[Cite as *State v. Battle*, 2011-Ohio-6661.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 10AP-1132 (C.P.C. No. 10CR-07-4172)
Chaswan N. Battle,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on December 22, 2011

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

Matthew S. Halley, for appellee.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Plaintiff-appellant, the State of Ohio ("appellant" or "the State"), appeals from an entry filed in the Franklin County Court of Common Pleas granting defendant-appellee, Chaswan N. Battle's ("defendant") motion to suppress evidence. For the reasons that follow, we reverse and remand this matter to the trial court.

{¶2} Defendant was indicted by the grand jury on July 19, 2010 on two counts of trafficking in cocaine and one count of possession of cocaine for offenses that occurred on July 9, 2010. These three charges were all felonies of the first degree and involved

cocaine in an amount equal to or exceeding 1,000 grams. All three offenses were indicted with a major drug offender specification. The indictment was later amended to allege the amount of cocaine to be equal to or exceeding 500 grams with respect to the possession charge and one of the trafficking charges. This resulted in the elimination of the major drug offender specification as to those counts.

{¶3} On September 23, 2010, defendant filed a motion to suppress evidence, claiming the evidence at issue had been seized as a result of an unconstitutional search and seizure, thereby violating defendant's rights under the United States and Ohio Constitutions. Specifically, defendant sought to suppress all physical evidence seized from the search of a black Chevy Traverse sport utility vehicle ("Traverse" or "SUV") located in the parking lot of the apartment named in the search warrant on the following grounds: (1) the warrant at issue was limited to the premises known as 4764 Carahan Road, Columbus, Ohio, and its curtilage; (2) the police did not have a warrant to search the vehicle at issue; (3) the police lacked probable cause to search the vehicle; and (4) the search warrant was an anticipatory warrant which violated the Fourth Amendment.

{¶4} The State filed a memorandum contra opposing the motion to suppress. The State argued this warrantless search was valid based upon the automobile exception, the exigent circumstances exception, and the doctrine of inevitable discovery.

{¶5} A suppression hearing was held on October 25, and November 30, 2010. The State called the following three witnesses to testify: Detective Rick Walker, Special Agent George Gyurko, and Detective Eric Rathgaber. The testimony and evidence provided the following information.

{¶6} All three officers are members of the High Intensity Drug Traffic Area ("HIDTA") task force. Detective Rathgaber is a narcotics officer who was involved in the arrest and prosecution of Shawn Bolon ("Bolon" or "confidential informant"). Detective Rathgaber used Bolon as a confidential informant. Bolon informed Detective Rathgaber that he had been contacted by someone who offered to sell him a kilo of cocaine.

{¶7} In order to establish the credibility of Bolon as a confidential informant, Detective Rathgaber monitored Bolon making controlled phone calls to Cinda Canter ("Canter"), the woman who was supposedly negotiating the drug transaction. Such a call was made on July 8, 2010 and an in-person meeting was scheduled for later that day between Bolon and Canter. Although Canter stated the drugs should arrive on July 8, 2010, Bolon did not observe cocaine at the target apartment on that date. Canter advised Bolon the suppliers were bringing the drugs from Florida. The confidential informant instructed Canter to contact him when the drugs arrived. The transaction between Canter and the confidential informant was to be rescheduled for July 9, 2010.

{¶8} Based upon the information obtained through the confidential informant, Detective Rathgaber obtained a search warrant for 4764 Carahan Road, Columbus, Ohio. That search warrant was later executed on July 9, 2010 and admitted into evidence at the hearing. However, before searching the apartment at that address, Bolon was sent into the apartment wearing a wireless transmitter (bodywire) so that the officers involved could hear his conversations inside the apartment. The plan was for Bolon to be sent in to the apartment without any money in order to confirm that the drugs had arrived at the apartment. After confirming the drugs had arrived, Bolon was to leave the apartment,

claiming he needed to go get the money, and then advise the task force of his observations so that the search warrant could be executed.

