

IN THE JUVENILE COURT OF WHEELER COUNTY
STATE OF GEORGIA

IN THE INTEREST OF

Cameron Brockington
(DOB: 02/13/2002)

Defendant.

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) JUVENILE NO: 153-18JV-009
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ORDER

The above-styled action comes before the Court on Defendants' Motion to Suppress filed on March 6, 2019. A hearing on this Motion was held in which Nicolas Parkerson appeared on behalf of the State and attorney Robert Kenner, Jr. appeared on behalf of Defendant.¹ Sheriff Randy Rigdon testified and was cross-examined and documentary evidence was tendered. After reviewing the entire record of the case, the arguments of counsel, and applicable law, the Court makes the following findings:

FINDINGS OF FACT

On the night of March 12, 2018 around 10:00 p.m., Wheeler County Sheriff Randy Rigdon was driving his vehicle down Highway 19 in the community of Glenwood. Approximately half a mile inside the city limits, Sheriff Rigdon noticed Defendant walking alongside the road with a backpack. Sheriff Rigdon testified that several break-ins had occurred in the general area so he stopped his vehicle with lights activated to identify the Defendant. Sheriff Rigdon exited his vehicle, met Defendant who was walking in his direction, and asked for his name due to the break-ins that had occurred in the area. Defendant declined to give his

¹ Both Parties were scheduled for an adjudicatory hearing on March 6, 2019. Upon the filing of Defendant's instant Motion to Suppress, the Court decided as a matter of judicial economy to address the issue in a pre-trial evidentiary hearing rather than interrupt the trial with a timely objection. The State did not object to this procedure and did not raise an objection to the timeliness of the motion based on Unif. Juv. Ct. R. 7.9. Had the objection been raised on the record, the Court would have permitted the untimely filing of the motion by express permission and given the State the opportunity to move for a continuance to review the motion. However, the State did not request a continuance, indicated that they were prepared to proceed with the hearing, and had previously subpoenaed witnesses to attend court for the adjudicatory hearing. Therefore, the State has not shown any prejudice with the failure of Defendant to file the motion in accordance with the Uniform Rules for the Juvenile Court.

name. During this exchange, Sheriff Rigdon testified that he noticed the smell of alcohol and marijuana. Sheriff Rigdon instructed Defendant to remain in place while he called for backup because his truck did not have a breathalyzer.

As Sheriff Rigdon entered his vehicle to radio a patrol car to the scene, Defendant briskly walked away. Sheriff Rigdon caught up with Defendant who had not left his line of sight and used his vehicle to block Defendant's path. Sheriff Rigdon exited his vehicle and attempted to place Defendant under arrest but Defendant successfully resisted the Sheriff's attempts to place him in handcuffs. Other law enforcement officers arrived on the scene and Defendant was physically placed under arrest. A search of Defendant revealed less than an ounce of marijuana in a grinder and a bottle of alcohol in his backpack. Defendant was charged with four counts of obstruction of an officer, possession of marijuana less than an ounce, and possession of a drug-related object. In his Motion, Defendant seeks to suppress the circumstances of the arrest and any discovery of contraband on the basis that the officers lacked probable cause for the arrest and search of Defendant.

STATEMENT OF THE LAW

Three tiers of police-citizen encounters have been identified by the courts: "(1) communication between police and citizens involving no coercion or detention and therefore without the compass of the Fourth Amendment, (2) brief seizures that must be supported by reasonable suspicion, and (3) full-scale arrests that must be supported by probable cause." In Interest of S.B., 207 Ga. App. 60 (1993) *citing* Terry v. Ohio, 392 U.S. 1 (1968). In a first level encounter, "an officer may approach citizens, ask for identification, and freely question the citizen without any basis or belief that the citizen is involved in criminal activity, as long as the officers do not detain the citizen or create the impression that the citizen may not leave." Lucas v. State, 284 Ga. App. 450 (2007). During a second-tier encounter, an officer

even in the absence of probable cause, may stop persons and detain them briefly, when the officer has a particularized and objective basis for suspecting the persons are involved in criminal activity. To stop a citizen, the officer must possess more than a subjective, unparticularized suspicion or hunch. The officer's action must be justified by specific and articulable facts which, taken together with rational inferences from those facts,

reasonably warrant that intrusion, and the officer must have some basis from which the court can determine that the detention was neither arbitrary nor harassing.

