[Cite as *State v. Forrest,* 2010-Ohio-5878.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 10AP-481 (C.P.C. No. 09CR-3935)
Al E. Forrest,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on December 2, 2010

Ron O'Brien, Prosecuting Attorney, and *John H. Cousins, IV,* for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Plaintiff-appellant, the State of Ohio, appeals from a decision of the Franklin County Court of Common Pleas granting the motion to suppress of defendant-appellee, Al E. Forrest. Because the trial court erred in failing to make essential findings pursuant to Crim.R. 12(F), we vacate the trial court's decision and remand for Crim.R. 12(F) findings.

I. Facts and Procedural History

{¶2} An indictment filed July 2, 2009 charged defendant with three fifth-degree felonies: (1) one count of possession of heroin, in violation of R.C. 2925.11, (2) one count of trafficking in heroin, in violation of R.C. 2925.03, and (3) one count of possession of

cocaine, in violation of R.C. 2925.11. On November 18, 2009, defendant filed a motion to suppress the narcotics evidence retrieved from his person and his vehicle, arguing police obtained the evidence in violation of the Fourth and Fourteenth Amendments of the United States Constitution and Sections 14 and 16, Article I of the Ohio Constitution. The state filed a memorandum opposing defendant's motion to suppress on February 18, 2010, and the matter was set for hearing.

{¶3} At the suppression hearing held March 1, 2010, Columbus Police Officer Kevin George testified that on May 16, 2009 he and his partner, Officer Mabry, were patrolling a neighborhood of Columbus, Ohio known as Southfield, an area in which George and Mabry had seen many narcotics and weapons offenses. The two officers encountered a 2003 Ford Explorer parked in front of 1571 Omar Drive. Mabry parked the police cruiser, and George exited the cruiser "to talk to the individuals in the vehicle." (Tr. 6.) Upon approaching the driver's side of the Explorer, George observed two men inside the car: defendant in the driver's seat and a man later identified as Mr. Rice in the front passenger's seat.

{¶4} George stated he had not witnessed any criminal activity when he approached the Explorer and still had not observed any criminal violation when he first stood at the driver's side window. Rather, as George approached the driver's side window, the first thing he noticed was the expression on defendant's face. George testified defendant "looked at [him], his eyes enlarged and his mouth dropped open." (Tr. 7.) Mr. Rice then "looked at [him], quickly looked at [him] and then looked straight ahead, would not look over." (Tr. 7.) According to George, "[u]sually it is a sign of nervous behavior, which encompasses * * * a sign of criminal activity, especially to see the police

approach the individuals." (Tr. 7.) Based on his experience in patrolling that neighborhood, George stated those signs of nervousness indicated to him "that obviously something is not right. That is not the normal reaction that [he] get[s] when [he] go[es] out of [his] vehicle to talk to people." (Tr. 8.)

{¶5} Once he arrived at the driver's side door, George saw defendant take "his right hand on his lap, he quickly moves it between himself and the center console, put his hand on his lap, turns toward [George], shifting his shoulders * * * so it is like he is shielding * * * [George's] vision of what is inside the vehicle." (Tr. 8-9.) George stated that upon observing defendant's quick movements with his hand, "for officer safety reasons, [his] first instinct is did he try to hide a weapon?" (Tr. 9.) George then noticed defendant had folded-up money in his left hand.

{¶6} At that point, George ordered defendant out of the vehicle, but defendant rolled up the driver's side window, took the keys out of the ignition, and stayed in the vehicle, even though "there was plenty of room" for defendant to "open his driver's door." (Tr. 19.) George could see defendant at that point was not holding a weapon. George ordered defendant out of the vehicle a second time, but defendant "just looked straight ahead, didn't want to make eye contact with [him]." (Tr. 10.) Fearing defendant was "thinking about fleeing," George opened the driver's door and "reached with [his] left hand to [defendant's] right hand, * * * pulled it across, and then when [he] pulled him across, [he] saw a clear plastic baggie of heroine [sic] between * * * [defendant's] center console and the right side of his body on the seat." (Tr. 10, 24.)

{¶7} While he was pulling defendant with his left hand, George used his right hand to search defendant's waistband for any weapons and defendant's two front

pockets, where he found "roughly $800 in each pocket." (Tr. 12.) George "pulled [defendant] out of the vehicle, searched him further, then placed him in the rear of the cruiser," at which time he considered defendant under arrest. (Tr. 12-13.) After Mabry removed the passenger from the Explorer, George searched the vehicle and "found baggies of cocaine in the driver's door panel." (Tr. 13.)

