

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
FAYETTE COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2010-12-037
 :
 - vs - : OPINION
 : 9/26/2011
 :
 TRAVIS L. MOORE, JR., :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
Case No. 10CRI00047

Jess C. Weade, Fayette County Prosecuting Attorney, 1st Floor Courthouse, 110 East Court Street, Washington, C.H., Ohio 43160, for plaintiff-appellee

Elizabeth C. Scott, 130 West Second Street, Suite 1600, Dayton, Ohio 45402, for defendant-appellant

HUTZEL, J.

{¶1} Defendant-appellant, Travis L. Moore, appeals a decision of the Fayette County Court of Common Pleas denying his motion to suppress.

{¶2} On March 26, 2010, appellant was indicted on one count of theft in violation of R.C. 2913.02, a felony of the fifth degree. On July 2, 2010, appellant moved to suppress any statements he made while in police custody and any evidence obtained as fruit of those

statements.

{¶3} At a suppression hearing, Deputy Eric J. Scott of the Fayette County Sherriff's Office testified on behalf of the state. His testimony revealed that on March 14, 2010, the Fayette County Sheriff's Office received a call around 3:15 p.m. from Prime One Mall Security regarding a theft complaint from the Old Navy Outlet store and dispatched him to investigate. Deputy Scott was told by dispatch that at least one black female and a black male departed the mall in a white Pontiac with an Ohio temporary vehicle registration and was given the registration number. Dispatch conveyed that the black male was of slender build and was wearing white tennis shoes and a red shirt.

{¶4} Deputy Scott located a vehicle matching the description near the mall traveling westbound on U.S. Route 35, before State Route 435, and conducted a traffic stop. A black male matching the description was in the back seat of the vehicle. He was of slender build, wearing white tennis shoes, and a red shirt was near his feet. Deputy Scott told everyone in the car why he stopped them, then told them that Old Navy was not going to file charges for the theft, but wanted their merchandise returned. Deputy Scott placed appellant, who was not handcuffed, in the back seat of his cruiser to question him. While appellant gave Deputy Scott inconsistent answers to questions posed, he continually denied any wrongdoing.

{¶5} Deputy Scott transported appellant in the back seat of his cruiser to the mall in order to further question him and watch the surveillance video from Old Navy. The other passengers and driver followed in the white Pontiac. When they returned to the mall, the driver of the white Pontiac rolled down her window, signaled Deputy Scott to come talk to her, and told him that appellant asked her to hold onto two bags. Deputy Scott testified that these were "the two bags * * * in question from the Old Navy store." Also, the driver indicated that while they were shopping, appellant asked for the keys to place some things in her car. The driver gave Deputy Scott written permission to search the entire vehicle. In the trunk, Deputy

Scott found more merchandise that "nobody could provide any receipts for," including merchandise from the Coach store located at the mall.

{¶6} After discovering the additional merchandise, Deputy Scott asked mall security to contact the other stores to see if they wanted to pursue criminal charges. Deputy Scott obtained a written statement from the driver of the vehicle regarding what she had told Deputy Scott, then went back to his police cruiser and read appellant his *Miranda* rights. Appellant initialed beside each *Miranda* right, did not indicate he had any questions, did not request an attorney, and signed a written *Miranda* waiver. Deputy Scott then questioned appellant in the back of his cruiser for approximately ten minutes and appellant made a statement regarding the Coach merchandise.

{¶7} After the suppression hearing, the trial court overruled the motion to suppress, finding that the stop was based on reasonable and articulable suspicion, consent to search was obtained from the vehicle owner, *Miranda* waivers were appropriate, no threats or promises were made, and appellant's *Miranda* waiver was knowing, intelligent, and voluntary.

{¶8} On August 10, 2010, appellant entered a no contest plea. Appellant was subsequently sentenced to 16 days in the Fayette County Jail and two years of community control.

{¶9} Appellant appeals the trial court's overruling of his motion to suppress and raises two assignments of error.

