[Cite as *State v. Johnson*, 2009-Ohio-5377.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92540

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

JAMES JOHNSON

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-513908

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

RELEASED: October 8, 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, the state of Ohio, takes issue with the lower court's grant of James Johnson's motion to suppress evidence obtained in a search of his girlfriend's vehicle. The trial court found no articulable facts that would justify the officers' actions in conducting a search of the vehicle. For the following reasons, we affirm the trial court's grant of appellee's motion to suppress.

{¶ 2} On July 2, 2008, Johnson ("appellee"), his girlfriend, Krystal Jackson, and her niece were in Ms. Jackson's vehicle, parked in the driveway of a residential address on East 65th Street in Cleveland, Ohio. At the suppression hearing, Ms. Jackson testified that appellee pulled into the driveway to turn around when an acquaintance at the address began talking to her. There were 10 to 15 people loitering at the address at the time. She further testified that soon after appellee pulled into the driveway, several police cars pulled up in front of the house, with one car blocking egress from the driveway. The police officers emerged from their respective vehicles, and several of the individuals who were at the address began to run from the police. Jackson testified that several officers began chasing after the fleeing individuals, while some officers stayed behind and ordered the remainder of those present to the ground.

{¶ 3} Detective Michael Rasberry of the Cleveland Police Department testified that he stayed behind and ordered the remaining individuals to the ground for officer safety. Detective Rasberry further testified that the officers were there that day because undercover Cleveland police officers had conducted several controlled drug buys and made several arrests in the area immediately around and including the East 65th Street address during the spring and summer of 2008.

{¶ 4} Detective Rasberry testified that because it was dark, he did not notice any occupants in a vehicle parked in the driveway. He only became aware of their presence when the driver, appellee, stuck his head out of the car window and asked Detective Rasberry to move the police car that was blocking the driveway so appellee could leave. Detective Rasberry testified that he instructed the occupants in the vehicle to wait a minute because the scene was not yet secure, the scene was chaotic, and he did not know whose patrol car was blocking the drive.

{¶ 5} Detective Rasberry testified that as he and Detective Barnes approached the vehicle, appellee appeared very nervous and in a hurry. The detectives decided to ask the occupants to exit the vehicle for officer safety. Detective Rasberry testified that as he escorted appellee out of the vehicle, he detected the smell of marijuana in the vehicle. He further testified that Detective Barnes confirmed the smell emanating from the passenger-side

open window of the car as well. Detective Rasberry then conducted a pat-down search of appellee. Detective Rasberry testified that, upon completion of the search, he stuck his head in the open driver's-side window of the vehicle and detected a strong odor of marijuana coming from the rear portion of the vehicle. Detective Barnes then escorted Ms. Jackson out of the vehicle.

{¶ 6} By this point, appellee had asked Detective Rasberry to move the car blocking the drive and be allowed to leave three times. At no point did Detective Rasberry attempt to move the car or locate the officer who parked the car in front of the driveway. Detective Rasberry testified that he retrieved the keys from appellee and walked to the rear of the vehicle. He testified that, upon arriving at the trunk, there was a "loud odor of marijuana" coming from inside. Detective Rasberry opened the trunk and found a shopping bag protruding from behind a large speaker. Detective Rasberry testified that the bag contained multiple sealed plastic bags, which held a total of 1337.7 grams of marijuana. At no time was consent to search the vehicle asked for or given. Ms. Jackson, the owner of the car, testified that she never smelled marijuana in the car, nor did she know marijuana was present in the trunk of her car.

{¶ 7} Appellee was arrested, and on July 31, 2008, a grand jury returned a two-count indictment charging appellee with drug trafficking in

violation of R.C. 2925.03(A)(2) and possession of drugs in violation of R.C. 2925.11(A). On October 9, 2008, appellee filed a motion to suppress the evidence obtained pursuant to the search of the vehicle, stating that the search was a violation of his Fourth Amendment right against unlawful search and seizure. A suppression hearing was held on November 18, 2008, which concluded with the trial judge granting appellee's motion to suppress.

{¶ 8} The state timely filed this appeal citing one assignment of error:

{¶ 9} "I. The trial court erred in granting Defendant-Appellee's motion to suppress evidence. (Entire Transcript)."

Law and Analysis

{¶ 10} "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, 96, 641 N.E.2d 1172.

