[Cite as *State v. Johnson*, 2009-Ohio-3436.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 08AP-990 (C.P.C. No. 07CR-12-8749)
Adrian L. Johnson,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on July 14, 2009

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

Yeura R. Venters, Public Defender, and *Allen V. Adair*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

TYACK, J.

{¶1} Adrian L. Johnson is appealing from his convictions for possession of cocaine and possession of crack cocaine. He assigns two errors for our consideration:

> First Assignment of Error: The trial court erroneously overruled appellant's motion to suppress evidence seized during the warrantless search of his person.
>
> Second Assignment of Error: The trial court erroneously overruled appellant's motion to suppress statements obtained in the aftermath of the illegal search of his person.

{¶2} On the evening of June 11, 2007, Adrian L. nson and two other men went to a Dairy Mart at the intersection of Main Street and Weyant on the east side of Columbus, Ohio. One or more of the men had been smoking marijuana in the car before they parked it outside the store with the windows open. A Columbus police officer checked the car and smelled the marijuana smoke. The officer shone his flashlight inside the car and saw what he considered to be a marijuana "blunt" sitting in the console between the front seats.

{¶3} The occupants of the car returned. Steven Pearson approached the door by the driver's seat. Omar Nolen approached the front passenger's seat. Johnson started toward the door behind the driver's door or the rear door on the passenger side, but decided to walk away when a police officer began asking Pearson about the marijuana in the car.

{¶4} Pearson admitted the car was his, apologized for having the marijuana and offered to throw it away. No one was ever charged with a marijuana offense, which is a minor misdemeanor in Ohio.

{¶5} Columbus Police Officer Justin Coleman was the officer who smelled the marijuana smoke and who questioned the driver. When Johnson began to walk away, Coleman directed a fellow officer, Greg Sanderson, to stop Johnson because "he was in the car, too." (Tr. 33.)

{¶6} Officer Sanderson frisked Johnson for weapons and found none. Officer Sanderson then searched Johnson's pockets and found small quantities of marijuana, cocaine and crack cocaine in a cigarette case.

{¶7} Johnson was placed in the back of a police cruiser and questioned. He acknowledged having the drugs, claiming he had found them at a restaurant earlier.

{¶8} The first question to be addressed is whether the police officer had the right to stop and search Johnson.

{¶9} The Fourth Amendment to the United States Constitution states that individuals have the right to be free of unreasonable searches and seizures. The Supreme Court of the United States has held in *Katz v. United States* (1967), 389 U.S. 347, 88 S.Ct. 507, that warrantless searches are per se unreasonable, subject to a few, well-delineated exceptions. However, a police officer can stop and frisk a citizen if the officer has a reasonable articulable suspicion of the citizen being involved in illegal activity. See *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868.

{¶10} Officer Sanderson went well beyond a frisk of Johnson. Having conducted a frisk, the officer searched Johnson's pockets. Officer Sanderson's action was beyond that authorized by *Terry*, so legal justification for the search must be found elsewhere if the search of Johnson's pockets is to be considered a reasonable, legal search.

{¶11} Because no warrant was involved, the burden falls upon the government to set forth one of the well-delineated exceptions which justify the search of Johnson's pockets. In the trial court, the State asserted two grounds for the search to be considered reasonable and legal. First, the assistant prosecuting attorney asserted that the police officer had "probable cause to know that this car was involved in something illegal. That's all that's required under these circumstances." (Tr. 41.) Second, the assistant prosecuting attorney asserted that "exigent circumstances" justified the search of Johnson's pockets after the frisk for weapons had revealed no weapons.

{¶12} Addressing the motor vehicle exception to the warrant requirement, first we find the exception not to apply here. The motor vehicle exception requires the search of a motor vehicle. The exception also requires that probable cause to search be present. See *Carroll v. United States* (1925), 267 U.S. 132, 45 S.Ct. 280, and its progeny.

{¶13} The issue in Johnson's case is not the search of a motor vehicle, but the search of Johnson's pockets outside the motor vehicle. For this reason alone, the motor vehicle exception to the warrant requirement does not apply.

{¶14} Further, no probable cause to believe that Johnson had contraband in his pockets existed. Probable cause to search one location (the car) does not automatically result in probable cause to search another location (Johnson's pockets).

