ORIGINAL

IN THE SUPREME COURT OF OHIO
2012

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

AL E. FORREST,

Defendant-Appellee

Case No. 12-0415

On Appeal from the Franklin County Court of Appeals, Tenth Appellate District

Court of Appeals Case No. 11AP-291

MEMORANDUM OF PLAINTIFF-APPELLANT IN SUPPORT OF JURISDICTION

RON O'BRIEN 0017245
Franklin County Prosecuting Attorney
373 South High Street, 13th Floor
Columbus, Ohio 43215
Phone: 614-525-3555
Fax: 614-525-6103
E-mail: sltaylor@franklincountyohio.gov

and

STEVEN L. TAYLOR 0043876 (Counsel of Record)
Chief Counsel, Appellate Division

COUNSEL FOR PLAINTIFF-APPELLANT

MICHAEL SIEWERT 0012995
307 East Livingston Avenue
Columbus, Ohio 43215
Phone: 614-224-6488

COUNSEL FOR DEFENDANT-APPELLEE

FILED
MAR 12 2012
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

EXPLANATION OF WHY THIS COURT SHOULD ACCEPT JURISDICTION 1

STATEMENT OF FACTS 5

ARGUMENT 7

Proposition of Law No. 1. The federal Exclusionary Rule will only be applied to suppress evidence when the Fourth Amendment violation is the result of deliberate, reckless, or grossly-negligent disregard of Fourth Amendment rights or involves circumstances of recurring or systemic negligence. (*Davis v. United States*, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011), and *Herring v. United States*, 555 U.S. 135, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009), followed). 7

Proposition of Law No. 2. Reasonable suspicion can arise to perform a *Terry* stop even when the police do not see outward criminal behavior. 10

Proposition of Law No. 3. The high-crime nature of the location is properly considered in determining whether there was reasonable suspicion. (*Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000); *State v. Bobo*, 37 Ohio St.3d 177, 179, 524 N.E.2d 489 (1988), followed). 12

Proposition of Law No. 4. Police may use force to effect or maintain a *Terry* stop. 13

Proposition of Law No. 5. When a party files an application for en banc consideration pursuant to App.R. 26(A)(2), all full-time judges of that Court of Appeals who are not recused or disqualified from the case must participate in determining whether to grant or deny the application. (*McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, and App.R. 26(A)(2), applied) 13

CERTIFICATE OF SERVICE 15

APPENDIX Appx. Page

10th Dist. Judgment (filed 12-6-11) A-1

10th Dist. Decision (filed 12-6-11) A-2

10th Dist. Journal Entry (filed 1-26-12) A-8

10th Dist. Decision (filed 1-26-12) A-9

10th Dist. Journal Entry (filed 3-8-12) A-14

10th Dist. Decision (filed 3-8-12) A-15

Common Pleas Decision and Entry (filed 3-23-11) A-17

EXPLANATION OF WHY THIS COURT SHOULD ACCEPT JURISDICTION

Charged with heroin trafficking and heroin and cocaine possession, defendant successfully moved to suppress the evidence of his guilt. The Tenth District's 12-6-11 decision (affirming suppression) and 1-26-12 decision (denying reconsideration etc.) left out material facts supporting the officer's actions that led to the discovery of the evidence. The trial court had accepted the officer's credibility without question, and so there was no reason to leave out such facts, but the Tenth District still omitted them. The Statement of Facts, infra, provides a full understanding of the facts.

This Court will face no bigger issue this year on its criminal docket than the State's first proposition of law regarding the existence of a good-faith exception to the federal exclusionary rule. The issue would affect the litigation of nearly every search-and-seizure motion to suppress filed in the state, and it presents fundamental questions of when and whether guilty offenders shall go unpunished because of a police error in a search or seizure. "The principal cost of applying any exclusionary rule 'is, of course, letting guilty and possibly dangerous criminals go free * * *.'" *Montejo v. Louisiana*, 556 U.S. 778, 129 S.Ct. 2079, 2090, 173 L.Ed.2d 955 (2009) (quoting *Herring v. United States*, 555 U.S. 135, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009)).

The exclusionary rule is controversial, and the stakes are high. The controversy exists because the awarding of a get-out-of-jail card to the guilty defendant is unpopular, is often disproportionate to the "error" of the police officer, and runs counter to the fundamental purpose of the criminal trial, i.e., the search for truth. The stakes are high because violent criminals and drug dealers can escape punishment, releasing them upon

society to strike again. The stakes are also high in terms of judicial administration, as the litigation of suppression motions takes up time better spent on the trial of cases. Recognizing the proper reach of the good-faith exception would cause some motions to suppress to not even be filed, and it would save the admissibility of evidence in a large number of cases when the police "error" was not at least grossly negligent. Given the controversy and the stakes, the good-faith exception easily justifies review here.

This Court granted review of the good-faith exception in *State v. Gould*, No. 10-1315, but this Court ultimately did not reach the issue. The present case now would present an exceptional opportunity to rule. The State preserved the issue at both lower-court levels, and the Court of Appeals rejected the good-faith exception as a matter of law. The issue comes to this Court in a perfect vehicle in which to rule.

Adding to the need for review here is the Tenth District's flawed attempt to limit the good-faith exception to situations as involved in *Herring* itself in which the police believed they had a warrant. *Herring* had summarized the good-faith exception in broad terms that were not dependent on the believed existence of a warrant. Moreover, any doubt on this point was shattered in 2011 in *Davis v. United States*, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011), in which the Court applied the good-faith exception to an avowedly warrantless car search. Thus, the Tenth District's belief-in-warrant limitation on the good-faith exception had already been rejected several months before it ruled.

The State pointed out in its application for reconsideration that, in light of *Herring* and *Davis*, the belief-in-warrant distinction constituted obvious error. In denying reconsideration, the lead decision of the original author adamantly made the distinction

again. While the other judges did not sign on to that opinion, they let the original opinion's flawed belief-in-warrant limitation stand despite *Davis*. This Court should address these issues under the first proposition of law in light of *Davis* and *Herring*.

