[Cite as *State v. Little*, 2010-Ohio-2923.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 09-CA-122
Plaintiff-Appellant	:	
	:	Trial Court Case No. 09-CA-122
v.	:	
	:	
MASON LITTLE	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellee	:	
	:	

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O P I N I O N

Rendered on the 25th day of June, 2010.

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FAIN, J.

{¶ 1} Plaintiff-appellant, the State of Ohio, appeals from an order suppressing evidence obtained as a result of an encounter between defendant-appellant Mason Little and two police officers. The State contends that (1) the evidence in the record does not support the trial court's conclusion that the

police officers stopped Little, who was in a parked car; and (2) in any event, the police officers had a reasonable and articulable suspicion that criminal activity was afoot, justifying a stop.

{¶ 2} We conclude that the evidence in the record supports the trial court's conclusion that Little was stopped. Although the issue is close, we further conclude that the officers lacked a reasonable articulable suspicion that Little was involved in, or a witness to, criminal activity. Accordingly, the order suppressing evidence, from which this appeal is taken, is Affirmed.

I

{¶ 3} Enon police officers Benjamin Barrett and Roxanna Hurst were on patrol in the village of Enon in the early morning hours of July 4, 2009. While traveling north on Enon Road, at 12:43 a.m., they noticed "a white in color vehicle, an SUV Chevy Avalanche, with its lights out, sitting in between the storage area and the liquor store."

{¶ 4} The officers pulled in alongside the parked SUV, activating the cruiser's overhead, flashing lights as they did so. They discovered that the motor of the SUV was running, in neutral. Little was sitting in the driver's seat. A passenger was sitting in the passenger seat.

{¶ 5} Barrett "could smell a strong odor of alcohol." He noticed an open container of beer sitting in the cup holder between the driver's seat and the passenger seat. Little and the passenger were ordered out of the vehicle. Evidence was recovered from the vehicle. Little was ultimately charged with

physical control of a motor vehicle while intoxicated and with possession of cocaine.

{¶ 6} Little moved to suppress the evidence, contending that it was obtained as the result of an unlawful search and seizure. Following a hearing, at which both police officers Barrett and Hurst testified, the trial court sustained Little's motion and suppressed the evidence. From the order suppressing evidence, the State appeals.

II

{¶ 7} The State's First Assignment of Error is as follows:

{¶ 8} "THE TRIAL COURT ERRED IN CONCLUDING THAT OFFICERS ENGAGED IN A *TERRY* STOP BY ACTIVATING THE OVERHEAD LIGHTS AND PULLING ALONGSIDE THE DEFENDANT."

{¶ 9} The State argues that the mere activation of overhead flashing lights, while pulling alongside a motor vehicle that is already stationary, without more, is not a sufficient show of authority to constitute a detention. We disagree. We conclude that the activation of overhead flashing lights by police officers in a marked police cruiser is a universally understood signal that a motorist being followed by a police cruiser must pull over and stop, because the police officer wants to talk to the motorist, or that a motorist in a stationary vehicle in the immediate vicinity of the cruiser should not leave the area, but wait, because the police officer wants to talk to the motorist.

{¶ 10} In reaching this conclusion, we are in agreement with the concurring opinion of Judge Lawrence Grey, in *State v. Johnston* (1993), 85 Ohio App.3d 475, 479, that: "Clearly [a police officer's use of overhead flashing lights] does [constitute

a stop], and it is perceived as a stop by every driver who has been distressed to see those flashing lights in the rear view window."

{¶ 11} The State cites *State v. Saunders*, Montgomery App. No. 22621, 2009-Ohio-1273, a decision of our court, for the contrary proposition. We conclude that *Saunders* is distinguishable. In that case, the police officer was interested in a Pontiac being driven by the defendant, Saunders, but never stopped it. Saunders parked the Pontiac in a parking lot and left it, on foot. Later, a van pulled up in front of the parking lot. Saunders got out of the van, from the passenger side, and approached the Pontiac. At this point, the police officer pulled up behind the van and activated his overhead, flashing lights. The van pulled into the parking lot, Saunders ran to the front of the van, and the officer saw Saunders make a throwing motion into an adjacent area. Based upon their suspicion that Saunders had thrown "some type of contraband," the officers ordered Saunders to the ground, and incriminating evidence was ultimately obtained as a result of the stop.

{¶ 12} Saunders was not in the van when the police officer pulled behind the stopped van and activated his overhead lights. Saunders had already left the van, and had evidently got into the Pontiac by this time, since the opinion says that "once Phillips activated his lights, he observed Saunders exit the Pontiac." Id., ¶ 5. Thus, even if the police had effectively stopped the van and its occupants by pulling in behind it and activating the overhead lights, they had not stopped *Saunders*, who was no longer in the van, or even adjacent to it. So Saunders was not stopped until he was ordered to the ground, by which time there was a reasonable, articulable basis for stopping him. Id., ¶ 22.

