[Cite as *State v. Howze*, 2010-Ohio-2893.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93418

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WILLIAM L. HOWZE

DEFENDANT-APPELLANT

JUDGMENT:
JUDGMENT VACATED; ORDER DENYING MOTION TO SUPPRESS REVERSED AND CASE REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-519673

BEFORE: Rocco, P.J., McMonagle, J., and Dyke, J.
RELEASED: June 24, 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).

KENNETH A. ROCCO, P.J.:

{¶ 1} Defendant-appellant, William L. Howze, appeals from a common pleas court order denying his motion to suppress evidence seized from his person during a pat-down. He contends that the evidence did not demonstrate that the police officers had a reasonable suspicion that he was involved in criminal activity sufficient to justify them in stopping his vehicle. We find that the common pleas court erred by denying appellant's motion to suppress. Therefore, we vacate the judgment of conviction, reverse the order denying appellant's motion to suppress, and remand for further proceedings.

Procedural History

{¶ 2} In an indictment filed February 2, 2009, appellant was charged with one count of possession of less than five grams of a substance containing cocaine. Appellant moved the court to suppress the evidence seized from him during a pat-down search because, he argued, the investigatory stop of his vehicle was not justified by a reasonable suspicion that he was involved in any criminal activity. The court held a hearing on this motion on April 13, 2009. At the conclusion of the hearing, the court overruled the motion.

{¶ 3} Appellant then entered a plea of no contest to the charge. On May 18, 2009, the court entered judgment placing appellant under two years of community control sanctions, with the condition that he complete an

in-patient treatment program, attend Alcoholics Anonymous meetings three times per week, and obtain and maintain verifiable employment.

{¶ 4} At the hearing on the motion to suppress, the court heard testimony from Cleveland Police detectives Benjamin McCully and Gerald Crayton and the appellant. Detective McCully testified that he had been assigned to the Fifth District Vice Unit for the previous nine months, prior to which he was a patrol officer for 18 years. He said he had made 200 to 300 drug arrests in his career.

{¶ 5} McCully was working a shift from 7:00 p.m. to 3:00 a.m. on the evening of December 17, 2008 conducting a "buy/bust" operation with an informer.[1] This informer had been working with the vice unit for six years. "[H]undreds" of arrests had been made based on the information she provided. McCully had also worked with her before.

{¶ 6} McCully met with the informer at the Fifth District police station, where the informer was searched and found to be free from drugs, money, and contraband. McCully gave her "buy money" that had been previously

[1]The police witnesses in this case referred to the informer as a "confidential reliable informant" or CRI. "We note that attorneys liberally refer to those that aid the police in controlled drug buys as confidential informants or confidential reliable informants. However, the use of these terms implicates the law having to do with the issuance of warrants, reasonable suspicion of criminal activity, and probable cause, leading inexorably to Fourth Amendment issues of whether an informant is reliable, what makes him reliable, whether his identity can be revealed, etc." *State v. Mansaray*, Cuyahoga App. No. 90647, 2009-Ohio-1237, fn. 1. These matters are not at issue here.

photocopied. McCully took her to the area of Parkwood and Columbia and let her out of the vehicle. The informer approached two men on a corner. McCully saw her talking to them. He then saw a black Chevrolet Cobalt pull up to the curb, approximately ten feet from the informer and the two men. He heard the appellant, who was in that vehicle, say something but he could not hear exactly what he said. The informer returned to McCully's car approximately two minutes later and told McCully that the appellant had asked the two men, "what she need?" The informer told McCully that "that meant that he had some drugs on him." McCully also interpreted appellant's statement to mean that "he had drugs and whatever she needed, he would sell to her."

{¶ 7} McCully was working with two other officers in take-down cars. He instructed one of the take-down cars to arrest a male who had sold drugs to the informer. He instructed the other car to pull the Cobalt over "because he had drugs."

{¶ 8} Detective Crayton testified that he was the sole officer in the take-down car that stopped appellant. Crayton had been a vice detective for 16 years, and had made "thousands" of drug arrests, 80%-85% of which involved crack cocaine. He stopped appellant's car on a radio instruction from Detective McCully that "this male possibly had drugs on him." He asked appellant to step out of the vehicle and patted him down. He discovered a

metal pipe containing crack cocaine residue in appellant's front coat pocket. Detective Crayton, through his experience, recognized that it was a crack pipe by feel.

