

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23736
v.	:	T.C. NO. 09CR1608
	:	
ROBERT W. MAYBERRY	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

OPINION

Rendered on the 30th day of August, 2010.

MICHELE D. PHIPPS, Atty. Reg. No. 0069829, Assistant Prosecuting Attorney, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

VICTOR A. HODGE, Atty. Reg. No. 0007298, Assistant Public Defender, 117 S. Main Street, Suite 400, Dayton, Ohio 45422
Attorney for Defendant-Appellant

FROELICH, J.

{¶ 1} After the trial court overruled his motion to suppress evidence, Robert W. Mayberry pled no contest in the Montgomery County Court of Common Pleas to carrying a concealed weapon, having a weapon while under disability, and tampering with evidence. The trial court found him guilty and sentenced him to one year in prison on each count, to be

served concurrently.

{¶ 2} Mayberry appeals from his convictions, claiming that the trial court erred in denying his motion to suppress. For the following reasons, the trial court's judgment will be reversed, and the matter will be remanded for further proceedings.

I.

{¶ 3} Police Officers Brian Dedrick and Ron Gustwiller and Detective William Elzholz, all of the Dayton Police Department, testified at the suppression hearing. Their testimony established the following facts:

{¶ 4} At approximately 11:00 p.m. on May 18, 2009, Officers Dedrick and Gustwiller were on patrol in a marked cruiser and wearing police uniforms when they were dispatched to the area of West Hillcrest and Salem Avenue in Dayton on a "check welfare" complaint. The dispatcher relayed that a "black female" wearing a "green shirt" was clutching her stomach, stumbling, and falling down; the underlying circumstances were unknown.

{¶ 5} The officers quickly responded to that location. Upon turning to go eastbound on Hillcrest, the officers observed a burgundy Chevy Caprice parked in a commercial private parking lot approximately 40 yards away. Standing on the driver's side of the vehicle was a woman in a green shirt that "appeared *** to match the description that was given to [them] by dispatch regarding the complaint."

Although the woman's body language suggested that she was involved in an argument, the officers could not hear what was being said. Officer Dedrick did not see signs of physical distress or of any criminal activity.

{¶ 6} Officer Gustwiller continued on Hillcrest and parked the cruiser behind

the Caprice. Two women were in the driver's and front passenger seats and one individual (later identified as Mayberry) was seated in the back seat of the vehicle; the woman in the green shirt was standing outside of the vehicle by the rear driver's side door, which was open.

{¶ 7} Officer Dedrick exited the cruiser "to make contact with the people that were there." For his safety, Officer Dedrick immediately told all of the individuals to show their hands, and he approached the vehicle with his weapon drawn. The women complied with his request. As he approached the passenger side of the Caprice, Officer Dedrick saw Mayberry watching him through the rear window, looking over his left shoulder, then his right, then his left shoulder again; Dedrick testified that Mayberry made "several movements on both sides of his body as he was looking back at me." Although Officer Dedrick repeatedly instructed the individuals to show their hands, Mayberry did not raise his hands so that the officer could see them. Officer Dedrick stated that he tried to keep an eye on the occupants of the vehicle, but it was difficult to see Mayberry's body from his standpoint.

{¶ 8} Officer Gustwiller exited the cruiser, approached the Caprice along the driver's side, and ordered Mayberry to show his hands. Officer Gustwiller saw that Mayberry's hands were underneath the driver's side seat. The officer was not able to see any part of his hands, because a dark-colored blanket or throw rug was across Mayberry's lap and covered Mayberry's arms and hands; however, Officer Gustwiller stated that he could tell that Mayberry "was lunging forward" and that both of his hands were underneath the seat.

{¶ 9} Based on his training and experience, Officer Gustwiller believed that Mayberry had placed a weapon underneath the seat. Gustwiller yelled to Officer Dedrick what he had seen, drew his weapon, and told Mayberry not to move. Mayberry, however, had already pulled his hands out, and Officer Gustwiller could see that he was not then holding a weapon. Gustwiller reached into the car and pulled Mayberry out of the vehicle. Gustwiller placed Mayberry on the ground, handcuffed him, patted him down for weapons, and put him into the back of the cruiser.

