[Cite as *State v. Taylor*, 2011-Ohio-1554.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94853

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DIAMOND TAYLOR

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-529406

BEFORE: S. Gallagher, J., Stewart, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: March 31, 2011

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SEAN C. GALLAGHER, J.:

{¶ 1} Appellant Diamond Taylor brings this appeal challenging the trial court's denial of her motion to suppress. For the reasons set forth herein, we reverse and remand.

{¶ 2} On October 6, 2009, a Cuyahoga County grand jury indicted Taylor on seven counts of an eight-count indictment, along with two codefendants. The charges included trafficking in drugs, drug possession,

failure to comply, tampering with evidence, and possession of criminal tools. On January 8, 2010, Taylor filed a motion to suppress. On February 22, 2010, after a jury was empaneled, the court excused the jury in order to hold a suppression hearing.

{¶ 3} At the suppression hearing, Detective Michael Rasberry testified that he and Detectives Thomas Barnes and David Gibson were in the area of Glendale Avenue and East 140th Street, on September 23, 2009, on vice patrol. They were driving an unmarked beige Ford Taurus, equipped with siren and lights. Det. Rasberry was driving eastbound on Glendale Avenue when the detectives approached a white SUV stopped in the traveling lane approximately six feet from the curb. It was in front of the last house on the south side of the street, near East 140th Street.

{¶ 4} When Det. Rasberry stopped the police vehicle behind the SUV, he noticed a male come off the front porch of the house, approach the SUV, and speak to the passengers. Det. Rasberry witnessed the male, later identified as Jimmy Moore ("Jimmy"), give the detectives a "curious" stare. Because the SUV was impeding traffic, Det. Gibson called out his window for the driver to move the vehicle. Det. Rasberry heard Jimmy say, "Oh, sh*t, that's the police." Jimmy then jumped in the backseat of the SUV, called out "[d]rive, drive," and the SUV pulled off down the street. Otherwise, the

detectives did not notice any suspicious behavior that suggested Jimmy and the occupants of the vehicle were engaged in criminal conduct.

{¶ 5} The detectives followed the SUV down Glendale and as it turned northbound on East 140th Street. Det. Rasberry stated that after the SUV took the turn, he activated his vehicle's siren and lights to pull it over for impeding the flow of traffic. At the next stop sign, the driver of the SUV, later identified as Myesha Moore ("Myesha"), looked out her window and appeared to observe the lights and siren. Nonetheless, Myesha proceeded through the stop sign two more blocks. Jimmy opened and closed the rear passenger door several times while the SUV was moving.

{¶ 6} Myesha turned westbound onto Southview Avenue. She stopped the SUV several houses from the corner, and Jimmy exited the vehicle and took off running. Det. Gibson and Det. Barnes exited their car and chased him. Det. Rasberry continued to follow the SUV until it stopped at the corner of Southview Avenue and East 136th Street, where he proceeded to remove Myesha and Taylor, who was the front-seat passenger.

{¶ 7} Det. Rasberry handcuffed Myesha, but he was unable to handcuff Taylor because he did not have an additional pair of handcuffs. He was able to identify both women, and he offered no evidence that either Taylor or Myesha was uncooperative in any way or refused to give their names. He placed both women in the rear seat of the Taurus, but neither was placed

under arrest. He also did not pat down Taylor and Myesha, but instead called for a female officer to respond to the scene for that purpose, citing Cleveland police protocol. He did state, however, that neither female appeared to have a weapon. He noticed that Taylor had a golf ball-sized bulge in the back of her shirt. Det. Rasberry drove his vehicle to meet up with Det. Barnes and Det. Gibson, who had apprehended Jimmy. Taylor and Myesha were detained for approximately 20 to 30 minutes, until Detective Vega, a female detective, arrived to pat down the women.

