

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

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| STATE OF OHIO, | : | APPEAL NO. C-070394 |
| | : | TRIAL NO. B-0608692 |
| Plaintiff-Appellee, | : | |
| | : | <i>JUDGMENT ENTRY.</i> |
| vs. | : | |
| MARCUS BERRY, | : | |
| | : | |
| Defendant-Appellant. | : | |

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Following the denial of his motion to suppress, defendant-appellant Marcus Berry pled no contest to charges of possession of marijuana and trafficking in marijuana. The trial court found Berry guilty of these offenses and sentenced him to three years of community control.

Berry has appealed, and he asserts in his sole assignment of error that the trial court erred in overruling his motion to suppress. During the suppression hearing, the state presented the testimony of Springfield Township Police Detective Matt Wilcher. Wilcher testified that, on August 30, 2006, he had been conducting surveillance in the Pleasant Run Manor Apartments in an unmarked vehicle. The surveillance was the result of numerous drug-related complaints that the Springfield Township police had received regarding this area.

Around 10:00 p.m., Wilcher observed Berry in the parking lot of the apartment complex. Berry had been talking on a telephone inside his car. The engine had been

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

running, but the vehicle's lights were not on. As Wilcher approached Berry's vehicle, Berry turned on his lights and quickly sped away. Wilcher testified that he had followed Berry and observed him pull into a parking lot across the street. Berry had parked near a store that was no longer open, and he had proceeded to exit from his vehicle and place a plastic bag in the trunk. Wilcher testified that Berry appeared nervous as he was doing so and continually checked to make sure that nobody was nearby.

As a result of this behavior, Wilcher requested that a marked police vehicle initiate a traffic stop of Berry. Springfield Township Police Officer Christopher Niehaus testified that he had executed the traffic stop along with two other officers, including a canine officer. Berry was read his *Miranda* rights, and as the canine alerted to the presence of drugs in his automobile, Berry stated there was a small amount of marijuana in the center console. The officers found this marijuana, as well as a bag of marijuana inside Berry's trunk. When asked if he had more marijuana at his residence, Berry responded that "[t]here might be just a little bit." Officer Niehaus received permission from Berry's girlfriend to search his apartment. In the master bedroom of the apartment, Niehaus found three large bags containing marijuana, one of which held 50 bags of individually packaged marijuana. He also found a digital scale, a metal tin containing marijuana residue, and another plastic bag containing marijuana.

Appellate review of a trial court's ruling on a motion to suppress presents a mixed question of law and fact.² We must accept the trial court's findings of fact if they are supported by competent, credible evidence, but we review *de novo* the trial court's application of the relevant law to the facts.³

An investigatory stop is lawful "where an officer has a reasonable, articulable suspicion that a person is engaging or has recently engaged in criminal activity."⁴

² *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶18.

³ *Id.*

⁴ *State v. Stallings*, 1st Dist. No. C-030233, 2003-Ohio-6918, ¶9.

Whether an officer possessed such a reasonable and articulable suspicion is to be determined based on the totality of the circumstances.⁵

Following our review of the record, we conclude that Detective Wilcher possessed a reasonable suspicion that Berry had been engaged in criminal activity. Wilcher had observed Berry in a high-drug-crime area. Berry had been sitting in a running vehicle without the lights on. Berry proceeded to speed away as Wilcher had approached him. He parked by a closed store and placed a plastic bag in the trunk of his car, all while appearing nervous and checking to see that nobody was around. Each of these circumstances, considered separately, could have been viewed as innocent behavior. But viewed in combination, these circumstances clearly justified a reasonable suspicion that Berry had been engaged in criminal activity. And because the initial stop of Berry was lawful, the evidence obtained as a result of the traffic stop need not have been suppressed.

The trial court properly overruled Berry's motion to suppress. Berry's assignment of error is overruled, and the judgment of the trial court is affirmed.

A certified copy of this Judgment Entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., HENDON and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on March 19, 2008
per order of the Court _____.
Presiding Judge

⁵ *State v. Bobo* (1988), 37 Ohio St.3d 177, 178, 524 N.E.2d 489.