[Cite as *State v. Thomas*, 2010-Ohio-12.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92692

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RUDOLPH THOMAS

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-513455

BEFORE: Celebrezze, J., Gallagher, A.J., and Stewart, J.

RELEASED: January 7, 2010

JOURNALIZED:

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendant-appellant, Rudolph Thomas, appeals the denial of his motion to suppress evidence obtained when Brook Park police officers searched him. After a thorough review of the record, and for the following reasons, we reverse the decision of the trial court denying appellant's motion to suppress.

{¶ 2} On June 23, 2008, two men were in Cleveland, Ohio on a business trip. Looking for a good time, they met two males and a female, who accompanied them back to a hotel room in Brook Park, Ohio for a night of alcohol and drugs. One of the visitors to Cleveland, Jess Jones, passed out at some point in the evening and awoke in the morning to find his laptop computer missing. He called one of the males who had been invited to his hotel room the night before and inquired about the missing computer. This man, later identified as appellant, informed Mr. Jones that he would return the laptop for $300. The two arranged to meet in a parking lot at the corner of West 130th Street and Bellaire Road.

{¶ 3} After getting off the phone with appellant, Mr. Jones called the police. Detective Walentek of the Brook Park police department responded with Patrolman Ward. The officers went to the parking lot armed with a description of the man Mr. Jones was supposed to meet — a male wearing black jeans and a white t-shirt.

{¶ 4} The officers arrived at the parking lot and waited a few minutes. Appellant arrived wearing black pants and a white t-shirt. He exited a vehicle with another male. After a few minutes, Det. Walentek contacted Mr. Jones and asked him to place a phone call to the individual he was supposed to meet. Det. Walentek then approached appellant. Det. Walentek testified that, when asked what he was doing in the parking lot, appellant responded that he was "'supposed to meet some guy up here,' something about a laptop computer." According to Det. Walentek's testimony, appellant was cooperative.

{¶ 5} Det. Walentek then proceeded to pat down appellant for officer safety. During the pat down, appellant's phone rang, and Patrolmen Ward confirmed that it was Mr. Jones calling. Throughout this encounter, appellant had his hands clenched into fists. During the pat-down search, but before appellant received the phone call from Mr. Jones, Det. Walentek ordered appellant to release his hands. When appellant unclenched his fists, a baggie containing about half a gram of crack cocaine was found. Appellant was arrested for possession of drugs. Further investigation was conducted, but Mr. Jones's laptop was never recovered.

{¶ 6} On June 21, 2008, appellant was indicted by a grand jury on one count of possession of drugs in violation of R.C. 2925.11(A), a felony of the fifth degree. Appellant filed a motion to suppress the drugs recovered. On

November 24, 2008, a hearing was conducted on this motion. The trial court denied appellant's motion, and appellant pled no contest and was sentenced to nine months incarceration with three years of postrelease control.

{¶ 7} On appeal, appellant claims that the trial court erred when it denied his motion to suppress.[1]

Law and Analysis

{¶ 8} "In a motion to suppress, the trial court assumes the role of trier of fact and is in the best position to resolve questions of fact and evaluate witness credibility. A reviewing court is bound to accept those findings of fact if supported by competent, credible evidence. However, without deference to the trial court's conclusion, it must be determined independently whether, as a matter of law, the facts meet the appropriate legal standard." (Internal citations omitted.) *State v. Curry* (1994), 95 Ohio App.3d 93, 96, 641 N.E.2d 1172.

{¶ 9} The Fourth Amendment to the United States Constitution prohibits warrantless searches and seizures, rendering them per se unreasonable unless an exception applies. *Katz v. United States* (1967), 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576. The analysis for a search requires a

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[1] Appellant's assignment of error reads, "The trial court erred by denying appellant's motion to suppress evidence obtained as a result of an unreasonable search and seizure, in violation of the Fourth Amendment of the United States Constitution, and Article I, Section 14 of the Ohio Constitution."

two-step inquiry where probable cause is required and, if it exists, a search warrant must be obtained unless an exception applies. *State v. Moore*, 90 Ohio St.3d 47, 2000-Ohio-10, 734 N.E.2d 804. "If the state fails to satisfy either step, the evidence seized in the unreasonable search must be suppressed." Id. at 49, citing *Mapp v. Ohio* (1961), 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081; *AL Post 763 v. Ohio Liquor Control Comm.*, 82 Ohio St.3d 108, 111, 1998-Ohio-367, 694 N.E.2d 905, 908.

{¶ 10} Common exceptions include consensual encounters with police officers and investigatory or *Terry* stops. *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. There are generally three types of interactions between law enforcement and the citizenry — consensual encounters, investigative stops, and arrests. *State v. Saunders*, Montgomery App. No. 22621, 2009-Ohio-1273. Each requires a successively higher level of evidence to constitute a valid search or seizure under the Fourth Amendment.

Investigatory Stop

{¶ 11} Under *Terry*, a police officer may stop and investigate an individual, even without probable cause to arrest, if he has sufficient evidence to reasonably conclude that criminal activity is afoot. The officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, supra, at 21. "An investigatory stop must be justified by some

objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *U.S. v. Cortez* (1981), 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621.