{¶ 8} When Det. Rasberry removed Taylor and Myesha from the rear of the police vehicle, he noticed that there was no longer a bulge in the back of Taylor's shirt. Upon inspection of the rear seat, he found a baggie containing suspected crack cocaine stuffed in between the seats in the location where Taylor had been sitting. It was the approximate size of the object Det. Rasberry had seen protruding from under Taylor's shirt when he placed her in the car. Taylor, Jimmy, and Myesha were placed under arrest.

{¶ 9} All three defendants filed motions to suppress the cocaine found in the police vehicle. At the hearing, only Det. Rasberry testified. The trial court denied Taylor's motion to suppress, and the trial commenced on the charges against Taylor.[1] The state dismissed Count 8 for possession of

[1] Both Jimmy and Myesha pleaded guilty to amended counts of the indictment. Only Taylor chose to proceed to trial.

criminal tools, and proceeded only on the trafficking, drug possession, and tampering charges.[2] The jury found Taylor not guilty of trafficking, and guilty of drug possession and tampering, without the forfeiture specifications. The trial court sentenced her to two years for possession and one year for tampering, to run concurrent.

{¶ 10} On appeal, Taylor cites one assignment of error for our review, which provides, "The trial court erred in denying the defendant's motion to suppress."

{¶ 11} "Appellate review of a motion to suppress presents a mixed question of law and fact. 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." (Citations omitted.) *State v. Burnside*, 100 Ohio St.3d 152, 154-155, 2003-Ohio-5372, 797 N.E.2d 71.

{¶ 12} The Fourth Amendment to the United States Constitution prohibits warrantless searches and seizures, rendering them per se

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[2] Both parties acknowledge that only Counts 1, 2, and 6 went forward to the jury.

unreasonable unless an exception applies. *Katz v. United States* (1967), 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576. An investigative stop, or *Terry* stop, is a common exception to the Fourth Amendment warrant requirement. *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. It is well recognized that officers may briefly stop and detain an individual, without an arrest warrant and without probable cause, in order to investigate a reasonable and articulable suspicion of criminal activity. Id.; see, also, *State v. Bobo* (1988), 37 Ohio St.3d 177, 524 N.E.2d 489. "The propriety of an investigative stop by a police officer must be viewed in light of the totality of the surrounding circumstances" as "viewed through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training." *State v. LeClair*, Clinton App. No. CA2005-11-027, 2006-Ohio-4958, quoting *State v. Freeman* (1980), 64 Ohio St.2d 291, 414 N.E.2d 1044, syllabus, and *Bobo,* 37 Ohio St.3d at 179.

{¶ 13} First, Taylor argues that the initial traffic stop was improper. Specifically, she argues that the arresting detectives violated R.C. 4549.13, which requires a police car used for traffic enforcement to be marked and distinguishable from other vehicles on the road. Taylor contends that since the detectives' beige Taurus was an unmarked car, they were not permitted to effectuate a traffic stop.

{¶ 14} The Seventh District addressed a similar issue in which a police chief in an unmarked car stopped a motorist after witnessing him commit a traffic violation. *State v. Lake*, Columbiana App. Nos. 08 CO 26 and 08 CO 27, 2009-Ohio-3057. The court held that "when officers * * * happen across a traffic violation and decide to make a stop for said violation, their status does not retroactively become on duty for the main purpose of enforcing traffic laws." Id. at ¶ 28.

{¶ 15} On September 23, Det. Rasberry and his fellow detectives were on vice patrol, and thus were driving in an unmarked car. They were dressed in clearly marked police clothing, which was visible through the windshield. When they initiated the traffic stop for impeding the flow of traffic, Det. Rasberry activated the car's lights and siren.

{¶ 16} The purpose of R.C. 4549.13 is "to avoid 'speed traps' where officers sit in unmarked cars in order to find traffic violators without being spotted. Another purpose is to avoid the situation where a driver has to debate whether to stop on the side of the road for an unmarked car, containing an unknown occupant, that seems to be trying to get his attention." (Internal citations omitted.) *Lake*, at ¶ 25.

