

IN THE SUPREME COURT OF OHIO

07-2108

STATE OF OHIO,

Plaintiff-Appellee,

vs.

ERVIN MITCHELL,

Defendant-Appellant

) Supreme Court Case No.:

) App. Case No.: L 07 1092

) Trial Court No.: CR 06 1769

) **APPELLANT'S MEMORANDUM**
) **IN SUPPORT OF JURISDICTION**

APPEAL FROM THE LUCAS COUNTY
COURT OF APPEALS,
SIXTH APPELLATE DISTRICT

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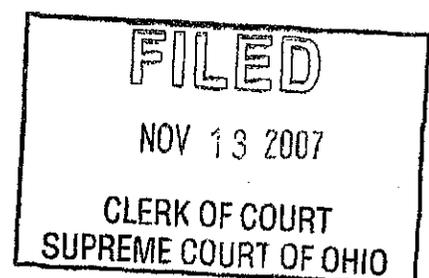


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EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND WHY LEAVE TO APPEAL SHOULD BE GRANTED

The Fourth Amendment to the Constitution of the United States, as applied through the Fourteenth Amendment, and Article I, § 14 of the Ohio Constitution prohibit unreasonable searches and seizures.¹ Warrantless arrests are generally per se unreasonable, subject to specifically established exceptions.² One such exception is the existence of probable cause to believe that a criminal offense has been or is being committed.³ It is axiomatic that a finding of probable cause is to be analyzed by a court using the “totality of the circumstances.”⁴ As this Court has stated:

“An arrest without a warrant is constitutionally invalid unless the arresting officer had probable cause to make it at that time. To have probable cause, the arresting officer must have sufficient information derived from a reasonably trustworthy source to warrant a prudent man in believing that a felony is has been committed and that it has been committed by the accused.”⁵

In the instant case, the Sixth District Court of Appeals found that the police had probable cause to arrest Mr. Mitchell.⁶ The probable cause finding was based on a “verified” tip from an informant and observations made by officers during surveillance.⁷ The record indicates that the tip was, in fact, not verified. The address provided by the informant and the address where the police ultimately found Mr. Mitchell are separated by several blocks. Moreover, many of the observations made by the police were consistent with innocent activity.

¹ *Katz v. United States* (1967), 389 U.S. 347, 357.

² *Katz* at 357.

³ *United States v. Watson* (1976), 423 U.S. 411, 417-424.

⁴ *State v. Homan* (2000), 89 Ohio St.3d 421, 427, 2000-Ohio-212.

⁵ *State v. Timson* (1974), 38 Ohio St.2d 122, 127.

⁶ *State v. Mitchell* (2007), 2007-Ohio-5316 (6th), ¶ 34.

⁷ *Id.* ¶ 34.

Based upon the decision in the instant matter, other decisions from the Sixth District Court of Appeals, and this Court's decision in *State v. Jordan*, there seems to be great confusion concerning the quantum of information required to establish not just probable cause, but also the less-stringent "reasonable, articulable suspicion."⁸

In *State v. Cabell* and *State v. Young*, the Sixth District found that the police lacked probable cause. The facts of those cases are nearly identical to the facts of this matter.

In *Cabell*, the Sixth District noted that the facts known to the officers at the time of the arrest were (1) appellee had sold cocaine to a CI during a controlled buy eight days before his arrest; (2) officers observed appellee driving his van in the general area of Toledo in which the informants said appellee was delivering cocaine; (3) appellee had apparently, according to officers, participated in a sale of cocaine when he pulled into a Bob Evans parking lot and a man momentarily entered appellee's van; and (4) appellee began to exit his mobile home park during the time period in which a CI had said a cocaine transaction was to take place.⁹

The court noted that it could easily discard the "apparent" drug transaction and the sight of the appellee driving his van in the general area, as both activities are entirely commensurate with innocent activity.¹⁰ The court also discarded the act of exiting the

⁸ See *State v. Jordan* (2004), 104 Ohio St.3d 21, 2004-Ohio-6085; *State v. Nelson* (1991), 72 Ohio App.3d 506; *State v. Young* (2005), 2005-Ohio-3369 (6th); *State v. Rivera* (2006), 2006-Ohio-1867 (6th); *State v. Cabell* (2006), 2006-Ohio-4914 (6th); and *State v. Mitchell* (2007), 2007-Ohio-5316 (6th).

⁹ *State v. Cabell* (2006), 2006-Ohio-4914 (6th), ¶ 28.

¹⁰ *Id.* ¶ 29.

mobile home park at the time of the alleged drug deal.¹¹ The State was left with nothing more than a controlled buy that took place 7 days prior to the arrest. As such, the court affirmed the trial court's decision wherein the court found that the police lacked probable cause to make an arrest.

Similarly, the Sixth District found that the police lacked probable cause in *State v. Young*.¹² In *Young*, the police had information that Young had agreed to buy cocaine from a federally indicted defendant.¹³ A deal was arranged to occur on July 30, 2002, with appellant leaving his home at 2:00 p.m.¹⁴ The officer conducting surveillance observed a previously convicted drug dealer enter the house and leave; the brother came to the house who had previously done a controlled buy at the house; and the mother left the house with "somebody".¹⁵ At approximately 2:00 p.m. Young left his home, put "something" into the trunk, and left.¹⁶ The Sixth District acknowledged that none of the observed actions of Young was indicative of criminal activity.¹⁷ In fact, the court noted that the actions were "equally consistent with innocent behavior, such as traveling to a restaurant or store, visiting a friend, or simply "joy-riding."¹⁸ Therefore, "despite the tip information, without something more to indicate criminal activity, appellant's actions were insufficient to establish probable cause."¹⁹ Because the stop and arrest were illegal, all evidence obtained thereafter was tainted.

