seizure. Law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, and by putting questions to him if the person is willing to listen. *Florida v. Royer* (1982),460 U.S. 491, 103 S.Ct. 1319, 75 L. Ed.2d 229. An investigative stop must be limited in duration and scope and can last only as long as is necessary for an officer to confirm or dispel his suspicions that criminal activity is afoot. Id "Encounters are consensual where the police merely approach a person in a public place, engage the person in conversation, request information, and the person is free not to answer and walk away." *State v. Taylor* (1995), 106 Ohio App.3d 741, 747, 667 N.E.2d 60, citing *United States v. Mendenhall* (1980), 446 U.S. 544, 553, 100 S.Ct. 1870, 64 L.Ed.2d

497. "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry v. Ohio* (1968), 392 U.S. 1, 19, 88 S. Ct. 1868, 20 L.Ed.2d 889.

{¶ 9} "The Fourth Amendment guarantees are not implicated in such an encounter unless the police officer has by either physical force or show of authority restrained the person's liberty so that a reasonable person would not feel free to decline the officer's requests or otherwise terminate the encounter." *State v. Taylor,* supra.

{¶ 10} In *State v. Aufrance,* Montgomery App. No. 21870, 2007-Ohio-2415, the court explained:

{¶ 11} "Contact between police officers and the public can be characterized in different ways. The first manner of contact and the least restrictive is contact that is initiated by a police officer for purposes of inquiry only. '[M]erely approaching an individual on the street or in another public place[,]' asking questions for voluntary, uncoerced responses, does not violate the Fourth Amendment. *United States v. Flowers* (C.A. 6, 1990), 909 F.2d 145, 147. The United States Supreme Court has repeatedly held that mere police questioning does not constitute a seizure for Fourth Amendment purposes. *Florida v. Bostick* (1991), 501 U.S. 429, 434, 111 S.Ct. 2382, 115 L.Ed.2d 389; *INS v. Delgado* (1984), 466 U.S. 210, 212, 104 S.Ct. 1758, 80 L.Ed.2d 247. '[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the

individual's identification; *** provided they do not convey a message that compliance with their request is required.' *Bostick,* 501 U.S. at 434-35 (citations omitted). A person approached in this fashion need not answer any questions, and may continue on his or her way unfettered by any real or implied restraint, and he may not be detained even momentarily for his refusal to listen or answer. Id."

{¶ 12} As to the subsequent search, we further note that a recognized exception to the Fourth Amendment's warrant requirement is a search conducted based on consent. *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 93 S.Ct. 2041, 36 L. Ed. 2d 854. The state must prove that the consent was freely and voluntarily given, as demonstrated by a totality of the circumstances. Id. The essential question is whether the consent was voluntary or the product of express or implied duress or coercion, as determined from the totality of the circumstances. Id. at 227.

{¶ 13} The standard for measuring the scope of consent under the Fourth Amendment is objective reasonableness, i.e., what a typical reasonable person would have understood by the exchange between the officer and the suspect. *Florida v. Jimeno* (1991), 500 U.S. 248, 251, 111 S.Ct. 1801, 114 L.Ed.2d 297. "Police officers act in full accord with the law when they ask citizens for consent." *United States v. Drayton* (2002), 536 U.S. 194, 207, 122 S.Ct. 2105, 153 L.Ed.2d 242 . Further, "a suspect may give a valid consent to a search even if the suspect is not informed that he or she has a right to refuse to consent." *State v. Morris* (1988), 48 Ohio App.3d 137, 139, 548 N.E.2d 969.

{¶ 14} In this matter, the evidence demonstrated that Euclid Police Det. Scott Meyer observed defendant waiting at a gas station. A white minivan pulled up to the pumps but the driver did not purchase gas. Defendant appeared to recognize the driver and got into the van. After a minute or two, defendant got out of the car and began walking toward nearby apartments, and the van drove off.

{¶ 15} Det. Meyer identified himself as a police officer and asked to speak with defendant. Defendant seemed startled. Det. Meyer then asked defendant what had just happened and defendant said that he met with a guy who owed him some money. Defendant then produced some change for the officer.

