

[Cite as *State v. Clack*, 2010-Ohio-5747.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23715
v.	:	T.C. NO. 09CR1552
	:	
ALVIN CLACK, JR.	:	(Criminal appeal from Common Pleas Court)
	:	
Defendant-Appellant	:	

OPINION

Rendered on the 24th day of November, 2010.

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CANNON, J. (by assignment)

{¶ 1} Appellant, Alvin Clack, Jr., appeals the judgment of the Montgomery County Court of Common Pleas denying his motion to suppress evidence. For the reasons stated herein, this court reverses and remands the judgment of the trial court.

{¶ 2} At approximately 3:44 a.m., Officer Scott Fitzgerald, a 17-year veteran with

the Miami Township Police Department, was patrolling the area of Studio Six in a marked police cruiser. Officer Fitzgerald described Studio Six as a “low-end motel” known for prostitution and drug activity. In fact, Officer Fitzgerald had made several drug and prostitution arrests at Studio Six.

{¶ 3} Officer Fitzgerald observed a Chevy Silverado, driven by a white male, pass by his police cruiser. Officer Fitzgerald ran the Silverado’s license plate; it had been reported stolen from the city of Dayton. Officer Fitzgerald requested back-up.

{¶ 4} Within 15 seconds, Officer Ooten, also a 17-year veteran of the Miami Township Police Department, arrived at the scene. Each officer secured a side of the hotel. As Officer Fitzgerald pulled further into the parking lot, he observed two individuals walking from the south parking area, where the truck was parked. The two individuals were walking toward the middle door of the hotel, which was being held open by a black male, later identified as Clack.

{¶ 5} Officer Fitzgerald stated that he was unable to say if Clack had been in the vehicle. Officer Fitzgerald noted that Clack was a person of interest in his investigation of the stolen truck; however, there is nothing in the record to suggest this was the case other than the fact Clack was at a doorway and appeared to be holding the door open for someone.

Officers Fitzgerald and Ooten then approached the three individuals, all of whom were outside the hotel. Being that a stolen vehicle was involved, Officer Fitzgerald was concerned for his and Officer Ooten’s safety. Therefore, each individual, including Clack, was detained and handcuffed and a pat-down search for weapons was conducted. No weapons were found on Clack’s person.

{¶ 6} Officer Duffey then arrived at the scene. Officer Duffey observed Clack “moving around.” As he approached Clack, he noticed a baggie containing a white substance lying on the ground within several inches of his hand.

{¶ 7} Clack was indicted on one count of possession of drug abuse instruments, one count of possession of drug paraphernalia, and one count of possession of cocaine.

{¶ 8} Clack filed a motion to suppress the evidence seized and the statements made during this incident. In his motion, Clack contended that the evidence was recovered as a result of his unlawful search and seizure, and, therefore, the evidence must be suppressed. Following a hearing on said motion, the trial court denied Clack’s motion. The trial court found that Officer Fitzgerald’s observations amounted to a reasonable, articulable suspicion of criminal activity that would permit a stop under *Terry v. Ohio* (1968) 392 U.S. 1.

{¶ 9} Clack filed a timely notice of appeal and asserts the following assignment of error:

{¶ 10} “The Arresting Officer’s Reliance on Another Party Driving a Stolen Vehicle is Insufficient to Establish the Reasonable Suspicion to Stop the Appellant under *Terry v. Ohio*. ***”

{¶ 11} On a motion to suppress, this court “must accept the trial court’s findings of fact if they are supported by competent, credible evidence.” *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶8, citing *State v. Fanning* (1982), 1 Ohio St.3d 19. “Accepting those facts as true, we must independently determine as a matter of law, without deference to the trial court’s conclusion, whether they meet the applicable legal standard.” *State v. Retherford* (1994), 93 Ohio App.3d 586, 592.

{¶ 12} Clack challenges only whether his initial stop violated his constitutional rights. Clack maintains that, based on the facts of the instant case, the police officers did not have sufficient, articulable facts to form the reasonable suspicion necessary to conduct a stop under *Terry v. Ohio*, supra. Clack argues that it was error for the trial court to rely on the fact that a “third party was allegedly driving a stolen vehicle” to justify his stop. We agree.

{¶ 13} Under the Fourth Amendment, searches and seizures conducted without a warrant based on probable cause are unreasonable unless the search falls within an exception to this requirement. *Katz v. United States* (1967), 389 U.S. 347, 357. One exception to the warrant requirement was articulated in *Terry v. Ohio*, 392 U.S. at 30.

