[Cite as *State v. Limoli*, 2012-Ohio-4502.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 11AP-924
v.	:	(C.P.C. No. 10CR-6678)
Amber M. Limoli,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 28, 2012

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

Dennis C. Belli, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶ 1} Defendant-appellant, Amber M. Limoli ("appellant"), appeals from her conviction and sentencing after entering a no-contest plea in the Franklin County Court of Common Pleas to a charge of possession of cocaine in violation of R.C. 2925.11. Appellant entered her plea of no contest following the denial of her motion to suppress evidence based on her contention that the cocaine was discovered during an illegal search and seizure. For the reasons that follow, we remand the case to the trial court for further proceedings.

I. Facts and Procedural Background

{¶ 2} On July 16, 2010, at approximately 4:00 or 5:00 p.m. in the afternoon, officers of the Columbus Police Department stopped appellant to cite her for jaywalking in Cherry Alley, an alley behind appellant's apartment on the west side of Columbus, Ohio. The police consider the area to be a high-crime neighborhood with a high incidence of drug activity. After the initial stop, Officer Brandon Harmon ("Officer Harmon") summoned a female officer, Officer April Redick ("Officer Redick"), to search appellant.

During the search, a rock of crack cocaine fell from underneath appellant's shirt. Although there is no dispute as to these facts, appellant and the police officers provided different accounts as to the circumstances surrounding the event. Most significantly, the police testified that appellant consented to a search of her person. Appellant denied giving consent to be searched.

{¶ 3} On November 16, 2010, the Grand Jury of the Franklin County Court of Common Pleas indicted appellant on one count of possession of cocaine in violation of R.C. 2925.11. The indictment charged that, on July 16, 2010, appellant "did knowingly obtain, possess, or use a controlled substance included in Schedule II, to wit: methylbenzoylecgonine, commonly known as crack cocaine, in an amount equal to or exceeding five (5) but less than ten (10) grams of crack cocaine as defined in section 2925.01 of the Ohio Revised Code."

{¶ 4} On July 15, 2011, appellant filed a motion to suppress evidence alleging that she had been illegally searched and, on July 20, 2011, the trial court conducted the first day of an evidentiary hearing on that motion. The court heard additional testimony on July 26 and August 17, 2011.

{¶ 5} In describing the events of July 16, 2010, Officer Harmon testified that the police had received information that there was possible drug trafficking going on in the area and that appellant's name "was being thrown out there" in connection with the report. (Tr. 120.) He and two other officers were patrolling the neighborhood on bicycles and riding north on Davis Avenue "in the area where we had heard that [appellant] was selling crack cocaine." (Tr. 43.) He testified that he looked down the alley and saw appellant and another woman walking towards Davis Avenue, side by side, "directly down the middle" of Cherry Alley. (Tr. 43.) He observed appellant immediately turn around and walk away from the officers at a fast pace. He testified that, when people immediately change their course of direction after seeing police, it usually means that there is a possibility that criminal activity is occurring.

{¶ 6} Officer Harmon made contact with appellant in the parking lot to the rear of appellant's apartment building. He testified that he had dealt with appellant on several prior occasions and that she "wasn't acting her normal self," but was acting "nervous"—as though she wanted the police encounter to be over as quickly as possible. (Tr. 38.) He informed appellant that he had observed her jaywalking and "immediately" asked her if

she had anything on her person of which he should be aware, i.e., weapons or narcotics. He testified that appellant responded "no" and that he then asked her if she would give consent to search her person, at which point appellant replied, "Sure. Call up a female officer.[1]" (Tr. 39.) Appellant then summoned Officer Redick. There was no evidence that any of the police officers conducted a patdown search to ensure their personal safety and, in fact, Officer Harmon testified that, in his approximately eight to ten prior encounters with appellant, "it's always been an officer relationship when everything is pretty docile. There has not been much conflict." (Tr. 118-19.)

{¶ 7} Officer Harmon testified that appellant was not free to leave while the officers were waiting for Officer Redick but, rather, that she was being detained by the three officers present. In addition, Officer Harmon testified that, at the time he observed appellant walking in the alley, he knew "that there could possibly be some narcotics related to this too." (Tr. 120.) He testified that appellant received the jaywalking ticket "[s]ometime during the incident" and estimated that 15 minutes at most passed between the time of the initial stop and the search and arrest. (Tr. 40.) During the encounter, several people came out from the apartment building, including appellant's friends and family members, and gathered in the parking lot to observe.

