[Cite as *State v. Massingill*, 2009-Ohio-6221.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92813

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

RAYMOND MASSINGILL

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-515478

BEFORE: Celebrezze, J., Dyke, P.J., and Jones, J.

RELEASED: November 25, 2009

JOURNALIZED:

ATTORNEYS FOR APPELLANT

William D. Mason
Cuyahoga County Prosecutor
BY: Megan Wolf
Assistant Prosecuting Attorneys
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

ATTORNEY FOR APPELLEE

Donald Tittle
633 West Broad Street
Suite 200
Elyria, Ohio 44035

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} The state of Ohio ("appellant") takes issue with the lower court's grant of Raymond Massingill's ("appellee") motion to suppress evidence obtained in a search of his person. After a thorough review of the record, and for the following reasons, we affirm.

{¶ 2} On Sunday, August 31, 2008, appellee was seen driving a motorcycle in the area of East 105th Street by Cleveland Police Officer Noreen Fellows, who was patrolling the area as part of the Sunday church detail. Officer Fellows testified at the suppression hearing that appellee appeared to be avoiding her as she did her patrol of churches in the area. Officer Fellows testified that, as she turned onto a street in her zone car, the motorcycle would seem to turn down a side street when the driver saw her. Appellee's counsel stated in closing argument that appellee was merely driving around the area of a barbershop as he waited for it to open.

{¶ 3} Officer Fellows stated that the driving reminded her of an incident that had occurred the previous winter when a person was driving at a high rate of speed with no regard for pedestrian safety. She chased the unidentified vehicle, described as an ATV or snowmobile with four tires, but the driver always managed to evade her down a side street. Officer Fellows had not been able to get a good look at the driver because he was too far away and wearing winter clothing including hat, gloves, eye protection, and coat.

{¶ 4} Contrary to her testimony that appellee appeared to be avoiding her, Officer Fellows testified that he stopped the motorcycle at an intersection within 50 feet of her zone car and remained there for several minutes. While the motorcycle was stopped at the intersection, Officer fellows read the license plate number and called dispatch to check on the status of the vehicle. She testified that she learned the motorcycle was registered to Toni Massingill. She assumed that Toni was a female name, which raised suspicion in her mind because the operator of the motorcycle was obviously male. Officer Fellows learned from dispatch that the vehicle in question had not been reported stolen.

{¶ 5} Officer Fellows testified that she observed the motorcycle pull into a church parking lot, then appellee walked down the side of a nearby building. Officer Fellows then called for back up. Appellee emerged a few minutes later and walked to a nearby barbershop. Officer Fellows testified that, up to this point, appellee did not appear to violate any law.

{¶ 6} Officer Fellows and two other Cleveland police officers followed appellee into the barbershop. As they entered, he was in the process of getting his hair cut with his body covered by a barber's cape. When officer Fellows asked those inside the shop who had been operating the motorcycle, appellee stated he had been the person operating the bike.

{¶ 7} Officer Fellows testified that she engaged appellee in a series of questions. She asked if he had a motorcycle endorsement to operate the

motorcycle, to which he answered he did not. He further stated that he did not have a valid driver's license. Officer Fellows testified that, during the course of the questioning, appellee was fidgeting under the barber's cape. She ordered him to keep his hands visible on top of the cape, but he continued to fidget under the cape. After more than one order to refrain from putting his hands under the cape, Officer Fellows requested that the barber stop cutting appellee's hair, and the officers present ordered appellee out of the barber's chair for a "pat down" search for officer safety. The officers recovered a handgun from appellee's waistband. Officer Fellows issued a citation to appellee for driving without a license and arrested him for carrying a concealed weapon.

{¶ 8} On September 10, 2008, a Cuyahoga County Grand Jury returned a three-count indictment, including one count of receiving stolen property, one count of carrying a concealed weapon, and one count of having a weapon while under disability. Appellee filed a motion to suppress and requested an evidentiary hearing on November 14, 2008. A suppression hearing was held on January 29, 2009, at which Officer Fellows was the only witness. On February 5, 2009, the trial court granted the motion to suppress evidence obtained in the search of appellee at the barbershop. The state then filed the instant appeal taking issue with the trial court's finding that the state lacked reasonable suspicion to justify the search of appellee.

{¶ 9} In it's sole assignment of error, the state claims:

{¶ 10} "The trial court erred when it granted defendant's motion to suppress, ruling that the officer did not have reasonable suspicion to justify the investigatory stop of defendant."

Law and Analysis

{¶ 11} "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. A reviewing court is bound to accept those findings of fact if supported by competent, credible evidence. 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." (Internal citations omitted.) *State v. Curry* (1994), 95 Ohio App.3d 93, 96, 641 N.E.2d 1172.