{¶15} The second justification for the search asserted below was "exigent circumstances." The exigent circumstances exception has consistently required probable cause to search the location to be searched or to seize the object to be seized. Also, the exigent circumstances exception has only been applied by the United States Supreme Court in circumstances far more exigent than one in which it is possible that a person is walking away with a small amount of marijuana in his pocket. Thus, in *Ker v. California* (1963), 374 U.S. 23, 83 S.Ct. 1623, the issue before the United States Supreme Court was whether police action was illegal with respect to a known drug dealer who had recently made a drug sale of a pound of marijuana to an undercover police officer. The drug dealer complained about police officers using a passkey to enter his apartment to seize a sizeable quantity of drugs when a serious risk existed that the drugs would be distributed before a warrant could be procured.

{¶16} In *Schmerber v. California* (1966), 384 U.S. 757, 86 S.Ct. 1826, officers were permitted to have blood drawn from a man who smelled of alcohol on his breath, had bloodshot eyes, and had caused serious injury to a passenger as a result of a motor vehicle collision.

{¶17} In *Mincey v. Arizona* (1978), 437 U.S. 385, 98 S.Ct. 2408, the United States Supreme Court struck down a prosecution theory that the severity of an offense, including murder, automatically created exigent circumstances such that a warrant was not required.

{¶18} In *Welsh v. Wisconsin* (1984), 466 U.S. 740, 104 S.Ct. 2091, the United States Supreme Court held that the warrant requirement should rarely be disregarded when minor offenses are involved, especially in the context of entering residences.

{¶19} The state has argued that the case of *State v. Moore*, 90 Ohio St.3d 47, 2000-Ohio-10, applies and supports a finding of exigent circumstances with respect to the search of Johnson's pockets. The syllabus for the *Moore* case reads:

> The smell of marijuana, alone, by a person qualified to recognize the odor, is sufficient to establish probable cause to conduct a search.

{¶20} If the issue before us were the search of the car, *Moore* would apply. However, no testimony at the hearing on the motion to suppress indicated that Johnson had any odor of marijuana smoke on him. At most, Johnson had been in a car while someone smoked marijuana earlier, but his presence in the car did not provide probable cause to believe he possessed marijuana at the time he was searched, especially in light of the driver's acknowledgement that the marijuana belonged to him (the driver). There

was no probable cause to believe that more marijuana or any other controlled substance was in the possession of anyone outside the car.

{¶21} The state also has submitted that the warrant exception of a search incident to a lawful arrest applies here. The lawful arrest posited is an arrest for possession of the marijuana left in the car when the men went into the Dairy Mart.

{¶22} To possess a controlled substance in Ohio, the individual must have control over the controlled substance. R.C. 2925.01(K) defines "possess" as follows:

> "Possess" or "possession" means having control over a thing or substance, but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found.

At most, Johnson previously had access to the marijuana blunt left in the console between the front seats of the car. Police officers had no basis for believing that Johnson had control over it, especially after Pearson claimed responsibility for it.

{¶23} Further, the Ohio Legislature has specifically barred arrest for minor misdemeanors, subject to exceptions which do not apply here. See R.C. 2935.26.

{¶24} In addition, the Supreme Court of Ohio has ruled that custodial arrests are prohibited unless compliance with R.C. 2935.26 is demonstrated.

{¶25} The Supreme Court of the United States has recently restricted the doctrines of searches incident to a lawful arrest in the case of *Arizona v. Gant*, ___ S.Ct. ____, 2009 WL 1045962 (U.S. Ariz.), 77 USLW, and narrow the scope of permissible searches under *New York v. Belton* (1981), 453 U.S. 454, 101 S.Ct. 2860.

{¶26} In short, no lawful arrest of Johnson was occurring, so no search incident to a lawful arrest could occur.

{¶27} Since none of the well-delineated exceptions to the warrant requirement apply, the search of Johnson's pockets was illegal per se and unreasonable. Hence, the trial court should have suppressed the small amount of controlled substances which was found and seized.

{¶28} The first assignment of error is sustained.

{¶29} The custodial interrogation of Johnson was a result of the search of Johnson's pockets and hence a fruit of the proverbial poisonous tree. See *Wong Sun v. United States* (1962), 371 U.S. 471, 83 S.Ct. 407. Therefore, the statement obtained as a result of the illegal search and seizure also should be suppressed.

{¶30} The second assignment of error is sustained.

{¶31} Both assignments of error having been sustained, the judgment of the Franklin County Court of Common Pleas is reversed and the case is remanded for further proceedings.

Judgment reversed and remanded for further proceedings.

