[Cite as *State v. Moyer*, 2009-Ohio-6777.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 09AP-434
v.	:	(C.P.C. No. 08CR-11-8005)
Jeremy M. Moyer,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 22, 2009

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard,* for appellee.

Yeura R. Venters, Public Defender, and *Allen V. Adair,* for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendant-appellant, Jeremy M. Moyer, appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty, pursuant to no contest plea, of carrying a concealed weapon, in violation of R.C. 2923.12. Defendant assigns a single error:

> The court erroneously overruled appellant's motion to suppress evidence seized in violation of his Fourth Amendment and Section 14, Article I rights.

Because the trial court did not err in overruling defendant's motion to suppress, we affirm.

I. Procedural History

{¶2} On October 29, 2008 at approximately 5:54 p.m., Officers Brandon Harmon and Jeffrey Beine were working bicycle patrol in the vicinity of Central Avenue on the west side of Columbus when they observed defendant and one other man walking down the sidewalk. After briefly conversing with the officers, defendant began running away from them. Police pursued him and ultimately arrested him when they found he was carrying a gun. An indictment was filed November 7, 2008, charging defendant with one count of carrying a concealed weapon. After pleading not guilty, defendant on February 3, 2009 filed a motion to suppress any and all evidence obtained through what defendant alleged was an unlawful search and seizure.

{¶3} The trial court on April 7, 2009 held a hearing on defendant's motion. At the hearing, the state presented Officer Harmon, who testified his encounter with defendant occurred in what is a "known high-crime area" where narcotics and weapons arrests are common. (Tr. 5.) Officer Harmon stated that when he first saw defendant, defendant and the other man accompanying him made eye contact with the officers and then tried to "kind of skirt around us, avoid us by cutting through a yard instead of continuing on the sidewalk." (Tr. 5.) Finding such behavior unusual, Officer Harmon and his partner approached defendant and the other man; Officer Harmon asked the two men to come toward them, and defendant and the other man "willingly agreed to come over." (Tr. 5.)

{¶4} During the encounter, Officer Harmon asked the two men their names and what they were doing. The other man produced an identification card; defendant did not have any identification with him but gave the officers what he represented to be his social security number. Both Officers Harmon and Beine testified they thought the social security number seemed strange. At that point, Officer Harmon used his radio to check for outstanding warrants for the two men. Before he could complete the check, defendant ran from the officers across Central Avenue.

{¶5} Officer Harmon, who stayed with the other man, radioed for police cruiser assistance while Officer Beine and one other officer pursued defendant over a fence and through a yard. By the time Officer Beine caught up with defendant, a police wagon had arrived on the scene and apprehended defendant. Officer Beine did not see defendant with a firearm until after the officers in the police wagon were on the scene.

{¶6} Officer Mark Denner, one of the officers in the police wagon, testified that when the call came from the bicycle patrol, he was one block away. After seeing defendant trip in an alley, Officer Denner got out of the vehicle to pursue defendant. Following a brief foot chase, Officer Denner brought defendant to the ground, rolled defendant over to handcuff him, and saw a gun under defendant's chest. The other officer in the wagon, Officer Lindy Alli, testified she exited her vehicle when she saw defendant running and "saw [defendant] had something black in his hands" that she believed to be a firearm. (Tr. 22.) Officer Alli attempted to use her Taser on defendant, but she missed. When her partner, Officer Denner, took custody of defendant, Officer Alli saw a black gun underneath defendant's chest.

{¶7} In arguing his motion in the trial court, defendant asserted that because his initial encounter with police was consensual and he was free to go at any time, his leaving, albeit running, failed to present any basis to detain defendant. Defendant thus contended the evidence the police derived from the illegal detention, including the gun subject of the charge against defendant, should be suppressed. The trial court overruled defendant's motion, concluding the arrest was properly supported and the evidence derived from it was admissible.

{¶8} Following the trial court's ruling on his motion to suppress, defendant entered a no contest plea. The trial court found defendant guilty and sentenced him to two years of community control. Defendant timely appeals from the trial court's April 8, 2009 judgment entry journalizing the court's decision.

II. Assignment of Error

{¶9} In his sole assignment of error, defendant asserts the trial court erred in overruling his motion to suppress evidence of the firearm seized during his arrest.