{¶ 8} In addition, Officer Harmon testified that he had previously arrested appellant for possession of cocaine. He stated that he had encountered appellant on approximately eight to ten prior occasions, including traffic stops, pedestrian violations, and the execution of search warrants of suspected drug houses. He stated that, on these previous occasions, he had asked appellant if she would consent to be searched and that she had always responded "absolutely no." (Tr. 119.) He testified that he had no doubt that appellant had given her consent to be searched when stopped for the jaywalking offense and that he did not hear appellant say or do anything before or during the search indicating that she was withdrawing her consent.

{¶ 9} A second bicycle patrol officer at the scene, Mark Denner ("Officer Denner"), testified that it was his "understanding" that appellant had consented to the search but that he could not recall any words that she may have used. He testified that

[1] Later in his testimony, Officer Harmon described her response to his question whether she would consent to be searched as "call up a female and go ahead." (Tr. 119.) Still later in the testimony the officer characterized the exchange as him asking the question "do you mind if we check," and her answering "no, go ahead and call a female and you can search." (Tr. 121.)

"there was no indication that she wasn't saying yes" and that her demeanor indicated that she was "okay" with having a female officer come and search. (Tr. 28.)

{¶ 10} The third bicycle patrol officer, Jeffrey Beine ("Officer Beine"), also testified. He stated that appellant and another female were both "in the middle of the alley" and that, when appellant saw the officers, she turned directly around and went the other way. (Tr. 108.) He could not testify that he heard appellant affirmatively consent to a search and had only a "very vague" recollection of the entire encounter.

{¶ 11} Officer Redick, who conducted the search, also testified at the suppression hearing. She testified that she arrived at the parking lot a few minutes after receiving the request that she conduct a search of appellant. Officer Harmon informed Officer Redick that appellant had consented to be searched. She conducted the search and felt a hard, solid object underneath appellant's breast area about the size of one-half to three-quarters of a golf ball. The officer was able to manipulate the object, causing the object to fall. She stated that appellant did not ask her at any time to stop the search nor indicate to her in any other way that she was not consenting to the search.

{¶ 12} Appellant also testified at the suppression hearing. She testified that she was just beginning to enter Cherry Alley from the parking lot of her apartment building and was with her cousin who was walking "way ahead" of her. (Tr. 84.) She testified that she did not enter the roadway at Cherry Alley when she saw the three officers on bicycles but instead turned around towards her apartment. In the parking lot behind the apartment building, she approached another individual she identified as "Q." By the time the officers arrived in the parking lot on their bicycles, she was hugging "Q," at which point the police officers stopped both of them. She testified that Officer Harmon approached her and asked her why she was acting "weird" and where she was going. She asked him whether she was "wanted or not." (Tr. 88.) She further testified that Officer Harmon then told her she was jaywalking and that she was going to get a ticket. He asked both appellant and "Q" for identification and ran an inquiry to determine if either had outstanding warrants. When appellant asked if any warrants had been disclosed, Officer Harmon answered that none had. She testified that she then tried to walk away and that Officer Harmon told her to come back and that the police were about to "search you all." (Tr. 90.) Appellant denied that the officer asked her whether she would consent to a search and denied that she ever gave consent. She testified that she repeatedly told him

"Write the ticket, write the ticket," but that Officer Harmon replied, "I'm about to have a female officer." (Tr. 132.) She further testified that the officers conducted a search of the individual called "Q" but let him go. She testified that "I never said they could search me or anything. I didn't say nothing. I tried to walk away. I just kept telling them to write the ticket." (Tr. 133.)

{¶ 13} Appellant testified that she felt intimidated by the officers because "they always stop me * * * [and] try to figure out a way to give me a ticket * * * and find out stuff." (Tr. 95.) She stated that, because of this, she felt she didn't have a choice as to whether the search was going to happen. Consistent with Officer Harmon's testimony, appellant stated that the two did have prior encounters with each other and that she had always previously refused to give Officer Harmon voluntary permission to be searched. She testified, however, that he had in the past nevertheless summoned female officers who then searched her. She testified that this had happened on three to four occasions. She identified one occasion as being a traffic stop involving a police canine unit, at which time she told Officer Harmon that she did not want to be searched, and he said "since the dog tapped on the car I had to be searched." (Tr. 131.) She testified that another incident had occurred while she was a pedestrian and was carrying a "little taser" that the officer may have thought was a gun. (Tr. 131.)

