[Cite as *State v. Houser*, 2010-Ohio-4246.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93179

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOSEPH HOUSER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED AND REMANDED

Criminal Appeal from the

Cuyahoga County Court of Common Pleas
Case No. CR-493723

BEFORE: McMonagle, P.J., Stewart, J., and Cooney, J.

RELEASED AND JOURNALIZED: September 9, 2010

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CHRISTINE T. McMONAGLE, P.J.:

{¶ 1} Defendant-appellant, Joseph Houser, appeals the trial court's denial of his motion to suppress. We affirm, but remand with an order that the trial judge record her denial of the motion upon the docket.

I.

{¶ 2} Houser was indicted on one count of drug trafficking with a schoolyard specification and one count of possessing criminal tools. He filed a motion to suppress; a hearing was held, and the trial court denied the motion.[1] Houser pleaded no contest to both charges; the trial court found him guilty of drug trafficking with the schoolyard specification, but not guilty of possessing criminal tools. He was sentenced to seven months of community control sanctions.

II.

{¶ 3} The Maple Heights police were dispatched to the area of 20015 Stockton Avenue after receiving an anonymous call about several suspicious males. In particular, one of the responding officers, Officer Halley, testified that he was informed that "several males [were] hanging out at the end of a dead-end street sitting on the guardrail, possibly up to some kind of illegal activity, either doing drugs, selling drugs, something like that." Officer

[1]The trial court orally denied the motion on the record, but did not put forth a judgment entry memorializing that denial.

Halley testified that upon arriving in the area, he "observed two males sitting on the guardrail." According to Officer Halley, no one else was in the area.

{¶ 4} Officer Halley approached the two males — one was Houser and the other was David Atkins. Atkins initiated conversation with the officer, saying that he and Houser were "just hanging out." By that time, another officer, Officer Tuzi, had arrived and asked Houser and Atkins for their identifications; both complied. Officer Halley testified that up until that point the two were not in custody and were free to leave at any time.

{¶ 5} A check on Atkins and Houser revealed that Houser had an outstanding warrant. He was therefore arrested and searched incident to arrest. Two cell phones and 14 small bags of marijuana were recovered during the search.

{¶ 6} Houser testified that the police approached him and Atkins in an "aggressive" manner and told him (Houser) to "come here." He could not remember if Atkins or the police initiated the conversation. Houser also testified that it was his belief that "when an officer asks you for your identification, you have to comply." Houser further testified that the officers did not present their request for identification as optional.

III.

{¶ 7} A motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶8. "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." (Internal citations omitted.) Id.

{¶ 8} It is apparent that the trial court accepted the testimony of the officers, and not Houser.

IV.

{¶ 9} Officer Halley testified that he was informed that "several males [were] hanging out at the end of a dead-end street sitting on the guardrail, possibly up to some kind of illegal activity, either doing drugs, selling drugs, something like that." Upon arriving in the area, the officer "observed two males sitting on the guardrail"; no one else was in the area. On these facts, it was permissible for Officer Halley to approach the men. The police asked them for identification. There is no seizure when an officer asks only for

identification. *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt Cty.* (2004), 542 U.S. 177, 186, 124 S.Ct. 2451, 159 L.Ed.2d 292.

{¶ 10} In *Florida v. Bostick* (1991), 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389, the United States Supreme Court ruled that the police may ask for identification of a citizen so long as they do not convey the message that compliance with their request is required. Id. at 434-435. The determination of whether a person's encounter with the police was consensual or the result of police coercion is a question of fact to be determined by the totality of the circumstances. *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 227, 93 S.Ct. 2041, 36 L.Ed.2d 854. We afford deference to the trial court's findings of fact. *State v. Dillard*, 173 Ohio App.3d 373, 2007-Ohio-5651, 87 N.E.2d 694, ¶28.

{¶ 11} Factors to be considered in determining whether a person's actions are voluntary include whether: (1) the person was informed of the right not to comply with the officer's request; (2) there was a show of force by the officer; (3) the officer used language or a tone of voice indicating that the compliance with the request might be compelled; (4) there was the threatening presence of several officers; (5) there was a display of a weapon by an officer; (6) the officer was in uniform or had identified himself as an officer; and (7) there was physical touching by the officer. *State v. Bryant* (May 30, 1991), Cuyahoga App. No. 58621.

{¶ 12} Here, there was no physical touching, particular show of force, or display of a weapon. On the other hand, Houser was not informed of his right not to comply, there was more than one officer, and both officers were apparently in uniform. In what could only be described as "a close call," the trial judge concluded that the factors mitigated in favor of a consensual encounter, and we cannot say that this conclusion was unmerited under these facts. Although Houser testified that he did not feel free to leave, he explained that was based upon his "understanding" of the law, as opposed to anything the officers did or said. We hence conclude that the encounter with the police up until and through the request for identification was consensual, and the Fourth Amendment was not implicated.

{¶ 13} We have misgivings, however, about the actions of the officers in "running" the identification. This case is unusual in that there was, at the time the officer took Houser's identification, no apparent probable cause to arrest or reasonable suspicion of any criminal activity. That Houser was free to leave when the officer walked away with his identification is specious. Nonetheless, the police did discover an active warrant for Houser, and the search complained of did not occur until *after* Houser's arrest on the outstanding warrant. In short, the search was conducted after a lawful arrest pursuant to a warrant. Even if the detention were at some point illegal, the existence of the warrant and the search pursuant to arrest on that warrant was valid.

{¶ 14} In light of the above, the trial court properly denied Houser's motion to suppress.

Judgment affirmed; case remanded for memorialization of the trial court's judgment.

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. Case remanded to the trial court for further proceedings consistent with this opinion and for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. McMONAGLE, PRESIDING JUDGE

MELODY J. STEWART, J., CONCURS;
COLLEEN CONWAY COONEY, J., CONCURS IN JUDGMENT ONLY