[Cite as *State v. Broughton*, 2012-Ohio-2526.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 11AP-620
v.	:	(C.P.C. No. 09CR-09-5798)
Derek J. Broughton,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 7, 2012

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Pritchard*, for appellee.

Yeura R. Venters, Public Defender, and *John W. Keeling*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} This is an appeal from a judgment of the Franklin County Court of Common Pleas, following a no contest plea, in which the trial court found defendant-appellant, Derek J. Broughton, guilty of carrying a concealed weapon and improper handling of a firearm. We note that this is clearly a very close case. However, for the following reasons, we affirm the trial court's judgment.

{¶ 2} On September 25, 2009, appellant was indicted on one count of carrying a concealed weapon in violation of R.C. 2923.12 and one count of improper handling of a firearm in violation of R.C. 2923.16, after police discovered a loaded .22 caliber handgun in the glove compartment of appellant's vehicle following a traffic stop on August 22, 2009.

{¶ 3} On March 4 and October 5, 2010, respectively, appellant filed initial and supplemental motions to suppress evidence (i.e., the handgun) obtained from the search of appellant's vehicle.[1] On October 22, 2010, the trial court held a hearing, at which plaintiff-appellee, state of Ohio, presented evidence consisting of the testimony of Columbus Police Officer Elizabeth Gibson and a DVD recording of the traffic stop taken from the police cruiser's dashboard-mounted video camera. That evidence established the following facts.

{¶ 4} At approximately 10:00 p.m. on August 22, 2009, Officer Gibson and her partner, Officer Debra Paxton, were on routine patrol in a marked police cruiser when they received a radio dispatch indicating only that a woman was "down and out" at the intersection of McGuffey and Weber Roads. (Tr. Vol. I, 7.) Officer Gibson described a "down and out" report as a "1034" code, which literally translates to "[u]nknown complaint" in police parlance. (Tr. Vol. I, 8.) According to Officer Gibson, a "down and out" report typically means that the person about whom the report is made is either intoxicated or suffering from health problems; however, such a report could mean "several other things," including a "hit and run." (Tr. Vol. I, 23.)

{¶ 5} En route to the scene, the officers observed appellant fail to stop at a red light before turning right onto Weber Road. As appellant turned the corner, he nearly collided with a vehicle traveling on Weber Road. Because they were uncertain whether appellant's erratic driving may have related to the earlier radio dispatch, the officers activated the cruiser's beacons and siren and pursued appellant. Appellant drove several blocks before turning left onto a side street.

{¶ 6} As appellant slowed to a stop, Officer Gibson observed him lean "all the way over * * * to the passenger" side of the vehicle. (Tr. Vol. I, 10.) Officer Gibson testified that based upon her police experience, appellant's movement suggested that he was either "reaching for something, hiding something, [or] putting something away," such as a weapon or drugs. (Tr. Vol. I, 10.) At the court's request, Officer Gibson demonstrated appellant's action, which the court subsequently described as "almost lunging over to the right." (Tr. Vol. I, 10.)

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[1] Appellant's motions also sought suppression of statements made by appellant in the course of the police encounter. We need not address this aspect of the motions, however, as appellant's appeal concerns only the trial court's ruling on the motions to suppress the handgun.

{¶ 7} After appellant came to a complete stop, the officers exited their cruiser, and Officer Paxton ordered appellant to turn off the engine. Appellant complied only after Officer Paxton repeated the order several times. Officer Paxton approached the driver's side of the vehicle while Officer Gibson approached the passenger side. The DVD recording depicts both officers with their service weapons unholstered as they approached the vehicle; Officer Gibson briefly pointed her weapon at the passenger window. Officer Gibson testified that she drew her weapon "for * * * precaution because I had no idea what was going on inside the vehicle." (Tr. Vol. I, 12.) According to Officer Gibson, the officers "use[d] all precautions at that point" due to the "unknown circumstances" related to the earlier radio dispatch and because appellant came "slow to a stop." (Tr. Vol. I, 11.)

{¶ 8} Officer Gibson illuminated the inside of appellant's vehicle with her flashlight and saw no evidence of a weapon or drug paraphernalia. Officer Paxton ordered appellant to exit the vehicle, and conducted a brief patdown search for weapons; none were found. Appellant complied with the patdown without incident, but, according to Officer Gibson, he appeared to be "nervous." (Tr. Vol. I, 21.) Indeed, Officer Gibson testified that appellant acted considerably more nervous than someone in his circumstances would be expected to act.