{¶ 14} On August 12, 2011, before the third and final day of the evidentiary hearing on the motion, appellant filed a supplemental memorandum regarding her motion to suppress. In that memorandum, appellant more specifically addressed the question whether she had provided voluntary consent to the search and argued that "whether a citizen has voluntarily consented to a search is determined by reviewing the totality of the circumstances." (Supplemental Memorandum to Motion to Suppress, at 4-5.)

{¶ 15} On August 16, 2011, the state filed a memorandum in response to appellant's supplemental memorandum, again emphasizing its position that appellant had voluntarily consented to be searched. (Memorandum Contra, at 5.) The state acknowledged that, "[w]hen a person is lawfully detained by police and consents to a search, the state must show by clear and convincing evidence that the consent was freely and voluntarily given." (Memorandum Contra, at 5.) It argued, inter alia, that the officers had made no promise nor threats; that appellant was not placed in the police cruiser or

handcuffed prior to the search; that the officers' guns were not drawn; and that appellant was not detained.

{¶ 16} On August 17, 2011, at the conclusion of the suppression hearing, the court denied appellant's motion to suppress, stating:

> [A]s far as duress is concerned, the officer said she consented. She said she did not consent. Nobody suggested there was evidence to show she did consent, but it was because she was afraid or under duress, so duress is not a[n] issue.
>
> * * *
>
> There were multiple officers that said she consented, some said directly, there were words spoken. Others through their testimony, obviously a female officer was called, brought to the scene and searched her.
>
> * * * I think it's important that there is testimony that a crowd gathered here. * * * And Ms. Limoli does not seem to be a shy young lady, she seems to speak her mind, she did just fine on the witness stand, and if she was not consenting to this search it would seem to me that there would be other people that witnessed all of this that would have been able to testify to that. I heard no one else.
>
> *So the issue on the consent comes down to a credibility question. The officers say she consented, she said she did not. And I find in favor of the officers on that issue.*
>
> So there was probable cause to write the ticket, there was probable cause to detain her. They asked for consent and she gave it. So the motion to suppress is denied.

(Emphasis added.) (Tr. 145-46.)

{¶ 17} The trial court judge was not asked to—nor did he—issue any written findings of fact or conclusions of law, or any other written decision in connection with his denial of appellant's motion to suppress. Accordingly, his statement quoted above constitutes the entirety of the court's findings of essential facts concerning the voluntariness of appellant's consent.

{¶ 18} Appellant has timely appealed and raises two assignments of error for our consideration.

II. Validity of Search

{¶ 19} Appellant's first assignment of error states:

> The trial court committed reversible error when it denied Defendant-Appellant's motion to suppress physical evidence obtained by the police in violation of her rights under the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 14 of the Ohio Constitution.

{¶ 20} It is axiomatic that the Fourth and Fourteenth Amendments to the United States Constitution and the Ohio Constitution protect individuals against unreasonable searches by agents of the government. " '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. Broughton*, 10th Dist. No. 11AP-620, 2012-Ohio-2526, ¶ 15, quoting *State v. Ford,* 10th Dist. No. 07AP-803, 2008-Ohio-4373, ¶ 19. The Fourth Amendment to the United States Constitution generally prohibits the government from conducting warrantless searches and seizures. *State v. Fowler*, 10th Dist. No. 10AP-658, 2011-Ohio-3156, ¶ 11-12. ("Searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment unless an exception applies." [Citation omitted.]). One exception permits police to conduct warrantless searches with the voluntary consent of the individual. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973) (stating "a search conducted pursuant to a valid consent is constitutionally permissible"). *Columbus v. Bickis*, 10th Dist. No. 09AP-898, 2010-Ohio-3208, ¶ 19.

{¶ 21} In reviewing the trial court's denial of appellant's motion to suppress, we are guided by the following principles:

> Appellate review of a motion to suppress involves mixed questions of law and fact and, therefore, is subject to a twofold standard of review. *State v. Humberto*, 10th Dist. No. 10AP–527, 2011-Ohio-3080, ¶ 46. "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 competent, credible evidence supports them. We nonetheless must independently determine, as a matter of law, whether the facts meet the applicable legal standard." *Id.*, citing *State v. Reedy*, 10th Dist. No. 05AP-501, 2006-Ohio-1212, ¶ 5 (internal citations omitted).

State v. Griffin, 10th Dist. No. 10AP-902, 2011-Ohio-4250, ¶ 49.

