[Cite as *State v. Morton*, 2010-Ohio-3582.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. ANTHONY MORTON Appellant	C.A. No. 25117 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 2008-04-1308

DECISION AND JOURNAL ENTRY

Dated: August 4, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Late one night, a police officer found Anthony Morton walking near the University of Akron with a bottle of methamphetamine tablets tucked in his underwear. After Mr. Morton unsuccessfully attempted to suppress the physical evidence, a jury found him guilty of aggravated possession of drugs. He has appealed, arguing that the officer violated his Fourth Amendment rights by stopping and frisking him without reasonable suspicion. He has also argued that the officer exceeded the permissible scope of a *Terry* pat down. This Court affirms because the record supports the trial court's determinations that the officer: (1) had reasonable suspicion that Mr. Morton had recently stolen a car and may have been armed and dangerous and (2) was immediately able to identify the pill bottle as contraband by patting Mr. Morton's clothing.

BACKGROUND

{¶2} Around midnight on April 18, 2008, Officer Pamela Helmick of the University of Akron Police Department was on patrol with her K9 partner when she heard a radio dispatch from the Akron Police Department. The dispatcher announced that a carjacking had just happened in the Sherman Street area and described the suspect as "a tall, thin, black male wearing a black skullcap and a black T shirt." Officer Helmick "patrolled the area looking for any possible suspects that would match the description."

{¶3} At about 12:30 a.m., within a half of a mile of the scene of the carjacking, Officer Helmick noticed Mr. Morton walking along Sherman Street. According to the officer, Mr. Morton was a tall, thin African-American and was wearing a black skullcap, a black shirt, and jeans. After she drove by him, she watched in her rearview mirror as he "duck[ed] into some back yards." Officer Helmick explained that Mr. Morton's immediate movement away from the street drew her attention. As he angled through the back yards, she circled around the block and found him on the sidewalk of Sumner Street. Thinking he was a possible suspect in the carjacking, the officer stopped Mr. Morton, telling him she needed to speak with him. He complied with her request and, when she asked for identification, produced a valid I.D. issued by the University of Akron.

{¶4} After he denied having anything on him that might hurt her, she began to "do a pat down for [her] safety." According to the officer, as she patted Mr. Morton's groin area, she felt a pill bottle. When she asked what it was, Mr. Morton said it was "his ADD medicine." Officer Helmick testified that she "asked him to take it out so that [she] could see it." Mr. Morton produced a prescription pill bottle with no label. The tablets inside field-tested positive for methamphetamine, and Officer Helmick arrested Mr. Morton.

{¶5} Mr. Morton moved to suppress the physical evidence based on claimed violations of his Fourth Amendment rights. He challenged the basis for the stop, the basis for the frisk, and the extent of the frisk. The trial court denied the motion, and a jury found him guilty as charged.

MOTION TO SUPPRESS

{¶6} A motion to suppress evidence presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St. 3d 152, 2003-Ohio-5372, at ¶8. A reviewing court "must accept the trial court's findings of fact if they are supported by competent, credible evidence." *Id.*, but see *State v. Metcalf*, 9th Dist. No. 23600, 2007-Ohio-4001, at ¶14 (Dickinson, J., concurring). The reviewing court "must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *Burnside*, 2003-Ohio-5372, at ¶8.

THE INVESTIGATIVE STOP

{¶7} As part of his first assignment of error, Mr. Morton has argued that Officer Helmick lacked reasonable, articulable suspicion that he had committed a crime because the officer failed to sufficiently corroborate the tip relayed by dispatch. Mr. Morton has cited *State v. Ross*, 5th Dist. No. 2007-CA-00127, 2008-Ohio-882, in support of this argument. In *Ross*, the Fifth District Court of Appeals considered whether officers had reasonable suspicion to justify stopping Mr. Ross based on two things: (1) his fitting a description given by an anonymous caller regarding an alleged burglary committed by "several men, one of whom was wearing a brown jacket and had an afro-style haircut" and (2) the fact that he fled when approached by a police officer. *Id.* at ¶2.

{¶8} "[A] police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though

there is no probable cause to make an arrest." *Terry v. Ohio*, 392 U.S. 1, 22 (1968). If the stop is supported by an officer's reasonable suspicion of criminal activity, it does not violate the Fourth Amendment. *State v. Taylor*, 9th Dist. No. 16686, 1994 WL 395616 at *2 (July 27, 1994). Reasonable suspicion requires that the officer "point to specific, articulable facts which, together with rational inferences from those facts, reasonably warrant the intrusion." *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 21 (1968)).

