

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23979
v.	:	T.C. NO. 09CR2913
ORLANDO CORTEZ THOMAS	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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OPINION

Rendered on the 18th day of March, 2011.

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FROELICH, J.

{¶ 1} Defendant-appellant Orlando Thomas appeals from his conviction and sentence for possession of cocaine. For the following reasons, the judgment of the trial court will be Affirmed.

{¶ 2} On the evening of September 3, 2009, Dayton Police Officers Heiser and Beavers were on patrol as part of a “gang interdiction squad” that included approximately ten Dayton police officers and Montgomery County Sheriff’s deputies. They noticed a group of people crouching in a circle near a wall of an apartment building, as if playing a game of dice, which in turn led the officers to suspect that the group was gambling. As the cruisers pulled into the parking lot of the apartment complex, one of the people in the group looked up and ran away. Several officers, including Officer Heiser, pursued the man, who abandoned a baggie of fleece as he ran. The officers found that the man had an outstanding warrant for his arrest.

{¶ 3} The other officers approached the rest of the group of people, all of whom remained by the wall. As Officer Heiser returned to the group a few minutes later, he heard Detective Knight asking the people in the group, which included Thomas, if they would consent to being patted down. Officer Heiser approached Thomas and asked him if he would consent to a pat-down. Thomas responded by pulling a handful of money and a baggie of crack cocaine from his pocket.

{¶ 4} Thomas was indicted on one count of possession of cocaine. He filed a motion to suppress, which the trial court overruled following a hearing. Thomas pled no contest and was sentenced to five years of community control. Thomas appeals

II

{¶ 5} Thomas’s Assignment of Error:

{¶ 6} “THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING THAT APPELLANT VOLUNTARILY CONSENTED TO A SEARCH BY POLICE.”

{¶ 7} Thomas claims that the trial court should have granted his motion to suppress because he was illegally seized by the officers, and therefore his consent to the pat-down search was not voluntary. When assessing a motion to suppress, the trial court is the finder of fact, judging the credibility of witnesses and the weight of evidence. *State v. Jackson*, Butler App. No. CA2002-01-013, citing *State v. Fanning* (1982), 1 Ohio St.3d 19, 20. An appellate court must rely on those findings and determine “without deference to the trial court, whether the court has applied the appropriate legal standard.” *Id.*, quoting *State v. Anderson* (1995), 100 Ohio App.3d 688, 691. When the trial court’s ruling on a motion to suppress is supported by competent, credible evidence, an appellate court may not disturb that ruling. *Id.*, citing *State v. Retherford* (1994), 93 Ohio App.3d 586.

{¶ 8} “To suppress evidence obtained pursuant to a warrantless search or seizure, the defendant must (1) demonstrate the lack of warrant, and (2) raise the grounds upon which the validity of the search or seizure is challenged in such a manner as to give the prosecutor notice of the basis for the challenge.” *City of Xenia v. Wallace* (1988), 37 Ohio St.3d 216, paragraph one of the syllabus. “Once a warrantless search is established, the burden of persuasion is on the state to show the validity of the search.” *Id.* at 218, citing *State v. Kessler* (1978), 53 Ohio St.2d 204, 207. The State must prove that any warrantless search or seizure “meets Fourth Amendment standards of reasonableness.” *Maumee v. Weisner*, 87 Ohio St.3d 295, 297, 1999-Ohio-68, citing 5 LaFave, *Search and Seizure* (3 Ed.1996), Section 11.2(b).

{¶ 9} Both the Fourth and Fourteenth Amendments to the United States Constitution and Section 14, Article I of the Ohio Constitution protect citizens against

unreasonable searches and seizures. *Delaware v. Prouse* (1979), 44 U.S. 648, 662, 99 S.Ct. 1391, 59 L.Ed.2d 66; *State v. Robinette* (1997), 80 Ohio St.3d 234, 238-39. However, the Fourth Amendment is not implicated every time a police officer has contact with a citizen. *State v. Crum*, Montgomery App. No. 22812, 2009-Ohio-3012, ¶12, citing *California v. Hodari D.* (1991), 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690; *Retherford*, at 593. Instead, police-citizen interactions can fall into three distinct categories: a consensual encounter, an investigative detention, or an arrest. *State v. Taylor*, (1995), Ohio App.3d 741, 747-49. See, also, *Crum*, supra, at ¶12, citing *Florida v. Royer* (1982), 460 U.S. 491, 501-507, 103 S.Ct. 1319, 75 L.Ed.2d 229; *State v. Hardin*, Montgomery App. No. 20305, 2005-Ohio-130, ¶13.

{¶ 10} An encounter is consensual when police approach a person in a public place and engage him in conversation or request information, but the person is free to choose not to answer and to walk away. *Crum*, ¶13, citing *United States v. Mendenhall* (1980), 446 U.S. 544, 553, 100 S.Ct. 1870, 64 L.Ed.2d 497; *Hardin*, supra, at ¶14. Unless the police officer has by physical force or show of authority restrained the person's liberty to the extent that a reasonable person would not feel free to either decline the officer's request for information or to walk away, Fourth Amendment guarantees are not implicated. *Id.*, citing *Taylor*, supra, at 747-48. Furthermore, neither a request to check the person's identification nor a request to pat-down his person or to search his possessions makes the encounter non-consensual, so long as the request is not coercive. *Id.*, at ¶¶13-14, citing *Florida v. Bostick* (1991), 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389; *Hardin*, supra, at ¶14.

{¶ 11} If a defendant "consented to a search during an illegal detention, the state

bears the burden of proving that under the totality of the circumstances, [his] consent was an ‘independent act of free will’ and not the result of the illegal detention.” *State v. Jones*, Wood App. No. WD-09-011, 2010-Ohio-1600, ¶32, internal citations omitted. “If, however, no illegal detention occurred, the state...must illustrate that the totality of the circumstances establish that the [defendant] voluntarily consented to the search.” *Id.*

{¶ 12} Based on the record, there is no indication that there ever was a detention of Thomas. While it is certainly conceivable that the officers’ remaining with the group caused Thomas to have a subjective belief that he was detained, courts must consider the objective circumstances of the situation. *State v. Hollins* (March 30, 2001), Hamilton App. No. C-000344. Again, all the record reflects regarding Thomas is that an officer approached him and asked for consent to search. “When officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual’s identification; and request consent to search....” *Florida v. Bostick*, 501 U.S. at 434-35.

{¶ 13} Thomas was in a public area. The officers did not activate the overhead lights or the sirens in their cruisers. Instead, the officers parked their cruisers and approached the group at a walk, without drawing weapons. There is no evidence that the officers blocked Thomas from being able to leave. Furthermore, as the trial court pointed out, there was no evidence “of harsh language, rough treatment or other coercive police tactics * * * [nor was there any] other inference of subtle coerciveness.”

{¶ 14} Having concluded that the encounter was consensual, we turn to the question of whether Thomas voluntarily consented to a pat-down of his person.

{¶ 15} A search conducted without a warrant is per se unreasonable, subject only to a few specifically established and well-delineated exceptions. *Katz v. United States* (1967), 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576; *State v. Sneed* (1992), 63 Ohio St.3d 3, 6-7. The State bears the burden of proving that an exception applies to any warrantless search. *Kessler*, 53 Ohio St.2d 204. One of the specifically established exceptions to the warrant requirement is a search that is conducted pursuant to consent. *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 249, 93 S.Ct. 2041, 36 L.Ed.2d 854; *State v. Posey* (1988), 40 Ohio St.3d 420, 427. The determination of whether consent to search was voluntary is a question of fact to be determined from the totality of the circumstances. *Schneckloth*, at 227.

{¶ 16} The trial court held that there was no “individualized belief that [the officer’s] safety or that of others was in danger at the hands of Defendant. Therefore, without more, conducting a brief pat-down, or a weapons frisk, upon Defendant and the others (besides Thomas) was unreasonable.” (Emphasis in original). The court held, however, that Thomas “willingly emptied his pockets himself, such that no actual search of Defendant occurred in this case until after his arrest.” In other words, a person who voluntarily relinquishes property to a law enforcement officer cannot claim that his reasonable expectation of privacy has been violated. Again, this does not ignore the reality that any citizen may feel inherently coerced to cooperate with a police request or even that Thomas subjectively believed that he would have been searched regardless, so he just cut to the chase and gave the contraband to the officer. But, as we have explained, that does not make the obtaining of the drugs the result of any unconstitutional action by the police.

{¶ 17} We conclude that the evidence adequately supports the trial court’s finding that Thomas voluntarily consented to a pat-down of his person, if there were a search at all. There is no evidence in the record that Thomas could not have walked away from the officers or refused their request. See, e.g., *Crum*, supra, at ¶16. The trial court concluded that there was no evidence “of harsh language, rough treatment or other coercive police tactics, nor was there any evidence of any low intellectual capacity of the Defendant; or other inference of subtle coerciveness, such that his consent to search was not voluntary....”

{¶ 18} Based on the totality of the circumstances and the record before the trial court and us, we conclude that during the consensual encounter between Thomas and the police officers, Thomas voluntarily gave up the contraband, and therefore the trial court properly denied his motion to suppress.

{¶ 19} Thomas’s Assignment of Error is overruled.

III

{¶ 20} Thomas’s sole Assignment of Error having been overruled, the judgment of the trial court is Affirmed.

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DONOVAN, J. and HALL, J., concur.

Copies mailed to:

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J. Allen Wilmes
Hon. Gregory F. Singer
Hon. Michael L. Tucker