{¶ 22} In determining the voluntariness of consent to a search, a court must apply a different standard when a consent is given during a lawful police detention as opposed to an unlawful detention. " '[W]hen a person is *lawfully detained* by police and consents to a search, the state must show by clear and convincing evidence that the consent was freely and voluntarily given.' * * * Important factors in determining the voluntariness of consent are: (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse to consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found. * * * *In re Parks,* 10th Dist. No. 04AP-355, 2004-Ohio-6449, ¶ 22." (Citation omitted; emphasis added.) *Fowler* at ¶ 16; s*ee also Schneckloth*.

{¶ 23} When a person is unlawfully detained by police and consents to a search, the state must meet a more stringent standard. When consent is "obtained during an illegal detention, the consent is negated 'even though voluntarily given if [the consent is] the product of the illegal detention and not the result of an independent act of free will.' * * * In order for consent to be considered an independent act of free will, 'the totality of the circumstances must clearly demonstrate that a reasonable person would believe that he or she had the freedom to refuse to answer further questions and could in fact leave.' [*State v.*] *Robinette* [80 Ohio St.3d 234 (1997)], paragraph three of the syllabus. The state 'bears the burden of proving, by "clear and positive" evidence, that consent was freely and voluntarily given.' " (Citations omitted.) *State v. Spain*, 10th Dist. No. 09AP-331, 2009-Ohio-6664, ¶ 26.

{¶ 24} Notably, irrespective of whether consent is given during a lawful or unlawful detention, a court must examine the totality of the circumstances in determining the voluntariness of a consent to be searched. *See State v. Lattimore*, 10th Dist. No. 03AP-467, 2003-Ohio-6829, ¶ 9 (determining that totality of circumstances demonstrated the appellant's consent was voluntary where officers lawfully detained appellant, officers made no promises or threats to obtain consent, and the appellant initially cooperated with the officers). *Compare, State v. Robinette*, 80 Ohio St.3d 234 (1997), at paragraphs two and three of the syllabus ("Under Section 14, Article I of the Ohio Constitution, the

totality-of-the-circumstances test is controlling in an unlawful detention to determine whether permission to search a vehicle is voluntary.").

A. Legality of Detention for Jaywalking.

{¶ 25} When ruling on a motion to suppress, the trial court assumes the role of trier of fact and is in the best position to resolve factual questions and evaluate witness credibility. *State v. Hogan*, 10th Dist. No. 11AP-644, 2012-Ohio-1421, ¶ 17, citing *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. In the case before us, the trial court expressly found Officer Harmon to be more credible than appellant as to two central questions of fact: (1) whether appellant was, in fact, walking down the center of Cherry Alley at the time the police first observed her, and (2) whether appellant gave express verbal consent to be searched. The trial court in this case accepted Officer Harmon's testimony as true and that his testimony constituted competent, credible evidence to support the trial court's conclusion that the answer to both of these questions is "yes." We therefore accept as fact that appellant was walking down the center of the alley prior to being stopped by the officers and that, during the initial few minutes of her encounter with police officers, appellant verbally consented to be searched.

{¶ 26} As previously discussed, at ¶ 22-24, in determining whether a verbal expression of consent was voluntary, we apply a different analysis when the consent was expressed during a legal detention as opposed to an illegal detention. We must therefore initially determine whether appellant's detention was legal or illegal.

{¶ 27} Appellant argues that her detention was unlawful and that the state was therefore required to meet the enhanced burden established in *Robinette,* i.e., to demonstrate that the totality of the circumstances clearly demonstrated that a reasonable person in appellant's circumstances would have believed that he or she had the freedom to refuse to answer further questions. Appellant contends that Officer Harmon could not reasonably have believed that her act of walking in the middle of Cherry Alley violated the jaywalking ordinance as there were no vehicles in the vicinity at the time, and she therefore did not interfere, or pose a reasonable possibility of interfering, with vehicular or pedestrian traffic, or public safety. Appellant contends that Officer Harmon lacked probable cause or reasonable suspicion to believe that she had committed a violation of the Columbus jaywalking ordinance and therefore had no legal basis to stop her. We reject appellant's argument that her detention was illegal.

