[Cite as *State v. McCord*, 2010-Ohio-1979.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93127

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MARK MCCORD

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-515848

BEFORE: Gallagher, A.J., Stewart, J., and Dyke, J.

RELEASED: May 6, 2010

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), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellant Mark McCord appeals his conviction from the Cuyahoga County Court of Common Pleas for drug possession and possession of criminal tools. Finding merit to the arguments set forth, we reverse the decision of the trial court and remand for further proceedings.

{¶ 2} On September 16, 2008, the Cleveland police received a phone call from an anonymous caller, stating that occupants of a black Hummer parked in front of 11903 Ablewhite Avenue were engaged in drug activity. The call came through the non-emergency line at the police department, and the dispatcher relayed the information to Officer Robert Taylor, who was patrolling in that area. On a previous occasion, when Officer Taylor encountered a similar vehicle at this address, a passenger was carrying a weapon; therefore, Officer Taylor called for backup.

{¶ 3} Two zone cars approached the Hummer, effectively restricting its ability to move; Ablewhite is a one-way street, and one zone car pulled in front of the Hummer, while the other zone car pulled alongside it. Officer Taylor exited his vehicle, and as he approached the Hummer, he instructed McCord, who was in the driver's seat, and the two visible passengers: "Let me see your hands." All three occupants of the Hummer complied with Taylor's order. However, the front seat passenger, later identified as co-defendant Walter Lanier, dropped his left hand to his waist, and Officer Taylor again

instructed him to keep his hands in view. Lanier raised his hands again, but then once more dropped his left hand to his waist. Because of what Officer Taylor believed to be furtive movements on Lanier's part, Officer Taylor and the other officers drew their service weapons. Officer Taylor directed Officer Carl Dooley to remove Lanier from the vehicle and pat him down.

{¶ 4} When Lanier exited the vehicle, a bag containing suspected heroin fell from his pants leg. Lanier was arrested and placed in a zone car. At that time, McCord was patted down while he sat in the vehicle. As Lanier was being placed in the zone car, Officer Robert Sauterer noticed a bag containing suspected ecstasy pills on the ground beside the zone car. After both the heroin and ecstasy pills were found, the officers removed McCord and the backseat passenger from the vehicle. The officers assisted McCord by placing him in his wheelchair and moving him to the sidewalk.

{¶ 5} The officers proceeded to search the vehicle incident to Lanier's arrest. Officer Sauterer noticed McCord with his hands in the hedge between the sidewalk and the front yard. McCord began moving himself along the sidewalk by pulling on the branches of the hedge. Officer Sauterer looked in and around the hedge where he discovered a bag containing suspected crack cocaine. McCord was then placed under arrest. The officers seized his Hummer and $5,300 they found on McCord. The backseat passenger was released at the scene.

{¶ 6} On October 24, 2008, a Cuyahoga County grand jury indicted McCord and Lanier on seven counts, including drug trafficking, possession of drugs, and possession of criminal tools, all with forfeiture specifications. The forfeiture specifications included $5,300, a 2004 Hummer, and a cell phone. McCord filed a motion to suppress illegally seized property and for the return of illegally seized property. The court held a suppression hearing on December 15, 2008.

{¶ 7} The trial transcript reflects that the trial court denied McCord's motion to suppress. Prior to trial, Lanier entered a no-contest plea to the charges against him. At the close of the state's case against McCord, the court granted a Crim.R. 29 motion as to Counts 1-4, with respect to the trafficking and possession charges for MDMA/BZP and heroin, and the forfeiture specification with respect to the cell phone. McCord was found not guilty of trafficking. The jury found McCord guilty of drug possession (cocaine) in violation of R.C. 2925.11(A), possession of criminal tools in violation of R.C. 2923.24(A), and the forfeiture specifications relating to the cash and vehicle. The court sentenced McCord to a total of 18 months in prison.

{¶ 8} McCord filed the instant appeal, raising five assignments of error. In his first assignment of error, McCord argues that it was error for the court to deny his motion to suppress. Specifically, he argues that an

uncorroborated anonymous tip about possible drug activity, without a reasonable articulable suspicion by the police that criminal activity is occurring, does not justify an investigatory stop.

