[Cite as *State v. Arrington*, 2009-Ohio-4721.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92556

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LEONARD ARRINGTON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-512378

BEFORE: Boyle, J., McMonagle, P.J., and Celebrezze, J.

RELEASED: September 10, 2009

JOURNALIZED:
ATTORNEY FOR APPELLANT

Carlos K. Johnson
420 Lakeside Place
323 Lakeside Avenue, West
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
Aaron Brockler
Assistant County Prosecutor
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, Leonard Arrington, appeals the trial court's denial of his motion to suppress. Finding no merit to the appeal, we affirm.

{¶ 2} The grand jury indicted Arrington on one count of possession of drugs, in violation of R.C. 2925.11(A), one count of drug trafficking, in violation of R.C. 2925.03(A)(2), with a schoolyard specification, and one count of possessing criminal tools, in violation of R.C. 2923.24. Each count also carried two forfeiture specifications.

{¶ 3} Arrington pled not guilty to the charges and moved to suppress evidence that was found in the vehicle and oral statements he made at the police station. He argued that police officers illegally detained him, searched his vehicle without probable cause, and coerced him into confessing that the drugs were his. The following evidence was presented at the suppression hearing.

{¶ 4} Officer John O'Leary testified that in early June 2008, he was in his patrol car at a Sunoco gas station getting ready to leave when he recognized "a silver Navigator" parked at a gas pump. He knew it belonged to Larry Adams, who was also known as "Navigator Jay." Officer O'Leary said that it was common for him to talk to Adams when he saw him. He usually said hello to Adams and asked him how his "businesses [were] going." They were always polite and cordial.

{¶ 5} According to Officer O'Leary, when he saw the SUV, he stopped his patrol car and parked it along the fence line on the edge of the gas station parking lot. Then, Officer O'Leary said that he "casually" walked over to the SUV.

When he arrived at the SUV, he did not see Adams. Arrington was at the gas pump getting ready to pump gas. Officer O'Leary asked Arrington, "where is Jay?" Arrington replied, "Jay lives in Orwell." While standing next to the vehicle, approximately 10 to 15 feet away, Officer O'Leary stated that he "could smell a very strong odor of burned marijuana."

{¶ 6} At that point, Officer O'Leary told Arrington that if he had marijuana in the SUV to give it to him and it would be "much easier." Arrington replied that he did not smoke marijuana and there was no marijuana in the vehicle. Officer O'Leary then had the occupants of the SUV "remain where they were," and he called other officers to assist him in a search. When the other officers arrived, Arrington and two females in the SUV were removed and placed near the rear of it. Officer O'Leary began searching the passenger-side area, while Officer Gardner searched the driver's side.

{¶ 7} When Officer O'Leary opened the passenger door, he saw a clear plastic bag of a white powdery substance "on the floor at the front of the seat." He suspected that it was cocaine. In between the seat and the center console, he also found "a marijuana roach from a *** suspected marijuana cigarette." After he found the suspected drugs, he arrested Arrington and the two females.

{¶ 8} On cross-examination, Officer O'Leary explained that he knew Adams because he had pulled him over "two or three times" when he worked in another district.

{¶ 9} Detective William Mitchell testified that he interviewed Arrington and the two females. He said that he gave the suspects *Miranda* forms, which they read out loud and then signed. He further stated that Arrington admitted the cocaine was his, that he bought it from someone "off Kinsman" for $1,500, and that the two females were just partying with him and "had nothing to do with it."

{¶ 10} Arrington then presented the following three witnesses.

{¶ 11} Anthony Rendell testified that he was coming out of the gas station that day when he saw a police car parked blocking a "light gray" truck so that it could not move. Rendell said that as the driver of the truck was getting out of it, the officer told him to get back in. Rendell further stated that the driver attempted to get out of the vehicle again, but the officer told him to get back in the truck again. Rendell also saw the officer tell a female passenger to get back in the vehicle when she tried to get out.