{¶8} At the close of testimony, the trial court announced from the bench that it would grant defendant's motion to suppress. The court stated in part: (1) "Officer Kevin George and Officer Mabry were patrolling the Southfield neighborhood area of Columbus, Ohio on May 16, 2009 * * * in Franklin County Ohio"; (2) "Officers George and Mabry searched a 2003 Ford Explorer parked at 1571 Omar Drive"; (3) "the officers did not observe any traffic or motor vehicle violations involving the 2003 Ford Explorer"; and (4) "the defendant, Mr. Forrest, was seated in the driver's seat of the 2003 Ford Explorer." (Tr. 32.) "Based on those facts," the trial court "concluded that as a matter of law * * * [t]he officers did not have any reasonable articulable suspicion that criminal activity was afoot. The officers had no probable cause to search the vehicle, and so, finally, the search was in violation of Mr. Forrest's fourth amendment rights." (Tr. 32.)

{¶9} The state requested the trial court provide essential findings pursuant to Crim.R. 12(F). In its May 12, 2010 decision and entry granting defendant's motion to suppress, the trial court included five specific findings of fact, reiterating the four it stated at the suppression hearing and including an additional finding of fact to indicate Omar Drive is located in the area commonly known as the Southfield neighborhood. In the "conclusions of law" section of the decision, the trial court stated (1) "[t]he officers who searched the 2003 Ford Explorer that was occupied by the defendant did not have a

reasonable articulable suspicion that criminal activity was afoot. (Terry v. Ohio (1968), 392 U.S. 1)"; (2) "[t]he officers had no probably [sic] cause to search the 2003 Ford Explorer that was occupied by the defendant"; and (3) "[t]he search of the 2003 Ford Explorer was conducted in violation of the defendant's rights under the Fourth and Fourteenth Amendments of the United States Constitution and in violation of the defendant's rights under Article I, Sections 14 and 16 of the Ohio Constitution." (Decision and Entry, 2.)

II. Assignments of Error

{¶10} The state timely appeals, assigning the following errors:

FIRST ASSIGNMENT OF ERROR

> THE TRIAL COURT MISAPPLIED THE LAW AND INCORRECTLY DECIDED AN ULTIMATE ISSUE IN THE CASE WHEN IT GRANTED DEFENDANT'S MOTION TO SUPPRESS.

SECOND ASSIGNMENT OF ERROR

> THE TRIAL COURT ERRED WHEN IT FAILED TO MAKE ITS ESSENTIAL FINDINGS PURSUANT TO CRIM.R. 12(F).

Because our resolution of the second assignment of error is dispositive, we address the second assignment of error first.

III. Second Assignment of Error – Essential Findings

{¶11} In its second assignment of error, the state argues the trial court erred in failing to make the essential findings required by Crim.R. 12(F). Pursuant to Crim.R. 12(F), "[w]here factual issues are involved in determining a motion, the court shall state its essential findings on the record." The state argues neither the trial court's statements

from the bench at the suppression hearing, nor the findings of fact and conclusions of law in the decision and entry, are sufficient to meet the requirements of Crim.R. 12(F).

{¶12} In particular, the state argues the trial court failed (1) to explain how the evidence at the suppression hearing did not create a reasonable, articulable suspicion to conduct an investigatory stop under *Terry*, (2) to consider the plain view exception to the warrant requirement, (3) to consider the automobile exception to the warrant requirement, and (4) to consider the search incident to a lawful arrest exception to the warrant requirement. See *Columbus v. Lewis* (1991), 77 Ohio App.3d 356, 361, citing *State v. Waddy* (Nov. 2, 1989), 10th Dist. No. 87AP-1159 (noting "essential findings are the fundamental or necessary reasons relied upon by the trial court in reaching its final determination on the issue," and while they "are more than mere conclusions of law" they "need not be as specific as special findings of fact").

{¶13} Initially, the trial court's decision purported to address only the first of the state's four arguments: whether George had a basis to detain defendant when he ordered him out of the vehicle, opened the car door and physically grabbed defendant's arm. If George's action leading to such initial warrantless detention of defendant's person were unlawful, the evidence obtained from such a stop violates the Fourth Amendment as "fruit of the poisonous tree." *Wong Sun v. United States* (1963), 371 U.S. 471, 481, 83 S.Ct. 407, 414; *Mapp v. Ohio* (1961), 367 U.S. 643, 655, 81 S.Ct. 1684, 1691. By contrast, if it were lawful, the state's remaining arguments may be pertinent to resolving defendant's motion.