¹¹ *Id.* ¶ 30.

¹² *State v. Young* (2005), 2005-Ohio-3369 (6th)

¹³ *Ibid.*

¹⁴ *Id.* ¶ 4.

¹⁵ *Id.* ¶ 4.

¹⁶ *Id.* ¶ 5.

¹⁷ *Id.* ¶ 23.

¹⁸ *Ibid.*

¹⁹ *Id.* ¶ 24.

In *State v. Rivera*, the Sixth District found, despite a wealth of information, that the police lacked the quantum of information needed to satisfy the less stringent “reasonable, articulable suspicion” standard. Again, the facts of *Rivera* are nearly identical to the facts of the instant matter. And yet the court found that the circumstances of that case not only failed to meet the standard for a finding of probable cause, but failed to meet the less stringent standard for a reasonable, articulable suspicion.

In *Rivera*, the Sixth District was presented with information similar to the information supplied in the instant matter.²⁰ The police were given a tip from an informant that Mr. Rivera would be at a parking lot of a certain strip mall, between 5:30 and 6:00 p.m., and would be delivering a half kilo of cocaine to the informant.²¹ At 5:45, Mr. Rivera entered the parking lot.²² The police recognized Mr. Rivera from the booking photo. He parked near the informant’s car, began to exit his vehicle, and the police pinned him in and approached with guns drawn.²³ In finding that the police lacked the requisite reasonable, articulable suspicion to conduct the stop, the court noted that “the informant predicted no future behavior by appellant that indicated the informant was either truthful or his information reliable.”²⁴ The court went on to note that the information merely predicted two neutral details: the appellant drove into a public place at a certain time.²⁵ Based upon these facts, the court of appeals found that the police lacked the requisite quantum of information for a reasonable, articulable suspicion, much less probable cause.

²⁰ *State v. Rivera* (2006), 2006-Ohio-1867 (6th).

²¹ *Id.* ¶ 4.

²² *Id.* ¶ 6.

²³ *Id.* ¶ 7.

²⁴ *Id.* ¶ 27.

²⁵ *Ibid.*

Though this Court did not address the issue of probable cause in *State v. Jordan*, the decision supplies some much needed guidance.²⁶ In *Jordan*, this Court noted that a verified tip from an informant, alone, was insufficient to satisfy the less stringent standard of a reasonable, articulable suspicion. But the verified tip coupled with the flight of one of the suspect's compatriots and the suspect's presence in a high-crime area established a reasonable, articulable suspicion. In the instant matter, the court of appeals was presented with an unverified tip from an unknown informant and several observations made by the police. All of which were consistent with innocent activity. The amount of information in the hands of the police at the time of arrest in this case is significantly less than the quantum of information known to the police in *Jordan*. And yet the Sixth District concluded that the information in this case was enough to establish probable cause. It is interesting to note that the information in *Jordan* was enough to establish only a reasonable, articulable suspicion. And that was only after it was bolstered by observations of flight and the suspect's presence in a high-crime area.

Based upon the apparent confusion regarding "probable cause" and "reasonable suspicion", the instant case involves substantial constitutional questions. Furthermore, as this case deals with the quantum of information needed to effectuate a seizure of a citizen of this State, it is clear that this is a matter of public or great general interest. A decision by the Supreme Court of Ohio will provide the much-needed guidance that the courts of appeals need in determining when information is sufficient to satisfy either probable cause or a reasonable, articulable suspicion. Accordingly, leave to appeal should be granted in the instant case.

²⁶ *State v. Jordan* (2004), 104 Ohio St.3d 21, 2004-Ohio-6085.

STATEMENT OF THE CASE

On April 11, 2006, Ervin Mitchell was indicted by the Grand Jury of Lucas County. Mr. Mitchell was charged with Trafficking in Cocaine, a felony of the first degree, Possession of Cocaine, a felony of the first degree, and Assault, a felony of the fourth degree.

On the 8th day of August, 2006, Mr. Mitchell filed a motion to suppress. A hearing was held on that motion October 12. The trial court denied that motion on December 8, 2006. On January 31, 2007 Mr. Mitchell withdrew his previous pleas of not guilty and entered a plea of no contest to the amended charge of Trafficking in Cocaine, a felony of the second degree. On February 26, 2007, the defendant was sentenced to five years in prison and a fine of \$10,000 was imposed.

A timely appeal followed wherein the appellant appealed the trial court's denial of his motion to suppress. On September 28, 2007, the Sixth District Court of Appeals affirmed the trial court's ruling. A motion for reconsideration was filed on October 9 highlighting some of the inconsistencies between the court's findings of fact and the transcript. The court of appeals denied that motion on November 6, 2007.

This appeal and Memorandum in Support of Jurisdiction followed.

STATEMENT OF RELEVANT FACTS

According Detective Awls of the Toledo Police Metro Drug Task Force, he received a tip from a confidential informant that "advised [him] that Mr. Mitchell was conducting narcotics transactions in the 3800 block of Woodland Avenue."²⁷ Detective Awls testified that upon leaving the Safety Building, the police went to the 1300 block of

²⁷ Transcript p. 8, lines 1-3.