{¶9} Special Agent Gyurko of the Bureau of Criminal Investigation was part of the surveillance team at 4764 Carahan Road on July 9, 2010. Special Agent Gyurko was the officer closest to the front door of the apartment. His primary objective was to watch the front door to observe who (or what) went in and/or came out the front door. He admitted that he could not see the back door and did not know if anyone went in or out of the back door during the surveillance period.

{¶10} Earlier in the day on July 9, 2010, Special Agent Gyurko heard radio communication stating there had been contact between Bolon and the target and that the product was on its way. At approximately 1:30 p.m. two black vehicles with tinted windows pulled up to the apartment. The first vehicle was a Chevy Traverse SUV with Florida license plates. The other vehicle was a Chevy HHR. The Traverse stopped and its passenger exited and met a man exiting from the target apartment. The passenger was carrying a white object the size of a shoebox. The two men walked into the target apartment. The Traverse then backed into a parking space in front of the apartment. The HHR pulled to the left and remained parallel to the apartment complex. The driver of the Traverse, who was later identified as the defendant, exited the vehicle, hit the key fob to lock the door, looked in the direction of the HHR, and walked into the target apartment.

{¶11} A short time later, the target dealer called Bolon and advised that the drugs had arrived and Bolon should come to the apartment to do the transaction. Upon hearing this information via radio communication, and given the timing of events, Special Agent

Gyurko believed the Traverse and HHR which had just arrived, along with the men who had exited the Traverse, were involved in the drug transaction.

{¶12} The confidential informant arrived at the apartment in a white van and entered the target apartment. The officers involved were able to hear Bolon's conversations regarding the product, such as price and weight. The officers also heard Bolon tell the dealer he needed to go get the money. Bolon then exited the apartment and got into the driver's side of his van. At the same time, Special Agent Gyurko was able to observe feet underneath Bolon's van, although the rest of the individual was obscured by the van. Special Agent Gyurko was not able to see the individual's hands or face. When the van pulled away, Special Agent Gyurko observed the driver of the Traverse (defendant) in the rear of the Traverse with the door open. At that time, Special Agent Gyurko could not see anything in his hands. He observed defendant close the door to the vehicle and enter the apartment.

{¶13} The police raided the apartment a few minutes later after the confidential informant reported he had observed drugs in the target apartment. Specifically, Detective Rathgaber testified the confidential informant advised him that defendant and his passenger (Robert Ingram) were both in the residence when he was inside on July 9, 2010. He further advised that defendant and Ingram brought a kilo of cocaine into the kitchen and opened it so that Bolon could see the cocaine for himself.

{¶14} Defendant and Ingram were both arrested. However, upon searching the residence, the police did not find a kilo of cocaine or anything resembling the white shoebox that the passenger of the Traverse (Ingram) had carried inside the apartment. Because it was not found inside the apartment, and based upon his observations and his

experience as an officer involved in making arrests in large-scale drug transactions, Special Agent Gyurko believed the cocaine was in the back of the Traverse.

{¶15} Specifically, Special Agent Gyurko testified he believed defendant had moved the drugs from the apartment to the Traverse after showing them to the confidential informant in order to "switch things up" in case the confidential informant returned to the apartment to try to rob him. (Tr. 56.) Thus, based upon the totality of the events, including the confidential informant's statement that he had observed drugs, Special Agent Gyurko testified he believed the only plausible explanation for the drugs not being inside the apartment was that the drugs had been moved to the Traverse when defendant followed Bolon outside when he exited the apartment.

{¶16} Detective Walker also participated in the surveillance activity that occurred at and around 4764 Carahan Road on July 9, 2010. Specifically, Detective Walker was assigned to perimeter surveillance and therefore was not positioned to observe the activities going on at the actual address under surveillance, although he was able to hear some of the open-air radio communications taking place. At one point, he was instructed to search the Traverse parked in front of the apartment. Detective Walker found a plastic bag in the rear passenger seat of the vehicle between the two seats, and also a cardboard shoebox containing a substance that appeared to be a kilo of cocaine. In addition, the police impounded the vehicle and inventoried its contents.

