[Cite as *State v. Johnson*, 2011-Ohio-1515.]

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

STATE OF OHIO Appellee v. BYRON A. JOHNSON Appellant	C.A. No. 25307 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 08-05-1606 (A)

DECISION AND JOURNAL ENTRY

Dated: March 30, 2011

MOORE, Judge

{¶1} Defendant Byron Johnson entered a no-contest plea to cocaine charges. He has appealed from the trial court's denial of a motion to suppress evidence obtained during an investigative traffic stop. Finding no fault with the trial court's denial of that motion, this Court affirms.

I.

{¶2} Detective Michael Gilbride was working undercover in the area of Montgomery Avenue in Akron, Ohio, on May 13, 2008, when he received a phone call from a confidential informant that a man was about to make a drug sale. The confidential informant said that a black male with long braided hair was going to leave a house located at 491 Montgomery Avenue within 15 minutes. He was then going to drive to the intersection of Brandon and Eastland Avenues to deliver a quarter-ounce of crack cocaine. The informant stated that the man would

be driving a silver Pontiac that had tinted windows and Ohio license plate, DMK-6376. The informant knew the man by the name "By."

{¶3} After receiving this information, Detective Gilbride drove past the house and noted that a car matching the description was parked in the driveway. He confirmed that the vehicle was registered to Byron Johnson and alerted the uniform detectives and undercover detectives who were on duty that day as to what he knew. Another detective began surveillance on the house while Detective Gilbride drove to the intersection and waited. Within 15 minutes, Detective Gilbride heard over the radio that a man matching the informant's description had left the house and had driven away in the car. The officer watching the house followed the vehicle as it proceeded directly to the intersection of Brandon and Eastland Avenues. Before reaching the intersection, uniformed police officers in marked cruisers turned on the blue lights and stopped the vehicle. Detective Gilbride observed the stop and then left the area and went to the police station to prepare a search warrant for the house on Montgomery Ave. He was not part of the group of officers who took part in the investigative stop.

{¶4} Officer Christopher Carney had heard the information over the radio and was part of the investigative stop. His cruiser arrived approximately 5 to 10 seconds behind the first cruiser that arrived at the intersection. Mr. Johnson was alone in his car. The officers were concerned because the windows of the car were tinted, so they approached the car with their guns drawn and one of them ordered Mr. Johnson to show his hands. Mr. Johnson ignored that command and the officers could see Mr. Johnson "fumbling around underneath the steering column of the vehicle." The officers removed him from the car and placed him on the ground to handcuff him. One of the officers examined the area of the dashboard that Mr. Johnson had reached towards. The officer removed the change tray and found five grams of crack cocaine.

{¶5} Knowing that Detective Gilbride was applying for a search warrant, one of the officers asked whether there were any guns, drugs, animals, or people, inside the house on Montgomery. Mr. Johnson stated that there was a gun under the sofa cushion, that he had a snake, and that his girlfriend was in the house. The officers then took Mr. Johnson back to the house where they performed an initial protective search and then a warrant search of the home. Because Mr. Johnson limited his assignment of error to the traffic stop, neither of those searches is directly at issue in this appeal.

{¶6} Mr. Johnson filed a motion to suppress all the evidence obtained after the traffic stop, including any statements he made while in police custody. The trial court made findings of fact and granted the motion with respect to any statements Mr. Johnson made while in police custody. It concluded that the vehicle stop was appropriate because the officers had information from a reliable source that was corroborated by what the officers personally observed. Accordingly, they had specific, articulable facts that gave rise to a reasonable suspicion that Mr. Johnson was engaged in criminal activity.

II.

{¶7} Mr. Johnson has argued that the trial court erred by not granting his motion to suppress. We disagree. His sole assignment of error states:

> "THE TRIAL COURT ERRED IN OVERRULING [Mr. JOHNSON'S] MOTION TO SUPPRESS IN THAT THERE WAS NO INDEPENDENT EVIDENCE FOR CONCLUDING THAT THE STOP OF THE DEFENDANT'S VEHICLE WAS JUSTIFIED BY THE TOTALITY OF THE CIRCUMSTANCES."