{¶ 11} 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. The analysis for a search requires a two-step inquiry where probable cause is required and, if it exists, a search warrant must be obtained unless an exception applies. *State v. Moore*, 90 Ohio St.3d 47, 2002-Ohio-10, 734 N.E.2d 804. "If the state fails to satisfy either step, the evidence seized in the unreasonable search must be suppressed." Id. at 49, 734 N.E.2d at 807, citing *Mapp v. Ohio* (1961), 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081; *AL Post 763 v. Ohio Liquor Control Comm.*, 82 Ohio St.3d 108, 111, 1998-Ohio-367, 694 N.E.2d 905, 908.

{¶ 12} Common exceptions include consensual encounters with police officers and investigatory or *Terry* stops. *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. There are generally three types of interactions between law enforcement and the citizenry – those that are consensual encounters, investigative stops, and arrest. *State v. Saunders*, Montgomery App. No. 22621, 2009-Ohio-1273. Each requires a successively higher level of evidence to constitute a valid search or seizure under the Fourth Amendment.

Consensual Encounter

{¶ 13} A consensual encounter is characterized by a citizen possessing a freedom of movement that allows them to stop the encounter simply by walking away. *U.S. v. Mendenhall* (1980), 446 U.S. 544, 100 S.Ct. 1970, 64 L.Ed.2d 497. Consensual encounters do not implicate Fourth Amendment guarantees because there is no restraint of liberty. *State v. Scott* (Aug. 5, 1999), Cuyahoga App. No. 74352, citing *Mendenhall*, supra. "Encounters between the police and a citizen are consensual where the police merely approach an individual in a public place, engage the person in conversation, and request information. *Mendenhall* * * * at 553. There need be no objective justification for such an encounter. As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy and the protections of the Fourth Amendment are not implicated. Id. at 554." *State v. Brock* (Dec. 9, 1999), Cuyahoga App. No. 75168.

{¶ 14} The state wishes to classify Detective Rasberry's encounter with appellee as consensual up to the point where Detective Rasberry smelled marijuana. The state argues the officers did not need probable cause or even a reasonable suspicion to seek information. *Mendenhall* at 553. The state relies on *State v. Schoolcraft*, Athens App. No. 03CA9, 2004-Ohio-817, for support. In *Schoolcraft*, a truck driver, Schoolcraft, stopped his truck in the road, got out, and began looking under the car seat or dash. Schoolcraft

approached a police officer's car, which had pulled up behind him. Schoolcraft then asked the officer if he could borrow a flashlight. The officer asked Schoolcraft for his social security number and identification and called into dispatch with this information. The officer learned Schoolcraft had a suspended driver's license. After a pat-down search, Schoolcraft confessed that he had a suspended license and was arrested by the officer. A search incident to arrest revealed a pill bottle that contained methamphetamines. The Fourth District upheld Schoolcraft's conviction and found that the interaction was consensual and that it was Schoolcraft who engaged the police officer and initiated the encounter when he approached the officer and asked to borrow a flashlight.

{¶ 15} The state's reliance on *Schoolcraft* is not persuasive. There is a substantive difference between that case and the case at bar. In *Schoolcraft*, the defendant truck driver approached the officer and asked the officer for assistance. In the instant case, appellee asked the officer to allow him to leave. This is not the same type of consensual encounter because appellee was prevented from leaving the driveway by a police vehicle blocking egress. The state wishes to characterize appellee's requests to leave as a consensual engagement of a police officer for assistance, but in reality the requests were made to be released from the area.

{¶ 16} The test for seizure adopted by the Ohio Supreme Court "provides that the police can be said to have seized an individual 'only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" *Michigan v. Chesternut* (1988), 486 U.S. 567, 573, 108 S.Ct. 1975, 1979, 100 L.Ed.2d 565, quoting *Mendenhall* at 554. That definition would appear to fit the situation here because the vehicle appellee was driving was blocked in by a police vehicle. However, the interaction between appellee and Detective Rasberry cannot be classified as a seizure simply because appellee was prevented from driving away by a car blocking the driveway.

{¶ 17} In *Brower v. County of Inyo* (1989), 489 U.S. 593, 109 S.Ct. 1378, 103 L.Ed.2d 628, the United States Supreme Court stated that the force preventing a person from leaving police custody must be intentionally applied. The Court hypothesized, "if a parked and unoccupied police car slips its brake and pins a passerby against a wall, it is likely that a tort has occurred, but not a violation of the Fourth Amendment. * * * It is clear, in other words, that a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement * * * but only when there is a governmental termination of freedom of movement through means intentionally applied." Id. at 596-597.

