[Cite as *State v. Martin*, 2009-Ohio-6948.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. CHARLES M. MARTIN Appellant	C. A. No. 24812 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 2008-12-4090(B)

DECISION AND JOURNAL ENTRY

Dated: December 31, 2009

MOORE, Presiding Judge.

{¶1} Appellant, Charles Martin, appeals from the decision of the Summit County Court of Common Pleas. The judgment is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

I.

{¶2} On December 12, 2008, Appellant, Charles Martin, was driving in Akron, Ohio when he was pulled over by Akron Police Detective Michael Zimcosky, an undercover officer. According to Detective Zimcosky, he observed Martin stopping and slowing in his car and then observed a pedestrian flag him down. Martin stopped and the pedestrian entered the car. Detective Zimcosky stated that he then observed the two men exchanging items. In response, Detective Zimcosky requested that a uniformed police officer stop Martin. During the stop, Martin informed Detective Zimcosky that there was cocaine in the car. Detective Zimcosky

located the cocaine and as a result, Martin was arrested and charged with one count of possession of cocaine, in violation of R.C. 2925.11(A)(C)(4).

{¶3} Martin pled not guilty to the charge and subsequently filed a motion to suppress. The trial court held a hearing on the motion, and on April 17, 2009, issued its journal entry denying the motion to suppress. On May 13, 2009, Martin changed his plea to no contest. The trial court found him guilty of the charge and sentenced him to a suspended 12 month term of incarceration, and placed him on community control for 18 months. Martin timely appealed and has raised two assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED MR. MARTIN'S MOTION TO SUPPRESS EVIDENCE OBTAINED AS THE RESULT OF AN UNREASONABLE SEARCH AND SEIZURE, IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 14, ARTICLE 1 OF THE OHIO CONSTITUTION."

{¶4} In his first assignment of error, Martin contends that the trial court erred when it denied his motion to suppress evidence obtained as the result of an unreasonable search and seizure. We do not agree.

{¶5} An appellate court's review of a trial court's ruling on a motion to suppress presents a mixed question of law and fact. *State v. Long* (1998), 127 Ohio App.3d 328, 332. The trial court acts as the trier of fact during a suppression hearing, and is therefore best equipped to evaluate the credibility of witnesses and resolve questions of fact. *State v. Hopfer* (1996), 112 Ohio App.3d 521, 548. Accordingly, this Court accepts the trial court's findings of fact so long as they are supported by competent, credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594. The reviewing court "must then independently determine, without

deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *State v. Burnside*, 100 Ohio St. 3d 152, 2003-Ohio-5372, at ¶8.

{¶6} Martin states in his merit brief that Detective Zimcosky "did not have any reasonable, articulable suspicion to initially stop Mr. Martin's vehicle; detain him against his will; search his vehicle; and/or conduct a custodial interrogation." Despite the scope of this statement, Martin's argument relates only to his contention that Detective Zimcosky did not have a reasonable, articulable suspicion to initially stop him. Accordingly, we will limit our review to this contention. With regard to the constitutionality of the initial traffic stop, the trial court found the following facts:

> "Detective Zimcosky is a police detective with fifteen years of experience in the narcotics division. He was driving through an area known for drug activity and observed behaviors on the part of both defendants that gave rise to a reasonable suspicion of criminal activity. His testimony as to the stop-and-start driving of Defendant Martin, and the flagging down of the vehicle by Defendant Antoine, and the observed hand-to-hand transaction between the defendants reasonably give rise to a suspicion of an illegal drug purchase."

{¶7} A review of the hearing transcript reveals that these facts are supported by competent, credible evidence. *Guysinger*, 86 Ohio App.3d 594. Accordingly, we must accept the trial court's findings of facts with regard to this issue. Id.

{¶8} Initially we note that the trial court placed the burden of proof on Martin "to demonstrate a violation of his constitutional or statutory rights justifying suppression." However, "[i]n Ohio, it is well established that the state bears the burden of proof upon proper motion by a defendant." *State v. Neuhoff* (1997), 119 Ohio App.3d 501, 504, citing *Xenia v. Wallac*e (1988), 37 Ohio St.3d 216, paragraph two of the syllabus. See, also, *State v. McDonald* (Apr 24, 2001), 5th Dist. No. 2000-CA-51 (applying the Ohio Supreme Court's statements regarding the burden of proof as found in *Xenia v. Wallace* to a motion to suppress contesting

whether an officer had reasonable suspicion to justify an initial stop.) Although we conclude that the trial court misstated the law, we reiterate that we must conduct a de novo review of the trial court's legal determination that there was reasonable suspicion to make the initial traffic stop. *Ornelas v. United States* (1996), 517 U.S. 690, 699.