The Tenth District's belief-in-warrant limitation conflicts with two other appellate districts, which have applied the good-faith exception to warrantless actions. *State v. Baughman*, 192 Ohio App.3d 45, 2011-Ohio-162, 947 N.E.2d 1273 (12th Dist.); *State v. Geiter*, 190 Ohio App.3d 541, 2010-Ohio-6017, 942 N.E.2d 1161 (8th Dist.). This conflict provides a further reason to grant review.

The second, third, and fourth propositions of law also warrant review regarding reasonable suspicion and *Terry* stops. Settled case law from the United States and Ohio Supreme Courts recognizes that the characteristics of the high-crime area of the stop can and should be weighed in determining whether there was reasonable suspicion. The Tenth District omitted the high-crime-area fact from the initial opinion, and then, in denying reconsideration, the lead author took the State to task for raising it, misrepresenting what the State "seem[ed] to imply."

Settled case law also recognizes that the police need not see outward criminal behavior in order to have reasonable suspicion. *Terry* itself involved otherwise innocent conduct that added up to reasonable suspicion. Yet the Tenth District here repeatedly focused on the officer's testimony that he did not see criminal conduct, as if this was a damning "admission." The lead author made the error again in denying reconsideration.

The lead author also contended that a *Terry* stop was not involved because the officer had grabbed defendant from the car. Although the other two judges did not join

in the lead decision denying reconsideration, the State notes that this contention is easily refuted. Settled case law indicates that the police may use force to effect or maintain a *Terry* stop, including *Terry* itself, in which the officer grabbed the suspect. The modest application of force here did not make the *Terry* doctrine inapplicable. Indeed, there was no other way to safely effect the *Terry* stop, since defendant twice ignored commands to exit the vehicle, thereby resulting in the need to use force.

The Tenth District's obvious errors under *Terry* doctrine warrant review for at least two reasons. *Terry* doctrine is fraught with concerns over officer and public safety, and this particular officer had to make a split-second judgment on the amount of danger posed by defendant's provocative actions. The Tenth District's mistakes on *Terry* doctrine, if not corrected, very well could cause that officer and other officers in Franklin County to second-guess themselves when they need to be acting with unhesitating speed in the protection of themselves and others.

Of equal importance is a concern about the Tenth District's failure to observe stare decisis. At worst, the Tenth District was refusing to follow the law. At best, the Tenth District's errors reflect a lack of care.

The State also presents a significant issue of appellate-court administration in the State's fifth proposition of law, on which the Tenth District has certified a conflict. The State specifically moved for the full participation of the en banc court in deciding whether to grant or deny the State's application for en banc consideration. But the three-judge panel *alone* denied the motion for full participation without comment and denied the application for en banc consideration. This was error, as App.R. 26(A)(2) plainly

contemplates the participation of the en banc court. The refusal even to circulate the application to the full en banc court prevented the other members of the court from exercising their prerogative under the rule to grant en banc consideration.

The State respectfully submits that review is warranted because the case involves substantial constitutional questions and involves questions of public and great general interest. The case also warrants the granting of leave to appeal in this felony case.

STATEMENT OF FACTS

The panel's 12-6-11 factual summary omitted material details. The State hereby quotes the summary and inserts bold and bracketed information that the panel left out.

{¶2} Al E. Forrest ("appellee") was in a 2003 Ford Explorer parked along the side of the road in a residential neighborhood in Columbus, Ohio, when two police officers stopped their cruiser behind the Explorer. One of the officers, Kevin George, testified in an evidentiary hearing that he **[had made "numerous arrests and received complaints regarding criminal activity within that three-block area." (Tr. 26) Police have had plenty of calls about narcotics trafficking and weapons activity in that neighborhood. (Tr. 25-26) He]** saw no illegal activity before he walked up to the vehicle. He also acknowledged that he saw no criminal activity as he approached the vehicle. He testified that he and his partner stopped their cruiser to "check on the well being" of the Explorer's occupants. (Tr. 17.)

{¶3} When appellee looked out of the window on the driver's side and saw Officer George standing beside the Explorer, appellee was surprised. His eyes seemed to get bigger and his mouth dropped open. The man in the passenger seat of the Explorer

glanced at the officer and then looked straight ahead. The officer claimed he asked Forrest if he was "okay." **[Officer George testified:**

> **The first thing I noticed was the expressions of Mr. Forrest in the driver's seat and Mr. Rice in the front passenger seat. Mr. Forrest looked at me, his eyes enlarged and his mouth dropped open. The passenger, Mr. Rice, looked at me, quickly looked at me and then looked straight ahead, would not look over.**

(Tr. 7) George testified that these reactions were "a sign of nervous behavior" which can be "a sign of criminal activity, especially to see the police approach the individuals." (Tr. 7) Such "signs of nervousness" indicate that "obviously something is not right." (Tr. 8) "That is not the normal reaction that I get when I go out of my vehicle to talk to people. So that is to me a sign that something is going on, maybe, you know, maybe I need to further my investigation * * *." (Tr. 8)]

{¶4} Appellee moved his right hand from his lap toward the center console of the Explorer and then turned back toward Officer George. **[George testified:**

> **I walk up to the driver's door. Mr. Forrest * * * takes his right hand on his lap, he quickly moves it between himself and the center console, puts his hand on his lap, turns toward me, shifting his shoulders toward * * * the driver's window, so it is like he is * * * shielding my vision of what is inside the vehicle." (Tr. 8-9)**

It was George's "first instinct" to think that appellee's "quick movements with his hand" involved trying to hide a weapon. (Tr. 9)]

{¶5} Officer George interpreted appellee's surprise as "nervousness" and his turning toward the officer as an effort to block the officer's view of the interior of the vehicle, even though the officer was asking Forrest a question. **[George testified that**

appellee "shifted his whole body towards the driver's window." (Tr. 23) Most drivers do not typically "blade" their upper torso in this manner to block the view. (Tr. 20, 21, 24)]

{¶6} At the hearing on the motion to suppress, Officer George testified he could see both of appellee's hands and knew appellee was not holding a weapon **[in his hands (Tr. 22)]**. Officer George next noticed appellee had some money in his left hand**[, which was "a further indication of something, the exchange of money possibly for products is taking place" (Tr. 9-10),]** and ordered appellee out of the vehicle. Appellee did not immediately get out of the vehicle. Instead, he rolled up the driver's window and took the keys out of the ignition.

