[Cite as *State v. Bell*, 2004-Ohio-1327.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-03-1015

Appellee — Trial Court No. CR-02-2217

v.

Rashawn Bell — **DECISION AND JUDGMENT ENTRY**

Appellant — Decided: March 19, 2004

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and David P. Petermann, Assistant Prosecuting Attorney, for appellee.

Jerome Phillips, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶1} This is an appeal from a judgment of conviction and sentence entered by the Lucas County Court of Common Pleas after defendant-appellant, Rashawn Bell, pled guilty to one count of possession of crack cocaine, a first degree felony. Appellant entered that plea after the trial court denied his motion to suppress evidence seized by officers during a search of his vehicle. Appellant now challenges that ruling through the following assignment of error:

{¶2} "The trial court committed error when it denied the motion to suppress."

{¶3} On June 21, 2002, appellant was indicted and charged with one count of possession of crack cocaine in violation of R.C. 2925.11(A) and (C)(4)(e). The indictment was the result of a search of appellant's vehicle that was conducted by officers of the Toledo Police Department on April 22, 2002. Appellant subsequently filed a motion to suppress the evidence seized in that search, namely crack cocaine. Appellant asserted that the police did not have a lawful basis to search his vehicle in that the officers did not conduct a valid stop and frisk pursuant to *Terry v. Ohio* (1968), 392 U.S. 1, and that his consent to the search was not voluntary.

{¶4} The case proceeded to a hearing on the motion to suppress at which the following evidence was presented. Captain Jackie L. Smith, a 30 year veteran of the Toledo Police Department, testified that on April 22, 2002, at approximately 2:00 p.m., he was on patrol wearing street clothes and driving an unmarked vehicle investigating stolen cars and tires. While driving along the 600 block of Fernwood, an area which he stated was known for criminal activity, Smith observed four to six black males in front of a Suburban passing around an unmarked amber colored pill bottle. When the men saw Smith they scattered in "six different directions" and one individual tried to hide the bottle. Based on his experience in prior drug investigations, Smith believed that drug activity was occurring and decided to investigate. He drove on for a couple of blocks and radioed for uniformed backup crews who arrived within three to five minutes. During that time, Smith could not see the Suburban or the individuals who had scattered.

{¶5} When Smith and the uniformed officers returned to the area, they observed appellant and several other men entering the Suburban. Appellant was climbing into the driver's seat. All got out of the car when they saw the police approach and one individual, later identified as Tyrell Lewis, ran into the house at 656 Fernwood. Smith ran after Lewis, arrested him and charged him with obstruction of official business. The rest of the group was detained for investigation and all were patted down for weapons. Upon questioning by Smith, Bell acknowledged that the vehicle was his. Smith testified that he was interested in searching the Suburban and that when he asked Bell for permission to search the vehicle Bell responded "no problem, go ahead." Smith testified that Bell never asked him to stop and never attempted to limit the search in any way. Smith further testified, however, that when he was searching the back seat of the vehicle, Bell walked around to the rear door, at which point Smith directed Bell to move to the front of the vehicle. Bell complied. During the search of appellant's vehicle, the officers found a cotton sock containing crack cocaine. The sock was in a small jack compartment near the rear of the vehicle. Bell then ran, was caught and hand cuffed, and placed under arrest.

{¶6} Upon cross-examination, Smith affirmed that he did not search appellant's vehicle until Bell consented to the search, although he did not ask Bell to sign an authorization to search form. He also did not recall if any officers drew their weapons but stated that he may have drawn his weapon when Lewis ran into the house. Smith stated that when Lewis did run, the other individuals standing by the Surburban stayed in

place. He also noted that all of the individuals that had been initially detained were free to leave after they were checked for warrants, although he admitted that he did not tell them they were free to go.

{¶7} Officer James Brown, an officer for 24 years, testified as one of the officers assisting Captain Smith. Brown, who is assigned to the motorcycle patrol, stated that upon being called to the scene, he, two or three marked units, and a paddy wagon responded. His testimony corroborated that of Smith. Although he did not recall people initially getting out of the Suburban, he assisted in the *Terry* pat down of appellant and his companions. Brown testified that when Bell was identified as the owner of the Surburban, Bell was asked if the vehicle could be searched. A couple of officers then entered the vehicle. Brown was not asked and did not state Bell's response when asked if the Suburban could be searched. When Bell tried to run upon being arrested, Brown caught him. Brown further stated that until the contraband was found, people were moving around and were not detained, although no one tried to leave the scene.

{¶8} Appellant took the stand and denied seeing any vial. He testified that he entered the car when the officers arrived and that he recognized Captain Smith as "Batman." Appellant stated that he asked Smith why he was being stopped and that Officer Brown responded that Smith would tell him when they were done. Bell acknowledged being asked for consent to search his car, but stated that he responded "You might as well, he's already in there." It was appellant's contention that officers

were already in his vehicle before they asked him for permission to search it. He was never told that he could refuse the search.

