[Cite as *State v. Roberts*, 2010-Ohio-300.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23219
v.	:	T.C. NO. 2008 CR 3301
RASHONN L. ROBERTS	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 29th day of January, 2010.

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FROELICH, J.

{¶ 1} Rashonn L. Roberts pled no contest to assault of a peace officer, a fourth degree felony, and having weapons while under disability, a third degree felony, after the Montgomery County Court of Common Pleas overruled his motion to suppress evidence.

The court found him guilty and sentenced him to two years for having weapons while under disability and eighteen months for assault of a peace officer, to be served concurrently.

{¶ 2} Roberts appeals the denial of his motion to suppress. For the following reasons, Roberts' conviction for assault of a peace officer will be affirmed. His conviction for heaving weapons while under disability will be reversed, and the matter will be remanded for further proceedings on this offense.

I

{¶ 3} The State's evidence at the suppression hearing established the following facts:

{¶ 4} At approximately 6:30 p.m. on August 14, 2008, during daylight hours, Dayton Police Officer Michael Fuller was in a marked cruiser in the parking lot of 2141 North Main Street in Dayton, Ohio, when he observed Roberts riding a bicycle on the sidewalk, heading northbound on the west side of Main Street. Roberts crossed West Fairview and then crossed North Main Street "at a diagonal zigzgging in and out of traffic." Roberts continued northbound on the east side of North Main Street. Because cyclists are not permitted to ride their bicycles on the sidewalk and Roberts crossed North Main Street "in complete violation of every traffic law that we have," Fuller decided to issue Roberts a citation.

{¶ 5} Fuller pulled his cruiser onto North Main Street and, using the PA system in the cruiser, instructed Roberts to pull over his bicycle. Roberts pulled over at the intersection of North Main Street and East Shadyside. At the officer's request, Roberts stepped off the bicycle, holding the bicycle upright. Fuller asked Roberts to lay down the

bicycle. Roberts complied with some reluctance.

{¶ 6} Fuller informed Roberts that he was going to frisk Roberts for weapons. Fuller explained at the hearing that he had decided to pat down Roberts because the area was a high crime and high drug area, where there had been numerous robberies and a recent officer-involved shooting. Roberts said, "okay," and faced the officer's cruiser. Fuller began by patting down the pockets of Roberts' shorts. Fuller felt an object in the right pocket that was immediately apparent to him to be a large handgun. The officer told Roberts to put his hands behind his back and "grabbed hold" of Roberts' arms so Roberts could not reach for the gun. Roberts "starting fighting." Fuller called for assistance from other officers. Roberts was subsequently subdued by four officers. Roberts was handcuffed, a .380 semiautomatic handgun was retrieved from his pocket, and he was placed in a cruiser.

{¶ 7} The next day, Roberts was charged by complaint with assault of a peace officer, having weapons while under disability, and carrying a concealed weapon. On September 16, 2008, he was indicted for these offenses. The assault charge included a firearm specification.

{¶ 8} On September 30, 2008, Roberts moved to suppress all evidence obtained from the stop and any statements that he may have made. Roberts claimed that the officer lacked a lawful basis to stop and search him and that his statements were made involuntarily. A hearing on the motion was held on November 18, 2008. Officer Fuller was the sole witness. At the conclusion of the hearing, Roberts waived his arguments concerning statements that he may have made. Counsel stated: "We believe that everything flowing

from the search is fruit of the poisonous tree and we are not disputing the statements made either the written statement or statements at the hospital."

{¶ 9} On December 16, 2008, the trial court announced its decision in open court. The court overruled the motion to suppress, concluding that the patdown of Roberts for weapons was permissible. The court reasoned:

{¶ 10} "*** The Court finds that Defendant was riding a bicycle in violation of Traffic Ordinance. This occurred in a high crime and drug area with numerous robberies in the area, gun violence, shootings, with officers involved. That the Officer being alone, was entitled to be more cautious than he otherwise might be. Therefore, the pat down for officer safety was reasonable under these circumstances. The stop being appropriate, this [a]mounting to more than a consensual encounter, the officer was abiding by his sworn duty and we are not going to, under these circumstances, expect to [sic] that they do so completely at their peril."

