[Cite as *State v. Clay*, 2009-Ohio-2725.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91942

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

L. C. CLAY

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-509838

BEFORE: Celebrezze, J., Dyke, P.J., and Jones, J.

RELEASED: June 11, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for 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(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant State of Ohio brings this appeal challenging the trial court's grant of a motion to suppress filed by appellee L. C. Clay. After a thorough review of the record, and for the reasons set forth below, we affirm.

{¶ 2} On April 24, 2008, a Cuyahoga County Grand Jury indicted Clay on one count of carrying a concealed weapon, in violation of R.C. 2922.12(A)(2), a fourth degree felony. At his arraignment, Clay pleaded not guilty. On June 9, 2008, Clay filed a motion to suppress and requested an oral hearing. In his brief, Clay argued that the entire search was a violation of his Fourth Amendment rights; specifically, that the search of his vehicle was unlawful because the vehicle was lawfully parked and there was no probable cause to search it. On July 31, 2008, the state filed its brief in opposition and argued the constitutionality of both the search of Clay and his vehicle. The trial court set the matter for hearing.

{¶ 3} On August 4, 2008, a suppression hearing was held. The state presented one witness, Detective William Mitchell, the arresting officer. Det. Mitchell testified that on March 26, 2008, he was part of a law enforcement team executing a warrant sweep for a felony suspect on Penrose Avenue in East Cleveland, Ohio. He stated the only description he had of the suspect was "black male," which he admitted matched the description of nearly the entire population of East Cleveland. Det. Mitchell arrived at the Penrose address and

saw Clay standing next to a vehicle parked in the driveway. He testified that he never saw Clay driving the vehicle, nor did he see Clay get out of the vehicle; he only saw Clay standing beside the vehicle and closing the driver's door.

{¶ 4} Det. Mitchell testified that he approached Clay, told him the police were looking for someone, and asked to see his identification. Clay told him that his license was in the car, and he proceeded to move as if to reach in the car. Det. Mitchell testified that he told Clay to stop and asked Clay if he could pat him down. Det. Mitchell explained that he stopped Clay from reaching into the car to ensure his own safety, stating, "I still didn't know who I'm dealing with and I wanted to pat down any person I'm going to encounter." Det. Mitchell testified that Clay agreed to a pat down. During the pat down, Det. Mitchell felt what he suspected was a bag of marijuana in Clay's jacket pocket. He removed the item from Clay's pocket, and it was a sandwich bag containing 15 grams of marijuana.

{¶ 5} Since possession of marijuana was an arrestable offense at the time of this encounter,[1] Det. Mitchell handcuffed Clay. Det. Mitchell testified that he then needed to make a decision as to what would happen to the vehicle, even though it was lawfully parked in the driveway on private property. According to what Clay had told him, Det. Mitchell learned that the car belonged to Clay's wife. Det. Mitchell testified that he planned to speak with someone in the house, but no one answered the door, despite the fact that he could hear voices inside. At this point, Det. Mitchell

[1]East Cleveland Codified Ordinance Sec. 513.03 was amended March 5, 2009 to

made the decision to have the car towed. He testified that he conducted an inventory search of the vehicle and, at that time, discovered a .380 caliber gun under a newspaper on the passenger seat.

{¶ 6} At the conclusion of Det. Mitchell's testimony, the state rested. Clay did not present a defense. On August 7, 2008, the trial court granted Clay's motion to suppress. On August 15, 2008, the trial court modified its order to state that it granted the motion to suppress in reliance on *State v. Tucker*, Cuyahoga App. No. 89589, 2008-Ohio-963.

Review and Analysis

{¶ 7} The state filed a timely appeal and cites one assignment of error for our review:

{¶ 8} "I. The trial court erred when it granted the appellee-defendant's motion to suppress evidence, relying on *State v. Tucker* ***."[2]

Waiver

{¶ 9} The state first argues that Clay waived his right to challenge the pat down because he did not raise it below. Actually, the state has waived its right to raise the argument of waiver since it never raised this issue below.

{¶ 10} "An appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by

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comply with R.C. 2925.11.

[2]Appellant's assignment of error in its entirety is included in the appendix to this opinion.

the trial court." *State v. Awan* (1986), 22 Ohio St.3d 120, 489 N.E.2d 277, citing *State v. Childs* (1968), 14 Ohio St.2d 56, 236 N.E.2d 545.