{¶7} Officer George ordered appellee out of the vehicle a second time. Appellee merely looked straight ahead and held **[and fumbled with (Tr. 10)]** the keys. At the hearing, Officer George acknowledged that he still had not seen any illegal activity.

{¶8} Officer George next opened the door to the Ford Explorer, reached across appellee's body and grabbed his right hand. The officer started to pull appellee out of the vehicle. **[George testified that he then "saw a clear plastic baggie of heroine (sic) between where Mr. Forrest's center console and the right side of his body on the seat." (Tr. 10) A search of appellee's bulky front pockets revealed "roughly $800 in each pocket * * *." (Tr. 12) A search of the vehicle led to the discovery of baggies of cocaine in the driver's door panel. (Tr. 13)]**

ARGUMENT

Proposition of Law No. 1. The federal Exclusionary Rule will only be applied to suppress evidence when the Fourth Amendment violation is

> the result of deliberate, reckless, or grossly-negligent disregard of Fourth Amendment rights or involves circumstances of recurring or systemic negligence. (*Davis v. United States*, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011), and *Herring v. United States*, 555 U.S. 135, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009), followed)

The existence of a Fourth Amendment violation "does not necessarily mean that the exclusionary rule applies." *Herring*, 129 S.Ct. at 700. "[E]xclusion 'has always been our last resort, not our first impulse' * * *." Id. (quoting another case). "[T]he exclusionary rule is not an individual right and applies only where it results in appreciable deterrence." Id. (quote marks & brackets omitted). "The extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct." Id. at 701.

> To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.

Id. at 702.

In the State's second assignment of error below, the State had relied on the good-faith exception as stated in *Herring*. The Tenth District refused to apply the good-faith exception, contending that *Herring* was narrowly limited to its facts involving an arrest based on the belief that a warrant existed. 12-6-11 Decision, ¶ 18. The same contention was made in denying reconsideration. 1-26-12 Decision, ¶ 13.

But this attempt to distinguish the good-faith exception on the basis of the actual/believed involvement of a warrant has already been rejected. In *Herring* itself, the Court noted that the good-faith exception already applied to warrantless searches that

were based on a statute later found unconstitutional. *Herring*, 555 U.S. at 142 (discussing *Illinois v. Krull*, 480 U.S. 340, 352–353, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987)). *Herring* summarized the good-faith exception in broad, overarching terms and did not mention the word "warrant." *Herring*, 555 U.S. at 147-148.

In *Davis v. United States*, the Court confirmed that the good-faith exception applies to avowedly warrantless searches, such as the warrantless car search involved in that case. Frequently citing and quoting the discussions from *Herring*, the *Davis* Court repeated *Herring*'s summary of the good-faith exception:

> The basic insight of the *Leon* line of cases is that the deterrence benefits of exclusion "var[y] with the culpability of the law enforcement conduct" at issue. *Herring*, 555 U.S., at 143, 129 S.Ct. 695. When the police exhibit "deliberate," "reckless," or "grossly negligent" disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. Id., at 144, 129 S.Ct. 695. But when the police act with an objectively "reasonable good-faith belief" that their conduct is lawful, *Leon*, *supra*, at 909, 104 S.Ct. 3405 (internal quotation marks omitted), or when their conduct involves only simple, "isolated" negligence, *Herring*, supra, at 137, 129 S.Ct. 695, the "'deterrence rationale loses much of its force,'" and exclusion cannot "pay its way." See *Leon*, *supra*, at 919, 908, n. 6, 104 S.Ct. 3405 (quoting *United States v. Peltier*, 422 U.S. 531, 539, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975)).

Davis, 131 S.Ct. at 2427-2428. The *Davis* Court emphasized that "[t]he Court has over time applied this 'good-faith' exception across a range of cases." Id. at 2428.

Applying the *Herring* formulation, the *Davis* Court held that the good-faith exception applied to the warrantless car search by the police:

> Under our exclusionary-rule precedents, this acknowledged absence of police culpability dooms Davis's

> claim. Police practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield "meaningfu[l]" deterrence, and culpable enough to be "worth the price paid by the justice system." *Herring*, 555 U.S., at 144, 129 S.Ct. 695. The conduct of the officers here was neither of these things. The officers who conducted the search did not violate Davis's Fourth Amendment rights deliberately, recklessly, or with gross negligence. See *ibid.* Nor does this case involve any "recurring or systemic negligence" on the part of law enforcement. Ibid. The police acted in strict compliance with binding precedent, and their behavior was not wrongful. Unless the exclusionary rule is to become a strict-liability regime, it can have no application in this case.

Davis, 131 S.Ct. at 2428-2429. "The good-faith exception * * * is no less an established limit on the *remedy* of exclusion than is inevitable discovery." Id. at 2431.

When all facts are considered here, Officer George's conduct fell far short of the kind of deliberate, reckless, or grossly negligent disregard of Fourth Amendment rights that would justify suppression. Indeed, his conduct was justified based on reasonable suspicion to detain and remove defendant from the car, and probable cause to arrest defendant based on obstructing official business in refusing to obey the command to exit the car. But even if George's conduct was somehow violative of the Fourth Amendment, George was not engaged in a deliberate, reckless, or grossly negligent disregard of Fourth Amendment rights. For the safety of himself, his partner, and the passenger, he needed to make a split-second decision based on defendant's provocative furtive movements.

Also, suppression cannot be justified under the Ohio Constitution as there is no exclusionary rule thereunder. *State v. Lindway*, 131 Ohio St. 166, 2 N.E.2d 490 (1936).

Proposition of Law No. 2. Reasonable suspicion can arise to perform a *Terry* stop even when the police do not see outward criminal behavior.

The panel contended that the officer's "admissions" were "inconsistent with a stop and frisk" because he admitted that he had not seen any outward criminal activity before grabbing defendant from the car. 12-6-11 Decision, ¶¶ 12, 14. But the United States Supreme Court and the Tenth District have already rejected this contention.

Nothing in the *Terry* doctrine requires outwardly observable criminal activity to warrant a *Terry* seizure. In *United States v. Arvizu*, 534 U.S. 266, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002), the Court emphasized that the test for reasonable suspicion depends on the totality of the circumstances and that individual factors cannot be disregarded merely because there is a possible innocent explanation. Id. at 274-275, 277-78.

