[Cite as *State v. Smith*, 2008-Ohio-2361.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 89432

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

HIRAM SMITH

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED;
CONVICTION VACATED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-486575

BEFORE: Blackmon, J., Cooney, P.J., and Rocco, J.

RELEASED: May 15, 2008

JOURNALIZED:

[Cite as *State v. Smith*, 2008-Ohio-2361.]

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[Cite as *State v. Smith*, 2008-Ohio-2361.]
PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Hiram Smith appeals his conviction and sentence for drug possession, a fifth degree felony, and assigns the following error for our review:

> **"The trial court committed prejudicial error by denying appellant's motion to suppress."**

{¶ 2} Having reviewed the record and pertinent law, we reverse the trial court's decision and vacate Smith's conviction and sentence.

{¶ 3} Hiram Smith moved to suppress the crack pipe, which was the subject of his drug possession charge. After a hearing, the trial court denied the motion and Smith entered a no contest plea to the charge. The trial court, thereafter, sentenced him to a one-year community control sanction. Smith timely appealed his conviction and sentence.

Facts From The Suppression Hearing

{¶ 4} The manager of the CMHA Ansel Road high rise apartment informed CMHA police officers that an occupant of apartment 1631 is unauthorized and not legally on the premises. The officers and K-9 dog Repo entered that apartment and found a female. While questioning her and running a warrant check on her, a male and a female arrived at the apartment door. Smith was walking behind the female. Once at the door, Smith and the female immediately turned and walked away. There is some confusion as to whether they actually entered the apartment or not. One of the officers was certain that the female walked into the apartment. In describing the individuals' actions, Officer Saleem Ali testified that "they went to walk

away and all we did was bring them back to check them to verify if they are authorized persons to be on CMHA property."[1]

{¶ 5} Once in the apartment, the officers checked Smith's identification and learned that he was a resident of the building. They continued to detain Smith while they ran warrant checks on both the female and Smith. It was during the warrant check that Smith started fidgeting and putting his hand into his pocket.

{¶ 6} Officer Jose Alcantara stated "while the wants and warrants check was requested, the male standing by the window kept fidgeting and reaching in his right pants pocket. He was advised several times to stop reaching to his right pants pockets. Wants and warrants check came back having the female cleared. The male, Hiram Smith, was still reaching into his pocket. That led us to believe that he was either concealing a weapon or due to [our] prior experiences or illegal narcotics on his person."[2] Although Officer Alcantara did not say whether Smith was cleared of the warrant check, his partner stated that no warrant came back for Smith's arrest. On cross-examination, Officer Ali could not remember whether the warrant check was completed before or after the pat-down search of Smith. He was sure that Smith did establish his residency before the pat-down search.

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[1]Tr. 14.

[2]Tr. 30.

{¶ 7} Neither officer gave any reason for detaining Smith after he had presented evidence of his right to be in the building; nor did they offer any facts to justify detaining Smith while they conducted a warrant check on him. However, they both maintained that at all times before the fidgeting episode, Smith was free to leave. Although the record does not establish that this was conveyed to Smith.

{¶ 8} Our standard of review is de novo.[3] In adhering to this standard of review, our concern is whether the facts in this case comply with the legal standard of *Terry v. Ohio*.[4] Under *Terry*, both the stop and seizure must be supported by a reasonable suspicion of criminal activity. Consequently, the state must point to specific and articulable facts that reasonably suggest criminal activity. Inarticulable hunches, general suspicion, or no evidence to support the stop and frisk is insufficient as a matter of law. Additionally, when an officer uses a show of authority and commands a person to adhere to an order to stop, the command to stop constitutes a Fourth Amendment seizure under *Terry*.

{¶ 9} Here, the officers stated that they were investigating an unauthorized occupant of apartment 1631 and that they stopped Smith after he turned to walk away from the apartment that they were investigating. They averred that the encounter was to further their investigation for unauthorized occupant of that apartment. Consequently, a limited detention to ascertain Smith's identity and

[3] *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372.

residency status was proper under *Terry.* However, the continued detention was unreasonable. In order to detain him to run a warrant check, the officers needed a reasonable suspicion that he was wanted for a crime.[5] Therefore, any evidence seized after an illegal seizure of a person is inadmissible as a matter of law.

{¶ 10} In *Bermundez*,[6] this court affirmed a trial court's order suppressing evidence, which was seized after an officer detained a person to run a warrant check. The state appealed and this court held that to detain a person to run a warrant check, the officer must comply with *Terry*, citing *State v. Barrow*[7] and *State v. McDowell*.[8]

{¶ 11} The facts in *Bermundez* established that the officers stopped Bermundez to investigate why she and a male were standing on a corner for almost 45 minutes. The police believed the male was intoxicated. They checked the male for outstanding warrants. In the interim, Bermundez was detained for thirty minutes while the officers ran a warrant check on her. Bermundez was simply on the street

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[4](1968), 392 U.S. 1.

[5]*State v. Bermundez*, Cuyahoga App. No. 88243, 2007-Ohio-2115; *State v. Stewart,* Cuyahoga App. No. 87237, 2006-Ohio-5934; and *State v. Barrow* (Dec. 17, 1987), Cuyahoga App. No. 53140.

[6]Supra.

[7]Supra.

[8](Oct. 6, 2000), 5th Dist. No. 99COA01328.

corner talking to the male. We held the officer failed to articulate a justification for the intrusion. *Bermundez* cited *Barrow*, a case decided by this court in 1987.

