

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93918

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

ROBERT THOMAS

DEFENDANT-APPELLEE

**JUDGMENT:
REVERSED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-523606

BEFORE: Cooney, J., Boyle, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: September 2, 2010

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COLLEEN CONWAY COONEY, J.:

{¶ 1} Plaintiff-appellant, state of Ohio (“State”), appeals the trial court’s decision granting the motion to suppress filed by defendant-appellee, Robert Thomas (“Thomas”). We find merit to the appeal and reverse.

{¶ 2} In April 2009, Thomas was charged with drug trafficking, drug possession, and possessing criminal tools.¹ In May 2009, Thomas filed a motion to suppress, in which he argued that the evidence obtained by Cleveland police Detective Jeffrey Yasenchack (“Yasenchack”) was illegally seized because the officer did not have probable cause to search his car. The trial court held a hearing on the motion, at which the following evidence was adduced.

{¶ 3} Yasenchack testified that on the evening of April 2, 2009, while conducting surveillance on Benham Avenue in Cleveland, he observed a blue Chevy Impala fail to come to a complete stop at a stop sign and then turn northbound on East 140th Street. Yasenchack stopped the car for the traffic violation and, as he approached the driver, who was later identified as Thomas, he noticed Thomas frantically reach for something on the floor and place it in the center console. When he asked Thomas for his driver’s license,

¹Each count carried several forfeiture specifications. The drug trafficking charge also carried a schoolyard specification, alleging that the offense occurred within 1000 feet of a school building or premises.

Thomas appeared unusually nervous for a routine traffic stop. This particular neighborhood was known for its high volume of drug activity.

{¶ 4} Yasenchack testified that having seen the furtive movements, coupled with Thomas's nervousness and the high crime area, he was concerned that Thomas had a weapon in the center console of the car. He further testified that in this situation, an officer has two options to ensure his safety: either remove the driver from the car or return to his zone car and call for assistance. Yasenchack chose to remove Thomas from the vehicle because he believed it would be dangerous to leave him in the car in close proximity to a possible weapon. Yasenchack patted down Thomas, handcuffed him, and placed him in the rear of the zone car. He then returned to Thomas's vehicle and searched the center console where he discovered a digital scale and a small baggie, both of which contained what appeared to be cocaine residue.

{¶ 5} Yasenchack placed the scale and the baggie in a "drug bag" in the zone car, advised Thomas of his *Miranda* rights, placed him under arrest, and returned to perform a more thorough search of Thomas's car where he found a bag of powder cocaine in the headliner.

{¶ 6} The trial court granted the motion to suppress, finding that although Yasenchack's concern for his safety was justified based on his

observations, training, and experience, once he had secured Thomas in his zone car, the danger associated with the weapon was removed such that the subsequent search of the vehicle was illegal. The State appeals, raising one assignment of error.

{¶ 7} In its sole assignment of error, the State argues that the trial court erred when it found that Yasenchack was not permitted to search Thomas's vehicle for a concealed weapon prior to allowing Thomas to reenter the vehicle.

{¶ 8} The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures. *United States v. Hensley* (1985), 469 U.S. 221, 226, 105 S.Ct. 675, 83 L.Ed.2d 604. Accordingly, in order to warrant a brief investigatory stop, a police officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio* (1968), 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889. Reasonable suspicion connotes something less than probable cause, but something more than an "inchoate and unparticularized suspicion or hunch." *Id.* at 27.

{¶ 9} During a legitimate investigative stop, if a police officer has a reasonable suspicion that an individual is armed, the officer may conduct a

limited protective search for the safety of the officer and the public. *State v. Bobo* (1988), 37 Ohio St.3d 177, 524 N.E.2d 489, paragraph two of the syllabus. The reasonableness of both an investigatory stop and a protective search must be viewed in light of the totality of the circumstances. *Bobo* at paragraph two of the syllabus.

{¶ 10} Further, when the suspect is an occupant of an automobile, police may search those areas of the passenger compartment that could contain a weapon if police have a reasonable articulable suspicion that the suspect is dangerous or may gain immediate control of weapons. *Bobo* at paragraph two of the syllabus.

{¶ 11} In *Bobo*, the court held that police officers reasonably stopped and searched the defendant based on seven factors: (1) the high-crime area where weapons were prevalent; (2) it was nighttime, when weapons could be easily hidden; (3) one officer's extensive experience with drug and weapon activity; (4) the officer's knowledge of how drug transactions occurred in that area; (5) the officer's observations of the defendant's movements, which seemed to indicate that he had hidden something under the front seat of the car; (6) the officer's experience in recovering weapons or drugs after observing such

furtive movements; and (7) the officers were out of their vehicle and away from protection if defendant had been armed. *Bobo* at 179.

