[Cite as *State v. Gove*, 2009-Ohio-3463.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91972

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MATTHEW GOVE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-509742

BEFORE: Kilbane, J., Gallagher, P.J., and McMonagle, J.

RELEASED: July 16, 2009

JOURNALIZED:

ATTORNEY FOR APPELLANT

Britta M. Barthol
P.O. Box 218
Northfield,Ohio 44067

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
Richard Mendelsohn
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

MARY EILEEN KILBANE, J.:

{¶ 1} Appellant, Matthew Gove (Gove), appeals the trial court's denial of his motion to suppress. After reviewing the appropriate law and facts, we affirm.

{¶ 2} On March 9, 2008, Gove was arrested and subsequently indicted on April 23, 2008, for drug possession, a fifth degree felony, in violation of R.C. 2925.11.

{¶ 3} On May 28, 2008, trial counsel filed a motion to suppress.

{¶ 4} On June 18, 2008, the trial court held an evidentiary hearing. The motion to suppress was denied. Gove entered a plea of no contest to the charge as indicted, and the trial court found him guilty as charged.

{¶ 5} On July 17, 2008, Gove was sentenced to two years of community control sanctions. This appeal followed.

{¶ 6} The following facts are gleaned from the record. On March 5, 2008, at approximately 5:50 p.m., Cleveland Police Sergeant Robert Tucker and Officer Mark Pesta were on patrol in the area of East 26th Street and Superior Avenue, an area known in the community for high drug activity. Sergeant Tucker testified that he used to receive many calls to that parking lot, and that he paid particular attention to it because it was an area where people congregated to purchase and use narcotics.

{¶ 7} Sergeant Tucker testified that as they passed the BP gas station on the northeast corner of East 26th Street and Superior Avenue, he observed a gray Chevrolet parked in an odd position in the middle of the parking lot. The vehicle was not in a parking spot and not at a gas pump. Sergeant Tucker made a u-turn and entered the gas station parking lot to investigate why the vehicle was parked there and to see if there were any occupants in the vehicle.

{¶ 8} Upon entering the lot, the officers observed three occupants inside the vehicle. A white male, later identified as Gove, was in the driver's seat. A white male, later identified as Christopher Gove (Gove's brother), was in the front passenger's seat. According to Sergeant Tucker's testimony, a white female, later identified as Alecia Johnson, was in the back seat but positioned up in between the two front seats and leaning into the front passenger compartment of the vehicle. None of the individuals noticed that the officers were present, despite the fact that Sergeant Tucker parked his police cruiser directly in front of their car, nearly nose-to-nose with it. At this point, the officers exited their vehicle with their guns drawn and approached the car. Both officers testified that as they approached the car they observed Gove shooting something into Johnson's arm and that Gove's brother was actually holding her arm down. Believing that illegal drug activity was occurring, Sergeant Tucker knocked on the driver's side window.

{¶ 9} At this point, the occupants looked up. According to Officer Pesta's testimony, they seemed startled. Officer Pesta testified that, at this point, he observed Gove place a syringe under the front seat. When one of the car doors opened, Sergeant Tucker asked, "Where is the heroin?" According to Sergeant Tucker, the reply was, "It's gone. There is no more." The vehicle's occupants were taken out of the vehicle, separated, questioned, Mirandized, arrested, and placed into the police cruiser. They later admitted that they obtained the heroin somewhere on Eddy Road and had driven to the gas station to use the drugs.

{¶ 10} A search of the vehicle on the premises revealed a spoon with heroin residue on the floor of the driver's side of the vehicle, together with an empty syringe. Neither Gove's brother nor Johnson were charged in this matter.

{¶ 11} Gove appeals, asserting one assignment of error for our review.

> "The trial court erred when it failed to grant the appellant's motion to suppress evidence."

