[Cite as *State v. Bowers*, 2019-Ohio-1321.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 18AP-530
v.	:	(C.P.C. No. 17CR-991)
Terry Bowers,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 12, 2019

On brief: *Ron O'Brien*, Prosecuting Attorney, and *Sheryl L. Pritchard*, for appellee. **Argued:** *Sheryl L. Pritchard*.

On brief: *Yeura R. Venters*, Public Defender, and *Robert D. Essex*, for appellant. **Argued:** *Robert D. Essex*.

APPEAL from the Franklin County Court of Common Pleas

BRUNNER, J.

{¶ 1} Defendant-appellant, Terry Bowers, appeals from an April 2018 decision of the Franklin County Court of Common Pleas denying his motion to suppress crack cocaine and opiate pills obtained from Bowers during an investigatory stop and pat down. That decision merged into a final judgment entered on June 8, 2018, after Bowers pled "no contest" to possession of cocaine and aggravated possession of drugs. Because the trial court's decision on Bowers' motion was largely based on credibility determinations and because the facts found by the trial court support the basis for the search, we affirm the trial court's judgment.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On February 17, 2017, a Franklin County Grand Jury indicted Bowers for possession of cocaine and aggravated possession of drugs (in this case, oxycodone). (Feb. 17, 2017 Indictment.) He pled not guilty and in November 2017, filed a motion to

suppress. (Mar. 3, 2017 Plea Form; Nov. 1, 2017 Mot. to Suppress.) After the plaintiff-appellee State of Ohio responded, the trial court held a hearing on the motion in April 2018. (Nov. 20, 2017 Memo Contra; Hearing Tr., filed Aug. 9, 2018.) Two witnesses testified at the hearing.

{¶ 3} The first witness to testify was Columbus police officer Anthony Johnson. (Hearing Tr. at 6.) Johnson testified that on April 30, 2016 at about 8:00 p.m., he was approached by an unknown female who flagged down his police cruiser and said that illegal narcotics sales were happening at a nearby address, 140 East Woodrow. *Id*. at 6-7. Acting on the tip, he went to the house to investigate and knocked on the door to 140 East Woodrow of what was a duplex house. *Id*. at 8. A homemade sign on the door said "no one lives here," and that side of the duplex seemed abandoned and vacant. *Id*. at 9. Johnson continued to the rear of 140 East Woodrow to further investigate and heard people moving around inside. *Id*. He then came back around front and knocked on the neighbor's door at 142 East Woodrow, yelling "Columbus Police," as he did. *Id*. at 9-10. The door was ajar and opened at his knock to reveal Bruce Hutchinson who was wearing a makeshift tourniquet (a shoe string) around his arm (which the officer testified that he knew from experience was indicative of intravenous drug use, possibly heroin). *Id*. at 10. The first thing Hutchinson said to the officer was "are you here for next door?" *Id*. Before the officer could respond, the door to 140 East Woodrow flew open and Bowers ran out along with some other people. *Id*.

{¶ 4} Bowers was stopped outside by other officers and apparently patted down once. *Id*. at 23-24. But because "two is better than one" and because the other officer only said he "kind of" performed a pat down on Bowers, Johnson "conducted a pat down for weapons." *Id*. at 10-11, 25. During the pat down he felt something that he could not identify. *Id*. at 10-11. He asked what it was and Bowers told him it was a cigarette pack with pills in it. *Id*. at 11. He asked Bowers if Bowers would mind showing it to him. *Id*. Bowers assented and took the pack from his pocket. *Id*. As he removed it, a small bag of crack fell out of his pocket. *Id*.

{¶ 5} The neighbor, Hutchinson, testified next. *Id*. at 37-38. He testified that he knew Bowers from the neighborhood. *Id*. at 37. According to Hutchinson, he was sitting watching television when officers burst into his home and went up to the duplex's attic

crossover between his home at 142 East Woodrow and 140 East Woodrow, which presumably frightened Bowers into fleeing from 140 East Woodrow. *Id*. at 40, 44, 46. He testified that Johnson had his gun drawn during the raid. *Id*. at 43-44. He said there was no sign stating that nobody lived in the house and that he did not give the police permission to go into his house. *Id*. at 50. He testified that the first officer, Johnson, has a bad reputation in the community but that one of the other officers who was on the scene has always been fair and treated people well. *Id*. at 42-43. At the time of the hearing on Bowers' motion to suppress, Hutchinson had been incarcerated for burglary and admitted as much and also that he was a heroin addict, who on April 30, 2016, had been using heroin. *Id*. at 36, 51.