{¶17} At the conclusion of the hearing on October 25, 2010, the State argued the motion to suppress should be denied on the following grounds: (1) the automobile exception allows police to search an automobile without a warrant if probable cause exists to believe contraband is contained in the vehicle; (2) the officers believed in good

faith that the Traverse was part of the "curtilage" of the property that was authorized to be searched pursuant to the search warrant; and (3) because the vehicle was going to be impounded, inventoried, and searched anyway, the inevitable discovery doctrine would apply, thereby making the search valid.

{¶18} Defendant's trial counsel, on the other hand, argued: (1) the search warrant did not explicitly authorize the search of a motor vehicle; (2) the motor vehicle was not included in the "curtilage" because the four factor test established by the United States Supreme Court in *United States v. Dunn* (1987), 480 U.S. 294, 107 S.Ct. 1134, had not been met; (3) the vehicle in this case was not going anywhere and the police should have taken the time to obtain a warrant; and (4) the inevitable discovery doctrine does not apply where the officers have violated the law.

{¶19} The trial court advised the parties it would issue a ruling at a later date. On November 30, 2010, the hearing reconvened. The trial court stated numerous findings of fact and conclusions of law on the record in support of its decision to grant the motion to suppress. In its conclusions of law, the trial court found the search warrant did not authorize the search of the Traverse because it was not within the curtilage of the property at 4764 Carahan Road. Next, the trial court determined the exigent circumstances exception did not apply to excuse the requirement to obtain a warrant to search, since there were no emergencies that would have precluded law enforcement from obtaining a warrant. In addition, the trial court found the inevitable discovery rule did not apply because there was no legitimate alternative line of investigation regarding the automobile which would have inevitably resulted in the same evidence being discovered.

{¶20} Following the court's ruling, the State requested clarification as to whether there was in fact probable cause to believe there was contraband in the vehicle. Initially, the trial court seemed to answer affirmatively. The trial court stated as follows:

> I did not make that specific finding of fact. What I will say * * * is that based on the affidavit, Detective Rathgaber provided information that he believed there would be a transport of some stuff, some substance what he believed to be cocaine from Florida. I don't know in and of itself if that establishes probable cause, and I think that there is case law, although I don't have it with me, that would support my conclusion that that information in and of itself establishes probable cause. So I guess the answer to your question would be, yes, that is the finding that I am making.

(Tr. 158.)

{¶21} However, the prosecutor then pointed out that if there was probable cause to believe there was contraband in the vehicle, the State was not required to have a warrant to search or to show there were exigent circumstances because the automobile exception itself would allow the search, based upon the knowledge and observations of the officers, which were enough to establish probable cause. At that point, the trial court agreed to take a second look at the case of *California v. Acevedo* (1991), 500 U.S. 565, 111 S.Ct. 1982.

{¶22} Following a recess, the trial court announced it was rejecting the State's argument. The trial court began by defining probable cause "in terms of facts and circumstances sufficient to warrant a prudent man from believing that the suspect has committed or was committing an offense." (Tr. 165.) The trial court reiterated its belief that the officers had failed to provide evidence that defendant had committed or was committing an offense. The trial court further stated defendant "walked into the apartment and came out of the apartment empty-handed * * * I do not believe that the officers

established sufficient probable cause to justify the search." (Tr. 165.) The trial court also distinguished *Acevedo* from the instant case by pointing out that the driver in *Acevedo* was pulled over while the car was moving and, thus, the warrantless search was undertaken in order to prevent that driver from removing evidence from the scene, unlike the circumstances in the instant case.

{¶23} On December 2, 2010, the trial court filed a judgment entry granting defendant's motion to suppress evidence based upon the court's November 30, 2010 findings of fact and conclusions of law as placed on the record in open court. This timely notice of appeal now follows in which the State asserts four assignments of error for our review.

