[Cite as *State v. Keith*, 2004-Ohio-5731.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 83686

STATE OF OHIO	:	JOURNAL ENTRY
	:	AND
Plaintiff-appellee	:	OPINION
	:	
-vs-	:	
	:	
DAVONNE KEITH	:	
	:	
Defendant-appellant	:	

DATE OF ANNOUNCEMENT
OF DECISION: OCTOBER 28, 2004

CHARACTER OF PROCEEDING: Criminal appeal from the Court of Common Pleas Case No. CR-439206

JUDGMENT: Affirmed.

DATE OF JOURNALIZATION:

APPEARANCES:

For Plaintiff-Appellee:

WILLIAM D. MASON, ESQ.
CUYAHOGA COUNTY PROSECUTOR
BY: KRISTEN LUSNIA, ESQ.
KERRY A. SOWUL, ESQ.
ASST. COUNTY PROSECUTORS
Justice Center - 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

For Defendant-Appellant: ROBERT L. TOBIK, ESQ.
CHIEF PUBLIC DEFENDER
BY: PATRICIA KOCH WINDHAM
ASST. PUBLIC DEFENDER
1200 Ontario Street
100 Lakeside Place
Cleveland, Ohio 44113

ANN DYKE, J.:

{¶ 1} Defendant-appellant Davonne Keith ("appellant") appeals from the judgment of the trial court denying his motion to suppress evidence. For the reasons set forth below, we affirm.

{¶ 2} The following facts were adduced at the suppression hearing. Officer Russell of the Cleveland Police Department was on duty on May 5, 2003 when he received a complaint of drug activity by two males in the neighborhood. A resident had flagged down the Officer to report that appellant was approaching cars and making frequent trips to and from a silver Chrysler. He was accompanied by a friend. The resident identified appellant. The officer talked to another neighbor who confirmed this information.

{¶ 3} Officer Russell knew both residents quite well. The resident who flagged the officer down was a childhood friend of his and the other neighbor was an older gentlemen who Russell stated "has known me since I was in diapers."

{¶ 4} Armed with the second report of appellant conducting suspected drug sales in the area, the officer called for backup before approaching the men for questioning. Upon approaching the men, Russell patted down appellant for his safety. He felt an object in appellant's pocket, asked what it was, and removed it after being told it was car keys. When Russell asked appellant if the keys belonged to the nearby silver Chrysler, appellant fled.

{¶ 5} Officers eventually apprehended appellant, learned his identity following appellant's attempt to provide police with several aliases, and learned that a search warrant was out for his arrest. Police arrested appellant and thereafter conducted an inventory search of the silver Chrysler, which they later determined belonged to a third party, and found a bag of crack cocaine containing approximately sixty rocks.

{¶ 6} Appellant was indicted on one count of drug trafficking in violation of R.C. 29225.03 with a schoolyard specification, one count of possession of drugs in violation of R.C. 2925.11, one count of felonious assault in violation of R.C. 2903.11, one count of possessing criminal tools in violation of R.C. 21923.24, one count of resisting arrest in violation of R.C. 2921.33 and one count of falsification in violation of R.C. 2921.13. The felonious assault in count three resulted from a separate incident and was bifurcated from the proceedings.

{¶ 7} Appellant filed a motion to suppress the evidence relating to counts one, two, four, five and six. Following a suppression hearing, the trial court denied the motion. Appellant changed his plea of not guilty to a plea of no contest to counts one, two, four, five and six and was thereafter sentenced. Appellant now appeals the denial of his motion to suppress in this sole assignment of error:

{¶ 8} "I. The trial court erred when it misapplied basic Fourth Amendment principles and failed to suppress the crack cocaine."

{¶ 9} Appellant maintains the trial court erred by not suppressing the crack cocaine found after Officer Russell allegedly exceeded the scope of a lawful detention. We disagree.

{¶ 10} Appellate review of a trial court's ruling on a motion to suppress presents mixed questions of law and fact. See *State v. McNamara* (1997), 124 Ohio App.3d 706, 710. An appellate

court is to accept the trial court's factual findings unless they are "clearly erroneous." *State v. Long* (1998), 127 Ohio App.3d 328, 332. We are therefore required to accept the factual determinations of a trial court if they are supported by competent and credible evidence. *State v. Harris* (1994), 98 Ohio App.3d 543, 546. The application of the law to those facts, however, is then subject to de novo review. Id

{¶ 11} The Fourth Amendment to the United States Constitution prohibits warrantless searches and seizures, rendering them per se unreasonable unless an exception applies. *Katz v. United States* (1967), 389 U.S. 347. A common exception to the Fourth Amendment warrant requirement is an investigative stop, or *Terry* stop. *Terry v. Ohio* (1968), 392 U.S. 1. A court, evaluating the validity of a *Terry* search, must consider "the totality of the circumstances -- the whole picture." *United States v. Cortez* (1981), 449 U.S. 411, 417.