{¶ 9} "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. 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." (Citations omitted.) *State v. Burnside*, 100 Ohio St.3d 152, 154-155, 2003-Ohio-5372, 797 N.E.2d 71.

{¶ 10} 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. An investigative stop, or *Terry* stop, is a common exception to the Fourth Amendment warrant requirement. *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. It is well recognized that officers may briefly stop and detain an individual, without an arrest warrant and without probable cause, in order to investigate a

reasonable and articulable suspicion of criminal activity. Id.; see, also, *State v. Bobo* (1988), 37 Ohio St.3d 177, 524 N.E.2d 489. "The propriety of an investigative stop by a police officer must be viewed in light of the totality of the surrounding circumstances" as "viewed through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training." *State v. LeClair*, Clinton App. No. CA2005-11-027, 2006-Ohio-4958, quoting *State v. Freeman* (1980), 64 Ohio St.2d 291, 414 N.E.2d 1044, syllabus, and *Bobo* at 179, 524 N.E.2d 489.

{¶ 11} It is also well recognized that the Fourth Amendment is not implicated in all personal encounters between police officers and citizens, such as the case where there is a consensual encounter. *Florida v. Bostick* (1991), 501 U.S. 429, 434, 111 S.Ct. 2382, 2386, 115 L.Ed.2d 389; *City of Hamilton v. Stewart*, Butler App. No. CA2000-07-148, 2001-Ohio-4217. "Encounters are consensual where the police merely approach a person in a public place, engage the person in conversation, request information, and the person is free not to answer and walk away." *State v. Taylor* (1995), 106 Ohio App.3d 741, 747, 667 N.E.2d 60.

{¶ 12} In the case before us, the stop was not consensual. At the suppression hearing, Officer Taylor testified that although the Hummer was not "pinned" in, there was no question the occupants of the car were not free to leave. Where it is not a consensual encounter, the Fourth Amendment

requires that the officers possess a reasonable and articulable suspicion that criminal activity is occurring. In this case, the officers' suspicion was based on an anonymous tip as well as knowledge of a prior conviction.

{¶ 13} Ohio courts have recognized three categories of informants: (1) citizen informants; (2) known informants, i.e., those from the criminal world who have previously provided reliable tips; and (3) anonymous informants, who are comparatively unreliable. *Maumee v. Weisner*, 87 Ohio St.3d 295, 300, 1999-Ohio-68, 720 N.E.2d 507. "[A]n anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity" to justify an investigative stop. *Alabama v. White* (1990), 496 U.S. 325, 329, 110 S.Ct. 2412, 110 L.Ed.2d 301.

{¶ 14} In *State v. Whitsette*, Cuyahoga App. No. 92566, 2009-Ohio-4373, which involved a fact pattern similar to the one in this case, this court affirmed the trial court's decision to grant the defendant's motion to suppress because "the caller-informant failed to provide more specific details that the officers could corroborate for veracity and failed to indicate the caller-informant possessed inside knowledge of the criminal behavior." Quoting *Florida v. J.L.*, 529 U.S. 266, 270, 120 S.Ct. 1375, 146 L.Ed.2d 254, this court noted, "'The anonymous call concerning [the defendant] provided no predictive information and, therefore, left the police without means to test the informant's knowledge or credibility. That the allegation * * * turned out to be correct does not suggest that

the officers, * * *, had a reasonable basis for suspecting [the defendant] of engaging in unlawful conduct: The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search. All the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about [the defendant].'"[1]

{¶ 15} In the case before us, Officer Taylor testified that he received a call from Officer Stucin saying that an anonymous caller reported suspected drug activity in a black Hummer parked at 11903 Ablewhite Avenue. Officer Taylor testified that when he arrived at the scene, he did not observe any drug activity. He further testified the only reason he called for backup before approaching the vehicle was because three or four months earlier, he approached a similar looking vehicle at this address, and the passenger had a weapon. In short, Officer Taylor admitted he relied solely on evidence of a prior encounter with a person who may or may not have been the same individual parked in the vehicle identified by the anonymous tipster.

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[1] In *State v. Smith*, Cuyahoga App. No. 92320, 2009-Ohio-5692 (affirmed on other grounds), an anonymous caller stated that two black males were using drugs in a tan SUV parked behind an apartment building. Although the apartment parking lot was small, and the description provided adequate detail to locate the individuals, the anonymous informant did not provide information with which to judge his own credibility, and the defendant could not have been searched solely on the basis of the anonymous tip. Id.