{¶ 12} Gove argues that the trial court erred by failing to suppress evidence from his vehicle because the officer's warrantless search was unconstitutional. Specifically, he contends that the trial court erred in denying the motion because his interactions with the police were not consensual and, under the totality of the circumstances, the arresting officers did not have a reasonable, articulable suspicion that criminal activity was afoot. While we agree with Gove's contention that his encounter with the police was not consensual, we disagree

with his contention that the officers lacked a reasonable, articulable suspicion to conduct the stop.

{¶ 13} Our review of the trial court's decision to deny a motion to suppress is de novo. *City of Strongsville v. Carr*, Cuyahoga App. No. 89666, 2008-Ohio-907. In this regard, our consideration of this case is set forth by the Ohio Supreme Court 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. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, at ¶8. (Internal citations omitted.)

{¶ 14} "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." *Burnside* at ¶8.

{¶ 15} In *Terry v. Ohio* (1968), 392 U.S. 1, 9, 88 S.Ct. 1868, the United States Supreme Court held 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." See, also, *State v. Andrews* (1991), 57 Ohio St.3d 86, 565 N.E.2d 1271.

{¶ 16} In deciding whether reasonable suspicion exists, courts must examine the "'totality of the circumstances' of each case to determine whether

the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." *United States v. Arvizu* (2002), 534 U.S. 266, 122 S.Ct. 744, quoting *United States v. Cortez* (1981), 449 U.S. 411, 417-418, 101 S.Ct. 690; *State v. Bobo* (1988), 37 Ohio St.3d 177, 524 N.E.2d 489, citing *State v. Freeman* (1980), 64 Ohio St.2d 291, 414 N.E.2d 1044, paragraph one of the syllabus.

{¶ 17} In *Terry*, the court explained the extent of the government's interest behind investigatory stops when it said "[o]ne general interest is of course that of effective crime prevention and detection; it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." Id. at 22.[1]

{¶ 18} Lastly, we note that constitutionally, three classifications of interactions between police and private citizens exist: a consensual encounter,

---

[1]In *Terry*, the United State's Supreme Court held: "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" Id. at 21-22.

an investigatory stop, and an arrest. *Lakewood v. McLaughlin* (1999), Cuyahoga App. No. 75134, citing *Florida v. Royer* (1982), 460 U.S. 491, 103 S.Ct. 1319.

{¶ 19} In this case, the trial court gave no reasons for denying the motion to suppress. The State argues that because the officers in this case did not request or demand that the occupants "stop," the encounter is more appropriately considered along the lines of a consensual or chance encounter. However, the record indicates that the encounter between Gove and the police was not consensual. None of the individuals in the car, including Gove, even noticed the police were present until Sergeant Tucker advised them of his presence by knocking on the car window. They therefore could not have given their consent to the encounter. What is more, the officers pulled directly in front of the vehicle, bumper-to-bumper, partially blocking its exit, and approached the vehicle with their guns drawn. No reasonable person when approached by the police in such a manner would believe they were free to leave.[2]

{¶ 20} However, by the time they knocked on the window, Sergeant Tucker and Officer Pesta had a reasonable suspicion that criminal activity was afoot, given their prior observation that the female inside the vehicle was leaning forward in the console area between the two front seats with her arm

---

[2]Such belief is a requisite indicator of a consensual encounter. "Encounters are consensual where police merely approach a person in a public place, engage the person in conversation, and the person is free to answer or walk away." *State v. Miller*, 148 Ohio App.3d 103, 106, 2002-Ohio-2389, citing *United States v. Mendenhall* (1980), 446 U.S. 544, 100 S.Ct. 1870.

outstretched, and one of the front seat passengers was holding her arm down while the other injected suspected drugs into her arm in plain view. Such an observation by the officers on the scene, coupled with the fact that the subject automobile was parked obtrusively, away from the service area, clearly not using any gas pumps or any other facilities of the gas station, and in a high drug area, justifies the officers' investigation in this case.

{¶ 21} "When a police officer has a reasonable suspicion that someone may be involved in criminal activity, he may approach that person for investigatory purposes even though there is no probable cause to make the arrest. In justifying the investigative stop, the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Bobo*, supra, syllabus. Such articulable facts were present here.