{¶ 9} Appellant testified that he pulled his car to the curb to drop someone off at a store, and immediately left. He saw two men there, but did not see a woman. He did not say anything to anyone.

{¶ 10} At the conclusion of the hearing, the court found that the police had sufficient information to justify a *Terry* stop, because appellant pulled up next to the informer, a person he did not know, in an area known for its high level of drug activity and asked what she needed. The court found that this information "was enough to allow the police to investigate further and make the stop."

Law and Analysis

{¶ 11} Appellate review of a trial court's ruling on a motion to suppress presents a mixed question of law and fact. We must accept the trial court's findings of fact as true if competent, credible evidence supports them, but must independently ascertain whether those facts satisfy the applicable legal standard. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8, 797 N.E.2d 71.

{¶ 12} The state argues that the police conducted a valid investigatory stop of appellant's vehicle under *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct.

1868, 20 L.Ed.2d 889 and its progeny. An investigatory stop is justified if, under the totality of the circumstances, the police have a reasonable suspicion based on specific and articulable facts that the person is or has been involved in criminal activity. Id., at 21.

{¶ 13} Appellant's presence in an area with a high level of drug activity, while not enough in itself to create a reasonable suspicion, was certainly one factor the officers could consider. See *State v. Bobo* (1988), 37 Ohio St.3d 177, 179, 524 N.E.2d 489. Appellant pulled up in his vehicle and spoke to the two men who were speaking to the informer, indicating that he may have known the men. Appellant asked the men "what she need?" demonstrating that he knew or suspected that the informer was trying to get something from them. These facts, combined with the fact that the informer actually purchased narcotics from one of the men on the corner, could have led a reasonable police officer to believe that the appellant was expressing an interest in helping with a drug transaction.

{¶ 14} The difficulty here is that the appellant did not actually consummate or attempt to consummate a drug transaction. He did not sell or even explicitly offer to sell drugs to the informer or the men. There is no evidence that appellant was going to engage in a drug transaction elsewhere. In other words, the police did not have a reasonable suspicion that appellant

trafficked drugs or was in the process of trafficking. Therefore, they could not have stopped his vehicle to investigate potential trafficking.

{¶ 15} The state argues that appellant's inquiry ("[w]hat she need?") led the police to reasonably suspect that the appellant possessed drugs and was willing to sell them.[2] However, we find the suspicion that appellant had drugs in his possession, based only on his expressed interest in a drug transaction, to be attenuated and therefore unreasonable. While we recognize that we must give some deference to the judgment of experienced police officers like the ones involved here, we cannot abandon our own common sense. There are many possible ways in which appellant could have helped the informer to obtain drugs. It is not reasonable to infer that a person inquiring about a drug transaction actually possesses drugs, at least without evidence of an explicit offer to sell. We find that the officers did not have a reasonable suspicion that appellant possessed drugs sufficient to allow them to conduct an investigatory stop of appellant's vehicle. There is no evidence that the appellant engaged in any traffic violations, or that the police had any other justification for stopping him.

[2]Officer McCully testified that in his experience as an officer, persons who offer to sell drugs "often have drugs on their person." He also said that, "[p]robably 99% of the time," when he receives information "of such a comment that an individual made," that person is arrested with drugs on their person.

{¶ 16} We must agree with appellant that the police had neither probable cause nor a reasonable suspicion of criminal activity sufficient to justify them in stopping his car. The crack pipe the police discovered when they frisked appellant's person during this stop was therefore inadmissible.

{¶ 17} Accordingly, we vacate the appellant's conviction and no contest plea, reverse the court order overruling the motion to suppress, and remand for further proceedings.

{¶ 18} Judgment vacated, order overruling motion to suppress reversed, and case remanded for further 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.

KENNETH A. ROCCO, PRESIDING JUDGE

CHRISTINE T. McMONAGLE, J., and
ANN DYKE, J., CONCUR