{¶ 12} Rendell testified on cross-examination that he did not really know Arrington, but that he overheard Arrington talking to "the people who [he] work[ed] for," about the incident at the gas station. He told Arrington that he was there and what he saw. Arrington then asked him if he would testify.

{¶ 13} Christina Ajian, one of the female passengers in the SUV, testified that Arrington had picked her and her friend up that day so they could "kick it" for her birthday. She said that both Adams and Arrington are her cousins. At the Sunoco, she stated that she opened her door to pay for the gas when a police officer pulled in front of the truck and told them not to get out of the vehicle. Ajian

said she had already gotten out of the vehicle, and he told her to get back in it. She said she did not feel free to leave at that point. She said the officer came to the driver's-side window and asked Arrington, "where's Jay?" Ajian said they all told the officer they did not know where "Jay" was and the officer kept yelling, "that's my buddy." Then the officer said, "where's the weed?"

{¶ 14} Ajian said on cross-examination that she never told the detectives at the station that the officer had blocked the SUV or that he had ordered her to get back in the car. When asked why, she said, "we weren't asked that question."

{¶ 15} Lorneda Williams, the other female passenger in the SUV, testified that when they pulled into Sunoco, there was already a police car parked there, but that "[h]e backed up and blocked the truck we were in." She said that the officer came up to the truck and asked, "where's Jay at?" She also stated that the officer told them to get back in the car and then began asking them where the "weed" was. She said she did not feel like she was free to leave.

{¶ 16} On cross-examination, Williams said that the officer was "being funny and sarcastic" when he asked where his buddy "Jay" was. She also stated that she never told detectives at the police station that Officer O'Leary had blocked their truck because "[t]hey didn't ask."

{¶ 17} After the evidence was presented, the trial court denied Arrington's motion to suppress. The trial court found that there were "reasonable grounds and probable cause to conduct a search of the vehicle based on the odor of

marijuana," and further found that there was no testimony presented that Arrington's statements were "unduly coerced or extracted."

{¶ 18} After the trial court denied his motion to suppress, Arrington pled no contest to all three charges as set forth in the indictment. The trial court sentenced Arrington to one year for drug possession, two years for trafficking drugs, and six months for possessing criminal tools, and ordered that they be served concurrently for a total of two years in prison. The trial court also notified him that he would be subject to three years of postrelease control upon his release from prison.

{¶ 19} Arrington raises one assignment of error for our review:

{¶ 20} "Whether the trial court erred in denying appellant's motion to suppress where the evidence at trial demonstrates that appellant was unlawfully seized."

{¶ 21} A motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. "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. *** 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." (Internal citations omitted.) Id.

{¶ 22} On appeal, Arrington does not challenge the trial court's decision regarding oral statements he made at the police station as he did below. He only argues that his initial encounter with Officer O'Leary was an investigative stop within the meaning of *Terry v. Ohio* (1968), 392 U.S. 1, and not a consensual encounter. Thus, he maintains that the stop was illegal because Officer O'Leary "never articulated any reasonable grounds for suspicion of criminal activity prior to approaching the truck."

{¶ 23} 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. An investigative stop, or *Terry* stop, is a common exception to the Fourth Amendment warrant requirement. Under *Terry*, both the stop and seizure must be supported by a reasonable suspicion of criminal activity. The state must be able to point to specific and articulable facts that reasonably suggest criminal activity "may be afoot." *Terry* at 9. Inarticulable hunches, general suspicion, or no evidence to support the stop is insufficient as a matter of law. *State v. Smith*, 8th Dist. No. 89432, 2008-Ohio-2361, ¶8.

{¶ 24} "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. A person is "seized," however, so as to trigger Fourth Amendment protection,

when, by means of physical force or a show of authority, his freedom of movement is restrained. *Mendenhall* at 554; *Terry* at 19.