Woodland.²⁸ It is worth noting that, ultimately, the arrest was made, not in the 3800 block of Woodland, as supplied by the tip, but in the 1300 block of Woodland Avenue.

In addition to the information regarding the block upon which Mr. Mitchell could be found, the informant told Detective Awls that Mr. Mitchell was driving a burgundy pickup.²⁹ Based on the tip from the informant, the police set up surveillance of Woodland Avenue.³⁰ Detective Renz and Sergeant Marzec were the only officers who could see Mr. Mitchell during the surveillance. They were positioned two blocks from the scene.³¹ During the surveillance, Sergeant Marzec observed Mr. Mitchell talk to one or two people and engage in what appeared to be a hand-to-hand exchange.³² The officers were unable to state that they did, in fact, see an exchange.³³ Moreover, they were unable to say what if anything was exchanged.³⁴ After the exchange, Sergeant Marzec claims, he saw the appellant hold some sort of currency up to the sunlight.³⁵

Shortly after what appeared to the police to be an exchange occurred, the police converged on the appellant. Detective Renz drove toward the appellant and blocked his path while other unmarked vehicles pulled up behind Mr. Mitchell's vehicle.³⁶ Captain Bombreys approached the vehicle with his gun drawn.³⁷

At the hearing, Detective Awls described the seizure of the appellant as an investigative stop. But the State did not dispute at the trial court that, when his vehicle

²⁸ *Id.* p. 10, lines 1-3.

²⁹ *Id.* p. 14.

³⁰ *Id.* p. 23.

³¹ *Id.* p. 10, p. 42.

³² *Id.* p. 59, p. 15, lines 3-5; p. 24, lines 6-8; p. 66, lines 15-18.

³³ *Ibid.*

³⁴ *Id.* p. 24, line 12; p. 26, line 4; p. 59, lines 6-9; p. 66, lines 15-18.

³⁵ *Id.* p. 43.

³⁶ *Id.* p. 64-65.

³⁷ *Id.* p. 65-66.

was blocked in and the police approached with guns drawn, Mr. Mitchell was in fact arrested.³⁸

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1:

The police lacked the quantum of information necessary to satisfy the stringent standard of probable cause to make an arrest as required by the Fourth Amendment to Constitution of the United States and Art. 1 § 14 of the Ohio Constitution.

The Fourth Amendment to the Constitution of the United States, as applied through the Fourteenth Amendment, and Article I, § 14 of the Ohio Constitution prohibit unreasonable searches and seizures.³⁹ Warrantless arrests are generally per se unreasonable, subject to specifically established exceptions.⁴⁰ One such exception is the existence of probable cause to believe that a criminal offense has been or is being committed.⁴¹ It is axiomatic that a finding of probable cause is to be analyzed by a court using the “totality of the circumstances.”⁴² As this Court has stated:

“An arrest without a warrant is constitutionally invalid unless the arresting officer had probable cause to make it at that time. To have probable cause, the arresting officer must have sufficient information derived from a reasonably trustworthy source to warrant a prudent man in believing that a felony is has been committed and that it has been committed by the accused.”⁴³

Just as warrantless arrests done without probable cause are unconstitutional, “any search incident to that arrest is unconstitutional, and any primary or derivative evidence obtained

³⁸ *Id.* p. 30, Judgment Entry file-stamped Dec. 8, 2006, p. 3.

³⁹ *Katz v. United States* (1967), 389 U.S. 347, 357.

⁴⁰ *Katz* at 357.

⁴¹ *United States v. Watson* (1976), 423 U.S. 411, 417-424.

⁴² *State v. Homan* (2000), 89 Ohio St.3d 421, 427, 2000-Ohio-212.

⁴³ *State v. Timson* (1974), 38 Ohio St.2d 122, 127.

subsequent to and as a result of the illegal arrest and search becomes “fruit of the poisonous tree” and must be suppressed.”⁴⁴

In making a probable cause determination, factors that may be considered include: officer’s observations of criminal activity, furtive or suspicious behavior, flight, and the reliability and veracity of an informant’s tips.

The September 28, 2007, decision of the Sixth District Court of Appeals found that the police had probable cause to effectuate an arrest based on the totality of the circumstances. According to the decision, the factors giving rise to the probable cause determination included:

- (1) a verified tip from an informant
- (2) appellant was driving with a suspended license;
- (3) appellant was known to engage in drug trafficking;
- (4) the area in which the arrest occurred was a high crime/drug trafficking area; and
- (5) Detective Marzec observed appellant engage in a hand-to-hand exchange and then hold up money to the sunlight.⁴⁵

The court also acknowledged that after the arrest had been made, the defendant dropped baggies of crack cocaine outside the door of the vehicle.⁴⁶ It is important to note that this action occurred after the police had pinned in Mr. Mitchell’s car, with at least one gun drawn, and, therefore, must not be considered in determining whether probable cause existed before the arrest.⁴⁷ As the appellate court has already acknowledged, “Whether

⁴⁴ *Segura v. United States* (1984), 468 U.S. 796, 804.

⁴⁵ *State v. Mitchell* (2007), 2007-Ohio-5316 (6th).

⁴⁶ *Id.* ¶ 8.

