[Cite as *State v. Agee*, 2010-Ohio-5074.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94035

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LYJESTA AGEE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED; REMANDED
FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-519395

BEFORE: Sweeney, J., Kilbane, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: October 14, 2010

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JAMES J. SWEENEY, J.:

{¶ 1} After entering pleas of no contest to charges of drug trafficking, drug possession, and possession of criminal tools, defendant-appellant, Lyjesta Agee, appeals from the trial court order that denied his motion to suppress evidence.

{¶ 2} Agee presents one assignment of error, arguing that the sheriff's deputies were not justified in stopping the vehicle he drove, so the trial court's order should be reversed.

{¶ 3} Upon a review of the record, this Court disagrees. Nevertheless, the trial court erred in convicting Agee of both drug trafficking and drug possession. *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d

182; R.C. 2954.21(A). The trial court's order, therefore, is affirmed, but this case is remanded for resentencing pursuant to the directive set forth in *Whitfield*.

{¶ 4} The state presented only one witness at the suppression hearing. Det. Joseph Zickes testified that he had been employed by the Cuyahoga County Sheriff's Office for nearly 16 years. On the afternoon of July 29, 2008, he and his partner, Sgt. Rivera, were "working some warrants" in the "Detroit shoreway area" of Cleveland.

{¶ 5} Zickes stated that they were traveling westbound on Lawn Avenue when they observed some activity occurring approximately 30 to 40 feet in front of them. "[A] black male exit[ed] the passenger side of [a] Ford Expedition, * * * approach[ed] a black female a short distance away. They both put their hand out as [if] to make a transaction." However, the male, later identified as co-defendant, Dionte Bennett, gave "one last look to see if anyone was around."

{¶ 6} At that point, Bennett "noticed the police vehicle" approaching. He "abruptly pulled his hand away and darted back into the Ford Expedition." Zickes and Rivera decided to make a traffic stop. They activated the lights and siren of their vehicle and pulled up to the rear of the Ford.

{¶ 7} Zickes stated that, as they "ran the plate," they observed "a lot of furtive movement between the driver and the passenger." The driver was later identified as Agee. Accordingly, they approached the Ford "quickly" and with "caution," with their weapons drawn. Zickes testified they "identified

[them]selves as police officers and [they] asked [Agee] to shut [the] vehicle off and for both of them to show their hands."

{¶ 8} Agee and Bennett both complied, but Zickes did not wait. Zickes "opened the [passenger] door to extract them when [he] noticed crack cocaine on the passenger side of the floor board." The men were placed under arrest. The pat-down search of Agee yielded a "wad of cash" that totaled over $1,000 dollars.

{¶ 9} Agee and Bennett subsequently were indicted together on three counts, and charged with drug trafficking, drug possession, and possession of criminal tools. Each count contained additional specifications.[1]

{¶ 10} Agee filed a motion to suppress evidence, contending that the sheriff's deputies lacked a legitimate basis to conduct a stop.[2] The trial court conducted an oral hearing on the motion, but ultimately denied it with a written opinion. The trial court determined, based upon the "totality of the circumstances," the deputies' stop and search was based upon a "reasonable suspicion" that criminal activity was taking place, and, therefore, was justified.

{¶ 11} Thereafter, Agee pleaded no contest to the charges. The trial court found him guilty on each count, and imposed concurrent sentences of, respectively, ten months, six months, and six months.

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[1]Most were forfeiture specifications, but Count 1 also included a schoolyard specification.

[2]The record fails to reflect Agee actually filed his written motion, although it

{¶ 12} Agee appeals from the trial court's order that denied his motion to suppress evidence with the following assignment of error.

{¶ 13} "I. The evidence in the present case was obtained as a result of an unreasonable search and seizure in violation of the Fourth Amendment to the Constitution of the United States and Article I, Sec. 14 of the Constitution of the State of Ohio."

{¶ 14} Agee argues that the trial court incorrectly applied the law to the facts of this case. He contends the deputies lacked a basis upon which to conduct their stop and search, citing as authority for his position this court's decision in *State v. Pettegrew*, Cuyahoga App. No. 91816, 2009-Ohio-4981. The facts of this case, however, are distinguishable.

{¶ 15} In *Pettegrew*, a police officer observed the defendant sitting in the driver's seat of a car parked in a high drug activity area, when a man reached into the driver's side window. Police subsequently recovered one rock of crack cocaine from the defendant. At the defendant's suppression hearing, the officer labeled what he saw as a "hand-to-hand interaction." This Court reversed the trial court's denial of the motion to suppress, stating that "[l]abeling the behavior is not sufficient as a matter of law." *Pettegrew*, ¶21.

