[Cite as *State v. Forrest,* 2011-Ohio-6234.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 11AP-291 (C.P.C. No. 09CR-07-3935)
Al E. Forrest,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on December 6, 2011

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellant.

Michael Siewert, for appellee.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶1} The State of Ohio is appealing from the rulings of a judge of the Franklin County Court of Common Pleas who sustained a motion to suppress evidence. The State assigns two errors for our consideration:

> FIRST ASSIGNMENT OF ERROR
>
> THE TRIAL COURT MISAPPLIED THE LAW AND INCORRECTLY DECIDED AN ULTIMATE ISSUE IN THE CASE WHEN IT GRANTED DEFENDANT'S MOTION TO SUPPRESS.

SECOND ASSIGNMENT OF ERROR

EVEN IF A CONSTITUTIONAL VIOLATION DID OCCUR, THE TRIAL COURT ERRED BY ORDERING SUPPRESSION WITHOUT DETERMINING WHETHER THE VIOLATION RESULTED FROM DELIBERATE, RECKLESS, OR GROSSLY NEGLIGENT POLICE MISCONDUCT, OR FROM RECURRING OR SYSTEMIC NEGLIGENCE.

{¶2} Al E. Forrest ("appellee") was in a 2003 Ford Explorer parked along the side of the road in a residential neighborhood in Columbus, Ohio, when two police officers stopped their cruiser behind the Explorer. One of the officers, Kevin George, testified in an evidentiary hearing that he saw no illegal activity before he walked up to the vehicle. He also acknowledged that he saw no criminal activity as he approached the vehicle. He testified that he and his partner stopped their cruiser to "check on the well being" of the Explorer's occupants. (Tr. 17.)

{¶3} When appellee looked out of the window on the driver's side and saw Officer George standing beside the Explorer, appellee was surprised. His eyes seemed to get bigger and his mouth dropped open. The man in the passenger seat of the Explorer glanced at the officer and then looked straight ahead. The officer claimed he asked Forrest if he was "okay."

{¶4} Appellee moved his right hand from his lap toward the center console of the Explorer and then turned back toward Officer George.

{¶5} Officer George interpreted appellee's surprise as "nervousness" and his turning toward the officer as an effort to block the officer's view of the interior of the vehicle, even though the officer was asking Forrest a question.

{¶6} At the hearing on the motion to suppress, Officer George testified he could see both of appellee's hands and knew appellee was not holding a weapon. Officer George next noticed appellee had some money in his left hand and ordered appellee out of the vehicle. Appellee did not immediately get out of the vehicle. Instead, he rolled up the driver's window and took the keys out of the ignition.

{¶7} Officer George ordered appellee out of the vehicle a second time. Appellee merely looked straight ahead and held the keys. At the hearing, Officer George acknowledged that he still had not seen any illegal activity.

{¶8} Officer George next opened the door to the Ford Explorer, reached across appellee's body and grabbed his right hand. The officer started to pull appellee out of the vehicle.

{¶9} At no time did the officer have a warrant, either a search warrant or an arrest warrant. Warrantless searches and/or seizures are "per se unreasonable, subject to a limited number of well-delineated exceptions." See *Katz v. United States* (1967), 389 U.S. 347, 88 S.Ct. 507. For the State of Ohio to justify the warrantless seizure of Forrest and the search of Forrest's vehicle, the State had the burden of proving the existence of and applicability of one of the well-delineated exceptions. The trial judge who conducted the evidentiary hearing on Forrest's motion to suppress found that the State of Ohio did not prove the applicability of any of the well-delineated exceptions and sustained the motion to suppress.

{¶10} We note initially that the police needed no suspicion of activity, legal or illegal, in order to walk up to or approach the Ford Explorer. What a person willingly displays in public is not subject to Fourth Amendment protection. However, Officer

George went far beyond approaching the vehicle. He ordered Forrest out of the vehicle and then physically grabbed Forrest and started to pull him out of the Ford Explorer when Forrest did not honor the officer's order.

{¶11} The State of Ohio has analogized the facts here to a "stop" justified by *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868. The trial court judge did not reject the State's "*Terry* stop" theory without consideration. Instead, the trial court judge described the officer's state of mind as "nothing more than a hunch." The trial court also expressly found that the police "did not have an objective evidentiary justification to initiate the stop and conduct any search." The reference to "initiate the stop" is an apparent reference to the State of Ohio's argument that the law of "stop and frisk" under *Terry* applied here.

{¶12} The trial court clearly rejected the State of Ohio's assertion that the stop and frisk exception to the warrant requirement applied and was demonstrated. We also note the attempt to apply *Terry* to the facts here is inconsistent with Officer George's claim that he and his partner stopped to check the well-being of the Explorer's occupants. The officer's statement that he saw no criminal activity right up to the time he decided to order appellee out of the vehicle and then to physically remove appellee from the vehicle when appellee did not get out voluntarily is inconsistent with a stop and frisk.

{¶13} The State of Ohio has argued other warrant exceptions on appeal, none of which are persuasive. The automobile exception requires probable cause to search. See, for instance, *Carroll v. United States* (1925), 267 U.S. 132, 45 S.Ct. 280, and the many cases following it. It similarly requires no probable cause to arrest Forrest as the State argues probably cause to arrest and then search incident to arrest are present, but both fail because they are premised on Forrest's wrongfully refusing to obey the order to

step out of the vehicle. The officer, however, had no basis to order Forrest out of the vehicle because he lacked reasonable articulable suspicion of criminal activity when Officer George reached across Forrest's body to grab his hand and pull him out of the vehicle. Since there was no lawful arrest, the search and seizure cannot be justified as a search incident to a lawful arrest.

{¶14} In short, the trial court's rejection of the State of Ohio's proffered exception to the warrant requirements was consistent with the evidence before it and the officer's own admissions.

{¶15} The first assignment of error is overruled.

{¶16} In the second assignment of error, the State of Ohio asserts the trial court should have applied the 2009 United States Supreme Court case of *Herring v. United States* (2009), 555 U.S. 135, 129 S.Ct. 695 to this case and used it as a basis to reach a different ruling on the motion to suppress.

{¶17} Simply stated, the facts in *Herring* bear little similarity to the facts of the present case. In *Herring*, police officers made an arrest based upon a warrant listed in a neighboring county's database. A search incident to that arrest yielded drugs and a gun. Later, the arresting officers discovered that the warrant listed in their computer records had been recalled months earlier. The failure of police in the adjoining county to update their database was, by the United States Supreme Court, seen as a simple act of negligence, but not such an error as to render the arrest illegal. The officers who arrested Herring had an honest, legitimate belief that a valid arrest warrant existed.

{¶18} The officers involved in the search and seizure of appellee had no warrant and had no basis for believing a warrant existed. *Herring* has no applicability to appellee's case. The trial court did not err by failing to apply it.

{¶19} The second assignment of error is overruled.

{¶20} Both assignments of error having been overruled, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT, P.J., and BROWN, J., concur.

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