{¶14} The Fourth Amendment to the United States Constitution as applied to the states through the Fourteenth Amendment, as well as Section 14, Article I of the Ohio

Constitution, prohibits the government from conducting warrantless searches and seizures, rendering them per se unreasonable unless an exception applies. *State v. Mendoza*, 10th Dist. No. 08AP-645, 2009-Ohio-1182, ¶11, citing *Katz v. United States* (1967), 389 U.S. 347, 357, 88 S.Ct. 507, 514. Even so, "not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred" within the meaning of the Fourth Amendment. *Terry v. Ohio* (1968), 392 U.S. 1, 19, fn. 16, 88 S.Ct. 1868, 1878; *Brendlin v. California* (2007), 551 U.S. 249, 254, 127 S.Ct. 2400, 2405.

{¶15} In determining whether a particular encounter constitutes a seizure, and thus implicates the Fourth Amendment, the question is whether, in view of all the circumstances surrounding the encounter, a reasonable person would believe he or she was not free to leave or "not free to decline the officers' requests or otherwise terminate the encounter." *Florida v. Bostick* (1991), 501 U.S. 429, 439, 111 S.Ct. 2382, 2389; *United States v. Mendenhall* (1980), 446 U.S. 544, 554, 100 S.Ct. 1870, 1877; *Michigan v. Chesternut* (1988), 486 U.S. 567, 573, 108 S.Ct. 1975, 1979; *Florida v. Royer* (1983), 460 U.S. 491, 502, 103 S.Ct. 1319, 1326 (plurality opinion). "[T]he crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.' " *Bostick*, 501 U.S. at 437, 111 S.Ct. at 2387, quoting *Chesternut,* 486 U.S. at 569, 108 S.Ct. at 1977. Where the encounter takes place is a factor in deciding whether it constitutes a seizure for purposes of the Fourth Amendment. Id.

{¶16} The United States Supreme Court recognizes three categories of police-citizen interactions: (1) a consensual encounter, which requires no objective justification, see *Bostick*, 501 U.S. at 434, 111 S.Ct. at 2386, (2) a brief investigatory stop or detention, which must be supported by reasonable suspicion of criminal activity, see *Terry*, supra, and (3) a full-scale arrest, which must be supported by probable cause, see *Brown v. Illinois* (1975), 422 U.S. 590, 95 S.Ct. 2254.

{¶17} Here, the state argues the officers had a reasonable, articulable suspicion of criminal activity sufficient to justify a *Terry* investigative stop of defendant. An investigatory stop constitutes a seizure for purposes of the Fourth Amendment. *State v. Guinn* (June 1, 2000), 10th Dist. No. 99AP-630, citing *Terry*, 392 U.S. at 16, 88 S.Ct. at 1877. Under *Terry*, a police officer may stop or detain an individual without probable cause when the officer has reasonable suspicion, based on specific, articulable facts, that criminal activity is afoot. Id. Accordingly, "[a]n investigative stop does not violate the Fourth Amendment to the United States Constitution if the police have reasonable suspicion that 'the person stopped is, or is about to be, engaged in criminal activity.' " *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, ¶35, superseded by statute on other grounds, quoting *United States v. Cortez* (1981), 449 U.S. 411, 417, 101 S.Ct. 690, 695.

{¶18} Reasonable suspicion entails some minimal level of objective justification, "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, 556-57, citing *Terry*, 392 U.S. at 27, 88 S.Ct. at 1883; *State v. Carter* (1994), 69 Ohio St.3d 57, 66 (concluding that a police "officer's inarticulate hunch will not provide a sufficient basis for an investigative stop"). Accordingly, "[a] police officer may

not rely on good faith and inarticulate hunches to meet the *Terry* standard of reasonable suspicion." *Jones* at 557.

{¶19} "[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Royer*, 460 U.S. at 500, 103 S.Ct. at 1325; *United States v. Brignoni-Ponce* (1975), 422 U.S. 873, 881-82, 95 S.Ct. 2574, 2580-81; *State v. Chatton* (1984), 11 Ohio St.3d 59, 63. A person's mere presence in a high-crime area does not suspend the protections of the Fourth Amendment; nor is it a sufficient basis to justify an investigative stop. *Brown v. Texas* (1979), 443 U.S. 47, 52, 99 S.Ct. 2637, 2641; *Carter* at 65; *State v. Chandler* (1989), 54 Ohio App.3d 92, 97. An appellate court views the propriety of a police officer's investigative stop or detention in light of the totality of the surrounding circumstances. *State v. Bobo* (1988), 37 Ohio St.3d 177, paragraph one of the syllabus, approving and following *State v. Freeman* (1980), 64 Ohio St.2d 291, paragraph one of the syllabus.