{¶ 11} A review of the hearing transcript shows that the state never raised the issue of waiver regarding the scope of the search and the plain-feel doctrine. The state's unfounded assertion in its appellate brief that it "tried to explain and argue this rationale to the trial court" at the hearing does not constitute an objection. Nothing in the record indicates that the state intended to raise the issue of waiver to the trial court. In fact, we find just the opposite occurred. The state's brief in opposition to Clay's motion to suppress argues the validity of both searches, so it was clearly on notice of the arguments Clay planned to make. Furthermore, in a 40-minute hearing, the state never once objected to anything on the record.

{¶ 12} The state has waived any objection to Clay's motion to suppress for having failed to raise this argument below.

Grant of Motion to Suppress

{¶ 13} Next we address whether or not the trial court erred in granting Clay's motion to suppress.

{¶ 14} "In a motion to suppress, the trial court assumes the role of trier of fact and is in the best position to resolve questions of fact and evaluate witness credibility. *State v. Clay* (1973), 34 Ohio St.2d 250, 298 N.E.2d 137. A reviewing court is bound to accept those findings of fact if supported by competent, credible evidence. See *State v. Schiebel* (1990), 55 Ohio St.3d 71, 564 N.E.2d 54. However, without deference to the trial court's conclusion, it must be determined independently whether, as a matter of law, the facts meet the appropriate legal

standard. *State v. Claytor* (1993), 85 Ohio App.3d 623, 627, 620 N.E.2d 906." *State v. Curry* (1994), 95 Ohio App.3d 93, 641 N.E.2d 1172.

{¶ 15} The Fourth Amendment to the United States Constitution prohibits warrantless searches and seizures, rendering them per se unreasonable unless an exception applies. *Katz v. United States* (1967), 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576. 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. "The propriety of an investigative stop by a police officer must be viewed in light of the totality of the surrounding circumstances" as "viewed through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training." *State v. LeClair,* Clinton App. No. CA2005-11-027, 2006-Ohio-4958, quoting *State v. Freeman* (1980), 64 Ohio St.2d 291, 414 N.E.2d 1044, syllabus, and *Bobo* at 179.

{¶ 16} It is also well recognized that the Fourth Amendment is not implicated in all personal encounters between police officers and citizens, such as the case where there is a consensual encounter. *Florida v. Bostick* (1991), 501 U.S. 429, 434, 111 S.Ct. 2382, 2386, 115 L.Ed.2d 389; *City of Hamilton v. Stewart*, Butler App. No. CA2000-07-148, 2001-Ohio-4217. "An encounter which does not involve physical force or a show of authority is a consensual encounter that does not trigger Fourth Amendment scrutiny; therefore, an officer does not need reasonable suspicion

merely to approach an individual in order to make reasonable inquiries of him." *Stewart*, supra, quoting *State v. Brock* (June 1, 1998), Clermont App. No. CA97-09-177. The fact that a police officer identifies himself as such does not "convert the encounter into a seizure requiring some level of objective justification." *Florida v. Royer* (1983), 460 U.S. 491, 498, 103 S.Ct. 1319, 1324, 75 L.Ed.2d 229. "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.

Pat-Down Search

{¶ 17} The trial court heard testimony from Det. Mitchell that he arrived, along with three other police vehicles, at the Penrose address based on information that a felony suspect resided there. Det. Mitchell was acting on the basis of a description of the suspect as a "black male," which he admitted applied to most of the residents of East Cleveland. His testimony was that he approached Clay, who was standing beside a vehicle parked in the driveway of the Penrose address, believing he may be the suspect he sought. According to Det. Mitchell's testimony, he did not remember whether his service weapon was in his hand, but he testified, "I can't be sure, but odds are, you know, I see a person and we have a felony suspect, I'm going to at least have the weapon drawn."

{¶ 18} Det. Mitchell also testified that when Clay attempted to retrieve his license from the vehicle, Mitchell stopped him for safety purposes, stating, "[l]ike I said, I don't know if he's [Clay] the felony suspect we're looking for." At that point,

Det. Mitchell asked Clay if he minded whether the detective patted him down, and Clay consented.

{¶ 19} The first question before this court, based on the facts adduced at the suppression hearing, is whether the interaction between Det. Mitchell and Clay was a consensual encounter or an investigatory stop based on probable cause. We find that what occurred that day was not a consensual encounter. Although Det. Mitchell admittedly approached Clay in a public place and requested information, there was clearly a show of authority by Mitchell that converted this encounter into an investigatory stop.

{¶ 20} According to the evidence, Det. Mitchell had his service weapon drawn, there were other law enforcement officials present, and Clay was prevented from responding to Det. Mitchell's request for information without first consenting to a pat down. At all times during his encounter with Clay, Det. Mitchell was operating under the impression that Clay could very likely be the felony suspect Mitchell was looking for. In fact, it defies logic that Det. Mitchell would not be operating under a reasonable and articulable suspicion that Clay was engaged in criminal activity given that Clay fit the description of a known felony suspect, and he was at the exact address the police were investigating to find the suspect.