BRYANT, J., concurs separately.
McGRATH, J., dissents.

BRYANT, J., concurring separately,

{¶32} I concur in the majority's judgment reversing the judgment of the Franklin County Court of Common Pleas that denied defendant's motion to suppress, but because I do so for different reasons than does the majority, I write separately.

{¶33} Even if we assume the police officers were justified under *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct 1868, in conducting an investigative stop and frisk of Johnson, the police officer who detained and searched Johnson exceeded *Terry's*

constitutionally permissible bounds when he reached into Johnson's pockets and seized the small quantities of marijuana, cocaine and crack cocaine. The "plain feel" exception to the warrant requirement of the Fourth Amendment does not apply here because Officer Sanderson testified at the suppression hearing the contraband was not detected during his patdown search of Johnson's outer clothing. See *Minnesota v. Dickerson* (1993), 508 U.S. 366, 113 S.Ct. 2130, and *State v. Evans* (1993), 67 Ohio St.3d 406 (stating a police officer conducting a lawful *Terry*-type search may seize nonthreatening contraband, such as controlled substances, when its incriminating nature is "immediately apparent" to the searching officer through his sense of touch during a patdown search). See also *State v. Daugherty,* 8th Dist. No. 89373, 2007-Ohio-6822, and *State v. Crusoe,* 150 Ohio App.3d 208, 2002-Ohio-6389 (concluding police exceeded the bounds of a lawful *Terry* search in seizing crack cocaine and drug paraphernalia from pockets). A police officer must have probable cause, not just reasonable suspicion to believe that an item is contraband before seizing it to "ensure * * * against excessively speculative seizures." *Dickerson* at 376; *State v. Moore* (2000), 90 Ohio St.3d 47.

{¶34} The state argues the search was proper as incident to arrest or because exigent circumstances were present. The suspected illegal conduct that gave rise to the investigatory stop and frisk of Johnson was, by Officer Coleman's own testimony at the suppression hearing, possession of a "very small amount of marijuana" which, if charged, would have been the basis only for a minor misdemeanor offense. R.C. 2935.26 prohibits police officers from arresting individuals for a minor misdemeanor unless one of four statutory exceptions applies, and none is applicable here. Because Johnson would not have been subject to lawful arrest even if the marijuana blunt found in the car were his,

the exception for search incident to a lawful arrest does not apply. See *State v. Jackson,* 8th Dist. No. 85639, 2005-Ohio-5688; *State v. Richardson* (Dec. 7, 1999), 10th Dist. No. 98AP-1500.

{¶35} Ohio's Supreme Court has concluded that Ohio's constitution provides greater protection than the Fourth Amendment against warrantless arrests for minor misdemeanors, and evidence obtained as the result of an arrest for a minor misdemeanor is subject to suppression in accordance with the exclusionary rule. *State v. Brown,* 99 Ohio St.3d 323, 2003-Ohio-3931; *State v. Jones,* 88 Ohio St.3d 430, 2000-Ohio-374; *Jackson,* supra. Although in this case the presence of the marijuana blunt and an odor of freshly burnt marijuana emanating from the automobile may have provided the officers with probable cause to conduct a search of the automobile's passenger compartment, it did not provide probable cause to arrest or search Johnson incident to arrest, when Johnson, unlike the defendant in *Moore,* had no detectible odor of marijuana coming from him. See *State v. Kelly* (Dec. 7, 2001), 11th Dist. No. 2000-P-0113.

{¶36} Although "exigent circumstances" may provide an exception to the Fourth Amendment warrant requirement, probable cause to arrest or to search must be present. *Moore; State v. Robinson* (1995), 103 Ohio App.3d 490, 497, citing *Steagald v. United States* (1981), 451 U.S. 204, 101 S.Ct. 1642. Because police had no probable cause to arrest Johnson or to conduct more than a *Terry*-type patdown search of him during a lawful investigative detention, the question of whether "exigent circumstances" existed to excuse the warrant requirement is not reached, and the controlled substances seized from Johnson's pockets, together with statements made by him after the illegal search

and seizure, must be suppressed. *Wong Sun v. United States* (1962), 371 U.S. 471, 83 S.Ct. 407.

{¶37} Accordingly, I agree with the majority's conclusion that the motion to suppress should have been granted. Because the trial court did not, I agree that the judgment of the trial court be reversed.

McGRATH, J., dissenting.

{¶38} Being unable to agree with the majority or concurring opinions herein, I respectfully dissent. Essentially, both the majority and concurring opinions find that, under the facts of this case, the police officers had neither a reasonable suspicion nor probable cause to believe that the defendant possessed a controlled substance at the time of the search of the defendant's pockets. Both opinions conclude that the odor of burning marijuana in a vehicle in which the defendant was a passenger and the observing of a "blunt" marijuana cigarette on the center console of the vehicle does not give rise to probable cause or reasonable suspicion as there was no specific odor of marijuana coming from the defendant's body once he was out of the car and being addressed by the searching police officer.

{¶39} Probable cause requires a fair probability of criminal activity, not a showing by preponderance of the evidence or beyond a reasonable doubt. Moreover, in assessing probable cause or reasonable suspicion, a court must consider the facts in their *totality*. *State v. Gantz* (1995), 106 Ohio App.3d 27, 35. Police officers may draw inferences based upon their experience and training in order to decide whether probable cause exists and, of course, those inferences may not be obvious to an untrained person. *United States v. Cortez* (1981), 449 U.S. 411, 417, 101 S.Ct. 690, 694.

{¶40} I believe additional factors here support the reasonableness of the officers' conduct. Not only did the defendant arrive in the vehicle a short time before the search took place in the company of two other men, the vehicle was one in which the odor of burnt marijuana was present, and marijuana was observed on the front console. The defendant and the other two men had exited the car and entered the Dairy Mart store. The officers knew this to be a particular location of heavy narcotics activity and it was 1:30 a.m. The officers waited to see if anyone approached the car. All three men returned to the car to their respective doors as if to get into the vehicle. As the police then approached, the driver spoke to Officer Coleman, acknowledged the marijuana, apologized for it, and offered to throw it away. The defendant, approaching a rear passenger door as if to enter the vehicle, saw the driver's encounter with the police and changed course as he turned and started to walk away and distance himself from the vehicle and from the police. As the driver identified the defendant as being an occupant of the vehicle and that the three men had all arrived together, Officer Coleman saw the defendant attempting to exit the area and patting his pockets. Officer Coleman relayed what he had seen to his fellow officer, Officer Sanderson, who ultimately stopped the defendant and searched him. Officer Coleman testified that police training and his experience both indicate that, in drug possession situations, persons very often pat the areas of the body where they may have drugs or other contraband. Such is considered by police to be a telltale sign or body cue indicative of possession of an illegal or controlled substance.

{¶41} Although I agree that the officers did not testify to smelling marijuana on the defendant's person, the facts here seem even stronger to indicate the likelihood of

possession by this defendant than existed in *State v. Moore*, 90 Ohio St.3d 47, 2000-Ohio-10, or *State v. Taylor* (Oct. 22, 1997), 9th Dist. No. 96CA006592.

{¶42} Officer Coleman was emphatic that the smell of marijuana here was of burnt marijuana, not simply the odor of marijuana itself. Thus, the defendant was among one of three individuals in the vehicle where a blunt producing burnt marijuana odor was plainly visible. The defendant had arrived in the car and obviously had left the car and had come back with a grocery bag containing beer. As he was about to enter the car, the defendant saw the police and then attempted to vacate the area. As he did so, he gave one of the "body cues" or telltale signs known to police with respect to drug possession situations—the defendant was patting his pockets and leaving the area.

{¶43} Under these circumstances and the cases of *Moore*, supra; *State v. Perryman*, 8th Dist. No. 82965, 2004-Ohio-1120; *State v. Garcia* (1986), 32 Ohio App.3d 58; *State v. Simmons*, 8th Dist. No. 85297, 2005-Ohio-3428; or *State v. Bird* (1992), 4th Dist. No. 92 CA 2, I believe these officers had more than sufficient probable cause to search the defendant's pockets for marijuana.

{¶44} Furthermore, though rejected by the majority and separate concurring opinions, the state has argued the exigency exception to the warrantless search. If there is probable cause to believe that a defendant possesses a controlled substance, then his exiting the area and getting out of the sight of the police officers produces an "exigent" situation by the mere fact that the drugs could easily then be disposed of and the police officers would not be aware that they had been thrown away. In essence, the drugs are going down the street and out of the possible controlled situation of the officers similar to a vehicle going down the street with controlled substances.

{¶45} Therefore, I would find that, not only did the officers have probable cause, but an exigent circumstance did exist justifying a warrantless search. Accordingly, I would agree with the trial court's disposition of the matter and would affirm the trial court's denial of the motion to suppress.

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