{¶ 17} Neither of these concerns is raised here. In fact, it is clear from Det. Rasberry's testimony that Jimmy recognized the car as a police car as soon as Det. Barnes called out for the driver to move the vehicle.

{¶ 18} Taylor also argues that the detectives never really intended to stop the SUV for impeding the flow of traffic, but instead were using the stop as a "fishing expedition." Nonetheless, "the Ohio Supreme Court has determined stops based upon even minor traffic violations do not run afoul of the Fourth Amendment even if the stopping officer harbors an 'ulterior motive for making the stop, such as suspicion that the violator was engaged in more nefarious criminal activity.'" *State v. Hoskins*, Cuyahoga App. No. 80384, 2002-Ohio-3451, ¶ 13, quoting *Dayton v. Erickson* (1996), 76 Ohio St.3d 3, 665 N.E.2d 1091, syllabus. See, also, *State v. Gillenwater*, Cuyahoga App. No. 93845, 2010-Ohio-5476.

{¶ 19} The detectives observed the SUV impeding the flow of traffic on Glendale, and after following the vehicle around the corner, they also witnessed the driver exceed the posted speed limit and run a stop sign. We do not find that stopping the SUV for violating traffic laws was improper, even though the detectives were in an unmarked car.

{¶ 20} It is irrelevant whether Det. Rasberry had a reasonably articulated suspicion of criminal activity to justify a stop. Even so, he was able to articulate his suspicions based on the fact that they were in a high crime area, Jimmy made arguably suspicious comments before entering the SUV, the driver failed to stop after the detectives activated the lights and siren, the car door opened and closed several times while the car was moving,

and Jimmy took off running from the car a few blocks later. These factors, considered together, are sufficient to justify an investigatory stop under *Terry*.

{¶ 21} We next address whether Det. Rasberry was justified in detaining Taylor while he waited for a female officer to conduct a pat-down. Certainly, the initial conduct of Jimmy and Myesha created a reasonable articulable suspicion of criminal activity warranting police investigation. While Taylor argues that the length of the detention, nearly 20 to 30 minutes, was unreasonable, we are less concerned about the length of time Taylor was detained than with whether Det. Rasberry had probable cause to subject Taylor to a search.

{¶ 22} "Once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures." *Pennsylvania v. Mimms* (1977), 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331. Furthermore, an officer may order a passenger to get out of the vehicle pending completion of the stop. *Maryland v. Wilson* (1997), 519 U.S. 408, 414, 117 S.Ct. 882, 137 L.Ed.2d 41. However, once a passenger exits the vehicle, the officer must possess specific and articulable facts to believe that the passenger is armed and dangerous, or is engaged in

criminal activity, to justify any further intrusions. See *State v. Taylor* (2000), 138 Ohio App.3d 139, 145, 740 N.E.2d 704.

{¶ 23} Det. Rasberry testified that the interior of the SUV smelled of fresh, not burnt, marijuana. The smell of marijuana, alone, by a person qualified to recognize the odor, is sufficient to establish probable cause to conduct a search. *State v. Moore*, 90 Ohio St.3d 47, 2000-Ohio-10, 734 N.E.2d 804, at syllabus. The Supreme Court, by affirming the trial court's decision to deny the motion to suppress, extended the warrantless exception to include both the vehicle and the defendant's person on the basis of the automobile exception and exigent circumstances; the officer detected the odor of burnt marijuana emanating from the defendant, and the officer was alone. Id.

