[Cite as *State v. Turner*, 2010-Ohio-6475.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94617

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

BYRON TURNER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-526276

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

RELEASED AND JOURNALIZED: December 30, 2010

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KENNETH A. ROCCO, P.J.:

{¶ 1} Defendant-appellant Byron Turner appeals from his conviction after a bench trial for carrying a concealed weapon.

{¶ 2} Turner presents four assignments of error. He claims the trial court erred in denying his motion to suppress evidence discovered as a result of two separate searches, he was denied his right to confront witnesses, and his conviction is not supported by sufficient evidence.

{¶ 3} Upon a review of the record, this court cannot find any error occurred. Consequently, Turner's conviction is affirmed.

{¶ 4} Turner's conviction results from an aborted "buy/bust"[1] operation conducted by detectives of the Cleveland police department's Fourth District Vice Unit at approximately 9:00 p.m. on July 1, 2009. According to the testimony presented at both the hearing on Turner's motion to suppress evidence and at trial, the detectives had received numerous complaints of drug activity occurring at the house located at 11334 Cotes Avenue. Turner's uncle, Carl Vincent, owned the house.

{¶ 5} Det. Luther Roddy prepared a confidential reliable informant ("CRI") to make a drug purchase, drove him into the neighborhood, and dropped him off. Roddy then parked his undercover vehicle in a location from which he could observe the CRI. Other detectives also had stationed their vehicles in the area; they were either observing the CRI from a different angle or awaiting instructions.

{¶ 6} Roddy watched the CRI walk to the house and proceed up the driveway. Several men stood near the driveway and on the house's porch. The CRI spoke to a man later identified as Turner.

{¶ 7} Det. Michael Rasberry saw the CRI engage in a brief conversation with Turner, who "displayed" a "dark object" that was "kind of like on the side of their [sic] waistband" of his shorts. The CRI "seemed a little nervous" and "backed up immediately" and left the area.

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[1]Quotes indicate testimony presented to the trial court.

{¶ 8} When the CRI returned to Roddy's vehicle, he indicated that Turner "had a gun and told him to get out of there." Roddy called Rasberry's cell phone to advise him "they just pulled a gun on the informant." At that point, Roddy left with the CRI, and Rasberry notified the other units of "what had transpired"; i.e., that one of the men "had a gun." The "takedown units" immediately responded, converging on the house.

{¶ 9} Dets. Frank Woyma and Thomas Barnes were together in one of the units. As Woyma drove around the corner toward the house, Turner "reached into his waistband and handed an object" to a man later identified as Deon Bulger. Bulger "just took off running into the house" as the takedown units sped toward them.

{¶ 10} Woyma and Barnes stopped, emerged from their vehicle with their guns drawn, and ordered all the men standing outside the house to the ground. While the men, including Turner, were handcuffed, "frisked," and detained by some of the detectives, Woyma, Barnes, and several of the others went into the house. They discovered Vincent was present, lying on the living room couch. Bulger lay behind it, as if sleeping.

{¶ 11} Woyma told Vincent the reason for the intrusion. Vincent "told [them] to go and search the house." Barnes started in the kitchen, where he found a digital scale, then proceeded into the basement. He noticed "a panel that was missing that was off" of the furnace "right in the middle" of the room.

Barnes looked inside, and saw "on the cement underneath the coils" of the furnace a ".9 millimeter" gun and two bags of crack cocaine. The gun contained a total of 9 rounds of live ammunition.

{¶ 12} Barnes took the contraband into evidence, then placed Bulger and Turner under arrest. Before the detectives left the area, however, an elderly woman, Vivian Chambers, approached them while they were outside; she asked "why her grandson Byron Turner was arrested." Barnes explained.

{¶ 13} At that time, Chambers told Woyma and Barnes that Turner lived with her; she "asked Detective Barnes if he could search * * * Mr. Turner's room in her home to make sure there were no more drugs or guns in [her] house." Chambers led the detectives to her nearby residence, showed them to Turner's bedroom, and watched as they performed a search. In looking through a dresser drawer and a closet, Woyma discovered "two boxes of bullets." One of the boxes contained ".9 millimeter shells, Blazer ammunition, and that ammunition matched the gun that was recovered" from the basement of Vincent's house.

