IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CORTEZ LAMONT FRANKLIN,	)	
	)	NOT FOR PUBLICATION
Appellant,	)	
v.	)	Case No. F 2000-341
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

JOHNSON, VICE PRESIDING JUDGE:

Appellant, Cortez Lamont Franklin, was tried and convicted by a jury in Oklahoma County District Court, Case No. CF 99-1834, of Possession of a Controlled Dangerous Substance (Cocaine Base), in violation of 63 O.S.Supp.1999, § 2-402, after former conviction of two or more felonies. Trial was held before the Honorable Ray Elliott, District Judge, on March 6th through 8th, 2000, and the jury set punishment at twenty (20) years imprisonment. Formal sentencing was held March 16, 2000, and Judge Elliott sentenced Appellant in accordance with the jury's verdict. From the Judgment and Sentence imposed, Appellant filed this appeal.

Appellant raised the following propositions of error:

1. The trial court erred in failing to suppress the contraband evidence obtained in violation of the fourth amendment, and

2. The evidence was insufficient to support Appellant's conviction for possession of cocaine base.

After thorough consideration of the propositions raised and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we have determined that Proposition 1 has merit and warrants reversal for the reasons set forth below.

Even in the absence of probable cause, police may stop persons and detain them briefly to investigate a reasonable suspicion that such persons are involved in criminal activity. To justify such an intrusion, the "reasonableness" standard requires that a police officer "be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968) "Reasonable suspicion" is determined from the totality of the circumstances." *United States v. Sokolow*, 490 U.S. 1, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989). Examining the totality of the circumstances in this case, we find the facts did not give rise to a "reasonable" suspicion that Appellant was involved in criminal activity sufficient to warrant his detention.

Because Appellant's detention was unreasonable under the fourth amendment, the discarded drugs were the fruits of that unlawful detention and the trial court should have suppressed the evidence. *See United States v. King*, 990 F.2d 1552, 1563-1565 (10th Cir. 1992). As no evidence remains to sustain the jury's verdict, this case must be reversed and remanded with instructions to dismiss. We need not address Proposition 2.

Decision

The Judgment and Sentence of the trial court is hereby **REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS**.

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OPINION BY: JOHNSON, V.P.J.:

LUMPKIN, P.J.:	DISSENT
CHAPEL, J.:	RECUSE
STRUBHAR, J.:	CONCUR
LILE, J.:	CONCUR

RD

LUMPKIN, P.J.: DISSENTING

On the night in question, Officers Martin and Hock were patrolling 29th Street in Oklahoma City when they saw Appellant standing at a corner within an apartment complex. Upon seeing him, the officers pulled into the complex with their lights off. Officer Martin testified:

> As soon as he saw our presence he immediately turned and started making quick steps away from us. And as he did so he made a somewhat of a tossing motion with his left hand after removing it from his front pocket area and continued walking away from us at a quick pace.

(Tr. at 37.) Appellant made the throwing motion as the officers were exiting their vehicle to approach him closer. (Tr. at 38, 80.)

Officer Martin testified Appellant drew their attention "because he became very nervous when he noticed our presence, turned and acted as if he was fixing to run." (Tr. at 53, 97.) Furthermore, according to the officers, the area is well known for drug and gang activity; there had been ongoing reports of narcotic activity there and several arrests. (Tr. at 77.)

Appellant did not initially respond to the officers' directions to stop, but he ultimately stopped and was detained. Officers found narcotics when they returned to the place where he made the throwing motion.

Officer Hock testified the officers had proceeded to the area to "investigate ongoing activities that had taken place in the apartment complex" and were looking for person dealing drugs. (Tr. at 101.) Upon

seeing Appellant, they shined their spotlight on him. Appellant started walking away at a fast rate. The officers got out of their car and ordered Appellant to stop. He made three or four hard steps like he was going to run, but then stopped and came back toward Officer Martin. Martin pointed and said, "Look. That's where he threw it." (Tr. at 102.) Officer Hock then retrieved a plastic bag containing three rocks of crack cocaine.

A police officer has a right and a duty to investigate unusual or suspicious circumstances. *Atterberry v. State*, 726 P.2d 898, 899 (Okl.Cr.1986). "Under appropriate circumstances police officers, in the course of their duty, may approach and question suspicious individuals in order to determine their identity or to maintain status quo momentarily while obtaining more information, even though there are insufficient grounds for arrest." *Loman v. State*, 806 P.2d 663, 667 (Okl.Cr.1991); *Adams v. Williams*, 407 U.S. 143, 147, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612 (1972); *Terry v. Ohio*, 392 U.S. at 22, 88 S.Ct. at 1880; *Prock v. State*, 542 P.2d 522, 526 (Okl.Cr.1975); *see also Post v. State*, 563 P.2d 1193, 1195 (Okl.Cr.1977) (holding that because of suspicious actions, under the circumstances presented, the officers were justified in temporarily detaining defendants to obtain more information).[1]

[1] The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal escape. To the contrary, *Terry v. Ohio* recognizes it

A police officer may use all circumstances at a given moment as well as his experience to form a reasonable suspicion that a suspect is engaged in or is about to be engaged in criminal activity to justify a temporary detention. *Floyd v. State,* 829 P.2d 981, 983 (Okl.Cr.1992). To justify a particular seizure, the officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. The facts must be judged against an objective standard: "[W]ould the facts available to the officer at the moment of seizure ... 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" *Terry v. Ohio,* 392 U.S. at 21, 88 S.Ct. at 1880, 20 L.Ed.2d at 906.

Here, the facts known to the police officers, i.e., a high crime area, Appellant's nervousness, his actions in distancing himself from the officers, his throwing motion, his failure to immediately stop when instructed to do so, and the discovery of narcotics, warranted the officers' actions. Moreover, Appellant had abandoned the drugs and had no expectation of privacy concerning them. *Atterberry,* 726 P.2d at 899.

I therefore dissent to the Court's opinion reversing Appellant's conviction and remanding the matter to the trial court with instructions to dismiss.

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may be in the essence of good police work to adopt an intermediate response. *Dentis v. State,* 578 P.2d 362, 363 (Okl.Cr.1978) *citing Adams v. Williams, supra.*