[Cite as *State v. Knox*, 2010-Ohio-2889.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93257

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

THURMAN KNOX

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-520839

BEFORE: Rocco, J., Gallagher, A.J., and Blackmon, J.

RELEASED: June 24, 2010

JOURNALIZED:

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KENNETH A. ROCCO, J.:

{¶ 1} Plaintiff-appellant the state of Ohio appeals from the trial court order that granted the motion to suppress evidence filed by defendant-appellee Thurman Knox.

{¶ 2} The state presents one assignment of error. It argues the trial court incorrectly determined the police officer exceeded the permissible scope of his initial investigative stop.

{¶ 3} Upon a review of the record, this court disagrees. Consequently, the trial court's order is affirmed.

{¶ 4} The state presented only the testimony of North Olmsted police officer Michael Bujnovsky at the hearing on Knox's motion to suppress evidence. Bujnovsky stated that on the afternoon of January 11, 2009, he was in his zone car on patrol. He "was sitting in"[1] the parking lot of the Goodwill store on Lorain Avenue when dispatch contacted him with the report of a "possible theft offense" at the Gordon Food Service ("GFS") market.

{¶ 5} The report indicated that the suspects, "three black males," left the store in a small black Chevy sedan heading eastbound toward Clague

[1]Quotes indicate specific testimony.

Road. Since Bujnovsky was near that location, he pulled out of the lot and began traveling westbound on Lorain.

{¶ 6} Just as Bujnovsky crossed Clague, he noticed a small black Geo Prism with three black men inside. The car was proceeding eastbound on Lorain, and turned south onto Clague Road. Bujnovsky immediately turned around and activated his lights.

{¶ 7} By the time Bujnovsky pulled up behind the Prism, the car's driver had driven into the gas station located on the southwest corner of the intersection, and both the driver and the front seat passenger, appellee Knox, were out of the car. Bujnovsky exited his cruiser and ordered the men to halt and to show their hands.

{¶ 8} Both men protested that they had done nothing wrong, but complied. Bujnovsky "called for a back-up unit" to assist him, then informed the men the reason they had been stopped. Bujnovsky asked for identification.

{¶ 9} The driver gave his name as "Paul Johnson," but told Bujnovsky that he had no license or tangible means to prove it; he supplied Bujnovsky with a date of birth and an address. Bujnovsky returned to his cruiser and consulted his Mobile Data Terminal with the information Johnson gave him.

{¶ 10} The Prism's listed owner was an 18-year-old female. Johnson's information "came back as being not in file." To Bujnovsky, this meant either that the person never had an Ohio's driver's license, or that the person was providing false information as to his identity.

{¶ 11} By this time, another police unit arrived on scene. Officer Miller informed Bujnovsky that "dispatch put out information that there was no theft offense occurred" at the GFS.

{¶ 12} Bujnovsky placed Johnson in the rear of his cruiser, then approached Knox. Knox "presented [him] with an identification card * * *." Knox's card contained valid information, but he also had another identification card "in [his] pocket." Bujnovsky asked Knox who the second card belonged to, and Knox told him "it belonged to his brother Willie."

{¶ 13} "At this point, after glancing at the driver in the back of [his] cruiser, [Bujnovsky] asked Mr. Knox if that was his brother Willie in the back of [the] patrol vehicle." Knox "said yes, that is my brother Willie." However, the third man, who had remained inside the Prism during the stop, and who supplied a valid ID, told Bujnovsky that he knew the driver as "Dootchie Johnson."

{¶ 14} Bujnovsky placed Knox under arrest for obstructing justice. The officers transported both Knox and Johnson to the police station, where other

officers identified Johnson; Johnson "had outstanding warrants for his arrest and did not have a valid driver's license."

{¶ 15} Knox was indicted on one count of obstructing justice in violation of R.C. 2921.32(A)(5). After obtaining discovery, his trial counsel filed a motion to suppress evidence. The trial court conducted an oral hearing on the motion.

{¶ 16} At the conclusion of the hearing, the trial court granted Knox's motion to suppress evidence. In pertinent part, the court stated:

{¶ 17} "* * * The driver was unable to produce any * * * identification or driver's license. Officer Bujnovsky placed the driver back into the zone car and did not at that point in time place him under arrest.

{¶ 18} "After the driver was placed * * * into the zone car, * * * Officer Bujnovsky questioned the defendant * * *. * * * [T]he defendant Mr. Knox provided correct information as to his own identification.

{¶ 19} "According to the testimony, * * * Officers Miller and Chung then arrived on the scene and at that point in time, Officer Bujnovsky was advised that in fact there had been no theft committed at the North Olmsted * * * store. * * * And in this Court's estimation, because Mr. Knox had provided to the police valid identification for himself, * * * and because of there being no theft, any further interrogation this Court finds to be inappropriate."

{¶ 20} The state appeals from the trial court's order with one assignment of error.

> **"The trial court erred when it determined that Officer Bujnovsky did not have the right to detain Mr. Knox, after learning that no theft offense had occurred in North Olmsted, for the limited purpose of determining the identity of the driver."**

{¶ 21} In essence, the state argues the trial court's decision imposed an arbitrary "cut-off" for an otherwise valid investigatory stop. The state's argument, however, is rejected, because the record supports the trial court's conclusion in this case. Before Knox provided the statement about the driver's identity, Bujnovsky's investigatory stop of Knox ceased to be valid.

{¶ 22} Knox challenged the state's intent to use his statement by means of a motion to suppress evidence. A motion to suppress evidence challenges the warrantless search and seizure at issue as being in violation of the Fourth Amendment of the United States Constitution. *State v. Williams,* Cuyahoga App. No. 81364, 2003-Ohio-2647, ¶7. The principal remedy for such a violation is the exclusion of evidence from the criminal trial of the individual whose rights have been violated. Id. Exclusion is mandatory when such

evidence is obtained as a result of an illegal seizure. Id., citing *Mapp v. Ohio* (1961), 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081.

{¶ 23} Appellate review of a trial court's ruling on a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8, 797 N.E.2d 7. This court accepts the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Gross*, Cuyahoga App. No. 91080, 2009-Ohio-611, ¶24. Accepting these facts as true, this court must independently determine, as a matter of law and without deference to the trial court's conclusion, whether those facts meet the applicable legal standard. *Burnside*; *State v. Williams*, ¶8.

{¶ 24} The Fourth and Fourteenth Amendments to the United States Constitution prohibit warrantless searches and seizures, unless an exception applies. Id., ¶25. One exception to the warrant requirement is the investigatory stop, which is permitted pursuant to *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889.

{¶ 25} This type of exception is "narrowly drawn"; it "allows a police officer without probable cause to stop and *briefly* detain a person if the officer has a reasonable suspicion based upon specific articulable facts *that the suspect is engaged in criminal activity*." *State v. Franklin* (1993), 86 Ohio App.3d 101, 103, 619 N.E.2d 1182. (Emphasis added.) As noted in

Franklin, at 104, "In *Terry*, the United States Supreme Court set forth a *dual* inquiry for evaluating the reasonableness of a search conducted incident to such an investigative stop:

{¶ 26} "'[1] whether the officer's action was justified at its inception, *and [2] whether it is reasonably related in scope to the circumstances which justified the interference in the first place.*'" Id. 392 U.S. at 20, 88 S.Ct. at 1879, 20 L.Ed.2d at 904-905. (Emphasis added.)

{¶ 27} The initial inquiry entails a determination of whether, under the totality of the facts available to the officer at the moment of the stop, the investigating officer can point to specific and articulable facts to support his reasonable belief that a crime may be occurring; if so, the intrusion is permitted. *Franklin*, supra. "The second inquiry considers the extent of the permissible intrusion. The scope of that intrusion is limited. The search must be reasonably related to the articulable suspicion that prompted the search." Id.

{¶ 28} The trial court in this case correctly allowed that Bujnovsky provided articulable facts that justified his initial stop of the Prism. *Williams*. He heard the dispatch, saw the car within moments, and intended to investigate whether the occupants had been involved in a "possible theft offense" at the GFS.

{¶ 29} His questioning of the driver then provided grounds to continue to investigate whether the *driver* was engaged in criminal activity. Knox, on the other hand, provided valid identification. Once Bujnovsky was informed that no theft offense had taken place, he lost any basis upon which to continue to detain Knox. *State v. Scalmato,* Cuyahoga App. No. 82576, 2003-Ohio-6617, ¶12. Therefore, Bujnovsky's continued questioning of Knox exceeded the permissible extent of the initial intrusion.

{¶ 30} Since the trial court thus correctly applied the law to the facts of this case, the state's assignment of error is overruled.

{¶ 31} The trial court's order is affirmed.

It is ordered that appellee recover from 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. Case remanded to the trial court for further proceedings.

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

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KENNETH A. ROCCO, JUDGE

PATRICIA ANN BLACKMON, J., CONCURS;
SEAN C. GALLAGHER, A.J., DISSENTS
(SEE ATTACHED DISSENTING OPINION)

SEAN C. GALLAGHER, A.J., DISSENTING:

{¶ 32} I respectfully dissent from the majority view in this case. I would reverse the judgment of the trial court and allow the admission of Knox's statement. The majority opinion paints a scenario where the events in question are clear and distinct. I find the "time line" of the facts at play in this encounter to be murky.

{¶ 33} Investigatory stops often involve changing circumstances. These encounters are shaped more by an evolution of facts rather than distinct starting and stopping points during the encounter. In this case, the investigatory stop "morphed" into at least three distinct phases, which at times overlapped each other. Under the totality of the circumstances, I would find there was a reasonable basis for Officer Bujnovsky's decision to detain Knox for a limited time.

{¶ 34} While the time line of facts in this encounter is murky, one fact is clear and undisputed. Officer Bujnovsky's detention of all three males did not exceed 15 minutes. Given the evolving nature of this encounter, I would find the limited time of this detention reasonable.

{¶ 35} In the first phase, Bujnovsky stopped the vehicle on a report of three males purportedly involved in a theft offense from a Gordon Food Service store in North Olmsted. This phase promptly morphed into a second phase involving an apparently unlicensed and unidentified driver. While the first phase, or initial basis for the stop, lapsed within minutes of the encounter, the second phase was ongoing when a third phase, not addressed in the majority opinion, emerged as Officer Bujnovsky learned that the detained individuals might be connected to a theft from another Gordon Food Service store in another jurisdiction (Brooklyn).

{¶ 36} Certainly it is reasonable for an 18-year police veteran to expect the passengers in a vehicle to have some knowledge of the identity of the driver. I would not place police officers like Bujnovsky under a "stop watch" standard when dealing with passengers while investigating the identity of a driver. Where there is an initial report of a local theft, followed by a confrontation with an unidentified driver, and a further report of a possible theft from another jurisdiction involving possibly all three males, a detention that ends after 15 minutes is hardly excessive. Would 30 minutes be too long? Perhaps, but in my view, the 15 minutes here was a reasonable time period given the totality of the facts and circumstances.

{¶ 37} This was not a case of the officer placing Knox in the back of his cruiser and subjecting him to a custodial interrogation. Knox was detained, but was not being interrogated. I do not find the fact that the officer "had" the driver

and could have arrested him for driving without a license controlling. The officer was going through a brief process to determine what each occupant in the car knew and what the passengers knew about the driver's identity. At some point during the limited encounter, the officer learned these three individuals may have been involved in an unrelated theft from another jurisdiction and an officer was on his way to the scene to confirm or refute that claim. Arguably, the officer had an articulable suspicion from a police source to detain these individuals to determine if they were wanted in connection with a theft from the other jurisdiction.

{¶ 38} Knox, subsequent to offering evidence of his own identity, chose to offer his brother's ID card and openly lie about the driver's identity. Knox was free to say nothing, and in short order his silence would have likely rendered the time for detention of the passengers excessive. He chose to lie within the small window of time that was reasonable for the detention of a passenger and thus, in my view, was properly charged.

> **"It is clear that there are several investigative techniques which may be utilized effectively in the course of a Terry-type stop. The most common is interrogation, which may include both a request for identification and inquiry concerning the suspicious conduct of the person detained. Sometimes the officer will communicate with others, either police or private citizens, in an effort to verify the explanation tendered or to confirm the identification or determine whether a person of that identity is otherwise wanted. Or, the suspect may be detained while it is determined if in fact an offense has occurred in the area, a process which might involve checking certain premises, locating and examining objects abandoned by the suspect, or talking with other people. If it is known that an offense has**

> **occurred in the area, the suspect may be viewed by witnesses to the crime. There is no reason to conclude that any investigative methods of the type just listed are inherently objectionable; they might cast doubt upon the reasonableness of the detention, however, if their use makes the period of detention unduly long or involves moving the suspect to another locale. 3 W. LaFave Search and Seizure § 9.2, pp. 36-37 (1978)."**

Michigan v. Summers (1981), 452 U.S. 692, 700-701, 69 L.Ed.2d 340, fn. 12. See, also, *State v. Fields* (Dec. 2, 1996), 4th Dist. App. No. 96CA1742, on the brief detention of a driver and three occupants of a related vehicle. See, also, *State v. Miller*, Cuyahoga App. No. 90518, 2008-Ohio-4453.

{¶ 39} For these reasons, I would reverse the decision of the common pleas court and remand the case for further proceedings.