{¶ 12} "In determining the reasonableness of the officer's belief, courts examine the totality of the circumstances, including the following factors: (1) whether the location of the contact is an area of high crime or high drug activity, (2) the suspect's non-compliance with the officer's orders, (3) the time of the occurrence, (4) the officer's experience, (5) the lack of backup for the officer, (6) the contact's location away from the police cruiser, (7) whether the suspect is fleeing the officer or the scene, (8) any furtive movements by the suspect, (9) the precautionary measures taken by the officer, and (10) the suspected offense." (Internal citations omitted.) *State v. Stiles,* Ashtabula App. No. 2002-A-0078, 2003-Ohio-5535, ¶17.

{¶ 13} In the instant case, police officers possessed a reasonable suspicion that appellant was engaged in criminal activity. Appellant fit the description provided to them of a person possessing stolen property and attempting to extort money from its owner. Appellant also admitted that he was in the parking lot to meet a guy about a laptop. Det. Walentek possessed a reasonable suspicion, supported by articulable facts, that appellant was engaged in criminal activity. Under *Terry*, Det. Walentek was permitted to stop appellant and investigate further. Because the stop was a

valid stop for further investigation, whether or not the encounter was also consensual is immaterial to our analysis.

Search Conducted for Officer Safety

{¶ 14} In order for police to conduct a protective pat-down search of a validly stopped individual, officers must possess a reasonable suspicion that the individual is armed. In *State v. Bobo* (1988), 37 Ohio St.3d 177, 524 N.E.2d 489, the Ohio Supreme Court held that, "[w]here a police officer, during an investigative stop, has a reasonable suspicion that an individual is armed based on the totality of the circumstances, the officer may initiate a protective search for the safety of himself and others." Id. at paragraph two of the syllabus. See, also, *Adams v. Williams* (1972), 407 U.S. 143, 146, 92 S.Ct. 1921, 32 L.Ed.2d 612.

{¶ 15} "[T]he question we must ask is whether, based on the totality of the circumstances, the officers had a reasonable, objective basis for frisking defendant[.]" *State v. Evans*, 67 Ohio St.3d 405, 409, 1993-Ohio-186, 618 N.E.2d 162.

{¶ 16} "The standard is whether a reasonably prudent person would be warranted in believing that his or others' safety is jeopardized. The officer need not be absolutely certain the individual is armed but may initiate a search when his suspicions are reasonably aroused." *State v. Curry* (1994), 95 Ohio App.3d 93, 96-97, 641 N.E.2d 1172.

{¶ 17} In *Curry*, supra, this court found that "[t]he detectives had reasonable and legitimate fears for their safety based on appellant's hostility and combativeness, the lateness of the hour, and the fact that they were away from the protection of their vehicle. Appellant's persistence in keeping his hands in his pockets where weapons could be located further added to the officers' anxiety and safety concerns. The whole picture of this incident yields sufficient evidence to support the officers' belief appellant was armed and dangerous." (Internal citations omitted.) Id. at 97.

{¶ 18} The factors articulated in *Curry* are not present in the instant case. Appellant was not hostile, made no furtive gestures, refused no order of the officers, had his hands visible at all times, and cooperated with officers fully. None of the information Det. Walentek received in regard to appellant involved any violence or use of a weapon. Det. Walentek testified that, in his experience, one could hide a small knife or razor blade in one's clenched fist. This may be so, but that alone does not give an officer a reasonable suspicion that an individual is armed or poses a danger. The officers never asked appellant to open his hands prior to conducting a pat-down search.

{¶ 19} Although officer safety is an important and legitimate concern, some reasonable suspicion that a suspect is armed is required before police may conduct a search of an individual for officer safety. *Curry*, supra. If the officers had only waited a few seconds, the search may have been validly

conducted as a search incident to arrest when it was confirmed that appellant was the individual attempting to extort money from Mr. Jones in exchange for the laptop.[2] However, the Ohio Supreme Court has held: "As we have had occasion in the past to observe, '[i]t is axiomatic that an incident search may not precede an arrest and serve as part of its justification.'"[3] *Smith v. Ohio* (1990), 494 U.S. 541, 543, 110 S.Ct. 1288, 108 L.Ed.2d 464, quoting *Sibron v. New York* (1968), 392 U.S. 40, 63, 88 S.Ct. 1889, 1902, 20 L.Ed.2d 917.

Conclusion

{¶ 20} The officers in this case prematurely searched appellant, justifying their action with a concern for officer safety. That justification, judged by the totality of the circumstances, was not reasonable; therefore, the decision of the trial court denying appellant's motion to suppress must be overturned.

{¶ 21} This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover of said appellee costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

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[2] But, see, *State v. Smith*, Slip Opinion No. 2009-Ohio-6426, holding police must obtain a search warrant to search a suspect's cell phone unless officers' safety is in danger or necessary for the preservation of evidence.

[3] Appellant was charged only with drug possession.

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.

FRANK D. CELEBREZZE, JR., JUDGE

SEAN C. GALLAGHER, A.J., and
MELODY J. STEWART, J., CONCUR