

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22812
v.	:	T.C. NO. 2008 CR 0484
DARRIN L. CRUM	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

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OPINION

Rendered on the 19th day of June, 2009.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on Notice of Appeal of Darrin L. Crum, filed June 26, 2008. On March 6, 2008, Crum was indicted on one count of possession of crack cocaine, in an amount equal or greater to one gram but less than five grams, in violation of R.C. 2925.11(A), a felony of the fourth degree. On March 20, 2008, Crum stood mute and a plea of not guilty was entered on his behalf. A motion to

suppress was filed on April 1, 2008. Following an evidentiary hearing on April 25, 2008, the trial court overruled Crum's motion. Thereafter, Crum entered a plea of no contest on May 2, 2008. He was sentenced to five years of community control sanctions.

{¶ 2} The events giving rise to this matter began at approximately 3:55 p.m. on January 25, 2008 when Dayton Police Officers Thomas Schloss and Officer Sweat were patrolling in the area of the 3400 block of East Third Street. According to Officer Schloss, this particular area was known to have a high rate of drug and prostitution arrests.

{¶ 3} While stopped at a Shell gas station, the officers observed Crum with a woman at a nearby bus stop. The officers were suspicious of them because they were standing at one of the "highest drug corners" in the police district and it appeared as though Crum and the women were acting like they were waiting for the bus, yet they waved off an approaching bus.

{¶ 4} The officers drove their marked cruiser across the street, parked on an adjacent street, and approached Crum and the woman. The officers asked Crum if they would be willing to speak with them. Crum said they would be willing to talk. Officer Schloss asked Crum if he had anything on him that would ". . . poke me or stick me or any weapons . . ." Crum said that he did not. Officer Schloss then asked Crum for permission to check. In response, Crum verbally consented to a pat down of his person. Crum then turned around and placed his hands up in the air without being asked to do so.

{¶ 5} Officer Schloss proceeded to pat down Crum. During the course of the

pat down, Officer Schloss felt something in Crum's right-front thigh pocket. Officer Schloss asked Crum what was in his pocket. Crum said that it was money. Officer Schloss testified that it did feel like there was money in the pocket, and he also felt a hard object that he did not believe to be a weapon. Thereafter, Officer Schloss asked for permission to check to see what the object was. Crum consented. Officer Schloss reached into the pocket and pulled out a white chalky substance that later was identified as crack cocaine.

{¶ 6} Crum was placed under arrest. He was read his *Miranda* rights. After each right was read, the defendant indicated that he understood the rights and verbally indicated that he waived the rights. Crum cooperated and was questioned for five to ten minutes.

{¶ 7} During the suppression hearing held April 25, 2008, Officer Schloss was the only witness. The trial court, in denying Crum's motion to suppress ruled that Officer Schloss' testimony was credible, and his testimony was undisputed. The trial court found that the incident was a consensual encounter, thereby falling outside of the protections of the Fourth Amendment. The trial court also ruled that Crum voluntarily consented to the pat down, as well as the retrieval of the drugs from his pocket.

{¶ 8} Crum's sole assignment of error is as follows:

{¶ 9} "THE TRIAL COURT ERRED IN OVERRULING DEFENDANT/APPELLANT'S MOTION TO SUPPRESS."

{¶ 10} Crum contends that the trial court erred when it found that the entire encounter between the police officers and Crum was consensual. Crum submits that the encounter was not consensual, but that it was the result of coercion in the form of a

show of force. Crum contends that two “burly” police officers in uniform arrived in a marked car with guns, “flanked” him and his lady friend and then asked for consent to search Crum’s person. Crum argues that a reasonable person in these circumstances would not feel free to walk away.

{¶ 11} A trial court undertakes the position of the trier of fact in a motion to suppress evidence. *State v. Retherford* (1994), 93 Ohio App.3d 586, 592; *State v. Mills* (1992), 62 Ohio St.3d 357, 366. The trial court is in the best position to decide questions of fact and to determine the credibility of witnesses. *Retherford*, 93 Ohio App.3d at 592; *State v. Clay* (1972), 34 Ohio St.2d 250, 251. “Accordingly, in our review, we are bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. 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.” *Retherford*, 93 Ohio App.3d at 592.

{¶ 12} The Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution guarantee “the right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” It is well established that the Fourth Amendment is not implicated in every instance where the police have contact with a private individual. *California v. Hodari D.* (1991), 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690; *Retherford*, 93 Ohio App.3d at 593. The United States Supreme Court has identified three categories of police-citizen contact to identify situations where the Fourth Amendment protections are implicated. *State v. Hardin*, Montgomery App. No. 20305, 2005-Ohio-130, at ¶ 13; *Florida v. Royer* (1982), 460 U.S. 491, 501-507, 103 S.Ct. 1319, 75 L.Ed.2d 229.

{¶ 13} A consensual encounter can be an instance in which the Fourth Amendment protections are not implicated. *State v. Taylor* (1995) 106 Ohio App.3d 741, 747-748. Encounters are consensual where the police merely approach a person in a public place, engage the person in conversation, request information, and the person is free to choose not to answer and walk away. *Hardin*, Montgomery App. No. 20305, at ¶ 14; *United States v. Mendenhall* (1980), 446 U.S. 544, 553, 100 S.Ct. 1870, 64 L.Ed.2d 497. “The Fourth Amendment guarantees are not implicated in such an encounter unless the police officer has by either physical force or show of authority restrained the person's liberty so that a reasonable person would not feel free to decline the officer's requests or otherwise terminate the encounter.” *Taylor*, 106 Ohio App.3d at 747-748 *citing Mendenhall*, 446 U.S. at 554. “Even when police officers have no basis for suspecting a particular individual of any criminal activity, they may ask questions and even request to search that person's property, so long as the requests are not perceived as coercive.” *State v. Hill* (Nov. 7, 1997), Hamilton App. No. C-960963, *citing Florida v. Bostick* (1991), 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389.

{¶ 14} The request to check a person's identification does not make the encounter nonconsensual; nor does the request to check one's belongings. *Hardin*, Montgomery App. No. 20305, at ¶ 14. Only once a person's liberty has been restrained has the encounter lost its consensual nature and falls into a separate category beyond the scope of a consensual encounter. *Hardin*, Montgomery App. No. 20305, at ¶ 14, *citing Taylor*, 106 Ohio App.3d at 747-748.

{¶ 15} A search is valid and does not violate the Fourth Amendment when it is

consensual, so long as the consent is freely and voluntarily given. *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854. The burden of proof is on the state to show, under the totality of the circumstances, by clear and convincing evidence that the consent was voluntary. *State v. Connors-Camp*, Montgomery App. No. 20850, 2006-Ohio-409, at ¶ 27.

{¶ 16} At the outset, it is important to note that the trial court, acting as trier of fact, found Officer Schloss to be a credible witness. Although in his brief on appeal, Crum submitted that he did not feel free to walk away from the police officers, or to tell the officers “no” to their requests, Crum did not elicit any facts that establish such a proposition, nor did he himself testify on the subject.

{¶ 17} The trial court found, looking at the totality of the circumstances that the state met its burden of proving that the police officers’ encounter with Crum was a consensual encounter. We agree.

{¶ 18} The two officers in uniform, and in a marked cruiser approached Crum and his girlfriend after their suspicion was aroused. While approaching, the trial court found that Officer Schloss used an inquiring tone, not a commanding tone, and asked if Crum would mind talking with him. Crum, although free to walk away, or to otherwise say no to the officer, agreed to speak with the police officers. The officers, according to the trial court, then flanked Crum and the woman. The court found that the officers’ actions of flanking Crum did not block his line of travel. As the trial judge correctly concluded, the evidence adduced reveals that Crum was not prevented from leaving, and the encounter occurred in a public place at a bus stop.

{¶ 19} The trial court found that there was no commanding language used.

Furthermore, there was no show of physical force. There is nothing in the record to indicate there was a show of authority in such a way that a reasonable person would have felt he or she could not decline the officer's request and walk away. The officers never brandished their weapons, nor did they otherwise threaten Crum. We agree with the trial court in concluding that this was a consensual encounter, requiring no justification or reasonable suspicion by the officers.

{¶ 20} Furthermore, the trial court found that the state met its burden, by clear and convincing evidence, that under the totality of the circumstances Crum consented to Officer Schloss' request to search. We agree.

{¶ 21} After Crum consented to speak with the officers, Officer Schloss asked if Crum had anything on him that would “. . . poke me or stick me or any weapons . . .” Crum denied that he did. Officer Schloss then asked for consent to check his person. In response, Crum verbally consented. Immediately thereafter, and without being instructed to do so, Crum turned around and put his hands in the air. The trial court found that Officer Schloss did not use force, or menacing words or tones to coerce Crum to consent to the pat down.

{¶ 22} While patting down Crum, Officer Schloss felt a hard object in Crum's right thigh pocket. Officer Schloss inquired as to what was in Crum's pocket. Crum indicated that he had money in his pocket when asked about the hard object. Officer Schloss asked for Crum's permission to look in his pocket and Crum acquiesced. Officer Schloss reached into Crum's pocket and retrieved a white chalky substance that was later determined to be crack cocaine. Once again, Officer Schloss did not use force, or menacing words or tones to coerce Crum to consent to search his pocket.

Furthermore, during the entire encounter, Crum coherently answered the officers' questions. Crum was not under the influence of alcohol or drugs. We agree with the trial court that Crum voluntarily consented to the search.

{¶ 23} Accordingly, Crum's sole assignment of error is overruled, and the judgment of the trial court is affirmed.

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FAIN, J. and GRADY, J., concur.