⁴⁷ *State v. Cabell* (2006), 2006-Ohio-4914, ¶ 27. Transcript, p. 47, l. 18-20; p. 66, l. 5-6.

probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest.”⁴⁸

The first factor relied upon by the court in its decision was that the police had a verified tip from an informant. The appellate court dismissed the appellant’s argument that it should have considered the reliability and basis of knowledge of the informant’s tip.⁴⁹ But these two factors should be included in a consideration of the “totality of the circumstances.”⁵⁰ Moreover, a review of the transcript shows that the tipster supplied the police with information that was not only *not* verified, it failed to predict the behavior of Mr. Mitchell. According to Detective Awls, the tip from the informant “advised [him] that Mr. Mitchell was conducting narcotics transactions in the 3800 block of Woodland.”⁵¹ He later testified that upon leaving the Safety Building, they went to the 1300 block of Woodland.⁵² Ultimately, the arrest was made in the 1300 block of Woodland Avenue. As is readily apparent from the testimony, the confidential informant’s tip exhibited little veracity or reliability. The trial court relied on the “verified tip”, as did the appellate court. The appellate court mentioned it no fewer than five times in its decision. Moreover, there was no testimony that the CI had worked with the police previously, and, therefore, no testimony that his tips led to any arrests or convictions.

Based upon the foregoing, the “verified tip” was not verified, and should not have been considered as a factor establishing probable cause. The appellant concedes that the

⁴⁸ *Ibid.*

⁴⁹ *State v. Mitchell* (2007), 2007-Ohio-5316 (6th), ¶ 15.

⁵⁰ See *State v. Rivera* (2006), L 04 1369, ¶ 26.

⁵¹ Transcript, p. 8, l. 1-3.

⁵² *Id.* p. 10, l. 1-3.

informant accurately described the vehicle that Mr. Mitchell would be driving. But this is a neutral detail and, therefore, should not bolster a claim of probable cause.

The court further relied on the officer's knowledge that Mr. Mitchell was driving on a suspended license. But, the transcript reveals that, at the time of the arrest, Sergeant Marzec believed that Mr. Mitchell's suspension expired in "May of 2005."⁵³ The arrest occurred in 2006.⁵⁴ If Sergeant Marzec believed the suspension to expire in May of 2005, then there was no reason for the police to believe he was driving on a suspended license in 2006.

The third probable cause factor relied upon by the appellate court was that the appellant was known to engage in drug trafficking.⁵⁵ In fact, the trial court noted that Mr. Mitchell's license suspension and community control violation were all related to case number CR 03 1655.⁵⁶ It is difficult to say that any weight can be given to an arrest for drugs from 2003 in establishing probable cause in 2006. Three years separated the arrest from the present behavior. As the Supreme Court of the United States noted in *Sibron v. New York*:

" * * * The inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security. Nothing resembling probable cause existed until after the search had turned up the envelopes of heroin. It is axiomatic that an incident search may not precede an arrest and serve as part of its justification. * * *"⁵⁷

⁵³ *Id.* p. 46, l. 23.

⁵⁴ *Id.* p. 7, l. 18-20.

⁵⁵ *State v. Mitchell* (2007), 2007-Ohio-5316 (6th), ¶ 34.

⁵⁶ Transcript, p. 4, l. 5-6; p. 84, l. 10-14.

⁵⁷ *State v. Fahy* (1988), 49 Ohio App.3d 160, at 162, 551 N.E.2d 131, citing *Sibron v. New York* (1968), 392 U.S. 40, 88 S.Ct. 1889.

And as one Ohio appellate court has extrapolated from this simple “association” theory, when an arresting officer knows that a defendant has been arrested for a narcotics violation, the same reasoning applies.⁵⁸ Put more succinctly, the fact that Mr. Mitchell was arrested in 2003 does not support a finding of probable cause in 2006.

Another factor that apparently supported a finding of probable cause was the assertion that Sergeant Marzec had observed appellant engage in a hand-to-hand exchange.⁵⁹ But a review of the transcript reveals that the officers saw no exchange. They merely testified that they saw what appeared to be an exchange.⁶⁰ While it may seem semantic and trivial, there is a great distinction between actually observing an exchange, and merely observing *what appeared to be* an exchange. Not only could the officers not say they witnessed an exchange, they could not say what, if anything, may have been exchanged.⁶¹ Moreover, the appellate court asserted that “Marzec saw a hand-to-hand exchange between the two in which appellant received paper money that he held up to the sunlight and examined.”⁶² But, when the transcript is subjected to greater scrutiny, it is apparent that Marzec did not see the exchange, nor could he say what was exchanged. Instead, he made an assumption.

Q: And the so-called hand-to-hand exchange, did you see what was exchanged?

A: No. I assumed one part was the money because as soon as that happened, he held the bill up.⁶³

⁵⁸ *Ibid.*

⁵⁹ *State v. Mitchell* (2007), 2007-Ohio-5316 (6th), ¶ 34.

⁶⁰ Transcript, p. 15, l. 3-5; p. 24, l. 6-8; p. 66, 15-18.

⁶¹ *Id.* p. 24, l. 12; p. 26, l. 4; p. 59, l. 6-9; p. 66, l. 15-18.

⁶² *State v. Mitchell* (2007), 2007-Ohio-5316 (6th), ¶ 6.

⁶³ Transcript, p. 66, l. 15-18.

From their own testimony, the officers acknowledged that they did not see a hand-to-hand exchange. Only what appeared to be an exchange. And, no one could say whether anything was actually exchanged. This entire investigation, upon which a warrantless arrest was made, was based on assumptions, NO ACTUAL OBSERVATIONS.

