

STATE OF OHIO)
) SS:
CUYAHOGA COUNTY)

IN THE COURT OF COMMON PLEAS
CASE NO. CR-570843

STATE OF OHIO)
)
) Plaintiff)
)
) vs)
)
) VICTOR PAYNE)
)
) Defendant)

OPINION AND ORDER

MICHAEL J. RUSSO, JUDGE:

This matter comes before the court on the motion to suppress evidence obtained in violation of the fourth amendment filed by the defendant, Victor Payne. For the following reasons, defendant's motion is granted.

An evidentiary hearing was held on May 6, 2013. Detectives Michael Rasberry and John Hall of the Fourth District vice unit of the Cleveland Police Department testified on behalf of the state; the defendant testified on his own behalf. The evidence presented at the hearing established that on January 16, 2013 Detective Rasberry was working alone in an undercover vehicle conducting surveillance for drug activity at E. 149th Street near Kinsman, which is a "high crime area." Detective Rasberry previously had executed search warrants for drugs on this street. On this day, there was an active complaint for drug activity at 3315 E. 149th Street. While conducting surveillance, Detective Rasberry observed a black truck pulling in and out of five different driveways. The truck would stay in each driveway for approximately 30 – 45 seconds; no one got out of the vehicle, nor did anyone approach the vehicle. Although the truck was in compliance with the traffic code, the activity seemed suspicious to the detective. According to Detective Rasberry, he had seen this behavior before when

people were trying to determine if a house was abandoned or were casing the area for a burglary. Detective Raspberry relayed information concerning this suspicious activity to other officers - - who were standing by in “take down” vehicles - - and these officers were asked to provide assistance. The truck thereafter parked legally in front of 3292 E. 149th and the “take-down” detectives arrived to investigate. These detectives activated lights and sirens to conduct the stop, with one police vehicle stopping in front of defendant’s truck and the other stopping in the rear. The detectives exited their vehicles and observed the passenger, Gordon Morris, with an open container of beer. The two occupants of the truck were asked if there was anything in the vehicle that the detectives should know about. Payne, the driver, replied, “Yes, I have a gun in the car.” Payne informed the detectives that the pistol was by the center console on the floor. Payne and Morris were removed from the vehicle. After the gun was recovered in the exact location that the defendant had stated, Payne was arrested for carrying a concealed weapon.

Payne’s account of the arrest does not differ greatly from the testimony of the detectives. According to Payne, he and Morris were returning from dinner. Payne was attempting to drop Morris off at the residence of his girlfriend’s mother, but they could not find the house. After pulling in and out of four different driveways, Payne finally parked so his friend could call for the correct address using his cell phone. At this moment police cars arrived with lights and sirens on. Payne testified his truck was blocked from moving and the police officers had their guns drawn.

Based upon the foregoing evidence, the Court finds that this incident was not a consensual encounter between the detectives and the defendant. It is clear that when the detectives activated lights and sirens and parked their patrol cars that Payne was not free to leave. *See State’s Exhibit 2.* At this point he was seized for the purposes of the Fourth amendment. *State v. Lynch*, 196 Ohio

App.3d 420, 2011-Ohio-5502, ¶29 (8th Dist.) and *State v. McCord*, 8th Dist. Cuyahoga No. 98127, 2010-Ohio-1979, ¶12. The court finds that this was an investigatory stop. To conduct an investigatory stop of a vehicle or individual pursuant to *Terry*, “a police officer must be able to cite specific and articulable facts, which taken together with rational inferences derived from those facts, give rise to reasonable suspicion that the individual is engaged or about to engage in criminal activity.” *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Reasonable suspicion entails some minimal level of objective justification “that is something more than an inchoate and unparticularized suspicion or hunch but less than the level of suspicion required for probable cause.” *State v. Parrish*, 10th Dist. Franklin No. 01-AP-832, 2002-Ohio-3275, ¶15-16.

In this instance, Detective Rasberry did not have reasonable suspicion to believe that Payne was engaged in criminal activity. He testified that he did not witness Payne doing anything illegal. *State v. Dailey*, 8th Dist. Cuyahoga No. 93214, 2010-Ohio-1981, ¶16. He had an “unparticularized suspicion” or a hunch because of the way Payne drove up and down the driveways in a high crime area, but that mere suspicion was not enough, without something more, to rise to the level of reasonable suspicion. *State v. Rhude*, 91 Ohio App.3d 623, 625 – 626 (12th Dist. 1993). Because Payne’s unlawful seizure occurred before he made a statement to the detectives about the gun, any statement regarding the gun or the gun itself must be suppressed as “fruit of the poisonous tree.” *State v. Jones*, 188 Ohio App.3d 628, 2010-Ohio-2854, ¶ 27 (10th Dist.) and *Dailey*, *supra* at ¶17.

Accordingly, the motion to suppress evidence obtained in violation of the fourth amendment is granted.

IT IS SO ORDERED.

MICHAEL J. RUSSO, JUDGE

Date: August ____, 2013

CERTIFICATE OF SERVICE

A copy of the foregoing **Opinion and Order** was sent by ordinary U.S. Mail this _____ day of August, 2013 to: Walter Edwards, Public Defender's Office, 310 Lakeside Avenue, Suite 400, Cleveland, Ohio 44113 and Ed Brydle, Assistant County Prosecutor, Cuyahoga County Prosecutor's Office, 1200 Ontario Street, Cleveland, Ohio 44113.

MICHAEL J. RUSSO, JUDGE