{¶ 9} Because appellant did not produce a driver's license upon request, the officers escorted him, unhandcuffed, to the police cruiser in order to ascertain his identity and conduct a LEADS check. After appellant was placed in the back of the cruiser, Officer Gibson conducted a "protective sweep" of appellant's vehicle "because of the furtive movements, him leaning to the other side of the vehicle." (Tr. Vol. I, 17.) Officer Gibson testified that she conducted the search "in case we put him back into the vehicle so he wouldn't have access to anything in that vehicle that could harm us." (Tr. Vol. I, 17-18.) During the protective sweep, Officer Gibson discovered a loaded .22 caliber handgun wrapped in a bandanna inside the glove compartment. Following discovery of the handgun, the officers arrested appellant for carrying a concealed weapon and issued a traffic citation for disobeying a traffic signal.

{¶ 10} By decision and entry filed October 26, 2010, the court denied appellant's motions to suppress, concluding that "there were ample factual grounds to support the officers' decision to do a protective search of the Defendant's vehicle." (Decision, 6.)

{¶ 11} Appellant subsequently pled no contest to the charges in the indictment. The trial court accepted appellant's pleas and found him guilty. The trial court found that the two offenses merged for purposes of sentencing, imposed a two-year community control sanction on the carrying a concealed weapon charge, and notified appellant that he would be subject to a nine-month prison term if he violated the terms of his community control.

{¶ 12} On appeal, appellant sets forth a single assignment of error for this court's review:

> THE TRIAL COURT ERRED WHEN IT OVERRULED THE DEFENDANT'S MOTION TO SUPPRESS THE EVIDENCE OBTAINED AS A RESULT OF A "PROTECTIVE SEARCH" OF HIS VEHICLE THAT WAS CONDUCTED AFTER THE DEFENDANT HAD ALREADY BEEN PATTED DOWN AND FRISKED AND PLACED IN THE REAR OF A POLICE CRUISER SINCE ISSUES OF OFFICER SAFETY, NECESSARY TO JUSTIFY THE SEARCH, NO LONGER WARRANTED SUCH AN INTRUSION.

{¶ 13} In his sole assignment of error, appellant contends the trial court erred in denying his motions to suppress evidence obtained as a result of the protective search of his vehicle. Appellant maintains that the search of his vehicle was constitutionally unlawful because at the time the search was conducted, he posed no threat to the officers' safety, having already been patted down and frisked and placed in the back of the police cruiser.

{¶ 14} " '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 is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard.' " (Citations omitted.) *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, ¶ 100, quoting *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8.

{¶ 15} "The Fourth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, and Section 14, Article I of the Ohio

Constitution, protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' " *State v. Ford*, 10th Dist. No. 07AP-803, 2008-Ohio-4373, ¶ 19. "Searches and seizures conducted without a warrant are per se unreasonable unless they come within one of the ' "few specifically established and well delineated exceptions." ' " *Id.*, quoting *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993), quoting *Thompson v. Louisiana*, 469 U.S. 17, 20 (1984). "Evidence is inadmissible if it stems from an unconstitutional search or seizure." *Id.*, citing *Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963). "Those seeking exemption from the warrant requirement bear the burden of establishing the applicability of one of the recognized exceptions." *State v. Fisher*, 10th Dist. No. 10AP-746, 2011-Ohio-2488, ¶ 17, citing *State v. Lowry*, 4th Dist. No. 96CA2259 (June 17, 1997).

{¶ 16} The United States Supreme Court recognized one exception to the warrant requirement in *Terry v. Ohio*, 392 U.S. 1 (1968). There, the Supreme Court held that a police officer may conduct a brief, warrantless search of an individual's person for weapons if the officer has a reasonable and articulable suspicion that the "individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others." *Id.* at 24. " 'The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence.' " *State v. Evans*, 67 Ohio St.3d 405, 408 (1993), quoting *Adams v. Williams*, 407 U.S. 143, 146 (1972).

{¶ 17} In *Michigan v. Long*, 463 U.S. 1032 (1983), the court extended its holding in *Terry* to protective searches of automobiles. There, police officers stopped Long's vehicle after observing him speeding and driving erratically. Long exited the vehicle and met the officers at the rear of his car. When Long began walking toward the open door of his car, the officers followed him and saw a hunting knife on the floorboard of the driver's side of the car. The officers conducted a patdown search and found no weapons. After shining a flashlight into the car, the officers noticed something protruding from under the armrest on the front seat and, upon lifting the armrest, saw an open pouch that contained marijuana. The officers then arrested Long for possession of marijuana. Long filed a motion to suppress the marijuana, arguing that the search of the passenger compartment of his vehicle violated Fourth Amendment principles.