{¶ 12} Under *Terry*, a law enforcement officer may briefly stop and detain an individual for investigative purposes if he has a reasonable suspicion supported by articulable facts that "criminal activity may be afoot." *Terry*, supra at 30; accord *United States v. Sokolow*, (1989), 490 U.S. 1, 7.

{¶ 13} We evaluate the legitimacy of Terry stops by engaging in a two-part analysis of the reasonableness of the stop. First, we must determine "whether there was a proper basis for the stop, which is judged by examining whether the law enforcement officials were aware of specific and articulable facts which gave rise to reasonable suspicion." *United States v. Garza*, 10 F.3d 1241, 1245 (6th Cir. 1993); *United States v. Hardnett*, 804 F.2d 353, 356 (6th Cir. 1986), cert. denied, 479 U.S. 1097, (1987). Second, we decide "whether the degree of intrusion into the suspect's personal security was reasonably related in scope to the situation at hand, which is judged by examining the

reasonableness of the officials' conduct given their suspicions and the surrounding circumstances." Id.

{¶ 14} Appellant argues the failure of Russell to personally observe any illegal activity by the appellant renders the subsequent seizure illegal. We disagree. Reasonable suspicion to initiate an investigatory stop need not be based solely on an officer's personal observations. *Adams v. Williams* (1972), 407 U.S. 143. In fact, where, as here, the information possessed by the police before the stop stems solely from an informant's tip, the determination of reasonable suspicion will be limited to an examination of the weight and reliability due that tip." *Maumee v. Weisner* (1999), 87 Ohio St.3d 295. Generally, a known citizen informant is more reliable than an anonymous or known criminal informant. Id.

{¶ 15} In this case, Officer Russell received citizen complaints from two independent sources that appellant was selling drugs. Russell knew both citizens well and trusted them. They identified appellant and reported watching him for thirty minutes approach cars and then walk frequently to and from the Chrysler. Russell knew from his experience that such conduct was consistent with drug activity. Russell lived in the area and had been patrolling it for over twelve years, and was aware it was a high drug activity area. In viewing the totality of the circumstances, we find specific and articulable facts existed to satisfy the reasonable suspicion standard and justify Russell's decision to conduct an investigatory stop and a protective weapons search on appellant.

{¶ 16} We reject appellant's contention that the *Terry* stop in this case was improper, as it was in *State v. Washington* (2001), 144 Ohio App.3d 482. In *Washington*, officers received general information about a suspected drug courier on an in-bound train. The officers were given a name,

but the passenger was not identified. Upon the train's arrival, officers approached a passenger because he was carrying new luggage and was one of the last people to get off the train. This court invalidated the seizure, finding the profile characteristics the officers used, the passenger's overall appearance and demeanor, were too general in the absence of any affirmative conduct indicating criminal activity.

{¶ 17} *Washington* differs substantially from the case at hand, in which the citizen informants specifically identified appellant and reported his conduct to the officer. The officer, using his vast experience as a police officer and his knowledge as a resident of the high drug activity neighborhood, had a reasonable suspicion that appellant was selling drugs and properly conducted an investigatory stop and protective weapons search. We overrule appellant's sole assignment of error.

Judgment affirmed.

It is ordered that appellee recover of appellant its 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.

KENNETH A. ROCCO, J., CONCURS.

ANNE L. KILBANE, P.J. CONCURS IN PART

AND DISSENTS IN PART (SEE ATTACHED

OPINION)

ANN DYKE

JUDGE

N.B. This entry is an announcement of the court's decision. See App.R.22(B), 22(D) and 26(A); Loc.App.R.22. This decision will be journalized and will become the judgment and order of the court pursuant to App. R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also S.Ct.Prac.R. II, Section 2(A)(1).