{¶10} "[A]ppellate review of a trial court's decision regarding a motion to suppress evidence involves mixed questions of law and fact." *State v. Vest*, 4th Dist. No. 00CA2576, 2001-Ohio-2394. Thus, an appellate court's standard of review of the trial court's decision denying the motion to suppress is two-fold. *State v. Reedy*, 10th Dist. No. 05AP-501, 2006-Ohio-1212, ¶5, citing *State v. Lloyd* (1998), 126 Ohio App.3d 95, 100-01. Because the trial court is in the best position to weigh the credibility of the witnesses, "we must uphold the trial court's findings of fact if they are supported by competent, credible evidence." Id., citing *State v. Klein* (1991), 73 Ohio App.3d 486, 488. We nonetheless must independently determine, as a matter of law, whether the facts meet the applicable

legal standard. Id., citing *State v. Claytor* (1993), 85 Ohio App.3d 623, 627. The state bears the burden of establishing the validity of a warrantless search. *Xenia v. Wallace* (1988), 37 Ohio St.3d 216, 218, citing *State v. Kessler* (1978), 53 Ohio St.2d 204, 207.

{¶11} On appeal defendant contends, as he did in the trial court, that the police officers unlawfully detained him: because his encounter with police was consensual, he argues he was free to depart at any time. Defendant asserts that, when he exercised his privilege to leave, police violated his constitutional rights by pursuing and apprehending him. Only through such unlawful conduct, defendant asserts, did police discover the gun subject of the indicted weapon charge. Defendant thus contends the trial court erred when it did not grant his motion to suppress. In so arguing, defendant does not challenge the trial court's findings of facts or the credibility of any witnesses. We therefore confine our review to whether the facts meet the applicable legal standard and support the trial court's decision to deny defendant's motion to dismiss.

{¶12} The Fourth Amendment to the United States Constitution as applied to the states through the Fourteenth Amendment, as well as Section 14, Article I, of the Ohio Constitution, prohibit the government from conducting warrantless searches and seizures, rendering them per se unreasonable unless an exception applies. *State v. Mendoza*, 10th Dist. No. 08AP-645, 2009-Ohio-1182, ¶11, citing *Katz v. United States* (1967), 389 U.S. 347, 357, 88 S.Ct. 507, 515; *State v. Stanley*, 10th Dist. No. 06AP-323, 2007-Ohio-2786, ¶13. The United States Supreme Court recognizes three categories of police interaction with citizens: a consensual encounter, an investigatory detention, and an arrest. *Florida v. Royer* (1983), 460 U.S. 491, 103 S.Ct. 1319; *State v. Johnson*, 2d Dist. No. 23017, 2009-Ohio-6136, ¶14, citing *State v. Taylor* (1995), 106 Ohio App.3d 741, 747-49.

{¶13} A consensual encounter occurs when the police approach a person in a public place, police engage the person in conversation, and the person remains free not to answer or to walk away. *United States v. Mendenhall* (1980), 446 U.S. 544, 553, 100 S.Ct. 1870, 1877. An encounter remains consensual, even if police ask questions, ask to see the person's identification, or ask to search the person's belongings, provided "the police do not convey a message that compliance with their requests is required." *Florida v. Bostick* (1991), 501 U.S. 429, 434-35, 111 S.Ct. 2382, 2386-87; *Florida v. Rodriguez* (1984), 469 U.S. 1, 4-6, 105 S.Ct. 308, 309-11. A consensual encounter does not involve the Fourth Amendment. *In re Parks*, 10th Dist. No. 04AP-355, 2004-Ohio-6449, ¶7, citing *Royer*. If, however, a police officer restrains an individual's freedom to walk away, the result is a "seizure," and the officer's conduct implicates the Fourth Amendment. Id., citing *Brown v. Texas* (1979), 443 U.S. 47, 52, 99 S.Ct. 2637, 2641. In determining whether a seizure occurs, the ultimate question is whether, in view of all the circumstances, a reasonable person would believe he or she was not free to leave. *State v. Bell*, 6th Dist. No. L-03-1015, 2004-Ohio-1327, ¶19, quoting *Mendenhall* at 554.

{¶14} The next category of police-citizen interaction is an investigatory detention, commonly referred to as a *Terry* stop. See *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868. Under *Terry*, a police officer may stop an individual without probable cause when the officer has a reasonable suspicion based on articulable facts that criminal activity is afoot. Id. at 21. "An investigative stop does not violate the Fourth Amendment to the United States Constitution if the police have reasonable suspicion that 'the person stopped is, or is about to be, engaged in criminal activity.' " *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, ¶35, quoting *United States v. Cortez* (1981), 449 U.S. 411,

417, 101 S.Ct. 690, 695. An appellate court must view the propriety of a police officer's investigative stop in light of the totality of the surrounding circumstances. *State v. Bobo* (1988), 37 Ohio St.3d 177, paragraph one of the syllabus.

