[Cite as *State v. Toles*, 2011-Ohio-217.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 94886 – 94889

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

DEMETRIUS TOLES

and

DAVID SPIRNAK

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-523826 and CR-527062

BEFORE: Cooney, J., Kilbane, A.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: January 20, 2011

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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 defendants-appellees, David Spirnak ("Spirnak") and Demetrius Toles ("Toles"). Having reviewed the record and pertinent law, we affirm.

{¶ 2} In April 2009, Spirnak and Toles were indicted on 18 counts of drug trafficking, drug possession, and possessing criminal tools. In August 2009, Spirnak and Toles were indicted a second time based on the same set of facts, for an additional 22 counts.

{¶ 3} A joint motion was filed to suppress the evidence in the case. A hearing was held, and the motion was denied. One month later, this court decided *State v. Pettegrew*, Cuyahoga App. No. 91816, 2009-Ohio-4981, appeal not allowed, 124 Ohio St.3d 1493, 2010-Ohio-670, 922 N.E.2d 228.[1] In light of this decision, defendants filed a motion to reconsider the denial of the motion to suppress. The trial court held a hearing and reversed its earlier ruling.

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[1]In *Pettegrew*, this court reversed the denial of a motion to suppress in which the officer could not "say outright that he observed the exchange of something." "The officer must be able to testify that he saw a hand-to-hand exchange, which he believes was a drug transaction." Id. at ¶18, 20.

{¶ 4} The State now appeals, arguing in its sole assignment of error that the trial court erred in granting the defendants' motion to suppress.

{¶ 5} The Ohio Supreme Court explained the standard of review for a motion to suppress in *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶8:

> "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. *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19, 1 OBR 57, 437 N.E.2d 583. 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. *State v. McNamara* (1997), 124 Ohio App.3d 706, 707 N.E.2d 539."

{¶ 6} The Fourth Amendment to the United States Constitution prohibits warrantless searches and seizures, with some exceptions. *Katz v. United States* (1967), 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576. In *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, the United States Supreme Court established one such exception, holding that a law enforcement officer may briefly detain an individual when he or she has reasonable and articulable suspicion that the individual may be engaged in criminal activity. A mere hunch or after-acquired facts cannot justify a *Terry* stop. Id.; *Brown v. Texas* (1979), 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357.

{¶ 7} In determining the lawfulness of the stop, a court must consider the totality of the circumstances, "viewed through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold." *State v. Andrews* (1990), 57 Ohio St.3d 86, 87, 565 N.E.2d 1271. Evidence that law enforcement officers obtain from a stop that violates the Fourth Amendment must be excluded from evidence as "fruit of the poisonous tree." *Wong Sun v. United States* (1963), 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441; *Mapp v. Ohio* (1961), 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081.

{¶ 8} The following evidence was adduced at the hearing on the motion to suppress.

{¶ 9} On the night in question, Detective Maria Matos ("Matos") witnessed Spirnak, Toles, and a third man parked in two cars at a gas station. The area being observed is a "hot spot" for drug activity and one of the highest crime areas in Cleveland's First District. None of the occupants entered the gas station or pumped any gas. Matos observed the driver of one of the vehicles pass something to the back seat. The back door then opened, and she saw a man exit the back seat and enter the other car, parked parallel to it. Both cars left the gas station. Based on her suspicion that criminal activity was afoot, Matos made a traffic stop of the vehicle containing Spirnak and Toles. The second car was also stopped. All three men were arrested. Large amounts of illegal drugs were discovered in the vehicles and on the occupants.

{¶ 10} At the suppression hearing, Matos gave conflicting testimony. On cross-examination, when asked if she saw a hand-to-hand exchange, she answered yes. But in her direct testimony, Matos used what the trial court described as "troubling language" as follows:

> "DETECTIVE: What happens was when I came from around here, when I decide to position myself here, then I wasn't able to see really well. So I said, you know, let me go around again. When I came around again, that's when I saw – I stopped here again because I had a good view. That's when I saw Mr. Toles, his body turn to the back seat, like so, okay.
>
> "*And apparently he handed something to someone in the back seat*. The reason I now know there was someone in the back seat is because the back seat passenger opened up the door and I could see him, okay, he had his back turned to me like this. And that's when Mr. Hines, who later would be identified as Mr. Hines, once that transaction was done Mr. Hines quickly jumped into his car, which would be the Matrix." (Emphasis added.)

{¶ 11} Based on this testimony, the trial court concluded that Matos could not confirm whether she *saw* a hand-to-hand exchange, or *apparently saw* a hand-to-hand exchange. Following *Pettegrew*, the court reversed its prior denial of the motion.

{¶ 12} As the Ohio Supreme Court explained in *Burnside*, the trier of fact is in the best position to resolve factual questions. Our task on appellate review is to independently determine whether these facts satisfy the appropriate legal standard. Matos did not see a back seat passenger until the passenger opened the door. Therefore, she did not observe a hand-to-hand exchange.

{¶ 13} Without a firm statement from the testifying officer that a hand-to-hand exchange occurred, the legal standard found in *Pettegrew* is not met. As this court found in *Pettegrew*, "because the action of the men is consistent with innocent behavior, we resolve this case in favor of [defendant's] Fourth Amendment rights."

{¶ 14} The trial court, in granting the motion, felt compelled to follow this court's decision in *Pettegrew*. We find the court's ruling complies with the legal standard set forth by this court in *Pettegrew*. Therefore, the assignment of error is overruled.

Judgment affirmed.

It is ordered that appellees recover of 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.

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

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COLLEEN CONWAY COONEY, JUDGE

MARY EILEEN KILBANE, A.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR