

[Cite as *State v. Higuera*, 2010-Ohio-4113.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93633

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TIODOSA HIGUERA

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-521078

BEFORE: Stewart, P.J., Dyke, J., and Celebrezze, J.

RELEASED AND JOURNALIZED: September 2, 2010
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MELODY J. STEWART, P.J.:

{¶ 1} Defendant-appellant, Tiodosa Higuera, appeals the judgment of the Cuyahoga County Court of Common Pleas denying his motion to dismiss. He contends that the evidence did not demonstrate that the police officers had

a reasonable suspicion that he was involved in criminal activity sufficient to justify their stopping his vehicle. Upon review, we affirm.

{¶ 2} On February 15, 2009, appellant was arrested and subsequently indicted for drug possession, drug trafficking, and possession of criminal tools. On April 6, 2009, appellant filed a motion to dismiss based upon an illegal stop. On May 12, 2009, the trial court held an evidentiary hearing, after which it denied the motion. A jury trial ensued and appellant was found guilty of all charges. The trial court imposed a sentence of nine years imprisonment. This appeal followed.

{¶ 3} The following facts are gleaned from the record of the suppression hearing. Detective Michael Alexander of the Cleveland Police Department testified that he had received information from a confidential informant that a large shipment of marijuana was going to be delivered to a local man named Robert Moore. The informant did not know the location of the delivery, but said the shipment contained more than 2,000 pounds of marijuana and would be delivered by “Mexicans.” On Friday 13, 2009, the informant initiated a controlled buy of more than 20,000 grams of marijuana from Moore. After the successful drug buy, police arrested Moore and seized from his car a large amount of cash, more than 20 pounds of marijuana, a firearm, a cell phone, suspected drug ledgers, and a receipt for the payment of rent on a warehouse suite at 19701 South Miles Road, Warrensville Heights, Ohio. Police learned

that Moore and a partner, Michael Parker, had operated a trucking company out of this address. Moore told police that the trucking company was no longer in business; however, the receipt showed the rent was recently paid.

{¶ 4} That night, police executed search warrants on Moore's home in Beachwood, Ohio, and at the warehouse. Police recovered close to \$400,000 in cash, marijuana, packaging materials, suspected drug ledgers, guns, ammunition, and bulletproof vests from Moore's house. At the warehouse, police found suspected drug ledgers, packaging material, and personal papers containing Moore's and Parker's names. Police also found slashed tires that Det. Alexander testified, based upon his experience, were used by drug traffickers to conceal drugs and drug money for transport.

{¶ 5} As a result of Moore's arrest and the search of the two locations, police set up surveillance at the warehouse on Saturday night, February 14, 2009. Shortly before 6 a.m. on Sunday, February 15, 2009, police on the scene reported to Detective Alexander that a semi-tractor trailer pulled into the drive and stopped at the loading dock located at the rear, northeast corner of the warehouse. Detective Alexander arrived a few minutes later and stationed himself and a local police unit at the front, southwest corner of the building, close to the drive. A few minutes later, Detective Alexander was notified by radio that a car was coming around the building with Mexicans in it, and to stop the car. Detective Alexander testified that the car was

“traveling very fast down this road and was kicking up dirt and was coming toward us.”¹ He said he stepped into the middle of the road wearing a police vest with “Cleveland Police” on it and attempted to flag the car down. The car did not stop; he moved out of its path and called to the zone car officer to stop the car. The officer jumped in his car, activated the siren, and pulled into the path of the car, stopping it.

{¶ 6} Detective Alexander testified that he yelled at appellant to keep his hands up but appellant did not comply and kept his hands on the steering wheel. Detective Alexander pulled appellant out of the car and the other officer pulled the passenger out. Appellant was handcuffed and placed in the rear of Detective Alexander’s car. The detective said he attempted to read appellant his rights, but it became apparent that appellant did not speak English so he did not interview him.

{¶ 7} Detective Alexander said he checked the records of the vehicle appellant was driving and found it was registered to Michael Parker. Subsequent investigation revealed that appellant was staying at a property owned by Robert Moore. After the tractor-trailer was searched and more than a ton of marijuana was found, appellant was arrested.

¹Appellant attempts to challenge this testimony with allegedly conflicting testimony from another officer at trial. However, appellant has not raised the issue of the sufficiency or manifest weight of the evidence in this appeal. The only issue on appeal relates to the suppression motion, and so our review is limited to the evidence presented at that hearing.

{¶ 8} Appellant raises the following single error for review.

{¶ 9} “I. The trial court erred when it denied the defendant-appellant’s motion to dismiss based upon an illegal stop in violation of the Fourth Amendment to the United States Constitution and Section 14 of the Ohio Constitution.”

{¶ 10} We first address the state’s challenge to appellant’s use of a “motion to dismiss.” The state argues that dismissal of an indictment is not the proper remedy for an illegal stop. We find, however, that although defendant’s pre-trial motion was improperly titled as one to dismiss rather than one to suppress, both counsel and the trial court treated it as a motion to suppress. The record reflects that the trial court stated at the beginning of the hearing that the parties were there on a motion to suppress. Accordingly, we will also decide the instant case as if appellant’s motion was a suppression motion, and will apply the appropriate standard to determine whether the trial court properly denied the motion.

{¶ 11} Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, at ¶8. In deciding a motion to suppress, the trial court assumes the role of trier of fact. *Id.* A reviewing court is bound to accept those findings of fact if they are supported by competent, credible evidence. *Id.* But with respect to the trial court’s conclusion of law, we apply

a de novo standard of review and decide whether the facts satisfy the applicable legal standard. *Id.*, citing *State v. McNamara* (1997), 124 Ohio App.3d 706, 707 N.E.2d 539. In this case, the trial court concluded that the police lawfully detained appellant based upon a reasonable suspicion of criminal activity.