{¶ 6} Following testimony and the presentations of argument by both sides, the trial court took a recess until later in the day and then orally announced its decision on the motion. *Id*. at 63-66. The trial court found Johnson to be more credible than Hutchinson. *Id*. at 65. Based on the recitation of facts as testified to by Johnson, the trial court found there was reasonable suspicion to detain Bowers and, because of the nature of the crime, it was also reasonable to suspect that Bowers might be armed and dangerous. *Id*. at 66. Accordingly, the trial court concluded that the pat down that led to the admission by Bowers and the discovery of both pills and crack cocaine was legally permissible. *Id*.

{¶ 7} Following the trial court's denial of his motion to suppress, Bowers pled "no contest" on April 25, 2018. (Apr. 25, 2018 Plea Form; Plea Tr., filed Aug. 9, 2018.) In June 2018, the trial court sentenced him to serve nine months concurrently on each of the two drug offenses. (June 8, 2018 Jgmt. Entry at 1; Sentencing Tr. at 8, filed Aug. 9, 2018.)

{¶ 8} Bowers now appeals.

II. ASSIGNMENTS OF ERROR

{¶ 9} On appeal Bowers presents a single assignment of error for review:

> The trial court erred in denying Defendant-Appellant's motion to suppress evidence where Mr. Bowers was subjected to two *Terry* pat-downs from two separate officers and where there was no reason for either officer to believe Mr. Bowers was armed.

III. DISCUSSION

{¶ 10} In reviewing decisions made on motions to suppress, we afford deference to the trial court's factual determinations and review the trial court's recitation of historical facts for "clear error," but we review statements of law and their application to facts de novo. *See, e.g., Ornelas v. United States*, 517 U.S. 690, 699 (1996); *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, ¶ 50; *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. In this appeal, Bowers does not argue that the officers illegally entered the house, improperly stopped him, or impermissibly asked him questions about what he had in his pocket. Rather, he confines his argument to Johnson's pat down. (Bowers Brief at 6-18.)

{¶ 11} "The United States Supreme Court recognizes three categories of police-citizen interactions: (1) a consensual encounter, which requires no objective justification, (2) a brief investigatory stop or detention, which must be supported by reasonable suspicion of criminal activity, and (3) a full-scale arrest, which must be supported by probable cause." (Citations omitted.) *State v. Jones*, 188 Ohio App.3d 628, 2010-Ohio-2854, ¶ 13 (10th Dist.), citing *Florida v. Bostick*, 501 U.S. 429 (1991); *Brown v. Illinois*, 422 U.S. 590 (1975); *Terry v. Ohio*, 392 U.S. 1 (1968). The stop in this case was clearly not a consensual encounter because Bowers was prevented from leaving when he attempted to flee from 140 East Woodrow. (Hearing Tr. at 23-24.) But there was also nothing in the record to suggest that Bowers was arrested until after the cocaine fell from his pocket. Thus, this case concerns a scenario of the second type—an investigatory stop that had to be supported by reasonable suspicion of criminal activity.

{¶ 12} We have previously explained reasonable suspicion:

> "[A]n 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, P35, 817 N.E.2d 864, *quoting United States v. Cortez* (1981), 449 U.S. 411, 417, 101 S.Ct. 690, 695, 66 L. Ed. 2d 621.
>
> Reasonable suspicion entails some minimal level of objective justification, "that is, something more than an inchoate and unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause." *State v. Jones* (1990), 70 Ohio App.3d 554, 556-57, 591 N.E.2d 810, 8 Anderson's Ohio App. Cas. 48, *citing Terry*, 392 U.S. at 27, 88 S.Ct. at

> 1883; *State v. Carter*, 69 Ohio St.3d 57, 66, 1994 Ohio 343, 630 N.E.2d 355 (concluding a police "officer's inarticulate hunch will not provide a sufficient basis for an investigative stop"). Accordingly, "[a] police officer may not rely on good faith and inarticulate hunches to meet the *Terry* standard of reasonable suspicion." *Jones*[, 70 Ohio App.3d] at 557.

