[Cite as *State v. Branch*, 2009-Ohio-4152.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellee	:	Hon., Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 08-CA-153
JAMES T. BRANCH	:	
	:	
	:	
Defendant-Appellant	:	OPINION

CHARACTER OF PROCEEDING: Appeal from the Licking County Court of Common Pleas Case No. 08-CR-357

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: August 11, 2009

APPEARANCES:

For Plaintiff-Appellee:

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Delaney, J.

{¶1} Defendant-Appellant, James Branch, appeals from his conviction of one count of trafficking in cocaine, a felony of the fifth degree, in violation of R.C. 2925.03(A)(1)(c)(4)(a) and one count of possession of crack cocaine, a felony of the second degree, in violation of R.C. 2925.11(A)(C)(4)(d), and a forfeiture specification, in violation of R.C. 2941.1417. The State of Ohio is Plaintiff-Appellee.

{¶2} On May 19, 2008, Captain James Hanzey of the Buckeye Lake Police Department received a phone call from a confidential informant that he had previously worked with. The informant was not under investigation for any crime nor had she been charged with a crime. She had also successfully aided Captain Hanzey in the arrest and conviction of one suspect within the past two years. She also aided him in the arrest of a second suspect who was awaiting trial at the time of the suppression hearing. The informant told Captain Hanzey that a man named Eric Tegge and a man that she knew as J.B. came to her motel room in Buckeye Lake, Ohio, where they asked the informant if she would be interested in purchasing crack cocaine.

{¶3} The informant told Tegge and J.B. that she would need to go to the bank to get money. Tegge and J.B. stated that they would return to the hotel room in an hour. Captain Hanzey, who was familiar with Tegge, drove by his residence and observed Tegge and a male matching the description of J.B. standing in Tegge's driveway. J.B. was also wearing a hat with the initials "J.B." on the hat.

{¶4} Captain Hanzey observed the vehicle enter the village of Buckeye Lake and watched it turn into the Buckeye Lake Truck Stop, which was also the location of

the informant's hotel. At that point, Captain Hanzey initiated a felony traffic stop. J.B. was identified as Appellant, James Branch.

{¶5} Prior to arresting Appellant, Captain Hanzey searched him and found him to be in possession of crack cocaine.

{¶6} Appellant was indicted on trafficking and possession of crack cocaine. He filed a motion to suppress, arguing that the stop was illegal and that the search and arrest of his person was also illegal. The trial court overruled his motion.

{¶7} Appellant then pled no contest to the indictment on December 16, 2008. The trial court found Appellant guilty and sentenced him to two years in prison.

{¶8} Appellant now appeals from his conviction and raises one Assignment of Error:

{¶9} "I. THE TRIAL COURT COMMITTED HARMFUL ERROR IN DENYING THE DEFENDANT-APPELLANT'S MOTION TO SUPPRESS EVIDENCE."

I.

{¶10} In his sole assignment of error, Appellant argues that the trial court erred in refusing to suppress evidence obtained as a result of a traffic stop based on a tip from a known informant. We disagree.

{¶11} Appellate review of a trial court's decision to deny a motion to suppress involves a mixed question of law and fact. *State v. Long* (1998), 127 Ohio App.3d 328, 713 N.E.2d 1. During a suppression hearing, the trial court assumes the role of trier of fact and, as such, is in the best position to resolve questions of fact and to evaluate witness credibility. *State v. Brooks*, (1996), 75 Ohio St.3d 148, 661 N.E.2d 1030. A reviewing court is bound to accept the trial court's findings of fact if they are supported

by competent, credible evidence. *State v. Metcalf* (1996), 111 Ohio App.3d 142, 675 N.E.2d 1268. Accepting these facts as true, the appellate court must independently determine as a matter of law, without deference to the trial court's conclusion, whether the trial court's decision meets the applicable legal standard. *State v. Williams* (1993), 86 Ohio App.3d 37, 619 N.E.2d 1141.

