

[Cite as *State v. Lucious*, 2009-Ohio-4880.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92196

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

EDDIE LUCIOUS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-486090

BEFORE: McMonagle, P.J., Blackmon, J., and Jones, J.

RELEASED: September 17, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) 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(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

CHRISTINE T. McMONAGLE, P.J.:

{¶ 1} Appellant Eddie Lucious was indicted, along with two others, in six counts of a ten-count indictment for various drug offenses. A motion to suppress evidence was filed, heard, and denied. On the date of the court's denial, Lucious entered pleas of no contest to all pertinent counts of the indictment. He was found guilty of all counts and sentenced to a total prison term of three years. Lucious appeals the denial of the motion to suppress.

Background

{¶ 2} In the summer of 2006, Cleveland police narcotics detectives conducted an investigation over a span of two months of a male named Charles Johnson. During that period of time, two controlled "buys" were made from Johnson by an informant. These "buys" involved both surveillance tapes and controlled phone calls. Based upon that investigation, a search warrant was issued for Johnson's home, and arrangements were made to purchase an ounce of crack cocaine and an "eightball" of crack cocaine. Surveillance was set up in the back parking lot of Johnson's residence.

{¶ 3} Shortly before the anticipated transaction, Lucious, who was not known by the detectives nor expected at the transaction, arrived at the scene as a passenger in the car of another. The police informant arrived in his own car, and pursuant to instructions, parked at the back of the parking lot.

Johnson drove into the lot, picked up Lucious as a passenger, and proceeded to the rear of the lot where the informant was located. Johnson pulled his car up next to that of the informant, driver-door to driver-door, then got out of his car and went to sit in the passenger seat of the informant's car. Lucious remained in the passenger seat of Johnson's automobile. The police surveillance car was located approximately 15-20 feet away.

{¶ 4} The detectives testified that they were concerned with this emerging scenario because this was not the manner in which previous "buys" were transacted, and they had information that Johnson was known to carry a gun. The combination of those factors led them to fear that the anticipated transaction with their informant was about to become a robbery. When the "take-down" signal was given by the informant, all three detectives rapidly exited their vehicles and approached the two subject vehicles.

{¶ 5} Lucious, still seated in Johnson's vehicle, was ordered to show his hands, which he did. He was then ordered out of the car and "to the ground" where he was immediately handcuffed.¹ After he was handcuffed, the officer patted him down. According to the officer, in the process of the pat-down, he

¹Lucious testified that "[h]e threw me on the ground, boom, boom, grabbed me up and said 'you're under arrest for'—I think it was, like, VSDL or something like that." Q. "So he told you [you] were arrested and he searched you? A. "Right." Other than this colloquy, Lucious did not contend that the facts were any different than that presented by the State.

touched “a large bulge” in Lucious’s left pants pocket, upon which Lucious quickly said, “It’s crack.”

Law and Analysis

{¶ 6} Lucious’s first two assignments of error are related and we consider them together. In his first assignment of error, Lucious argues that “[t]he trial court erred in denying defendant’s motion to suppress evidence, since there was no objective basis to show that the defendant was armed and dangerous necessitating a pat-down search.” In his second assignment of error, Lucious contends that “[t]he trial court erred when it denied the defendant’s motion to suppress, since there was no probable cause to arrest him, and thus any search of his person was likewise illegal.”

{¶ 7} On a motion to suppress, the trial court is the trier of fact and resolves questions of fact and issues regarding witness credibility. *State v. Curry* (1994), 95 Ohio App.3d 93, 96. A reviewing court is bound to accept those findings of fact if they are supported by competent, credible evidence. *Id.* Then, without deference to the trial court’s conclusion, it must determine whether, as a matter of law, the facts meet the appropriate legal standard. *Id.*

{¶ 8} We address first the contention that the pat-down was illegal. In this case, we know that the officers reasonably believed that they were attendant upon a drug sale. They certainly had probable cause to believe

that Johnson was about to sell drugs to their informant. They had a reasonable suspicion that Johnson had a gun, and the fact that the transaction was not following the familiar norms of Johnson's other drug sales gave them some reason to believe that this transaction might well involve a robbery. When Lucious joined Johnson in his car at one end of the parking lot and rode with him to the other portion of the lot, where Johnson entered the informant's car, the police certainly had reasonable suspicion that the two were together involved in criminal activity.

{¶ 9} Under *Terry v. Ohio* (1968), 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed. 889, the State is required to point to specific and articulable facts, which, taken together with the rational inferences from those facts, "reasonably warrant the intrusion." Here, the officers had probable cause to believe a drug deal was about to transpire, and reasonable suspicion that this "deal" might well transform to a robbery.

{¶ 10} Thus, ordering Lucious out of the car and handcuffing him while he was on the ground was justified under the circumstances of this case. See *State v. Hopper*, Cuyahoga App. Nos. 91269, 91327, 2009-Ohio-2711. In *State v. Hubbard*, Cuyahoga App. No. 83385, 2004-Ohio 4498, ¶17 (cited in *Hopper*), this court held that "[h]andcuffing and other means of detention are reasonable as long as the restraint was temporary, lasted no longer than was necessary to effectuate the purpose of the stop, and the methods employed

were the least intrusive means reasonably available to verify the officers' suspicions in a short period of time." Handcuffing and other means of detention may also be used to prevent flight. *State v. Pickett* (Aug. 3, 2000), Cuyahoga App. No. 76295. In sum, we find that there was reasonable suspicion to detain and pat down Lucious, and the handcuffing was likewise reasonable as it was apparently utilized only to secure him during the pat-down.

{¶ 11} In light of our resolution of the first assignment of error, we find Lucious's second assignment of error moot. If there was reasonable suspicion of criminal activity to detain him, and handcuffing was permissible as part of that detention in order to facilitate a safe pat-down, then probable cause for arrest was unnecessary as there is evidence in the record that Lucious was not arrested until after the "large bulge" was discovered during the pat-down.

{¶ 12} In his third assignment of error, Lucious alleges that "[t]he trial court erred when it failed to give factual findings and conclusions of law pursuant to Criminal Rule 12(F) of the Ohio Rules of Criminal Procedure" when denying his motion. Crim.R. 12(F) provides that a trial court "may adjudicate a motion based upon briefs, affidavits, the proffer of testimony and exhibits, a hearing, or other appropriate means." The rule also states that "*where factual issues are involved in determining a motion, the court shall state its essential findings on the record.*" (Emphasis added.)

{¶ 13} Here, the State and defense’s recitation of the facts at the suppression hearing were all but identical. The only real difference was that Lucious claimed that the officer *pushed* him to the ground, *announced that he was under arrest*, handcuffed him, patted him down, and discovered the large package of crack cocaine. The officer’s version was that he ordered Lucious to get on the ground, handcuffed him, patted him down, discovered the large package of crack cocaine, and was told by Lucious that the package was cocaine.

{¶ 14} While the testimony was different, under either scenario, the officer had reasonable suspicion of criminal activity, the right to detain and pat-down, and the right, under the circumstances, to handcuff. Whether the State’s scenario or the defense’s scenario is believed, the encounter passes Fourth Amendment muster. The record provides a sufficient basis for appellate review, and the court’s failure to make findings is therefore excused. *State v. King* (1999), 136 Ohio App.3d 377, 381.

{¶ 15} Finally, in his fourth assignment of error, Lucious contends that “[t]he trial court erred when it failed to suppress certain incriminating statements made to the police prior to the *Miranda* warnings given to the defendant.” Specifically, Lucious complains that his statement during the pat-down that the drugs in his pocket were cocaine should have been suppressed. This argument, not having been made below, will not be

reviewed here. *State ex rel. Gutierrez v. Trumbull Cty. Bd. of Elections* (1992), 65 Ohio St.3d 175.

{¶ 16} Lucious's assignments of error are overruled and the judgment of the trial court denying his motion to suppress is affirmed.

It is ordered that appellee recover from appellant 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.

CHRISTINE T. McMONAGLE, PRESIDING JUDGE

PATRICIA A. BLACKMON, J., and
LARRY A. JONES, J., CONCUR