{¶ 16} Like the defendant in *Whitsette*, McCord was merely sitting in his parked car; no one approached the car, and no furtive movements were observed by the officers prior to initiating the stop. Thus, we find there were insufficient surrounding circumstances to provide the officers with reasonable suspicion of criminal activity.

{¶ 17} We do not mean to suggest that McCord and the men with him that day are necessarily innocent of the charges brought against them by the state. Nor do we fail to appreciate the pressure the police are under to keep our streets safe and crime-free. Quite the contrary. Their search uncovered heroin, ecstasy, and cocaine; the officers knew of an earlier arrest McCord had for a drug-related offense. Nevertheless, the Fourth Amendment does not permit officers to conduct searches and seizures on any person known to have a criminal record without corroborating information that that same person is presently involved in criminal activity.

{¶ 18} We find that the officers who conducted the search and seizure of McCord's vehicle and person did not possess a reasonable and articulable suspicion of criminal activity before initiating a *Terry* stop. Therefore, the court erred in denying McCord's motion to suppress. His first assignment of error is sustained.

{¶ 19} Having found that the trial court erred in denying McCord's motion to suppress, his remaining assignments of error[2] are moot.

{¶ 20} This cause is reversed and remanded to the trial court for proceedings consistent with this opinion.

It is ordered that appellant recover from appellee 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.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

ANN DYKE, J., CONCURS;

MELODY J. STEWART, J., DISSENTS WITH DISSENTING OPINION

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[2] McCord's additional assignments of error are as follows:

"II. A due process violation occurs when the trial court fails to fully comply with Rule 12(F), Rules of Criminal Procedure, especially when the Court is expressly asked to do so."

"III. The court erred when it failed to even address the return of the seized property aspect of the defendant's pre-trial motion to suppress."

"IV. Given the evidence in this case is, and was, insufficient to support any findings of guilt beyond a reasonable doubt, it follows judgment should be entered for the appellant."

"V. Contrary to the court's expressed position, the arrest of the passenger following his removal from the vehicle does not provide officers the right to inventory the car."

MELODY J. STEWART, J., DISSENTING:

{¶ 21} I respectfully dissent from the majority's decision to sustain the first assignment of error and, as a result, find the remaining assignments moot.

{¶ 22} Unlike the defendant in *Whitsette*, appellant was not on private property, he was sitting in a car parked on a public street. Officer Taylor testified that he walked up to the car to ask the occupants why they were sitting there. A seizure does not occur simply because a police officer approaches an individual to ask questions. "More pertinently, the mere approach and questioning of persons seated within parked vehicles does not constitute a seizure so as to require reasonable suspicion supported by specific and articulable facts." *City of Westlake v. Jordan*, 8th Dist. No. 84289, 2004-Ohio-6022, at ¶15, quoting *State v. Johnston* (1993), 85 Ohio App.3d 475, 478, 620 N.E.2d 128.

{¶ 23} Thus, the officers' initial approach to appellant's car did not constitute a seizure. It was not until after Officer Taylor recognized appellant in the driver's seat that he ordered everyone in the car to show their hands. Under the totality of the circumstances, Officer Taylor's order to the occupants to show their hands was a reasonable request arising out of a concern for his and the other officers' safety. The order was not based

solely upon the telephone tip informing the police that the occupants of that particular car parked at that particular location were engaging in drug activity, but also upon Officer Taylor's personal knowledge that he had recently arrested appellant for drug activity out of the same vehicle and that one of appellant's passengers had been armed with a gun. Finally, the front seat passenger's refusal to follow the order to show his hands and the repeated, furtive movements to his waist provided the police with the reasonable suspicion necessary to continue the detention. "Furtive movements can provide an officer with the reasonable suspicion required to continue the detention because the potential of attack portrays possible criminal activity." *State v. Jenkins*, 8th Dist. No. 91100, 2009-Ohio-235, at ¶10, citing *State v. Sears*, 2nd Dist. No. 20849, 2005-Ohio-3880.

{¶ 24} Accordingly, I would overrule the first assignment of error and address the remaining assigned errors.