{¶ 22} Furthermore, it may be plausibly argued that Gove's encounter with the police in this case does not encompass his Fourth Amendment rights at all, given the plain view circumstances of the encounter. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. *Katz v. United States* (1976), 389 U.S. 347, 88 S.Ct. 507. Objects falling in the plain view of an officer who has a right to be in the position to have the view are subject to seizure. *Harris v. United States* (1968), 390 U.S. 234, 88 S.Ct. 992.

{¶ 23} In *State v. Lang* (1996), 117 Ohio App.3d 29, 34-35, 689 N.E.2d 994, the First District Court of Appeals discussed the plain view doctrine as it relates to those instances where an officer observes evidence of a crime in an open field or similarly nonprotected area, including the interior of a vehicle:

> "*By comparison, the concern here is with plain view in a quite different sense, namely, as descriptive of a situation in which there has been no search at all in the Fourth Amendment sense. This situation *** encompasses those circumstances in which an observation is made by a police officer without a prior physical intrusion into a constitutionally protected area. This includes the case in which an officer discovers an object which has been left in an 'open field' or similar nonprotected area, and also those cases in which an officer - again, without making a prior physical intrusion -* sees an object on the person of an individual, within premises, or *within a vehicle*. In each of these instances there has been no search at all because of the plain view character of the situation, and this means that the observation is lawful without the necessity of establishing either pre-existing probable cause or the existence of a search warrant or one of the traditional exceptions to the warrant requirement.
>
> It is extremely important to understand that the kind of plain view described in the preceding paragraph, because it involves no intrusion covered by the Fourth Amendment, need not meet the three requirements set out in the *Coolidge* plurality opinion. By definition, there is no prior valid intrusion. Whether it is immediately apparent that what has been observed is evidence of crime may have a bearing upon what the police may do as a result of this nonsearch observation, but it is clearly irrelevant to the

threshold issue of whether the observation was a search." (Footnotes omitted and emphasis added.) 1 LaFave, Search and Seizure (2 Ed.1987) 321-322, Section 2.2(a)." (Citation omitted.)

{¶ 24} Thus, as in *Lang*, observation of contraband, such as a heroin needle, that indicates drug activity in a vehicle on a public street without physical intrusion does not constitute a search. See, also, *State v. Butler* (May 23, 1996), Cuyahoga App. No. 68581; *State v. Thurman* (Oct. 25, 2001), Cuyahoga App. No. 78230.

{¶ 25} While we agree with Gove that his encounter with the police was not consensual and he was seized without a warrant, the articulable facts mentioned above give rise to sufficient reasonable suspicion to warrant the stop. Gove argues that this case is analogous to *State v. Mesley* (1999), 134 Ohio App.3d 833, 732 N.E.2d 477, wherein the Sixth District suppressed evidence seized as a result of a detective's efforts to conduct a *Terry* stop without reasonable and articulable suspicion of criminal activity. Based upon the facts cited above, we disagree.

{¶ 26} Further, because the arrest in this case was valid, the ensuing search of Gove's car was permissible as a search incident to arrest.

{¶ 27} Thus, based on the evidence, we conclude that the officers had lawful authority to search Gove's vehicle. We also note that a limited search of the vehicle is permissible under *Arizona v. Gant* (2009), 556 U.S. ___, 129 S.Ct. 1710,

wherein the court held that a law enforcement officer who arrests a vehicle occupant may search the vehicle if the arrestee was in reaching distance of a weapon or contraband at the time of the search, or if the officer has reason to believe the vehicle contains evidence of the crime of arrest. Id.

{¶ 28} Accordingly, we overrule Gove's sole assignment of error.

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.

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

MARY EILEEN KILBANE, JUDGE

SEAN C. GALLAGHER, P.J., and
CHRISTINE T. McMONAGLE, J., CONCUR