{¶ 14} Turner subsequently was indicted with Bulger, but was charged in only Counts 5 and 6 with, respectively, carrying a concealed weapon and tampering with evidence. Count 5 contained a forfeiture specification, and Count 6 contained a firearm specification.

{¶ 15} Turner and Bulger joined in a motion to suppress evidence gained from the searches of the Cotes Avenue house and Chambers's house. Following the hearing, the trial court denied the motion.

{¶ 16} The case proceeded to a bench trial. After considering the evidence, the trial court found Turner guilty on Count 5, with the forfeiture specification, but not guilty on Count 6. Turner received a prison sentence of 14 months.

{¶ 17} Turner presents four assignments of error in his appeal of his conviction, as follows.

{¶ 18} "I. The trial court erred when it failed to grant the Appellant's motion to suppress evidence.

{¶ 19} "II. The trial court erred when it failed to grant the Appellant's motion to suppress evidence found in the Appellant's bedroom.

{¶ 20} "III. The trial court erred when the Appellant was improperly prohibited from challenging a witness, in violation of his constitutional right to confront and cross-examine the witness against him.

{¶ 21} "IV. The evidence was insufficient as a matter of law to support a finding beyond a reasonable doubt that Appellant was guilty of carrying a concealed weapon."

{¶ 22} In his first assignment of error, Turner argues that the detectives lacked a reasonable basis to conduct a stop at and search of Vincent's house.

In his second assignment of error, Turner argues that Chambers's consent to the search of her house was not voluntary. Turner contends, therefore, the trial court should have granted his motion to suppress evidence gained from the searches. This court disagrees.

{¶ 23} Appellate review of a motion to suppress evidence 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. While the trial court assumes the role of the trier of fact in a hearing on a motion to suppress, and is in the best position to resolve issues regarding credibility of witnesses and the weight of the evidence, an appellate court's role is to determine whether those facts meet the appropriate legal standard. *In re: D.W.*, 184 Ohio App.3d 627, 2009-Ohio-5406, 921 N.E.2d 1114. Thus, the trial court's conclusions of law are reviewed de novo. *State v. Williams*, Cuyahoga App. No. 92822, 2010-Ohio-901, ¶7.

{¶ 24} The state bears the burden of proving that a warrantless search or seizure meets Fourth Amendment standards of reasonableness. *Maumee v. Weisner*, 87 Ohio St.3d 295, 297, 1999-Ohio-68, 720 N.E.2d 507. In the case of an investigative stop, this typically requires evidence demonstrating that the officer making the stop was aware of sufficient facts to justify it. Id., citing *Terry v. Ohio* (1968), 392 U.S. 1, 22, 88 S.Ct. 1868, 20 L.Ed.2d 889.

{¶ 25} Under *Terry*, police officers may temporarily detain individuals in order to investigate possible criminal activity as long as the officers have a

reasonable, articulable suspicion that criminal activity may be afoot. "Reasonable suspicion" entails some minimal level of objective justification for making a stop; this is something more than an inchoate and unparticularized suspicion or "hunch," but something less than the level of suspicion required for probable cause. Id.

{¶ 26} The appellate court determines if a reasonable suspicion existed by evaluating the totality of the circumstances, considering those circumstances through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold. *State v. Andrews* (1991), 57 Ohio St.3d 86, 87-88, 565 N.E.2d 1271. When an investigative stop is made in reliance upon a police dispatch, the state must demonstrate at a suppression hearing that the facts precipitating the dispatch justified a reasonable suspicion of criminal activity. *In re: D.W.*, supra. This can be accomplished if the state shows that the source had previously provided the officer information that proved to be correct. *Maumee v. Weisner*, supra. A stop is lawful if facts relayed are sufficiently corroborated to furnish reasonable suspicion that the defendant was engaged in criminal activity. Id.