In *United States v. Sokolow*, 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989), the Court made the same point:

> Any one of these factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think taken together they amount to reasonable suspicion. We said in *Reid v. Georgia*, 448 U.S. 438, 100 S.Ct. 2752, 65 L.Ed.2d 890 (1980) (per curiam), "there could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot." Id., at 441, 100 S.Ct., at 2754. Indeed, *Terry* itself involved "a series of acts, each of them perhaps innocent" if viewed separately, "but which taken together warranted further investigation." 392 U.S., at 22, 88 S.Ct., at 1881; see also [*United States v. Cortez*, 449 U.S. 411 (1981)], supra, 449 U.S., at 417–419, 101 S.Ct., at 694–696. We noted in [*Illinois v. Gates*, 462 U.S. 213 (1983)] at 243–244, n. 13, 103 S.Ct., at 2335 n. 13, that "innocent behavior will frequently provide the basis for a showing of probable cause," and that "[i]n making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." That principle applies equally well to the reasonable suspicion

inquiry.

Sokolow, 490 U.S. at 9-10 (some citations omitted). Consistent with *Arvizu* and *Sokolow*, the Tenth District has repeatedly rejected any requirement that the conduct creating reasonable suspicion be outwardly criminal. *State v. McClendon*, 10th Dist. No. 09AP-554, 2009-Ohio-6421, ¶ 12; *State v. Mendoza*, 10th Dist. No. 08AP-645, 2009-Ohio-1182, ¶¶ 12-14; *State v. Taylor*, 10th Dist. No. 05AP-1016, 2006-Ohio-5866, ¶ 11.

The foregoing authorities establish beyond peradventure that it is entirely consistent with *Terry* doctrine that the officer "saw no criminal activity." Most *Terry* stops, including in *Terry* itself, are based on conduct that may have an innocent explanation and that is not outwardly criminal. The officer's "admissions" that he saw no overt criminal activity are insignificant under *Terry* doctrine.

> Proposition of Law No. 3. The high-crime nature of the location is properly considered in determining whether there was reasonable suspicion. (*Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000); *State v. Bobo*, 37 Ohio St.3d 177, 179, 524 N.E.2d 489 (1988), followed)

"'The reputation of an area for criminal activity is an articulable fact upon which a police officer may legitimately rely' in determining whether an investigative stop is warranted." *Bobo*, 37 Ohio St.3d at 179 (quoting another case). "[O]fficers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation." *Wardlow*, 528 U.S. at 124. Police and courts may consider "the fact that the stop occurred in a 'high crime area' among the relevant contextual considerations in a *Terry* analysis." Id.; *State v. Andrews*, 57 Ohio St.3d 86, 88, 565 N.E.2d 1271 (1991).

The original panel decision omitted this factor from its determination even though the officer testified without contradiction about the drugs and weapons activity in the area. In denying reconsideration, the lead author affirmatively refused to consider it and chastised the State for raising it. The need to maintain stare decisis weighs heavily toward granting review to correct the Tenth District on these matters.

> Proposition of Law No. 4. Police may use force to effect or maintain a *Terry* stop.

Police can use force to effect or maintain a *Terry* stop, including grabbing the suspect, as occurred in *Terry* itself. *Terry v. Ohio*, 392 U.S. 1, 7, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) ("Officer McFadden grabbed petitioner Terry, spun him around"). "Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). Police can "take such steps as [are] reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop." *United States v. Hensley*, 469 U.S. 221, 235, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985). A *Terry* stop *is* a "forcible stop." *Bobo*, 37 Ohio St.3d at 180.

> Proposition of Law No. 5. When a party files an application for en banc consideration pursuant to App.R. 26(A)(2), all full-time judges of that Court of Appeals who are not recused or disqualified from the case must participate in determining whether to grant or deny the application. (*McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, and App.R. 26(A)(2), applied)

"[I]f the judges of a court of appeals determine that two or more decisions of the court on which they sit are in conflict, they *must* convene en banc to resolve the conflict."

McFadden, paragraph two of the syllabus (emphasis added). Under App.R. 26(A)(2)(a), if a majority of all of the judges in a court of appeals determines that an intra-district conflict exists, the majority may order that the appeal be considered en banc. "The en banc court shall consist of all full-time judges of the appellate district who have not recused themselves or otherwise been disqualified from the case." Id.

The State sought en banc consideration on the innocent-activity issue, see Proposition of Law No. 2, supra, based on three prior conflicting Tenth District decisions. See p. 12, supra. The State also moved to have all eight full-time judges determine the application for en banc review. But, without any circulation to the other judges, the panel alone denied both the application and the motion. The panel provided no rationale for how the panel alone had the authority to deny the application.

The rule does not authorize panel-only review, and such review deprives other members of the en banc court of their prerogative under the Rule to determine the application for en banc consideration. The perspectives of other members, particularly the members who approved the earlier, potentially-conflicting decision(s), are needed to bring a full perspective to the question of whether an intra-district conflict exists.

Full participation is consistent with *McFadden*, which recognizes that "[t]he principal utility of determinations by the courts of appeals in banc is to enable the court to maintain its integrity as an institution by making it possible for a majority of its judges always to control and thereby to secure uniformity and continuity in its decisions, * * *." *McFadden*, ¶ 16 (internal quotation marks omitted). The majority of the en banc court is deprived of the opportunity to exercise this control if only the three-judge panel is given

the chance to review the application for en banc consideration.

In at least two other districts, the en banc court participates in the decision to grant or deny en banc review. *State v. Morris*, 9th Dist. No. 09CA0022-M, 2010-Ohio-5973; *Kelley v. Ferraro*, 8th Dist. No. 92446, 2010-Ohio-4179; 8th Dist. Loc.R. 26(D).

The panel has granted the State's motion to certify a conflict on this issue. "[T]he conflict is best resolved by the Supreme Court of Ohio." 3-8-12 Decision, ¶ 5.

