[Cite as *State v. Williams*, 2010-Ohio-901.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92822

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ROBERT WILLIAMS

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-516947

BEFORE: McMonagle, P.J., Stewart, J., and Cooney, J.

RELEASED: March 11, 2010

JOURNALIZED:

ATTORNEYS FOR APPELLANT

Robert Tobik
Cuyahoga County Public Defender
John T. Martin
Assistant Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, OH 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
Jesse W. Canonico
Assistant Prosecuting Attorney
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, OH 44113

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), or a motion for consideration en banc with supporting brief, per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

CHRISTINE T. McMONAGLE, P.J.:

{¶ 1} Defendant-appellant, Robert Williams, appeals from the trial court's judgment denying his motion to suppress. We reverse and remand.

I

{¶ 2} Williams was charged with carrying a concealed weapon. The charge stemmed from an investigative stop and search of Williams's person.

{¶ 3} At the hearing on Williams's motion to suppress, Cleveland police detective Frank Woyma testified that at approximately 8:50 p.m. on October 16, 2008, he and five other Vice Unit detectives were riding in a convoy of three cars "checking out" complaints of drug activity in the area of East 124th Street and Corlett Avenue in Cleveland. Woyma testified that the complaints had been received several days to months earlier and none of them specifically involved Williams or his companions. Woyma testified further that neither Williams nor his companions were known to the police.

{¶ 4} The three cars parked at the corner of East 124th Street and Corlett Avenue and six policemen, each wearing vests with the word "Police" on them, got out. Woyma testified that he saw three people "huddled" in the doorway of an apartment building next to the corner store. According to Woyma, when the three individuals saw the police, "they dispersed, started to

go in different directions." Woyma testified that no one ran, yelled, or threw anything. Williams started to walk away, but according to Woyma, seemed unsure of which way to go because he first walked toward the doorway of the building but then turned and walked the other way.

{¶ 5} At this point, Woyma and another detective approached Williams and directed him to a police car. One of the detectives then patted him down for weapons, although, according to Woyma, Williams had not given any indication that he was armed. The police found a loaded .38 caliber pistol in his pocket. They arrested him, advised him of his *Miranda* rights, and upon searching him again, found a cell phone. Woyma testified that he opened the cell phone and saw a photo of a hand making a gang symbol; he then looked at other photos on the phone and saw two photos of the gun the police had just seized from Williams. On the way to the police station, upon questioning, Williams told Woyma that he was a member of a gang.

{¶ 6} Williams subsequently filed a motion to suppress evidence of the gun, cell phone, and his ensuing statements, which the trial court denied.

II

{¶ 7} 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, ¶8. In deciding a motion to suppress, the trial court assumes the role of trier of fact. Id. A reviewing court is bound

to accept those findings of fact if they are supported by competent, credible evidence. Id. But with respect to the trial court's conclusion of law, we apply a de novo standard of review and decide whether the facts satisfy the applicable legal standard. Id., citing *State v. McNamara* (1977), 124 Ohio App.3d 706, 707 N.E.2d 539.

{¶ 8} 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, 88 S.Ct. 507, 19 L.Ed.2d 576. One exception is an investigative stop. *Terry v. Ohio* (1968), 392 U.S. 1, 20, 88 S.Ct. 1868, 20 L.Ed.2d 889. A police officer may make a brief, warrantless, investigatory stop of an individual where the officer reasonably suspects that the individual is or has been involved in criminal activity. Id. In reaching that conclusion, the officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. *State v. Andrews* (1991), 57 Ohio St.3d 86, 87, 565 N.E.2d 1271, citing *Terry*. A person may not be detained, even momentarily, without reasonable, objective grounds to do so. *State v. Robinette* (1997), 80 Ohio St.3d 234, 240, 685 N.E.2d 762, citing *Florida v. Royer* (1983), 460 U.S. 491, 497-498, 103 S.Ct. 1319, 75 L.Ed.2d 229. Whether an investigatory stop is

reasonable depends upon the totality of the circumstances surrounding the incident. *State v. Williams* (1990), 51 Ohio St.3d 58, 60, 554 N.E.2d 108.

{¶ 9} In his two assignments of error, Williams argues that the trial court erred in denying his motion to suppress because the police did not have reasonable suspicion that he was engaged in criminal activity sufficient to justify the investigative stop. The State does not contest that Williams was stopped when the police directed him to the police car, but argues that the stop was justified by a reasonable suspicion of criminal activity. We reverse and remand, as the investigatory stop of Williams was unlawful.

{¶ 10} Detective Woyma testified that the police suspected Williams and the two persons he was with of drug activity because they were "huddled" together near a corner known for drug activity and tried to walk away when the police arrived. Neither fact justifies an investigatory stop.

{¶ 11} First, a person's mere presence in an area of high crime activity is by itself not enough to give rise to a reasonable suspicion of criminal activity. *State v. Chandler* (1989), 54 Ohio App.3d 92, 560 N.E.2d 832, paragraph two of the syllabus. "Acts that are essentially neutral or ambiguous do not become specifically criminal in character because they occur in a high-crime area. * * * The setting can inform the officer's judgment, but it does not make the act criminal. In order to detain an individual to investigate for crime, some nexus between the individual and specific criminal conduct must

reasonably exist * * *." *State v. Maldonado* (Sept. 24, 1993), 2nd Dist. No. 13530.

{¶ 12} But there was no nexus between Williams and any criminal activity. Williams lived in one of the apartments in the building and was standing in front of it with his 17-year-old brother and 16-year-old cousin. None of the complaints about drug activity that the police were investigating involved him or his companions and neither Williams nor his companions were known to the police. Further, there was no evidence that the police saw any activity associated with drug dealing. Williams was merely standing "huddled" in front of the building with his companions. His mere presence with two other people near a corner perhaps known for drug activity was not enough to give rise to a reasonable suspicion of criminal activity, at least not in America 2009.

{¶ 13} Williams's attempt to walk away when the police arrived likewise did not indicate criminal activity. This court has held that absent observation of other suspicious behavior, the mere fact that a person walks briskly away when the police approach does not justify an investigative stop or subsequent pat-down. *State v. Fanning* (1990), 70 Ohio App.3d 648, 650, 591 N.E.2d 869. See, also, *State v. Locklear*, Cuyahoga App. No. 90429, 2008-Ohio-4247, ¶32. Woyma testified that neither Williams nor the two individuals he was with ran away from the police; they merely walked away.

They did not yell and did not throw anything away. Despite the State's assertion otherwise, none of the three individuals tried to "flee" in "panic." In short, the police saw no suspicious behavior from which reasonable minds could infer criminal activity.

{¶ 14} The State's citation to *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, is unpersuasive. In *Jordan*, police responded to an anonymous tip that a male was "doing drugs" on the porch of 2019 West 105th Street in Cleveland, and that the same male had earlier been driving a light blue car, which was now parked in front of that address. The location was allegedly a high-drug-activity area. Upon arriving in a marked police vehicle, the police saw Jordan and another man sitting on the front porch and a blue vehicle fitting the tipster's description parked nearby. As the uniformed officers approached, Jordan "hollered something" to his companion, who immediately fled through the house and out the back door. Jordan stayed on the porch and confirmed that the vehicle belonged to him. Based on these circumstances, the police conducted a protective pat-down search of Jordan, during which they found a crack pipe. Jordan was arrested and subsequently indicted for possession of cocaine. Id., ¶31-32.

{¶ 15} The Ohio Supreme Court affirmed the trial court's denial of Jordan's motion to suppress. It stated:

{¶ 16} "To summarize, the officers * * * considered the totality of the circumstances: their receipt of an anonymous tip regarding drug activity that they were able to partially confirm, the residence location in an area known to them as a high drug activity area, Jordan's shout upon seeing their approach in uniform, and his companion's immediate flight. * * * [These circumstances] taken as a whole, created a reasonable suspicion that Jordan was engaged in illegal activity, and, therefore, the officers' investigatory stop did not violate the Fourth Amendment." Id., ¶52.

{¶ 17} Here, however, there was no complaint or tip relating to Williams or his companions, there was no shouting or yelling upon seeing the police, and there was no panicked flight when the police arrived — Williams and the other two individuals simply walked away. The totality of the circumstances — three people standing near a building in a high-crime area who walked away when three police cars and six uniformed policemen arrived on the scene — are not at all like those in *Jordan*, and were not sufficient to create a reasonable suspicion of criminal activity to justify an investigative stop. Thus the trial court erred in denying the motion to suppress.

{¶ 18} Furthermore, even if the stop and subsequent arrest were lawful, Woyma's search of Williams's cell phone after his arrest was unlawful and the pictures should have been suppressed. A police officer may not conduct a search of a cell phone's contents incident to a lawful arrest without first

obtaining a warrant. *State v. Smith*, 124 Ohio St.3d 163, 2009-Ohio-6426, 920 N.E.2d 949, ¶24.

{¶ 19} As the trial court erred in denying Williams's motion to suppress, his assignments of error are sustained and the matter is reversed and 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.

CHRISTINE T. McMONAGLE, PRESIDING JUDGE

MELODY J. STEWART, J., and
COLLEEN CONWAY COONEY, J., CONCUR