{¶ 24} In *State v. Johnson*, Franklin App. No. 08AP-990, 2009-Ohio-3436, the Tenth District refused to extend the holding in *Moore* to a search of the defendant where officers detected the odor of burnt marijuana emanating from the vehicle, not the defendant, despite having noticed a marijuana blunt in the front seat. The court stated, "If the issue before us were the search of the car, *Moore* would apply. However, no testimony at the hearing on the motion to suppress indicated that Johnson had any odor of marijuana smoke on him. At most, Johnson had been in a car while someone smoked marijuana earlier, but his presence in the car did not provide

probable cause to believe he possessed marijuana at the time he was searched * * *. There was no probable cause to believe that more marijuana or any other controlled substance was in the possession of anyone outside the car." Id. at ¶ 20.

{¶ 25} We find the facts in *Johnson* similar to the facts in our case and justify reversing the trial court's decision. Det. Rasberry said the vehicle smelled of fresh marijuana; there was no evidence that Taylor herself smelled of marijuana, and there was no evidence of marijuana in the car. Although he was alone and it was night, Det. Rasberry testified repeatedly that he did not fear for his safety, but instead was detaining the two women until a female officer could search them. This is supported by the fact that Det. Rasberry did not suspect Taylor or Myesha had a weapon, and he put Taylor in the back of the police vehicle without handcuffs.[3]

{¶ 26} The scope and duration of the investigative stop must be no more than necessary to effectuate the purpose for which the initial stop was made.

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[3] We further note that in certain quantities, marijuana possession is a minor misdemeanor and therefore a non-arrestable offense in the city of Cleveland. Det. Rasberry testified that he did not initially search the vehicle, and a subsequent search found no marijuana in the vehicle. We also note that had Rasberry patted the golf ball-sized object and recognized it as contraband, it could have been properly seized, short of a full *Terry* "pat-down." The United States Supreme Court expanded *Terry* to include discovery of contraband other than weapons under the "plain feel" doctrine "'[i]f a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent * * *.' *Minnesota v. Dickerson* (1993), 508 U.S. 366, 375, 113 S.Ct. 2130, 124 L.Ed.2d 334." *State v. Huffman*, Cuyahoga App. No. 93000, 2010-Ohio-5116.

United States v. Brignoni-Ponce (1975), 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607. That purpose must be such as to protect the officer from the presence of weapons or other dangerous instruments. *Terry,* 392 U.S. at 29. We are cognizant that in today's world of "political correctness," a male officer, working alone, will be hesitant to perform a *Terry* pat-down for weapons on a female suspect. Nevertheless, officer safety cannot be constrained by fears of political correctness. Either Det. Rasberry was concerned about a weapon and had a justifiable reason to pat down Taylor or he did not. When asked why he wanted Taylor patted down if he did not feel his safety was threatened or whether Taylor was under arrest and probable cause had been established, Det. Rasberry responded as follows:

> **"Q. What reasonable suspicion did you have to pat Ms. Taylor down?**
>
> **A. If it's some kind of involvement or some kind of crime here, we don't start letting people go. Just because they're the front-seat passenger, they have nothing to do with it? She could have had anything on her.**
>
> **Q. Drugs?**
>
> **A. She could have.**
>
> **Q. So that's why you're patting her down, for drugs?**
>
> **A. We're patting her down for — I'm patting her down for anything, anything possible. Detective Vega was called to handle that."**

{¶ 27} Thus, the inference by the state that Taylor's ongoing detention was for the limited purpose of a pat-down for weapons under *Terry* is not supported by the actual facts. We find this reason places the search outside the scope of the Fourth Amendment.

{¶ 28} The facts demonstrate that Officer Vega was called to the scene to conduct a search of Taylor, not to perform a pat-down for weapons. Such a warrantless search, as distinguished from a pat-down for weapons under *Terry*, would have to be supported by probable cause. While Det. Rasberry testified that Taylor was not under arrest, she was effectively in custody once placed in the back of the police vehicle. The protections afforded by the Fourth Amendment are not implicated in every situation of police and citizen conduct. *California v. Hodari D.* (1991), 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690. The test for determining whether a person has been seized, which triggers the protections of the Fourth Amendment, is whether, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. *United States v. Mendenhall* (1980), 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497. That generally occurs when the police officer has by either physical force or show of authority restrained the person's liberty, so that a reasonable person would not feel free to decline the officer's requests or otherwise terminate the encounter. Id.