{¶12} There are three methods of challenging a trial court's ruling on a motion to suppress on appeal. First, an appellant may challenge the trial court's finding of fact. In reviewing a challenge of this nature, an appellate court must determine whether the trial court's findings of fact are against the manifest weight of the evidence. See *State v. Fanning* (1982), 1 Ohio St.3d 19, 1 Ohio B. 57, 437 N.E.2d 583; and *State v. Klein* (1991), 73 Ohio App.3d 486, 597 N.E.2d 1141. Second, an appellant may argue that the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. See *State v. Williams* (1993), 86 Ohio App.3d 37, 619 N.E.2d 1141. Finally, an appellant may argue the trial court has incorrectly decided the ultimate or final issues raised in a motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry* (1994), 95 Ohio App.3d 623, 620 N.E.2d 906.

{¶13} 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, 357, 88 S.Ct. 507. An investigative stop, or *Terry* stop, is a common exception to the Fourth Amendment

warrant requirement. *Terry v. Ohio* (1968), 391 U.S. 1, 88 S.Ct. 1503. Because the "balance between the public interest and the individual's right to personal security," *United States v. Brignoni-Ponce* (1975), 422 U.S. 873, 878, 95 S.Ct. 2574, tilts in favor of a standard less than probable cause in such cases, the Fourth Amendment is satisfied if the officer's action is supported by reasonable suspicion to believe that criminal activity "may be afoot." *United States v. Sokolow* (1989), 490 U.S. 1, 7, 109 S.Ct. 1581 (quoting *Terry*, supra, at 30). In *Terry*, the Supreme Court held that a police officer may stop an individual if the officer has a reasonable suspicion based upon specific and articulable facts that criminal behavior has occurred or is imminent. See, also, *State v. Chatton* (1984), 11 Ohio St.3d 59, 61, 463 N.E.2d 1237.

{¶14} The propriety of an investigative stop must be viewed in light of the totality of the circumstances surrounding the stop "as viewed through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold." *State v. Andrews* (1991), 57 Ohio St.3d 86, 87-88, 565 N.E.2d 1271; *State v. Bobo* (1988), 37 Ohio St.3d 177, 524 N.E.2d 489. The Supreme Court of the United States recently re-emphasized the importance of reviewing the totality of the circumstances in making a reasonable suspicion determination:

{¶15} "When discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the "totality of the circumstances" of each case to see whether the detaining officer has a "particularized and objective basis" for suspecting legal wrongdoing. This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that

"might well elude an untrained person." Although an officer's reliance on a mere "hunch" is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.

{¶16} When a vehicle is stopped for the purpose of effecting an immediate, warrantless arrest, however, police must have probable cause for the stop and the arrest. *State v. Young*, 6th Dist. No. E-04-013, 2005-Ohio-3369. at ¶20.

{¶17} Probable cause exists when the arresting officer has sufficient information to warrant a prudent man in believing that a felony has been or is being committed and that it has been or is being committed by the accused. *Henry v. United States* (1959), 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134; *Brinegar v. United States* (1949), 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879; *State v. Hill* (1977), 52 Ohio App.2d 393, 6 O.O.3d 436, 370 N.E.2d 775.

{¶18} The existence of an arrest is dependent upon the existence of four requisite elements:

{¶19} “(1) An intent to arrest, (2) under real or pretended authority, (3) accompanied by an actual or constructive seizure or detention of the person, and (4) which is so understood by the person arrested.” *State v. Barker* (1978), 53 Ohio St.2d 135, 7 O.O.3d 213, 372 N.E.2d 1324, paragraph one of the syllabus, certiorari denied (1978), 439 U.S. 913, 99 S.Ct. 285, 58 L.Ed.2d 260.

{¶20} As Captain Hanzey testified, the purpose of this stop was a “take down” felony traffic stop. Though the record does not clarify what this means, from the context

of the suppression hearing, it is reasonable to assume that the officers intended to arrest Appellant upon initiating the traffic stop.

{¶21} Unlike in *Young*, supra, however, where the court determined that probable cause did not exist for the warrantless arrest, we find that probable cause did exist in this case.

{¶22} In *Young*, the Erie County Drug Task Force received a tip from federal agents (who obtained their information from a federally indicted defendant) that Young would be traveling to Cleveland, Ohio in his own motor vehicle, a tan or cream-colored Infinity, on March 26, 2002, to purchase cocaine. The task force set up a surveillance of Young's residence on that day; however, Young did not travel to Cleveland. Learning that a different cocaine transaction was allegedly going to occur on July 30, 2002, the task force again conducted a surveillance of Young's residence. During the early afternoon, Young came out of his house and put "something" in the trunk of a red Cadillac driven by his girlfriend. The couple then drove east and stopped at a gas station to buy gas. They then began driving toward the city of Huron, Ohio, but were stopped by Huron police officers, who had been notified by the task force of the surveillance. Both Young and his girlfriend were detained.

{¶23} A search of Young's car trunk resulted in the discovery of a box containing a set of scales, $24,000, and plastic bags. As a result of the search, Young and his girlfriend were arrested for conspiracy to possess cocaine. Young filed a motion to suppress in which he alleged that the law enforcement officers lacked probable cause to stop the Cadillac for the purpose of arresting him. At the motion hearing, law enforcement officers were not able to verify that the objects found in the trunk were

placed there by Young on July 30, 2002. Additionally, task force officers admitted that regardless of which route the car in which Young was a passenger was driven, it would be stopped if it was traveling east. After the hearing, the trial court denied Young's motion to suppress as it related to probable cause to arrest. On appeal, the Sixth District reversed the trial court, finding that the officers lacked probable cause to stop the vehicle for the purpose of arresting Young. The court stated that the only facts and circumstances known to the task force concerning any criminal activity on the part of Young was the “tip” received from the federal agent and that “there was no actual evidence of any criminal activity at the time of his arrest which reasonably indicated that [Young] was about to commit criminal acts.” *Young*, supra.

{¶24} In the present case, Appellant was charged and convicted of drug trafficking under R.C. 2925.03(A)(1) which states:

{¶25} “(A) No person shall knowingly do any of the following:

{¶26} “(1) Sell or offer to sell a controlled substance * * *”

{¶27} The facts presented at the suppression hearing showed that Appellant approached a confidential informant, who was known to Captain Hanzey, at her residence and asked her if she wanted to purchase crack cocaine from him. Captain Hanzey testified that he had worked closely with this informant on two prior occasions within the past year and that because of the informant’s information and cooperation, one defendant had been successfully convicted and that another one was awaiting trial at the time of the suppression hearing.

{¶28} The informant telephoned Captain Hanzey and told him of the offer to sell by Appellant. She informed Captain Hanzey that she told Appellant that she did not

have the money to purchase the crack cocaine at that time, but that she would get the money and return to her residence. Appellant and his partner, Mr. Tegge, told the informant that they would return within the hour.

{¶29} The informant identified Eric Tegge by name and identified Appellant by the name "J.B." and stated that she had met both Tegge and J.B. before.

{¶30} Captain Hanzey, who was familiar with Mr. Tegge, then drove by Tegge's residence and saw Tegge and a man matching the description of J.B. standing in Tegge's driveway. J.B. was wearing a hat with the initials "J.B." on it.

{¶31} Captain Hanzey arranged for back-up to meet him and he initiated a felony traffic stop as Appellant was driving back into the entrance to the motel where the informant was residing. Captain Hanzey ordered Appellant out of the car at gunpoint, as the informant had told him that Appellant was known to carry a gun, and upon patting him down, found crack cocaine in his pocket.

{¶32} A crime occurred at the time that Appellant and Mr. Tegge offered to sell the informant the crack cocaine. Accordingly, the officers had probable cause to arrest Appellant based on the offer to sell.

{¶33} Appellant cites *Florida v. J.L.* (2000), 529 U.S. 266, 120 S.Ct. 1375 for the proposition that the informant's tip was unreliable. *J.L.* is inapposite to this case. In *Florida v. J.L.*, the U.S. Supreme Court held that an anonymous tip, with nothing more, is insufficient to provide reasonable suspicion for a *Terry* stop. However, there is more to this case than what occurred in *Florida v. J.L.* (2000), 529 U.S. 266, 120 S.Ct. 1375. In *Florida v. J.L.*, police received an anonymous tip that a young black male was standing at a particular bus stop, wearing a plaid shirt and carrying a gun. Apart from

that tip, officers had no reason to believe that any illegal activity either had just occurred or was about to occur. The Court held that the anonymous tip alone lacked sufficient indicia of reliability and violated the defendant's Fourth Amendment rights. The court's reasoning for determining that the anonymous tip did not contain sufficient indicia of reliability were that the anonymous information neither (1) explained how the informant knew about the gun, nor, (2) supplied any basis for believing that the informant had inside information. *Florida v. J.L.* (2000), 529 U.S. at 271.

{¶34} This was not an anonymous tip. The officer knew the informant, and in fact had previously successfully arrested two defendants with the help of the informant. Moreover, the informant's description of Appellant was corroborated when Captain Hanzey drove by Mr. Tegge's residence and observed Mr. Tegge, whom he was familiar with, and a male matching the description of Appellant, wearing a hat with the initials "J.B." on it. Additionally, Captain Tanzey observed Appellant and Mr. Tegge drive back into the informant's motel parking lot a short time later. Upon seizing Appellant, Captain Hanzey found crack cocaine in Appellant's pocket.

{¶35} A person can be convicted of offering to sell a controlled substance in violation of R.C. 2925.03(A)(1) without transferring the controlled substance to a buyer. *State v. Scott* (1982), 69 Ohio St.2d 439, 432 N.E.2d 798, syllabus. "For purposes of R.C. 2925.03(A), the phrase, 'offer to sell a controlled substance,' simply means to declare one's readiness or willingness to sell a controlled substance or to present a controlled substance for acceptance or rejection. Furthermore, the issue of whether a defendant has knowingly made an offer to sell a controlled substance in any given case must be determined by examining the totality of the circumstances, including 'the

dialogue and course of conduct of the accused.' *[State v.] Patterson* [(1982), 69 Ohio St.2d 445,] 447 [23 O.O.3d 394, 395], 432 N.E.2d 802 [803-804]." *State v. Burton* (Mar. 31, 1995), Greene App. No. 94-CA-13, unreported, 1995 WL 137054. Accord *State v. McKenzie* (Sept. 12, 1996), Jefferson App. No. 96-JE-2, unreported, 1996 WL 529520." *State v. Henton* (1997), 121 Ohio App.3d 501, 510, 700 N.E.2d 371.

{¶36} No actual transfer of the drugs must occur in order for a violation of R.C. 2925.03(A)(1) to occur. *State v. Jeter*, 6th Dist. No. E-02-047, 2004-Ohio-1332, at ¶26. Moreover, the suspect's subjective intent as to whether he intended to sell the informant drugs is irrelevant in this context. "Because intent lies within the privacy of a person's own thoughts and is not susceptible to objective proof, intent is determined from the surrounding facts and circumstances, and persons are presumed to have intended the natural, reasonable and probable consequences of their voluntary acts." *Jeter*, supra, citing *State v. Garner* (1995), 74 Ohio St.3d 49, 60, 656 N.E.2d 623.

{¶37} When Appellant approached the informant and offered to sell her crack cocaine, that clearly indicates an offer to sell within the meaning of R.C 2925.03(A)(1). As such, the officer had probable cause to believe that a crime had been committed when he effectuated the traffic stop of Appellant's vehicle.

{¶38} For the foregoing reasons, we find Appellant's assignment of error to be without merit and overrule it. The judgment of the Licking County Court of Common Pleas is affirmed.

By: Delaney, J.

Edwards, P.J. and

Farmer, J. concur.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. SHEILA G. FARMER

[Cite as *State v. Branch*, 2009-Ohio-4152.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
JAMES BRANCH	:	
Defendant-Appellant	:	Case No. 08-CA-153

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Court of Common Pleas is affirmed. Costs assessed to Appellant.

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HON. PATRICIA A. DELANEY

____
HON. JULIE A. EDWARDS

____
HON. SHEILA G. FARMER