{¶ 11} On December 18, 2008, the trial court filed a written entry adopting its oral reasoning and denying the motion to suppress. Shortly thereafter, Roberts pled no contest to assault of a peace officer and having weapons while under disability. In exchange for the plea, the State dismissed the carrying a concealed weapon charge and the firearm specification. The court found Roberts guilty and sentenced him accordingly.

II

{¶ 12} Roberts appeals. His sole assignment of error states that the trial court erred in denying his motion to suppress.

{¶ 13} In reviewing the trial court's ruling on a motion to suppress evidence, this

court must accept the findings of fact made by the trial court if they are supported by competent, credible evidence. See *State v. Morgan*, Montgomery App. No. 18985, 2002-Ohio-268. However, "the reviewing court must independently determine, as a matter of law, whether the facts meet the appropriate legal standard." Id.

{¶ 14} The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures. *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. Under *Terry*, police officers may briefly stop and/or temporarily detain individuals in order to investigate possible criminal activity if the officers have a reasonable, articulable suspicion that criminal activity may be afoot. *State v. Martin*, Montgomery App. No. 20270, 2004-Ohio-2738, at ¶10, citing *Terry*, supra; *State v. Molette*, Montgomery App. No. 19694, 2003-Ohio-5965, at ¶10. A police officer may lawfully stop a vehicle, motorized or otherwise, if he has a reasonable articulable suspicion that the operator has engaged in criminal activity, including a minor traffic violation. See *State v. Buckner*, Montgomery App. No. 21892, 2007-Ohio-4329, ¶8.

{¶ 15} We agree with the trial court that Officer Fuller was entitled to stop Roberts. Fuller observed Roberts riding his bicycle on the sidewalk, contrary to local ordinance, and saw Roberts commit several traffic violations when he crossed North Main Street.

{¶ 16} "Authority to conduct a patdown search for weapons does not automatically flow from a lawful stop[.]" *State v. Stewart*, Montgomery App. No. 19961, 2004-Ohio-1319, ¶16. Once a lawful stop has been made, the police may conduct a limited protective search for concealed weapons if the officer reasonably believes that the suspect may be armed or a danger to the officer or to others. *State v. Evans* (1993), 67 Ohio St.3d

405, 408; *State v. Molette*, Montgomery App. No. 19694, 2003-Ohio-5965, ¶13. "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence ***." *Evans*, 67 Ohio St.3d at 408, quoting *Adams v. Williams* (1972), 407 U.S. 143, 146, 92 S.Ct. 1921, 32 L.Ed.2d 612.

{¶ 17} To justify a patdown search, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21. However, "[t]he officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." Id. at 27; *State v. Smith* (1978), 56 Ohio St.2d 405, 407. The totality of the circumstances must "be 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, citing *State v. Freeman* (1980), 64 Ohio St.2d 291, 295.

{¶ 18} We emphasize that an officer must have a reasonable *individualized* suspicion that the suspect is armed and dangerous before he may conduct a patdown for weapons. See *Terry*, supra; *Ybarra v. Illinois* (1979), 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238; *Maryland v. Buie* (1990), 494 U.S. 325, 334, fn.2, 110 S.Ct. 1093, 108 L.Ed.2d 276 ("Even in high crime areas, where the possibility that any given individual is armed is significant, *Terry* requires reasonable, individualized suspicion before a frisk for weapons can be conducted.") Mere presence in a high crime or high drug area, by itself, is insufficient to justify the stop and frisk of an individual. See *State v. Carter* (1994), 69 Ohio St.3d 57, 65 ("Although the investigative stop took place in a high crime area, that

factor alone is not sufficient to justify an investigative stop"); *Brown v. Texas* (1979), 443 U.S. 47, 52, 99 S.Ct. 2637, 61 L.Ed.2d 357 (being "in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct"). "To hold otherwise would result in the wholesale loss of the personal liberty of those with the misfortune of living in high crime areas." *Carter*, 69 Ohio St.3d at 65.