{¶15} The third and final category of police-citizen interaction is a seizure that is the equivalent of an arrest. "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." *Taylor*, 106 Ohio App.3d at 749, citing *State v. Barker* (1978), 53 Ohio St.2d 135, syllabus. "A warrantless arrest that is based upon probable cause and occurs in a public place does not violate the Fourth Amendment." *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, ¶66, citing *United States v. Watson* (1976), 423 U.S. 411, 96 S.Ct. 820.

{¶16} The state does not challenge, and the facts support, defendant's contention that his initial contact with police was a consensual encounter. Officer Harmon testified he first saw defendant and the other individual begin to cut through a yard when Officer Harmon was on bike patrol. When Officer Harmon approached defendant and the other man, Officer Harmon "asked for them to come over" and "[t]hey willingly agreed and came over, over to us." (Tr. 5.) Even though Officer Harmon and Officer Beine conversed with defendant, asked him his name, and asked why he was in the area, the encounter remained consensual, and defendant was free to walk away. See *Mendenhall* at 553.

{¶17} Defendant, however, asserts police infringed his Fourth Amendment rights when, with no articulable suspicion that defendant did or was about to do anything illegal, they chased him. Defendant argues that because he was free to walk away, he was also free to run away. The speed at which he distanced himself from the officers, defendant

argues, neither changes the nature of the encounter nor creates a basis for police to pursue him, thus making his eventual seizure unreasonable. *Brown* at 52 (observing that Fourth Amendment protections mandate any seizure must be reasonable under the circumstances).

{¶18} Even when contact with police begins as a consensual encounter, it can escalate into an investigatory detention. See *State v. Morris* (1988), 48 Ohio App.3d 137, 138-39 (finding an encounter between police and defendants "escalated from a consensual encounter into probable cause for arrest" based on the officers' observations of defendant after the initial encounter); *State v. Jones* (June 13, 2000), 10th Dist. No. 99AP-704 (finding no ineffective assistance of counsel where defendant's trial counsel failed to file a motion to suppress because "even if the police's initial contact with [defendant] was a consensual encounter, [defendant's] subsequent actions gave rise to reasonable suspicion and then to a lawful arrest"); *State v. Jones*, 9th Dist. No. 20810, 2002-Ohio-1109 (stating "the contact escalated from a consensual encounter into one requiring reasonable suspicion for an investigative detention based upon the officer's observations of [defendant] as he rejoined the group"); *State v. Adams*, 11th Dist. No. 2003-L-014, 2004-Ohio-3852, ¶17 (concluding the initial consensual encounter later garnered Fourth Amendment implications); *State v. Robinson*, 5th Dist. No. 2006CA0024, 2007-Ohio-850, ¶20 (finding "[t]he facts indicate a consensual encounter that was elevated to a *Terry* stop with the fleeing of appellant").

{¶19} Defendant's argument, however, attempts to isolate his flight from the other circumstances surrounding the encounter. "The propriety of an investigatory stop must be assessed in light of the totality of circumstances viewed from the standpoint of a

reasonable police officer who must confront those circumstances on the scene." *In re Parks* at ¶16, citing *Columbus v. Wright*, 10th Dist. No. 03AP-421, 2004-Ohio-188, quoting *State v. Williams* (Aug. 30, 2001), 8th Dist. No. 78732.

{¶20} Here, defendant's initial consensual encounter escalated due to additional factors that gave police a constitutionally permissible basis to stop defendant. Whether or not sufficient on its own, one relevant factor in defendant's seizure is his flight from police. Defendant argues this court should not consider his flight, and to support his proposition defendant attempts to distinguish *Illinois v. Wardlow* (2000), 528 U.S. 119, 120 S.Ct. 673, and *Jordan* as involving immediate, unprovoked flight as officers approached.

{¶21} Defendant's attempt is unpersuasive here, where defendant ran from police only after Officer Harmon began to radio for a warrant check. Flight at the initiation of a warrant check is as probative of reasonable suspicion as was immediate flight upon the sight of a police officer in *Wardlow* and *Jordan*. *State v. Grundy*, 2d Dist. No. 2008 CA 62, 2009-Ohio-4950 (concluding the trial court did not err in overruling defendant's motion to suppress where the defendant, during a consensual encounter, began to act nervously and to reach into his pocket while the officer conducted a warrant check, as such behavior during the warrant check gave the officer a "reasonable, articulable suspicion" necessary to transform the consensual encounter into a *Terry* stop).