{¶ 14} “The investigative stop exception to the Fourth Amendment warrant requirement allows a police officer to stop and briefly detain an individual if the officer possesses a reasonable suspicion, based upon specific and articulable facts, that criminal activity ‘may be afoot.’ *** To justify an investigative stop, the officer must be able to articulate specific facts which would warrant a person of reasonable caution in the belief that the person stopped has committed or is committing a crime. ***

{¶ 15} “A valid investigative stop must be based upon more than a mere ‘hunch’ that criminal activity is afoot. *** Reviewing courts should not, however, ‘demand scientific certainty’ from law enforcement officers. *** Rather, a reasonable suspicion determination ‘must be based on commonsense judgments and inferences about human behavior.’ *** Thus, ‘the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the

evidence standard.’ ***

{¶ 16} “In deciding whether a reasonable suspicion exists, courts must examine the “totality of the circumstances” of each case to determine whether the detaining officer has a “particularized and objective basis” for suspecting legal wrongdoing.’ *** The totality of the circumstances approach ‘allows officers to 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.”’ *** Thus, when a court reviews an officer’s reasonable suspicion determination, a court must give ‘due weight’ to factual inferences drawn by resident judges and local law enforcement officers. ***.” *State v. Spindler*, Ross App. No. 01CA2624, 2002-Ohio-2037, at ¶15. (Internal citations omitted.)

{¶ 17} Officer Fitzgerald testified that he was a 17-year veteran of the Miami Township Police Department, that Studio Six was a high crime area, that he had made several drug and prostitution arrests at this location, and that this incident took place at approximately 3:45 a.m. See *State v. Bobo* (1988), 37 Ohio St.3d 177, 179.

{¶ 18} During his testimony, Officer Fitzgerald stated that upon making an initial pass-through of the parking lot, he did not observe: (1) any individual standing at the door, (2) any of the doors to the hotel being propped open, (3) any individual in the hallways of the hotel, as he could see the hallways from the parking lot, or (4) any individual in the parking lot.

{¶ 19} As the Silverado passed Officer Fitzgerald, he ran its plate. The vehicle at issue had been reported stolen. Officer Fitzgerald further testified that although he observed only a white male driving the vehicle, he was unable to ascertain how many individuals were

in the vehicle, as he was trying to observe the vehicle and run its plate. When the second officer arrived, Officer Fitzgerald pulled his police cruiser further into the parking lot. At this time, he observed two individuals, the driver and a female, walking from the south side of the parking lot toward a door being held open by a black male. Clack was holding the door open with his arm while standing on the outside of the building. The two individuals were within 25 feet of Clack. Besides these three individuals, no one else was in the parking lot. The only crime being investigated at this point was theft of a motor vehicle. Other than the fact that Clack was standing at the door of the hotel holding open a door, there was no testimony as to why it was believed he was involved with the theft.

{¶ 20} On appeal, Clack maintains he was not in the vehicle that was allegedly stolen, that he was not walking with the two individuals, nor did Officer Fitzgerald witness any suspicious behavior. Officer Fitzgerald noted that although he did not observe Clack walking in the parking lot with the two other individuals, he was unaware if Clack had been an occupant in the stolen vehicle. Officer Fitzgerald testified that he could not say if Clack had been “inside the hotel, if he was in the truck, or [if] he was milling around in the parking lot.” While Officer Fitzgerald stated that, at this point, he considered Clack, along with the driver and the female, to be persons of interest in the investigation of the stolen vehicle, he was unable to articulate any facts that could connect Clack to the vehicle in any way. The entire focus of the investigative stop was to determine who was responsible for the stolen vehicle, but there was no reason to believe it was Clack. The record contains no suggestion of furtive movements or gestures. His conduct was more consistent with innocent behavior than with theft of the vehicle in question.

{¶ 21} The fact this was a high crime area does not persuade us to believe that it was reasonable to handcuff and detain Clack. As this court has previously held, “the fact the investigative detention occurred in a high crime area is not by itself sufficient to justify the stop.” *State v. Sheppard* (1997), 122 Ohio App.3d 358, 369. (Citation omitted.) This confirmed the position stated by the Supreme Court of Ohio and this court that “to hold otherwise would result in the wholesale loss of the personal liberty of those with the misfortune of living in high crime areas.” *State v. Carter* (1994), 69 Ohio St.3d 57, 65, adopting this court’s opinion and judgment in *State v. Carter* (Feb. 4, 1993), Montgomery App. No. 13628, 1993 Ohio App. LEXIS 615.

{¶ 22} We find that the above circumstances, when taken as a whole, failed to establish a reasonable, articulable suspicion that Clack was engaged in illegal activity, and, therefore, the officers’ detention and investigatory stop violated the Fourth Amendment. Accordingly, we find merit with Clack’s sole assignment of error and reverse the judgment of the Montgomery County Court of Common Pleas. This matter is remanded to the trial court for further proceedings consistent with this opinion.

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BROGAN, J. and GRADY, J., concur.

(Hon. Timothy P. Cannon, Eleventh District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

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Hon. Michael L. Tucker