State v. Harris, 261 Ga. App. 119 (2003). The determination of whether reasonable suspicion exists to effectuate a stop “must be measured by current knowledge, i.e. at the moment the stop is made and not hindsight.” Lewis v. State, 233 Ga. App. 560 (1998). At a hearing on a motion to suppress, the State has the burden of showing that the stop was lawful. State v. Hammond, 313 Ga. App. 882 (2012). Evidence obtained through an unlawful stop must be suppressed. Peters v. State, 242 Ga. App. 816 (2000).

ANALYSIS

The evidence provided at the hearing indicates that the initial interaction between Sheriff Rigdon and the Defendant constituted a first-tier encounter as it solely involved communication between the Sheriff and Defendant. At no point in time did Sheriff Rigdon indicate by his words or actions that the Defendant was not permitted to leave the area.² The purpose of the initial stop was merely to identify the Defendant in light of the recent break-ins that had occurred in the area which is permitted under the first-tier of encounters without invoking the protections of the Fourth Amendment. However, Defendant did not cooperate with the first-tier encounter and, following the detection of the odor of alcohol and marijuana, the Sheriff indicated to Defendant that he could not leave the area. This statement escalated the encounter to the second-tier. *See, Lucas, supra*. At this point, Sheriff Rigdon was required to possess a reasonable suspicion that Defendant was involved in criminal activity to detain Defendant. *See, Ewumi v. State*, 315 Ga. App. 656 (2012).

The State primarily argues that the smell of marijuana and alcohol provided the Sheriff with a reasonable suspicion. An officer’s detection of marijuana odor may provide probable cause if the officer has training and experience in the detection of illegal drugs. *See, Caffee v. State*, 303 Ga. 557 (2018); State v. Kazmiercak, 331 Ga. App. 817 (2015); State v. Alford, 347 Ga. App. 208 (2018). The State failed to provide any testimony regarding Sheriff Rigdon’s

² The Sheriff’s activation of his blue lights immediately upon pulling off on the shoulder of the road does not necessarily increase the level of the police-citizen encounter or give impression that Defendant was prohibited from leaving “given the late hour [and] the hazard presented by vehicles parked on the side of a dark highway.” Cash v. State, 337 Ga. App. 511 (2016).

training or experience in the detection of marijuana. This Court may not infer that everyone who works as a law enforcement officer or holds the position of sheriff can accurately identify the odor of marijuana. Wingate v. State, 347 Ga. App. 341 (2018) (“Such an inference, however, would render the holding in Kazmierczak meaningless.”); State v. Folk, 238 Ga. App. 206 (1999). Faced with no evidence that Sheriff Rigdon was qualified by training or experience to detect the odor of marijuana and prohibited from inferring from Sheriff Rigdon’s years of service that he possesses the requisite training or experience, the testimony relating to the Sheriff’s detection of an odor he believed to be marijuana fails to provide the reasonable suspicion to justify the tier-two detention of Defendant.