{¶ 19} In this case, there is no evidence that Fuller's patdown of Roberts was based on a reasonable and articulable suspicion that Roberts may have been armed. Fuller explained the bases for the frisk, stating: "I did this because this is both a high crime and high drug area. I personally have made drug arrests, gun arrests, and have personal knowledge of other officers making gun and drug arrests within the same vicinity. We have an officer involved shooting within two blocks of there several weeks before that. Based on these reasons, I patted him down for weapons." As for Roberts specifically, Fuller stated that, prior to the search, Roberts was compliant, made no assertive movements, did not reach into his pockets, was not belligerent or verbally abusive, and had not discarded anything. Fuller did not know Roberts, and his stop of Roberts was based on a traffic violation, not any suspicion of drug activity or any other criminal conduct that might involve weapons. Fuller acknowledged on cross-examination that, "at this point, [Roberts] was 100% compliant. He didn't do anything to make [the officer] worry that he was going to do anything to harm [him]."

{¶ 20} Based on Fuller's testimony, it is apparent that the officer lacked the requisite reasonable and articulable suspicion that Roberts was armed and dangerous to justify a

patdown for weapons. Accordingly, the trial court erred in denying Roberts' motion to suppress evidence obtained as a result of the patdown, i.e., the handgun.

{¶ 21} Roberts argues that all "fruits" of Fuller's search should be suppressed as "fruit of the poisonous tree." Presumably, he means that the assault charge should be precluded by the officer's unlawful patdown for weapons. The State responds that a detainee cannot respond to an illegal arrest by physically attacking the officer and, therefore, the assault charge must stand regardless of the legality of the patdown. We agree with the State.

{¶ 22} We have held that "where the officers lacked cause to effectuate an original arrest yet where the accused responded to an illegal arrest by physically attacking the officer, the evidence of this new independent crime is admissible." *State v. Stargell*, Montgomery App. No. 20631, 2005-Ohio-312, ¶19, citing *State v. Jobes*, Montgomery App. No. 20210, 2004-Ohio-1167; *State v. Nelson* (Mar. 9, 2001), Champaign App. No. 00CA12; *State v. Barnes* (Dec. 5, 1997), Montgomery App. No. 16434. "In such cases, no exploitation of the prior illegality by police is involved." *Jobes* at ¶15, quoting *Nelson*, supra.

{¶ 23} In *Stargell*, we held that, even though the officers lacked a reasonable and articulable suspicion to stop the defendant, the police had probable cause to arrest the defendant for assault of an police officer based on the defendant's hitting the officer with his vehicle when he tried to flee from the scene. We relied on our prior opinions on this issue, stating:

{¶ 24} "*** In *Barnes*, we quoted from our decision in *Nelson* as follows: 'The fruit of the poisonous tree doctrine has not been applied by courts to all fruits in a "but for"

fashion. Id. The conduct of Defendant subsequent to his arrest in assaulting police officers and paramedics at the police station, which is what Defendant seeks to have suppressed, are new, independent acts of willful misconduct which involve no exploitation by police of his earlier arrest. Defendant's criminal conduct at the police station is completely separate from the offenses police were investigating when they originally arrested Defendant. The rationale behind the exclusionary rule simply does not reach that far to bar evidence of this new crime.'

{¶ 25} "We further stated in *Barnes* that in a case of an attack on the police officers subsequent to an unlawful arrest involves no exploitation of the prior illegality and the rationale of the exclusionary rule does not justify its extension to this extreme. 'Application of the exclusionary rule in such fashion,' as one court put it, 'would in effect give the victims of illegal searches a license to assault and murder the officers involved – a result manifestly unacceptable.' Id." *Stargell* at ¶19-20.

{¶ 26} *Stargell* and *Barnes* apply to this case, as well. Although Fuller lacked a reasonable and articulable suspicion to search Roberts for weapons, thus making the seizure of the handgun unlawful, the officers were nonetheless permitted to arrest Roberts for his assault on a police officer. Roberts was not entitled to resist arrest upon the officer's discovery of the handgun; his decision to do so led to an independent, unrelated offense – i.e., assault of a peace officer – which did not result from exploitation of the prior unlawful discovery of the weapon. Accordingly, the exclusionary rule does not apply to bar evidence of Roberts' assault on Fuller.

{¶ 27} The assignment of error is sustained in part and overruled in part.

III

{¶ 28} Roberts' conviction for assault of a peace officer will be affirmed. His conviction for heaving weapons while under disability will be reversed, and the matter will be remanded for further proceedings on this offense.

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DONOVAN, P.J. and BROGAN, J., concur.

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