{¶ 28} Appellant was cited for violating Columbus Traffic Code 2171.05(c), which provides: "Where neither a sidewalk nor a shoulder is available, any pedestrian walking along or upon a street or highway shall walk as near as practicable to an outside edge of the roadway, and, if on a two (2) way roadway, should walk only on the left side of the roadway." Accordingly, here, as no sidewalk or shoulder was available, Officer Harmon had the authority to stop appellant for the purpose of issuing her a jaywalking citation if he had reason to suspect that appellant had failed to "walk as near as practicable to an outside edge of the roadway." The ordinance does not include as an element of the offense proof that a pedestrian's failure to walk as near as practicable to the outside edge of a roadway posed a risk of interfering with traffic.

{¶ 29} In support of her argument, appellant cites a Seventh Circuit case sustaining the grant of a motion to suppress filed by a person stopped for jaywalking. In *United States v. Holmes*, 210 F.3d 376 (7th Cir.2000), the court held that police detention of the pedestrian was unlawful because "when the officers decided to stop Holmes, they could not reasonably believe he was violating the jaywalking ordinance" in light of the fact that he was not interfering with traffic at the time of the stop. *Id*. But the underlying ordinance in *Holmes*, unlike the Columbus ordinance, specifically provided that "[n]o person shall stand or loiter on any roadway other than in a safety zone *if such act interferes with the lawful movement of traffic*." (Emphasis added.) *Id*. at fn. 2. This court will not rewrite the Columbus jaywalking ordinance to add as an element of the offense that the pedestrian's location in the street interfered with traffic.

{¶ 30} Officer Harmon observed appellant walking down the middle of Cherry Alley and that observation alone justified appellant's initial detention, as an officer who observes the commission of a minor misdemeanor has reasonable suspicion to believe a criminal offense has occurred and may stop and briefly detain the offender. *State v. Dillon*, 10th Dist. No. 04AP-1211, 2005-Ohio-4124, ¶ 27-28, 38 ("[T]he officers possessed an independent reason to stop appellant because they witnessed him commit the offense of jaywalking."). Police may detain an individual when there is a reasonable suspicion to believe that a traffic violation has been committed regardless of the officer's motives in making the stop. *See State v. Stokes*, 10th Dist. No. 07AP-960, 2008-Ohio-5222, ¶ 29 ("In *Whren* [*v. United States*, 517 U.S. 806 (1996)], the United States Supreme Court held that a pretextual traffic stop was not unconstitutional where the officer had an objectively

reasonable basis for making the stop. And, in [*City of Dayton v.*] *Erickson* [76 Ohio St.3d 3 (1996)] the Supreme Court of Ohio held that a police officer's stop of a vehicle based on probable cause that a traffic violation has occurred or was occurring does not violate constitutional restrictions 'even if the officer had some ulterior motive for making the stop, such as a suspicion that the violator was engaging in more nefarious criminal activity.' *Id.* at syllabus.").

{¶ 31} Appellant further observes that this court in 1983 found unconstitutional a Columbus ordinance directing that pedestrians "shall move, whenever practicable, upon the right half of crosswalks." *Columbus v. Truax*, 7 Ohio App.3d 49 (10th Dist.1983). We held that an ordinance that "requires pedestrians to walk on the right side of a crosswalk even though no other pedestrian may be in the crosswalk," *id.* at 52, was an arbitrary and unreasonable exercise of the city's police power; that the ordinance was unconstitutional; and that Truax therefore could not be found guilty of violating it.

{¶ 32} The holding in *Truax* does not avail the appellant in this case. First, *Truax* is distinguishable. The issue in that case was whether a pedestrian could be found guilty of the misdemeanor offense of jaywalking for failing to walk on the right side of a crosswalk. In the case at bar, the issue before the trial court was not whether appellant was guilty of the misdemeanor offense of jaywalking. Rather, the issue was whether Officer Harmon had reasonable suspicion to believe appellant had violated the ordinance. Based on the text of the ordinance and his observation of appellant walking in the middle of the alley, he clearly did.

{¶ 33} Second, assuming, arguendo, that the jaywalking ordinance in the case at bar was arbitrary or unreasonable, either on its face or as applied to appellant, that circumstance does not compel the conclusion that Officer Harmon acted inappropriately in detaining appellant in order to issue her a citation for jaywalking. The officer observed appellant walking down the middle of the alley—in violation of the ordinance as written. "Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law. If the statute is subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written." *Illinois v. Krull,* 480 U.S. 340, 350 (1987). *See also United States v. Cardenas-Alatorre,* 485 F.3d 1111, 1115-17

(10th Cir.2007) (holding that, even if a New Mexico traffic law forbidding tinted windows as unconstitutionally vague as applied to the defendant, an officer who relied on the statute to effectuate a traffic stop did not act unreasonably).