{¶ 10} Officer Gustwiller returned to the vehicle, put his head inside, and observed a black pistol under the driver's seat where Mayberry had been reaching. The officer retrieved the weapon, "made it safe," and secured it in the cruiser. The magazine contained six rounds; none was in the chamber.

{¶ 11} Officer Dedrick asked the two women to get out of the Caprice. While Officer Gustwiller dealt with Mayberry, Officer Dedrick addressed the women. The women and the car were later released.

{¶ 12} Officer Gustwiller returned to the cruiser and read Mayberry his *Miranda* rights. Gustwiller asked Mayberry if he wanted to talk, and Mayberry responded, "No." Gustwiller did not speak with Mayberry further at the scene. Afterward, the officers transported Mayberry to the Montgomery County Jail. While driving to the jail, the officers could hear Mayberry kicking the floorboard and the metal piece behind the front passenger seat where Officer Dedrick was seated. Upon arriving at the jail's sally port, a crack pipe was retrieved from the left front pocket of Mayberry's windbreaker-type jacket and a piece of brillo was found on the

floorboard just behind passenger seat.

{¶ 13} The following morning, Mayberry was interviewed by Detective William Elzholz, at which time he made incriminating statements. Mayberry was subsequently indicted for carrying a concealed weapon, having a weapon while under disability, possession of drug paraphernalia, and tampering with evidence.

{¶ 14} On July 1, 2009, Mayberry moved to suppress the gun, the drug paraphernalia, and any other items seized from him at the time of his arrest, as well as any statements that he made subsequent to his arrest. Mayberry argued that the officers unlawfully detained, searched, and questioned him.

{¶ 15} After a hearing, the trial court denied Mayberry's motion. The court found that the officers "had a reason for approaching the car and its passengers when they spotted a woman matching the description given in the check welfare dispatch standing outside of the car." The court further found that the officers had reasonable safety concerns given Mayberry's furtive movements, the time of day, their presence in a high-crime area,¹ and that there were four individuals in or around the car, each of whom may have been able to access the pistol. The court further concluded that Officer Gustwiller's subsequent search of the vehicle was properly limited to where he had observed Mayberry's hands, that Mayberry's subsequent arrest and search were lawful, and that Mayberry's statements were

¹Although this factor alone is never controlling, we can find no testimony in the record that this occurred in a "high-crime area." The only reference was that the officers were assigned to the Phoenix Project, which "was put in place by City Wide Development and Good Sam[aritan] Hospital to address criminal activity in an eight-square block area around Good Sam Hospital."

validly given.

{¶ 16} A week later, Mayberry pled no contest to carrying a concealed weapon, tampering with evidence, and having a weapon while under disability. In exchange for the plea, the possession of drug paraphernalia charge was dismissed. Mayberry was sentenced accordingly.

II.

{¶ 17} Mayberry's sole assignment of error claims that the trial court erred in overruling his motion to suppress.

{¶ 18} In addressing a motion to suppress, the trial court assumes the role of the trier of fact. *State v. Morgan*, Montgomery App. No. 18985, 2002-Ohio-268, citing *State v. Curry* (1994), 95 Ohio App.3d 93, 96. The court must determine the credibility of the witnesses and weigh the evidence presented at the hearing. *Id.* In reviewing the trial court's ruling, an appellate court must accept the findings of fact made by the trial court if they are supported by competent, credible evidence. *Id.* However, "the reviewing court must independently determine, as a matter of law, whether the facts meet the appropriate legal standard." *Id.*

{¶ 19} 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. Not all interactions between citizens and the police, however, constitute seizures. Rather, the interactions between citizens and law enforcement officers can fall within three distinct categories: a consensual encounter, an investigatory detention, and an arrest. *State v. Taylor* (1995), 106 Ohio App.3d 741, 747-749.

{¶ 20} Consensual encounters occur when the police merely approach a person in a public place and engage the person in conversation, and the person remains free not to answer and to walk away. *United States v. Mendenhall* (1980), 446 U.S. 544, 553, 100 S.Ct. 1870, 1876, 64 L.Ed.2d 497, 504-505. The encounter remains consensual even if the officer asks questions, requests to examine an individual's identification, and asks to search the person's belongings, provided that the officer does not convey that compliance is required. *Florida v. Rodriguez* (1984), 469 U.S. 1, 4-6, 105 S.Ct. 308, 83 L.Ed.2d 165, 169-171; *Florida v. Bostick* (1991), 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389. "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." (Citations omitted) *Taylor*, 106 Ohio App.3d at 747-48.

