[Cite as *State v. Coger*, 2011-Ohio-54.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
		No. 10AP-320
v.	:	(C.P.C. No. 09CR-11-7073)
Gregory A. Coger,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on January 11, 2011

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert,* for appellant.

Yavitch & Palmer Co., LPA, and *Mickey Prisley,* for appellee.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Plaintiff-appellant, state of Ohio ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas, which granted a motion to suppress filed by defendant-appellee, Gregory A. Coger ("appellee"). For the following reasons, we reverse the trial court's judgment and remand the matter for further proceedings.

{¶2} Appellee was indicted on one count of crack cocaine possession. He filed a motion to suppress the drugs, and the trial court held a hearing on the motion. Columbus Police Officer Phillip Jackson testified as follows at the hearing. While monitoring a house where drug trafficking occurred, Jackson saw someone in a truck pull away from a curb and back up in the middle of the two-way street for about 10 to 15 yards before turning into an alley without signaling. That driver, Christopher Dittle, violated traffic laws by failing to use a turn signal and backing up in the manner he did, and Jackson stopped him for those traffic violations.

{¶3} After Officer Jackson made the stop, he saw the passenger, appellee, look back over his shoulder, rise from his seat, lean forward and sit back down. When Jackson approached the truck, he saw that Dittle was sitting on a knife with a six-inch blade. Jackson removed Dittle from the truck and patted him down for weapons. During the pat-down, Dittle informed Jackson that he had no driver's license. Jackson arrested Dittle for carrying a concealed weapon and driving without a license, and he put Dittle in his police cruiser. While in the cruiser, Dittle said that appellee had "two blocks" or "[t]wo bags" of drugs. (Tr. 11.)

{¶4} Columbus Police Officer Heath Gillespie arrived on the scene after Officer Jackson had made the traffic stop. Jackson told Gillespie that Dittle mentioned appellee having drugs. Gillespie removed appellee from Dittle's truck, and the officers performed a "protective sweep" of the vehicle. (Tr. 11.) They found no weapons or drugs during the search.

{¶5} Officer Gillespie testified as follows. When he arrived to assist Officer Jackson, he already knew that Dittle and appellee had left "a known narcotics trafficking location." (Tr. 26.) Gillespie approached the truck on the passenger's side where appellee was sitting. Appellee was extremely nervous, and his hands were shaking. Appellee did not have his seatbelt on, and Gillespie decided to cite him for that offense. He asked appellee for identification so that he could process the citation, but appellee had none. He asked appellee to get out of the truck because he was going to place him in his police cruiser while he finished writing the citation. Gillespie patted down appellee's outer clothing in order to search him for weapons, and he found nothing "that raised any suspicions." (Tr. 40.)

{¶6} Officer Gillespie verified appellee's identification, and he talked to Officer Jackson about whether Dittle was going to be arrested and whether his truck was going to be impounded. During their conversation, Jackson informed Gillespie that Dittle mentioned seeing appellee put drugs "somewhere on his person." (Tr. 32.) Gillespie concluded that Dittle's tip established probable cause that appellee was concealing drugs "somewhere on his body." (Tr. 35.) Gillespie confronted appellee about Dittle's tip, but appellee denied having drugs and became upset. Gillespie ordered appellee out of the cruiser because he wanted to search him again. Gillespie told appellee, "[w]e're going to find it eventually. If you have it, you can take it out." (Tr. 32.) Appellee reached into the back of his boxer shorts and removed a plastic baggie containing "good-sized chunks" of crack cocaine. (Tr. 46.) Gillespie searched appellee's pockets,

but could not remember whether he did that immediately before or after appellee pulled out the drugs. Gillespie arrested appellee for drug possession.