Though it is offensive to any member of any community, the appellant acknowledges that some courts have held that activities that would be considered innocuous in affluent areas are cast in a different light in high-crime areas. But considering the foregoing, the police are left with little more than their assertion that Mr. Mitchell was observed in a high crime area, meeting with others on the street, and holding some sort of currency up to the sunlight. It is worth noting that although he was blocks away at the time, the officer made the absurd assertion that he remembers the bill as being a hundred dollar bill.⁶⁴

In its decision, the Sixth District court distinguished many cases from Mr. Mitchell's case. In distinguishing *State v. Cabell*, the court noted that the "alleged criminal activity occurred on days separate from the day he was arrested," whereas in the instant case the observations and the arrest were made on the same day.⁶⁵ But a more thorough review of the facts in *Cabell* reveals that Mr. Cabell had apparently participated in a sale of cocaine earlier on the day of his arrest.⁶⁶ As such, *Cabell* is not distinguishable from the instant matter.

⁶⁴ *Id.* p. 61, l. 17-19.

⁶⁵ *State v. Mitchell* (2007), 2007-Ohio-5316 (6th), ¶ 22.

⁶⁶ *State v. Cabell* (2006), 2006-Ohio-4914, ¶ 28.

Additionally, the appellate court distinguished the instant matter from *State v. Young*.⁶⁷ In so doing, the court noted that the only facts known to the police at the time of Young's arrest, facts that related to criminal activity, were from the "tip."⁶⁸ All of Young's behavior on the day in question was commensurate with innocent behavior. In the instant matter, the court went to great lengths to claim that Mr. Mitchell "engaged in behavior that could be construed as drug trafficking."⁶⁹ But it could have been construed as almost anything. The salient point is not whether it could have been construed as drug trafficking. Young's behavior *could have been construed* as drug trafficking, and was occurring as the informant predicted. Mr. Mitchell's behavior was not predicted by the informant in any way. Other than the type of vehicle he would be driving.

The Sixth District court also distinguished the facts of the instant matter from those in *State v. Nelson*.⁷⁰ Here, the court noted that the officer in *Nelson* observed only a movement of hands, but he did not observe an exchange.⁷¹ The court added that Nelson had not been observed engaging in any type of drug activity.⁷² As in *Nelson*, the officers in the instant matter admitted during testimony that they saw only what *appeared* to be an exchange. Further, they could not indicate what, if anything, had been exchanged. So the facts of the two cases, after a through review of the transcript and the officer's actual testimony, are strikingly similar and can not be distinguished.

Based upon the foregoing, the police lacked the necessary information from which a finding of probable cause could be made. They had an unverified tip from an

⁶⁷ *State v. Mitchell* (2007), L 07 1092, ¶ 26.

⁶⁸ *Ibid.*

⁶⁹ *Id.* ¶ 27.

⁷⁰ *State v. Mitchell* (2007), 2007-Ohio-5316 (6th), ¶ 31.

⁷¹ *Ibid.*

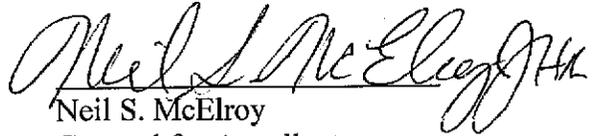
⁷² *Ibid.*

informant about which the court knew very little and the record reveals very little. The police observed actions by Mr. Mitchell that could have been consistent with any number of innocent activities. This case is strikingly similar to others wherein courts determined the police lacked sufficient information to form a finding of probable cause, much less a reasonable suspicion. The police in this case may have had a suspicion that Mr. Mitchell was involved in nefarious activities. But such is simply insufficient to sustain a finding of probable cause.

CONCLUSION

Accordingly, this Honorable Court should accept jurisdiction, reverse the decision of the Sixth District Court of Appeals, adopt Appellant's proposition of law, and remand the case for further proceedings.

Respectfully submitted,



Neil S. McElroy
Counsel for Appellant,
Ervin Mitchell

CERTIFICATION

The undersigned hereby certifies that a copy of the foregoing was sent via U.S. mail this 13th day of November, 2007, to Michael Loisel; Lucas County Prosecutor's Office; 700 Adams Street; Toledo, Ohio 43604.



Neil S. McElroy

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

State of Ohio

Court of Appeals No. L-07-1092

Appellee

Trial Court No. CR-06-1769

v.

Ervin L. Mitchell

DECISION AND JUDGMENT ENTRY

Appellant

Decided: September 28, 2007

Julia R. Bates, Lucas County Prosecuting Attorney, and
Michael J. Loisel, Assistant Prosecuting Attorney, for appellee.

Jerome Phillips, for appellant.

HANDWORK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, wherein appellant, Ervin L. Mitchell, was found guilty of trafficking in cocaine, a violation of R.C. 2925.03(A)(2) and (C)(4)(f), a felony of the second degree. He was sentenced to a mandatory five years in prison and ordered to pay a mandatory \$10,000

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fine. His motor vehicle operator's license was also suspended for a period of three years.

Appellant claims that the following error occurred in the proceedings below:

{¶ 2} "The trial court erred in denying the appellant's motion to suppress."

{¶ 3} The following facts, as adduced at the hearing on appellant's motion to suppress, are salient to our disposition of appellant's sole assignment of error.

{¶ 4} On February 15, 2006, Toledo Police Detective Michael J. Awls, who is assigned to the Metro Drug Task Force, received a call from a "confidential source," that is, a confidential informant. The informant told Detective Awls that Mitchell was selling drugs at 1300 Woodland Avenue and was driving a maroon pickup truck.

