[Cite as *State v. Raine*, 2008-Ohio-5993.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90681

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

MELVIN RAINE

DEFENDANT-APPELLEE

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-500721

BEFORE: Gallagher, P.J., Kilbane, J., and Dyke, J.

RELEASED: November 20, 2008

JOURNALIZED:

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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).

SEAN C. GALLAGHER, P.J.:

{¶ 1} Plaintiff-appellant, the state of Ohio, appeals from the decision of the Cuyahoga County Court of Common Pleas that granted defendant-appellee, Melvin Raine's motion to suppress. For the reasons that follow, we reverse and remand.

{¶ 2} At the suppression hearing, the testimony revealed that on July 6, 2007, at approximately 4:30 a.m., Sergeant Christopher Svec of the Cuyahoga Metropolitan Housing Authority ("CMHA"), a ten-year veteran, was on patrol in the area of East 55th Street and Central Avenue, in Cleveland. Sgt. Svec testified that the store at the corner of East 55th Street and Central Avenue, and the playground located in the courtyard of 4908 Central Avenue are well known for drug sales.

{¶ 3} While at the traffic light at East 55th Street and Central Avenue, Sgt. Svec, who was facing northbound on East 55th Street, looked to his left and saw a car stopped, with the motor running and brake lights activated, in front of 4908 Central Avenue. Sgt. Svec later testified he was about 30 feet away from the vehicle and had an unobstructed view. The driver was later identified as Raine.

{¶ 4} Sgt. Svec saw an unknown male standing outside of the driver's side door of Raine's vehicle. He observed the unidentified male take something out of his pocket, reach inside the vehicle, exchange the unknown object for money, and then put the money in his pocket. After the exchange, the unknown male saw

the police car and began running and fled into the CMHA projects. He was not apprehended.

{¶ 5} CMHA Officer Bartley was also on patrol in a one-man police vehicle right behind Sgt. Svec's vehicle. As soon as Raine pulled forward, Sgt. Svec and Officer Bartley, in their separate police vehicles, made left turns onto Central Avenue, activated their overhead lights, and immediately pulled Raine over. Both Raine and his passenger were instructed to exit the vehicle.

{¶ 6} Sgt. Svec testified that Raine was advised of why he was pulled over and what the police had observed. Raine was then asked whether he had anything that would hurt the officers, any kind of weapons, or anything illegal on his person. Raine stated that he had a rock of crack cocaine in his pocket.

{¶ 7} Sgt. Svec testified that he retrieved the rock of crack cocaine and placed Raine under arrest for a drug-law violation. Raine was placed in the back of the police car in handcuffs. The crack cocaine was placed in an evidence bag and sealed. Since Raine was under arrest, necessitating a tow of his vehicle, an inventory search of the car was conducted, which revealed a suspected glass crack pipe in the front ashtray.

{¶ 8} On September 12, 2007, Raine was indicted on one count of possession of drugs in violation of R.C. 2925.11, alleging possession of crack cocaine, a schedule II drug, in an amount less than one gram, a felony of the fifth degree. Raine pleaded not guilty.

{¶ 9} Prior to trial, Raine's counsel moved to suppress Raine's answer to Svec's question regarding contraband, as well as the crack cocaine and glass crack pipe. Raine argues that his statement and the seized items must be suppressed because Svec questioned Raine without informing him of his *Miranda* rights beforehand. See *Arizona v. Miranda* (1966), 384 U.S. 436.

{¶ 10} On November 8, 2007, the trial court conducted a hearing on the motion. After hearing from both sides, the trial court granted Raine's motion and suppressed his statement regarding the crack cocaine and the glass crack pipe.

{¶ 11} In granting the motion, the trial court found that "the initial stop was valid. However, once ordered out of the auto, testimony further revealed the defendant was not free to leave after a period of time as he would be charged with fleeing and eluding." The court found that Raine was in custody from the moment he exited the car. The court determined that since Raine had been placed in custodial detention, he should have been read his *Miranda* rights before being asked by Sgt. Svec about contraband on his person.

{¶ 12} The state timely appealed the trial court's decision and submits two assignments of error for our review. The state's first assignment of error states the following:

> "The trial court erred when it found that the investigating officer prior to questioning [the defendant] should have Mirandized [the] defendant."

{¶ 13} The state contends that the trial court incorrectly determined that Raine was in custody when Sgt. Svec asked him whether he had anything that would harm the officers, any weapons, or anything illegal on his person. The state argues that it was not a custodial interrogation but rather an investigative stop, which did not require *Miranda* warnings.