{¶ 27} According to Roddy's testimony, the CRI had provided reliable information in the past. Roddy stated the CRI returned without the drugs because he saw a gun and was told to "get out of there." Rasberry testified that, in his observation of the CRI's brief encounter with Turner, Turner appeared to

display something in his waistband, which caused the CRI to act in a nervous manner and then to retreat. These actions caused Rasberry to believe the object in Turner's waistband was a gun.

{¶ 28} The detectives' suspicions became heightened when Turner handed the item in his waistband to Bulgar, who turned and fled into the house. With respect to the flight of a suspect, "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion. * * * Headlong flight—wherever it occurs—is the consummate act of evasion; [i]t is not necessarily indicative of wrongdoing, but it is certainly suggestive of such. In reviewing the propriety of an officer's conduct, courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior." *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, ¶47.

{¶ 29} Based upon the testimony presented at the hearing on Turner's motion to suppress evidence, the stop conducted at Vincent's house was reasonable. Id. Moreover, once the detectives went inside, Vincent gave his consent to search his house, and Turner, who did not reside there, lacked standing to challenge that search. *State v. Renner*, Clinton App. No. CA2002-08-033, 2003-Ohio-6550.

{¶ 30} A review of the record further demonstrates that Turner's grandmother was under no compulsion when she permitted the detectives to search her home. *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, ¶99-103; *State v. Jefferson*, Montgomery App. No. 22511, 2008-Ohio-2888. It is well established that a search conducted pursuant to a valid consent is constitutional where the consent is freely and voluntarily given. *Roberts*, ¶98, citing *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854. Chambers admitted during the suppression hearing that she willingly took the detectives into her home and upstairs to Turner's room.

{¶ 31} For the foregoing reasons, the trial court properly denied Turner's motion to suppress evidence. His first and second assignments of error, accordingly, are overruled.

{¶ 32} Turner argues in his third assignment of error that the trial court's decision to permit Roddy to testify concerning what he learned from the CRI violated Turner's Sixth Amendment right to confront the witnesses against him. Turner contends the CRI's statements constituted inadmissible hearsay.[2] He cites as authority for his argument *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177.

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[2]Evid.R. 801(C) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or the hearing, offered in evidence to prove the truth of the matter asserted."

{¶ 33} *Crawford*, however, limited its scope to "testimonial hearsay." Id. at 51. According to *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834, at paragraphs one and two of the syllabus, for purposes of the Confrontation Clause, a "testimonial" statement is one made "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," therefore, in determining whether a statement is "testimonial," courts should focus on the expectation of the declarant at the time of making the statement; the intent of a questioner is relevant only if it could affect a reasonable declarant's expectations.

{¶ 34} In this case, while acknowledging the CRI's statement might constitute hearsay, the trial court admitted the statement as an exception to the rule against hearsay pursuant to Evid.R. 803(1), a statement of "present sense impression." This court reviews evidentiary rulings for an abuse of the trial court's discretion. *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343.

{¶ 35} A trial court possesses broad discretion with respect to the admission of evidence, including the discretion to determine whether evidence constitutes hearsay, and whether it is admissible hearsay. *State v. Graves*, Lorain App. No. 08CA009397, 2009-Ohio-1133, ¶4. Whether or not the declarant is available as a witness, Evid.R. 803(1) permits the admission of statements "describing or explaining an event or condition made while the declarant was perceiving the

event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness."

{¶ 36} Therefore, of central concern to the admission of statements of present sense impression is the temporal proximity of statements to the event at issue. This is so because the principle underlying this hearsay exception is the assumption that statements or perceptions, describing the event and uttered closely in time to the event, bear a high degree of trustworthiness. Id.

{¶ 37} The key to the statement's trustworthiness is the spontaneity of the statement; it must be either contemporaneous with the event or be made immediately thereafter. A minimal lapse of time between the event and statement indicates an insufficient period to reflect on the event perceived; the declarant's reflection would detract from the statement's trustworthiness. *State v. Ellington*, Cuyahoga App. No. 84014, 2004-Ohio-5036, ¶10. When the statement is the "product of reflective thinking rather than spontaneous perception," Evid.R. 803(1) does not apply. *Graves*, citing *State v. Simmons*, 9th Dist. No. 21150, 2003-Ohio-721, at ¶35-36.