Sheriff Rigdon also testified that he smelled alcohol on Defendant’s breath. The State contends that this provides the required reasonable suspicion to detain Defendant for public intoxication and in concern for Defendant’s safety walking along a roadway.³ However, the Sheriff never testified that he was concerned about Defendant’s safety when he instructed Defendant to remain in place while he called in a patrol car with a breathalyzer or that he had any reason to believe that Defendant was a danger to himself or the public. O.C.G.A. § 4-6-95 provides that “A person who is under the influence of intoxicating liquor [. . .] to a degree which renders him a hazard shall not walk or be upon any roadway or the shoulder of any roadway.” Perhaps more importantly, there was no testimony or any indication given that Defendant acted intoxicated. Specifically, the Sheriff did not testify that Defendant was stumbling, uncoordinated, presented glassy or bloodshot eyes, had slurred speech or even a “strong” odor of alcohol.⁴ *Compare*, Mack v. State, 305 Ga. App. 697 (2010) (finding probable cause where the defendant presented red, watery eyes and a strong odor of alcohol); Long v. State, 271 Ga. App. 565 (2004) (holding that odor and appearance supplies reasonable suspicion for a brief detention); Miller v. State, 221 Ga. App. 494 (1996). “[I]ndividual responses to alcohol vary, the presence of alcohol in a defendant’s body, by itself, does *not* support an inference that the defendant was an

³ While not argued by the State, the available evidence does not provide support for a tier-two stop based on the suspicion of underage drinking. The Sheriff did not testify that he detained the Defendant because he suspected underage drinking. In fact, the only testimony provided by the Sheriff indicated that he did not recognize the Defendant and did not know he was underage until after the arrest had occurred. No testimony was provided that the Sheriff believed Defendant possessed a “youthful appearance.” *Compare*, State v. Beasley, 270 Ga. App. 638 (2004).

⁴ Unlike State v. Ellison, Sheriff Rigdon did not testify to the extent of the smell of alcohol or that he had the requisite training or experience to determine a person’s level of impairment based solely on smell. 271 Ga. App. 898 (2005).

impaired [pedestrian].” Baird v. State, 260 Ga. App. 661, (2003)(emphasis in original). The Sheriff had ample opportunity to observe the Defendant walking alongside the road, walking to the truck, walking away from the truck, and engaging Defendant in a brief conversation. While Defendant may have been under the influence of alcohol, the Sheriff’s testimony provided no indication that it was “to a degree which renders him a hazard.” Therefore, the Sheriff lacked a reasonable suspicion to detain Defendant based upon the smell of alcohol.

Sheriff Rigdon originally engaged with Defendant because he was walking at night with a backpack in an area that had seen recent criminal activity in the form of break-ins. While the Sheriff was certainly authorized to initiate a first-tier encounter with Defendant, the act of walking at night with a backpack does not provide a reasonable suspicion of criminal activity to justify a tier-two detention even in an area of recent break-ins. Sheriff Rigdon testified that several break-ins had occurred in the Glenwood area. The State introduced incident reports of three⁵ vehicle break-ins which had occurred on February 27, 2019 and March 10, 2019.⁶ None of these incidents occurred on the night of the incident and the February 27, 2019 incident was actually reported in the morning. All of the incidents occurred blocks away from Defendant’s location. “A person’s mere presence in a high crime area does not give rise to reasonable suspicion of criminal activity, even if police observe conduct which they believe consistent with a general pattern of such activity.” State v. Hopper, 293 Ga. App. 220 (2008) *citing* Hughes v. State, 269 Ga. 258 (1998); *see also*, Lyttle v. State, 279 Ga. App. 659 (2006)(holding that act of driving at night in high crime area, without more, is insufficient to give rise to reasonable suspicion of wrongdoing). No crimes had been reported in Glenwood on the night of the stop. *Compare*, Overand v. State, 240 Ga. App. 683 (1999)(report of crime at a specific location provides a reasonable suspicion to investigate and detain individuals at the scene). Defendant’s walking in the general vicinity of previous break-ins did not provide a reasonable suspicion to detain Defendant.⁷ This analysis is not changed by Defendant’s possession of a backpack which

⁵ Defendant objected to additional incident reports tendered by the State which were voluntarily withdrawn without the Court ruling on the objection. Therefore, the Court may only consider the particulars of the three incidents provided and available testimony of the Sheriff.

⁶ Two break-ins were reported on March 10, 2019.

⁷ Unlike Gainor v. Douglas County, Georgia, 59 F.Supp.2d 1259 (N.D. Ga. 1998) relied upon by the State in opposition to the Motion to Suppress, the instant case critically does not involve an individual found in the yard of

is commonly carried by law-abiding citizens of all ages and not in itself a tool for the commission of a crime.

