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APR 10 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

	)	2 CA-JV 2008-0124
	)	DEPARTMENT A
	)	
IN RE HENRY N.-F.	)	MEMORANDUM DECISION
	)	Not for Publication
	)	Rule 28, Rules of Civil
	)	Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 16919902

Honorable Ted B. Borek, Judge

AFFIRMED

Barbara LaWall, Pima County Attorney
By Dale Cardy
Tucson
Attorneys for State

Robert J. Hirsh, Pima County Public Defender
By Julie M. Levitt-Guren
Tucson
Attorneys for Minor

H O W A R D, Presiding Judge.

¶1 The juvenile court adjudicated appellant Henry N.-F. delinquent for having possessed a deadly weapon as a prohibited possessor and having possessed or consumed alcohol. The court placed Henry on juvenile intensive probation supervision, and he

appealed, challenging the court's order denying his motion to suppress evidence. For the following reasons, we affirm.

¶2 In reviewing a ruling on a motion to suppress, "[w]e review only the evidence presented at the suppression hearing, and we view it in the light most favorable to upholding the juvenile court's factual findings." *In re Ilono H.*, 210 Ariz. 473, ¶ 2, 113 P.3d 696, 697 (App. 2005) (citation omitted). Shortly before 2:00 a.m. on May 2, 2008, Pima County Sheriff's deputy Keith Barnes received a report of "somebody possibly trying to break into cars or trying to steal cars" in a particular area. Barnes arrived at the location of the report just after 2:00 a.m. and observed Henry walking down the middle of the street, approximately two houses away. No one else was present. Barnes had no idea how old Henry was when he first observed him, but he testified he "believed it was suspicious that at 2:00 a.m. somebody would be walking around in this area with a report that . . . an individual [had been] possibly breaking into vehicles or trying to steal vehicles."

¶3 Barnes shined a light on Henry, stepped out of his patrol vehicle, and asked Henry "to come over and speak with [him]." Henry responded with an "aggressive and defiant" demeanor, cursing and telling Barnes "he was trying to go home." He also "kept his hands out of [Barnes's] view." Barnes repeated his request for Henry to come to him and told Henry to show him his hands. Henry began to approach Barnes, but he was "real[ly] aggressive," hid his right side from Barnes, and ignored Barnes's requests and/or demands for Henry to keep his hands out of his pockets. Eventually, concerned Henry might have a weapon, Barnes drew his weapon and ordered Henry to the ground. Henry "became compliant" when another officer arrived on the scene, and Barnes placed him in handcuffs.

Thereafter, Barnes smelled intoxicants on Henry, and Henry said he was sixteen years old. Barnes arrested Henry for violating curfew and consuming alcohol. In a search incident to the arrest, Barnes found, among other things, a steak knife in Henry's right pocket and a razor blade in his shoe.

¶4 Henry moved to suppress the knife, razor blade, and any testimony about his smelling of alcohol, based on his contention that Barnes had violated his "rights [under] the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, and Article 2, Sections 4, 8 and 10 of the Arizona Constitution." Specifically, he contended that Barnes had seized Henry at the moment of his second request to speak with him, after Henry had ignored Barnes's first request; he also asserted that Barnes had not reasonably suspected Henry of criminal activity at that time.[1] On appeal, Henry asserts the juvenile court erred by determining reasonable suspicion existed under the circumstances of this case.

¶5 "[W]e review de novo whether police had reasonable suspicion to justify an investigatory stop." *State v. Fornof*, 218 Ariz. 74, ¶ 5, 179 P.3d 954, 956 (App. 2008). "Under *Terry* [*v. Ohio*, 392 U.S. 1 (1968),] and its progeny, an officer may conduct an investigatory stop or detention only if the officer has 'a reasonable suspicion supported by articulable facts that criminal activity "may be afoot"' or if the person stopped is reasonably suspected of having committed a crime." *Ilono H.*, 218 Ariz. 473, ¶ 4, 113 P.3d at 697, *quoting United States v. Sokolow*, 490 U.S. 1, 7 (1989) (citation omitted). "While

[1]Henry did not challenge below Barnes's justification for the arrest and search incident thereto based on the information gained during the course of the investigatory stop, nor does he do so on appeal.

'reasonable suspicion' is a less demanding standard than probable cause and requires a showing considerably less than a preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop." *Illiniois v. Wardlow*, 528 U.S. 119, 123-24 (2000). "The officer must be able to articulate more than an 'inchoate and unparticularized suspicion or "hunch"' of criminal activity." *Id.*, *quoting Terry*, 392 U.S. at 27.

¶6 "Our assessment of reasonable suspicion is based on the totality of the circumstances, considering such objective factors as the suspect's conduct and appearance, location, and surrounding circumstances, such as the time of day, and taking into account the officer's relevant experience, training, and knowledge." *Fornof*, 218 Ariz. 74, ¶ 6, 179 P.3d at 956. In *State v. Wyman*, 197 Ariz. 10, ¶ 12, 3 P.3d 392, 396 (App. 2000), we recognized that "a consensual encounter with an uncooperative subject can become a Fourth Amendment seizure when the subject's participation is ultimately gained through more than one request for 'voluntary' cooperation," as was the case here. Therefore, for purposes of our analysis, we look to the circumstances that existed when Barnes asked Henry to approach for the second time.

¶7 As Henry acknowledges, those circumstances included the fact that Barnes had received a report shortly before 2:00 a.m. that someone was attempting to break into cars at a particular location; Barnes saw Henry close to that location shortly thereafter; and that, when Barnes approached him, Henry was "swearing and aggressive and was hiding his hand in his pocket." Although Henry claims Barnes also knew that Henry lived in the area, this claim misstates the record. Barnes testified Henry told him he was "trying to go home," but

there is nothing in the record indicating Barnes knew or had reason to believe Henry's home was close-by at the time. The juvenile court also ascertained that the area in question was residential, with only one road connecting it to a major roadway. And Barnes testified that Henry was the only person on the street at the time. Given these facts, the court did not err in determining Barnes reasonably suspected Henry of engaging in criminal activity.

¶8 "[T]he determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior." *Wardlow*, 528 U.S. at 125. Common sense supported Barnes's suspicion that Henry was "involved with the report" of criminal activity when Barnes found Henry at that specific time and location and Henry reacted to Barnes's approach uncooperatively and aggressively and concealed his hands. Although an individual's "refusal to cooperate, [with an officer's request for contact] without more, does not furnish the minimal level of objective justification needed for a detention or seizure," *Florida v. Bostick*, 501 U.S. 429, 437 (1991), the surrounding circumstances in this case provided the minimum justification Barnes needed to stop Henry in this case.

¶9 Accordingly, we find no error in the juvenile court's denial of Henry's motion to suppress, and we affirm the court's adjudication of delinquency and the disposition.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

PHILIP G. ESPINOSA, Judge