[Cite as *State v. Rowe*, 2010-Ohio-6030.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95152

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAMIAN ROWE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-530339

BEFORE: Cannon, J.,* Gallagher, A.J., and Sweeney, J.

RELEASED AND JOURNALIZED: December 9, 2010

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TIMOTHY P. CANNON, J.:*

This appeal is before the Court on the accelerated docket pursuant to App.R. 11.1 and Loc. App.R. 11.1.

Defendant Damian Rowe appeals from the judgment of the trial court that denied his motion to suppress evidence. For the reasons set forth below, we affirm.

On October 28, 2009, defendant was charged pursuant to a five-count indictment. Count One charged him with carrying a concealed weapon, with a furthermore clause indicating that the weapon was loaded or ammunition was ready at hand, and forfeiture specifications; Count Two charged him with assault on a peace officer; Count Three charged him with resisting arrest; Count Four charged defendant with having weapons under disability, with forfeiture specifications; and Count Five charged him with unlawful possession of a dangerous ordnance, with forfeiture specifications.

Defendant moved to suppress the evidence obtained against him, asserting that he was illegally stopped, in violation of his rights under the Fourth Amendment to the United States Constitution.

The trial court held an evidentiary hearing on the motion to suppress on May 13, 2010. The state presented the testimony of Cleveland Police Det. Farid Alim and Sgt. Ron Ross.

Det. Farid Alim of the Cleveland Police Vice Unit testified that on August 27, 2009, at about 12:10 a.m., he responded to Daily's Market, on East 116th Street. In the parking lot, they observed defendant walking away from a vehicle with an idling engine. Det. Alim became concerned as to whether the vehicle was stolen, and called out to defendant. At this point, defendant fled to a nearby vacant lot. Alim and his partner called for assistance from other units and ran after defendant. A backup unit subsequently stopped defendant and arrested him.

Det. Alim asked defendant a series of pre-booking questions. At this time, defendant had identification belonging to another individual.

On cross-examination, Det. Alim admitted that the police regularly receive complaints of illegal activity at the market.

Cleveland Police Sgt. Ron Ross testified that he was in uniform and on foot patrol near Daily's Market when he received a call for assistance and observed defendant running toward his vehicle. Ross began to chase the man. According to Sgt. Ross, defendant climbed over a fence, removed a silver object from his pocket, threw the object, and continued to run. Defendant then

punched Sgt. Ross in the mouth. Sgt. Ross then tackled him to the ground and he was later arrested. The officers returned to the area where defendant had thrown the silver object and found a .25 caliber handgun. A second weapon was found during an inventory search of defendant's car.

On cross-examination, Sgt. Ross acknowledged that Daily's Market may become the subject of nuisance abatement proceedings in connection with an incident in which an individual was selling drugs at the premises.

The trial court subsequently denied the motion to suppress, concluding that pursuant to *Terry v. Ohio* (1968), 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889, and *State v. Bobo* (1988), 37 Ohio St.3d 177, 524 N.E.2d 489, "it was reasonable that the police officer was justified and did not violate the defendant's constitutional rights."

Defendant subsequently pled no contest to the indictment, and was sentenced to a total of two years of imprisonment. He now appeals, challenging the trial court's denial of the motion to suppress.

With regard to procedure, we note that appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside,* 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71. A reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. Id. Accepting those facts as true, we must then independently ascertain as a matter of law, without deferring to the lower court's conclusions, whether the facts comply with the applicable legal standard. *State v. Kobi* (1997), 122 Ohio App.3d 160, 168, 701 N.E.2d 420.

As to the substantive law, the Fourth Amendment to the United States Constitution provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *. An investigative stop, or "*Terry* stop," is a common exception to the requirement of probable cause. *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. In *Terry,* the Court held that if a law enforcement officer has a reasonable suspicion that a person is, or has been, involved in criminal activity, he or she can stop and briefly detain a person for investigative purposes, even if probable cause under the Fourth Amendment is lacking. The Court stated:

"Where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." Id.

To justify an investigatory stop, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Id. at 21. Furthermore, a court evaluating the validity of a *Terry* stop and search must consider the totality of the

circumstances as "viewed 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, 565 N.E.2d 1271; see, also, *United States v. Cortez* (1981), 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.E.2d 621.

Thus, the propriety of a "*Terry*" investigative stop must be viewed in light of the totality of the surrounding circumstances. *State v. Bobo* (1988), 37 Ohio St.3d 177, 524 N.E.2d 489, paragraph one of the syllabus.

In considering the totality of the circumstances, courts generally consider factors such as the high-crime nature of the area, the time of day, the experience of the officers involved, whether the officer was away from his cruiser, and suspicious activities by the defendant, such as furtive gestures. *State v. Bobo*. Evasive behavior is pertinent in determining reasonable suspicion. *In re Parks,* Franklin App. No. 04AP-355, 2004-Ohio-6449, citing *Illinois v. Wardlow* (2000), 528 U.S. 119, 120 S.Ct. 673, 145 L.Ed.2d 570 ("Headlong flight — wherever it occurs — is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such.")

Applying the above standard to the facts of the instant case, we find the investigatory stop of defendant was lawful under *Terry v. Ohio*. The stop occurred in a high crime area, after midnight. Defendant was standing next to an idling vehicle, with the door open and fled immediately after Det. Alim called out to him. The totality of circumstances was sufficient to give rise to reasonable suspicion of criminal activity and to justify stopping and briefly detaining Defendant for further investigation. Accord *Illinois v. Wardlow*; *State v. Davis,*

Cuyahoga App. No. 89530, 2008-Ohio-322; *State v. Stafford,* Montgomery App. No. 20230, 2004-Ohio-2200.

Defendant cites to this court's decision in *State v. Coleman,* Cuyahoga App. No. 93451, 2009-Ohio-6471, in support of his claim that there was no reasonable suspicion for the investigatory stop. In *Coleman,* the record indicated that, based upon their observations of a female, the police believed that there was drug activity taking place there. When the police pulled up to that area, two of the males that were standing by a car began to disperse from the area. At that point, one of the officers grabbed one of the males and began to do a pat down and Coleman, the driver of the car, "pushed Officer Svoboda back and took off running."

This court determined that the police did not have reasonable suspicion to pull Coleman out of his vehicle, and that the officer did not have reasonable suspicion to justify a *Terry* stop of Coleman. Nonetheless, as is pertinent herein, the *Coleman* court observed:

"There is no question that once Coleman took off running, the police had reasonable suspicion of criminal activity."

Coleman is therefore distinguishable from this matter, as defendant was not pulled out of his vehicle, but rather, fled from the idling car immediately after Det. Alim called out to him.

The assignment of error is without merit.

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.

TIMOTHY P. CANNON, JUDGE*

SEAN C. GALLAGHER, A.J., and
JAMES J. SWEENEY, J., CONCUR

*(Sitting by Assignment: Judge Timothy P. Cannon of the 11th District Court of Appeals.)