The panel contends that panel-only review serves a "more efficient" gatekeeping role by weeding out applications that have "no arguable merit" and/or are interposed for delay. But this previously-unstated rationale is not supported by any language in App.R. 26(A)(2) and is inconsistent with the language of *McFadden*.

In any event, the State's application for en banc review still should have been submitted to the full court, as it easily satisfied this newly-stated "arguable merit" standard. The panel's refusal to find "arguable merit" here *supports* the State's position that panel-only review disserves the interests underlying en banc review.

Respectfully submitted,

STEVEN L. TAYLOR 0043876 (Counsel of Record)
Chief Counsel, Appellate Division
Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail on this 12th day of Mar., 2012, to MICHAEL SIEWERT, 307 East Livingston Avenue, Columbus, OH 43215; Counsel for Defendant-Appellee.

STEVEN L. TAYLOR

20818 - C22

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO
2011 DEC -6 PM 12:08
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 11AP-291 (C.P.C. No. 09CR-07-3935)
Al E. Forrest,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on December 6, 2011, appellant's assignments of error are overruled. Therefore, it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellant.

TYACK, J., BRYANT, P.J., & BROWN, JJ.

By Gary Tyack
Judge G. Gary Tyack

A-1

20818 - B15

M

Cosgrove, J. 6

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO

2011 DEC -6 PM 12: 03

CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 11AP-291 (C.P.C. No. 09CR-07-3935)
Al E. Forrest,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on December 6, 2011

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellant.

Michael Siewert, for appellee.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶1} The State of Ohio is appealing from the rulings of a judge of the Franklin County Court of Common Pleas who sustained a motion to suppress evidence. The State assigns two errors for our consideration:

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.

A-2

SECOND ASSIGNMENT OF ERROR

EVEN IF A CONSTITUTIONAL VIOLATION DID OCCUR, THE TRIAL COURT ERRED BY ORDERING SUPPRESSION WITHOUT DETERMINING WHETHER THE VIOLATION RESULTED FROM DELIBERATE, RECKLESS, OR GROSSLY NEGLIGENT POLICE MISCONDUCT, OR FROM RECURRING OR SYSTEMIC NEGLIGENCE.

{¶2} Al E. Forrest ("appellee") was in a 2003 Ford Explorer parked along the side of the road in a residential neighborhood in Columbus, Ohio, when two police officers stopped their cruiser behind the Explorer. One of the officers, Kevin George, testified in an evidentiary hearing that he saw no illegal activity before he walked up to the vehicle. He also acknowledged that he saw no criminal activity as he approached the vehicle. He testified that he and his partner stopped their cruiser to "check on the well being" of the Explorer's occupants. (Tr. 17.)

{¶3} When appellee looked out of the window on the driver's side and saw Officer George standing beside the Explorer, appellee was surprised. His eyes seemed to get bigger and his mouth dropped open. The man in the passenger seat of the Explorer glanced at the officer and then looked straight ahead. The officer claimed he asked Forrest if he was "okay."

{¶4} Appellee moved his right hand from his lap toward the center console of the Explorer and then turned back toward Officer George.

{¶5} Officer George interpreted appellee's surprise as "nervousness" and his turning toward the officer as an effort to block the officer's view of the interior of the vehicle, even though the officer was asking Forrest a question.

{¶6} At the hearing on the motion to suppress, Officer George testified he could see both of appellee's hands and knew appellee was not holding a weapon. Officer George next noticed appellee had some money in his left hand and ordered appellee out of the vehicle. Appellee did not immediately get out of the vehicle. Instead, he rolled up the driver's window and took the keys out of the ignition.

{¶7} Officer George ordered appellee out of the vehicle a second time. Appellee merely looked straight ahead and held the keys. At the hearing, Officer George acknowledged that he still had not seen any illegal activity.

{¶8} Officer George next opened the door to the Ford Explorer, reached across appellee's body and grabbed his right hand. The officer started to pull appellee out of the vehicle.

{¶9} At no time did the officer have a warrant, either a search warrant or an arrest warrant. Warrantless searches and/or seizures are "per se unreasonable, subject to a limited number of well-delineated exceptions." See *Katz v. United States* (1967), 389 U.S. 347, 88 S.Ct. 507. For the State of Ohio to justify the warrantless seizure of Forrest and the search of Forrest's vehicle, the State had the burden of proving the existence of and applicability of one of the well-delineated exceptions. The trial judge who conducted the evidentiary hearing on Forrest's motion to suppress found that the State of Ohio did not prove the applicability of any of the well-delineated exceptions and sustained the motion to suppress.

{¶10} We note initially that the police needed no suspicion of activity, legal or illegal, in order to walk up to or approach the Ford Explorer. What a person willingly displays in public is not subject to Fourth Amendment protection. However, Officer

George went far beyond approaching the vehicle. He ordered Forrest out of the vehicle and then physically grabbed Forrest and started to pull him out of the Ford Explorer when Forrest did not honor the officer's order.

{¶11} The State of Ohio has analogized the facts here to a "stop" justified by *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868. The trial court judge did not reject the State's "*Terry* stop" theory without consideration. Instead, the trial court judge described the officer's state of mind as "nothing more than a hunch." The trial court also expressly found that the police "did not have an objective evidentiary justification to initiate the stop and conduct any search." The reference to "initiate the stop" is an apparent reference to the State of Ohio's argument that the law of "stop and frisk" under *Terry* applied here.

{¶12} The trial court clearly rejected the State of Ohio's assertion that the stop and frisk exception to the warrant requirement applied and was demonstrated. We also note the attempt to apply *Terry* to the facts here is inconsistent with Officer George's claim that he and his partner stopped to check the well-being of the Explorer's occupants. The officer's statement that he saw no criminal activity right up to the time he decided to order appellee out of the vehicle and then to physically remove appellee from the vehicle when appellee did not get out voluntarily is inconsistent with a stop and frisk.

{¶13} The State of Ohio has argued other warrant exceptions on appeal, none of which are persuasive. The automobile exception requires probable cause to search. See, for instance, *Carroll v. United States* (1925), 267 U.S. 132, 45 S.Ct. 280, and the many cases following it. It similarly requires no probable cause to arrest Forrest as the State argues probably cause to arrest and then search incident to arrest are present, but both fail because they are premised on Forrest's wrongfully refusing to obey the order to

step out of the vehicle. The officer, however, had no basis to order Forrest out of the vehicle because he lacked reasonable articulable suspicion of criminal activity when Officer George reached across Forrest's body to grab his hand and pull him out of the vehicle. Since there was no lawful arrest, the search and seizure cannot be justified as a search incident to a lawful arrest.

