[Cite as *State v. Roubideaux*, 2010-Ohio-73.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92948

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOSHUA ROUBIDEAUX

DEFENDANT-APPELLANT

JUDGMENT:
CONVICTIONS & SENTENCES AFFIRMED;
REMANDED WITH INSTRUCTIONS

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-516108

BEFORE: Rocco, P.J., Celebrezze, J., and Sweeney, J.

RELEASED: January 14, 2010

JOURNALIZED:

ATTORNEY FOR APPELLANT

Ruth Fischbein-Cohen
3552 Severn Road
Suite 613
Cleveland Heights, Ohio 44118

ATTORNEY FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
BY: Thorin Freeman
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

KENNETH A. ROCCO, P.J.:

{¶ 1} After entering pleas of no contest[1] to charges of drug trafficking and possession, defendant-appellant Joshua Roubideaux appeals, asserting that the trial court erred in denying his motion to suppress evidence.

{¶ 2} Roubideaux presents one assignment of error. He argues the police detective lacked a reasonable basis to detain him for questioning, failed to advise him of his constitutional rights prior to questioning him, and lacked

[1] The trial court's journal entries incorrectly indicate Roubideaux entered "guilty" pleas to the charges.

probable cause to search his vehicle for contraband; therefore, his motion to suppress evidence should have been granted.

{¶ 3} Upon a review of the record, this court cannot agree. Consequently, Roubideaux's convictions are affirmed. However, this case must be remanded for correction of the journal entries of convictions and sentences.

{¶ 4} Roubideaux's convictions result from an incident that occurred on Sunday afternoon, September 29, 2008. At the hearing on Roubideaux's motion to suppress evidence, the state's witnesses described the circumstances of the incident.

{¶ 5} According to Parma police detective Kevin Monnolly, he had received information prior to that date "from three separate sources"[2] of unusual activity occurring at 4302 Longwood Avenue. Monnolly detailed the sources as follows: 1) in executing a search warrant at the house "directly across the street" in early August, "several of the neighbors came out and pointed out" that house, stating that it "was also involved in drug trafficking"; 2) he received complaints from two additional sources that the residence had "suspicious activity" around it; 3) a third source "corroborated that there was drug activity at the house" by claiming "he had actually been in the house and observed crack cocaine being smoked by the residents."

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[2]Quotes indicate testimony provided at the hearing on Roubideaux's motion to suppress evidence.

{¶ 6} The informants indicated the activity involved "one car in particular." Monnolly's sources gave him the license plate number of a Honda Prelude, told him the car "would come to the house, stay not more than a couple minutes, then leave," and indicated to him these visits occurred on Sunday afternoons.

{¶ 7} On September 29, 2008, Monnolly received a call from a "confidential source" ("CS"). The CS told him that the Honda had come to the house at 4302 Longwood, and the driver, after making his delivery, had become involved in a traffic accident as he attempted to exit the driveway. The CS further told Monnolly that the driver was "acting very nervous."

{¶ 8} Monnolly surmised that the driver sought to leave the area as quickly as possible. He called "dispatch," notified them of the accident, requested they send a "cruiser" to the location, and indicated he was on his way to the scene.

{¶ 9} While en route, Monnolly received another call from the CS. The CS told Monnolly that "he had observed the [driver] walk back to his car and look around and he was attempting to conceal something, unknown items, in the back pouch of the passenger's seat."

{¶ 10} Upon Monnolly's arrival at the scene, he briefly spoke to one of the patrol officers. The officer indicated the driver, identified as Roubideaux, seemed "nervous," and "kept asking to go to the bathroom," so Roubideaux briefly had reentered the house. Monnolly noticed that Roubideaux had been

seated in a patrol car while the officers obtained information about the accident, but he got out when Monnolly arrived.

{¶ 11} Monnolly looked at the Honda to note it was "drivable." He then approached Roubideaux and began asking him "basic questions, what was he doing in the neighborhood, what was he there for."

{¶ 12} Roubideaux responded that he was visiting his friend Dave, and they had been watching the football game. However, Roubideaux could not provide the score. Moreover, he could not explain where he had met Dave. Monnolly noticed Roubideaux seemed "extremely nervous" during the exchange. Roubideaux shifted on his legs, and, rather than meeting Monnolly's eyes, instead, looked "around."

{¶ 13} By this time, David Swietynowski emerged from his house. Monnolly "asked him what was going on," and he indicated Roubideaux had come to watch the game. However, Monnolly received two different versions of how the men met. Monnolly asked for consent to search the house, but Swietynowski permitted only a brief look at the bathroom; he refused the detective's request to search any other portion of the premises.

{¶ 14} Monnolly testified that, because he saw nothing in the house's bathroom, and because Roubideaux was going to be permitted to leave, he asked Roubideaux if he could conduct a search of the Honda. When Roubideaux refused, Monnolly simply opened the passenger's side door, reached

into the seat pocket in which the CS had seen Roubideaux "conceal something," and extracted three separate plastic bags. The first contained "a large baggie with 36 bags of marijuana," the second contained "47 tablets of what [he] knew

{¶ 15} * * was ecstasy, and then a third bag with crack cocaine." At that point, Roubideaux was arrested for violation of state drug laws.

{¶ 16} Roubideaux subsequently was indicted on six counts. Counts one, two and three, respectively, charged him with trafficking in up to five times the bulk amount of MDMA (commonly known as "ecstacy"), between ten and twenty-five grams of crack cocaine, and "less than two hundred grams" of marijuana; each count contained both a schoolyard and a forfeiture specification. Counts four, five, and six charged him with possession of crack cocaine, MDMA, and criminal tools; each with a forfeiture specification.

{¶ 17} Roubideaux pleaded not guilty to the charges and filed a motion to suppress evidence. At the hearing on his motion, the trial court heard Monnolly's testimony, then the testimony of Roubideaux and David Swietynowski. The trial court subsequently denied Roubideaux's motion.

{¶ 18} Roubideaux thereafter entered pleas of no contest to the charges; the journal entry, however, incorrectly states that Roubideaux entered "guilty" pleas to each count. The trial court found him guilty of the offenses, and imposed a prison term that totaled five years for the convictions; once again, the

journal entry of sentence incorrectly states that Roubideaux entered “guilty” pleas to each count.

{¶ 19} Roubideaux appeals from his convictions with the following assignment of error:

“The trial court erred in denying the motion to suppress evidence.”

{¶ 20} Roubideaux argues that his motion to suppress evidence should have been granted because Monnolly lacked a reasonable basis to detain him for questioning, failed to advise him of his constitutional rights prior to questioning him, and lacked probable cause to search his vehicle for contraband. This court does not agree.

{¶ 21} The facts and issues raised in this case compare similarly to those presented in *State v. Abernathy*, Scioto App. No. 07CA3160, 2008-Ohio-2949. Thus, *Abernathy* will be quoted at some length in addressing Roubideaux’s argument. The appropriate standard of this court’s review of the argument Roubideaux makes in his assignment of error cogently was set forth in that opinion, beginning at ¶17, as follows:

{¶ 22} “Our analysis begins with the well-settled premise that appellate review of a trial court’s decision on a motion to suppress evidence involves mixed questions of law and fact. [Citations omitted.] In hearing such motions, trial courts assume the role of trier of fact and are in the best position to resolve factual disputes and to evaluate witnesses’ [sic] credibility. See, e.g., *State v.*

Burnside, 100 Ohio St.3d 152, 797 N.E.2d 71, 2003-Ohio-5372, at ¶8; *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972. Appellate courts must accept a trial court's factual findings so long as competent and credible evidence supports those findings. [Citations omitted.] Appellate courts then independently review whether the trial court properly applied the law to the facts."

{¶ 23} In analyzing the evidence presented at the hearing, the trial court in this case indicated it found Monnolly's testimony to be credible. The trial court's factual findings, therefore, are accepted as true.

{¶ 24} "The Fourth and Fourteenth Amendments to the United States Constitution, and Section 14, Article I of the Ohio Constitution, protect individuals against unreasonable searches and seizures. [Citations omitted.] Searches and seizures conducted outside the judicial process, without prior approval by either a judge or magistrate, are per se unreasonable under the Fourth Amendment subject only to specifically established and well-delineated exceptions. *Katz v. United States* (1967), 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576; *State v. Sneed* (1992), 63 Ohio St.3d 3, 6-7, 584 N.E.2d 1160; *State v. Braxton* (1995), 102 Ohio App.3d 28, 36, 656 N.E.2d 970. Once the defendant demonstrates that he was subjected to a warrantless search or seizure, the burden shifts to the state to establish that the warrantless search or seizure was constitutionally permissible. See *Maumee v. Weisner* (1999), 87 Ohio St.3d 295, 297, 720

N.E.2d 507; *Xenia v. Wallace* (1988), 37 Ohio St.3d 216, 524 N.E.2d 889, paragraph two of the syllabus." *Abernathy*, ¶18.

{¶ 25} The *Abernathy* court went on to state at ¶19:

{¶ 26} "Two exceptions to the warrant requirement include (1) short, investigative stops founded upon reasonable suspicion of criminal activity and (2) searches and seizures founded upon probable cause of criminal activity. See, e.g., *Dunaway v. New York* (1979), 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824; *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. * * *

{¶ 27} "In *State v. Taylor* (1995), 106 Ohio App.3d 741, 748-749, 667 N.E.2d 60, the court distinguished between an investigative stop and a seizure that is the functional equivalent of an arrest, which must be founded upon probable cause:

{¶ 28} 'The investigatory detention is * * * less intrusive than a formal custodial arrest. The investigatory detention is limited in duration and purpose and can only last as long as it takes a police officer to confirm or to dispel his suspicions. *Terry*, supra. A person is seized under this category when, in view of all the circumstances surrounding the incident, by means of physical force or show of authority a reasonable person would have believed that he was not free to leave or is compelled to respond to questions. [*United States v.*] *Mendenhall* [(1980, 446 U.S. 544], supra, 446 U.S. at 553, 100 S.Ct. at 1877, 1878, 64

L.Ed.2d at 508; *Terry*, supra, 392 U.S. at 16, 19, 88 S.Ct. at 1877, 1878, 20 L.Ed.2d at 903, 904.

{¶ 29} 'The Supreme Court in *Mendenhall* listed factors that might indicate a seizure. These factors include a threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person, the use of language or tone of voice indicating that compliance with the officer's request might be compelled, approaching the citizen in a nonpublic place, and blocking the citizen's path. Id. at 554, 100 S.Ct. at 1877, 64 L.Ed.2d at 509. A police officer may perform an investigatory detention without running afoul of the Fourth Amendment as long as the police officer has a reasonable, articulable suspicion of criminal activity. *Terry*, supra, 392 U.S. at 21, 88 S.Ct. at 1879, 20 L.Ed.2d at 906.

{¶ 30} "* * *

{¶ 31} '* * * To perform [a seizure that is the functional equivalent of an arrest] the police officer must have probable cause. *State v. Barker* (1978), 53 Ohio St.2d 135, 7 O.O.3d 213, 372 N.E.2d 1324. A seizure is equivalent to an arrest when (1) there is an intent to arrest; (2) the seizure is made under real or pretended authority; (3) it is accompanied by an actual or constructive seizure or detention; and (4) it is so understood by the person arrested. Id. at syllabus.'"

{¶ 32} As in *Abernathy*, the evidence in the instant case demonstrated the initial stop of Roubideaux was investigative in nature. Roubideaux had been

involved in a traffic accident, an occurrence that routinely can involve some police investigation. See, e.g., *Dayton v. Erickson* (1996), 76 Ohio St.3d 3, at the syllabus.

{¶ 33} Moreover, neither the Parma police officers nor Monnolly had any intent to arrest Roubideaux when they arrived at the scene; rather, Monnolly sought to stop Roubideaux's vehicle to investigate whether he had visited the residence to sell drugs. Therefore, the "reasonable suspicion analysis" provides the "proper framework" for addressing the issues raised in this appeal. *Abernathy*, ¶21; cf., *State v. Isabell*, Cuyahoga App. No. 87113, 2006-Ohio-3350.

{¶ 34} "Reasonable suspicion may be founded on information provided by persons outside the police department. *Adams v. Williams* (1972), 407 U.S. 143, 147, 92 S.Ct. 1921, 32 L.Ed.2d 612. In *Adams*, the court held that informants' tips, while they vary greatly in their value and reliability, may in certain cases produce reasonable suspicion. Id. The court noted that ' * * * one simple rule will not cover every situation.' Id. Each case must be decided on its own unique circumstances and any attendant indicia of reliability. Id." *State v. Bailey*, Cuyahoga App. No. 81498, 2003-Ohio-1834, ¶20.

{¶ 35} Thus, a tip which, standing alone, would lack sufficient indicia of reliability nevertheless may establish reasonable suspicion to make an investigatory stop if it is sufficiently corroborated through independent police

work. *Alabama v. White* (1990), 496 U.S. 325, 332. The simple corroboration of neutral details describing the suspect or other conditions existing at the time of the tip, without more, will not produce reasonable suspicion for an investigatory stop. Rather, reasonable suspicion is dependent upon both the content of the information provided, and its degree of reliability. Id. at 330-31. Quantity of information available and the quality of that information both are examined under a totality of the circumstances approach. Id. at 330.

{¶ 36} In this case, Monnolly had information gathered over at least a month from three independent sources, some of whom were known because they were neighbors of Swietynowski's, that described Roubideaux's car, his license plate number, his customary delivery times to the house, his habits in making his deliveries, and the presence of drugs in the house after his visits. Under these circumstances, Monnolly acted prudently in seeking to acquire additional information when he approached Roubideaux. *Bailey*, supra at ¶23.

{¶ 37} Monnolly then continued to investigate after speaking with Roubideaux, whose words and behavior only increased Monnolly's suspicions. He examined Swietynowski's bathroom, ensuring that Roubideaux had not concealed any drugs there. *In re Lester*, Warren App. No. CA2003-04-050, 2004-Ohio-1376.

{¶ 38} By that point, based upon his own firsthand observations in conjunction with the information provided by the CS who saw Roubideaux's

actions, Monnolly had probable cause to believe Roubideaux's car contained contraband. *State v. Underwood*, Butler App. No. CA2003-03-057, 2004-Ohio-504; *State v. Branch*, Licking App. No. 08-CA-153, 2009-Ohio-4152, ¶34 (distinguishing *Florida v. J.L.* (2000), 529 U.S. 266). Indeed, if Monnolly did not act, any evidence of criminal activity would be lost because Roubideaux could no longer be detained for the traffic accident.

{¶ 39} Based upon the totality of the circumstances, therefore, Monnolly was justified in reaching into the rear passenger seat pocket of Roubideaux's car. The trial court properly concluded on the facts presented that Monnolly's stop and search comported with constitutional requirements. *State v. Abernathy*, supra; *State v. Bailey*, supra; *State v. Branch*, supra.

{¶ 40} As to Roubideaux's argument that Monnolly failed to advise him of his rights, thus violating his Fifth Amendment right against self-incrimination, see *Miranda v. Arizona* (1966), 384 U.S. 436, Roubideaux never raised this issue with the trial court. It was neither in his written motion, nor made orally at the hearing.

{¶ 41} Pursuant to Crim.R. 12(B), a defendant is required to raise any objection to the admissibility of unconstitutionally obtained evidence in a pretrial motion to suppress. *State v. Moody* (1978), 55 Ohio St.2d 64, 65-66. The Ohio Supreme Court has held as follows:

{¶ 42} "To suppress evidence obtained pursuant to a warrantless search or seizure, the defendant must (1) demonstrate the lack of a warrant, and (2) raise

the grounds upon which the validity of the search or seizure is challenged in such a manner as to give the prosecutor notice of the basis for the challenge." *Xenia v. Wallace* (1988), 37 Ohio St.3d 216, paragraph one of the syllabus.

{¶ 43} "Failure on the part of the defendant to adequately raise the basis of his challenge constitutes a waiver of that issue on appeal." Id. at 218. Nevertheless, if a defendant fails to raise a suppression issue in his or her written motion, he or she can raise it orally at the suppression hearing where the issues stem from common facts. *State v. Wells* (1983), 11 Ohio App.3d 217, 219-220.

{¶ 44} In this case, Roubideaux did not challenge the legality of his oral statements. The trial court under these circumstances properly entertained and ruled upon the arguments he made in his written motion and orally at the hearing. Since Roubideaux now argues for the first time on appeal that the trial court erred in overruling his motion to suppress because he was not advised of his rights under *Miranda,* his failure to raise that issue below constituted a waiver of his argument. *State v. Jones*, Cuyahoga App. No. 92820, 2009-Ohio-5701, ¶46.

{¶ 45} For the foregoing reasons, Roubideaux's assignment of error is overruled.

{¶ 46} His convictions and sentences are affirmed.

{¶ 47} However, this case is remanded for correction of the journal entries of Roubideaux's convictions and sentences.

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. 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.

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KENNETH A. ROCCO, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
JAMES J. SWEENEY, J., CONCUR