{¶ 21} An individual is subject to an investigatory detention 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 was compelled to respond to questions. *Mendenhall*, 446 U.S. at 553; *Terry*, 392 U.S. at 16, 19. 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, ¶10, citing *Terry*, supra.

{¶ 22} "Reasonable suspicion entails some minimal level of objective

justification for making a stop – that is, something more than an inchoate and unparticularized suspicion or ‘hunch,’ but less than the level of suspicion required for probable cause.” *State v. Jones* (1990), 70 Ohio App.3d 554, 556-557, citing *Terry*, 392 U.S. at 27. We determine the existence of reasonable suspicion of criminal activity by evaluating the totality of the circumstances, considering those circumstances “through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold.” *State v. Heard*, Montgomery App. No. 19323, 2003-Ohio-1047, ¶14, quoting *State v. Andrews* (1991), 57 Ohio St.3d 86, 87-88.

{¶ 23} The final category is a seizure that is the equivalent of an arrest. “A seizure is equivalent to an arrest when (1) there is an intent to arrest; (2) the seizure is made under real or pretended authority; (3) it is accompanied by an actual or constructive seizure or detention; and (4) it is so understood by the person arrested.” *Taylor*, 106 Ohio App.3d at 749, citing *State v. Barker* (1978), 53 Ohio St.2d 135, at syllabus. An arrest must be based on probable cause.

{¶ 24} In this case, Officers Dedrick and Gustwiller went to the intersection of Hillcrest and Salem Avenue in order to check on the welfare of a woman in a green shirt, who was reportedly clutching her stomach, stumbling, and falling down. When the officers arrived at that location, they saw a woman in a green shirt talking to individuals in a parked vehicle; at that time, they did not observe any sign that the woman was ill or in distress or that she or the other individuals were engaged in criminal activity.

{¶ 25} Both officers testified that Officer Gustwiller parked the cruiser behind

the Caprice. “Generally, when a police officer merely approaches and questions persons seated within parked vehicles, a consensual encounter occurs that does not constitute a seizure so as to require reasonable suspicion supported by specific and articulable facts.” *State v. Jones*, Franklin App. No. 09AP-1053, 2010-Ohio-2854, ¶20. There is no indication in the record that the officers activated the cruiser’s overhead emergency lights or took any other action, while both officers were still seated inside the cruiser, to inform the four individuals that they were initiating an investigatory detention. Contrast *State v. Little*, Clark App. No. 09-CA-122, 2010-Ohio-2923, ¶9 (stating that “the activation of overhead flashing lights by police officers in a marked police cruiser is a universally understood signal *** 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.”). Rather, at the time Officer Gustwiller parked the cruiser, the officers had done nothing more than begin a consensual encounter.

{¶ 26} However, when Officer Dedrick exited the police cruiser, he approached the car from the passenger side with his weapon drawn and commanded everyone in the car to “show your hands.” Officer Gustwiller testified that he was not certain whether everyone immediately showed their hands once Officer Dedrick exited the cruiser, but he “continue[d] to hear Officer Dedrick order everybody in the vehicle to show their hands.” Once Officer Gustwiller “knew [his] car was safe and secure,” he “immediately” got out of the cruiser and approached the Caprice from the driver’s side. Officer Gustwiller testified that, while he was approaching, “I knew Officer Dedrick was giving commands. I let him continue.

But once I made my way around to where I could actually see into the back seat due to the fact that the back door was open *** I started to address Mayberry and at that time, I ordered him to show his hands due to the fact that I had a clear view of him.”