{¶9} Before a law enforcement officer may stop a vehicle, the "officer must have reasonable suspicion, based upon specific and articulable facts, that an occupant is or has been engaged in criminal activity." *State v. Trbovich* (July 3, 1996), 9th Dist. No. 17613, at *2. Reasonable suspicion constitutes something less than probable cause. *State v. Carlson* (1995), 102 Ohio App.3d 585, 590. The trial court must look at the totality of the circumstances in determining whether a stop is reasonable. *State v. Anderson* (1995), 100 Ohio App.3d 688, 692. "[T]he circumstances surrounding the stop must 'be viewed through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training.'" *State v. Bobo* (1988), 37 Ohio St.3d 177, 179, quoting *U.S.* v. Hall (C.A.D.C.1976), 525 F.2d 857, 859. The court must weigh the facts of the case against an objective standard: "[W]ould the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" *Terry v. Ohio* (1968), 392 U.S. 1, 21-22, citing *Carroll v. U.S.* (1925), 267 U.S. 132, 162.

{¶10} We conclude, based upon the trial court's finding of facts, that the stop in this case was reasonable. Detective Zimcosky testified that he observed Martin drive slowly and stop and start on a road in an area known for drug activity. He further testified that he observed an individual flag Martin down and then get into Martin's car. Finally, he testified that he observed a hand-to-hand transaction between the men inside the car. We conclude that these facts, viewed by an objective standard, lead to a determination that Detective Zimcosky had a reasonable

suspicion of criminal activity and thus the initial stop of Martin's vehicle was appropriate. *Bobo*, 37 Ohio St.3d at 179.

{¶11} Accordingly, Martin's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

"THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED MR. MARTIN'S MOTION TO SUPPRESS STATEMENTS MADE DURING A CUSTODIAL INTERROGATION WITHOUT THE BENEFIT OF 'MIRANDA WARNINGS', BY RULING THAT MR. MARTIN VOLUNTARILY MADE SUCH STATEMENTS BEFORE HE WAS INTERROGATED BY THE INVESTIGATING OFFICER."

{¶12} In his second assignment of error, Martin contends that the trial court committed reversible error when it denied his motion to suppress the statements made during a custodial interrogation without the benefit of "Miranda warnings." Because we conclude that the trial court failed to make sufficient factual findings, we reverse and remand for proceedings consistent with this opinion.

{¶13} In his second assignment of error, Martin challenges what he perceives to be the trial court's findings of fact. As we explained above, the trial court acts as the trier of fact during a suppression hearing, and is therefore best equipped to evaluate the credibility of witnesses and resolve questions of fact. *Hopfer*, 112 Ohio App.3d at 548. Therefore, we must defer to these findings of fact if they are supported by some competent credible evidence. *Guysinger*, 86 Ohio App.3d at 594.

{¶14} Our review is hindered by the trial court's incomplete findings of fact. *State v. Foster*, 9th Dist. No. 24349, 2009-Ohio-840, at ¶7. Although the trial court stated that Detective Zimcosky testified that Martin gave his statement voluntarily before any questions were asked and that Martin disputed this testimony, the court did not reconcile the conflict in testimony and make findings about what it believed happened. Id. Instead, the trial court determined that the

"evidence is at best in equipoise, and the Defendants have not satisfied their burden to show a Constitutional violation occurred."[1] It is imperative to this Court's application of law to the facts in this case that the trial court make a finding of credibility as to the disputed facts. Due to our limited standard of review with regard to the facts, we are not permitted to fill in this gap. *Guysinger*, 86 Ohio App.3d at 594. Because the trial court has failed to adequately set forth its findings of fact, we cannot properly apply the law. Accordingly, we must remand to the trial court to set forth its findings of fact with regard to the disputed testimony of the timing of Martin's statements to Detective Zimcosky.

{¶15} Martin's second assignment of error is sustained.

III.

{¶16} The judgment of the Summit County Court of Common Pleas is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

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[1] We reiterate, as we have fully set forth above, that the trial court has misstated the applicable burden of proof in this case. See *Neuhoff* , 119 Ohio App.3d at 504, citing *Wallac*e, 37 Ohio St.3d at paragraph two of the syllabus.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to both parties equally.

CARLA MOORE
FOR THE COURT

CARR, J.
CONCURS

BELFANCE, J.
CONCURS IN JUDGMENT ONLY, SAYING:

{¶17} I concur in the judgment. I write separately because I do not think it is necessary to remand the matter to the trial court for further consideration of the second assignment of error. In my view, the trial court's statement that the "evidence is at best in equipoise," suggests the State failed to meet its burden of proof given that the trial court could not accord greater weight to the testimony offered by the State. In essence, the trial court determined that it was unable to believe the detective's version of events more than the Appellant's version of events. Thus, because it was unable to resolve the conflict in the State's favor by finding that the detective was more credible than the Appellant, the State was unable to meet its burden of proof.

APPEARANCES:

JAMES K. REED, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.