[Cite as *State v. Coleman*, 2009-Ohio-6471.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93451

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ROBERT COLEMAN

DEFENDANT-APPELLANT

JUDGMENT:
JUDGMENT REVERSED, CONVICTION VACATED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-488899

BEFORE: Boyle, J., Cooney, A.J., and Sweeney, J.

RELEASED: December 10, 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).

MARY J. BOYLE, J.:

{¶ 1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1, the record from the lower court, the briefs, and the oral arguments of counsel.

{¶ 2} Defendant-appellant, Robert Coleman, appeals from a judgment convicting him of drug possession, drug trafficking, and possessing criminal tools. On appeal, he contends that the trial court erred when it denied his motion to suppress evidence obtained in violation of his Fourth Amendment rights. Finding merit to his appeal, we reverse, vacate his conviction, and remand.

{¶ 3} The state called Detective George Lewandowski as its sole witness at the suppression hearing. Detective Lewandowski testified that on the evening in question, he was assigned to investigate drug activity. He explained that Officer Jackson was in an undercover vehicle, assigned to do "spotting." Detective Lewandowski explained that meant Officer Jackson "was going to approach the drug complaint corners that we have and see if he could observe any type of drug activity, at which time if he saw activity he would alert us over radio and we come in and conduct an investigation."

{¶ 4} That night, police were focusing on the area of East 71st Street and Wade Park Avenue, where they had "received constant complaints from citizens, store owners." He explained that police made "numerous arrests in the past" at Ruby's Deli, which is on the corner of East 71st Street and Wade Park Avenue.

{¶ 5} Detective Lewandowski and his partner learned from Officer Jackson "that there was a female flagging down passing cars" in front of Ruby's Deli.

Based on that information, they believed there was drug activity on that corner.

{¶ 6} When Detective Lewandowski "came into the area," he "noticed several individuals standing by a parked gray auto [and] there was one male occupant in the auto." As Detective Lewandowski and his partner pulled up, "two of the males that were standing by the car began to disperse from the area." At that point, Detective Lewandowski testified that he "grabbed one of the males and began to do a pat down." Detective Lewandowski further testified that he "looked over," and saw that "Officer Svoboda had removed the driver [Coleman] from the vehicle." He said it looked like Officer Svoboda was about to "do a pat down," but Coleman "pushed Officer Svoboda back and took off running." Officers chased him and caught him. When they returned, the officers were carrying Coleman's gray sweatshirt that he had been wearing. In one of the sweatshirt pockets, they found "a large bag of suspected crack cocaine." Coleman was then "patted down," and officers also found $500 cash and a cell phone.

{¶ 7} Detective Lewandowski said that when they pulled up to the corner, he believed there was drug activity occurring because there were "individuals leaning into the auto." That, he explained, "is usually enough reason for us to believe there may be drug activity." When asked if the woman flagging down automobiles was somehow related to Coleman, Detective Lewandowski said he did not personally know. Through the investigation, he later learned that the woman was cited for "flagging down as like soliciting rides."

{¶ 8} Detective Lewandowski agreed on cross-examination that he never

saw a hand-to-hand transaction, that he never saw money exchanged, and that he never saw the woman flagging down cars. He said that the only reason Coleman was stopped is that they saw two men leaning into his car. He said it was around 10:00 p.m., and it was not uncommon for people to be standing outside Ruby's Deli at that time.

{¶ 9} The trial court denied Coleman's motion to suppress without opinion. Coleman withdrew his former plea of not guilty and pled no contest to the charges. The trial court sentenced him to an aggregate term of three years and ten months in prison.

{¶ 10} Coleman now appeals, raising two assignments of error for our review:

{¶ 11} "[1.] The trial court erred when it denied the defendant's motion to suppress evidence.

{¶ 12} "[2.] The trial court erred when it imposed mandatory fines upon the defendant when the defendant indicated that he was indigent and unable to pay mandatory fines, and the record did not support the court's denial of his request."

{¶ 13} A motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. "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." (Internal citations omitted.) Id.

{¶ 14} Coleman argues that Officer Lewandowski did not articulate facts to reasonably suggest criminal activity may be afoot, justifying a *Terry* stop. We agree.

{¶ 15} 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. An investigative stop, as set forth in *Terry v. Ohio* (1968), 392 U.S. 1, is a common exception to the Fourth Amendment warrant requirement. Under *Terry*, both the stop and seizure must be supported by a reasonable suspicion of criminal activity. The state must be able to point to specific and articulable facts that reasonably suggest criminal activity "may be afoot." *Terry* at 9. Inarticulable hunches, general suspicion, or no evidence to support the stop is insufficient as a matter of law. *State v. Smith*, 8th Dist. No. 89432, 2008-Ohio-2361, ¶8.

{¶ 16} There is no question in this case that the stop of Coleman was indeed a *Terry* stop. Coleman was forcibly pulled from his vehicle by Officer Svoboda as soon as the officers got to him.