{¶9} "In making a determination of reasonable suspicion, the relevant inquiry is not whether particular conduct is innocent or guilty, but the degree of suspicion that attaches to particular types of noncriminal acts." *State v. Lungs*, 2d Dist. No. 22704, 2008-Ohio-4928, at ¶17 (quoting *State v. Taylor*, 106 Ohio App. 3d 741, 747-49 (1995)). "Reasonable suspicion can arise from information that is less reliable than that required to show probable cause." *State v. Jordan*, 104 Ohio St. 3d 21, 2004-Ohio-6085, at ¶35. The reasonableness of a police officer's actions in making an investigative stop must be evaluated in light of the totality of the circumstances. *State v. Taylor*, 9th Dist. No. 16686, 1994 WL 395616 at *2 (July 27, 1994) (citing *State v. Freeman*, 64 Ohio St. 2d 291, paragraph one of the syllabus (1980)). Officers may "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.'" *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)).

{¶10} If an officer justifies an investigative stop with just an informant's tip, "the determination of reasonable suspicion will be limited to an examination of the weight and reliability due that tip." *Maumee v. Weisner*, 87 Ohio St. 3d 295, 299 (1999). The analysis requires a consideration of "the informant's veracity, reliability, and basis of knowledge." *Id.*

(citing *Alabama v. White*, 496 U.S. 325, 328 (1990)). As compared to either an anonymous informant or a known informant, the "identified citizen informant" is generally considered to be highly reliable, especially because a fabricated report could subject him to criminal liability. *Id.* at 300 (citing *Illinois v. Gates*, 462 U.S. 213, 233-34 (1983)).

{¶11} In this case, the State did not ask Officer Helmick about what she knew, prior to stopping Mr. Morton, about the reliability of the carjacking report. Officer Helmick testified, however, that before she stopped Mr. Morton, she had stopped another man who matched the description of the carjacker. At that time, the victim was still on the scene and police brought him over to identify the suspect face to face. The victim did not identify the first suspect as the man who stole his car. Officer Helmick also testified that, sometime prior to her interaction with Mr. Morton, she had learned that the victim's car had been recovered within two blocks of the scene of the crime. On cross-examination, Officer Helmick testified that she could not be sure whether she learned about the vehicle's recovery before or after she stopped Mr. Morton, but she believed she had learned about it before she stopped him.

{¶12} Unlike the situation in *Ross*, the reasonableness of this warrantless search did not depend primarily on the reliability of an anonymous telephone tipster. At a minimum, by the time she stopped Mr. Morton, Officer Helmick had learned that the victim-informant was not only known to police, but had remained on the scene and was working with officers trying to locate the carjacker. Therefore, he was an "identified citizen informant," generally considered to be a highly reliable source. *Maumee v. Weisner*, 87 Ohio St. 3d 295, 300 (1999) (citing *Illinois v. Gates*, 462 U.S. 213, 233-34 (1983)).

{¶13} Officer Helmick testified that she found Mr. Morton near the scene of the reported crime just thirty minutes after the report. According to the officer, Mr. Morton matched each

element of the description of the carjacker. After she passed him in a marked police cruiser, she watched in her rearview mirror as he "duck[ed] into some back yards, which drew [her] attention." Officer Helmick testified that she has been a police officer for twelve years. In her estimation, Mr. Morton's movement off of the sidewalk seemed suspicious, coming as it did, just after the police car passed him.

{¶14} The Ohio Supreme Court has written that "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion . . . [and] [h]eadlong flight . . . is the consummate act of evasion . . . ." *State v. Jordan*, 104 Ohio St. 3d 21, 2004-Ohio-6085, at ¶47. It has also written that the circumstances surrounding an investigative stop "are to be viewed through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold . . . [and reviewing courts] must give due weight to [the officer's] experience and training and view the evidence as it would be understood by those in law enforcement." *State v. Andrews*, 57 Ohio St. 3d 86, 87-88 (1991).

{¶15} There was no evidence that Mr. Morton engaged in "headlong" flight after the cruiser passed, but "[i]n reviewing the propriety of an officer's conduct, courts do not have . . . empirical studies dealing with inferences drawn from suspicious behavior, and . . . cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior." *State v. Jordan*, 104 Ohio St. 3d 21, 2004-Ohio-6085, at ¶47 (citing *United States v. Cortez*, 449 U.S. 411, 418 (1981)). In addition to fitting each of the factors offered in the radio description of the suspect, Mr. Morton seemed to engage in evasive behavior after seeing the police car. Officer Helmick was able to articulate

specific facts that led her, under the totality of the circumstances, to a reasonable suspicion of criminal activity justifying her investigative stop of Mr. Morton.