COURT OF APPEALS OF OHIO EIGHTH DISTRICT
COUNTY OF CUYAHOGA
NO. 83686

STATE OF OHIO,	:	
	:	C O N C U R R I N G
Plaintiff-Appellee	:	
	:	A N D
-vs-	:	
	:	D I S S E N T I N G
	:	
DAVONNE KEITH,	:	O P I N I O N
	:	
	:	
Defendant-Appellant	:	

DATE OF ANNOUNCEMENT
OF DECISION: OCTOBER 28, 2004

ANNE L. KILBANE, P.J., CONCURRING IN PART AND DISSENTING IN PART:

{¶ 18} I concur with the majority's decision to affirm the order of Judge Timothy J. McGinty that denied Davonne Keith's motion to suppress. I dissent in part, however, because the majority has chosen to ignore an obvious sentencing error and, instead of vacating the sentence and remanding for resentencing, they invite yet another appeal based, this time, upon ineffective assistance of appellate counsel. The judge imposed consecutive sentences without making findings and without giving reasons necessary under R.C. 2929.14(E)(4) and R.C. 2929.19(B)(2)(c), and the majority turns a blind eye using the excuse that an appellate court is not required to recognize errors that have not been assigned. Apparently they decided to be blissfully unaware that the emperor is not wearing any clothes.[1]

{¶ 19} Although Keith did not challenge his sentencing on appeal, a reviewing court has the authority to address it sua sponte,[2] because the judge's failure to articulate the statutory requirements is plain error[3] and grounds for a vacation of the sentence and remand for resentencing.[4] A plain error is defined as an inarguable, or "'obvious' defect in the trial proceedings[,]" that has "affected the

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[1] "But he hasn't got anything on," a little child said. The Emperor's New Clothes, Hans Christian Anderson(1805-1875).

[2] See, e.g., *State v. Slagter* (Oct. 26, 2000), Cuyahoga App. No. 76459 (remanded, sua sponte, for resentencing); *State v. Mills* (Dec. 9, 1999), Cuyahoga App. No. 74700 (sentence modified, sua sponte); *Cleveland v. Abuaun* (Feb. 19, 1998), Cuyahoga App. Nos. 72342, 72343 (conviction reversed, sua sponte).

[3] *State v. Brown*, Cuyahoga App. No. 80725, 2002-Ohio-5468, at ¶23.

[4] Although R.C. 2953.08(G)(1) can be read to provide for a limited remand for findings only, such relief would be ineffective because the findings must be accompanied by reasons. *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, 793 N.E.2d 473, paragraph one of the syllabus.

outcome of the trial."[5] The error here satisfies the standard because the imposition of consecutive sentences without first satisfying statutory requirements is, without doubt, "contrary to law."[6] Furthermore, *Barnes* makes it clear that an error need only affect substantial rights in order to be recognized; the court's explanation ameliorated the stringent "outcome-determinative" standard of *State v. Long*.[7] Therefore, regardless of whether the judge could have made proper findings and given reasons supporting consecutive sentences, the failure to follow sentencing requirements certainly affected Keith's substantial rights. The judge was required to make such findings and give such reasons during the hearing, on the record,[8] and the failure to do so affected Keith's sentence.

{¶ 20} The judge's plain error in sentencing Keith is even more apparent in light of the United States Supreme Court's decision in *Blakely v. Washington*,[9] which may have altered or restricted the reasons for the statutorily required findings for sentencing, including the findings necessary to impose consecutive sentences. The *Blakely* court ruled that for sentencing purposes the "statutory maximum" is not the longest term the defendant can receive under any circumstances, but is "the maximum sentence a judge may impose solely on the basis of facts reflected in the jury

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[5] *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240.

[6] R.C. 2953.08(A)(1)(4); *State v. Jones*, 93 Ohio St.3d 391, 399, 2001-Ohio-1341, 754 N.E.2d 1252.

[7] *Barnes* at 27, citing *State v. Long*, 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804, paragraph two of the syllabus.

[8] *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, 793 N.E.2d 473, paragraph one of the syllabus.

[9] *Blakely v. Washington* (2004), ___ U.S. ___, 124 S.Ct. 2531, 159 L.Ed.2d 403.

verdict or admitted by the defendant."[10] The court explained that its holding applied equally well when a defendant's conviction was based on a guilty plea or no contest plea: "When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding."[11]

{¶ 21} Here, the judge failed to make any of the findings required by statute and gave no reason for imposing a consecutive sentence. The Supreme Court of Ohio has admonished courts "to notice plain error with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice."[12] If *Blakely* applies to Ohio sentencing, Keith's constitutional rights guaranteed by the Sixth Amendment to the United States Constitution are at stake. Certainly, the plain error doctrine should be applied to this case to prevent a manifest miscarriage of justice. I cannot fathom why the majority thinks otherwise.[13]

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[10]Id. at 2537-38, 159 L.Ed.2d at 413-14.

[11]Id. at 2541, 159 L.Ed.2d at 417.

[12]*Barnes* at 27, quoting *State v. Long*, 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804, paragraph three of the syllabus (internal quotation marks omitted).

[13]Note the majority writer's concurrence in *State v. Wright*, Cuyahoga App. No. 81644, 2003-Ohio-1958, where the panel determined sua sponte that a defendant's sentence had to be increased.