{¶ 12} Appellant argues that the warrantless stop and subsequent arrest were unlawful and in violation of his Fourth Amendment rights. He claims that there were no articulable facts to justify the initial stop of the vehicle. He argues that the police did not observe him involved in any criminal activity. He also maintains that the informant did not provide any information on the age, gender, or other distinguishing characteristic of the individuals involved in the drug trafficking. Therefore, he argues that there was nothing to give the police a reasonable suspicion that he was one of the individuals involved. In his motion, appellant claimed that he merely happened upon the scene at the warehouse as the other co-defendants were being detained. He maintains that this was not sufficient for the police to approach or to stop him.

{¶ 13} 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. One exception was announced in the

United States Supreme Court decision in *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, which held that a police officer can stop and briefly detain a person for investigative purposes, even if probable cause under the Fourth Amendment is lacking, if the officer reasonably suspects that the individual is or has been involved in criminal activity. *Id.* In reaching that conclusion, the officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. *State v. Andrews* (1991), 57 Ohio St.3d 86, 565 N.E.2d 1271, citing *Terry*. The propriety of a “Terry” investigative stop must be viewed in light of the totality of the surrounding circumstances. *State v. Bobo* (1988), 37 Ohio St.3d 177, 524 N.E.2d 489, paragraph one of the syllabus.

{¶ 14} In considering the totality of the circumstances, we must look at all of the facts known to the police at the time of the stop and judge those facts against an objective standard. *Terry* at 21. The pertinent inquiry is “would 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?” *Id.*

{¶ 15} Applying the above standard to the facts of the instant case, we find the investigatory stop of appellant was lawful. Police were conducting surveillance of a warehouse leased to Robert Moore, a person from whom the police had made a successful controlled drug buy less than two days earlier.

A search of Moore's home provided evidence of a large scale drug trafficking operation. The same informant who made the controlled buy told police that a shipment of more than a ton of marijuana was in route to Moore from Mexico. Appellant pulled into the warehouse lot in the pre-dawn hours of a Sunday morning, just shortly after the arrival of a tractor-trailer driven by a man of Mexican descent and suspected of transporting the marijuana. After driving past the tractor-trailer, now stopped by police, appellant sped around the building and attempted to leave. He did not stop when flagged down by Detective Alexander, and only stopped when a police car blocked his exit. These facts are sufficient to give rise to a reasonable suspicion that appellant was involved in the criminal activity, and to permit the police to make an investigatory stop.

{¶ 16} Once appellant was detained, the police conducted an investigation. The investigation determined that appellant was driving a car registered to Parker. It was also discovered that appellant was currently staying at a property owned by Moore, and that his cell phone and the tractor-trailer driver's cell phone had been in contact. Finally, the search of the tractor-trailer found more than a ton of marijuana. These facts constitute probable cause to arrest appellant.

{¶ 17} We are unpersuaded by appellant's assertion that the facts of this case are similar to those in *State v. Holly*, 8th Dist. No. 92057,

2009-Ohio-3081, and *State v. Gaston*, 8th Dist. No. 92823, 2010-Ohio-248, two recent cases in which this court found a lack of reasonable suspicion to warrant an investigatory stop. The cases are factually distinguishable.

{¶ 18} In *Holly*, the state argued that observation of suspicious vehicular traffic and a hand-to-hand exchange in defendant's driveway gave the police reasonable suspicion that defendant was engaged in drug trafficking. However, a review of the record revealed that none of the state's witnesses at the suppression hearing testified that this was the reason for stopping defendant. The state's witnesses testified that the only reason they stopped the defendant was to determine his identity. In the instant case, the state's witness testified that it was the timing of appellant's arrival at the warehouse, coupled with appellant's behavior in trying to flee, added to the facts developed from their investigation of Moore over the prior two days, that formed the basis of their suspicion that appellant was involved in the drug trafficking operation.

{¶ 19} In *Gaston*, the police were on patrol in an area known for drug activity when they observed two males standing on the corner of the street in the early afternoon. Upon noticing the police car, the males turned and "hurriedly walked" about four or five steps into the nearby corner store. The state argued that because these actions occurred in a high drug area, the police had reasonable suspicion to stop and search the defendant. This court

disagreed and found that while the street location's characteristics were relevant, the defendant's presence in a high crime area, standing alone was not enough to support a reasonable, particularized suspicion of criminal activity. The decision noted that there were no furtive movements and the men did not run from police but rather "walked."

{¶ 20} There is no merit to appellant's argument that, like Gaston, he was stopped for his "mere presence" at the warehouse. First, there is no allegation that the warehouse was located in a high crime area. Second, the police were not on a routine patrol of the area. They were staking-out a particular location in anticipation of the arrival of a large shipment of drugs. Finally, appellant, unlike Gaston, did flee from the police. Detective Alexander testified that appellant was driving at a high speed, and only stopped when his path was blocked by a police vehicle. The detective testified that he later learned that appellant began his flight after making eye-to-eye contact with a police officer standing next to the tractor-trailer.

{¶ 21} Having found appellant's stop, detention, and arrest to be valid, the single assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its 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 Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

MELODY J. STEWART, PRESIDING JUDGE _____

FRANK D. CELEBREZZE, JR., J., CONCURS;
ANN DYKE, J., CONCURS IN JUDGMENT ONLY