[Cite as *State v. McClendon*, 2009-Ohio-6421.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-554 (C.P.C. No. 08CR05-3557)
Ivan J. McClendon,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 8, 2009

Ron O'Brien, Prosecuting Attorney, and *Sarah W. Creedon*, for appellee.

Yeura R. Venters, Public Defender, and *Paul Skendelas*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Defendant-appellant, Ivan J. McClendon ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas, in which that court convicted him of one count of possession of heroin, a violation of R.C. 2925.11 and a felony of the fifth degree, following the court's denial of appellant's motion to suppress evidence seized during a warrantless search.

{¶2} The following facts are taken from the record, including the transcript of the suppression hearing. On the evening of November 27, 2007, Columbus Police Officer Daniel Yap ("Officer Yap") was on routine bicycle patrol in an area of Columbus known for high levels of drug activity and violent crime, in which Officer Yap had worked for over four years. He and his partner encountered a vehicle parked illegally too close to a stop sign at the corner of Monroe Street and Mount Vernon Avenue. While his partner approached the driver of the vehicle, Officer Yap approached appellant, who was the back-seat passenger.

{¶3} While standing next to the vehicle, Officer Yap saw a syringe cap on the floor of the vehicle at appellant's feet. Officer Yap testified that because the area is a high-crime area, particularly known for drug activity and violent crime, and because the presence of the syringe indicated to Officer Yap that there might be drug activity going on in the car, he asked appellant about the syringe and asked appellant to step out of the vehicle. (Mar. 17, 2009 Tr. 13.) As he exited the vehicle, appellant told Officer Yap that he might have a needle. Officer Yap conducted a pat-down search of appellant and felt a hard substance. Officer Yap testified that he performed the pat-down search "for self-protection" and "also to recover the syringe." (Mar. 17, 2009 Tr. 15.) Appellant told Officer Yap that the hard substance might be heroin. The substance was later tested and determined to be heroin.

{¶4} On May 12, 2008, the Franklin County Grand Jury indicted appellant on one count of possession of heroin, a violation of R.C. 2925.11 and a fifth-degree felony. Appellant filed a motion to suppress the evidence resulting from the pat-down search and on March 17, 2009, the trial court held an evidentiary hearing. At the conclusion of the

hearing, the trial court overruled the motion. Later, appellant pleaded no contest to the charge in the indictment and the trial court found him guilty. The court imposed a 12-month suspended jail sentence with three years of community control and a six-month driver's license suspension.

{¶5} Appellant appealed and assigns one error for our review, as follows:

> The trial court erred in failing to suppress the evidence taken in an unlawful seizure. This decision violated the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 14 of the Ohio Constitution.

{¶6} In support of his assignment of error, appellant argues that Officer Yap lacked reasonable suspicion to ask appellant to exit the vehicle or to conduct a pat-down search of appellant's person. For this reason, appellant contends, the trial court erred in denying appellant's motion to suppress the fruits of the pat-down search.

{¶7} We recently set forth the standard of review of a trial court's decision on a motion to suppress evidence in the case of *State v. Pilgrim*, 10th Dist. No. 08AP-993, 2009-Ohio-5357, ¶13:

> "[A]ppellate review of a trial court's decision regarding a motion to suppress evidence involves mixed questions of law and fact." *State v. Vest*, 4th Dist. No. 00CA2576, 2001-Ohio-2394. Thus, an appellate court's standard of review of the trial court's decision denying the motion to suppress is two-fold. *State v. Reedy*, 10th Dist. No. 05AP-501, 2006-Ohio-1212, ¶5, citing *State v. Lloyd* (1998), 126 Ohio App.3d 95, 100-01. Because the trial court is in the best position to weigh the credibility of the witnesses, "we must uphold the trial court's findings of fact if they are supported by competent, credible evidence." Id., citing *State v. Klein* (1991), 73 Ohio App.3d 486, 488. We nonetheless must independently determine, as a matter of law, whether the facts meet the applicable legal standard. Id., citing *State v. Claytor* (1993), 85 Ohio App.3d 623, 627. The state bears the burden of establishing the validity of a warrantless search. *Xenia v.*

> *Wallace* (1988), 37 Ohio St.3d 216, 218, citing *State v. Kessler* (1978), 53 Ohio St.2d 204, 207.