{¶ 38} The record reflects that Roddy and Rasberry both observed the CRI walk up the driveway, where he spoke briefly with Turner, who indicated a dark object in his waistband. The detectives saw the CRI suddenly back away; he returned to Roddy's car in "less than a minute," and, in answer to Roddy's question, "did you get anything," the CRI "immediately" answered negatively,

adding, “he pulled a gun on me and told me to get the f---- out of there, so I came right back to you.”

{¶ 39} Based upon the circumstances thus presented, this court cannot find the trial court abused its discretion in admitting this testimony. The CRI could not have expected his statement to be used as evidence at trial, and the lack of time between the event and the CRI’s statement indicates its trustworthiness. *State v. Travis*, 165 Ohio App.3d 626, 2006-Ohio-787, 847 N.E.2d 1237.

{¶ 40} Accordingly, Turner’s third assignment of error also is overruled.

{¶ 41} Turner argues in his fourth assignment of error that his conviction is not supported by sufficient evidence because the gun was not found in his possession, but, rather, was found poorly hidden in his uncle’s basement. Turner contends on this basis that the trial court should have granted his motion for acquittal on the charge of carrying a concealed weapon.

{¶ 42} A defendant’s motion for acquittal should be denied if the evidence is such that reasonable minds could reach different conclusions as to whether each material element of the crime has been proven beyond a reasonable doubt. *State v. Dennis*, 79 Ohio St.3d 421, 1997-Ohio-372, 683 N.E.2d 1096; *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492; *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184. The trial court is required to view the evidence in a light most favorable to the state. *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717.

{¶ 43} Under this analysis, circumstantial evidence alone may be used to support a conviction. *Jenks*. Circumstantial evidence is the proof of certain facts from which the trier of fact may infer other connected facts that usually and reasonably follow, according to the common experience of mankind. *State v. Duganitz* (1991), 76 Ohio App.3d 363, 601 N.E.2d 642. "[T]he circumstances, to have the effect of establishing an allegation of fact, must be such as to make the fact alleged appear more probable than any other; the fact in issue must be the most natural inference from the facts proved." Id.

{¶ 44} Turner was charged in this case with violating R.C. 2923.12(A)(2), which states in pertinent part that, "No person shall knowingly carry or have * * * concealed ready at hand * * * a handgun * * * ." This court has held that the state can establish this offense by presenting evidence of constructive possession. *State v. Tisdel*, Cuyahoga App. No. 87516, 2006-Ohio-6763, ¶26.

{¶ 45} Roddy and Rasberry both testified they saw Turner, who stood outside his uncle's house, show the CRI a dark object the size of "something that could be held in a hand" that was present in his waistband. The CRI quickly backed away and returned to Roddy's car, where he immediately told Roddy he did not purchase any drugs because Turner showed him a gun and told him to get out of there.

{¶ 46} As the "takedown" cars drove up, Turner took the object from his waistband and passed it to Bulger, who ran into Vincent's house. Det. Gordon

Holmes testified that he found Bulger in the living room a few minutes later, and when Holmes placed his hand on Bulger's chest, he felt Bulger's heart "beating really, really fast." Barnes soon found a gun in the basement; it was loaded and was the size, shape, and color of the object the detectives had seen Turner display in his waistband. Soon thereafter, Turner's grandmother led the detectives to her nearby house, where Barnes found bullets in Turner's bedroom that "exactly" matched the ones that the gun contained.

{¶ 47} Viewing this evidence in a light most favorable to the prosecution, reasonable minds could determine the state established the elements of the charge of carrying a concealed weapon. *State v. Lucic*, Cuyahoga App. No. 91069, 2009-Ohio-616.

{¶ 48} Turner's fourth assignment of error, accordingly, is overruled.

{¶ 49} His conviction is affirmed.

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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

JAMES J. SWEENEY, J., CONCURS
MARY J. BOYLE, J., CONCURS
IN JUDGMENT ONLY