{¶ 27} The threatening presence of several officers, the officer’s wearing of a uniform, the officer’s display of a weapon, and the officer’s use of language or a tone of voice conveying that compliance is compelled are among various factors that indicate that an encounter is not consensual. *State v. Saunders*, Montgomery App. No. 22621, 2009-Ohio-1273, ¶16, quoting *State v. Schott* (May 16, 1997), Darke App. No. 1415. Officer Dedrick’s conduct of approaching the vehicle with his weapon drawn and ordering the occupants to show their hands, along with Officer Gustwiller’s subsequent orders to Mayberry, constituted a display of authority such that the four individuals would not have believed that they were free to leave but, instead, that they were compelled to comply with the officers’ orders. Accordingly, upon exiting the cruiser, the officers initiated an investigatory detention, which was lawful only if they had a reasonable and articulable suspicion of criminal activity when the detention began.²

{¶ 28} Nothing in the officers’ testimony indicates that the officers, at that point in time, had a reasonable and articulable suspicion of criminal activity to warrant an investigatory detention under *Terry*. Both officers testified that they

²At oral argument, the State agreed that, in these circumstances, the four individuals would not have felt free to leave when the officer, with weapon drawn, instructed them to show their hands and, consequently, that a *Terry* stop occurred.

were dispatched on a “check welfare” complaint regarding a woman in a green shirt who appeared to be injured. When an investigative stop is made in sole reliance upon a police dispatch, the State must demonstrate at the suppression hearing that the facts precipitating the dispatch justified a reasonable suspicion of criminal activity. *Id.* “This can be accomplished in either of two ways. The State may show that the source had previously provided the officer information that proved to be correct. Or, if that prior experience is lacking or the source was anonymous, the State may show that subsequent events corroborated the substance of the tip. *Illinois v. Gates* (1983), 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527. However, the corroboration must demonstrate that the tip was ‘reliable in its assertion of illegality, not just its tendency to identify a determinate person.’” *State v. Yeatts*, Clark App. No. 02CA45, 2002-Ohio-7285, at ¶12, citing *Florida v. J.L.* (2000), 529 U.S. 266, 272, 120 S.Ct. 1375, 146 L.Ed.2d 254. In this case, the circumstances underlying the dispatch were unknown, and nothing in the dispatch suggested that the woman in the green shirt was engaged in criminal activity.

{¶ 29} Moreover, Officer Dedrick acknowledged that he did not see any signs of criminal activity when the officers observed a woman in a green shirt standing by the parked car; both officers also testified that the woman in a green shirt did not appear to be clutching her stomach or otherwise in physical distress. It appeared to both officers that the woman in green was arguing with someone inside the vehicle; however, neither officer could hear what was being said. When asked on cross-examination, “And so you walk up with no warrant and no signs of criminal activity and you say put your hands up or show your hands,” Officer Dedrick

responded affirmatively. When later asked, “So you approached this vehicle, weapon drawn, for a welfare check,” Officer Dedrick answered, “Absolutely.” Both officers testified that they acted out of concern for officer safety. Based on the testimony, at the time the officers began the *Terry* stop, the officers had not observed any conduct on the part of the woman in the green shirt or the occupants of the Caprice that would create a reasonable and articulable suspicion of criminal activity.

{¶ 30} We are not unsympathetic to the argument that the officers approached Mayberry and the others as they did out of concern for their own safety. Although their actions are understandable, the fact remains that the investigatory detention in this case was not constitutionally permissible given the circumstances surrounding the seizure. Prior to exiting the cruiser, the officers had no reason to believe that any of the individuals was armed and was engaging in criminal activity. Nevertheless, the seizure here involved at least one officer approaching the group with his weapon drawn and ordering the individuals to show their hands. Under these circumstances, the seizure of Mayberry was unreasonable under the Fourth Amendment. See, also, *State v. Wilson*, Montgomery App. No. 22001, 2007-Ohio-6581 (affirming the suppression of evidence when at least one uniformed officer approached a passenger in a parked vehicle with his gun drawn and ordered the passenger to put his hands up based on a report that the passenger had a handgun in the car, but without any individualized suspicion that the passenger had engaged in any criminal activity).

{¶ 31} The assignment of error is sustained.

III.

{¶ 32} The judgment of the trial court will be reversed, and the matter will be remanded for further proceedings.

.....

BROGAN, J. and FAIN, J., concur.

Copies mailed to:

Michele D. Phipps
Victor A. Hodge
Hon. Connie S. Price