{¶22} Just as nervous behavior in *Grundy* during a warrant check could constitute reasonable, articulable suspicion necessary for a *Terry* stop, so too can flight from police during a warrant check, as "[n]ervous, evasive behavior is pertinent in determining reasonable suspicion." *In re Parks* at ¶15, citing *Wardlow* at 124; see also *State v. Smith*, 10th Dist. No. 04AP-859, 2005-Ohio-2560, ¶37. "Headlong flight–wherever it occurs–is

the consummate act of evasion." *Jordan* at ¶47, citing *Wardlow* at 124-25 (stating "[f]light, by its very nature, is not 'going about one's business' " but "is just the opposite"). (Internal quotation marks omitted.) Although "[a] suspect is 'free to leave' a non-seizure interview, * * * when he does so by abruptly bolting after having consented to talk, the officers are free to draw the natural conclusions." *State v. Holloway* (Sept. 28, 2000), 10th Dist. No. 99AP-1455 (finding seizure after flight from a consensual encounter "was based on reasonable suspicion and, therefore, lawful"), quoting *United States v. Jones* (D.C.Cir.1992), 973 F.2d 928, 931.

{¶23} Relying on *State v. Paschal*, 169 Ohio App.3d 200, 2006-Ohio-5331, defendant argues that a consensual encounter followed by a hurried departure cannot be the basis for reasonable suspicion. *Paschal*, however, dealt with a defendant in an automobile who drove quickly away from a police officer. In concluding no reasonable, articulable suspicion existed, the Eighth District also noted the officer there did not describe the defendant's conduct as "suspicious," but merely as "odd." Id. at ¶20. Here, defendant fled on foot while officers checked for outstanding warrants. Because the facts here are considerably different than those in *Paschal*, defendant's reliance on *Paschal* is misplaced.

{¶24} Moreover, Officer Harmon and Officer Beine testified the initial encounter here occurred in what both characterized as a high-crime area. (Tr. 5, 12.) An individual's presence in a known high-crime area is alone insufficient to support reasonable suspicion. *In re Parks* at ¶14, citing *Brown* at 52. Nonetheless, officers are not required to ignore the relevant characteristics of the area, and "the fact that the stop occurred in a 'high crime area' [is] among the relevant contextual considerations" in finding reasonable

suspicion. Id. at ¶15, citing *Wardlow* at 124 (noting an individual's presence in a high-crime area and his unprovoked flight upon noticing the police were sufficient to satisfy reasonable suspicion standard).

{¶25} Moreover, other factors support a reasonable, articulable suspicion that defendant was engaged in illegal conduct. Defendant provided the officers a suspicious social security number. Indeed, in what may be the most glaring factor, Officer Alli testified that when she saw defendant running, she also saw defendant holding what she believed to be a firearm. An officer's seeing an object the officer reasonably believed to be a firearm in a person's hand creates reasonable, articulable suspicion that defendant is, or is about to be, engaged in criminal activity, namely carrying a concealed weapon. See *Jordan* at ¶35. See also *State v. Taylor*, 8th Dist. No. 92382, 2009-Ohio-5822, ¶8 (finding police officer's testimony she observed a gun handle in defendant's waistband was sufficient to create reasonable suspicion that defendant might be carrying a concealed weapon illegally).

{¶26} In the final analysis, the officers on the scene knew defendant was present in a high-crime area, he gave police a suspicious social security number, and he fled from the police as an outstanding warrant check was initiated. Such factors gave police a basis for chasing defendant, and his holding an object resembling a gun provided any additionally needed basis for detaining defendant. When viewed collectively, the factors present here support a reasonable, articulable suspicion that defendant was engaged in illegal activity and provide a constitutionally permissible basis to detain him.

{¶27} The officers in this case had a reasonable, articulable suspicion to conduct an investigatory stop of defendant so their detaining defendant and their seizing his

weapon were lawful. The state properly may introduce into evidence weapons seized during a lawful investigatory detention against the person from whom they were taken. *Terry* at 30-31. Since defendant's investigatory detention was lawful, the seizure of his immediately apparent weapon also was lawful.

III. Disposition

{¶28} Because the trial court did not err in overruling defendant's motion to suppress, we overrule defendant's sole assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

FRENCH, P.J., and KLATT, J., concur.

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