[Cite as *State v. Pettegrew*, 2009-Ohio-4981.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91816

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LEON PETTEGREW

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-494913

BEFORE: Blackmon, J., Cooney, A.J., and Sweeney, J.

RELEASED: September 24, 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).

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Leon Pettegrew appeals his conviction for drug possession and assigns the following error for our review:

> **"I. The appellant was stopped and arrested in violation of the Fourth and Fourteenth Amendments of the federal Constitution and Article I, Section 14 of the Ohio Constitution."**

{¶ 2} Having reviewed the record and pertinent law, we reverse the judgment of the trial court and remand for proceedings consistent with this opinion. The apposite facts follow.

{¶ 3} On April 13, 2007, the Cuyahoga County Grand Jury indicted Pettegrew for drug trafficking and drug possession. Pettegrew pleaded not guilty at his arraignment, and he subsequently filed a motion to suppress the $10 rock of crack cocaine, which the police recovered. On June 25, 2008, the trial court conducted a hearing on Pettegrew's motion to suppress.

Suppression Hearing

{¶ 4} At the suppression hearing, one of the arresting officers testified about Pettegrew's actions that led to his arrest for drug trafficking and possession. Officer Kennedy Jones described the area where Pettegrew's car was parked as "notorious for drug activity."[1] He observed Pettegrew in the driver's seat, and an unidentified male standing outside the car on the driver's side.

[1]Tr. 18.

{¶ 5} The officer described what the men were doing as a "hand-to-hand" transaction or a hand-to-hand interaction. He stated that the "male standing outside the vehicle reached into the vehicle and the male sitting inside the vehicle with their hands at each other, making a transaction hand-to-hand."[2] When asked if their hands were touching, the officer stated, "they were making an interaction – their hands were interacting, if that makes sense. You don't have to touch my hand to give me something. So, their hands were interacting."[3]

{¶ 6} Further, Officer Jones testified as follows:

"Q. * You did not see any money exchange hands; correct?**

A. No.

Q. And, you did not see any contraband exchange hands; correct?

A. No.

Q. So you were too far away to see actually what the exchange was?

A. Correct.

Q. It could have been matches for a cigarette. It could have been - -

A. Could have been anything.

Q. Could have been a phone number; could have been anything?

A. Correct.

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[2]Tr. 19.

[3]Tr. 19-20.

Q. You did not know that a drug transaction had occurred?

A. Based on my experience in that area and the arrests I've made, that was the deduction I've made.

Q. It was a hunch, it was in the - -

A. It turned out to be right.

Q. But, at the time you did not know it was actual drugs; it was just a hunch?

A. That was my suspicion."[4]

{¶ 7} Once the officer made the observation of the hand interaction, he stopped the police car behind Pettegrew's car. The other male fled, and the officer ordered Pettegrew to show his hands. Pettegrew immediately raised his clutched left hand. He eventually released his hand and one rock of crack cocaine was surrendered.

{¶ 8} Officer Jones was clear that during his 13 years on the force, he had observed many drug transactions in high crime areas and this was a drug transaction.

{¶ 9} At the hearing, Pettegrew stated that on the day in question, he was in the vicinity of Coit and Woodworth Roads for the purpose of purchasing crack cocaine. Pettegrew pulled into the parking lot of the corner store and turned his

[4]Tr. 33-34.

car around so that he could leave as soon as the transaction was completed. Pettegrew parked behind the corner store and away from the entrance.

{¶ 10} A few moments later, the police arrived, pulled directly in front of Pettegrew's car, and the unknown male fled. The police exited the patrol car with their guns drawn and began yelling that he should show his hands. Pettegrew complied with the officers' orders; he was subsequently arrested and charged.

{¶ 11} The trial court denied Pettegrew's motion to suppress. The following day, Pettegrew executed a jury waiver, and a bench trial ensued. After the State's case in chief, the trial court granted Pettegrew's motion for acquittal on the drug trafficking charge.

{¶ 12} Thereafter, Pettegrew pleaded no contest to drug possession. The trial court entered a finding of guilt and sentenced him to six months of community control sanctions.

Investigative Stop

{¶ 13} The standard of review for the legality of an investigative stop is de novo. When reviewing the facts, this court will give deference to the trial court unless its fact-finding is not supported by competent, credible evidence.[5] Once this court accepts the trial court's fact-finding as supported by competent, credible

[5]*State v. Guysinger* (1993), 86 Ohio App.3d 592, *State v. Harris* (1994), 98 Ohio App.3d 543.

evidence, the only issue for the appellate court is whether these facts satisfy the applicable legal standard.[6]

{¶ 14} The applicable legal standard for whether an investigative stop passes Fourth Amendment scrutiny is *Terry v. Ohio*.[7] A *Terry* stop is valid when it is supported by reasonable suspicion; the reasonable suspicion must be articulated with specific facts that would lead a reasonable person to suspect criminal activity is afoot. The officer must independently observe the circumstances showing the criminal activity and the observation must occur before detention or seizure.[8]

{¶ 15} The Ohio Supreme Court has held that a *Terry* stop is valid when viewed through the eyes of a reasonable and prudent police officer on the scene who must act when the crime is unfolding. This view is defined as the totality of the circumstances. These circumstances have been defined as location, character of location, and action of the suspect or suspects (fleeing). Regardless of the officer's lens to assess the criminal behavior, he must have a reasonable articulable suspicion before a stop is made and the logical inference is that he must be able to articulate what he observed that gave rise to that suspicion.