Jones at ¶ 16-17. Even with reasonable suspicion to stop and frisk "a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous." *Arizona v. Johnson*, 555 U.S. 323, 326-27 (2009). When this proposition of law is applied in reviewing the police frisk of Johnson, we review it in two parts: what reason the police had to suspect that Bowers was committing or was about to commit a crime, and whether there was also reasonable suspicion that Bowers was "armed and dangerous." *Id.*

{¶ 13} The police had received a tip that someone was dealing drugs from 140 East Woodrow. (Hearing Tr. at 6-7.) The record does not reveal the identity of the tipster or reveal the basis for the tipster's knowledge. Those failings make it less reliable. *Maumee v. Weisner*, 87 Ohio St.3d 295, 299-302 (1999). However, the tip was corroborated to some minor extent when the officers arrived at 140 East Woodrow and, despite covered windows and a homemade sign on the door indicating no one lived there, they later heard people moving around in the house. (Hearing Tr. at 8-9, 17.) The tip was also corroborated before they heard people moving around in the house when they knocked on the door of the 142 East Woodrow address of the duplex and discovered an apparent heroin user whose first question on seeing the officers was "are you here for next door?" *Id.* at 10. Partially corroborated tips are generally considered reliable. *See Illinois v. Gates*, 462 U.S. 213, 241-44 (1983) (discussing *Draper v. United States*, 358 U.S. 307 (1959)). The suspicion created by the tip was still further enhanced when Bowers attempted to flee from 140 East Woodrow while police were on the threshold of the duplex, having knocked and announced themselves as police. (Hearing Tr. at 10.) " '[U]nprovoked flight upon noticing the police, * * * is certainly suggestive' of wrongdoing and can be treated as 'suspicious behavior[.]' * * * In fact, 'deliberately furtive actions and flight at the approach of . . . law officers are strong indicia of *mens rea*.' " (Emphasis added.) *District of Columbia v. Wesby*, __ U.S. __, 138 S.Ct. 577, 587 (2018), quoting *Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000); *Sibron v. New York*, 392 U.S. 40, 66 (1968). The officer also testified that in previous

encounters, Bowers had bragged that he sold drugs and would never be caught. (Hearing Tr. at 11-12.) These facts under applicable case law support reasonable suspicion that Bowers was involved in drug trafficking from 140 East Woodrow.

{¶ 14} While the record reveals no separate basis for suspecting that Bowers was "armed and dangerous," the Supreme Court of Ohio has held:

> The right to frisk is virtually automatic when individuals are suspected of committing a crime, like drug trafficking, for which they are likely to be armed. *See State v. Williams* (1990), 51 Ohio St.3d 58, 554 N.E.2d 108. *See, also, United States v. Ceballos* (E.D.N.Y.1989), 719 F.Supp. 119, 126: "The nature of narcotics trafficking today reasonably warrants the conclusion that a suspected dealer may be armed and dangerous."

State v. Evans, 67 Ohio St.3d 405, 413 (1993); *see also, e.g., State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, ¶ 61. Thus, we find that the police also had reasonable suspicion that Bowers was "armed and dangerous" because the facts as found by the trial court support that he was involved in drug trafficking at the time of the stop.

{¶ 15} Having reviewed the trial court's finding that Johnson's pat down of Bowers in and of itself was warranted and having found the trial court's determination to be appropriate, we examine further whether *Terry* or any of its progeny permits or supports more than a single, limited pat down. *See, e.g., Terry* at 25-26; *State v. Michael*, 10th Dist. No. 12AP-508, 2013-Ohio-3889, ¶ 15. In this case, Bowers was patted down twice. (Hearing Tr. at 10-11, 25.) Investigative stops must be limited in duration and scope such that an extended or repetitive pat down could exceed the "strictly circumscribed" bounds of the investigative stop and frisk. *Terry* at 26; *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993). In Bowers' case, Johnson indicated he received an ambiguous response when he asked his fellow officer if Bowers had been patted down. (Hearing Tr. at 25.) Under the facts of Bowers' case, we do not find that it exceeded the limited scope of the *Terry* stop for Johnson to perform the pat down that his fellow officer had only "kind of" performed. *Id.*

{¶ 16} We overrule Bowers' sole assignment of error.

IV. CONCLUSION

{¶ 17} Deferring to the version of the facts credited by the trial court, officers had reasonable suspicion to stop Bowers on suspicion of drug trafficking based on his past statements that he was a drug dealer and a partially corroborated tip identifying his drug-

dealing address. Because the officers had a reasonable suspicion that Bowers was involved in drug dealing, by law they also had reasonable suspicion that Bowers was armed and dangerous. Although Bowers claims he was subjected to two pat downs, the scope of the investigative stop was not exceeded because there is evidence that the first pat down was apparently incomplete. We overrule Bowers' sole assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BEATTY BLUNT and HANDWORK, JJ., concur.

HANDWORK, J., retired, formerly of the Sixth Appellate District, assigned to active duty under authority of Ohio Constitution, Article IV, Section 6(C).