{¶ 5} Based on this information, and from numerous past experiences in arresting Mitchell for drug offenses, Detective Awls and other members of the Metro Drug Task Force set up a surveillance of appellant on Woodland Avenue, which is known as a high crime, drug trafficking area. In the meantime, a Detective Greenwood stayed at the police station and ran a computer check on appellant's driving status and any possible outstanding warrants. When he learned that appellant driver's license was suspended, with limited driving privileges, Greenwood informed the surveillance team of this fact.

{¶ 6} Sergeant Robert Marzec, the lead detective on the case, knew appellant because he had previously arrested him for drug trafficking. He positioned himself in an alley approximately two blocks south of appellant's truck, which was parked in the 1300 block of Woodland Avenue, where he was able to observe, through binoculars, any activity occurring around that truck. During a one-half hour period, the detective saw

appellant meet with one or two people who would move out of Marzec's sight. Mitchell would then appear and walk back to his truck. He would open the driver's side door of the truck, reach into the truck, close the door, and then turn and disappear out of sight again. At one point, appellant met with another individual at the opening of an alley; Marzec saw a hand-to-hand exchange between the two in which appellant received paper (as opposed to coins) money that he held up to the sunlight and examined. At the hearing on appellant's motion to suppress, Marzec testified that he believed the hand-to-hand exchange was a drug transaction and that appellant examined the money to determine whether it was counterfeit.

{¶ 7} Shortly after the above exchange, appellant got into his truck and started to leave. Detective Marzec lost sight of the vehicle, but Detective Lori Renz pulled her unmarked vehicle in front of appellant's truck, and he was forced to stop. Mitchell climbed out of his truck and tried to flee, but he was seized by the task force captain. Appellant broke away from the captain and started to run. By that time, Detective Marzec arrived at the scene. He pursued appellant, tackled him, and placed him under arrest. According to Marzec, appellant was stopped because he had only limited/no driving privileges and for the purpose of conducting a drug investigation.

{¶ 8} When he stepped out of his vehicle, appellant dropped an individual baggy of crack cocaine outside the door of the pickup and started to run. He continued to drop baggies of crack cocaine until he was captured by Detective Marzec. A search of appellant's truck revealed more crack cocaine.

him to a mandatory five years in prison, suspended his driver's license for a period of three years, and ordered his five year sentence to be served consecutively to a sentence imposed in another criminal case in which appellant was a defendant. Mitchell was also ordered to pay a mandatory fine of \$10,000, plus fees and the costs of his confinement.

{¶ 12} The applicable standard of review on a motion to suppress evidence presents a mixed question of law and fact to the reviewing court. *State v. Long* (1998), 127 Ohio App.3d 328, 332 (citations omitted). When ruling on a motion to suppress evidence, the trial court serves as the trier of fact and is the primary judge of the credibility of the witnesses and the weight to be given the evidence presented. *State v. Johnson* (2000), 137 Ohio App.3d 847, 850. 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.

{¶ 13} The Fourth Amendment to the Constitution of the United States, as applied to the states through the Fourteenth Amendment, and Section 14, prohibits unreasonable searches and seizures. *Katz v. United States* (1967), 389 U.S. 347, 357. A seizure occurs for purposes of the Fourth Amendment when, in view of all 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. Generally, this occurs when a law enforcement officer, either by physical force or a show of authority, restrains a "person's liberty, so that a reasonable person would not feel free to decline the officer's

requests or otherwise to terminate the encounter." *State v. Gonsior* (1996), 117 Ohio App.3d 481, 485.

{¶ 14} Warrantless arrests are generally per se unreasonable, subject to specifically established exceptions. *Katz v. United States*, 389 U.S. at 357. A warrantless arrest is, however, reasonable under the Fourth Amendment to the United States Constitution when there is probable cause to believe that a criminal offense has been or is being committed. *United States v. Watson* (1976), 423 U.S. 411, 417-424. It is impossible to articulate a precise meaning of "probable cause." *Illinois v. Gates* (1983), 462 U.S. 213, 231. Thus, probable cause to arrest depends "upon whether, at the moment the arrest was made * * * the facts and circumstances within [the law enforcement officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [defendant] had committed or was committing an offense." *Beck v. Ohio* (1964), 379 U.S. 89, 91 (citations omitted).

{¶ 15} On appeal, appellant first maintains that appellee failed to offer any evidence demonstrating the reliability or the basis of knowledge of the informant's tip. Therefore, appellant urges that little weight should have been given to that tip. Appellant forgets that in determining whether probable cause exists a court must examine the "totality" of the facts and circumstances surrounding the arrest." *State v. Homan*, 89 Ohio St.3d 421, 427, 2000-Ohio-212. Here, we find that the trial court simply mentioned that the tip was verified within the context of an examination of the totality of the circumstances surrounding Mitchell's arrest.

{¶ 16} Appellant next compares a number of cases which have facts similar to the one before us. In each of these cases, the court found that the law enforcement officer or officers lacked probable cause to arrest the defendant(s).

{¶ 17} The first cited case is *State v. Cabell*, 6th Dist. No. L-06-1026, 2006-Ohio-4914. Appellant contends that the facts of that case, which included a controlled buy of cocaine, tips from confidential informants, and an eight day surveillance of the defendant, Matthew Cabell, provide a stronger basis for a finding of probable cause to arrest than do the facts in the case before us; yet, in *Cabell*, this court affirmed the trial court's judgment in which it determined that law enforcement officers lacked said probable cause to arrest. We disagree.