{¶ 14} Raine submits that the trial court's determination that he was under custodial arrest, and not merely an investigative detention, was supported by competent, credible evidence and must be upheld. Hence Raine argues that the question posed without prior reading of his *Miranda* rights violated his rights under the *Miranda* decision. Raine asserts that the trial court's determination that his statement in response to the officer's question and the subsequently recovered rock of cocaine and crack pipe were properly suppressed.

{¶ 15} In *State v. Burnside,* 100 Ohio St.3d 152, 2003-Ohio-5372, the Ohio Supreme Court addressed appellate review of a motion to suppress:

> "Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence.
>
> "Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." Id. at ¶8. (Internal citations omitted.)

{¶ 16} In this case, the trial court determined that the initial stop of Raine's automobile was valid. Under the Fourth Amendment, a policeman who lacks probable cause but whose "observations lead him reasonably to suspect" that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to "investigate the circumstances that provoke suspicion." *United States v. Brignoni-Ponce* (1975), 422 U.S. 873, 881. "[The] stop and inquiry must be 'reasonably related in scope to the justification for their initiation.'" Id. (quoting *Terry v. Ohio* (1968), 392 U.S. 1, 29). Here, Raine was stopped, in an area known for drug trafficking, after a ten-year veteran police officer observed him making a suspected hand-to-hand drug transaction. In addition, the suspected seller fled the area after seeing the officer's vehicle. We find that the trial court's finding that the initial stop was valid is supported by competent, credible evidence.

{¶ 17} We turn now to the trial court's ruling that Raine was in custody when he was removed from the car because he was not free to leave.

{¶ 18} A "seizure" occurs when an individual is detained under circumstances in which a reasonable person would not feel free to leave the scene. *United States v. Montgomery* (C.A.6, 2004), 377 F.3d 582, 587-88. Both an "investigatory stop" and an "arrest" thus constitute "seizures" within the meaning of the Fourth Amendment. Id. In order to be termed an "investigatory stop," the seizure must be temporary, lasting no longer than needed to effectuate the purpose of the stop, and the investigation must be conducted by the least intrusive means possible to allow

the officer to verify or dispel the officer's suspicion in a short period of time. *Florida v. Royer* (1983), 460 U.S. 491, 500. If the detention exceeds the bounds of an investigatory stop, it may be tantamount to an arrest. See id. at 496.

{¶ 19} *Terry* permits a police officer to detain a person briefly to investigate the circumstances that provoked the suspicion. *Berkemer v. McCarty* (1984), 468 U.S. 420, 442. An officer may ask a moderate number of questions that are designed to "obtain information confirming or allaying" the officer's suspicions or fears. *Berkemer*, supra. The officer's inquiry must be "reasonable" in scope. *Terry*, at 29.

{¶ 20} A person is entitled to *Miranda* warnings only when that person is in police "custody," i.e., when the person is deprived of his freedom in a significant way, because the warnings are designed to advise a party of his right against *compelled* self-incrimination. *State v. Gaston* (1996), 110 Ohio App.3d 835, 842. Since an investigatory detention is ordinarily "non-threatening [in] character" to the person detained, *Terry* stops are not subject to the requirements of *Miranda* because the person detained is not "obligated to respond." *Berkemer*, 439-440. The United States Supreme Court has held that "persons temporarily detained pursuant to *Terry* stops are not 'in custody' for the purposes of *Miranda*." Id. We find that this was a valid investigatory stop that did not rise to the level of custodial interrogation. Raine was pulled over, advised of the reason for the stop, and asked to the step from the car. An officer can order a driver and the passengers out of the car as a precautionary measure, regardless of whether he has any reason to believe that they are armed and dangerous. *State v. Lozada* (2001), 92 Ohio St.3d 74, 81, 2001-

Ohio-149, citing *Maryland v. Wilson* (1997), 519 U.S. 408. See, also, *Pennsylvania v. Mimms* (1977), 434 U.S. 106 (holding an officer may order a motorist out of a vehicle that has been lawfully stopped for a traffic violation, even in the absence of any criminal wrongdoing). Removing someone from their car does not transform an investigatory stop into a custodial detention. Id.

{¶ 21} Sgt. Svec asked Raine whether he had anything that could hurt the officers: any weapons, or anything illegal on his person. This inquiry did not run afoul of either *Terry* or *Miranda*, because it was the least intrusive means by which the officer could confirm or dispel his suspicions. Raine was not obligated to respond; however, he volunteered an incriminating answer that led to the recovery of drugs and, subsequently, the crack pipe.

{¶ 22} Also, Raine was not detained for any length of time before being asked the question. Finally, the fact that Raine was not free to leave is not outcome determinative. No suspect is ever "free to leave" an investigatory stop. "The determination whether a custodial interrogation has occurred requires an inquiry into how a reasonable man in the suspect's position would have understood his situation. * * * The ultimate inquiry is simply whether there is a formal arrest *or restraint on freedom of movement of the degree associated with a formal arrest*." *State v. Martin,* Montgomery App. No. 19186, 2002-Ohio-2621, citing *State v. Biros*, 78 Ohio St.3d 426, 440, 1997-Ohio-204; *California v. Beheler* (1983), 463 U.S. 1121, 1125. (Emphasis added.) Further, a policeman's unarticulated plan to arrest someone is not relevant to the question of whether a suspect was "in custody" at a particular

time. *Berkemer,* at 442. Therefore, the officer's testimony that Raine was not free to leave and that he would have arrested Raine for fleeing and alluding has no bearing on this case. Raine's freedom of movement was not restrained to the degree associated with a formal arrest, and Sgt. Svec's question was the least intrusive means to confirm or dispel his suspicions. We find that Raine was not in custody at the time he made the incriminating statement; consequently, *Miranda* warnings were not required. The state's first assignment of error is sustained.

{¶ 23} The state's second assignment of error is moot in light of our decision in the first assignment of error.

Judgment reversed and case remanded.

It is ordered that appellant recover from appellee 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.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

____
SEAN C. GALLAGHER, PRESIDING JUDGE

ANN DYKE, J., CONCURS;
MARY EILEEN KILBANE, J., DISSENTS
(WITH SEPARATE OPINION)
MARY EILEEN KILBANE, J., DISSENTING:

{¶ 24} I respectfully dissent. I would affirm the trial court's granting of Raine's motion to suppress.

{¶ 25} "Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *State v. Burnside* (2003), 100 Ohio St.3d 152. (Internal citations omitted.)

{¶ 26} The trial court determined that once Raine was ordered out of his vehicle to the time of his formal arrest, Raine had been placed in custodial detention and *Miranda* rights should have been administered to him before being asked by the officer about contraband on his person.

> "Police are not required to administer *Miranda* warnings to everyone whom they question. *Oregon v. Mathiason* (1977), 429 U.S. 492, 495 ***. 'Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect.' Id. Only custodial interrogation triggers the need for

> *Miranda* warnings. Id. at 494 ***. See, also, *Berkemer v. McCarty* (1984), 468 U.S. 420, 440-442 ***. The determination whether a custodial interrogation has occurred requires an inquiry into 'how a reasonable man in the suspect's position would have understood his situation.' *Berkemer* at 442 ***. 'The ultimate inquiry is simply whether there is a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.' *California v. Beheler* (1983), 463 U.S. 1121, 1125 ***. See, also, *State v. Barnes* (1986), 25 Ohio St.3d 203, 207." *State v. Biros*, 78 Ohio St.3d 426, 440, 1997-Ohio-204.

{¶ 27} Upon review and consideration of the entire record of proceedings before the trial court, and after giving proper deference to the trial court as the trier of fact, I find sufficient competent, credible evidence supporting the trial court's conclusion that Raine was in a state of "custodial interrogation" when asked the ultimate "thousand dollar" question, whether he had "anything illegal" on his person, necessitating prior administration of his *Miranda* warnings.

{¶ 28} The pertinent inquiry as to whether Raine was in a custodial status at the time he was asked if he had *anything illegal* was whether given the objective circumstances of the interrogation "a reasonable man in the suspect's position would have understood his situation" as being a "formal arrest or

restraint on freedom of movement of the degree associated with a formal arrest." *Berkemer* at 442; *Beheler* at 1125.

{¶ 29} In my opinion, a review of the record under the objective standard set forth in *Berkemer* and *Beheler* supports the trial court's determination that Raine viewed his movement as restricted to the degree associated with a formal arrest at the time of his questioning. In light of the stated standards of review with regard to suppression hearings, the trial court's determination that Raine had been quickly placed by the officers in a situation of custodial interrogation prior to questioning and absent the required *Miranda* warnings should not be disturbed.

{¶ 30} Accordingly, I would affirm the trial court's granting of Raine's motion to suppress.