{¶8} A motion to suppress evidence presents both a question of law and fact. *State v. Burnside* (2003), 100 Ohio St.3d 152, 154. The trial court serves a dual role, first becoming the trier of fact and hearing testimony regarding the event in question. Id. As such, the trial court is

in the best position to resolve factual questions and evaluate the credibility of witnesses. Id. at 154-55, citing *State v. Mills* (1992), 62 Ohio St.3d 357, 366. After the trial court makes findings of fact, it must then determine the applicable law. Id.

{¶9} On review, an appellate court must first determine if the findings are supported by competent, credible evidence. If they are, then the appellate court must give deference to the trial court and accept those findings. Id., citing *State v. Fanning* (1982), 1 Ohio St.3d 19. The appellate court must then independently determine by a *de novo* review, without giving deference to the trial court's conclusion, whether the facts satisfy the applicable legal standard. Id., citing *State v. McNamara* (1997), 124 Ohio App.3d 706, 707.

{¶10} Although Mr. Johnson has set forth one assignment of error, he actually makes two arguments. First, he has argued that the trial court's findings of fact were not supported by credible evidence. Second, he has argued that the court misapplied the law when evaluating the officer's hearsay testimony based on the statements of the confidential informant.

A. Findings of Fact

{¶11} At the suppression hearing, the trial court heard testimony from two police officers. Mr. Johnson has argued that their testimony was not credible because, he claims, they were inconsistent on the direction the car was facing when it was stopped, they claimed they could see through tinted windows, and they testified that keys were used to enter the home in a subsequent search although videotape evidence showed the police using a battering ram to force open the door. Mr. Johnson is not claiming that the trial court's findings about the events giving rise to the investigative stop are incorrect, rather he is claiming that the officers' testimony, taken in its entirety, is not credible and could not have been used as the basis for a valid investigative stop.

{¶12} A review of the testimony reveals that the trial court had credible testimony upon which to base its findings of fact. The three specific concerns Mr. Johnson raises do not render the officers' testimony incredible. Officer Gilbride was at the intersection of Brandon and Eastland Avenues. He testified that Mr. Johnson's car was stopped "right in the street." Officer Carney testified that the car pulled into a driveway and turned around before it was "stopped in the roadway." There is no factual dispute that Mr. Johnson was driving toward the intersection when his car was stopped by police officers in cruisers. The trial court was in the best position to listen to the testimony, evaluate the witnesses' credibility, and determine which description was more accurate. See *Seasons Coal Co., Inc. v. City of Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶13} Mr. Johnson also claimed that the officers' testimony that the windows were darkly tinted contradicted any testimony that they were able to see Mr. Johnson reaching underneath the steering column. Officer Carney noted that the windows were tinted, but he went on to describe the furtive movement he saw Mr. Johnson make after he had been told to raise his hands. Detective Gilbride testified that he was not present when the stop was made but that he was informed they could see inside the car. This testimony is not contradictory because even though the officers expressed concern about the tinted windows, there was no evidence presented that the tint completely prevented them from seeing through the windows.

{¶14} Finally, Mr. Johnson points to Officer Carney's testimony that the door keys were used to enter the house when in fact videotape showed that a battering ram had been employed. In its ruling on the motion to suppress, the trial court expressly stated that it took this inconsistency into consideration when it evaluated the officers' testimony. Of the two officers, only Officer Carney was present when the officers entered the house. The trial court was, again,

in the best position to evaluate the testimony. This Court will not say that such a discrepancy affects the credibility of the entirety of their testimony.

{¶15} The trial court was presented competent, credible testimony from which to make findings of fact. Accordingly, this Court will afford the proper deference to the trial court and accept its findings of fact.

B. Questions of Law

{¶16} Mr. Johnson has also argued that the hearsay testimony regarding the informant's statements does not create probable cause that Mr. Johnson was engaged in criminal activity. Probable cause is not the standard, however, in an investigatory stop. Although a police officer generally may not seize a person within the meaning of the Fourth Amendment unless he has probable cause to arrest the person for a crime, "not all seizures of the person must be justified by probable cause." *Florida v. Royer* (1983), 460 U.S. 491, 498. For example, a police officer may "approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Terry v. Ohio* (1968), 392 U.S. 1, 22. This standard also applies to investigatory stops of automobiles. *United States v. Brignoni-Ponce* (1975), 422 U.S. 873. Such an investigative stop does not violate the Fourth Amendment "if the police have reasonable suspicion that 'the person stopped is, or is about to be, engaged in criminal activity.'" *State v. Jordan*, 104 Ohio St.3d 21, 30, quoting *United States v. Cortez* (1981), 449 U.S. 411, 417.