{¶ 12} In *Barrow*, two officers observed the defendant and another man leaning in the open doors of a car with a back window that had been smashed. Suspecting that the car had been stolen, the officers then ran warrant checks on the men. This court stated that "the initial stop was proper but the officer that ran the warrant check said he had no reason to hold them and they had committed no crime in his presence but they were not free to go. The officers failed to tell the trial court the articulable and reasonable suspicion which justified the further detention."[9]

{¶ 13} *Bermundez* also cited *McDowell*. In *McDowell*, "the officer believed that a wanted drug dealer was in a certain car. The officer wanted to stop the car to execute a bench warrant. The car stopped at a convenience store, and the officer realized the dealer was not in the car. Nevertheless, the officer got out and told the driver and the passenger to remain in the car while he checked for outstanding warrants." The court determined that "once Sgt. Bammann determined the passenger in the Cadillac was not the drug dealer, he had no reasonable, articulable facts or suspicion of criminal activity to justify appellant's continued detention. *** By detaining appellant after it was determined he was not the drug dealer, the scope

[9]*Bermundez* at 4, citing *Barrow* at 5, citing *State v. Chatton* (1984), 11 Ohio St.3d 59, 63.

and duration of the investigatory stop lasted longer than was necessary 'to effectuate the purpose for which the initial stop was made.'"[10]

{¶ 14} Recently, in *State v. Stewart*,[11] this court again held that in order to detain a person for a warrant check, the officer must articulate a reason for the detention of a person who is otherwise free to leave.

{¶ 15} We appreciate that there exists minor differences in all of these cases. However, they each have one thing in common, the *Terry* standard. Under *Terry*, an officer must articulate a reasonable basis for detaining an individual.

{¶ 16} We are mindful that it could be argued that because Smith was free to leave, no seizure occurred. We are not persuaded that Smith was free to leave, although each officer stressed that fact in their testimony. The officers cannot have it both ways. They cannot order Smith to remain in the apartment and then later maintain that Smith was free to leave.

{¶ 17} Once the officers "brought" Smith into the apartment and continued to hold him there, this show of authority constituted a seizure. Under *Terry*, in order for the officers to detain Smith for a warrant check, they needed an articulable reasonable suspicion to run the warrant check. Accordingly, we reverse the trial court's decision and vacate Smith's conviction.

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[10]*Bermundez*, citing *McDowell*, quoting *State v. Bevan* (1992), 80 Ohio App.3d 126, 129.

[11]Supra.

{¶ 18} Judgment is reversed and conviction is vacated.

It is, therefore, considered that said appellant recover of said appellee his costs herein.

It is ordered that a special mandate be sent to said court 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.

PATRICIA ANN BLACKMON, JUDGE

KENNETH A. ROCCO, J., CONCURS;
COLLEEN CONWAY COONEY, P.J., DISSENTS.
(SEE ATTACHED DISSENTING OPINION.)

COLLEEN CONWAY COONEY, P.J., DISSENTING:

{¶ 19} I respectfully dissent. I would affirm the trial court's denial of the motion to suppress, agreeing with the court that the instant case presents a classic pat-down for safety in light of Smith's reaching for his pocket during the three-minute period his "status" was being checked.

{¶ 20} The cases cited by the majority are easily distinguishable on their facts. None presented the police with furtive movements such as reaching for one's pocket. Moreover, the officer in *Bermundez* articulated no facts to warrant the initial intrusion of approaching Bermundez who was merely standing on a street corner

talking with an intoxicated man. Therefore, we affirmed the trial court's granting the motion to suppress.

{¶ 21} In the instant case, police articulated facts to justify the initial intrusion as it pertained to Smith. As the police were investigating a complaint about an unauthorized occupant in a specific CMHA apartment, Smith approached the doorway of the unit, and promptly turned around when he saw the police. Officer Ali found that act to be suspicious, so he asked for Smith's identification and ran a routine warrant check. During this three-minute process, Smith repeatedly reached for his pocket despite the officer's advising him to stop his "fidgeting."

{¶ 22} This court affirmed denial of a motion to suppress in a similar case involving the "King-Kennedy projects," another CMHA building. The Cleveland police were investigating suspected drug activity in a hallway when defendant McDaniel was observed loitering in the particular hallway. In *State v. McDaniel* (1993), 91 Ohio App.3d 189, we found that the police conduct in approaching the defendant and asking him if he had drugs or weapons did not constitute a seizure. McDaniel was "free to decline the officers' requests or otherwise terminate the encounter," citing *Florida v. Bostick* (1991), 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389.

{¶ 23} Similarly, we affirmed the denial of a motion to suppress in *State v. Johnson* (1986), 34 Ohio App.3d 94, in which the defendant's hiding behind a tree drew the officers' attention. The officers approached Johnson and asked his name.

A routine warrant check revealed an active warrant. At that point, police seized Johnson and arrested him. In the alternative, we stated that even assuming the initial contact constituted a seizure, the police were justified in making the stop. Id. at 96. We analyzed the facts pursuant to the standard set in *State v. McFarland* (1982), 4 Ohio App.3d 158, 446 N.E.2d 1168, and found the intrusion into defendant's freedom to be slight, the police articulated a reasonable suspicion to justify the intrusion, and the officers who were located in a high crime area, observed defendant hiding behind a tree to avoid them. Id. at 97. Although these facts did not rise to the level of probable cause, they constituted sufficient facts to permit an officer to "simply ask the defendant his name." Id.

{¶ 24} The instant case presents a slight intrusion into Smith's freedom and no prolonged detention as Smith argued on appeal. The officers articulated a reasonable suspicion to justify the initial intrusion. These facts permitted the officers to verify Smith's identity and run a routine warrant check. His constant reaching for his pocket during this three-minute period justified a pat-down for officer safety. Therefore, I would affirm the trial court's denial of the motion to suppress.