{¶ 12} The Fourth Amendment to the United States Constitution prohibits warrantless searches and seizures, rendering them per se unreasonable unless an exception applies. *Katz v. U.S.* (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, 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.

{¶ 13} Common exceptions to the warrant requirement 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 — consensual encounters, investigative stops, and arrests. *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.

{¶ 14} 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. 1870, 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, 4.

{¶ 15} An investigative stop, or "*Terry* stop," is a common exception to the Fourth Amendment warrant requirement. *Terry*, supra. A law enforcement officer may properly stop an individual under the *Terry*-stop exception if the officer possesses the requisite reasonable suspicion based on specific and articulable facts. *Delaware v. Prouse* (1979), 440 U.S. 648, 653, 99 S. Ct. 1391, 59 L.Ed.2d 660; *State v. Gedeon* (1992), 81 Ohio App.3d 617, 618, 611 N.E.2d 972; *State v. Heinrichs* (1988), 46 Ohio App.3d 63, 545 N.E.2d 1304.

{¶ 16} Police may stop and question a person if there are reasonable grounds to believe that the person is wanted for past criminal conduct, is currently engaged in criminal conduct, or will, in the future, be involved in a crime. *U.S. v. Cortez* (1981), 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621. Whether reasonable grounds for a stop exist must be viewed in light of the totality of the circumstances. *London v. Edley* (1991), 75 Ohio App.3d 30, 32, 598 N.E.2d 851.

{¶ 17} During a *Terry* stop, an officer may perform a "pat down" search for weapons. The purpose of this limited search is to allow an officer to pursue his or her investigation without fear of violence; it is not intended to provide the officer with an opportunity to ascertain evidence of a crime. *State v. Evans*, 67 Ohio St.3d 405, 408, 1993-Ohio-186, 618 N.E.2d 162.

{¶ 18} At the conclusion of the suppression hearing, the trial court found "there was a lack of reasonable suspicion to justify the investigatory stop of [appellee] as it was unreasonable to believe that he was involved in or had been involved in any criminal activity." Officer Fellows's stated reason for following appellee — that he might have been the person who evaded her in the winter — was not reasonable. Officer Fellows could not identify that person because he had been wearing snow gear, including a hat and eye protection. Officer Fellows's belief that the motorcycle was registered to a female, which gave her probable cause to inquire further, is also insufficient when the officer knew the vehicle in question had not been reported stolen. Someone borrowing a vehicle does not constitute reasonable suspicion of criminal activity. Appellee was not speeding or violating other traffic laws prior to being engaged by police officers. Officer Fellows testified as to that fact. There were no articulable reasons put forth by Officer Fellows that would justify the stop of appellee.

{¶ 19} The state argues on appeal that the officers did not need probable cause or even a reasonable suspicion to seek information. According to the state, the officers in the barbershop were engaged in a consensual encounter and only searched appellee after he repeatedly ignored police instructions and continued to put his hands under the barber's cape. The state failed to raise this argument at the suppression hearing.

{¶ 20} In order for an accused to even receive a hearing on a motion to suppress, the "accused must state the motion's legal and factual bases with sufficient particularity to place the prosecutor and the court on notice of the issues to be decided." *State v. Shindler*, 70 Ohio St.3d 54, 1994-Ohio-452, 636 N.E.2d319, at syllabus. Further, "the failure to raise suppression claims in the trial court prior to the commencement of trial precludes raising the argument for the first time on appeal." *State v. Brown* (1994), 97 Ohio App.3d 293, 297, 646 N.E.2d 838. Although these cases deal with an accused's burden in a motion to suppress, the reasoning applies equally to the state. If the state fails to raise an issue at the suppression hearing, and waits until appeal to raise it, the accused has no opportunity to question witnesses on the issue or to properly present their case at the suppression hearing.

{¶ 21} At the suppression hearing, the state could have argued that Officer Fellows's encounter with appellee was consensual, but it did not do so. This court will not now address that claim. See *State v. Awan* (1986), 22 Ohio St.3d 120, 489 N.E.2d 277. Because "[a]ppellate courts should give great deference to the judgment of the trier of fact[,] * * * we are bound to accept the trial court's findings of fact if they are supported by competent, credible evidence." (Internal citations omitted.) *State v. Bryson* (2001), 142 Ohio App.3d 397, 401, 755 N.E.2d 964.

{¶ 22} Competent, credible evidence exists in the record to substantiate the trial court's finding that appellee's Fourth Amendment rights were violated. Contrary to the state's contention, the trial court applied the proper law, and its determination is supported in the record. Accordingly, the evidence obtained in the unlawful search of appellee must be suppressed.

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.

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

ANN DYKE, P.J., and
LARRY A. JONES, J., CONCUR