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appears that he supplied one to the court and to the prosecutor.

{¶ 16} In the instant case, however, Agee made sudden, furtive movements after seeing the police vehicle. This, coupled with the high drug area and the officer's experience, lead to reasonable suspicion that criminal activity was afoot.

{¶ 17} 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.

{¶ 18} Both the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution prohibit warrantless searches and seizures, rendering them, per se, unreasonable, unless an exception applies. *State v. Andrews* (1991), 57 Ohio St.3d 86, 565 N.E.2d 1271. An investigative stop, as set forth in *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, is a common exception to the warrant requirement.

{¶ 19} Under *Terry*, both the stop and seizure must be supported by a "reasonable suspicion" of criminal activity. A valid investigative stop must be

based on more than a mere "hunch" that criminal activity is afoot. *State v. Scales*, Cuyahoga App. No. 87023, 2006-Ohio-3946, ¶9, citing *United States v. Arvizu* (2002), 534 U.S. 266, 122 S.Ct. 744, 151 L.Ed.2d 740. Nevertheless, a reviewing court should not demand hard certainty from law enforcement officers. *Andrews*, at fn. 2.

{¶ 20} In deciding whether reasonable suspicion exists, courts must examine the "totality of the circumstances" of each case in order to determine whether the detaining officer had an objective basis for suspecting criminal activity. *State v. Bobo* (1988), 37 Ohio St.3d 177, 524 N.E.2d 489, citing *State v. Freeman* (1980), 64 Ohio St.2d 291, 414 N.E.2d 1044. Under this approach, 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. *Scales*, ¶11.

{¶ 21} 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. *Andrews*, at 87-88. The question that must be answered is whether the facts available to the officer at the moment of the stop support a person of reasonable caution in the belief that the action taken was appropriate. *Terry* at 21-22.

{¶ 22} In this case, Zickes testified the area in which he and his partner were traveling was a "federally-designated area of high drug activity and high

crime." He further stated that he has 16 years of experience as an officer and had conducted "a lot of controlled buys" in his career. Zickes observed Bennett approaching a woman, who had her hand outstretched as if ready to receive an item from him. Just before handing her something, however, Bennett looked around. Upon spotting the deputies' vehicle, he stopped his action, turned abruptly, and hurried back to Agee's SUV.

{¶ 23} This Court has commented that "nervous, evasive behavior" constitutes a "pertinent factor" in determining the existence of reasonable suspicion. *State v. Davis*, Cuyahoga App. No. 89530, 2008-Ohio-322, ¶12. In light of the character of the area and Zickes's experience, and when the aborted hand-to-hand transaction was added, Bennett's behavior also served to supply a basis upon which to detain the occupants of the Ford Expedition for further investigation. Id.; see, also, *State v. Burnett*, Franklin App. No. 02AP-863, 2003-Ohio-1787, appeal not allowed, *State v. Burnett*, 99 Ohio St.3d 1515, 2003-Ohio-3957, 792 N.E.2d 201; cf., *Pettegrew*; *State v. Hodges*, 183 Ohio App.3d 160, 2009-Ohio-3378, 916 N.E.2d 527.

{¶ 24} Once the deputies stopped the Ford Expedition, they saw the occupants moving as if to hide something. This activity caused concern; Zickes testified they approached the vehicle with "caution." Thus, the deputies also were justified in "extracting" Agee and Bennett from the vehicle for purposes of officer safety. *Bobo*, at 180-181; see, also, *State v. White*, Cuyahoga App. No.

93109, 2010-Ohio-521. Zickes further testified the crack cocaine was in plain view on the floor of the vehicle. *State v. Greathouse*, Cuyahoga App. No. 90078, 2008-Ohio-3023

{¶ 25} Based upon the record, the trial court correctly denied Agee's motion to suppress evidence. Agee's sole assignment of error, accordingly, is overruled.

{¶ 26} However, since the trial court committed plain error pursuant to R.C. 2945.21(A) in convicting and sentencing Agee for the allied offenses of drug trafficking and drug possession, this case is remanded for a resentencing hearing consistent with the Ohio Supreme Court's decision in *Whitfield*.

Judgment affirmed; cause remanded for further proceedings consistent with this opinion.

It is ordered that appellee recover from appellant its 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.

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

JAMES J. SWEENEY, JUDGE

MARY EILEEN KILBANE, P.J., and
MARY J. BOYLE, J., CONCUR