{¶ 18} Uncontradicted testimony at the suppression hearing demonstrated that the car was not intentionally parked at the base of the drive to prevent appellee from leaving. Therefore, the force or restriction of freedom of movement was not a seizure according the standard set forth in *Brower*, supra.

{¶ 19} However, when Detective Rasberry ordered appellee out of the vehicle, the encounter could no longer be classified as one where an individual would feel free to disregard the officer's commands or feel free to leave. Detective Rasberry ordered appellee out of the car and opened the door of the car appellant was in. These actions are not indicative of a consensual request. Appellee was seized before Detective Rasberry opened the car door. As such, this interaction must be classified as an investigatory stop.

Investigative Stop

{¶ 20} Under *Terry*, a police officer may stop and investigate unusual behavior, even without probable cause to arrest, if he has sufficient evidence to reasonably conclude that criminal activity is afoot. 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." *Terry* at 21. An investigatory stop "must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in

criminal activity." *U.S. v. Cortez* (1981), 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621.

{¶ 21} "In determining the reasonableness of the officer's belief, courts examine the totality of the circumstances, including the following factors: (1) whether the location of the contact is an area of high crime or high drug activity, (2) the suspect's non-compliance with the officer's orders, (3) the time of the occurrence, (4) the officer's experience, (5) the lack of backup for the officer, (6) the contact's location away from the police cruiser, (7) whether the suspect is fleeing the officer or the scene, (8) any furtive movements by the suspect, (9) the precautionary measures taken by the officer, and (10) the suspected offense." (Internal citations omitted.) *State v. Stiles*, Ashtabula App. No. 2002-A-0078, 2003-Ohio-5535, ¶17.

{¶ 22} Appellee was seized when Detective Rasberry ordered him out of the car. As a result, reasonable suspicion of criminal activity was required in order to do so. Here, the area in question was a high crime area at night. The police were conducting a raid after receiving citizen complaints of drug activity at the address where appellee was parked. Officers had previously conducted several controlled drug purchases at or near this location. As officers pulled up, several people ran from this location, and several officers gave chase. Both Detective Rasberry and Ms. Jackson testified that the scene was one of chaos. Several people were being directed to the ground for

officer safety. Officers were still trying to secure the scene when appellee called out to the officers to move the car blocking the driveway.

{¶ 23} However, Detective Rasberry testified that he initially had no idea the car parked in the drive was occupied. He articulated no facts that would provide him with a reasonable suspicion that appellee was engaging in criminal activity. While officer safety is a legitimate concern, it cannot be used as a subterfuge to justify an otherwise unlawful search. "An officer may initiate a protective search when, based on the totality of the circumstances, there is a reasonable suspicion the person is armed. *State v. Bobo* (1988), 37 Ohio St.3d 177, 524 N.E.2d 489, paragraph two of the syllabus. However, the officer's concern for safety must be reasonable." *State v. Hines* (1993), 92 Ohio App.3d 163, 167, 634 N.E.2d 654.

{¶ 24} "The United States Supreme Court has held that mere proximity to others independently suspected of criminal activity does not, without more, provide a sufficient basis to search that person. *Ybarra v. Illinois* (1979), 444 U.S. 85, 91, 100 S.Ct. 338, 342, 62 L.Ed.2d 238, 245. A third party's mere association with suspected criminals does not reasonably give rise to probable cause to search his person or property." *State v. Davis* (2000), 140 Ohio App.3d 659, 664, 748 N.E.2d 1160. Here, merely because appellee was in a car parked in an area where several people were loitering on a sidewalk does not give the state justification to search appellee or the car he was occupying.

The officers could not point to any articulable facts that would demonstrate appellee presented a danger to the officers present or was engaged in criminal activity.

{¶ 25} Because Detective Rasberry's interaction with appellee can only be classified as investigatory when Detective Rasberry opened the car door, some reasonable suspicion is required to justify a search. Having found none, the subsequent smell of marijuana and the resultant evidence must be excluded. Detective Rasberry testified that he smelled the odor of marijuana as he opened the car door. The opening of the door and the subsequent search of the vehicle violated appellee's Fourth Amendment rights. The evidence recovered from that search must be excluded.

{¶ 26} The judgment of the trial court is affirmed.

It is ordered that appellee recover of 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

SEAN C. GALLAGHER, P.J., and

CHRISTINE T. McMONAGLE, J., CONCUR