After Defendant refused to provide his name, the Sheriff instructed Defendant to remain in place while he summoned a patrol car. Defendant then walked briskly away from the Sheriff. While the encounter had already been improperly escalated to the second tier before Defendant left the scene, the mere act of walking away does not provide reasonable suspicion in this case. While courts have held that “[f]light is a circumstance sufficient to give an articulable suspicion of illegal activity,” Defendant’s act of walking briskly⁸ away from Sheriff was not evidence of “flight” or other wrongdoing. Sharp v. State, 275 Ga. App. 487 (2005). Immediately after catching up with Defendant, Sheriff Rigdon attempted to place Defendant under arrest using handcuffs which escalated the encounter to the third-tier requiring probable cause. An arrest based solely on Defendant’s “flight” from a first-tier encounter is insufficient. *See, State v. Dukes*, 279 Ga. App. 247 (2006)(holding that flight from a first-tier encounter does not provide a basis for arrest for obstruction); State v. Harris, 261 Ga. App. 119 (2003)(“a citizen’s ability to walk away from or otherwise avoid a police officer is the touchstone of a first-tier encounter”). Defendant had the right to leave or terminate the first-tier encounter which is premised upon the lack of a detention or the impression that the citizen cannot leave. *See, Black v. State*, 281 Ga. App. 40 (2006)(holding that avoiding contact with police, quickly walking away from an officer, and refusing to answer questions fails to create an objective articulable suspicion); Galindo-Eriza v. State, 306 Ga. App. 19 (2010). Additionally, “the mere refusal to identify oneself to an officer is not a crime.” Ewumi at 661, *citing Wagner v. State*, 206 Ga. App. 180 (1992). As discussed above, the State failed to provide a reasonable or articulable basis for detaining Defendant as part of a second-tier encounter and the Sheriff lacked probable cause to justify the subsequent arrest of Defendant simply for leaving the area.

After arresting Defendant, law enforcement officers searched the backpack and discovered marijuana. Considering the totality of the circumstances, the State has failed to

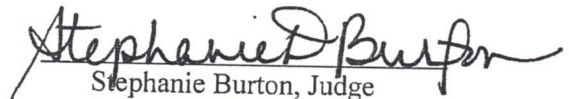
a residence where an attempted break-in had occurred days earlier. Rather, Defendant was located blocks away from any reported break-ins walking along a public road.

⁸ Extensive cross-examination occurred related to the manner in which Defendant left Sheriff Rigdon after being instructed to remain in place. Sheriff Rigdon testified that Defendant either walked quickly or lightly jogged away but did not run. The testimony provided was not consistent with an individual fleeing from law enforcement but is consistent with a citizen proceeding with his business.

provide a reasonable and articulable suspicion for detaining Defendant or probable cause for arresting Defendant. The State has not shown that Sheriff Rigdon had a reasonable and objective basis for detaining or arresting Defendant. A police officer “is *not* discharging his lawful duty when he arrests an individual without reasonable or probable cause.” Sidner v. State, 304 Ga. App. 373, 400 (2010)(emphasis in original). Therefore, Defendant’s attempts to resist arrest cannot form the basis for an arrest for obstruction. As the officers lacked probable cause to arrest Defendant, the arrest and any evidence obtained as a result of the arrest must be suppressed.⁹ *See, Ewumi v. State*, 315 Ga. App. 656 (2012).

Accordingly, **IT IS HEREBY ORDERED** that Defendant’s Motion to Suppress be **GRANTED**.

SO ORDERED, this 17^m day of April, 2019.


Stephanie Burton, Judge
Wheeler County Juvenile Court

⁹ The Court notes that Defendant also sought to suppress any statement made by Defendant. However, the State consented to that portion of Defendant’s motion and informed Defendant and the Court that it would not seek to introduce any statements made by Defendant. As that portion of the motion in limine was not heard, it will not be addressed herein.