{¶16} Mr. Morton has argued that, because it was obvious to Officer Helmick before she stopped him that he was not carrying a shot gun, she had no reasonable suspicion that he was the carjacker, who had allegedly used a shot gun in the carjacking. As Officer Helmick explained, however, a shotgun is easily "ditched in a back yard" and, therefore, its absence cannot be considered a decisive factor for law enforcement. Mr. Morton has also argued that because Officer Helmick did not question him about the carjacking or bring the victim to try to identify him at the scene, the stop must have been pretextual. This Court agrees with the trial court's statement that Officer Helmick had time to investigate Mr. Morton's involvement with the carjacking after he was in custody for possession of illegal drugs. If an officer who has stopped a suspect is presented with "reasonable suspicion of some other illegal activity, different from the suspected illegal activity that triggered the stop, then . . . the [individual] may be detained for as long as that new articulable and reasonable suspicion continues, even if the officer is satisfied that the suspicion that justified the stop initially has dissipated." *State v. Myers*, 63 Ohio App. 3d 765, 771 (1990). If the officer was justified in frisking Mr. Morton and legally discovered contraband in the course of that procedure, then she was justified in arresting him for the contraband before investigating his potential connection to the carjacking.

THE FRISK

{¶17} The second part of Mr. Morton's first assignment of error is that Officer Helmick did not have reasonable suspicion to justify frisking him because she did not have reason to believe that he was armed and dangerous. Under *Terry v. Ohio*, an officer is justified in conducting a limited pat down to search for concealed weapons if she has "reasonable suspicion,

[based on the totality of the circumstances], that the individual whose behavior [s]he is investigating at close range may be armed and dangerous." *State v. Andrews*, 57 Ohio St. 3d 86, 89 (1991) (citing *Terry v. Ohio*, 392 U.S. 1, 27 (1968)). "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent [police officer] in the circumstances would be warranted in the belief that [her] safety or that of others was in danger." *Terry*, 392 U.S. at 27.

{¶18} Officer Helmick testified that she was alone on patrol near the University of Akron around midnight when she heard the report about a nearby carjacking. Approximately thirty minutes later, she encountered Mr. Morton in the same vicinity. Although it was obvious to her that Mr. Morton was not carrying a shotgun, it was reasonable to suspect that, if he had just committed a crime, he might be carrying some kind of weapon. She testified that he fit the description of the carjacker who had been armed with at least one gun just thirty minutes earlier. For her own safety, Officer Helmick was justified in conducting a limited pat down of Mr. Morton's outer clothing to determine whether he was armed before continuing with her investigation. As the United States Supreme Court has written, this Court "cannot say [the officer's] decision . . . to . . . pat [the suspect's] clothing for weapons was the product of a volatile or inventive imagination, or was undertaken simply as an act of harassment; the record evidences the tempered act of a police[wo]man who in the course of an investigation had to make a quick decision as to how to protect [her]self and others from possible danger, and took limited steps to do so." *Terry v. Ohio*, 392 U.S. 1, 28 (1968). Mr. Morton's first assignment of error is overruled.

THE SCOPE OF A *TERRY* PAT DOWN

{¶19} Mr. Morton's second assignment of error is that Officer Helmick exceeded the permissible scope of a *Terry* search for weapons by manipulating an object she detected in Mr. Morton's underwear in order to determine that it was contraband. Officer Helmick testified that, while patting down the outside of Mr. Morton's clothing, she identified an item located in his groin area. She denied that she manipulated the item, explaining that it was obviously a prescription pill bottle.

{¶20} The United States Supreme Court has endorsed the plain-feel exception to the presumption that all warrantless searches and seizures are unreasonable. *Minnesota v. Dickerson*, 508 U.S. 366, 376 (1993). "If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context." *Id.* at 375-76. Therefore, "[u]nder the plain feel doctrine, an officer conducting a patdown for weapons may lawfully seize an object if [s]he has probable cause to believe that the item is contraband." *State v. Allen*, 2d Dist. No. 22663, 2009-Ohio-1280, at ¶46 (citing *Dickerson*, 508 U.S. at 375; *State v. Phillips*, 155 Ohio App. 3d 149, 2003-Ohio-5742, ¶41-42). The officer, however, is limited to detecting the object's incriminating character by merely patting the exterior clothing without manipulating the object to identify it as contraband. *Id.*

{¶21} The trial court concluded that there was no evidence to contradict the officer's testimony that she was able to identify the pill bottle without manipulating it. The trial court determined Officer Helmick's testimony was "both plausible and credible." This Court has not

discovered any contrary evidence in its review of the record. Although a pill bottle is not always contraband, its location in Mr. Morton's underwear supports the trial court's finding that the object's incriminating character was "immediately apparent." *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993). Generally speaking, people do not carry legal medications in their underwear. Mr. Morton's second assignment of error is overruled.

CONCLUSION

{¶22} Mr. Morton's first assignment of error is overruled because Officer Helmick did not violate his Fourth Amendment rights by stopping him and patting down his outer clothing for weapons. His second assignment of error is overruled because there was no evidence that the officer exceeded the permissible scope of a *Terry* pat down when she identified the illegal drugs in Mr. Morton's underwear. The judgment of the Summit County Common Pleas Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

CLAIR E. DICKINSON
FOR THE COURT

MOORE, J.
BELFANCE, J.
CONCUR

APPEARANCES:

MATILDA O. CARRENA, attorney at law, for appellant.

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