

[Cite as *State v. Holly*, 2009-Ohio-3081.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 92057**

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**STATE OF OHIO**

PLAINTIFF-APPELLANT

vs.

**BRANDT HOLLY**

DEFENDANT-APPELLEE

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**JUDGMENT:  
AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-505645

**BEFORE:** McMonagle, P.J., Dyke, J., and Stewart, J.

**RELEASED:** June 25, 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).

CHRISTINE T. McMONAGLE, P.J.:

{¶ 1} Plaintiff-appellant, the State of Ohio, appeals from the trial court's judgment granting the motion to suppress of defendant-appellee, Brandt Holly. Finding no merit to the State's appeal, we affirm.

I

{¶ 2} Holly was charged with carrying a concealed weapon, with a forfeiture specification, and having a weapon while under a disability. The indictment stemmed from a stop of his Ford pickup truck on the evening of November 28, 2007. During the stop, the police found a bag of marijuana in the center console of the truck and a loaded .45 caliber handgun behind the driver's seat, both of which Holly admitted were his.

{¶ 3} At the hearing on Holly's motion to suppress, Cleveland police detective Rowland Mitchell testified that in September 2007, he conducted surveillance at 6330 Carl Avenue, Cleveland, Ohio, after receiving information that an individual living at that address was selling crack cocaine. Mitchell did not observe any suspicious pedestrian or vehicular traffic during his surveillance, so he stopped his investigation.

{¶ 4} In November 2007, after receiving information from a confidential informant that a male who lived at 6330 Carl Avenue was selling drugs, Mitchell initiated another investigation. On November 28, 2007, he and several other undercover officers set up surveillance of the Carl Avenue residence. Mitchell

testified that he saw a vehicle pull up in front of the house; the driver of the vehicle kept his foot on the brakes and did not put the car into park. A male who fit the description given by the confidential informant walked to the car from the rear of the house and had a brief conversation with the driver of the vehicle. Mitchell saw a hand-to-hand exchange, which he characterized as indicative of drug activity. The vehicle left the scene and the male returned to the house.

{¶ 5} An hour or so later another vehicle arrived, pulled to the rear of the driveway, stayed for about a minute, then backed out of the driveway and drove away. Approximately two minutes later, a large Ford truck pulled out of the driveway.

{¶ 6} Mitchell testified that he decided to follow the truck. According to Mitchell, “We did not have any information. The truck plates were listed to a female, and my purpose at that particular time was to identify the driver to see if that was going to be the target of my investigation.”

{¶ 7} Mitchell radioed Cleveland police detective Matthew Stepic to stop the truck and “detain” the driver. Stepic testified that when he approached the driver, later identified as Holly, he smelled the odor of “freshly cut” marijuana. Stepic escorted Holly out of the truck to the rear of the vehicle.

{¶ 8} Detective Michael Rinkus arrived at the scene almost immediately. Rinkus testified that Holly admitted there was marijuana in the truck. Rinkus then searched the truck and found a bag of marijuana in the center console. He

also found a loaded .45 caliber handgun in a black bag behind the driver's seat. Holly told Mitchell that he was carrying the gun for protection because he had earlier been robbed by some "dope boys."

{¶ 9} Mitchell then advised Holly that he wanted to conduct a consensual search of Holly's residence. Holly signed the consent form and the officers returned to his home and searched it, but did not find any items indicative of drug activity.

{¶ 10} Mitchell testified that the police did not stop the car whose driver had engaged in a hand-to-hand transaction with Holly, and did not stop the car that pulled into the driveway and then pulled out after only a minute. He testified further that he never made or attempted to make any drug buys from Holly before stopping him on the evening of November 28. Finally, he testified that Holly was stopped, but not arrested, simply because "I wanted to identify him."

{¶ 11} After his indictment, Holly filed a motion to suppress all the evidence obtained as a result of the stop. The trial court granted his motion and the State now appeals from the trial court's judgment.

## II

{¶ 12} Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. In deciding a motion to suppress, the trial court assumes the role of trier of fact. *Id.*

A reviewing court is bound to accept those findings of fact if they are supported by competent, credible evidence. *Id.* But with respect to the trial court's conclusion of law, we apply a de novo standard of review and decide whether the facts satisfy the applicable legal standard. *Id.*, citing *State v. McNamara* (1997), 124 Ohio App.3d 706.

{¶ 13} In its first assignment of error, the State contends that the trial court erred in granting Holly's motion to suppress because the police had a reasonable suspicion that Holly was engaged in drug trafficking sufficient to justify an investigative stop. In its second assignment of error, the State contends that the trial court erred in suppressing the evidence obtained from the search of the truck because the smell of marijuana emanating from the vehicle when Holly was stopped justified the search.

{¶ 14} 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. One exception is an investigative stop. *Terry v. Ohio* (1968), 392 U.S. 1, 20, 88 S.Ct. 1868, 20 L.Ed.2d 889. A police officer may make a brief, warrantless, investigatory stop of an individual where the officer reasonably suspects that the individual is or has been involved in criminal activity. *Id.* In reaching that conclusion, the officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts,

reasonably warrant the intrusion. *State v. Andrews* (1991), 57 Ohio St.3d 86, citing *Terry*. A person may not be detained, even momentarily, without reasonable, objective grounds to do so. *State v. Robinette* (1997), 80 Ohio St.3d 234, 240, citing *Florida v. Royer* (1983), 460 U.S. 491, 497-498, 103 S.Ct. 1319, 75 L.Ed.2d 229. Whether an investigatory stop is reasonable depends upon the totality of the circumstances surrounding the incident. *State v. Williams* (1990), 51 Ohio St.3d 58, 60.

{¶ 15} Applying these principles, we find that the investigatory stop of Holly was unlawful. Despite the State's argument that Holly was stopped because the police had a reasonable suspicion that he was engaged in drug activity, Detective Mitchell's testimony was clear: the only reason Holly was stopped was to determine his identity. In America, however, the police may not stop an individual for the sole purpose of compelling him to identify himself.

{¶ 16} Although the State argues that the stop was justified because the vehicular traffic outside the house and alleged hand-to-hand exchange created a reasonable suspicion that Holly was involved in drug activity, none of the State's witnesses at the suppression hearing testified that Holly was stopped for that reason. In fact, Detective Mitchell, who was leading the investigation, testified several times that Holly was stopped solely to determine his identity. ~~Without~~ an articulated reasonable suspicion of criminal activity, the stop was unlawful. Thus, any evidence obtained after the illegal stop (including Holly's statements

about the marijuana and gun), was a product of the Fourth Amendment violation and properly suppressed as “fruit of the poisonous tree.” *Wong Sun v. United States* (1963), 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441; *Mapp v. Ohio* (1961), 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081.

{¶ 17} The trial court did not err in granting Holly’s motion to suppress. Appellant’s assignments of error are therefore overruled; the judgment is 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.

CHRISTINE T. McMONAGLE, PRESIDING JUDGE

ANN DYKE, J., and  
MELODY J. STEWART, J., CONCUR