

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

STATE OF OHIO,	:	APPEAL NO. C-070817
	:	TRIAL NO. B-0610271
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
OMAR BOYD,	:	
	:	
Defendant-Appellant.	:	

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

In a single assignment of error, defendant-appellant Omar Boyd challenges the trial court’s post-hearing decision overruling his suppression motion. On appeal, Boyd argues that the arresting officer lacked a reasonable and articulable suspicion to perform an investigative weapons search under *Terry v. Ohio*.² We affirm.

I. The Locale

This case involves Boyd’s arrest, which had been effected around an apartment complex that was near a McDonald’s and a Dairy Market on or about 1110 East McMillan Street in the Walnut Hills section of Cincinnati. The witnesses’ testimony conflicted on the exact events leading up to Boyd’s arrest, but the following description of the surrounding area is correct. The McDonald’s is located

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

² (1968), 392 U.S. 1, 88 S.Ct. 1868.

on the northwest corner of the Victory Parkway and East McMillan intersection, bordered on the east by Victory Parkway and on the South by East McMillan. Relative to McDonald's, on the west adjacent lot is the Dairy Market (which also abuts East McMillan) and the north adjacent lot is occupied by the apartment complex. So the apartment complex is due north of McDonald's and is diagonally northeast of the Dairy Market, though the Dairy Market parking lot extends north. The northeast corner of the Dairy Market lot is bordered by a row of shrubs and bushes running north to south that also borders the apartment complex.

II. Search and Seizure Law

The Fourth and Fourteenth Amendments to the United States Constitution generally prohibit a state from conducting warrantless searches and seizures. Unless an exception applies, warrantless searches are per se unreasonable.³ One exception has been enunciated by the United States Supreme Court in *Terry v. Ohio*, where a citizen's right to be free from unreasonable searches was balanced against the need to protect the police and the public.⁴ The Fourth Amendment's protection against unreasonable searches and seizures extends to investigative traffic stops, but such a stop is permissible if it is supported by reasonable suspicion.⁵ Courts evaluate the totality of the circumstances in determining whether an investigative stop was reasonable.⁶ Courts may consider both training and experience in determining whether an officer's inferences and deductions led to reasonable suspicion: "A

³ *Terry*, 392 U.S. 1, 88 S.Ct. 1868.

⁴ *Id.*

⁵ See *United States v. Arvizu* (2002), 534 U.S. 266, 273, 122 S.Ct. 744; *United States v. Jacob* (C.A.6, 2004), 377 F.3d 573; *State v. Bacher*, 170 Ohio App.3d 457, 2007-Ohio-727, 876 N.E.2d 864, ¶8.

⁶ See *State v. Bobo* (1988), 37 Ohio St.3d 177, 524 N.E.2d 489, paragraph one of the syllabus.

review of the totality of the circumstances is based on the objective observations and information of the officer along with the inferences and deductions made by a trained law enforcement officer that the particular individual is engaged in wrongdoing.” Another exception is that the police may conduct a warrantless search incident to a lawful arrest. If the arrest is unlawful, as where the police do not possess probable cause to make the arrest, the search is also unlawful.⁷

III. Officer Watson’s Account of Boyd’s Arrest

In November of 2006, Cincinnati Police Officer Tim Watson was on bicycle patrol in the 1100 block of East McMillan in Walnut Hills. Watson described this area as a high-crime area known for its gun crimes, drug use and sales, prostitution, and homicides. Watson was riding his bicycle through a local convenience-store parking lot when he noticed the smell of burning marijuana emanating from an adjoining apartment complex. A small row of bushes separated the complex from the convenience store.

Watson testified that this particular apartment complex had a history of drug dealers, drug users, and loiterers. The loitering was so commonplace that the building owners had requested that officers check the identities of persons on the apartment property to prove residency status and to confirm that the person was not a trespasser.

After smelling the marijuana, Watson saw Boyd as he was carrying a bag from the apartment complex to the convenience store. As Boyd crossed the threshold onto the convenience-store property, he saw a group of officers gathered in front of the

⁷ See *State v. Johnson* (Feb. 25, 2000), 1st Dist. No. C-990042.

store and immediately ducked back into the row of bushes and hid. Though Boyd saw the officers in front of the store, he did not notice that Watson had been observing his every move from a different position.

Boyd's behavior effected a sense of suspicion in Watson and his partner. They decided to investigate and, on approaching Boyd, first asked for identification. As he fumbled through his pockets, Boyd attempted to obstruct the officers' line of sight by angling and turning his body away from them.

Boyd's contortions led Watson to suspect that the fidgeting had been meant to conceal a weapon; the officer then concluded that safety required a pat-down.

Watson asked Boyd if he was carrying anything that the officers should know about. And Boyd then bowed his head; his arms and head dangled listlessly. Watson, standing behind Boyd, began to reach for his waistband, but before he could be patted down, Boyd doubled over, flinched, and defensively exclaimed, "It's just a belt buckle!"

On raising Boyd's arms and lifting his shirt, Watson saw a handgun that had been concealed under the shirt, inside the waistband of Boyd's pants. Watson then seized Boyd's arms, holding them behind his back. The gun was removed; Boyd was arrested. Watson then searched Boyd's bag and found several dozen bullets, some of which could have been loaded in the confiscated handgun.

IV. Boyd's Contradicting Account of His Arrest

Boyd's account of his dealings with Officer Watson was quite different; at the suppression hearing, Boyd testified that he had walked through a McDonald's parking lot to the entrance of the apartment building. He explained that he went through the bushes as part of a shortcut to his home, and that the police should have

ended the stop when they realized that he was not the source of the marijuana odor. Boyd oversimplified the facts. Watson was investigating both the smell of marijuana and the possibility that Boyd was trespassing on the apartment property. This entitled the officers to stop and question Boyd.

Boyd asserted that there was no evidence to suggest that he was armed. But Watson testified that Boyd had twisted and turned his body in an attempt to hide something from the officers. Watson believed that Boyd was attempting to conceal a weapon. This case turned on Boyd's and Watson's credibility. The trial court did not believe Boyd.

The trial court functions as the trier of fact during a suppression hearing.⁸ In performing this fact-finding function, the court is in the best position to weigh the evidence and to evaluate the credibility of witnesses;⁹ we must therefore accept its findings of fact so long as they are supported by some competent and credible evidence.¹⁰ Accepting as true those facts that are supported by competent and credible evidence, we must independently determine as a matter of law whether the applicable legal standard was met.¹¹

We are convinced that the trial court did not err in denying Boyd's suppression motion. As we have already noted, the court believed Watson's account of the arrest, and his testimony was buttressed by supporting competent and credible evidence. Watson believed that Boyd was attempting to conceal a weapon; within

⁸ *Blue Ash v. Kavanagh*, 113 Ohio St.3d 67, 2007-Ohio-1103, 862 N.E.2d 810, at ¶30.

⁹ *State v. Mills* (1992), 62 Ohio St.3d 357, 582 N.E.2d 972.

¹⁰ *State v. Retherford* (1994), 93 Ohio St.3d 586, 639 N.E.2d 498.

¹¹ *Id.*

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the overall context of the stop, Watson's belief was reasonable. Therefore, we affirm the trial court's judgment.

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.

SUNDERMANN, P.J., WINKLER and HENDON, JJ.

RALPH WINKLER, retired, from the First Appellate District, sitting by assignment.

To the Clerk:

Enter upon the Journal of the Court on July 2, 2008
by order of the court _____.
Presiding Judge