{¶ 18} The court upheld the search, holding that "the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons." *Id.* at 1049, citing *Terry* at 21. The court continued, stating " '[T]he 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.' " *Id.* at 1050, quoting *Terry* at 21. In so holding, the court noted its previous jurisprudence which indicated that "protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger, that roadside encounters between police and suspects are especially hazardous, and that danger may arise from the possible presence of weapons in the area surrounding a suspect." *Id.* at 1049.

{¶ 19} When determining whether a protective search is justified, courts apply an objective standard to determine if the "facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate." *State v. Bobo*, 37 Ohio St.3d 177, 178-79 (1988), quoting *Terry* at 22. Applying this objective standard, courts review the totality of the circumstances "through the eyes of a reasonable and prudent police officer on the scene who must react to events as they unfold." *State v. Andrews*, 57 Ohio St.3d 86, 87-88 (1991), citing *United States v. Hall*, 525 F.2d 857, 859 (D.C.Cir.1976). In assessing the totality of the circumstances, courts generally consider factors such as the time of day, the experience of the officers involved, and suspicious activities by the defendant, both before and during the stop, including furtive gestures. *Bobo* at 179.

{¶ 20} In the present case, the traffic stop occurred at night and under darkness. Appellant ran a red light and nearly collided with another vehicle in the vicinity of a reported "[u]nknown complaint." Officer Gibson averred that an "[u]nknown complaint" could constitute "several other things," including a "hit and run" accident. Appellant did not immediately stop his vehicle after the officers activated their cruiser beacons and siren. In addition, Officer Paxton had to repeatedly order appellant to turn off the engine

after he pulled over. Appellant's erratic driving in the vicinity of a possible hit and run accident, coupled with his failure to immediately heed police orders, could have reasonably raised the officers' suspicion that appellant might pose a danger to their safety. Indeed, Officer Gibson testified that she and Officer Paxton "use[d] all precautions at that point" due to the "unknown circumstances" related to the earlier radio dispatch and because appellant came "slow to a stop." (Tr. Vol. I, 11.)

{¶ 21} Officer Gibson also testified regarding the furtive gestures appellant made prior to stopping the car. Specifically, Officer Gibson testified that she observed appellant lean "all the way over * * * to the passenger" side of the vehicle. Such furtive movements could support Officer Gibson's reasonable suspicion that appellant may have been trying to access or hide a weapon on the passenger side of the car. Indeed, when questioned why appellant's furtive movements concerned her, Officer Gibson stated that, based on her police experience, the movements suggested that appellant was "reaching for something, hiding something, [or] putting something away," such as a weapon or drugs. Although a mere furtive gesture, standing alone, may not create sufficient reasonable suspicion in all cases, here the furtive movement was one factor in addition to others giving rise to a finding of reasonable and articulable suspicion justifying the protective search of the vehicle.

{¶ 22} In addition, both officers approached appellant's vehicle with their service weapons drawn, and Officer Gibson pointed her weapon at the passenger window. Officer Gibson testified that she did so as a precautionary measure "because [she] had no idea what was going on inside the vehicle." The officers' actions in this regard clearly suggest that they viewed appellant as a potentially dangerous individual.

{¶ 23} Officer Gibson also testified that appellant exhibited nervous behavior after he exited his vehicle. Although some degree of nervousness during interactions with the police is not uncommon, nervousness can be a factor to weigh in determining reasonable suspicion. *State v. Atchley*, 10th Dist. No. 07AP-412, 2007-Ohio-7009, ¶ 14, citing *State v. Williams*, 5th Dist. No. 01-CA-00026 (Dec. 12, 2001) (that defendant appeared too nervous for the circumstances can be one factor to determine reasonable suspicion). Here, Officer Gibson testified that appellant appeared too nervous for the circumstances.

{¶ 24} Appellant asserts that the search was unwarranted because he was detained in the police cruiser at the time and thus had no access to the weapon. Appellant contends that the officers could not perform a protective search until they were certain he would return to his vehicle. The *Long* court rejected an argument that it was not reasonable for the officers to fear that Long could injure them because he was effectively under their control during the investigative stop and could not gain access to any weapons that might have been located in the car. The court determined that a protective sweep of the area where an individual could have immediate control of or obtain a weapon is justified before the police return that individual to the vehicle. The court noted that when the suspect is not placed under arrest and instead will be permitted to return to his or her vehicle, an officer "remains particularly vulnerable in part *because* a full custodial arrest has not been effected, and the officer must make a 'quick decision as to how to protect himself and others from possible danger.' " (Emphasis sic.) *Id.* at 1052, quoting *Terry* at 28. Accordingly, the court held that the protective search of Long's car was justified because the officers were taking "preventive measures to ensure that there were no other weapons within Long's immediate grasp before permitting him to reenter his automobile." *Id.* at 1051.

{¶ 25} In *State v. Walker*, 2d Dist. No. 24542, 2012-Ohio-847, a police officer initiated a traffic stop after dark in a high-crime area. During the course of the stop, the officer observed the driver and the passenger, both males, frantically moving their hands near the floorboard of the vehicle, out of the officer's sight. Neither man immediately responded to the officer's commands to show their hands. The officer testified that he was concerned that the men might produce a weapon. The court determined that, under the totality of the circumstances, the officer had a reasonable basis to believe that one or both of the men may have been armed and/or that a weapon may have been hidden in the front passenger area of the vehicle. Accordingly, the court found that the officer was entitled to conduct a limited protective search for weapons for his safety. The court further found that the lawfulness of the officer's protective search of the passenger area of the vehicle was not limited by the fact that the men were handcuffed and seated on the curb when the search occurred. In so finding, the court noted that the officer had testified that " '[a]fter checking the area where these individuals had been reaching, if nothing had been

discovered, [the defendant] would have been issued a citation for driving with an expired license plate. And both individuals would have been allowed to leave.' " *Id.* at ¶ 31. The court concluded that " '[c]onsidering that, at the time of the search, it was likely that one, if not both, of the occupants would be permitted to return to the van, [the officer] acted reasonably when, out of a concern for the officers' safety, the van was searched for weapons prior to allowing [the defendants] to re-enter the vehicle.' " *Id*.

{¶ 26} In *State v. Watson,* 157 Ohio App.3d 217, 2004-Ohio-2628, ¶ 16 (4th Dist.) the court stated "had [the officer] not searched the vehicle and not found the gun, [the officer] would have had no reason to arrest defendant. Thus, [the officer] would have permitted defendant to leave and, presumably, to reenter his vehicle. At that point, [the] defendant would have had immediate access to the gun. Under these circumstances, it was appropriate to conduct a search of [the] defendant's vehicle to ensure the safety of the officers and others."

{¶ 27} Other courts, including this one, have held similarly. *E.g., Atchley* at ¶ 19 (police officer's belief that he "might" allow the defendant to return to his vehicle after a traffic stop necessitated protective search of any part of the vehicle to which the defendant could have quick and easy access to retrieve a weapon); *State v. Roberts,* 2d Dist. No. 21221, 2006-Ohio-3042, ¶ 12 (officers may conduct protective search inside the vehicle if defendant "may" be allowed to return to the vehicle).

{¶ 28} Here, appellant was not under arrest at the time Officer Gibson conducted the protective search. Because he was not under arrest and would not have been arrested had Officer Gibson not found the handgun, appellant would have been permitted to return to his car and would have had access to any weapons in the front passenger area of the vehicle, including the glove compartment. Indeed, Officer Gibson testified that she performed the search "in case we put him back into the vehicle so he wouldn't have access to anything in that vehicle that could harm us." (Tr. Vol. I, 17-18.) Officer Gibson noted that the traffic offense precipitating the stop of appellant's vehicle is a non-arrestable offense and that individuals stopped for such violations are "routinely, if nothing else [is] going on, allowed [to re-enter] their car and drive away." (Tr. Vol. I, 18.) Officer Gibson further averred that "based on the fact that this is a ticket and a nonarrestable offense that

we've established, [appellant] would have been allowed back in the vehicle to gain access to anything that was in the vehicle." (Tr. Vol. I, 52.)

{¶ 29} Appellant challenges the application of *Long*, averring that two more recent decisions of the United States Supreme Court render the protective search here invalid. We find both of these cases distinguishable and thus inapposite.

{¶ 30} In *Knowles v. Iowa*, 525 U.S. 113 (1998), a police officer stopped Knowles for speeding and issued him a traffic citation, although under state law the officer could have arrested Knowles. The officer searched Knowles' car pursuant to a state statute authorizing a full search of an automobile and driver in those cases where police elect not to make a custodial arrest and instead issue a citation. The search resulted in the discovery of marijuana and drug paraphernalia under the driver's seat. Knowles moved to suppress the evidence obtained in the search, arguing that the search could not be sustained under the search incident to arrest exception to the warrant requirement because he had not been placed under arrest.

{¶ 31} The court found that neither of the historical rationales justifying the search incident to arrest exception to the warrant requirement, i.e., officer safety and the need to discover and preserve evidence, applied to justify the search. As pertinent here, the court averred that while concern for officer safety in the context of a routine traffic stop may justify the "minimal" intrusion of ordering a driver and passengers out of the car, it did not justify the "considerably greater intrusion attending a full field-type search." *Id.* at 117. The court noted, however, that police officers have "other, independent bases to search for weapons and protect themselves from danger," such as a " '*Terry* patdown' of the passenger compartment of a vehicle upon reasonable suspicion that an occupant is dangerous and may gain immediate control of a weapon." *Id.* at 117-18, citing *Long* at 1049. The court's citation to *Long* reaffirms its viability in situations where a police officer has a reasonable suspicion that an occupant of a vehicle is dangerous and may gain immediate control of a weapon.

{¶ 32} In *Knowles,* the sole justification for the search was the state statute authorizing a police officer to search a vehicle following issuance of a traffic citation; no evidence established a reasonable suspicion that other criminal activity was afoot. Here, Officer Gibson conducted the search pursuant to a reasonable belief that appellant posed

a danger to her and her fellow officer were he to be returned to his vehicle at the conclusion of the traffic stop. Thus, *Knowles* does not apply.

{¶ 33} In *Arizona v. Gant*, 556 U.S. 332 (2009), the court considered whether the search incident to arrest exception to the Fourth Amendment's warrant requirement—set forth in *Chimel v. California*, 395 U.S. 752 (1969) and applied to automobiles in *New York v. Belton*, 453 U.S. 454 (1981)—permitted the search of a vehicle after a motorist has been arrested, handcuffed, and locked in the back of a police car. The court held that it did not, stating that "*Belton* does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle." *Gant* at 335.

{¶ 34} In limiting and clarifying *Belton*, the court recognized that other established exceptions to the warrant requirement authorize the search of an automobile when safety or evidentiary concerns are implicated. *Gant* at 346. The court specifically cited to the exception set forth in *Long*, among others, stating that *Long* "permits an officer to search a vehicle's passenger compartment when he has reasonable suspicion that an individual, whether or not the arrestee, is 'dangerous' and might access the vehicle to 'gain immediate control of weapons.' " *Gant* at 346-47, quoting *Long*.

{¶ 35} In his concurring opinion, Justice Scalia averred that the holding in *Gant* had no effect on the viability of *Long*, reasoning that "[i]t must be borne in mind that we are speaking here only of a rule automatically permitting a search when the driver or an occupant is arrested. Where no arrest is made, we have held that officers may search the car if they reasonably believe the suspect is dangerous and . . . may gain immediate control of weapons. * * * In the no-arrest case, the possibility of access to weapons in the vehicle always exists, since the driver or passenger will be allowed to return to the vehicle when the interrogation is completed. The rule of *Michigan v. Long* is not at issue here." (Internal citations omitted.) *Id.* at 352.

{¶ 36} At the time of the search in *Gant*, the defendant was arrested and handcuffed and seated in the back of a locked police cruiser, with no possibility of returning to his vehicle. Here, appellant was neither under arrest nor in handcuffs while seated in the police cruiser, and would have been returned to his car had the search not

revealed the handgun. Thus, *Gant* is inapplicable. Further, the *Gant* court reaffirmed the validity of *Long*.

{¶ 37} Because the rule of law set forth in *Long* remains viable, Officer Gibson's search of the glove compartment of appellant's vehicle, based on a reasonable suspicion that he was dangerous and would gain immediate control of a weapon upon return to the vehicle, was constitutionally valid. The trial court thus did not err in denying appellant's motions to suppress. Accordingly, appellant's assignment of error is overruled.

{¶ 38} Having overruled appellant's single assignment of error, we hereby affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and CONNOR, JJ., concur.