{¶9} Finally, Maria Stripling, a resident of the 600 block of Fernwood testified. Stripling stated that on April 22, 2002, she was sitting on her front porch when she witnessed officers search appellant's car. She testified that she heard an officer ask appellant for permission to search the vehicle and that appellant responded "you might as well because the other guy's already in the truck." Stripling stated that two officers were already in the back of appellant's vehicle before one officer asked him for permission to search. Upon cross-examination, Stripling admitted that she was an acquaintance of appellant and that appellant's family lives a couple of houses down from her. She also stated that the officer who asked appellant for permission to conduct the search was wearing a Toledo Police Department uniform.

{¶10} On September 11, 2002, the trial court issued an opinion and judgment entry denying appellant's motion to suppress. The court concluded that Captain Smith had a reasonable articulable suspicion of criminal activity to initiate an investigation of appellant and his cohorts. The court then further found that appellant voluntarily consented to the search of his vehicle. The court determined that this issue turned on the credibility of the witnesses and that the officers' testimony was more credible than that of appellant and Stripling. Because the officers were not required to explain that appellant could refuse the search, and because appellant was not detained or under arrest when he was asked for his permission, the court found that consent was voluntarily given.

{¶11} In light of the court's ruling on his motion to suppress, appellant changed his former not guilty plea to a plea of no contest to one count of possession of crack cocaine in violation of R.C. 2925.11(A) and (C)(4)(e), a first degree felony. The court subsequently found appellant guilty of that charge and sentenced him to a term of four years in prison.

{¶12} In his sole assignment of error, appellant challenges the trial court's ruling on his motion to suppress. Appellant asserts that there was no valid basis for the officers' initial detention of him and that he did not voluntarily consent to the search of his vehicle.

{¶13} Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Davis* (1999), 133 Ohio App.3d 114, 117. The trial court's findings of fact must be accepted as true if supported by competent, credible evidence. *State v. Kobi* (1997), 122 Ohio App.3d 160, 167-168. In this vein, a reviewing court must keep in mind that weighing the evidence and determining the credibility of witnesses are functions of the trier of fact. *State v. DePew* (1988), 38 Ohio St.3d 275, 277. Nevertheless, the trial court's application of the law to the facts must be reviewed de novo. *Kobi*, supra at 168.

{¶14} The Fourth Amendment to the United States Constitution protects citizens from unreasonable searches and seizures. Searches and seizures conducted outside of the judicial process, without a warrant based on probable cause, are per se unreasonable, subject to several specific established exceptions. *Schneckloth v. Bustamonte* (1973), 412

U.S. 218, 219. The burden of proof is on the state to prove that a warrantless search or seizure was a reasonable intrusion. *United States v. Jeffers* (1951), 342 U.S. 48, 51.

{¶15} One of the specific exceptions to the requirements of a warrant based on probable cause is an investigatory detention of an individual reasonably suspected of criminal activity. The reasonable suspicion, however, must be justified by specific and articulable facts which, when viewed in light of the totality of the surrounding circumstances, indicate that the detention was reasonable. *State v. Bobo* (1988), 37 Ohio St.3d 177; *State v. Chatton* (1984), 11 Ohio St.3d 59. During such a brief detention, the officer may conduct a limited pat down search of the detained individual for weapons. *Terry*, supra at 22-24. Appellant's initial detention was conducted under the auspices of *Terry*.

{¶16} Under the circumstances of this case as testified to by Officer Smith, we cannot say that the investigatory stop and detention of appellant was justified under *Terry* and its progeny. After Officer Smith saw the "suspicious" individuals scattering in "six different directions," he left the scene for approximately five minutes. When he returned to the scene, he saw individuals in and around appellant's car. He could not, however, positively identify appellant or any of the individuals who were with him as individuals he had seen earlier with the pill bottle. Rather, Smith testified that when he returned to the scene, he assumed the individuals in and around appellant's car were the same individuals whom he had seen earlier. The United States Supreme Court has specified that a warrantless search must be based on individualized suspicion. *Chandler v. Miller*

(1997), 520 U.S. 305, 313. In order to conduct at *Terry* stop and search of appellant, the officers could only consider appellant's actions and the circumstances surrounding him alone. Id. See, also, *United States v. Patterson* (C.A.6, 2003), 340 F.3d 368, 372. Absent evidence that appellant was among the individuals whom Officer Smith first saw in the vicinity of the Surburban, the officer's suspicion was based on little more than a "hunch." Reasonable suspicion must be based on more than a hunch. *State v. Mesley* (1999), 134 Ohio App.3d 833, 840.