FIRST ASSIGNMENT OF ERROR

> THE TRIAL COURT ERRED IN GRANTING THE MOTION TO SUPPRESS BASED ON ITS CONCLUSION THAT THERE WAS NO PROBABLE CAUSE TO ARREST DEFENDANT, AS THE AUTOMOBILE EXCEPTION ONLY REQUIRES PROBABLE CAUSE TO SEARCH, NOT PROBABLE CAUSE TO ARREST.

SECOND ASSIGNMENT OF ERROR

> THE TRIAL COURT ERRED IN GRANTING THE MOTION TO SUPPRESS BASED ON ITS FINDING THAT "THERE WAS NO INFORMATION PROVIDED BY THE OFFICERS WHO TESTIFIED IN THE HEARING THAT MR. BATTLE HAD COMMITTED OR WAS COMMITTING AN OFFENSE."

THIRD ASSIGNMENT OF ERROR

> THE TRIAL COURT ERRED IN GRANTING THE MOTION TO SUPPRESS BASED ON ITS FINDING THAT DEFENDANT "CAME OUT OF THE APARTMENT EMPTY-HANDED," AS THERE WAS NO EVIDENCE THAT DEFENDANT WAS EMPTY-HANDED AND THERE WAS AFFIRMATIVE CIRCUMSTANTIAL EVIDENCE THAT HE WAS NOT EMPTY-HANDED.

FOURTH ASSIGNMENT OF ERROR

> THE TRIAL COURT ERRED IN GRANTING THE MOTION TO SUPPRESS BASED ON ITS CONCLUSION THAT INEVITABLE DISCOVERY COULD NOT APPLY BECAUSE THERE WAS NO "LEGITIMATE ALTERNATIVE LINE OF INVESTIGATION" BY WHICH THE EVIDENCE WOULD HAVE BEEN DISCOVERED.

{¶24} Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact, and therefore is in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. As a result, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. Id. Then, the appellate court must independently determine whether the facts satisfy the applicable legal standard, pursuant to a de novo review and without giving deference to the conclusion of the trial court. Id.

{¶25} In its first assignment of error, the State argues the trial court erred in applying the probable cause to arrest standard, rather than the probable cause to search standard, in finding that the automobile exception did not apply to relieve the police of the requirement of obtaining a warrant prior to searching the motor vehicle at issue. We agree.

{¶26} The Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution prohibit unreasonable searches and seizures. See *State v. Moore*, 90 Ohio St.3d 47, 2000-Ohio-10. In order for a search or seizure to be reasonable under the Fourth Amendment, it must be based upon probable cause and executed pursuant to a warrant, unless an exception to the warrant requirement is

applicable. Id. at 49. "Because the Fourth Amendment's ultimate touchstone is 'reasonableness,' the warrant requirement is subject to certain exceptions." *Brigham City, Utah v. Stuart* (2006), 547 U.S. 398, 126 S.Ct. 1943, syllabus. One such well-established exception is the automobile exception. See *Moore* at 51; *Maryland v. Dyson* (1999), 527 U.S. 465, 466, 119 S.Ct. 2013, 2014.

{¶27} Once a law enforcement officer has probable cause to believe that a vehicle contains contraband, the officer may search the motor vehicle based upon the automobile exception to the warrant requirement. *Moore* at 51; *State v. Mills* (1992), 62 Ohio St.3d 357, 367. Furthermore, in *Dyson*, the United States Supreme Court held the automobile exception has no separate exigency requirement. Id. at 466-67. We believe a review of *Dyson* to be instructive in analyzing the instant case.