{¶8} Both the Fourth Amendment to the United States Constitution ("Fourth Amendment"), as applied to the states through the Fourteenth Amendment, and Section 14, Article I, of the Ohio Constitution, prohibit the government from conducting warrantless searches and seizures, rendering them per se unreasonable unless an exception applies. *State v. Mendoza*, 10th Dist. No. 08AP-645, 2009-Ohio-1182, ¶11, citing *Katz v. United States* (1967), 389 U.S. 347, 357, 88 S.Ct. 507, 514. A consensual encounter does not trigger Fourth Amendment scrutiny. *Florida v. Bostick* (1991), 501 U.S. 429, 111 S.Ct. 2382. A police approach of a parked vehicle is deemed a consensual encounter; thus, the Fourth Amendment does not apply to such an encounter. *State v. Chapa*, 10th Dist. No. 04AP-66, 2004-Ohio-5070, ¶8; *State v. Klein*, 5th Dist. No. 2006-CA-00146, 2007-Ohio-5401, ¶21; *State v. Welz* (Dec. 9, 1994), 11th Dist. No. 93-L-137; see also *United States v. Castellanos* (C.A.D.C.1984), 731 F.2d 979 (man asleep behind the wheel of a parked car was not seized when an officer approached, asked if he was okay, and requested identification). Accordingly, appellant does not challenge the propriety of Officer Yap approaching the vehicle and speaking with appellant.

{¶9} Rather, appellant challenges Officer Yap's request that he exit the vehicle and the pat-down search that followed. Thus, the issue here is an investigative search and seizure, referred to in common parlance as a *Terry* stop. In *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, "the United States Supreme Court held that a police officer may stop and investigate unusual behavior, even without probable cause to arrest, when he reasonably concludes that the individual is engaged in criminal activity. In assessing that

conclusion, the officer 'must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.' " *State v. Andrews* (1991), 57 Ohio St.3d 86, 87, quoting *Terry*, 392 U.S. at 21, 88 S.Ct. at 1879.

{¶10} "[A]n objective and particularized suspicion that criminal activity was afoot must be based on the entire picture -- a totality of the surrounding circumstances. Furthermore, these circumstances are to be viewed through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold. A court reviewing the officer's actions must give due weight to his experience and training and view the evidence as it would be understood by those in law enforcement." (Citations omitted.) Id. at 87-88.

{¶11} The state urges that Officer Yap's request that appellant exit the vehicle was reasonable under the foregoing standards. Specifically, the state points to Officer Yap's four and one-half years' experience patrolling the area; the character of the area known to Officer Yap as one in which drug crime occurred frequently; and the presence of a syringe cap at appellant's feet. We believe that these facts support a reasonable suspicion that appellant was engaged in criminal activity.

{¶12} We recognize that possession of a hypodermic needle – in and of itself – does not constitute criminal activity. But in allowing brief investigatory seizures, "*Terry* accepts the risk that officers may stop innocent people. Indeed, the Fourth Amendment accepts that risk in connection with more drastic police action; persons arrested and detained on probable cause to believe they have committed a crime may turn out to be innocent. The *Terry* stop is a far more minimal intrusion, simply allowing the officer to

briefly investigate further." *Illinois v. Wardlow* (2000), 528 U.S. 119, 126, 120 S.Ct. 673, 677.

{¶13} Relevant to this case, " '[t]he reputation of an area for criminal activity is an articulable fact upon which a police officer may legitimately rely' in determining whether an investigative stop is warranted." *State v. Bobo* (1988), 37 Ohio St.3d 177, 179, quoting *United States v. Magda* (C.A.2, 1976), 547 F.2d 756, 758; see also *United States v. Brignoni-Ponce* (1975), 422 U.S. 873, 884-85. As noted earlier, "[a]ssessing the need for a brief stop, 'the circumstances * * * before [the officer] are not to be dissected and viewed singly; rather they must be considered as a whole.' " *State v. Freeman* (1980), 64 Ohio St.2d 291, 295, quoting *United States v. Hall* (U.S.D.C.1976), 525 F.2d 857, 859.

{¶14} In this case, once Officer Yap saw the hypodermic needle cap at appellant's feet, in the back seat of a vehicle in which appellant was sitting at a corner in a high drug-crime area, he had reasonable suspicion to warrant the request for appellant to exit the vehicle. See *State v. Ghiloni*, 5th Dist. No. 08 CA 0091, 2009-Ohio-2330 (once patrolling officer was aware that suspect was carrying a hypodermic needle he possessed reasonable suspicion that suspect was in possession of drug paraphernalia, despite the fact that the suspect claimed he was diabetic, and subsequent stop and pat-down search were reasonable); *State v. Barnhart* (Aug. 17, 1999), 10th Dist. No. 98AP-1474 (officer who had approached vehicle parked late at night in parking lot of closed business, observed driver with bloodshot eyes, and smelled the odor of alcohol, had reasonable suspicion to believe the driver was under the influence of alcohol, and properly requested the driver to exit the vehicle).

{¶15} "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 to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response." *Adams v. Williams* (1972), 407 U.S. 143, 145, 92 S.Ct. 1921, 1923. In the present case, Officer Yap's request that appellant exit the parked vehicle was a reasonable seizure based upon articulable facts that, under the totality of the circumstances, supported a reasonable belief that criminal activity was afoot. Accordingly, the request that appellant exit the vehicle did not violate the Fourth Amendment.

{¶16} In conjunction with an investigatory stop, an officer may make "a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry*, 392 U.S. at 27, 88 S.Ct. at 1893. In the present case, following his request that appellant exit the vehicle, Officer Yap performed a pat-down search of appellant's person. Appellant challenges that search as unreasonable and violative of the Fourth Amendment.

{¶17} As the Supreme Court of Ohio explained in *State v. Andrews* (1991), 57 Ohio St.3d 86, 89:

> The frisk, or protective search, approved in *Terry* is limited in scope to a pat-down search for concealed weapons when the officer has a reasonable suspicion that the individual whose behavior he is investigating at close range may be armed and dangerous. *Terry, supra*, at 27. While probable cause is not required, the standard to perform a protective search, like the standard for an investigatory stop, is an objective one based on the totality of the circumstances. *Id.* The rationale behind the protective search is to allow the officer to take reasonable precautions for his own safety in order to pursue his investigation without fear of violence. *Terry, supra*, at 24, 30. See, also, *Adams, supra*, at 146; *State v. Williams* (1990), 51 Ohio St.3d 58, 62; *United States v. Smith* (C.A.6, 1978), 574 F.2d 882, 885.

{¶18} "An officer cannot conduct a protective search as a pretext for a search for contraband, a search for convenience, or as part of his or her normal routine or practice." *State v. Stamper*, 7th Dist. No. 03-MA-144, 2004-Ohio-5366, ¶12. "The sole justification of the search * * * is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." *Terry*, 392 U.S. at 29, 88 S.Ct. at 1884. "*Terry* does not permit searches for drugs." *State v. White* (1996), 110 Ohio App.3d 347, 355.

{¶19} Here, Officer Yap testified that he performed the pat-down search of appellant in order to "recover the syringe" and "for self-protection." (Mar. 17, 2009 Tr. 15.) Appellant argues that the fact that he told the officer that he might have a syringe was an insufficient basis upon which Officer Yap could conduct a pat-down search of appellant's person. For support of this proposition appellant cites the case of *State v. Beamer*, 5th Dist. No. 2004AP120075, 2005-Ohio-6069, in which the court of appeals deferred to the trial court's conclusion that an officer was not justified in performing a pat-

down search based on the presence of an uncapped hypodermic needle on the floor of the vehicle in which the suspect was riding. Initially, we note that we are not bound by the result in *Beamer*.

{¶20} Moreover, though the court in *Beamer* recognized that "an uncapped syringe or any sharp object if brandished as a weapon could be termed a weapon," it nonetheless deferred to the trial court having "found fault with [the officer's] motivation in using the uncapped syringe as a springboard to a pat down search." Id. at ¶12. Specifically, the trial court had noted that the defendant in *Beamer* was known to the officers as a person who had violated drug possession laws in the past, and the trial court believed that this information rendered the pat-down search a search for drugs or drug paraphernalia and not for weapons. Essentially, then, the trial court based its decision on its evaluation of the officers' credibility, and, believed that the officers' knowledge of the defendant's past offenses – not a concern for officer safety – motivated the officers to conduct the pat-down search. This is a unique fact present in *Beamer* that is not present in the case at bar. We also note that in *Beamer* there was no indication that the area of the stop was a high-crime area.

{¶21} In the present case, appellant was discovered sitting in the back seat of a vehicle that was illegally parked at a corner in a high drug- and violent-crime area, with a syringe cap at his feet. He told Officer Yap that he might have a needle. Initially, as the court in *Beamer* noted, a needle can be a weapon if it is brandished as a weapon. *Beamer* at ¶12. In a slightly different context, the Second Appellate District has recognized that avoidance of being stuck with a needle is a legitimate safety concern for police officers. *State v. Strozier*, 172 Ohio App.3d 780, 2007-Ohio-4575, ¶27.

{¶22} Moreover, "[t]he right to frisk is virtually automatic when individuals are suspected of committing a crime, like drug trafficking, for which they are likely to be armed." *State v. Evans*, 67 Ohio St.3d 405, 413, 1993-Ohio-186. The same rationale applies to "all drug traffickers, be they sellers or buyers and users." *State v. Lindsey* (June 23, 2000), 2d Dist. No. 18073. Indeed, "Ohio courts have long recognized that persons who engage in illegal drug activities are often armed with a weapon." *State v. Hansard*, 4th Dist. No. 07CA3177, 2008-Ohio-3349, ¶26.

{¶23} Here, after Officer Yap asked appellant to exit the vehicle, the officer was aware that appellant had been sitting in the back seat of a vehicle that was illegally parked at a street corner in an area known to be high in drug activity and violent crime, with a syringe cap at his feet. These facts, along with the officer's experience and the fact that those engaged in drug activity are often armed, provided sufficient basis for Officer Yap to perform the pat-down search for weapons. Thus, the trial court correctly concluded that this search did not violate the Fourth Amendment.

{¶24} For all of the foregoing reasons, the trial court did not err in overruling appellant's motion to suppress evidence. Accordingly, appellant's single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

TYACK and KLINE, JJ., concur.

KLINE, J., of the Fourth Appellate District, sitting by assignment in the Tenth Appellate District.

_____