{¶ 21} Det. Mitchell was conducting an investigatory stop when he asked Clay if he could conduct a pat down. Thus, Det. Mitchell did not exceed the scope of his authority up until this point. The trial court, however, was not convinced by Det. Mitchell's testimony that it was immediately apparent Clay had marijuana in his pocket.

{¶ 22} During a *Terry* stop, an officer may perform a pat down search for weapons. The purpose of this limited search is to allow an officer to pursue his or her investigation without fear of violence; it is not intended to provide the officer with an opportunity to ascertain evidence of a crime. *State v. Evans*, 67 Ohio St.3d 405, 408, 1993-Ohio-186, 618 N.E.2d 162. When police officers are conducting a lawful *Terry* search for weapons, they may seize nonthreatening contraband when its incriminating nature is "immediately apparent" to the searching officer through the sense of touch. Id. at 414, fn. 5, citing *Minnesota v. Dickerson* (1993), 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334.

{¶ 23} In *Evans*, supra, the Ohio Supreme Court stated: "*Dickerson* answered the question whether police may enter a suspect's pockets during the course of a *Terry* pat down on the basis of something other than a belief that the individual is carrying a weapon. Drawing an analogy to the plain view doctrine, the court held that police, conducting a lawful *Terry*-type search, may seize nonthreatening contraband when its incriminating nature is 'immediately apparent' to the searching officer through his sense of touch. *Dickerson*, supra, at 2137. In other words, the officer may not manipulate the object, which he has previously determined not to be a weapon, in order to ascertain its incriminating nature. This limitation on the 'plain feel' exception to the warrant requirement of the Fourth Amendment ensures that police will search only within the narrow parameters allowed for a *Terry*-type search."

{¶ 24} In the case before us, although the trial court could have concluded that it was immediately apparent to Det. Mitchell that Clay had marijuana in his jacket pocket, it did not. The trial court was in the best position to assess Det. Mitchell's

credibility and resolve the factual questions before it. We afford the trial court great deference on its factual conclusions, and we will not reverse its decision on the facts before us.

Search of Vehicle

{¶ 25} Furthermore, even if we found that the evidence supported Det. Mitchell's conclusion that there was marijuana in Clay's jacket pocket, we do not find that Det. Mitchell was entitled to conduct an inventory of his car incident to Clay's arrest.

{¶ 26} "This court has held that police may not seize a defendant's car and conduct an inventory search following a defendant's arrest where it was legally parked and no public concern existed which required the removal of the car from its legally parked place." *State v. Ross* (May 20, 1993), Cuyahoga App. No. 62215, citing *State v. Collura* (1991), 72 Ohio App.3d 364, 594 N.E.2d 975.

{¶ 27} In the recently decided *Arizona v. Gant* (2009), 556 U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485, the United States Supreme Court held that "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest."

{¶ 28} In the case at bar, there was actually no evidence that Clay was a recent occupant of the vehicle parked in the driveway. Even if he had just exited the vehicle, it was parked on private property, and there was no public concern requiring its removal. And finally, Clay was handcuffed outside of the car as soon as Det. Mitchell found the marijuana, so there was no chance Clay was within reaching

distance of the passenger compartment, nor was there any evidence that the car would contain evidence of the marijuana offense.

{¶ 29} Det. Mitchell had no authority to search Clay's vehicle; therefore, the trial court did not err in suppressing evidence of the gun. The state's assignment of error is overruled, both as it relates to the seizure of marijuana and the seizure of the weapon.

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.

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

FRANK D. CELEBREZZE, JR., JUDGE

ANN DYKE, P.J., and
LARRY A. JONES, J., CONCUR

APPENDIX

Appellant's Assignment of Error in its entirety:

"I. The trial court erred when it granted the appellee-defendant's motion to suppress evidence, relying on *State v. Tucker,* Cuyahoga App. No. 89589, 2008-Ohio-963, for any and all of the following reasons: First, because Defendant waived any argument based on the scope of the search and the plain-feel doctrine when he failed to raise the issue in his motion to suppress to put the state on notice that the theory would serve as a basis of his challenge; second, because the court erroneously applied the investigatory search and plain-feel doctrines to a consent search; and finally, because the court's decision was against the manifest weight of the evidence because the record from the evidentiary hearing contains competent, credible evidence to satisfy the plain-feel doctrine."