{¶ 16} Det. Meyer told defendant that it appeared as though drug activity might be involved and he asked if defendant minded if he searched his person. According to Meyer, defendant was cooperative and stated that he did not have anything. The searched yielded one rock of crack cocaine, however.

{¶ 17} On cross-examination, Det. Meyer stated that if defendant had not agreed to speak with him initially, he believed that there was reasonable suspicion and probably would have then stopped him from proceeding on his way. He stated that he did not touch defendant.

{¶ 18} From the foregoing, we conclude that competent credible evidence supported the trial court's determinations that the evidence was discovered following a consensual encounter and consensual search. The evidence demonstrated that the detective approached the defendant in a public place and engaged him in

conversation about what he had just observed. Although the officer opined that he thought the requirements for a Terry stop were satisfied in the event that defendant had not cooperated with the questioning, there is nothing in the record which established that the officer conveyed a message that compliance with his request was required. Defendant was not restrained, and there is no indication that he was impeded from continuing on his way.

{¶ 19} As to the subsequent search, the record also supports the trial court's conclusion that the consent was freely and voluntarily given. From the totality of the circumstances, it appears that the consent was voluntary and not the product of any coercion or duress as a typical reasonable person would have understood that Det. Meyers was making a request and not a demand or order.

{¶ 20} The assignment of error is overruled.

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.

ANN DYKE, JUDGE

FRANK D. CELEBREZZE, A.J., CONCURS
PATRICIA ANN BLACKMON, J., DISSENTS
(SEE ATTACHED DISSENTING OPINION)

BLACKMON, J., DISSENTS:

{¶ 21} I respectfully dissent from the Majority Opinion. The facts of the case mirror the facts in *Terry v. Ohio*[1] with the exception of the type of crime and the absence of a pat-down search. Here, the officer was on surveillance at a gas station known to be a haven for drug activity. The officer observed Cobbs enter a van, exit the van, and walk away. He followed Cobbs, not the van. He did not see any money or drugs change hands. He did not recognize either of the men.

{¶ 22} Upon stopping Cobbs, he identified himself as a police officer. He informed Cobbs that he suspected a drug transaction. He continued the detention. Cobbs offered him an explanation; the officer did not believe him and restated his belief that a drug transaction had occurred. He then asked Cobbs if he could search his person. Cobbs agreed and a rock of crack was retrieved.

{¶ 23} The State argues and the Majority Opinion agrees that this stop did not implicate the Fourth Amendment, but was a casual, consensual encounter. I disagree. The facts mirror *Terry v. Ohio*, which requires a reasonable basis to stop

and seize a suspect.

{¶ 24} In *Florida v. Bostick*,[2] the United States Supreme Court drew a distinction between *Terry* stop-seizure and casual, consensual encounters. The distinction is whether under the surrounding circumstances of the encounter would a reasonable person feel free to decline the officer's requests, or terminate the encounter. If a reasonable person felt free to leave, the encounter does not implicate the Fourth Amendment. For example, in a recent Supreme Court decision, *United States v. Drayton*,[3] the agents entered a bus, moved through the passengers, interviewed all of them, but did not focus on anyone person and made it obvious that any one of the passengers was free to object, leave, or not cooperate. The United States Supreme Court defined this police action as casual and consensual, and not a violation of the Fourth Amendment.

{¶ 25} In *Florida v. Royer*,[4] the agents focused on the suspect, took his identification, and told him he was a suspect before obtaining his consent to search his luggage. In *Florida v. Royer*, the court held this was non-consensual. Here, Cobbs was stopped, detained, and questioned. When he offered an explanation, he was not believed, and the officer continued the detention and the investigatory

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[1](1968), 392 U.S. 1.

[2](1991), 501 U.S. 429.

[3](2002) 536 U.S. 194.

[4](1983), 460 U.S. 491

interrogation. Under these circumstances a reasonable person could conclude that he was not free to leave.

{¶ 26} To take any other approach would result in what is becoming a commonplace thought; that thought is so long as the officer does not show force, the encounter is casual, and if the suspect does not walk away, the encounter is consensual. I believe the approach evidenced in this view weakens the Fourth Amendment even further and contravenes the historical relevance of the freedom to object, or not consent to police street encounters; consequently, I would have reversed.