{¶17} To establish reasonable suspicion sufficient to make an investigate stop, an officer must "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21. The circumstances giving rise to the stop "are to be viewed through the eyes of the reasonable and prudent police officer on

the scene who must react to events as they unfold." *Andrews*, 57 Ohio St.3d at 87-88. "A court reviewing the officer's actions must give due weight to his experience and training and view the evidence as it would be understood by those in law enforcement." Id. at 88. It must also recognize that, based on their own experience and training, officers may "make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" *United States v. Arvizu* (2002), 534 U.S. 266, 273, quoting *Cortez*, 449 U.S. at 418. Accordingly, a court must base its conclusion on an objective view of "the entire picture - a totality of the surrounding circumstances." *Andrews* 57 Ohio St.3d at 86, citing *Cortez*, 449 U.S. at 418; *State v. Bobo* (1988), 37 Ohio St.3d 177.

{¶18} In this case, the informant's testimony coupled with Mr. Johnson's own actions would give an officer reasonable suspicion that the defendant was engaged, or was about to be engaged, in criminal activity. Detective Gilbride testified that he was working as an undercover officer when he received the call from the confidential informant. He testified that he had relied on the confidential informant in the past and, in those previous instances, the information had been reliable. The informant provided the name "By" and a physical description of a black man with long braids whom he said was in possession of a quarter-ounce of crack cocaine. The informant provided the man's home address and the time frame in which the man was to leave his home and deliver the crack cocaine. He gave a specific description of Mr. Johnson's car, including the make and color, the license plate number, and the fact that the windows were tinted. He told the officer that Mr. Johnson would be driving to the intersection of Brandon and Eastland Avenues, where the sale was to occur.

{¶19} The officer drove past the address and confirmed that a vehicle matching the description was parked in the driveway. He confirmed the vehicle's registration. He set up

surveillance of the home with another officer so that the house was watched until Mr. Johnson left it and was followed.

{¶20} After establishing surveillance, Detective Gilbride drove to the intersection and waited. He learned via police radio that a man matching the informant's description left the house and was driving toward the intersection, where he saw several officers make the investigative stop.

{¶21} In addition, Detective Gilbride testified about his education, training, and experience as a police officer. He testified that he worked in the Street Narcotics Uniform Detail for six years. He testified that the primary focus of that unit was to "address street level drug trafficking complaints throughout the city." He received training as an officer as well as specialized training for handling cases involving narcotics. He testified that he had been involved in an estimated 1,800 arrests during his tenure with the unit.

{¶22} Moreover, the officer who participated in the stop, Officer Carney, testified that he relied on the radio dispatch for details regarding the investigation. This Court has recognized that "a police radio broadcast may provide the sole, articulable fact underlying an officer's reasonable suspicion to initiate a *Terry* stop." *State v. Craft* (Dec. 18, 1996), 9th Dist. No. 96CA0027, at *2 (italics added).

{¶23} Examining the totality of the circumstances, the officers had reasonable suspicion to initiate a stop of Mr. Johnson's vehicle. Detective Gilbride relied on an informant's statements that were corroborated by the detective's investigation and Mr. Johnson's own actions. Officer Carney and the other officers properly relied on the police radio dispatch to make the stop. Therefore, the trial court properly denied the motion to suppress regarding the stop.

III.

{¶24} Mr. Johnson's sole assignment of error is overruled. The judgment of the trial court is affirmed.

Judgment affirmed

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.

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 Appellant.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
CONCURS

BELFANCE, P. J.
CONCURS IN THE JUDGMENT ONLY, SAYING:

{¶25} I concur in the judgment. However, I would conclude that the Court's discussion concerning questions of law is unnecessary given that in his merit brief, Mr. Johnson refers to United States Supreme Court precedent concerning the probable cause standard for the issuance of search warrants rather than authority applicable to the propriety of the stop. As such, he appears to argue that the standards articulated in *Aguilar v. Texas* (1964), 378 U.S. 108, and *Spinelli* v. *United States* (1969), 393 U.S. 410, have continued vitality as neither case was completely disavowed by *Illinois v. Gates* (1983), 462 U.S. 213, without articulating how the trial court erred if we were to agree with this proposition.

APPEARANCES:

CHARLES R. QUINN, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.