{¶14} In short, the trial court's rejection of the State of Ohio's proffered exception to the warrant requirements was consistent with the evidence before it and the officer's own admissions.

{¶15} The first assignment of error is overruled.

{¶16} In the second assignment of error, the State of Ohio asserts the trial court should have applied the 2009 United States Supreme Court case of *Herring v. United States* (2009), 555 U.S. 135, 129 S.Ct. 695 to this case and used it as a basis to reach a different ruling on the motion to suppress.

{¶17} Simply stated, the facts in *Herring* bear little similarity to the facts of the present case. In *Herring*, police officers made an arrest based upon a warrant listed in a neighboring county's database. A search incident to that arrest yielded drugs and a gun. Later, the arresting officers discovered that the warrant listed in their computer records had been recalled months earlier. The failure of police in the adjoining county to update their database was, by the United States Supreme Court, seen as a simple act of negligence, but not such an error as to render the arrest illegal. The officers who arrested Herring had an honest, legitimate belief that a valid arrest warrant existed.

{¶18} The officers involved in the search and seizure of appellee had no warrant and had no basis for believing a warrant existed. *Herring* has no applicability to appellee's case. The trial court did not err by failing to apply it.

{¶19} The second assignment of error is overruled.

{¶20} Both assignments of error having been overruled, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT, P.J., and BROWN, J., concur.

20831 - W2

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO
2012 JAN 26 PM 12:56
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 11AP-291 (C.P C. No. 09CR-07-3935)
Al E. Forrest,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

JOURNAL ENTRY

For the reasons stated in the decision of this court rendered herein on January 26, 2012, it is the order of this court that appellant's motions are denied.

TYACK, J., BROWN, P.J., & BRYANT, J.

By: Judge G. Gary Tyack

A-8

20831 - U48

M

Cocroft, J.V.5

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO
2012 JAN 26 PM 12:46
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 11AP-291 (C.P.C No. 09CR-07-3935)
Al E. Forrest,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on January 26, 2012

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellant.

Michael Siewert, for appellee.

ON MOTION

TYACK, J.

{¶1} The State of Ohio has filed a compound application and motion entitled: "Plaintiff-Appellant's Application for Reconsideration, Plaintiff-Appellant's Application for En Banc Consideration, Plaintiff-Appellant's Motion for Review of this Application for En Banc Consideration by all Eight Judges, [and] Plaintiff-Appellant's Motion to Certify a Conflict."

{¶2} The case involves the warrantless seizure of the person of Al E. Forrest, followed by a search of the motor vehicle in which he was present. A trial court judge

conducted an evidentiary hearing in which she found the State of Ohio had not justified the warrantless seizure and search. As a result, she ordered suppression of the evidence.

{¶3} The State of Ohio appealed and a panel of this court remanded the case for additional findings and additional clarity as to the trial court's rulings.

{¶4} The trial judge conducted a second hearing and again ordered suppression of the evidence.

{¶5} The State of Ohio appealed once again and a different panel of this court affirmed the trial court's ruling.

{¶6} The State of Ohio wants to argue again that the police officer who seized Forrest had the right to do so under the stop and frisk rights granted to police under *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868.

{¶7} This is not a stop and frisk situation. Forrest was in the driver's seat of a parked vehicle. The police did not stop him. They did not frisk him. Instead, a police officer opened the door of the vehicle, reached across Forrest's body, grabbed Forrest's arm which was the closest to the center of the vehicle and pulled Forrest from the vehicle. The officer acknowledged during the evidentiary hearing on the motion to suppress that he had seen no illegal activity when he first ordered Forrest to get out of the vehicle and then seized Forrest. The officer's actions went far beyond stopping a citizen on a public sidewalk and patting the citizen down for weapons, the facts in *Terry*. Again, this was not a stop and frisk situation and *Terry* does not apply. The State of Ohio's discussion of a reasonable articulable suspicion of criminal activity all assumes a *Terry* stop occurred. No such stop occurred.

{¶8} The State's argument at times seems to imply that persons who live in a minority neighborhood have fewer rights under the Fourth Amendment to the United States Constitution than persons who live elsewhere if a police officer calls the neighborhood a "high crime neighborhood" or asserts that other persons have been arrested in the area. The Fourth Amendment applies throughout the nation. The strong preference for requiring police to get a warrant before seizing a person has been the law of the land for over 40 years, at least since the decision in *Katz v. United States* (1967), 389 U.S. 347, 88 S.Ct. 507.

{¶9} The Fourth Amendment jurisprudence has not proceeded to the point that a police officer can pull a citizen out of a parked vehicle merely because the citizen is parked in a minority neighborhood and acts surprised when he or she suddenly sees a police officer standing right outside his or her vehicle.

{¶10} The State of Ohio also, asserts once again, that the decision of the United States Supreme Court in States in *Herring v. United States* (2009), 555 U.S. 135, 129 S.Ct. 695 somehow worked a major change in Fourth Amendment law. It did not.

{¶11} In *Herring,* police officers made an arrest based upon an assertion from a nearby police agency that an active warrant existed. In fact, unbeknownst to the arresting officers and at least some officers of the nearby district, the warrant had been recalled. The United States Supreme Court found that the fruits of the arrest should not be suppressed under the circumstances.

{¶12} The differences from Forrest's case are striking. The officers here knew they had no warrants. They claimed they were approaching the vehicle to check on the

well-being of the occupants. They made no claim to having seen any illegal activity until after they had seized Forrest.

{¶13} The good-faith exclusionary rule claimed by the State of Ohio exists only in the context of searches and arrests where police believe they have a valid warrant. The rule does not apply to situations where no warrants exist or are believed to exist. The rule does not apply to Forrest's factual situations, which involves a deliberate seizure of the person, not negligent record keeping.

{¶14} The cases alleged by the State of Ohio as being in conflict with our decision in this case all involve stop and frisk situations. As noted above, the seizure of Forrest was not a stop or a frisk. No conflict exists such that a conflict should be certified.