{¶17} The state asserts that the passenger's flight from appellant's Suburban in a high crime area justifies the detention of appellant and others and cites the case of *Illinois v. Wardlow* (2000), 528 U.S. 119 in support. This is the case on which the trial court relied in finding that the initial stop and detention of appellant was justified. In *Wardlow*, however, it was the *suspect's* headlong flight from the police in a high crime area that the United States Supreme Court found created a reasonable suspicion of criminal activity justifying a *Terry* stop of that suspect. The court did not determine that the suspect's flight would justify a detention of others around him who simply stood in the area as the officers approached. We believe it cannot. Indeed, the court in *Wardlow*, at 124, reaffirmed the position that an individual's presence in a "high crime area" standing alone is not enough to support a reasonable, particularized suspicion that the individual is committing a crime. Accordingly, we conclude that Officer Smith's investigatory detention of appellant was not justified.

{¶18} The trial court further concluded, however, that the evidence which appellant sought to suppress was obtained after appellant voluntarily consented to the search of his vehicle. A search based on consent constitutes a waiver of an individual's Fourth Amendment rights and therefore requires more than a mere expression of approval; it must be demonstrated by the totality of all surrounding circumstances that consent to search was freely and voluntarily given. *Schneckloth*, supra at 233. The state has the burden of proving by "clear and positive evidence" that appellant voluntarily consented to a warrantless search. Id. at 222. "Clear and positive evidence" has been held to be equivalent to clear and convincing evidence. *State v. Danby* (1983), 11 Ohio App.3d 38, 41.

{¶19} "Once an individual has been unlawfully detained by law enforcement, for his or her consent to be considered an independent act of free will, the totality of the circumstances must clearly demonstrate that a reasonable person would believe that he or she had the freedom to refuse to answer further questions and could in fact leave." *State v. Robinette* (1997), 80 Ohio St.3d 234, paragraph three of the syllabus. A suspect's knowledge of a right to refuse, however, "is not a prerequisite of a voluntary consent." *Schneckloth*, supra at 234. Rather, it must be determined if a person felt compelled to submit to the officer's questioning in light of the police officer's superior position of authority. *Robinette*, supra at 244-245. The ultimate issue in this determination is whether, at the point of the police officer's questioning, the individual was "seized" within the meaning of the Fourth Amendment. "The distinction between an 'encounter'

and a 'seizure' is that 'a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.' *United States v. Mendenhall* (1980), 446 U.S. 544, 554 ***. In *Mendenhall*, at 554 *** the Supreme Court cited examples of circumstances indicating a seizure even where the person did not attempt to leave, including the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *State v. Pierce* (1998), 125 Ohio App.3d 592, 597.

{¶20} The trial court determined that the matter of consent turned on the credibility of the witnesses. The court then found that Officer Smith's testimony that appellant answered "no problem, go ahead" when asked if his car could be searched, was more credible than appellant's testimony that he consented to the search because officers were already in his car. It is unclear, however, whether the court looked to the surrounding circumstances in determining whether a reasonable person in appellant's position would believe that he had the freedom to refuse to answer further questions and could in fact leave.

{¶21} Based on the surrounding circumstances, as testified to by Officers Smith and Brown, we cannot conclude that a reasonable person in appellant's position would have felt free to refuse to consent to the search of his vehicle or would have felt free to leave. See *State v. Moore*, 6th Dist. No. E-02-249, 2003 Ohio 3983. When Officer

Smith returned to the scene, he was accompanied by four or five marked police units, including a paddy wagon. The presence of a paddy wagon surely suggested more than an investigatory detention or consensual encounter. The officers then approached appellant and his companions who were entering appellant's Suburban. When one of appellant's companions ran, Officer Smith ran after him and arrested him. The officers then patted down appellant and his companions in a search for weapons. These are not the indicia of a consensual police encounter. Under these circumstances, appellant had been "seized" when Officer Smith asked him for consent to search his vehicle and, as such, he was entitled to the protections of the Fourth Amendment.

{¶22} Accordingly, the trial court erred in denying appellant's motion to suppress and the sole assignment of error is well-taken.

{¶23} On consideration whereof, the court finds that appellant was prejudiced and prevented from having a fair trial and the judgment of the Lucas County Court of Common Pleas is vacated. This cause is remanded to that court for further proceedings consistent with this decision. Court costs of this appeal are assessed to appellee.

JUDGMENT VACATED.

Richard W. Knepper, J. _____

JUDGE

Mark L. Pietrykowski, J. _____
CONCUR.

_____

JUDGE

Peter M. Handwork, P.J.,
DISSENTS.

{¶24} HANDWORK, P.J., dissenting. I respectfully dissent. I believe the trial court was in the best position to judge the credibility of the witnesses and its judgment is soundly grounded in law.