{¶ 13} We conclude that a reasonable person in Little's position would not have regarded himself as free to leave the scene. Therefore, Little was detained for Fourth Amendment purposes.

{¶ 14} The State's First Assignment of Error is overruled.

III

{¶ 15} The State's Second Assignment of Error is as follows:

{¶ 16} "THE TRIAL COURT ERRED IN CONCLUDING THAT OFFICERS DID NOT HAVE REASONABLE, ARTICULABLE SUSPICION OF CRIMINAL ACTIVITY."

{¶ 17} As the State notes, to justify a brief, investigative stop, "the police officer must be able to point to specific and articulable facts [that], taken together with rational inferences

{¶ 18} from those facts, reasonably warrant that intrusion." *Terry v. Ohio* (1968), 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889. The officer's suspicion cannot be merely general – there must be a "particularized and objective basis for suspecting legal wrongdoing." *State v. Paschal*, 169 Ohio App.3d 200, 2006-Ohio-5331, ¶ 10.

{¶ 19} In other words, there must be a particularized suspicion that criminal activity is afoot, and that the person being detained is either a participant in that activity, or a witness to it. Thus, officer McFadden, in *Terry v. Ohio*, supra, saw Terry appear to be "casing" a jewelry store, preparatory to robbing it. This justified a brief, investigative stop.

{¶ 20} In the case before us, police officers Barrett and Hurst saw a motor

vehicle parked between two businesses at 12:43 at night. They testified that the area was known for drug activity, and that the liquor store had been broken into "many times." This amounted to a generalized suspicion that the area was one in which criminal activity was likely to occur, and the time of night certainly did not detract from that suspicion.

{¶ 21} But the police officers in this case, unlike officer McFadden, in *Terry*, lacked any particularized suspicion that the occupants of the motor vehicle were involved in criminal activity, or were witnesses to criminal activity, at the time of the stop. Upon cross-examination, Barrett acknowledged that there had been "no tips for possible drug activity" that night. And while Barrett asserted that "there's always a potential for drug activity in that area," he had to acknowledge that it would "be fair to say there's a potential for drug activity anywhere in Enon."

{¶ 22} In short, although we conclude that police officers Barrett and Hurst were justified in being on the lookout for criminal activity in that area of Enon Road, at the time they stopped Little, they lacked a particularized suspicion that he was involved in criminal activity, or was a witness to criminal activity. For all they knew, he may just have been a sleepy motorist who chose to stop and rest a while before continuing.

{¶ 23} In its decision, the trial court opined as follows:

{¶ 24} "Officers Barrett and Hurst are no doubt fine law enforcement officers who had every right to initiate a consensual encounter with the defendant. They were obviously concerned about recent break-ins at the liquor store and the possibility of drug activity in the area. Two people sitting in a parked vehicle

adjacent to the liquor store in the early morning hours justifiably heightened their concerns. Given the totality of the circumstances, they acted conscientiously, professionally, and diligently by approaching the defendant.

{¶ 25} "The officers could have initiated a consensual encounter by approaching the defendant in this public place, engaging him in some conversation, and even requesting some information from him. That type of police conduct would have unveiled the criminal activity that was afoot which in turn would have justified a Terry stop and probably even an eventual arrest.

{¶ 26} "Unfortunately, Officer Barrett completely by-passed a consensual encounter with the defendant and immediately engaged in a Terry stop by activating his overhead lights and pulling up alongside the defendant. No reasonable person in the defendant's position would have felt free to leave because activating overhead lights is a significant show of authority that makes a police-citizen encounter considerably more intrusive than a simple consensual one. The problem with that police conduct in this case is that Officer Barrett had not first acquired the requisite reasonable, articulable suspicion of criminal activity. While Officer Barrett was certainly suspicious of the defendant before he activated his lights, that suspicion could not have risen to the level necessary for a Terry stop given the particular facts and circumstances of this case. Officer Barrett had a parked vehicle with two occupants in a suspicious area and no more. His initial suspicion warranted a consensual encounter with the defendant but not a Terry stop."

{¶ 27} With the possible exception of its speculation concerning what might have happened if officers Barrett and Hurst had initiated a consensual stop, we

agree with the trial court's analysis. The State's Second Assignment of Error is overruled.

IV

{¶ 28} Both of the State's assignments of error having been overruled, the order suppressing evidence, from which this appeal is taken, is Affirmed.

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FROELICH and DONOFRIO, JJ., concur.

(Hon. Gene Donofrio, Seventh District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

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