{¶ 29} Here, Taylor was clearly in custody. Even if she was not under arrest, her seizure triggered the protections of the Fourth Amendment. When evidence left by a defendant is discovered in the backseat of a police car after a legal arrest or detention, courts have concluded the evidence was voluntarily abandoned. *United States v. Maryland* (C.A. 5, 1973), 479 F.2d 566, 568; *United States v. Wai-Keung* (S.D.Fla.1994), 845 F.Supp. 1548, 1559. When evidence is left in a police car after an illegal arrest or detention, however, it cannot be voluntarily abandoned for purposes of the exclusionary rule. *United States v. Maryland*; *Lawrence v. Henderson* (C.A. 5, 1973), 478 F.2d 705, 708.

{¶ 30} As the Second District Court of Appeals noted in *State v. Cosby*, 177 Ohio App.3d 670, 678-679, 2008-Ohio-3862, 895 N.E.2d 868:

> "When a person disposes of or abandons property in response to illegal police conduct, such as an illegal seizure or search, that person is not precluded from challenging the admissibility of the evidence because his act of abandonment is not voluntary and is a product or fruit of that illegal police conduct. *State v. Harbison* (2007), 141 N.M. 392, 156 P.3d 30; *United States v. Beck* (5th Cir., 1979), 602 F.2d 726; *Monahan v. State* (Fla.App.1980), 390 So.2d 756; LaFave, Search and Seizure (2004), 683-684, Section 2.6(b).
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> "* * * The test for voluntary abandonment involves a determination of whether the abandonment was a product of the illegal stop and seizure of defendant. *State v. Mathews,* Montgomery App. No. 19120, 2002-Ohio-4970, 2002 WL 31105392. In *Mathews,* we concluded that it was not. In *Mathews,* the defendant voluntarily chose to abandon the property as he fled from police, before he was seized for Fourth Amendment purposes by either some physical touching of his person or submission to a show of authority by police, which is necessary for a seizure. *California v.*

> *Hodari* (1991), 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690. Defendant in this case did not abandon the property until after he had submitted to Deputy Shiverdecker's show of authority and been seized/detained. Under those circumstances, we conclude that the evidence was abandoned in response to the unlawful police conduct, the illegal seizure, and therefore defendant does not lack standing to object to the admissibility of that evidence. *State v. Taub* (1988), 47 Ohio App.3d 5, 547 N.E.2d 360."

{¶ 31} We conclude that Taylor's detention to effectuate a search was unlawful; therefore, her abandonment of the crack cocaine was not voluntary, and it must be excluded.

{¶ 32} Had Det. Rasberry conducted a *Terry* pat-down and in the process touched the golf ball-sized bulge in the back of Taylor's shirt and recognized it as contraband, the recovery of the object could have been supported under the "plain feel" doctrine. *Minnesota v. Dickerson*. However, Det. Rasberry repeatedly testified that he did not pat Taylor down because he determined she was not armed and a threat to his safety, and he was able to verify her identity before placing her in his car.

{¶ 33} Once Det. Rasberry determined that Taylor did not have a weapon, a purported pat-down for weapons after her seizure could not be used as the basis for a search of her person. Det. Rasberry pointed to no reasonable articulable suspicion of criminal activity on Taylor's part justifying her detention, much less one that lasts 20 to 30 minutes. Had Det. Rasberry searched the SUV and found marijuana, or testified he smelled marijuana on Taylor's person, we may well have a different result.

{¶ 34} On the facts presented by Det. Rasberry himself, we find that Taylor's Fourth Amendment rights were violated. Taylor's sole assignment of error is sustained.

Judgment reversed and case remanded for 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.

SEAN C. GALLAGHER, JUDGE

MELODY J. STEWART, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR