

[Cite as *State v. Sturtz*, 2009-Ohio-6937.]

COURT OF APPEALS
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	W. Scott Gwin, P.J.
	:	Julie A. Edwards, J.
Plaintiff-Appellee	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. 09 CA 02
	:	
	:	
BRANDON STURTZ	:	<u>OPINION</u>
	:	
Defendant-Appellant	:	

CHARACTER OF PROCEEDING: Criminal Appeal from Coshocton
Municipal Court Case No. CRB
0800359 and TRC 081301

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: December 29, 2009

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Edwards, J.

{¶1} Defendant-appellant, Brandon Sturtz, appeals his conviction and sentence from the Coshocton Municipal Court on one count each of contributing to the delinquency of a minor and operating a motor vehicle while under the influence. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On July 3, 2008, appellant was arrested and charged in Case No. CRB 0800359 with underage consumption/possession of alcohol in violation of R.C. 4301.69(E), a misdemeanor of the first degree, contributing to the delinquency of a minor in violation of R.C. 2929.24(A)(2), also a misdemeanor of the first degree, and child endangering in violation of R.C. 2919.22(C)(1), a misdemeanor of the first degree. On the same date, appellant was arrested and charged in Case No. TRC 0801301 with operating a motor vehicle while under the influence of alcohol/drug of abuse and with a prohibited blood alcohol concentration in violation of R.C. 4511.19(A)(1)(a) and 4511.19(B)(3). At his arraignment on July 7, 2008, appellant pleaded not guilty to the charges.

{¶3} On August 14, 2008, appellant filed a Motion to Suppress in both cases, arguing that the evidence was the product of an illegal search and seizure. Appellant specifically argued that there was no reasonable suspicion of criminal activity and that, therefore, the stop of appellant was unconstitutional.

{¶4} A hearing on appellant's Motion to Suppress was held on August 29, 2008. At the hearing, Deputy Chip Udishas¹ of the Coshocton County Sheriff's Office testified that on July 3, 2008, dispatch received a call at approximately 12:19 a.m. about

¹ The Deputy's name is spelled "Udischas" in the file and "Undishas" in the transcript.

a possible fight between a man and woman in the 300 block of Main Street. During the call, the caller advised dispatch that the subject who was fighting threw a beer can out of a red truck and was wearing a red shirt and a ball cap. Deputies were dispatched to the scene. While Deputy Udishas testified that he received a call from dispatch regarding the possible fight, he was not dispatched to such location.

{¶5} Shortly thereafter, an EMT working at Station 2 called and indicated that there was a group of people fighting in front of the station, which is in the 500 block of Chestnut Street. The address on Main and the address on Chestnut are within walking distance from each other and, according to the Deputy, are “within two minutes.” Transcript at 7. The Deputy testified that he was advised by dispatch that there was “a possible domestic dispute, a verbal fight between two people.” Transcript at 7.

{¶6} When asked, Deputy Udishas testified that while on his way to Station 2, he was advised that the group of people had left the station and were headed east on Chestnut towards Seventh Street, which was roughly two blocks away. Two blocks away from the Station at approximately 12:20 a.m., the Deputy encountered a group on Chestnut Street. The Deputy testified that he did not see any other people on that block or in the surrounding blocks.

{¶7} Deputy Udishas testified that he stopped the people. The following is an excerpt from this testimony:

{¶8} “Q. Were they walking at this point?”

{¶9} “A. There was a group walking. There was a truck stopped next to the people walking on Chestnut Street, blocking the lane of travel. I went around the truck and blocked the lanes so they couldn’t get away and tried to find out what was going on.

There were a male and female and several other subjects that had been tagging along with this group.

{¶10} “Q. Now, you mentioned this truck stopped in the roadway. Was it stopped at a stoplight?”

{¶11} “A. No. The light was green. It was stopped back from the stoplight next to the vehicle.

{¶12} “Q. Was there anyone in the truck?”

{¶13} “A. There was a driver in the truck and then the person was getting into the truck.

{¶14} “Q. Who was the driver of the truck?”

{¶15} “A. I didn’t get him identified before he left.

{¶16} “Q. You mentioned that you stopped these people. How did you stop the people?”

{¶17} “A. I went around the truck and I cut catty cornered in front of them and stopped my patrol car in the road and stepped out and told them I wanted to speak. The only person who was trying to leave at the time was the female getting into the truck.

{¶18} “Q. All right. So we know that you stopped the truck by pulling in front of the truck?”

{¶19} “A. Right.” Transcript at 9-10.

{¶20} The Deputy testified that the truck that he stopped was not appellant’s truck and that appellant was not in the truck, but was walking with a group of people. Deputy Udishas testified that he stopped appellant and his group by saying that he

wanted to talk to them and that he started asking them if they knew about the fight. Everyone denied that a fight had occurred. When asked, he testified that he never told appellant to stop, but that appellant did not try to leave when the Deputy pulled up and started asking him questions. According to Deputy Udishas, appellant never tried to leave.

{¶21} At the hearing, Deputy Udishas testified that at one point, he told appellant that he needed to “stay over there while I talked with the other officers. He wasn’t attempting to leave, but I just wanted to make sure he didn’t.” Transcript at 11.

{¶22} According to Deputy Udishas, everyone in the group denied that there was any fighting. The EMT from Station 2 came and identified the people who had been arguing. He told the deputy that there was no physical fight, but that the people were just yelling at one another. Deputy Udishas testified that he personally spoke with appellant at that point and that appellant was wearing a red shirt and a ball cap, which matched the description of the person on Main Street who was involved in a possible domestic incident. However, at that point, the Deputy did not know that appellant matched such description. While speaking with appellant, the Deputy noticed an odor with the group. After appellant, who was underage, denied that he had been drinking, the Deputy “did a nystagmus on him” and “found his eyes showed nystagmus.” Transcript at 13. Appellant, who himself smelled very faintly of alcohol, then admitted that he had been drinking.

{¶23} Deputy Udishas testified that another deputy spoke with Brittany Richards, who also was on the scene, and learned that Richards had been drinking. Richards,

who was underage, told the deputy that appellant had given her alcohol. The Deputy also testified that appellant told him that he had driven his truck on Main Street.

{¶24} On cross-examination, Deputy Udishas testified that when he arrived on the scene, one girl was attempting to get into the truck, but that he told her not to leave until things got straightened out. The Deputy further admitted that he wanted everyone to stay on the scene until the matter was straightened out. The following is an excerpt from his testimony on cross-examination:

{¶25} “A. Right. I as advised they were the only people in the area. So I wanted to find out if they had been in contact with the fight or if they knew about the fight.

{¶26} “Q. Okay. So you stopped them and asked them if they knew about the fight and you they tell you no?

{¶27} “A. Right.

{¶28} “Q. How long do you detain them until somebody from the - - at that point, when they tell you there was no fight, that’s all the information you have, right?

{¶29} “A. Right. But - -

{¶30} “Q. - - A report of a fight and they denied there was a fight?

{¶31} “A. Correct.

{¶32} “Q. Then you make a call to the EMT. How do you get the EMTs up there?

{¶33} “A. dispatch had him come up.

{¶34} “Q. How long did it take?

{¶35} “A. I would guess two or three minutes.” Transcript at 20.

{¶36} As memorialized in a Judgment Entry filed in both cases on September 2, 2009, the trial court denied appellant's Motion to Suppress. Thereafter, on September 26, 2008, appellant pleaded no contest in Case No. CRB 0800359 to contributing to the delinquency of a minor and in Case No. TRC 081301 to operating a motor vehicle while under the influence. Pursuant to a Judgment Entry filed on December 5, 2008 in Case No CRB 0800359, appellant was sentenced to 30 days in jail, consecutive to his sentence in TRC 0801301. The jail time was suspended and appellant was placed on probation under specified terms and conditions. Appellant also was fined \$150.00. Pursuant to a Judgment Entry filed on the same date in Case No. TRC 0801301, appellant was sentenced to 60 days in jail, with 54 days suspended, his driver's license was suspended for 180 days and appellant was fined \$775.00 with \$325.00 of the fine suspended. Appellant was placed on probation for a period of two years under specified terms and conditions.

{¶37} On December 12, 2008, appellee filed a Motion to Dismiss, seeking dismissal of the charge of operating a motor vehicle with a prohibited blood alcohol level and underage possession/consumption. The trial court granted such motion as memorialized in a Judgment Entry filed in both cases on December 12, 2008. The trial court also dismissed the charge of endangering children.

{¶38} A Nunc Pro Tunc Judgment Entry was filed in Case No. TRC 0801301 on January 21, 2009, after this Court, pursuant to a Judgment Entry filed on January 16, 2009, found that there was no final appealable order.

{¶39} Appellant now raises the following assignment of error on appeal:

{¶40} “THE TRIAL COURT ERRED IN FINDING THAT THERE WAS A LEGAL BASIS FOR THE INITIAL STOP AND DETENTION OF THE APPELLANT AND IN OVERRULING THE APPELLANT’S MOTION TO SUPPRESS EVIDENCE.”

{¶41} Appellant, in his sole assignment of error, argues that the trial court erred in denying appellant’s Motion to Suppress. Appellant specifically contends that the trial court erred in finding that there was a legal basis for the initial stop and detention of appellant.

{¶42} There are three methods of challenging on appeal a trial court’s ruling on a motion to suppress. First, an appellant may challenge the trial court’s findings of fact. In reviewing a challenge of this nature, an appellate court must determine whether said findings of fact are against the manifest weight of the evidence. See *State v. Fanning* (1982), 1 Ohio St.3d 19, 437 N.E.2d 583; *State v. Klein* (1991), 73 Ohio App.3d 486, 597 N.E.2d 1141; *State v. Guysinger* (1993), 86 Ohio App.3d 592, 621 N.E.2d 726. Second, an appellant may argue 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, overruled on other grounds. Finally, assuming the trial court’s findings of fact are not against the manifest weight of the evidence and it has properly identified the law to be applied, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the 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 93, 641 N.E.2d 1172; *State v. Claytor*

(1993), 85 Ohio App.3d 623, 620 N.E.2d 906; *Guysinger*, supra. As the United States Supreme Court held in *Ornelas v. U.S.* (1996), 517 U.S. 690, 116 S.Ct. 1657, 134 L.E2d 911, "... as a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal."

{¶43} In *Terry v. Ohio* (1968), 392 U.S. 1, 22, 88 S.Ct. 1868, the United States Supreme Court determined that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." However, for the propriety of a brief investigatory stop pursuant to *Terry*, the police officer involved "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. Such an investigatory stop "must be viewed in the light of the totality of the surrounding circumstances" presented to the police officer. *State v. Freeman* (1980), 64 Ohio St.2d 291, 414 N.E.2d 1044, paragraph one of the syllabus.

{¶44} Our first inquiry is whether or not the stop was a "consensual encounter" or a stop. "The first type is a consensual encounter. Encounters are consensual where the police merely approach a person in a public place, engage the person in conversation, request information, and the person is free not to answer and walk away.* * * The request to examine one's identification does not make an encounter nonconsensual.* * * Nor does the request to search a person's belongings.* * * The Fourth Amendment guarantees are not implicated in such an encounter unless the police officer has by either physical force or show of authority restrained the person's liberty so that a reasonable person would not feel free to decline the officer's requests or

otherwise terminate the encounter.* * * Once a person's liberty has been restrained, the encounter loses its consensual nature and falls into one of the next two Supreme Court categories....

{¶45} “The second type of encounter is a ‘*Terry* stop’ or an investigatory detention. The investigatory detention is more intrusive than a consensual encounter, but less intrusive than a formal custodial arrest. The investigatory detention is limited in duration and purpose and can only last as long as it takes a police officer to confirm or to dispel his suspicions. *Terry, supra*. A person is seized under this category when, in view of all the circumstances surrounding the incident, by means of physical force or show of authority a reasonable person would have believed that he was not free to leave or is compelled to respond to questions.* * * ” (Citations omitted.) *State v. Taylor* (1995), 106 Ohio App.3d 741, 747-748, 667 N.E.2d 60.

{¶46} While appellee argues that appellant was never stopped by Deputy Udishas, we disagree. At the hearing, Deputy Udishas testified that he never told appellant to “Stop right there” and that he was just talking to appellant. However, when asked if he ever had to tell appellant that he could not leave, the Deputy testified that “[a]t one point I told him that he needed to stay over there while I talked with the officers. He wasn’t attempting to leave, but I just wanted to make sure he didn’t.” Transcript at 11. Clearly, appellant was stopped when he was told that he needed to “stay” because a reasonable person would not have felt free to leave in such a situation.

{¶47} However, we find that the Deputy had reasonable suspicion to believe that appellant had been involved in criminal activity, and, as such, the stop of appellant did not abridge the protections guaranteed by the Fourth Amendment.

{¶48} As is stated above, the Sheriff's Department received a call that a man wearing a red shirt and ball cap and a woman were arguing in the 300 block of Main Street and that the man had thrown a beer can from his vehicle. Deputy Udishas was aware of such call, but was not dispatched in response to the same. Shortly thereafter, an EMT working at Station 2 called and indicated that there was a possible domestic dispute in front of the station, which is in the 500 block of Chestnut Street. The addresses on Main and Chestnut are "within two minutes" of each other. Transcript at 7.

{¶49} While en route to the station, Deputy Udishas was informed that the group had left the station on foot and were headed towards Seventh Street. The Deputy who arrived at approximately 12:20 a.m. then observed a group of people walking on Chestnut Street in the area of 7th Street, which is approximately two blocks from the EMS station. A truck was stopped at a green light next to the group of people, blocking the lane of travel. Appellant was next to the truck. Deputy Udishas testified that he did not see any other groups of people on Chestnut at the time. We find that Deputy Udishas, based on the foregoing, had reasonable suspicion to stop the group to investigate the earlier alleged domestic dispute that had occurred just blocks away.

{¶50} Appellant's sole assignment of error is, therefore, overruled.

{¶51} Accordingly, the judgment of the Coshocton Municipal Court is affirmed.

By: Edwards, J.

Gwin, P.J. and

Delaney, J. concur

s/Julie A. Edwards

s/W. Scott Gwin

s/Patricia A. Delaney

JUDGES

JAE/d0814