{¶ 34} We conclude that Officer Harmon did not illegally stop and detain appellant for the purpose of issuing a jaywalking violation. Where an officer observes a violation of law, lawfully stops that individual in connection with that violation, and, prior to completing the purpose of the stop, asks permission to conduct a search, the request occurs during a lawful detention. *Fowler* at ¶ 16, citing *State v. Riggins*, 1st Dist. No. C–030626, 2004-Ohio-4247, ¶ 21, and *State v. Chiodo*, 10th Dist. No. 01AP-1064, 2002-Ohio-1573. We therefore conclude that appellant had been lawfully detained when Officer Harmon requested appellant's consent to be searched.

B. Trial Court's Finding that Consent was Voluntarily Given

{¶ 35} Having determined that appellant was lawfully detained at the time Officer Harmon requested her consent to be searched, we must ascertain whether the trial court correctly determined, in effect, that the state had met its burden of demonstrating by clear and convincing evidence that her consent was freely and voluntarily given. *Spain* at ¶ 26; *Lattimore* at ¶ 14.

{¶ 36} The voluntariness of a consent to a search is a question of fact and will not be reversed on appeal unless clearly erroneous. *Lattimore* at ¶ 9, citing *State v. Clelland*, 83 Ohio App.3d 474 (4th Dist.1992). Appellant argues, however, that the trial court erred in not adequately considering the totality of the circumstances in finding that her consent was valid. She suggests that the court's finding that she uttered words indicating consent was insufficient to justify a finding of voluntariness. She argues that she is therefore entitled to a remand to the trial court for it to make additional findings of fact.

{¶ 37} We agree that it is not enough under the Fourth Amendment that a trial court find that an individual spoke words of consent to search. The court must also determine, under the totality of the circumstances, whether the individual gave consent voluntarily. And that finding must be supported by clear and convincing evidence.

{¶ 38} Moreover, Crim.R. 12(C) and (F) govern the process by which a trial court must adjudicate a pretrial motion to suppress evidence. Specifically, Crim.R. 12(F) provides: "[w]here factual issues are involved in determining a motion, the court shall state its essential findings on the record."

{¶ 39} Based on the record before us, we find that the trial court failed to document in the record that it had addressed the totality of the circumstances and to state on the record its essential facts supporting a finding of voluntariness. We therefore remand the case to the trial court.

{¶ 40} In reaching this conclusion, we are guided by our own precedent. In *Spain,* a 2009 case, we reviewed a case in which police found cocaine on an individual who had been stopped for jaywalking and thereafter gave police consent to be searched. The trial court found that consent had been given under duress. On appeal, we observed that " '[t]he question of whether consent to a search was voluntary or the product of *duress or coercion, express or implied*, is a question of fact to be determined from the totality of the circumstances.' " (Emphasis added.) *Id*. at ¶28, quoting *State v. Roberts,* 110 Ohio St.3d 71, 2006-Ohio-3665, ¶ 99. We further found that the trial court had not "discuss[ed] the factual findings it found essential, based upon the totality of the circumstances, in making its finding of duress." *Spain* at ¶ 28. We vacated the trial court's decision and remanded it for the court to make findings as to whether there was consent, and, if so "whether such consent was voluntary under the totality of the circumstances, and/or to further discuss the factual basis in support of its ruling on duress." *Id*. at ¶ 29.

{¶ 41} In *Spain*, we cited *State v. Ogletree*, 8th Dist. No. 86285, 2006-Ohio-448, ¶ 15–17, for the proposition that, under Crim.R. 12(F), a trial court has the responsibility "to make 'essential findings' on the record to provide [an] appellate court with [a] sufficient basis to review assignments of error relating to factual issues in pre-trial motions." *Spain* at ¶ 29. The *Ogletree* court remanded a criminal case to the trial court to make findings necessary to resolve the "fact-intensive" issue of consent. Consistent with the decision in *Ogletree*, we held in *Spain* that the trial court had not made "critical determinations or findings * * * [and] that the record was insufficient for this court to effectively review the trial court's decision to grant the motion to suppress." *Spain* at ¶ 29.