{¶7} The trial court granted appellee's motion to suppress. Although the court found nothing improper about Officer Jackson initiating the traffic stop, it concluded that the "warrantless search of [appellee] that yielded the narcotics concealed on his body" was unconstitutional. The court said that the search cannot be justified as incident to an arrest because, "[f]actually, Officer Gillespie candidly acknowledged that without confirmation of drug possession * * * he lacked any basis to arrest [appellee]." It also concluded that exigent circumstances did not exist for a warrantless search because there was no danger that appellee could destroy the large amount of drugs in his possession. Instead, according to the court, it would have been proper for the officers to detain appellee pending receipt of a search warrant. The court declined to consider whether that warrant would have been issued, however.

{¶8} Appellant appeals, raising the following assignment of error:

> The trial court erred in granting defendant's motion to suppress.

{¶9} In its single assignment of error, appellant argues that the trial court erred by granting appellee's motion to suppress. We agree.

{¶10} When presented with a motion to suppress, the trial court assumes the role of the trier of fact. *State v. Mills* (1992), 62 Ohio St.3d 357, 366. Thus, the trial court is in the best position to resolve questions of fact and evaluate witness credibility. *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, ¶41, citing *State v. Burnside*, 100

Ohio St.3d 152, 2003-Ohio-5372, ¶8. On review, we must accept the trial court's factual findings if they are supported by competent, credible evidence. *State v. Stokes*, 10th Dist. No. 07AP-960, 2008-Ohio-5222, ¶7. Accepting those facts as true, we must then independently determine, as a matter of law and without deference to the trial court's conclusion, whether the court applied the correct law and whether the facts meet the applicable legal standard. *State v. Luke*, 10th Dist. No. 05AP-371, 2006-Ohio-2306, ¶12-13.

{¶11} Appellant contends that the trial court erred by concluding that "the warrantless search of [appellee] that yielded the narcotics concealed on his body" was unconstitutional. The Fourth Amendment to the United States Constitution prohibits unreasonable searches. Warrantless searches are unreasonable unless an exception applies. *State v. Jones*, 188 Ohio App.3d 628, 2010-Ohio-2854, ¶11. The state bears the burden of proving the validity of a warrantless search. Id. at ¶10. According to appellant, Officer Gillespie found crack cocaine on appellee pursuant to an exception to the warrant requirement for searches incident to arrest. See *Chimel v. California* (1969), 395 U.S. 752, 762-63, 89 S.Ct. 2034, 2040. We now determine whether that exception applied.

{¶12} For the search-incident-to-arrest exception to apply, there must be a lawful arrest based on probable cause. *State v. Dingess*, 10th Dist. No. 01AP-1232, 2002-Ohio-2775, ¶9-10. " 'Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed.' " *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, ¶73, quoting *Henry v. United States*

(1959), 361 U.S. 98, 102, 80 S.Ct. 168, 171. " 'Probable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction.' " *Perez* at ¶73, quoting *Adams v. Williams* (1972), 407 U.S. 143, 149, 92 S.Ct. 1921, 1924. The standard for probable cause requires only a showing that a probability of criminal activity exists, not a prima facie showing of criminal activity. *State v. George* (1989), 45 Ohio St.3d 325, 329. In determining whether probable cause exists, courts examine the totality of facts and circumstances surrounding the arrest. *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, ¶39.

{¶13} As an initial matter, we note that Officer Gillespie arrested appellee after searching him for drugs. For the search-incident-to-arrest exception to apply, the actual arrest need not precede the search so long as contraband discovered during the search is not used to support probable cause for the arrest. *Rawlings v. Kentucky* (1980), 448 U.S. 98, 111, 100 S.Ct. 2556, 2564. Thus, we must consider whether Gillespie had probable cause to arrest appellee based on evidence other than the crack cocaine procured during the preceding search.