{¶ 18} In *Cabell*, members of the Toledo Police Department's Metro Drug Task Force received tips from two confidential informants stating that Cabell was selling drugs in the vicinity of Lewis Avenue, Alexis Road, and Laskey Road in Toledo. *Id.*, ¶ 3. One of the confidential informants participated in a controlled buy of cocaine on March 2, 2005. *Id.* On March 3, 2005, the second confidential informant told the officers that Cabell would be delivering cocaine in the area by means of his tan van. *Id.*, ¶ 4. Although the officers followed Cabell on that day, they did not observe any criminal activity. *Id.*

{¶ 19} Over the next week, task force members continued their observation of Cabell. *Id.*, ¶ 5. On March 7, 2005, Cabell was seen driving a blue automobile in the area of Alexis and Lewis. *Id.* On March 10, 2005, the first confidential informant

advised the police that Cabell would be delivering cocaine somewhere on Lewis Avenue between 6 and 7 p.m. that evening. Id. The task force set up surveillance in two unmarked cars at the entrance to the mobile home park where Cabell lived. Id. A third unmarked vehicle was stationed just outside the mobile home park on Lewis Avenue. Id. At approximately 6:30 p.m., the officers allowed a woman driving the tan van to leave the mobile home park. Id., ¶ 6. She went to a gas station on Lewis Avenue and returned to the mobile home park. Id. Cabell came out of a mobile home and entered the van. Id. The van started to leave the mobile home park. Id.

{¶ 20} At that point, the officers decided to stop the van and blocked its egress with their unmarked motor vehicles. Id., ¶ 7. When the officers approached the van with their guns drawn, Cabell exited and ran. Id., ¶ 8. He was tackled and handcuffed. Id. A search of his pockets revealed four baggies of cocaine, a bag of marijuana, two cell phones, and some cash. Id. Cabell's girlfriend, who was in the passenger seat of the van was handcuffed, searched, and Mirandized. Id., ¶ 9. Her two children were also in the van. Id. It was later learned that the group was going to a restaurant to celebrate the older child's birthday. Id. The girlfriend gave the officers written consent to search the mobile home, where they found more cocaine and marijuana. Id., ¶ 10.

{¶ 21} Cabell was charged with possession of cocaine and marijuana and trafficking in cocaine in marijuana. ¶ 2. He filed a motion to suppress any evidence gathered as the result of the seizure of his person and the subsequent searches. Id., ¶ 1. The trial court granted the motion to suppress, finding that Cabell was arrested when the

officers blocked his van with their unmarked vehicles and that the police lacked probable cause for that arrest. *Id.*, ¶ 11. As stated *infra*, we affirmed the judgment of the trial court because the task force observed no criminal activity on March 10, 2005, that would give rise to probable cause to arrest Cabell. *Id.*, ¶ 38.

{¶ 22} As can be readily seen, the *Cabell* case is distinguishable from the case before us because Cabell's alleged criminal activity occurred on days separate from the day that he was arrested. In the instant case, the tip, the surveillance, and the arrest all occurred within a short period of time on the same day. Thus, we do not find appellant's argument predicated upon *Cabell* persuasive.

{¶ 23} Appellant, relying on *State v. Young*, 6th Dist. No. E-04-013, 2005-Ohio-3369, also argues that his conduct during the one-half hour of police surveillance at Woodland Avenue was equally consistent with innocent behavior as it was with criminal behavior and, therefore, could not serve as a basis for probable cause to arrest him.

{¶ 24} In *Young*, the Erie County Drug Task Force received a tip from federal agents (who obtained this information from a federally indicted defendant) that Young would be traveling to Cleveland, Ohio in his own motor vehicle, a tan or cream-colored Infinity, on March 26, 2002, to purchase cocaine. *Id.*, ¶ 3. The task force set up a surveillance of Young's residence on that day; however, Young never went to Cleveland. *Id.* Learning that a cocaine transaction was allegedly to occur on July 30, 2002, the task force again conducted a surveillance of Young's residence. *Id.*, ¶ 4. During the early afternoon, Young came out of his house and put "something" in the trunk of a red

placing some type of object in the trunk of the red Cadillac, purchasing gasoline, and traveling east toward Cleveland could be consistent with an innocent activity, e.g., shopping, as it could be with the criminal act of purchasing cocaine. *Id.* Thus, based upon the "tip" alone, we held that the "stop was illegal, appellant's arrest was illegal, and any evidence obtained subsequent to the arrest is tainted." *Id.*, ¶ 24.

(¶ 27) Unlike the circumstances in *Young*, the tip in this cause was not the sole fact offered to support probable cause to arrest appellant. Additionally, in the case before us, the facts of the tip were immediately verified. In particular, Mitchell drove to the 1300 block of Woodland Avenue in his maroon pickup truck and engaged in behavior that could be construed as drug trafficking. Furthermore, the fact that appellant's actions took place in front of property that he claims to own does not automatically classify his behavior as consistent with innocent activity. To repeat, it is but a single fact that must be considered within the total of the facts and circumstances known by the police officers involved in this cause. Moreover, the law enforcement officers involved in the *Young* case admitted that they would have stopped Young solely on the basis that the Cadillac was headed east toward Cleveland. Such an admission was not made in this cause. Therefore, the *Young* case is distinguishable from the present case.