{¶ 25} We note at the outset that if the initial encounter here were indeed a *Terry* stop, we would agree that Officer O'Leary never articulated "any reasonable grounds for suspicion of criminal activity," and thus, the stop would be illegal. In fact, Officer O'Leary testified that when he first approached the SUV, he did not think that criminal activity was taking place. He only approached the SUV because he recognized it as being owned by "Navigator Jay" or Larry Adams. The only question then that we must answer is whether the initial encounter between Officer O'Leary and Arrington was a consensual encounter or whether it was an investigative stop.

{¶ 26} The test for determining whether a person has been seized, is whether, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Mendenhall* at 554. "Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." Id.

{¶ 27} Here, Officer O'Leary testified that he "casually walked up" to Arrington and asked him where Adams was. Officer O'Leary said that when he asked Arrington where Adams was, he was approximately ten to fifteen feet

away from the truck, the door to the truck was open, Arrington was at the gas pump, and almost instantaneously, Officer O'Leary smelled a strong odor of burned marijuana emanating from the truck.

{¶ 28} Under these circumstances, we find that the initial encounter, which had to have occurred within seconds, was a consensual encounter. Officer O'Leary was the only officer present. He did not have his gun drawn. He did not even ask Arrington what he was doing nor did he instruct him to comply with some order; he simply asked him where Adams was. Both females who were in the vehicle testified that when Officer O'Leary walked up to the truck, he asked, "where's Jay?" Although one of the women testified that Officer O'Leary was being sarcastic when he asked where "his buddy Jay" was, that fact does not make an otherwise consensual encounter a *Terry* stop.

{¶ 29} Further, although the two females testified that Officer O'Leary blocked the SUV with his police car, Officer O'Leary stated that he parked along the edge of the gas station's property and walked over to the SUV. Rendell also testified that he saw a police car blocking the "light gray" SUV, but it is not clear from his testimony if he saw Officer O'Leary's police car or another police car that had arrived after Officer O'Leary called for assistance. And although the trial court did not make findings of fact on the record, it must have found Officer O'Leary more credible than Arrington's three witnesses.[1]

[1]The trial court did not state its findings of fact on the record, as required by Crim.R. 12(F). Regarding the failure to make findings of fact, however, the Ohio

{¶ 30} Finally, the females' testimony that Officer O'Leary told everyone to remain in the vehicle when he first approached does not make sense because they also stated that when he approached, he was being "funny and sarcastic," asking where "Jay" was and almost immediately began asking where the "weed" was.

{¶ 31} The initial encounter, lasting only seconds before Officer O'Leary smelled the marijuana, was not a stop within the meaning of *Terry*. And once he smelled the marijuana, he had reasonable suspicion that criminal activity was afoot, justifying the search of the vehicle. See *State v. Hopper*, 8th Dist. Nos. 91269 and 91327, 2009-Ohio-2711, citing *State v. Moore*, 90 Ohio St.3d 47, 2000-Ohio-10 ("the smell of marijuana, alone, by a person qualified to recognize the odor, is sufficient to establish probable cause to search a motor vehicle").

{¶ 32} Arrington's sole assignment of error is overruled.

{¶ 33} Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

Supreme Court has made it clear that "in order to invoke the rule, the defendant must request that the trial court state its essential findings." *State v. Brown* (1992), 64 Ohio St.3d 476, 481. See, also, *State v. Benner* (1988), 40 Ohio St.3d 310; *State v. Richey* (1992), 64 Ohio St.3d 353; and *Bryan v. Knapp* (1986), 21 Ohio St.3d 64. Moreover, where a defendant does not request the trial court to state findings of fact, "an appellate court errs in reversing a conviction if there is sufficient evidence demonstrating that the trial court's decision was legally justified and supported by the record." *Brown* at 42. Here, there is sufficient evidence (Officer O'Leary's testimony) on the record to legally justify the trial court's decision.

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.

MARY J. BOYLE, JUDGE

CHRISTINE T. McMONAGLE, P.J., CONCURS;
FRANK D. CELEBREZZE, JR., J., CONCURS IN JUDGMENT ONLY