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[6]*State v. McNamara* (1997), 124 Ohio App.3d 706.

[7](1986), 392 U.S. 1.

[8]*State v. Johnson* (1990), Cuyahoga App. No. 58344.

{¶ 16} We conclude that these facts do not satisfy the above stated legal standard. The officer failed to articulate the basis for his reasonable suspicion that a crime was afoot. He never stated that he observed the unidentified male exchange something with Pettegrew, or vice versa. He never said he saw Pettegrew's hands outside the car. He said he saw the unidentified male reach into the car, but could not describe anything other than he reached into the car. Instead, he labeled their action a hand-to-hand transaction or interaction without describing what they were doing. We realize that this is a close case. However, because the action of the men is consistent with innocent behavior, we resolve this case in favor of Pettegrew's Fourth Amendment rights.

{¶ 17} Officer Kennedy was very accurate in describing the area where the men stood as notorious for drug activity. In *State v. Carter*,[9] the Ohio Supreme Court cautioned against the misfortune of innocent individuals losing their liberty because of the character or label of the area in which they live.

{¶ 18} We find, given the officer's inability to say outright that he observed the exchange of something, this case rests solely on the character of the area. In *State v. Carter*, the court held as a matter of law the area alone is insufficient to justify a stop.

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[9](1994), 69 Ohio St.3d 57.

{¶ 19} We are mindful that the fleeing of the unidentified male may be attributed to Pettegrew as suspicious behavior and justify a stop.[10] However, in *State v*. *Jordan*, the suspect "shouted" to the fleeing suspect "something," which the supreme court concluded sufficient to attribute to the nonfleeing suspect. This was not the case here. Also, we are mindful that fleeing has been held to constitute suspicious behavior as it relates to the fleeing suspect and not as to the non-fleeing suspect unless *State v. Jordan* applies, which we hold it does not.

{¶ 20} Nor does *State v. Fletcher* apply; there the parties had a hand-to-hand exchange on a bike. The officer must be able to testify that he saw a hand-to-hand exchange, which he believes was a drug transaction based on the area. The officer did not say that Pettegrew and the unidentified male secretively or furtively exchanged something, which was the case in *State v. Fletcher*.[11]

{¶ 21} Finally, on cross-examination, the officer intimated that he had a hunch that proved to be correct that the men were dealing drugs. A hunch is not enough. In *State v. Shepherd*,[12] that court in analyzing *State v. Bobo*[13] concluded that a hunch, plus a high crime area, might be sufficient. We believe

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[10]*State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085.

[11]Cuyahoga App. No. 88038, 2007-Ohio-989.

[12](1997), 122 Ohio App.3d 358.

[13](1988), 37 Ohio St.3d 177.

even under *State v. Bobo*, these facts are insufficient to withstand constitutional scrutiny under a *Terry* stop. The officer must be able to articulate the criminal activity that he observed. Labeling the behavior is not sufficient as a matter of law. The officer must be able to say he saw a hand-to-hand exchange. During the officer's testimony, he tried to explain what he meant by hands interacting, but was not clear. The officer must be able to make sense of what he observed, especially when one person is sitting in the car, the other is on the outside, and the officer is too far away to see anything being exchanged. The Fourth Amendment requires more than a hunch when the suspicious behavior is consistent with innocent behavior, and the officer testified that indeed the behavior of the two men could well have been innocent.

{¶ 22} We do not hold that the officer must identify what the item is, when a hand-to-hand exchange takes place in a high crime area. However, the officer must be able to say that an exchange occurred. Here, the officer could not.

Judgment reversed and case remanded for proceedings consistent with this opinion.

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

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

JAMES J. SWEENEY, J., CONCURS;
COLLEEN CONWAY COONEY, A.J., DISSENTS
(SEE ATTACHED DISSENTING OPINION.)

COLLEEN CONWAY COONEY, A.J., DISSENTING:

{¶ 23} I respectfully dissent. I would affirm the trial court's denial of the motion to suppress the rock of crack cocaine that Pettegrew dropped when police approached him. Under the totality of the circumstances, I would find that Officer Jones had a reasonable suspicion that criminal activity "may be afoot" to justify a *Terry* stop. "Under *Terry*, an officer must articulate a reasonable basis for detaining an individual." *State v. Smith*, Cuyahoga App. No. 89443, 2008-Ohio-2361. Officer Jones claimed that based on his experience in that area and the arrests he had made, his deduction was a drug transaction had occurred. When asked if it was a hunch, he replied, "That was my suspicion." He never said he had a hunch. He honestly testified that he could not see what was exchanged between Pettegrew and

the unidentified male. I disagree with the majority's requirement that the officer unequivocally state that an exchange occurred.

{¶ 24} I agree with the majority's characterization that "this is a close case." Pursuant to the appropriate standard of review for a motion to suppress, I would affirm.