{¶10} Before we address appellant's assignments of error, we must look at the appropriate standard for appellate review regarding a motion to suppress. Reviewing a motion to suppress involves a mixed question of fact and law. *State v. Long* (1998), 127 Ohio App.3d 328, 332. The trial court is in the best position to decide questions of fact and is able to evaluate witness credibility. *State v. Baughman*, 192 Ohio App.3d 45, 2011-Ohio-162, ¶12. An appellate court must accept the trial court's findings of fact if supported by

competent, credible evidence. *Id.* Then the appellate court reviews whether the trial court applied the appropriate legal standard as a matter of law, without deference to the trial court. *Id.* We have reviewed the record and believe that the trial court's findings of fact are supported by competent, credible evidence. See *id.* at ¶13.

{¶11} For convenience of analysis, we will address appellant's assignments of error out of sequence.

{¶12} Assignment of Error No. 2:

{¶13} "THE TRIAL COURT ERRED IN NOT SUPPRESSING STATEMENTS MADE IN THE BACK OF THE POLICE CRUISER PRIOR TO BEING ADVISED OF HIS MIRANDA WARNINGS."

{¶14} Appellant argues that he "was in custody during the interrogation because he was ordered [sic] the back of the cruiser, he was a suspect in the theft, and his freedom to leave was restricted;" therefore, he was subjected to custodial interrogation and his initial statements made in the back of the cruiser should have been suppressed.

{¶15} *Miranda* rights must be given "when questioning by law enforcement officers rises to the level of custodial interrogation." *In re J.B.*, Butler App. No. CA2004-09-226, 2005-Ohio-7029, ¶53, citing *State v. Gumm*, 73 Ohio St.3d 413, 429, 1995-Ohio-24. Custodial interrogation is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona* (1966), 384 U.S. 436, 444, 86 S.Ct. 1602.

{¶16} To determine whether a person is in custody for *Miranda* purposes, the "courts must first inquire into the circumstances surrounding the questioning and, second, given those circumstances, determine whether a reasonable person would have felt that he or she was not at liberty to terminate the interview and leave." *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, ¶27, citing *Thompson v. Keohane* (1995), 516 U.S. 99, 112, 116 S.Ct. 457.

"Where a suspect has not been formally arrested, 'the restraint on the suspect's freedom of movement must be significant in order to constitute custody.'" *In re J.B.* at ¶54, quoting *State v. Coleman*, Butler App. No. CA2001-10-241, 2002-Ohio-2068, ¶23.

{¶17} According to the Ohio Supreme Court, an arrest occurs when the following elements are met: "(1) an intent to arrest, (2) under a real or pretended authority, (3) accompanied by an actual * * * seizure or detention of the person, and (4) which is so understood by the person arrested." *State v. Barker* (1978), 53 Ohio St.2d 135, 139. "[A]n arrest, in the technical, as well as the common sense, signifies the apprehension of an individual or the restraint of a person's freedom in contemplation of the formal charging with a crime." *State v. Darrah* (1980), 64 Ohio St.2d 22, 26. However, the United States Supreme Court decision, *Dunaway v. New York* (1979), 442 U.S. 200, 99 S.Ct. 2248, "has been interpreted to mean that detention for custodial interrogation is procedurally equivalent to an arrest." *State v. Grant* (July 14, 1989), Ashtabula App. No. 1362, 1989 WL 78586 at *4, citing *United States v. Nembhard* (C.A.6, 1982), 676 F.2d 193, 204.

{¶18} Nonetheless, "[c]onfining an individual to the police cruiser is not a custodial placement if it is part of the investigation, even if the suspect in the police cruiser is not free to leave." *State v. Haines*, Clermont App. No. CA2003-02-015, 2003-Ohio-6103, ¶13. "Having an individual sit in a police cruiser for a short time to answer a few questions does not necessarily elevate the situation to something greater than an ordinary traffic stop." *State v. Johnson* (May 1, 2000), Clermont App. No. CA99-06-061, at 8, citing *State v. Warrell* (1987), 41 Ohio App.3d 286, 287. This is true if the individual is being requested to stay while relevant facts are ascertained. *Id.*

{¶19} Here, the trial court found that appellant "was placed in the back of the cruiser, [and] preliminary interrogation went on." The trial court also found that appellant "was in detention." The trial court having found appellant to be in detention, we must analyze the

circumstances surrounding the questioning and whether a person under the same or similar circumstances would feel free to leave.