{¶15} We do not find that two or more decisions of this appellate court are in conflict, so the requirements of App.R. 26(A)(2) are not met and en banc consideration is not permitted.

{¶16} As a result of the foregoing analysis, the State of Ohio's application for reconsideration is denied. The State's application for en banc consideration and related motions are denied. The motion for certification of a conflict is also denied.

Motions denied.

BROWN, P.J., concurs in judgment only.
BRYANT, J., concurs separately.

BRYANT, J., concurring separately.

{¶17} Although I agree with the majority that the state's motions be denied, I disagree to some extent with the majority opinion and so write separately.

{¶18} The majority points out that this case does not involve a stop and frisk. I do not interpret the state's motion to suggest the case involves a stop and frisk as the officers approached defendant's vehicle. Rather, the state contends that the officers, on arriving at the vehicle, developed a reasonable suspicion that defendant was engaged in criminal activity. Our prior decision addressed that contention and found it unpersuasive.

{¶19} The state's motion for reconsideration does not raise issues this court failed to address in deciding the state's appeal. Accordingly, I would deny the state's motion for reconsideration. For the reasons the majority states, I, too, would deny the state's motions related to en banc consideration and its motion to certify a conflict.

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO
2012 MAR -8 PM 1:02
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 11AP-291
Al E. Forrest,	:	(C.P.C. No. 09CR-07-3935)
Defendant-Appellee.	:	(REGULAR CALENDAR)

JOURNAL ENTRY

For the reasons stated in the decision of this court rendered herein on March 8, 2012, it is the order of this court that the motion to certify the judgment of this court as being in conflict with the judgments of other Courts of Appeals is sustained, and, pursuant to the Ohio Constitution, Article IV, Section 3(B)94), the record of this case is certified to the Supreme Court of Ohio for review and final determination upon the following issue in conflict:

> Whether the entire en banc court as defined in App.R. 26(A)(2) must participate in the decision whether to grant or deny an application for en banc consideration.

TYACK, J., BROWN, P.J., & BRYANT, J.

By G. Gary Tyack
Judge G. Gary Tyack

STEVEN L. TAYLOR
FR CO PROSECUTORS OFC
13TH FLOOR
373 SOUTH HIGH STREET
COLUMBUS, OH 43215

A-14

20844 - C54

m

Corcoft J.

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO
2012 MAR -8 PM 12:49
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 11AP-291 (C.P.C. No. 09CR-07-3935)
Al E. Forrest,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

DECISION

Rendered on March 8, 2012

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellant.

Michael Siewert, for appellee.

ON MOTION TO CERTIFY CONFLICT

TYACK, J.

{¶ 1} The State of Ohio has filed a second motion to certify a conflict in this case. The issue to be certified is:

> Whether the entire en banc court as defined in App.R. 26(A)(2) must participate in the decision whether to grant or deny an application for en banc consideration.

{¶ 2} The State of Ohio is correct in its assertion that different courts of appeals handle motions for en banc consideration differently. Some submit the motion to the entire membership of the court. Some, as the Tenth District, submit the motions to the panel who decided the case originally to ascertain if there is arguable merit to the motions and only after that decision is made submit the issue to the full membership of the court.

A-15

{¶ 3} App.R. 26(A)(2)(a) reads:

> Upon a determination that two or more decisions of the court on which they sit are in conflict, a majority of the en banc court may order that an appeal or other proceeding be considered en banc. The en banc court shall consist of all full-time judges of the appellate district who have not recused themselves or otherwise been disqualified from the case. Consideration en banc is not favored and will not be ordered unless necessary to secure or maintain uniformity of decisions within the district on an issue that is dispositive in the case in which the application is filed.

{¶ 4} The rule does not literally state who shall make an initial determination that two or more decisions in a district are in conflict. The procedure used by the Tenth District is more efficient, especially in the vast majority of cases where no arguable merit is present. Many prisoners initiated cases fall into this category. Also, cases where one of the parties simply wants to delay, routinely fit into this category.

{¶ 5} Since there is a conflict among the districts as to the correct interpretation of App.R. 26(A)(2), the conflict is best resolved by the Supreme Court of Ohio.

{¶ 6} The motion to certify a conflict is granted. The issue set forth above is certified to the Supreme Court of Ohio for review.

Motion to certify a conflict granted.

BROWN, P.J., and BRYANT, J., concur.

20760 - S15
57722 - X63

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

2011 MAR 23 PM 12:34
CLERK OF COURTS

State of Ohio,

Plaintiff,

vs. Case No.09CR-3935 (Cocroft, J.)

Al E. Forrest,

Defendant.

DECISION AND ENTRY ON DEFENDANT'S MOTION TO SUPPRESS EVIDENCE, FILED NOVEMBER 18, 2009

Rendered this 23rd day of March, 2011

This matter came before the Court on the defendant's Motion to Suppress Evidence filed on November 18, 2009. On February 18, 2010, the State filed its Memorandum Contra Defendant's Motion to Suppress Evidence. The motion came before the Court for an evidentiary hearing on March 1, 2010. This Court issued a decision granting the defendant's motion on May 12, 2010. The State of Ohio appealed this Court's decision to the 10th Appellate District, which rendered its Decision on December 2, 2010. In its Decision, the Court vacated the lower court's judgment and remanded this matter for further Crim. R. 12 findings. Specifically, the 10th District wrote:

> 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 the 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 the matter for findings of fact and conclusions of law that explain why the evidence the state submitted warrants whatever decision the trial

FILED
COMMON PLEAS COURT
2011 MAR 23 PM 3:03
CLERK OF COURTS

(8)

A-17

> court renders regarding whether the officers possessed a requisite reasonable, articulable suspicion under *Terry* to detain defendant.

Decision at ¶23. (Internal citations omitted). Consequently, on March 10, 2011, this court held a second hearing during which additional arguments from counsel were heard.