{¶ 42} Similarly, in a 2010 state appeal, this court considered the issue whether a trial court had failed to make the essential findings required by Crim.R. 12(F) so as to allow meaningful appellate review of its ruling to suppress evidence. *State v. Forrest*, 10th Dist. No. 10AP-481, 2010-Ohio-5878. We noted that "essential findings are the fundamental or necessary reasons relied upon by the trial court in reaching its final determination" on an issue and that they "are more than mere conclusions of law" but

"need not be as specific as special findings of fact." *Id.* at ¶ 12. The court cited *Spain* and instructed the court on remand to make findings of fact explaining why the evidence submitted warranted its legal conclusion concerning duress. *Id.* at ¶ 23.

{¶ 43} In the case before us, as in *Spain* and *Forrest*, the trial court failed to discuss the totality of the circumstances in arriving at its conclusion concerning the voluntariness of appellant's consent to be searched. Rather, the trial court was satisfied that the consent was valid based on its factual determination that appellant had spoken words of consent, and its legal observation that neither party had suggested that appellant in fact consented but did so only because she was afraid or under duress. The trial court therefore concluded that "duress is not an issue." (Tr. 145.)

{¶ 44} We find, in contrast and for reasons stated below, that appellant in this case had raised the issue of the voluntariness of her consent. And determination of voluntariness is the touchstone in determining the validity of an express verbal consent—not an absence of duress. Coercion, express or implied, also precludes a finding of voluntariness. *See State v. Pierce*, 125 Ohio App.3d 592, 599 (10th Dist.1998), quoting *Schneckloth* at 233 (" 'Proof of voluntariness necessarily includes a demonstration that no coercion was employed and that consent was not granted "only in submission to a claim of lawful authority." ' "). Moreover, " 'no matter how subtly the coercion was applied, the resulting "consent" would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed.' " *State v. Ingram*, 82 Ohio App.3d 341, 347 (10th Dist.1992), quoting *Schneckloth* at 227. And "[c]onsent given only in submission to a claim of lawful authority is not free and voluntary." *State v. Trumbull,* 10th Dist. No. 97APA12-1661 (Sept. 17, 1998), citing *Ingram* at 346.

{¶ 45} Appellant testified that Officer Harmon, accompanied initially by two and thereafter by three other officers, asked her for permission to search her in light of a history of prior encounters in which appellant was searched despite her affirmative refusal of permission to search. She testified that she repeatedly asked the officers to "write the ticket," presumably to end the police detention, and that Officer Harmon replied, "I'm about to have a female officer." (Tr. 132.) Moreover, both appellant and Officer Harmon testified that Officer Harmon specifically advised her that she was not free to leave while they were waiting on Officer Redick to arrive to conduct the search.

{¶ 46} As mentioned above, on August 12, 2011, before the third and final day of

the evidentiary hearing on her motion to suppress, appellant filed a supplemental memorandum regarding her motion to suppress. In that memorandum, appellant more specifically addressed the question whether she had provided voluntary consent to the search, raised the issue of police coercion, and argued that "whether a citizen has voluntarily consented to a search is determined by reviewing the totality of the circumstances." (Supplemental Memorandum to Motion to Suppress, at 4-5.) She suggested that Officer Harmon conveyed to her an air of inevitability as to the search, justifying the conclusion that her expression of consent was not truly voluntary. She contended that she had been approached by several male, uniformed, armed officers on bicycles, was not free to leave, and was intimidated by their presence. She noted that her testimony had been that she had been stopped and searched by Officer Harmon on several past occasions and that she did not feel that she ever had a choice about whether or not she could refuse a search of her person because, in her experience, she was going to be searched every time officers saw her whether or not she consented. She asserted that "in the totality of the circumstances, this pattern of constantly stopping the defendant and searching her constitutes official harassment and intimidation resulting in coercion to consent to search." (Supplemental Memorandum, at 5.)

{¶ 47} Accordingly, our review of the record discloses that appellant raised the issue as to whether, should the court believe she orally gave consent, she gave that consent voluntarily. Appellant expressly testified that she felt she had no choice but to submit to a search. We cannot determine from the record before us, however, that the trial court evaluated appellant's credibility as to this testimony. Accordingly, we are unable to determine whether the trial court found this portion of appellant's testimony to lack credibility or even considered the question of the voluntariness of appellant's consent.

{¶ 48} Moreover, in this case, neither the defense nor the state presented evidence as to several of the factors relevant to a totality-of-the-circumstances analysis of voluntariness; e.g., the individual's age, experience, and knowledge of right to refuse consent. Nor is the timing clear as to the point in time at which appellant received the jaywalking citation. We note that, generally, where consent to search is given after a detention for the issuance of a traffic citation, but before the citation is issued, that fact weighs in favor of a finding of coercion. *State v. Bickel*, 5th Dist. No. 2006-COA-034,

2007-Ohio-3517, ¶ 26 ("The potentially coercive effect of the roadside detention is far more compelling when the officer requests permission to search *before* completing the citation."(Emphasis sic.)). Moreover, the burden of proving that appellant gave voluntary consent to be searched was on the prosecution, and a factual finding that appellant voluntarily consented must be supported by clear and convincing evidence.