{¶20} Deputy Scott testified that he did not intend to arrest appellant regarding the Old Navy theft, and testified that he communicated that to appellant. However, appellant was placed in the back seat of the cruiser and questioned by Deputy Scott regarding his whereabouts and the Old Navy theft. According to Deputy Scott, appellant admitted to being at Old Navy, but stated "he didn't have any bags other than his friend had a small bag." Deputy Scott also testified that appellant stated he went to the Cinnabon shop at the mall to eat, although the Cinnabon shop located at the mall had been closed for about one year. During this time, while appellant was not handcuffed, he was locked in the back seat of the cruiser and questioned by Deputy Scott. This, in and of itself, may not give rise to *Miranda*. However, he was then transported back to the mall in the back seat of the cruiser, heightening his physical restraint. Given the heightened physical restraint and the fact that a reasonable person under the same or similar circumstances would not feel free to leave, we find that *Miranda* rights should have been given to appellant. However, while appellant's pre-*Miranda* statements should have been suppressed, it was not fatal to the state's case.

{¶21} An error that affects a constitutional right may be harmless if it is harmless beyond a reasonable doubt. *State v. Brown*, 65 Ohio St.3d 483, 485, 1992-Ohio-61, citing *Chapman v. California* (1967), 386 U.S. 18, 24, 87 S.Ct. 824. While *Miranda* rights were not given to appellant prior to being transported to the mall, *Miranda* rights were given to appellant at the mall. The United States Supreme Court in *Missouri v. Seibert* (2004), 542 U.S. 600, 124 S.Ct. 2601, outlined factors to determine whether *Miranda* rights delivered after some questioning could be effective. The factors include: "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police

personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." *Id.* at 615.

{¶22} Here, appellant was given his *Miranda* rights after Deputy Scott drove him to the mall in the back seat of the cruiser. According to Deputy Scott's testimony, once they arrived at the mall, the driver of the white Pontiac motioned for him to come over and gave the deputy two bags that she stated appellant told her to "hold onto." Deputy Scott testified that these were the bags "in question from the Old Navy store." The driver also gave Deputy Scott written permission to search the white Pontiac, where he uncovered additional merchandise without receipts from several different stores. At this point, Deputy Scott went to mall security to see if any of the other stores wanted to pursue charges. Here, there was a break in the questioning.

{¶23} With the possibility of theft charges being pursued, Deputy Scott testified that he then read appellant's *Miranda* rights. The trial court found that *Miranda* rights were given and explained in both verbal and written form, and that appellant initialed all of the warnings. The trial court also found that appellant did not have any questions about any particular right, did not request counsel, and signed the waiver. Only at this point did appellant make statements regarding the Coach merchandise. Prior to this point, Deputy Scott had only questioned appellant regarding the Old Navy merchandise because he did not know about any other possible thefts. The second round of questioning resulted in completely new statements from appellant regarding a different store. Although the questioning was performed by the same officer in the same location, there was a break in time and the questioning involved new content, more detailed questions, and more complete answers, thus indicating that appellant's *Miranda* waiver was valid.

{¶24} In addition, while appellant initially gave inconsistent statements, he continually denied any wrongdoing. Therefore, while the suppression of appellant's initial statements

may have been proper, the statements themselves were not incriminating and the additional evidence and statements made after appellant waived his *Miranda* rights could convict appellant beyond a reasonable doubt.

{¶25} Appellant's second assignment of error is accordingly overruled.

{¶26} Assignment of Error No. 1:

{¶27} "THE TRIAL COURT ERRED IN APPLYING THE REASONABLE ARTICULABLE STANDARD TO THE CUSTODIAL DETENTION OF MR. MOORE[.]"

{¶28} Appellant argues that the trial court should have used a probable cause standard of review regarding his detention because the detention "rose from a simple *Terry* stop to a full blown seizure when he was placed in the back of Deputy Scott's cruiser." Appellant states that the seizure "goes even further" when appellant was transported back to the mall.

{¶29} At the suppression hearing, defense counsel argued that the deputy needed probable cause in order to initiate the stop of the vehicle. It appears the trial court applied reasonable and articulable suspicion as the standard in regard to the stop. The trial court found "that the deputy had reasonable and articulable suspicion that this vehicle and or one of its occupants had been involved in the theft offense at Old Navy." However, it is unclear from the record as to what standard the trial court applied regarding appellant's detention.

{¶30} The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures. We will first analyze the stop of the vehicle to determine whether it complied with the Fourth Amendment, and then we will analyze appellant's detention to determine if it complied with the Fourth Amendment.

{¶31} Regarding the stop, there are two types of traffic stops which are subject to different constitutional standards. *Baughman*, 2011-Ohio-162 at ¶14. The first type of traffic stop is a noninvestigatory stop in which an officer has probable cause to stop a vehicle

because he or she observed a traffic violation. *Id.*, citing *Whren v. United States* (1996), 517 U.S. 806, 810, 116 S.Ct. 1769.

{¶32} There is no indication from the record that Deputy Scott observed the driver of the white Pontiac commit a traffic violation. Therefore, probable cause is not the appropriate standard to apply regarding the traffic stop.

{¶33} The second type of traffic stop is an investigative stop, known as a *Terry* stop. *Id.* For a *Terry* stop, the officer must have reasonable suspicion based upon specific or articulable facts that criminal behavior is imminent or has occurred. *Terry v. Ohio* (1968), 392 U.S. 1, 21, 88 S.Ct. 1868. "While the concept of 'reasonable and articulable suspicion' has not been precisely defined, it has been described as something more than an undeveloped suspicion or hunch, but less than probable cause." *Baughman* at ¶15, citing *Terry* at 20-21. A court must look at the "totality of the circumstances" regarding the traffic stop. *State v. Batchili*, 113 Ohio St.3d 403, 2007-Ohio-2204, paragraph two of the syllabus. The circumstances that surround the stop must "be viewed through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training." *State v. Bobo* (1988), 37 Ohio St.3d 177, 179, quoting *United States v. Hall* (C.A.D.C., 1976), 525 F.2d 857, 859.

{¶34} When dispatch receives a tip from an informant, this can constitute reasonable suspicion by itself for an investigative stop if the "tip has sufficient indicia of reliability." *Maumee v. Weisner*, 87 Ohio St.3d 295, 1999-Ohio-68, paragraph two of the syllabus. Courts generally have categorized informants into three groups based on their characteristics: "the anonymous informant, the known informant (someone from the criminal world who has provided previous reliable tips), and the identified citizen informant." *Id.* at 300. While an anonymous tip generally requires independent observation by the police, there is no need for rigorous scrutiny of the basis of knowledge of an identified citizen

informant. *Alabama v. White* (1990), 496 U.S. 325, 329, 110 S.Ct. 2412; *Illinois v. Gates* (1983), 462 U.S. 213, 233-34, 103 S.Ct. 2317. In addition, information from security guards has been deemed reliable, and reasonable suspicion has been found when a police officer relies on information provided by a security guard or store detective. See *State v. Peak*, Lake App. No. 2004-L-124, 2005-Ohio-6422; *State v. Wilks* (Sept. 30, 1993), Montgomery App. No. 13654, 1993 WL 386246; *State v. Rivera* (June 11, 1987), Cuyahoga App. No. 52016, 1987 WL 12604; *State v. First* (Dec. 27, 1995), Summit App. No. CA 17293, 1995 WL 760386.

{¶35} Here, Deputy Scott relied on information that dispatch received from mall security regarding a theft from Old Navy. The information provided was specific; that a black female and a black male departed the mall in a white Pontiac with a specific Ohio temporary vehicle registration. Deputy Scott testified that he "conducted a traffic stop based on the theft offense and the exact matching description of the vehicle * * *." The vehicle was located in the area of the mall on U.S. Route 35 near State Route 435. The information provided by mall security, which may be deemed reliable, proved to be accurate. See *id.* Based on the totality of the circumstances, we conclude that Deputy Scott had reasonable and articulable suspicion to stop the vehicle and the trial court applied the proper standard of reasonable and articulable suspicion to the stop.

{¶36} We will next address whether appellant's detention met the proper standard to comply with the Fourth Amendment of the United States Constitution. Once stopped, an investigatory detention is limited in scope and purpose and may only last as long as it takes for a police officer to dispel or confirm suspicions. *United States v. Sharpe* (1985), 470 U.S. 675, 686, 105 S.Ct. 1568. A seizure of a person occurs under *Terry* when a reasonable person would not feel free to leave and the use of language or tone by the police officer compels a person to answer questions. *United States v. Mendenhall* (1980), 466 U.S. 544,

554, 100 S.Ct. 1870. When a person becomes increasingly more suspicious to a police officer, the officer is permitted to continue to investigate based on this suspicion. *State v. Potter*, Butler App. No. CA2006-07-166, 2007-Ohio-4216, ¶15.

{¶37} In order to arrest a person without a warrant an officer must have probable cause. *Beck v. Ohio* (1964), 379 U.S. 89, 91, 85 S.Ct. 223. The Fourth Amendment's requirement of probable cause does not depend on the definition of "arrest" under state law. *Dunaway*, 442 U.S. at 212. Because we previously determined appellant was subjected to custodial interrogation which is procedurally equivalent to an arrest, probable cause is the proper standard to use for analysis regarding appellant's detention. See *Grant*, 1989 WL 78586 at *4.

{¶38} "Probable cause is generally defined as a reasonable ground of suspicion supported by facts and circumstances sufficiently strong in themselves to warrant a prudent person in believing an accused person has committed or was committing an offense." *State v. Christopher*, Clermont App. No. CA2009-08-041, 2010-Ohio-1816, ¶16, appeal not allowed, 126 Ohio St.3d 1583, 2010-Ohio-4542; *Beck* at 91. "An informant's tip may contribute to the circumstances supporting probable cause to arrest." *State v. Crittenden*, Clermont App. No. CA2001-04-045, 2001-Ohio-8665, at 5.

{¶39} When evaluating probable cause from an informant's tip for a warrantless arrest, an appellate court should review the "totality of the circumstances" surrounding the informant's tip. *Id.* at 5, citing *Gates* at 233. "Under the totality of the circumstances test, an informant's veracity, reliability, and basis of knowledge are all relevant factors in considering the value of the informant's report." *Id.* Generally, even an unidentified informant's tip is deemed trustworthy when corroborated by independent police work. See *State v. Heston* (1972), 29 Ohio St.2d 152, paragraph one of the syllabus. See, also, *Crittenden* at 5. It has been held that an informant's tip is credible when it is subsequently corroborated with the

name or physical description of a suspect, the time or location of an illegal sale, the description of the automobile, or the license plate numbers of the automobile. *Crittenden* at 5-6.

{¶40} Here, Deputy Scott observed a vehicle matching the description given by mall security through dispatch with the exact temporary license plate in the area of the mall, giving rise to reasonable and articulable suspicion to stop the vehicle. When Deputy Scott pulled the white Pontiac over, a black male of slender build wearing white tennis shoes was sitting in the back seat with a red shirt nearby, also matching the description given by mall security through dispatch. Deputy Scott testified he told the passengers in the vehicle that he received a theft complaint from Old Navy and that while Old Navy wanted their merchandise returned, they did not want to pursue charges. Deputy Scott placed appellant in the back seat of his cruiser in order to question appellant outside of the presence of the driver and other passengers. This was allowed to further investigate the complaint. See *Johnson*, Clermont App. No. CA99-06-061, at 8, citing *Warrell*, 41 Ohio App.3d at 287 ("Having an individual sit in a police cruiser for a short time to answer a few questions does not necessarily elevate the situation to something greater than an ordinary traffic stop"). See, also, *Potter* at ¶15.

{¶41} During questioning, appellant admitted to being at Old Navy, but denied having any bags from the store. According to Deputy Scott, dispatch informed him that appellant was seen on a security video going into Old Navy empty handed, but left the store carrying two large bags. Appellant also stated that he went to Cinnabon to eat. However, Deputy Scott testified that Cinnabon had not been in the mall for about one year. Deputy Scott testified that he knew appellant was not being truthful with him. Deputy Scott's transportation of appellant to the mall in the back seat of the cruiser to further question him and view the security video amounted to a custodial detention, despite the fact that Deputy Scott indicated

that he did not intend to formally arrest appellant at this point.

{¶42} The specific information giving rise to the *Terry* stop, the fact that appellant matched the description of the suspect given by mall security through dispatch, the security video of appellant, and the inconsistent answers given by appellant gave rise to sufficient probable cause for Deputy Scott to detain and transport appellant. While the trial court should have applied probable cause as the standard in regard to appellant's detention, because appellate review regarding the applicable legal standard is *de novo* and because we find probable cause existed, appellant was not harmed by the trial court's error.

{¶43} Appellant's first assignment of error is overruled.

{¶44} Judgment affirmed.

POWELL, P.J., and PIPER, J., concur.