STATEMENT OF FACTS

The following facts were adduced at the March 1, 2010 hearing: Officer Kevin George, of the Columbus Police Department, testified that, On May 16, 2009, he and his partner, Officer Mayberry were on patrol on Omar Drive, which is located in an area commonly referred to as Southfield in Columbus, Franklin County, Ohio. (Transcript at 4). During that patrol, Officer George "noticed a 2003 Ford Explorer parked in front of 1571 Omar Drive". (Transcript at 4). Officer George further testified that, upon seeing the parked vehicle, Officer Mayberry drove the cruiser behind the parked vehicle and that the occupants of the car would not have necessarily seen the police cruiser approaching. (Transcript at 16). Officer George then exited the cruiser and approached the individuals who were seated inside, one of whom was eventually identified as the defendant.

Officer George testified that, before approaching the vehicle and even as he approached the vehicle, he did not observe any criminal violations involving the 2003 Ford Explorer or its occupants. (Transcript at 17). Moreover, Officer George stated that, as he observed the defendant and the other occupant while they were sitting in the vehicle, he did not observe any criminal violations. (Transcript at 17).

Nevertheless, as Officer George walked towards the vehicle, he testified:

> The first thing I noticed was the expressions of [the defendant] in the driver's seat and [the other occupant] in the front passenger seat. Mr. Forrest looked at me, eyes enlarged and mouth dropped open. The passenger...looked at me quickly, looked at me, and then straight ahead, would not look over.

(Transcript at 5). Officer George then stated that, as he walked up to the driver's door, he observed the defendant, who was in the driver's seat, move something with his right hand between himself and the center console and then shift his shoulders towards the driver's window "like [the defendant] is...shielding my vision of what is inside the vehicle." (Transcript at 6).

At that point, Officer George ordered the defendant out of the vehicle, which order the defendant ignored. (Transcript at 8). So, Officer George opened the driver's side door of the vehicle and pulled the defendant's right hand across his body. (Transcript at 8). At that point, Officer George testified that he saw a clear plastic baggie of what he believed to be heroin between the defendant's center console and right side of his body. (Transcript at 8). After observing what he believed to be heroin, Officer George pulled the defendant "out of the vehicle, searched him further, then placed him in the rear of the cruiser." (Transcript at 10). After removing the defendant from the vehicle, the officers removed the passenger, searched the vehicle for additional contraband and then read the passenger his *Miranda* rights. (Transcript at 10). (Transcript at 10). Officer George also testified that neither he nor his partner received any specific calls about the 2003 Ford Explorer in question on May 16,

2009, or any specific calls about any criminal activity in this neighborhood on May 16, 2009. (Transcript at 23).

LAW AND ANALYSIS

The issue before this court is whether the officers had a reasonable, articulable suspicion to approach the defendant based on *Terry v. Ohio* (1968), 392 U.S. 1. In *Terry*, the Supreme Court of the United States held:

> [W]here a police officer observes unusual conduct which leads him to reasonably conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

Id. at 30. The *Terry* Court further reasoned that in determining the reasonableness of an officer's conduct, a court must "first focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen." *Id.* at 21. The Court articulated:

> And in justifying the particular intrusion, the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of particular circumstances. And in making that assessment, it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief that the action taken was appropriate? Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing

> more substantial than inarticulate hunches, a result this Court has consistently refused to sanction. And simple "'good faith on the part of the arresting officer is not enough.' . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate and the people would be 'secure in their persons, houses, papers and effects,' only in the discretion of the police."

Id. at 21,22. (Internal citations omitted).

During both evidentiary hearings before this Court, the State contended that the officers had a reasonable, articulable suspicion to detain the defendant because: 1) the neighborhood in which the stop occurred was known to the officers as a high crime area; and 2) the totality of the circumstances justified the stop and search of the defendant and the vehicle. This Court disagrees. There was no evidence presented during either hearing which demonstrates that the officers believed that criminal activity was afoot when they noticed and approached the vehicle. Indeed, Officer George testified that there was no indication that any criminal violation had occurred when the officers pulled behind the 2003 Ford Explorer. The only rationale provided to the Court for the officers' actions was that, in the past, these officers had received numerous complaints regarding criminal activity in this area and that the defendant's mouth "dropped open" and his eyes enlarged when the officers approached the Ford Explorer. (Transcript at 5).

This Court finds that this rationale, in and of itself, does not provide the officers with sufficient indicia that the defendant was engaged in any criminal activity or sufficient probable cause to search the 2003 Ford Explorer. Rather, this Court finds that the officers' basis for the stop amounts to nothing more than a hunch, as expressed in *Terry*, based on their past patrol efforts in this

area. In truth, the officers had not received any reports of any criminal activity on the date in question and their stop was not based on any information gleaned from other sources, such as other officers or a police radio dispatch. *See United States v. Hensley* (1985), 469 U.S. 221, 232, 233. Moreover, while the State suggested during the second evidentiary hearing that the officers noticed that the defendant and vehicle passenger were "huddled" in the Ford Explorer, there is nothing in the record that bears out this conclusion. As stated previously, Officer George testified that, as he approached the vehicle, he did not observe the defendant engaged in any criminal activity.

While this Court appreciates the efforts of law enforcement to patrol areas that have developed reputations as high crime areas and to make lawful arrests as necessary, it cannot endorse or sanction those patrol efforts at the expense of the rights of those citizens who live in these areas. To find that the officers in the instant case had a reasonable, articulable suspicion to initiate this stop would mean that anyone who sat in their vehicle, for any period of time or for any reason during a patrol in this area, could possibly be subjected to inquiry and search just because the area in which they live or are visiting has a negative reputation. Such an outcome creates incongruous results which this Court does not believe the *Terry* Court intended to create.

Indeed, as the Court noted in *Terry*, "[C]ourts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is

identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials." *Terry* at 15. In this case, this Court finds that the officers did not have an objective evidentiary justification to initiate the stop and conduct any search.

While the defendant may not be a paragon of virtue, and while he may have been derelict in his responsibility to ensure that his neighborhood does not develop a reputation as a crime-ridden area, he is, nonetheless, entitled to the same protections under the 4th and 14th Amendments of the United States Constitution and Article 1, Sections 14 and 16 of the Ohio Constitution as any other citizen.

As such, the defendant's Motion to Suppress the Evidence in this matter is hereby **GRANTED.**

IT IS SO ORDERED.

Judge Kimberly Cocroft