[Cite as *State v. Gaston*, 2010-Ohio-248.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92838

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MARCEAL GASTON

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-510146

BEFORE: Dyke, J., Blackmon, P.J., and Cooney, J.

RELEASED: January 28, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

ANN DYKE, J.:

{¶ 1} Defendant-appellant, Marceal Gaston, appeals the trial court's denial of his motion to suppress. For the reasons that follow, we reverse and remand for proceedings consistent with this opinion.

{¶ 2} On May 5, 2008, the Cuyahoga County Grand Jury indicted appellant for one count of drug trafficking in violation of R.C. 2925.03(A)(2) and one count of drug possession in violation of R.C. 2925.11(A). Initially, appellant pled not guilty to the charges in the indictment.

{¶ 3} On December 1, 2008, the trial court conducted a hearing concerning appellant's motion to suppress that was filed on October 14, 2008. At the hearing, the state presented the testimony of Sergeant Michael Butler of the Cleveland Police Department.

{¶ 4} Butler testified that he and his partner, Officer Robert Taylor, were patrolling the area of East 128th Street and Woodside Avenue in Cleveland, Ohio for drug activity during the early afternoon of April 11, 2008. Butler explained that the area was a high drug area with a school located within 50 yards and two drug houses nearby.

{¶ 5} Around 2:00 p.m., Butler and his partner witnessed two males standing on the corner of the street. Butler testified that when the men noticed the police vehicle, they turned and "hurriedly walked" about four or five steps into the nearby corner store.

{¶ 6} Sergeant Butler and his partner followed appellant into the store, stopped him, and asked him to exit so that the officers could search him for

weapons. Shortly thereafter, Butler placed his right hand above the back pocket of appellant's pants and immediately felt an object. There, Butler discovered a plastic baggy containing crack cocaine.

{¶ 7} Following the testimony of Sergeant Butler and the arguments of both the state and defense, the trial court denied appellant's motion to suppress. As a result of the denial, on December 2, 2008, appellant pled no contest and the trial court found him guilty of all charges in the indictment. Subsequently, the trial court sentenced him to six months for both counts and ordered that the sentences run concurrent to each other. The court also imposed three years of postrelease control.

{¶ 8} Appellant now appeals and presents one assignment of error for our review. His sole assignment states:

{¶ 9} "The trial court erred and/or abused its discretion in denying appellant's motion to suppress."

{¶ 10} Here, appellant argues that Sergeant Butler did not have reasonable suspicion to stop and search him. Therefore, he argues, the trial court should have suppressed the evidence obtained from the search. For the reasons that follow, we agree.

{¶ 11} As an initial matter, we note that, when reviewing a trial court's ruling on a motion to suppress, we are presented with mixed questions of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372. If competent, credible evidence exists to support the trial court's findings of fact, we must accept those

findings. See *State v. Long* (1998), 127 Ohio App.3d 328, 332, 713 N.E.2d 1. Accepting those facts as true, we must then independently ascertain as a matter of law, without deferring to the lower court's conclusions, whether the facts comply with the applicable legal standard. *State v. Kobi* (1997), 122 Ohio App.3d 160, 168, 701 N.E.2d 420.

{¶ 12} As to the substantive law, the Fourth Amendment to the United States Constitution prohibits warrantless searches and seizures, rendering them per se unreasonable, unless an exception applies. *Katz v. U.S.* (1967), 389 U.S. 347, 357, 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. Pursuant to *Terry*, if a law enforcement officer has a reasonable suspicion that a person is, or has been, involved in criminal activity, he or she may briefly make an investigatory stop without probable cause. Id. To justify an investigatory stop, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Id. at 21. The officer may not rely upon a mere hunch or an inchoate and unparticularized suspicion. Id. at 27. The Fourth Amendment requires a minimal level of objective justification for making the stop. *INS v. Delgado* (1984), 466 U.S. 210, 217, 104 S.Ct. 1758, 1763, 80 L.Ed.2d 247. Furthermore, a court evaluating the validity of a *Terry* stop and search must consider the totality of the circumstances as "viewed through the eyes of the reasonable and prudent police officer on the

scene who must react to the events as they unfold." *State v. Andrews* (1991), 57 Ohio St.3d 86, 87-88, 565 N.E.2d 1271; see, also, *United States v. Cortez* (1981), 449 U.S. 411, 417, 101 S.Ct. 690, 695, 66 L.E.2d 621.

{¶ 13} In *Brown v. Texas* (1979), 443 U.S. 47, 52, 99 S.Ct. 2637, 61 L.Ed.2d 357, the United States Supreme Court held that police lacked the requisite reasonable suspicion when they stopped two suspects after they walked away from each other in an alley located in a high crime area. Additionally, in *State v. Gonsior* (1996), 117 Ohio App.3d 481, 487, 690 N.E.2d 1293, the suspects were standing around a car when they turned away from the police officer when he approached and one of them leaned down, reaching inside the car. The court determined that this behavior does not connote any criminal conduct on the suspects' part. Id. at 487. Furthermore, the court recognized that it is not unusual for even an innocent person to display some form of nervousness when approached by law enforcement. Id.

{¶ 14} Applying the principles set forth in *Terry*, as well as the cases of *Brown* and *Gonsior* to this matter, we find that the objective facts do not justify the stop and search of appellant. It is not uncommon for two men to stand on a corner and then take four or five quick steps into a store. See *Terry*, supra at 22 ("There is nothing unusual in two men standing together on a street corner, perhaps waiting for someone."). Sergeant Butler maintains that because these innocent actions occurred in a high drug area, he had reasonable suspicion to stop and search appellant. While a location's characteristics are relevant in

determining whether the circumstances are sufficiently suspicious to warrant further investigation, an individual's presence in a "high crime area," standing alone is not enough to support a reasonable, particularized suspicion of criminal activity. *Adams v. Williams* (1972), 407 U.S. 143, 144, 147-148, 92 S.Ct. 1921, 32 L.E.2d 612.

{¶ 15} Additionally, we note that there were no furtive movements and the men did not run from police but rather "walked." Furthermore, Sergeant Butler testified that he did not recognize appellant or his companion as having any prior interactions with police, was not informed of any drug activity on that specific day, and did not see any exchange of money or objects. Rather, Sergeant Butler merely witnessed two men standing on a corner who then turned and walked briskly into the corner store. "In short, the appellant's activity was no different from the activity of other pedestrians in that neighborhood." *Brown*, supra at 52.

{¶ 16} In this case, we find that, at the time of the stop and search of appellant, the officers had only an inchoate hunch of criminal activity rather than the required reasonable suspicion. Considering the facts, taken together with the rational inferences from those facts, we do not find that they warrant an intrusion into appellant's right to be free from unreasonable searches and seizures. Accordingly, appellant's sole assignment of error is sustained, the judgment of the trial court is reversed, and the matter is remanded to the trial court for proceedings consistent with this opinion.

It is, therefore, considered that said appellant recover of said appellee

its costs herein.

It is ordered that a special mandate be sent to said 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.

ANN DYKE, JUDGE

PATRICIA ANN BLACKMON, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR