[Cite as *State v. Scrivens,* 2010-Ohio-712.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2009-T-0072**
- vs -	:	
REGINALD D. SCRIVENS, JR.,	:	
Defendant-Appellee.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 2008 CR 00396.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, *Charles L. Morrow*, Assistant Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481 (For Plaintiff-Appellant).

John E. Fowler, II, and *Jeffrey V. Goodman*, Fowler & Goodman, L.P.A., Inc., 119 West Market Street, Warren, OH 44481 (For Defendant-Appellee).

DIANE V. GRENDELL, J.

{¶1} Plaintiff-appellant, State of Ohio, appeals the Judgment Entry of the Trumbull County Court of Common Pleas, in which the trial court granted defendant-appellee, Reginald D. Scrivens, Jr.'s, Motion to Suppress. For the following reasons, we affirm the decision of the trial court.

{¶2} Officer Dave Weber of the Warren City Police Department observed a vehicle, with a female driver and a male passenger, stopping then moving a few times, in what is considered to be a high crime rate area. Officer Weber and his partner, Officer Marks, decided to further investigate. After shining a spot light on the vehicle, Officer Weber witnessed the lips of the passenger, Scrivens, mouthing the words "go, go, go." The officers then pulled over the vehicle and witnessed Scrivens reach for something at his belt or on the floor. After giving a command, to show the officer his hands, to which Scrivens was slow to reply, Officer Weber approached the vehicle and immediately recognized Scrivens from a previous pursuit. Officer Weber then handcuffed Scrivens, removed him from the car, and in doing so, noticed plastic coming out of Scrivens' shoe. Officer Weber recovered a plastic baggie containing a white, rock-like substance, later determined to be crack cocaine. The driver of the vehicle was issued a traffic citation for a moving violation pursuant to Warren City Ordinance 333.04.

{¶3} On July 15, 2009, an indictment was filed and Scrivens was subsequently charged with Possession of Cocaine, in violation of R.C. 2925.11(A) and (C)(4)(c) and Trafficking in Cocaine, in violation of R.C. 2925,03(A)(2) and (C)(4)(d).

{¶4} Scrivens then filed a Motion to Suppress contending that the trial court "must suppress the evidence obtained during the traffic stop of the vehicle in which Reginald Scrivens was a passenger because it is a violation of his and every American citizen's Fourth Amendment rights against unreasonable searches and seizures."

{¶5} After a suppression hearing was held, the trial court granted Scrivens' motion, reasoning that there was not "a reasonable and articulable suspicion of criminal activity and that this investigatory stop under these specific circumstances fails to meet

the standard." The court then suppressed and excluded "any statements and any evidence that was received as a result of the investigatory stop."

{¶6} The State timely appeals and raises the following assignments of error:

{¶7} "[1.] The trial court erred in admitting defendant's exhibit "B," the photographs.

{¶8} "[2.] The trial court erred in precluding appellant from questioning Officer Weber as to how he was familiar with appellee.

{¶9} "[3.] The trial court erred in granting defendant-appellee's Motion to Suppress Statements and Evidence."

{¶10} During the cross-examination of Officer Weber at the suppression hearing, Scrivens' counsel showed several photographs from a DVD to Officer Weber. The pictures depicted the area near the place where the incident took place, albeit they were taken months later and in the day time.

{¶11} The State argues that "[t]here was not any testimony that the pictures were fair and accurate representations of the scene, let alone fair and accurate representations of the scene at the time of the incident." Thus, he contends that the "improperly admitted photographs materially prejudiced" the State.

{¶12} "A trial court has 'broad discretion concerning the admissibility of evidence presented in a suppression hearing.'" *State v. Pandolfi*, 11th Dist. No. 2001-L-061, 2002-Ohio-7265, at ¶38 quoting *State v. Woodring* (1989), 63 Ohio App.3d 79, 81. "'The term "abuse of discretion" *** implies that the court's attitude is unreasonable, arbitrary or unconscionable.'" *State v. White*, 118 Ohio St.3d 12, 2008-Ohio-1623, at ¶46, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157 (citations omitted).

{¶13} "'It is settled law that the rules of evidence *** do not apply in a suppression hearing. Evid.R. 101(C); Evid.R. 104(A); *State v. Woodring* (1989), 63 Ohio App.3d 79, *** *State v. Parsons (*1989), 64 Ohio App.3d 63, 68.'" *State v. Bishop*, 2nd Dist. No. 2003-CA-37, 2004-Ohio-6221, at ¶19 (parallel citations omitted).

{¶14} After acknowledging that it was "obvious that" the scene was not a true and accurate representation of the way the scene looked the night of the stop, the trial judge stated he was going to "take all those things into consideration." Moreover, the pictures gave him "a general view of the area" and the pictures were allowed into evidence for "what limited purposes the Court is going to grant them."

{¶15} Consequently, as the court is not bound by the rules of evidence in suppression hearings, the trial court did not abuse its discretion in allowing defendant's exhibit B into evidence.

{¶16} The State's first assignment of error is without merit.

{¶17} In the second assignment of error, the State contends that it "was prevented from presenting any evidence regarding whether [Scrivens] was a known drug dealer, violent, or carried a weapon." Further, the State claims such information was "admissible and material at a suppression hearing to explain Officer Weber's decision to detain and ultimately search [Scrivens]".

{¶18} The trial court has broad discretion to determine whether evidence is relevant, and whether relevant evidence should be excluded. *State v. Sage* (1987), 31 Ohio St.3d 173, at paragraph two of the syllabus. The trial court's decision will be reversed only upon a finding that the trial court abused its discretion. *Williams v. Oeder* (1995), 103 Ohio App.3d 333, 341.

{¶19} The State argues that "the trial court's decision precluded the State from eliciting testimony from the officer concerning the totality of circumstances he relied upon in arriving at a conclusion that [he] had probable cause to detain and search [Scrivens]. However, Officer Weber testified that he had encountered Scrivens before when he "was involved in a pursuit with him" in "[w]hich he fled on a four wheeler and then crashed and took off on foot." When the State's counsel asked if Officer Weber was "familiar with [Scrivens] in any other kind of criminal activity or events", Scrivens' counsel objected and the court sustained the objection. The court stated that Officer Weber had "already said that he recognized [Scrivens]" and told the State's counsel to "go to something else." We agree. Officer Weber's testimony reflected that he recognized Scrivens from a prior criminal pursuit. Consequently, the trial court's exercise of discretion in disallowing further testimony on Scrivens' criminal history was not an abuse of discretion.

{¶20} The State's second assignment of error is without merit.

{¶21} In the final assignment of error, the State alleges that the trial court erred "by concluding that the stop at issue is 'an investigatory stop,' and that Officer Weber lacked 'a reasonable and articulable suspicion of criminal activity' to warrant the stop."

{¶22} "The trial court acts as trier of fact at a suppression hearing and must weigh the evidence and judge the credibility of the witnesses." *State v. Ferry*, 11th Dist. No. 2007-L-217, 2008-Ohio-2616, at ¶11 (citations omitted). "The trial court is best able to decide facts and evaluate the credibility of witnesses. Its findings of fact are to be accepted if they are supported by competent, credible evidence." *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, at ¶41. "Once the appellate court accepts the trial court's factual determinations, the appellate court conducts a de novo review of the trial

court's application of the law to these facts." *Ferry*, 2008-Ohio-2616, at ¶11 (citations omitted); *Mayl*, 2005-Ohio-2304, at ¶41 ("we are to independently determine whether [the trial court's factual findings] satisfy the applicable legal standard") (citation omitted).

{¶23} The trial court found "[t]here has been no testimony that the vehicle was stopped because of any moving violations" therefore, the type of stop was an investigatory stop. "The Court further note[d] specifically that any view that the officers had of this vehicle was very limited if at all and that there has been no evidence any moving violation did in fact occur. The arrest was solely made because of lip reading the words 'go, go, go' from a moving vehicle."

{¶24} The State first argues that the stop was a traffic stop, not an investigatory stop, and should be analyzed as such. We disagree.

{¶25} There are two types of traffic stops, each with a different constitutional analysis. The first is the non-investigatory traffic stop, wherein the police officer witnesses a violation of the traffic code, such as crossing over the center line of a road, and then stops the motorist for this traffic violation. The applicable standard is whether an officer has probable cause to believe a traffic offense has occurred or was occurring. See *Whren v. United States* (1996), 517 U.S. 806, 810.

{¶26} The second is the 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 *Terry v. Ohio* (1968), 392 U.S. 1, 21.

{¶27} Although the officers subsequently issued a citation to the driver, the testimony elicited from Officer Weber revealed that the reason for the stop was because

Officer Weber read Scrivens' lips mouth the words "go, go, go." ("He said, "Go, go go," and then she [the driver] started rolling forward. And then I [Officer Weber] hit the emergency lights.") When explicitly asked the reason why he stopped the vehicle, Officer Weber responded "[f]or the, you know, stopped in the roadway. The activity I observed."

{¶28} Warren City Ordinance 333.049(a) states that "No person shall stop or operate a vehicle at such an unreasonably slow speed as to impede or block the normal and reasonable movement of traffic." Although testimony was presented that the car was, at times, stopped or slow moving in the residential area, there was no testimony as to blocking any traffic. Additionally, the court found that "the officer did see a vehicle slow and/or stopped for a short period of time but at or near a stop sign." Furthermore, the court found that "any view that the officers had of this vehicle was very limited[,] if at all."

{¶29} The trial court found that the State's version of the events was not credible and/ or supported by evidentiary materials. Included within the above standards of review is the acknowledgement that great deference is to be given to the trial court's findings of fact

{¶30} The investigatory standard is the applicable standard in the instant situation. The investigative stop allows an officer to stop a motorist when he or she has a reasonable suspicion based upon specific, articulable facts that criminal activity has been or is occurring. *Terry*, 392 U.S. at 21. The State argues that "the original activity of the car was sufficient articulable suspicion for the investigatory stop." Moreover, "[e]ven assuming that these actions alone did not justify Officer Weber halting the vehicle, the totality of the circumstances warranted the stop."

{¶31} Probable cause is defined in terms of "facts or circumstances 'sufficient to warrant a prudent man in believing that the (suspect) had committed or was committing an offense.'" *Gerstein v. Pugh* (1975), 420 U.S. 103, 111, quoting *Beck v. Ohio* (1964), 379 U.S. 89, 91. When evaluating the propriety of an investigative stop, a reviewing court must examine the totality of the circumstances surrounding the stop as "viewed through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold." *State v. Andrews* (1991), 57 Ohio St.3d 86, 87-88. "The court reviewing the officer's actions must give due deference to the officer's experience and training, and view the evidence as it would be understood by those in law enforcement." *State v. Teter*, 11th Dist. No. 99-A-0073, 2000 Ohio App. LEXIS 4656, at *8 (citations omitted).

{¶32} Officer Weber stated that he decided to drive closer to the vehicle because he "felt that it was just abnormal." After he witnessed Scrivens mouthing, what he observed to be the words "go, go, go," he claimed he was concerned because "when it's a police car, most people, you're not gonna get that type of reaction." Then, when "the car started to roll," Weber "hit the emergency lights and she stopped right away."

{¶33} The State attempts to use *Illinois v. Wardlow* (2000), 528 U.S. 119, which stands for the proposition that "headlong flight- wherever it occurs- is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such", to suggest there was reasonable suspicion to stop the car under the investigatory stop standard. However, there was no "flight" in this case; simply the officer's observations of Scrivens mouthing the words "go, go go".

{¶34} Taking into consideration that the stop took place in a high crime area[1] and at nighttime, Officer Weber failed to point to any indicia that Scrivens had committed or was committing an offense. A requirement of more than this is necessary to protect each person's right to be free from improper searches and seizures. "To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." *Beck v. Ohio*, 379 U.S. 89, 91, quoting from *Brinegar v. United States* (1949), 338 U.S. 160.

{¶35} As the trial court found, this court cannot find that there was a reasonable and articulable suspicion of criminal activity based on the facts at the time of the investigatory stop. Consequently, the trial court did not err in granting Scrivens' Motion to Suppress.

{¶36} The State's third assignment of error is without merit.

{¶37} For the foregoing reasons, the Judgment Entry of the Trumbull County Court of Common Pleas, granting Scrivens' Motion to Suppress, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J.,

COLLEEN MARY O'TOOLE, J.,

concur.

1. The State cites to *State v. Bobo* (1988), 37 Ohio St.3d 177, which stands for the proposition that past incidents of numerous law violations and also the "high crime" character of the neighborhood are relevant factors in determining probable cause. However, it was only after the officers had stopped the vehicle and approached it that they recognized Scrivens from a prior encounter. The only reasonable articulable suspicion that has been suggested by the State is an officer lip reading of the words "go, go, go". This investigatory stop, under these specific circumstances, failed to meet the standard.