{¶ 12} Under the totality of the circumstances test, police officers are permitted to “draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that ‘might well elude an untrained person.’” *United States v. Arvizu* (2002), 534 U.S. 266, 122 S.Ct. 744, 151 L.Ed.2d 740, quoting *United States v. Cortez* (1981), 449 U.S. 411, 418, 101 S.Ct. 690, 66 L.Ed.2d 621; *Bobo* at paragraph one of the syllabus, citing, *State v. Freeman* (1980), 64 Ohio St.2d 291, 414 N.E.2d 1044. Thus, a court reviewing an officer’s reasonable suspicion determination must give due weight to the officer’s trained eye and experience and view the evidence through the eyes of law enforcement. *Id.* See, also, *State v. Andrews* (1991), 57 Ohio St.3d 86, 87-88, 565 N.E.2d 1271.

{¶ 13} In reviewing a trial court’s ruling on a motion to suppress, a reviewing court must keep in mind that weighing the evidence and determining the credibility of witnesses are functions for the trier of fact. *State v. DePew* (1988), 38 Ohio St.3d 275, 277, 528 N.E.2d 542. A reviewing court is bound to accept those findings of fact if supported by competent, credible evidence. *State v. Curry* (1994), 95 Ohio App.3d 93, 96, 641 N.E.2d

1172, citing, *State v. Schiebel* (1990), 55 Ohio St.3d 71, 564 N.E.2d 54. A reviewing court, however, must decide de novo whether, as a matter of law, the facts meet the appropriate legal standard. *Id.* See, also, *State v. Claytor* (1993), 85 Ohio App.3d 623, 627, 620 N.E.2d 906.

{¶ 14} Here, Yasenchack testified that he observed Thomas reach down to the floor of the car and then frantically hide something in the center console as he approached Thomas's vehicle. Yasenchack, who was patrolling alone, was aware that this was a high crime area with considerable drug activity because he had personally made numerous drug arrests in this neighborhood. Yasenchack explained that he had previously recovered weapons from the center console in other arrests. He also stated that Thomas's voice sounded nervous and his hands were shaking when he asked Thomas for his driver's license. Based on these observations, the high crime area, and his past experience and training, Yasenchack suspected that Thomas had a weapon in the center console of his car. And as the State has argued, once Thomas was issued a traffic citation, he would be returning to his vehicle and have access to the console.

{¶ 15} In *Bobo*, the Ohio Supreme Court held that police officers' observations of a suspect bending down as if to place something under the

front seat of the car was enough to justify an investigative stop of the driver and search of the passenger compartment of the vehicle. *Bobo*, 37 Ohio St.3d 177 at 180. The *Bobo* court also explained that: “‘The reputation of an area for criminal activity is an articulable fact upon which a police officer may legitimately rely’ in determining whether an investigative stop is warranted. *United States v. Magda* (C.A.2, 1976), 547 F.2d 756, 758, cert. denied (1977), 434 U.S. 878, 98 S.Ct. 230, 54 L.Ed.2d 157.” *Id.* at 179.

{¶ 16} In granting the motion to suppress, the trial court found that once Yasenchack removed Thomas from the vehicle and thus away from any weapon that might be in the console, there was no longer any danger that would justify a *Terry* search for weapons. However, as the United States Supreme Court explained:

“Protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger. Roadside encounters between police and suspects are especially hazardous, and danger may arise from the possible presence of weapons in the area surrounding the suspect. Thus, the search of the passenger compartment of an automobile, limited to those areas on which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant the officer to believe that the suspect is dangerous and the suspect may gain immediate control of weapons.”

Michigan v. Long (1983), 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201, paragraph two of the syllabus.

{¶ 17} Therefore, we find that Yasenchack articulated specific and articulable facts that justified his suspicion that Thomas possessed a weapon in the center console of his car and that justified his search. Having found contraband in the console, his expanded search of the passenger compartment of the vehicle for additional drugs and weapons was also justified. The *Michigan v. Long* court further held that:

“If, while conducting a legitimate *Terry* search of the interior of the automobile, the officer should, as here, discover contraband other than weapons, he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances.” (Citations omitted.)

Id. at 1050.

{¶ 18} Therefore, the State’s sole assignment of error is sustained.

{¶ 19} Judgment is reversed and case remanded.

It is ordered that appellant recover of said 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.

COLLEEN CONWAY COONEY, JUDGE

MARY J. BOYLE, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR