IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

APPELLATE CASE NO: 2013-AP-34-A-O
Lower Case No.: 2013-MM-4134-A-O

OZAY FRANZELLE ANDREWS,

Appellant,
v.

STATE OF FLORIDA,

Appellee.
___________________________/

Appeal from the County Court
for Orange County, Florida
Deb S. Blechman, County Court Judge

Robert Wesley, Public Defender,
and Kirsten Leigh Holz, Assistant Public Defender,
for Appellant

Jeffrey Ashton, State Attorney,
and Shannon Laurie, Assistant State Attorney,
for Appellee

Before DOHERTY, O'KANE, EVANS, J.J.

PER CURIAM.

FINAL ORDER REVERSING TRIAL COURT

Ozay Andrews ("Appellant") appeals the trial court's final order denying his Motion to Suppress rendered on August 16, 2013. On September 24, 2013, Appellant entered into a negotiated plea with the trial court and pled *nolo contendere* reserving his right to appeal the

denial of his Motion to Suppress. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1). We reverse and remand.

In the late evening hours of April 27, 2013, Appellant was arrested in a parking lot in the 30th block of West Pine Street and charged with Possession of Cannabis < 20 Grams and Possession of Drug Paraphernalia, in violation of Fla. Stat. § 893.13(6)(B) and 893.147(1), respectively.

On August 16, 2013, Appellant, through counsel, filed a Motion to Suppress seeking to suppress all evidence from the seizure, search and arrest of Appellant. On August 16, 2013, the trial court conducted a suppression hearing.

At the hearing, Officer Joseph Catanzaro ("Catanzaro") testified that on April 27, 2013, he was assigned to the Orlando Police Department's Delta Alpha midnight downtown bike unit and was conducting surveillance from the sixth floor of the parking garage located at 2 South Orange Avenue. Catanzaro testified he had been conducting surveillance from that particular position in the garage just about every night for the last year and a half and had numerous encounters with individuals who were consuming and/or selling illegal narcotics within the parking lot, which resulted in somewhere around fifteen arrests. Additionally, he testified he tried cannabis on one occasion in college and has been around individuals consuming cannabis, both through surveillance and directly in front of him.

Catanzaro testified that he has been an officer with the Orlando Police Department since August 12, 2007, completed a 40-hour drug identification course, and has made approximately 120 – 125 cannabis arrests. Catanzaro testified he is familiar with the type of conduct someone smoking cannabis would engage in and how they may act, especially when in a public place. He explained that in determining if someone was smoking a cannabis cigarette he would start by

looking at the cigarette itself and whether it was burning flatter and extinguishing quickly, requiring it to be relit during the course of the smoking, as opposed to a tobacco cigarette which continuously stays lit and burns differently. He testified that people tend to be nervous if they are smoking cannabis in a public area, often looking around, and if in a group setting, the cigarette would be passed back and forth for community consumption.

On April 27, 2013, Catanzaro observed, approximately fifty feet from where he was conducting surveillance, two black males dressed in all black walking around the parking lot directly behind the Ember bar. The two individuals positioned themselves up against a wall behind vehicles in a darker area of the parking lot. He believed these individuals to be employees of Ember based on how they were dressed. He had a clear view of the two males without any use of a visual aid. Once against the wall, the two males began to light what appeared to be some sort of cigarette, press it against their mouths, and pass it back and forth to each other. The cigarette appeared to extinguish itself and had to be relit multiple times. The men appeared to be nervous as they looked around towards the Ember side of the parking lot. It was Catanzaro's belief that these individuals were smoking cannabis based on his training and experience with narcotics.

After coming to this conclusion, Catanzaro notified fellow bike Officer Brad Bakeman ("Bakeman") of his suspicions, and Bakeman responded to the location of the two males within two minutes. From where he was positioned, Catanzaro notified Bakeman he was detaining the correct person, later determined to be Appellant. Prior to Bakeman making contact, the second individual quickly concealed the suspected cannabis cigarette and left the area. He was not detained and neither officer attempted to locate him. Once Appellant was detained, Catanzaro left his surveillance position and made contact with him.

At the hearing, Bakeman testified the Pine Street parking lot has a lot of drug activity, including drug sales and use, and he has made approximately ten drug-related arrests there within the last six months. Additionally, Bakeman completed a 40-hour drug recognition course and has made over one hundred cannabis arrests in his six years with the Orlando Police Department.

Bakeman testified he made contact with Appellant after Catanzaro requested he respond to the parking lot on Pine Street and stop two individuals believed to be smoking cannabis. At the time he approached Appellant there was another individual present who was permitted to leave once it was determined he was not the person with whom Appellant had been sharing the suspected cannabis cigarette. Bakeman testified when he made contact with Appellant he did not smell anything or see anything. Bakeman testified he was present when Catanzaro searched Appellant and found a bag of cannabis in his pants pocket.

Appellant alleges the trial court erred in denying his Motion to Suppress because his detention was without reasonable suspicion. Furthermore, he alleges the search of his person was conducted without probable cause, or any other legal basis.

A trial court's ruling on a motion to suppress is a mixed question of fact and law. The standard of review of the findings of fact is whether competent, substantial evidence supports the trial court's factual findings. The historical facts should be reviewed only for clear error with due weight to be accorded to inferences drawn from those facts by the lower tribunal. The trial court's application of law is reviewed do novo. *Ornelas v. United States*, 517 U.S. 690, 699 (1996); *C.G. v. State*, 689 So. 2d 1246, 1248 (Fla. 4th DCA 1997).

First, this Court must determine if the stop and detention of Appellant was justified. In order to detain a person an officer must have reasonable suspicion. Reasonable suspicion arises

from specific and articulable facts and the rational inferences from those facts. *Terry v. Ohio*, 392 U.S. 1, 21 (1968). Although not precisely delineated, the minimal level of justification for an investigatory stop has been described as something more than a "mere hunch." *United States v. Arvizu*, 534 U.S. 266 (2002).

To determine whether an officer's suspicions are supported by "more than a mere hunch," a court must look at the "totality of the circumstances," viewed in light of the officer's "experience and specialized training." *Id*. at 273-74. Thus, even seemingly innocent behavior may support an inference that criminal activity is afoot when viewed from the perspective of an experienced officer. *Id*. at 274-75.

Based on Catanzaro's training, experience, observations, and the totality of the circumstances, this Court finds the investigatory detention of Appellant was valid. Catanzaro had reasonable suspicion based on articulable facts to believe Appellant was committing a crime, specifically, possessing a cannabis cigarette. This authorized officers to detain him to determine his identity and the circumstances surrounding his presence in the area. An arrest at any time after the investigatory stop is permissible if supported by probable cause that a crime has been or is being committed. *Popple v. State*, 626 So. 2d 185, 186 (Fla. 1993). However, if no probable cause developed, law enforcement would be required to release him. § 901.15, Fla. Stat.

Second, this Court must determine whether sufficient probable cause developed in order to search Appellant. The record is silent as to what occurred after Appellant was detained. There was no testimony elicited from either officer as to what information, if any, was obtained from Appellant that prompted a search. Furthermore, no testimony was presented as to why or how Appellant was searched. Even more troubling is the fact that no testimony was elicited

from Catanzaro, the officer who searched Appellant, about anything that occurred after he left his surveillance post and went to meet with Bakeman and Appellant in the parking lot.

Once the officers had Appellant detained, the testimony from Bakeman indicates that Catanzaro immediately searched his person based merely on suspicions he had just smoked cannabis. However, Bakeman testified he did not smell cannabis when he approached Appellant. Additionally, Catanzaro did not testify he smelled cannabis at any point. There was testimony, however, that the person who had possession of the suspected cannabis cigarette left the scene prior to being detained and neither officer attempted to locate him. Moreover, there was no testimony that the officers were in fear of their safety because they believed Appellant to be armed and dangerous, therefore, permitting a limited exterior pat-down to feel for weapons. § 901.15, Fla. Stat. Furthermore, nothing in the record indicates Appellant consented to a search of his person.

The State has the burden to prove the officer had probable cause, and proof must be more than the subjective statement of a police officer who has a 'feeling' based on 'experience' that someone is committing a crime. *Coney v. State*, 820 So. 2d 1012, 1014 (Fla. 2d DCA 2002); *Doctor v. State*, 596 So. 2d 442, 445 (Fla. 1992). An officer's mere suspicion that a person is carrying illegal drugs is insufficient to supply probable cause for a search. *State v. Witherspoon*, 924 So. 2d 868, 871 (Fla. 2d DCA 2006).

Based on the diminutive testimony that was elicited, the State failed to meet its burden, and we cannot find that the warrantless search of Appellant was supported by probable cause. This Court concludes the trial court erred in denying the Motion to Suppress.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the trial court's order denying the Motion to Suppress is **REVERSED** and this matter is **REMANDED** for further proceedings consistent with this opinion.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 18th day of September, 2014.

/S/_______________________
PATRICIA A. DOHERTY
Presiding Circuit Judge

O'KANE and EVANS, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing order was furnished by U.S. mail or hand delivery to **Kirsten Holz, Assistant Public Defender**, 435 North Orange Avenue, Suite 400, Orlando, Florida 32801; and to **Shannon Laurie, Assistant State Attorney,** Office of the State Attorney**,** 415 North Orange Avenue, Post Office Box 1673, Orlando, Florida 32801, on this 18th day of September , 2014.

/S/_______________________
Judicial Assistant