[Cite as *State v. Okundaye*, 2010-Ohio-6363.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94796

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

UYI OKUNDAYE

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-530847-A

BEFORE: Kilbane, P.J., Sweeney, J., and Cooney, J.

RELEASED AND JOURNALIZED: December 23, 2010

ATTORNEYS FOR APPELLANT

William D. Mason
Cuyahoga County Prosecutor
Carl Sullivan
Assistant County Prosecutor
Justice Center - 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

ATTORNEY FOR APPELLEE

Lawrence R. Floyd
3675 Warrensville Center Road
P.O. Box 202271
Shaker Heights, Ohio 44120

MARY EILEEN KILBANE, P.J.:

{¶ 1} Plaintiff-appellant, state of Ohio ("the State"), appeals from the order of the trial court that suppressed evidence obtained from the vehicle of defendant-appellee, Uyi Okundaye ("defendant"). For the reasons set forth below, we affirm.

{¶ 2} Defendant was indicted pursuant to a ten-count indictment in connection with an alleged drug sale in his vehicle on October 29, 2009, and the November 2, 2009 search of his home and vehicle. With regard to the alleged October 29, 2009 offense, the State charged defendant with trafficking in less

than one gram of crack cocaine in violation of R.C. 2925.03(A)(1); trafficking in less than one gram of crack cocaine in violation of R.C. 2925.03(A)(2); and possession of less than a gram of crack cocaine in violation of R.C. 2925.11(A).

{¶ 3} With regard to the November 2, 2009 search of his home and vehicle, the State charged defendant with trafficking in less than the bulk amount of benzylpiperazine, in violation of R.C. 2925.03(A)(2), with firearm and forfeiture specifications; possession of less than the bulk amount of benzylpiperazine, in violation of R.C. 2925.11(A), with firearm and forfeiture specifications; trafficking in more than one but less than five grams of crack cocaine, in violation of R.C. 2925.03(A)(2), with juvenile and forfeiture specifications; possession of less than one gram of crack cocaine, in violation of R.C. 2925.11(A), with a forfeiture specification; carrying a concealed weapon, in violation of R.C. 2923.12(A)(2), with a forfeiture specification; and two counts of possession of criminal tools, in violation of R.C. 2923.24(A), with forfeiture specifications.

{¶ 4} Defendant pled not guilty and moved to suppress the items found in his vehicle (a .38 caliber revolver, a scale with drug residue, a plate with drug residue, a plastic baggie with ecstacy pills, $450, and a key to a home). Defendant maintained that prior to the execution of a search warrant for his

home, police stopped him in his vehicle about a block away and searched his vehicle, but did not have probable cause to do so.

{¶ 5} The motion to suppress was heard on February 22, 2010. Cleveland Police Detective John Pitts ("Detective Pitts") testified that on October 29, 2009, he assisted Detective Maria Matos ("Detective Matos") with a controlled drug buy and the search of defendant's house and the car he was known to drive, a 2004 silver Chevrolet Malibu. According to the testimony of Detectives Pitts and Matos, a confidential informant with marked money, made a controlled drug buy from defendant, known as "Six," in defendant's silver Malibu. Several minutes later, a zone car made a traffic stop of this vehicle for no rear plate illumination, an equipment violation, in order to determine defendant's identification.

{¶ 6} Detective Pitts observed defendant return home, following the traffic stop. The officers obtained a search warrant for the premises, but it did not specifically authorize a search of defendant's vehicle. They then continued surveillance of defendant as they prepared for execution of the warrant. According to Detective Pitts, the officers wanted to protect the identity of the confidential informant, so they decided to execute the warrant at a later time.

{¶ 7} On November 2, 2009, after obtaining the warrant, the officers observed defendant leaving the apartment. They were not ready to execute the warrant at that time, so they waited until all the officers had arrived. Defendant began to drive around the block; the officers believed that he was engaging in counter-surveillance measures. They also observed individuals from inside the apartment looking out to the street. According to Detective Pitts,

> **"[We] decided to just stop the defendant then execute the warrant. We kind of cobbled together a plan on the fly because that wasn't our original plan. The original plan was to execute a warrant with the defendant in the premises."**

{¶ 8} The officers stopped defendant as he was proceeding in front of the premises, and his turn signal indicated that he was proceeding away from the apartment. The officers arrested defendant and recovered from the vehicle boxes of shoes, clothing, a handgun, a scale, drugs, $450 in cash, and drug residue.

{¶ 9} The trial court subsequently suppressed the items found in defendant's vehicle and stated:

> **"The court having reviewed the evidence in the case decides the following: That the police officers must have a reasonable, articulable suspicion that a person is or has been engaged in criminal activity for an investigatory stop. There was none present here. The stop is improper.**

"There is also no probable cause the vehicle contained contraband, no basis for the search of the vehicle. The search warrant was for the [residence] not the vehicle. There also was not an arrest warrant. Therefore the court grants the defendant's motion to suppress the evidence recovered in the vehicle and suppresses the evidence that was recovered."

{¶ 10} The State now appeals.

{¶ 11} For its sole assignment of error, the State asserts the following:

"The trial court erred in granting appellee's motion to suppress evidence on the grounds that it was illegally seized by officers and/or agents of the Cleveland Police Department and is the fruit of an unconstitutional search and seizure in violation of the rights guaranteed by the Fourth and Fourteenth Amendment to the United States Constitution and Article 1, Section 14 of the Ohio Constitution."

{¶ 12} In this assignment of error, the State maintains that the trial court erroneously suppressed the evidence obtained from the car because there was probable cause for the stop and search of the vehicle.

{¶ 13} An appellate court's review of a ruling on a motion to suppress presents mixed questions of law and fact. *State v. Burnside,* 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71. This court defers to a trial court's factual findings where they are supported by competent, credible evidence. Id. See, also, *State v. Brooks*, 75 Ohio St.3d 148, 1996-Ohio-134, 661 N.E.2d 1030. "[T]he appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal

standard." *Burnside*, citing *State v. McNamara* (1997), 124 Ohio App.3d 706, 707 N.E.2d 539.

{¶ 14} The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." A law enforcement officer's stop of an automobile must comply with the Fourth Amendment's reasonableness requirement. *Whren v. United States* (1996), 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89.

{¶ 15} A stop may be justified as a noninvestigatory traffic stop wherein the police officer witnesses a violation of the traffic code, which is proper where the officer has probable cause to believe a traffic offense has occurred or was occurring. Id. A stop may also be justified as an investigative or *Terry* stop wherein the officer does not necessarily witness a specific traffic violation, but the officer does have sufficient reason to believe that a criminal act has taken place or is occurring and the officer seeks to confirm or refute this suspicion of criminal activity. See *State v. Scrivens*, Trumbull App. No. 2009-T-0072, 2010-Ohio-712, citing *Terry v. Ohio* (1968), 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889. In this situation, the stop is justified if the officer observes facts giving rise to a reasonable articulable suspicion of criminal activity and the officer can articulate specific facts that would warrant a person of reasonable caution in the belief that

the person stopped has committed or is committing a crime. See, generally, *Terry*.

{¶ 16} In this matter, the record demonstrates that defendant's vehicle was stopped while proceeding on a public road, away from the defendant's apartment. Therefore, from the record, the stop of the vehicle is an independent event, separate from the execution of the search warrant for his apartment, as the undisputed evidence of record indicates that the officers "decided to just stop the defendant then execute the warrant [and] kind of cobbled together a plan on the fly[.]" As such, it must be supported by a separate legal justification.

{¶ 17} In this matter, Detective Pitts testified as follows:

> **"Another vehicle [followed defendant]. A police vehicle. The defendant began to drive around the block. The determination was made as we were communicating over our radios that it appeared that the defendant had spotted the police car behind him, so we decided to just stop the defendant and then execute the warrant. We kind of cobbled together a plan on the fly because that wasn't our original plan. The original plan was to execute a warrant with the defendant in the premises.**
>
> **"As it appeared the defendant was driving around the block, kind of without any purpose, it seemed to us, we decided to go ahead and stop the defendant."**

{¶ 18} On this record, there was no proper justification for the stop of the vehicle. The State insists that there was probable cause to search the vehicle

based upon the fact that defendant completed a drug sale in it, and he went from the apartment, which contained drugs, to the vehicle. The officers did not identify a traffic offense to support the stop or provide any other probable cause for stopping the vehicle. They also failed to establish a reasonable, articulable basis for the stop pursuant to *Terry* or *State v. Bobo* (1988), 37 Ohio St.3d 177, 179, 524 N.E.2d 489, as the drug sale in the vehicle occurred several days earlier, and there were no specific and articulable facts linking the vehicle to drugs at the time of the stop.

{¶ 19} Moreover, the search warrant in this matter did not authorize search of defendant's vehicle. Where the police have obtained a search warrant, Ohio courts have recognized that such a warrant extends to permit search of motor vehicles located within the curtilage of the premises or that area immediately surrounding a dwelling house. See *State v. Ballez,* Lucas App. No. L-10, 2010-Ohio-4720, citing *United States v. Dunn* (1987), 480 U.S. 294, 300, 107 S.Ct. 1134, 94 L.Ed.2d 326. The warrant does not extend to vehicles being driven on public roadways. *Ballez*. Accordingly, the search warrant, which did not specifically authorize search of the vehicle, cannot be interpreted to include defendant's vehicle in this instance. Cf. *State v. Dudley,* Montgomery App. No. 21781, 2008-Ohio-6545 (vehicle parked in driveway); *State v. Williams,*

Cuyahoga App. No. 88137, 2007-Ohio-3897 (vehicle parked in driveway); *State v. Simpson* (Mar. 22, 2002), Montgomery App. No. 19011 (vehicle parked in attached garage); *State v. Tewell* (1983), 9 Ohio App.3d 330, 330-331, 460 N.E.2d 285 (vehicle parked in driveway).

{¶ 20} In accordance with the foregoing, the trial court properly concluded that there was no reasonable, articulable suspicion that the defendant had been engaged in criminal activity to justify an investigatory stop and no probable cause that the vehicle contained contraband. Therefore, the trial court properly suppressed the evidence obtained from defendant's vehicle (a .38 caliber revolver, a scale with drug residue, a plate with drug residue, a plastic baggie with ecstacy pills, $450, a cell phone, and a key to a home in Cleveland). Accordingly, we affirm.

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.

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

MARY EILEEN KILBANE, PRESIDING JUDGE

JAMES J. SWEENEY, J., and
COLLEEN CONWAY COONEY, J., CONCUR