{¶28} In *Dyson*, the defendant's vehicle was stopped and searched by police following receipt of a tip from a reliable informant that the defendant was transporting drugs. The trial court denied the defendant's motion to suppress the cocaine recovered from his vehicle. The defendant appealed, arguing the police lacked probable cause, and even if there was probable cause, the warrantless search violated his Fourth Amendment rights because the police had sufficient time to obtain a warrant after they received the tip from the informant but before the stop. The Maryland Court of Special Appeals reversed, finding that in order for the automobile exception to apply, there must be both probable cause to believe that evidence of a crime is contained in the automobile, as well as a separate finding of exigency which made it difficult for the police to obtain a warrant, and thus precluded the police from obtaining said warrant. However, on appeal, the United States Supreme Court reiterated its previous finding made in *United States v. Ross*

(1982), 456 U.S. 798, 809, 102 S.Ct. 2157, stating that the automobile exception does not have a separate exigency requirement. " 'If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more.' " *Dyson*, 527 U.S. at 467, 119 S.Ct. at 2014, quoting *Pennsylvania v. Labron* (1996), 518 U.S. 938, 940, 116 S.Ct. 2485, 2487.

{¶29} In the instant case, the trial court initially failed to address the State's automobile exception argument and/or subsequently failed to fully understand the exception, perhaps believing that exigency was a separate requirement to be demonstrated in order to meet the exception. Based upon current case law, it is readily apparent that a separate lack of exigency is not a basis for rejecting or ignoring the automobile exception.

{¶30} Furthermore, "a vehicle's inherent mobility-not the probability that it might actually be set in motion-is the foundation of the mobility rationale." *United States v. Navas* (C.A.2, 2010), 597 F.3d 492, 498. "[T]he mobility rationale articulated in *Carroll* [*v. United States* (1925), 267 U.S. 132, 45 S.Ct. 280], does not turn on case-by-case determinations * * * regarding either the probability that a vehicle could be mobilized or the speed with which movement could be achieved. Rather, '[w]hether a vehicle is 'readily mobile' within the meaning of the automobile exception has more to do with *the inherent mobility of the vehicle* than with the potential for the vehicle to be moved from the jurisdiction, thereby precluding a search.' " *Navas* at 498, quoting *United States v. Howard* (C.A.2, 2007), 489 F.3d 484, 493. (Emphasis sic.) See also *State v. Mackey* (Dec. 31, 1997), 2d Dist. No. 97 CA 42 (a suspect's arrest does not detract from the exigency created by an automobile's inherent mobility, because, from a practical sense, a

vehicle will generally be "immobile" when officers conduct a search, since the former occupant will be removed and confined prior to the search. The critical inquiry is whether the vehicle was readily mobile at the time of the stop); and *State v. Miller*, 11th Dist. No. 2011-T-0016, 2011-Ohio-5860, ¶18-24 (if a car is readily mobile and probable cause exists to believe it contains contraband, the police may search the vehicle; the automobile exception does not have a separate exigency requirement; probable cause in the context of an automobile search is a reasonable belief arising out of circumstances known to the seizing officer that an automobile contains that which is subject to seizure and destruction).

{¶31} Significantly, in taking another look at the case law setting forth the automobile exception, the trial court also used an inapplicable definition of probable cause. Following its second review of *Acevedo*, the trial court defined probable cause, pursuant to *Gerstein v. Pugh* (1975), 420 U.S. 103, 95 S.Ct. 854, as follows: "the standard for a constitutionally valid arrest is probable cause defined in terms of facts and circumstances sufficient to warrant a prudent man from believing that the suspect has committed or was committing an offense." (Tr. 165.) The trial court went on to find the officers who testified at the hearing failed to provide any information that defendant "had committed or was committing an offense." (Tr. 165.) Despite its earlier statement regarding probable cause, the trial court now stated "I do not believe that the officers established sufficient probable cause to justify the search." (Tr. 165.)

{¶32} For reasons which are unclear, the trial court appeared to conclude that in order to have probable cause to search the motor vehicle at issue, it was first necessary to establish probable cause to arrest defendant. Because the trial court did not find the

testimony of the officers established there was probable cause to arrest defendant, since the court did not find the testimony established that defendant had committed or was committing an offense, specifically citing the "fact" that defendant walked into and out of the apartment empty-handed,[1] the trial court concluded the officers failed to establish probable cause to justify the search of the vehicle. However, we find the trial court's application of the law on this issue to be in error.

{¶33} As stated above, under the automobile exception to the warrant requirement, the police may search a motor vehicle without a warrant if they have probable cause to believe that the vehicle contains contraband. Stated another way, the standard is probable cause to search the vehicle, not probable cause to arrest defendant or any other individual. Therefore, whether or not there was probable cause to arrest defendant does not directly impact the assessment of probable cause to search in this case. Here, based upon the facts as presented in their totality, and under a correct application of the law, there was sufficient probable cause to believe the Traverse would contain contraband.

{¶34} Probable cause is determined by examining the historical facts, such as the events leading up to a stop or search, as viewed from the standpoint of an objectively reasonable police officer. *Bowling Green v. Godwin*, 110 Ohio St.3d 58, 2006-Ohio-3563, ¶14. The determination of probable cause is fact-dependent and turns on what the officer knew at the time he made the stop and/or search. Id. Probable cause sufficient to justify a search exists where, based on the totality of the circumstances, there is a fair

[1] This finding will be discussed more fully in our analysis of the State's third assignment of error.

probability that contraband or evidence of a crime will be found in a particular place. *Illinois v. Gates* (1983), 462 U.S. 213, 238, 103 S.Ct. 2317, 2332.

{¶35} In the case subjudice, probable cause was supported by the following events: (1) the target dealer advised the confidential informant that the drugs would be arriving from Florida, and the Traverse arrived bearing Florida license plates; (2) officers observed the passenger of the Traverse (Ingram) exit the vehicle with a shoebox sized package and enter the apartment, while the driver of the Traverse (defendant) parked and locked the vehicle and looked in the direction of the second vehicle that arrived simultaneously; (3) the confidential informant received a phone call from the target dealer within a very short time after the Traverse arrived; the target dealer advised the product had arrived and stated the confidential informant should come over to the apartment to do a transaction; (4) the confidential informant watched defendant and Ingram bring the cocaine into the kitchen for him to observe; thereafter, the confidential informant reported this information to the police and provided a description of the individuals involved, which matched that of defendant and his passenger; (5) using the bodywire worn by the confidential informant, the police were able to listen to the confidential informant's conversations with individuals inside the apartment regarding the price and quantity of the product; (6) following the raid, defendant and his passenger were still inside the apartment, but the package that had been carried in by the passenger was nowhere to be found; and (7) Special Agent Gyurko had earlier observed defendant in or near the Traverse for a short period of time around the time the confidential informant exited the apartment; he then observed defendant go back inside the apartment.

{¶36} Given all of this, it was logical for Special Agent Gyurko to reach the obvious inference that defendant had returned the package to the Traverse during the time that he came back to the vehicle following the confidential informant's exit from the apartment. Based upon his years of experience, Special Agent Gyurko testified such an action would be consistent with that of drugs dealers who often "switch[] things up at the last minute." (Tr. 56.)

{¶37} Even if these circumstances were not enough to establish probable cause to believe that the particular package in question was inside the Traverse, there was also probable cause to believe that other evidence of drug possession and/or drug trafficking would be present in the Traverse, including drug paraphernalia, cash, and weapons.

{¶38} Finally, it is significant to note that nowhere in the trial court's analysis did the court ever indicate that it did not find the testimony of the officers to be credible. The trial court repeatedly cited to the testimony of the officers and the information averred to in the search warrant affidavit. Thus, all indications in the record point to the conclusion that the trial court accepted the facts as set forth via the witness testimony and evidence presented. Rather than questioning the credibility of the witnesses, the trial court instead seemed to find that the facts as applied to its interpretation of the law warranted suppression of the evidence. Therefore, our analysis regarding this assignment of error addresses a question of law, not an issue of fact.

{¶39} Based upon the totality of the circumstances and the application of the relevant law, we find there was sufficient probable cause to believe the Traverse contained contraband and, therefore, the automobile exception justified the search of the

Traverse. As a result, the trial court should have denied the motion to suppress. Accordingly, we sustain appellant's first assignment of error.

{¶40} In its second assignment of error, the State argues the trial court erred in granting the motion to suppress based upon its finding that the officers who testified failed to provide any information to support a determination that defendant had committed or was committing an offense.

{¶41} In the State's first assignment of error, we determined the proper standard to apply was whether or not there was probable cause to search, not whether or not there was probable cause to arrest defendant. Based upon that determination, it is unnecessary at this time for us to determine whether or not there was in fact no information presented on this issue, since such a determination is moot, in light of our finding that there was probable cause to search and that the automobile exception justified the warrantless search of the vehicle. Consequently, we render the State's second assignment of error moot.

{¶42} In its third assignment of error, the State argues the trial court erred in granting the motion to suppress based in part upon its finding that defendant "came out of the apartment empty-handed." The State contends there is no evidence to establish that defendant was empty-handed when he exited the apartment. In fact, the State submits there was affirmative circumstantial evidence to demonstrate that defendant was not empty-handed when he exited the apartment.

{¶43} After recessing to take a second look at the *Acevedo* case, the trial court stated that in considering the State's argument, it looked at the definition of probable cause. The trial court then relied upon the probable cause to arrest standard. The trial

court went on to state: "There was no information provided by the officers who testified in the hearing that Mr. Battle had committed or was committing an offense. He walked into the apartment and came out of the apartment empty-handed[.]" (Tr. 165.)

{¶44} As previously stated above, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. See *Burnside* at ¶8. Here, however, this particular finding is not supported by competent, credible evidence.

{¶45} Defendant claims Special Agent Gyurko testified he never observed defendant with an object in his hand when he was in or near the Traverse, and therefore, there is strong evidence to support the trial court's finding that he left the apartment empty-handed. However, upon closer examination of the actual testimony provided at the hearing, it is clear that Special Agent Gyurko's testimony actually reflected the fact that he was initially unable to see defendant's hands when he exited the apartment, and therefore could not say that he saw something (or nothing) in defendant's hands.

{¶46} In fact, Special Agent Gyurko testified he observed the confidential informant exit the residence and get into the driver's side of a white van. As the confidential informant was walking out, Special Agent Gyurko could also see two feet from underneath the bottom of the van, although he could not see who it was until the confidential informant had backed out of the parking space, at which time he then observed and recognized defendant in the rear of the Traverse with the door open. Special Agent Gyurko further testified that upon seeing and recognizing defendant, he did not see anything in defendant's hands. He next observed defendant close the door to the Traverse and enter the apartment. (Tr. 51-53.) On cross-examination, Special Agent

Gyurko reiterated he did not observe defendant physically walking out the door of the apartment, but he saw defendant walking back into the apartment. Special Agent Gyurko testified that while defendant was by the Traverse, he was unable to see defendant's hands. (Tr. 74-76.)

{¶47} Based upon this testimony, the trial court's finding that defendant "came out of the apartment empty-handed" is not supported by competent, credible evidence in the record. In fact, there is circumstantial evidence to suggest that defendant was not empty-handed, given that the shoebox-sized package that was carried into the apartment by Ingram could not be located inside, but a shoebox was found in the Traverse.

{¶48} Accordingly, we sustain the State's third assignment of error.

{¶49} In its fourth assignment of error, the State argues the trial court erred in granting the motion to suppress based upon its conclusion that the inevitable discovery doctrine could not apply to allow the admission of the evidence found in the Traverse because there was no legitimate alternative line of investigation through which the evidence would have been discovered.

{¶50} Because we have already determined in our analysis of appellant's first and third assignments of error that the trial court's decision to grant the motion to suppress based upon a lack of probable cause and/or a warrant (or an applicable exception thereto) was in error, we need not address this issue. Therefore, we render the State's fourth assignment of error moot.

{¶51} In conclusion, the State's first and third assignments of error are sustained. The State's second and fourth assignments of error are rendered moot. The judgment of the Franklin County Court of Common Pleas is hereby reversed and this matter is

remanded to the trial court to proceed to trial or for further proceedings consistent with this decision.

Judgment reversed;
cause remanded.

BRYANT, P.J., and KLATT, J., concur.

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