{¶ 17} 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. The circumstances are also to be viewed objectively:

"Would the facts available to the officer at the moment of the seizure or search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" *Terry* at 21-22. In other words, the court must view the circumstances surrounding the stop "through the eyes of the reasonable and prudent police officer on the scene who must react to the events as they unfold." *State v. Andrews* (1991), 57 Ohio St.3d 86, 87-88.

{¶ 18} In *State v. Hodges*, 8th Dist. No. 92014, 2009-Ohio-3378, this court found that a police officer lacked reasonable suspicion to justify a *Terry* stop. Id. at ¶14. The officer testified that he observed a man in a gas station flagging down two women. The officer's suspicion was heightened by the location of the gas station in a high-drug area and by the early-morning hour. The two women drove into the gas station parking lot, but when they saw the officer, they quickly drove away. The man then got into the passenger side of a van parked at the gas station. The driver, Hodges, and the passenger were arrested, and drugs and a gun were found.

{¶ 19} In finding that the police officer in *Hodges* did not have reasonable suspicion, we explained: "This court has repeatedly held that an individual's presence in a high-drug area does not suspend the protections of the Fourth and Fourteenth Amendments. See, e.g., *State v. Simmons*, 8th Dist. No. 89309, 2007-Ohio-6636; *State v. Scales*, 8th Dist. No. 87023, 2006-Ohio-3946; *State v. Chandler* (1989), 54 Ohio App.3d 92, 97.

{¶ 20} "Moreover, this court has previously held that 'an individual's walking

toward an occupied car and then, upon observing the police, retreating from the scene, is not sufficient to justify an investigative stop, even in an area of high drug activity.' *Simmons* at ¶14, citing *State v. Fincher* (1991), 76 Ohio App.3d 721." *Hodges* at ¶12-13.

{¶ 21} More recently, in *State v. Pettegrew*, 8th Dist. No. 91816, 2009-Ohio-4981, this court again found that a police officer did not articulate facts of reasonable suspicion. Id. at ¶16. The officer saw Pettegrew in the driver's seat of a vehicle parked in a high-drug area and an unidentified man standing outside the driver's side of the vehicle. The officer observed Pettegrew and the unidentified man make a "hand-to-hand" transaction, but the officer could not see what was exchanged, and said it "could have been anything." Once the officer saw the interaction, he pulled his police car behind Pettegrew's car. The unidentified male fled, and the officer ordered Pettegrew to show his hands, in which he had a rock of crack cocaine. Recognizing that *Pettegrew* was "a close case," we still resolved it in favor of Pettegrew's Fourth Amendment rights "because the action of the men [was] consistent with innocent behavior." Id. at ¶16.

{¶ 22} In *Pettegrew*, we explained that the Ohio Supreme Court cautioned against the misfortune of innocent individuals losing their liberty because of the character or label of the area in which they live. Id. at ¶17, citing *State v. Carter* (1994), 69 Ohio St.3d 57. Because the officer in *Pettegrew* could not "say outright that he observed the exchange of something, this case rests solely on

the character of the area." Id. at ¶18. We found that the area, plus the officer's "hunch" that this was a drug transaction was not enough. Id. at ¶21.

{¶ 23} Moreover, the fact that the unidentified male in *Pettegrew* fled when the officer pulled his patrol car behind Pettegrew's did not change the outcome. We distinguished *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085 (where the court held that a fleeing person may be attributed to a defendant as suspicious behavior to justify a stop), because the fleeing man in *Jordan* shouted something to the defendant. *Pettegrew* at ¶19.

{¶ 24} In this case, there is no question that once Coleman took off running, the police had reasonable suspicion of criminal activity. The question here is whether the police had reasonable suspicion to pull Coleman out of his vehicle — based upon very few articulable facts. We find that based on Detective Lewandowski's testimony, he did not have reasonable suspicion to justify a *Terry* stop of Coleman. We further find that this is not the "close case" presented in *Pettegrew*.

{¶ 25} Detective Lewandowski testified that he and his partner received reports from an undercover officer that there was a woman flagging down cars in the vicinity of East 71st Street and Wade Park Avenue, an area of high-drug activity. They arrived, did not see the woman, but did see Coleman in his vehicle with two men either standing by or leaning in Coleman's car (he first said several people "standing by" and later said two men "leaning in"). As Detective Lewandowski approached, two of the men dispersed. Coleman was immediately

pulled out of his car at that point by another officer.

{¶ 26} Reviewing the totality of the circumstances in this case, we find that the state did not present specific or articulated facts sufficient to justify a *Terry* stop of Coleman. Everything the police did following this illegal stop was also improper.

{¶ 27} Coleman's first assignment of error is sustained. Judgment is reversed and his conviction is vacated. Because we vacate his conviction, his second assignment of error regarding fines is moot.

{¶ 28} Judgment reversed, conviction vacated, and cause remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover of 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.

MARY J. BOYLE, JUDGE

JAMES J. SWEENEY, J., CONCURS;
COLLEEN CONWAY COONEY, A.J., CONCURS IN JUDGMENT ONLY