(¶ 28) Appellant further contends that the mere movement of hands, i.e., a hand-to-hand exchange, as observed by Detective Marzec, was insufficient to establish probable cause to arrest appellant. Nevertheless, the case, *State v. Nelson* (1991), 72 Ohio App.3d 506, appellant relies on for this contention can be distinguished from the

case at hand. In *Nelson*, the arresting officer saw a group of people standing in front of an apartment located in a high crime area. *Id.* at 507. He observed a "movement of hands" in the group, but failed to see anything, presumably illicit drugs, exchanged. *Id.* The group dispersed when they saw the police arrive. *Id.*

{¶ 29} The arresting officer chased Nelson and a female juvenile down an alley. *Id.* He found them on a third floor porch. *Id.* Nelson and the female both told the officer that they were having an argument, but he handcuffed them because he "suspected drug activity." *Id.* The officer looked around the porch and found a vial of crack cocaine and a small plastic bag containing crushed cocaine. *Id.* at 508. The vial had a label with the name of a third individual on it. *Id.* However, the officer "arrested" Nelson, who was indicted for trafficking in drugs, drug abuse, and the possession of criminal tools. *Id.* at 507.

{¶ 30} Nelson filed a motion to suppress the evidence related to the charged offenses. *Id.* He asserted that at the time that the officer handcuffed him, the officer lacked probable cause to arrest. *Id.* at 508. The common pleas court agreed. *Id.* The Eighth District Court of Appeals affirmed the judgment of the trial court holding that the officer's "observations of Nelson did not warrant a prudent man in believing a felony was in progress." *Id.*

{¶ 31} In *Nelson*, the officer neither saw the defendant engage in a hand-to-hand exchange nor saw him engage in any type of drug activity prior to placing him in handcuffs, that is, arresting him. Here, the drug task force had a verified tip concerning

appellant and knew that he had previously engaged in selling drugs. Detective Marzec, who had arrested appellant for trafficking in drugs, saw appellant interact with individuals in what appeared to be drug transactions and then saw him hold up money received from one of those individuals to the sunlight. The detective and other members of the task force knew that appellant's driver's license was suspended¹ and that, despite the suspension, Mitchell was driving on the day in question. Thus, unlike *Nelson*, these law enforcement officers could reasonably believe that appellant was involved in criminal activity.

{¶ 32} The final case relied upon by appellant is *State v. Rivera*, 6th Dist. No. L-02-1369, 2006-Ohio-1867. *Rivera* also involved a tip from a confidential informant stating that the defendant, Ricardo Rivera, was going to deliver a half kilo of powder cocaine to the informant in the parking lot of a strip mall between 5:30 and 6:00 p.m. on April 7, 2004. *Id.* ¶ 4. Rivera, accompanied by his girlfriend and two young sons arrived during the designated time period. *Id.*, ¶ 6. As soon as Rivera parked the car, police officers surrounded it with their guns drawn; Rivera dropped a black satchel to the floor of the car. *Id.*, ¶ 7. Rivera was pulled from the vehicle by the officers. *Id.*, ¶ 8. A search of the satchel revealed 496 grams of powder cocaine. *Id.*, ¶ 8. Rivera and his girlfriend were then formally placed under arrest. *Id.*

.....
All that the task force officers needed to know was that Mitchell's driver's license was suspended. They had no duty to ascertain whether he was driving under any type of privilege, e.g., an occupational privilege. See *State v. Bonn* (1995), 101 Ohio App.3d 69.

{¶ 33} Rivera filed a motion to suppress the evidence, asserting that the search and seizure made pursuant to his arrest was "unlawful." *Id.* at 9. The trial court denied the motion to suppress. *Id.*, ¶ 10. On appeal, we reversed the trial court's judgment on the basis that (1) the police did not personally observe any criminal activity justifying Rivera's detention; and (2) the sole basis for the stop was the informant's tip, and there was no indicia of reliability of that tip, e.g., the informant failed to identify the car that Rivera would be driving. *Id.*, ¶ 26, ¶ 27, ¶ 30, and ¶ 31. Once again, a similar set of facts underlies our decision in *Rivera*, as in those cases discussed above. Consequently, we conclude that *Rivera* can also be distinguished from the case before us.

{¶ 34} In sum, we find that, under the totality of the circumstances, the members of the drug task force had probable cause to arrest appellant. The specific facts, taken as true, considered by this court in reaching this finding are: (1) a verified tip from an informant; (2) appellant was driving with a suspended license; (3) appellant was a known to engage in drug trafficking; (4) the area in which the arrest occurred was a high crime/drug trafficking area; and (5) Detective Marzec observed appellant engage in a hand-to-hand exchange and then hold up money to the sunlight. Accordingly, appellant's sole assignment of error is found not well-taken.

{¶ 35} The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Lucas County.

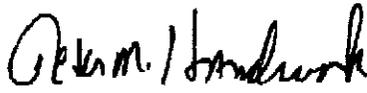
JUDGMENT AFFIRMED.

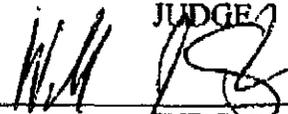
A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See, also, 6th Dist. Loc. App.R. 4.

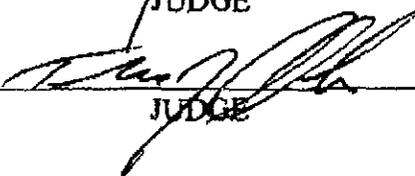
Peter M. Handwork, J. _____

William J. Skow, J. _____

Thomas J. Osowik, J. _____
CONCUR.



JUDGE


JUDGE


JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.