{¶20} Based on defendant's furtive hand movements and attempt to shield George's view into the vehicle, George's "first instinct" was that defendant perhaps was trying to hide a weapon. (Tr. 9.) Coupling that action with defendant's "nervous" behavior, George feared defendant might try to flee in what George knew to be a high-crime neighborhood. The state argues such factors gave George a reasonable, articulable suspicion to order defendant out of the car; when defendant did not follow this order, Officer George was justified in opening the driver's side door and physically grabbing defendant's arm to remove him from the car. See *State v. Atchley*, 10th Dist. No. 07AP-412, 2007-Ohio-7009, ¶15 (stating a defendant's furtive gestures, when considered with other factors, can support finding of reasonable suspicion), citing *Bobo* at 179; *State v.*

Morris, 10th Dist. No. 09AP-751, 2010-Ohio-1383, ¶16 (noting nervousness is a factor to consider in determining reasonable suspicion), citing *Atchley* at ¶12, 14 (stating a defendant's "open mouth" and "wide eyes" support an officer's characterization of the defendant's behavior as "nervous"); *State v. Andrews* (1991), 57 Ohio St.3d 86, 88 (stating a neighborhood's "reputation for criminal activity is an articulable fact which is a part of the totality of circumstances surrounding a stop to investigate suspicious behavior"), citing *Bobo* at 179.

{¶21} In concluding the officers did not have the requisite reasonable, articulable suspicion under *Terry* to justify an investigative stop, the trial court did not address and resolve the issue the state's evidence presented and any credibility issues it raised. The trial court found, as a matter of fact, that no traffic violation gave police a basis to stop defendant. Apparently based on that factual finding, the trial court concluded the officers lacked a reasonable, articulable basis to detain defendant and further investigate. The state, however, did not premise the lawfulness of the officers' actions on a traffic stop; it argued defendant's facial expressions, his furtive movements, including defendant's "shielding" posture, and the character of the neighborhood presented a basis to conclude the officers had the requisite reasonable, articulable basis to detain defendant and Rice. Neither the trial court's findings of fact nor conclusions of law even acknowledge either the evidence the state presented or the state's argument against defendant's motion to suppress based on that evidence.

{¶22} The trial court's essential findings thus fail to explain its decision to grant defendant's motion to suppress. Instead, the trial court should articulate in its findings of facts the evidence on which it premised its conclusion that the officers "did not have a

reasonable articulable suspicion that criminal activity was afoot." (Decision and Entry, 2.) In doing so, the court should indicate how or why the state's evidence, including George's other observations regarding defendant's nervous behavior and furtive gestures affects, either positively or negatively, whether the officers had a reasonable, articulable suspicion criminal activity was afoot. See *State v. Spain*, 10th Dist. No. 09AP-331, 2009-Ohio-6664, ¶28 (finding the trial court erred in making conclusory finding of duress without explaining the factual findings it found essential to that determination), citing *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, ¶99.

{¶23} Because the trial court did not make critical determinations or findings that disclose why the state's evidence failed to present a basis to detain defendant under *Terry*, the record is insufficient to allow this court to review the trial court's decision to grant defendant's motion to suppress. Accordingly, we reverse the trial court's decision and entry and remand this matter for findings of fact and conclusions of law that explain why the evidence the state submitted warrants whatever decision the trial court renders regarding whether the officers possessed a requisite reasonable, articulable suspicion under *Terry* to detain defendant. *Spain* at ¶29, citing *State v. Ogletree*, 8th Dist. No. 86285, 2006-Ohio-448, ¶15-17 (noting import, under Crim.R. 12(F), for trial court to make "essential findings" on the record to provide appellate court with sufficient basis to review assignments of error relating to factual issues in pre-trial motions, and remanding case to trial court to make findings necessary to resolve "fact-intensive" issue of consent). Should the court determine the detention was proper under *Terry,* it will have the opportunity to address the state's remaining argument concerning exceptions to the Fourth Amendment's warrant requirement.

IV. Disposition

{¶24} Based upon the foregoing, the state's second assignment of error is sustained to the extent indicated, rendering the state's first assignment of error premature. We vacate the judgment of the Franklin County Court of Common Pleas and remand this matter to that court for Crim.R. 12 findings.

Judgment vacated;
case remanded.

TYACK, P.J., and SADLER, J., concur.

_____