{¶14} According to the trial court, Officer Gillespie "acknowledged that without confirmation of drug possession * * * he lacked any basis to arrest [appellee]." (R. 52, 8.) That finding, which appellant disputes, is irrelevant to our analysis. Appellee was arrested without a warrant and, on the issue of whether probable cause exists for a warrantless arrest, this court applies de novo review without deference to the trial court's conclusions. *State v. Featherstone*, 150 Ohio App.3d 24, 2002-Ohio-6028, ¶20; *Columbus v. Ellyson*, 10th Dist. No. 05AP-573, 2006-Ohio-2075, ¶4. In addition, "an

arresting officer's subjective belief is not material to the legality of an arrest." *Dingess* at ¶12, citing *State v. Stringer* (Feb. 24, 1999), 4th Dist. No. 97CA2506. Probable cause is also not negated by Gillespie's failure to find drugs on appellee during an initial pat-down search. Gillespie testified that the focus of that search was to look for weapons, and it was limited to a pat-down of appellee's outer clothing.

{¶15} Significant to our analysis, however, is that Dittle provided a tip that appellee had drugs. An informant's tip can establish probable cause, depending on the totality of the circumstances. *Illinois v. Gates* (1983), 462 U.S. 213, 241-44, 103 S.Ct. 2317, 2334. "[C]ourts have generally identified three classes of informants: the anonymous informant, the known informant (someone from the criminal world who has provided previous reliable tips), and the identified citizen informant." *Maumee v. Weisner*, 87 Ohio St.3d 295, 300, 1999-Ohio-68. "While the United States Supreme Court discourages conclusory analysis based solely upon these categories, insisting instead upon a totality of the circumstances review, it has acknowledged their relevance to an informant's reliability." Id. For instance, an anonymous informant is "comparatively unreliable and his tip, therefore, will generally require independent police corroboration." Id., citing *Alabama v. White* (1990), 496 U.S. 325, 329, 110 S.Ct. 2412, 2415. An identified citizen informant is typically accorded a "greater degree of reliability" and, "therefore, a strong showing as to the other indicia of reliability may be unnecessary." *Weisner* at 300-01.

{¶16} Dittle does not fit neatly under any of the three identified categories of informants. Although Officers Jackson and Gillespie knew Dittle's identity, appellee

suggests that Dittle should not be considered a reliable identified citizen informant because he had a motive to draw suspicion away from him after his arrest. The record does not demonstrate that Dittle provided the tip under that motive because the tip was unrelated to the offenses for which he was arrested. Dittle indicated that he saw appellee conceal drugs, and a personal observation by an informant is due greater reliability than a secondhand description. *Gates*, 462 U.S. at 234, 103 S.Ct. at 2330. The tip was also verifiable. Given these circumstances, we accord Dittle's tip the "greater degree of reliability" typically given to tips from identified citizens. *Weisner* at 301.

{¶17} Moreover, corroborating evidence supported the tip. When Officer Jackson approached Dittle's truck, he saw appellee rise up in his seat, lean forward, and then sit back down—all of which is consistent with appellee hiding something in his pants. Although Officer Gillespie arrived after this conduct, probable cause may be based on the knowledge of more than one officer. *State v. Waddy* (1992), 63 Ohio St.3d 424, 441-42, superceded by state constitutional amendment on other grounds in *State v. Smith* (1997), 80 Ohio St.3d 89.

{¶18} In any event, other facts corroborated Dittle's tip. Appellee had just departed an area known for drug trafficking. See *Gates*, 462 U.S. at 243, 103 S.Ct. at 2335 (considering, in its totality of the circumstances review for probable cause, a drug trafficking suspect's trip to a site known for illegal drugs). When Officer Gillespie approached the truck, appellee was so nervous that his hands were shaking, and he became upset when confronted about the tip. See *State v. Henry*, 10th Dist. No. 04AP-

1061, 2005-Ohio-3931, ¶38, quoting *Thomas v. State* (Md.2002), 812 A.2d 1050, 1056, citing 1 Wigmore, Evidence (3d Ed.1940), 632, Section 173 (noting that " 'the commission of a crime can be expected to leave some mental traces on the criminal' ").

{¶19} Based on the totality of the circumstances, we conclude that Dittle's tip and corroborating evidence, not including the crack cocaine procured during the search preceding appellee's arrest, established probable cause for Officer Gillespie to believe that appellee was in possession of illegal drugs. Therefore, even before the search that yielded appellee's drugs, Gillespie had a sufficient basis to arrest appellee for drug possession. Accordingly, Gillespie was authorized to conduct a warrantless search of appellee incident to his arrest, and it was immaterial that the search preceded the arrest.

{¶20} A search incident to arrest "allows officers to conduct a search that includes an arrestee's person and the area within the arrestee's immediate control." *State v. Smith*, 124 Ohio St.3d 163, 2009-Ohio-6426, ¶11, citing *Chimel*, 395 U.S. at 762-63, 89 S.Ct. at 2040. An officer performs a search incident to an arrest in order to ensure his safety and safeguard evidence. *Virginia v. Moore* (2008), 553 U.S. 164, 176, 128 S.Ct. 1598, 1607. To be sure, the trial court determined that appellee could not have easily destroyed the drugs in his possession, but appellee was concealing them, and an officer may search a person incident to arrest to safeguard evidence from concealment. *Chimel*, 395 U.S. at 763, 89 S.Ct. at 2040.

{¶21} To conclude, Officer Gillespie procured crack cocaine from appellee pursuant to a constitutional search incident to arrest. Consequently, the trial court erred

by granting appellee's motion to suppress. Accordingly, we sustain appellant's single assignment of error. We reverse the judgment of the Franklin County Court of Common Pleas and remand this cause to that court for further proceedings consistent with this opinion.

Judgment reversed
and cause remanded.

BRYANT, P.J., concurs.
TYACK, J., dissents.

TYACK, J., dissenting.

{¶22} I respectfully dissent.

{¶23} Warrantless searches are per se unreasonable, subject to a few well-delineated exceptions. This has been Fourth Amendment law for over 40 years. See *Katz v. United States* (1967), 389 U.S. 347, 88 S.Ct. 507.

{¶24} The trial court found that the government did not prove the existence of any of the exceptions to the warrant requirement. I believe that the trial court was correct in its findings.

{¶25} The majority opinion relies heavily on the statement of the driver of the car in which Gregory Coger was a passenger. That driver, Christopher Dittle, was seen leaving a residence where police believed drug sales were occurring. Dittle was seen driving illegally. Dittle had no operator's license and apparently was in possession of a concealed weapon.

{¶26} Dittle clearly knew he was going to jail. He probably knew that his truck was going to be impounded and that, in all likelihood, the truck would be inventoried and searched during the process of impounding.

{¶27} Dittle, in an effort to make his own lot at least a little better, told police "any dope in the vehicle is not mine, * * * he has the dope, two blocks of it, something to that extent." (Tr. 11.)

{¶28} The police officer who was arresting Dittle fully understood what was going on. He testified with respect to Dittle:

> He was just rambling along. He was basically real nervous, I guess, and he was trying to really, you know, just get himself out of it, basically.

(Tr. 13.)

{¶29} Clearly Dittle knew that there were drugs in the truck and that police were likely to find them. He tried to push responsibility away from himself and toward his passenger, the only other person in the truck.

{¶30} I fail to see how Dittle's statement could even approach establishing probable cause to search Coger or to arrest Coger. The fact that Coger was nervous when approached by police does not change my opinion. Lots of very honest people feel nervous when being approached by police during a traffic stop after dark. This is especially so in neighborhoods where the relationship between police and the local citizens have not always been the best.

{¶31} I also note that police did a pat-down search of Coger at least once and possibly twice. The pat-down search or searches yielded nothing, which made Dittle's statements about drugs even less credible.

{¶32} Again, I see no applicable exception to the requirement that police obtain a warrant before arresting a person or searching them. Since the government did not prove the existence of an exception, the trial court was correct to sustain the motion to suppress. I would affirm the trial court's decision.

_____