{¶ 49} We therefore sustain appellant's first assignment of error to the extent that we remand this case to the trial court with instructions that it make additional findings relative to the voluntariness of appellant's consent to be searched, so as to allow meaningful appellate review of the court's ultimate disposition of appellant's motion to suppress.

III. Sentencing—Applicability of Am.Sub.H.B. No.86

{¶ 50} Appellant's second assignment of error states:

> The trial court's refusal to apply the 2011 Sub. H.B. 86 amendments to R.C. 2925.11(C) (possession of cocaine) and R.C. 2929.13(B) (sentencing for a fourth or fifth degree felony) resulted in a sentence that is contrary to law.

{¶ 51} On June 29, 2011, the governor signed into law 2011 Am.Sub.H.B. No. 86 ("H.B. 86"). As summarized by the Ohio Legislative Service Commission, H.B. 86 "[e]liminate[d] the distinction between the criminal penalties provided for drug offenses involving crack cocaine and those offenses involving powder cocaine, provide[d] a penalty for all such drug offenses involving any type of cocaine that generally has a severity that is between the two current penalties, and also revise[d], in specified circumstances regarding an offender who is guilty of 'possession of cocaine,' the specified statutory rules to use in determining whether to impose a prison term on the offender." Legislative Service Commission, Final Analysis, Am.Sub.H.B. No. 86, 129th General Assembly, http://www.lsc.state.oh.us/analyses129/11-hb86-129.pdf (accessed Sept. 24, 2012), at 8. Specifically, H.B. 86 deleted the term "crack cocaine" from the statutory scheme.

{¶ 52} Prior to the effective date of H.B. 86, a defendant convicted of possessing an amount of crack cocaine exceeding five grams but less than ten grams (as was appellant), was guilty of a felony of the third degree and faced a mandatory prison term. *See* former R.C. 2925.11(C)(4)(c). H.B. 86 amended R.C. 2925.11(C)(4) to provide:

> If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is guilty of

> possession of cocaine. The penalty for the offense shall be determined as follows:
>
> * * *
>
> (b) If the amount of the drug involved equals or exceeds five grams but is less than ten grams of cocaine, possession of cocaine is a felony of the fourth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

R.C. 2929.13, as amended by H.B. 86, provides in part:

> (B)(1)(a) Except as provided in division (B)(1)(b) of this section, if an offender is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence, the court shall sentence the offender to a community control sanction of at least one year's duration if all of the following apply:
>
> (i) The offender previously has not been convicted of or pleaded guilty to a felony offense or to an offense of violence that is a misdemeanor and that the offender committed within two years prior to the offense for which sentence is being imposed.
>
> (ii) The most serious charge against the offender at the time of sentencing is a felony of the fourth or fifth degree.
>
> (iii) If the court made a request of the department of rehabilitation and correction pursuant to division (B)(1)(c) of this section, the department, within the forty-five-day period specified in that division, provided the court with the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court.
>
> (b) The court has discretion to impose a prison term upon an offender who is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence if any of the following apply:
>
> (i) The offender committed the offense while having a firearm on or about the offender's person or under the offender's control.
>
> (ii) The offender caused physical harm to another person while committing the offense.

(iii) The offender violated a term of the conditions of bond as set by the court.

(iv) The court made a request of the department of rehabilitation and correction pursuant to division (B)(1)(c) of this section, and the department, within the forty-five-day period specified in that division, did not provide the court with the name of, contact information for, and program details of any community control sanction of at least one year's duration that is available for persons sentenced by the court.

(c) If a court that is sentencing an offender who is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence believes that no community control sanctions are available for its use that, if imposed on the offender, will adequately fulfill the overriding principles and purposes of sentencing, the court shall contact the department of rehabilitation and correction and ask the department to provide the court with the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court. Not later than forty-five days after receipt of a request from a court under this division, the department shall provide the court with the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court, if any. Upon making a request under this division that relates to a particular offender, a court shall defer sentencing of that offender until it receives from the department the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court or for forty-five days, whichever is the earlier.

If the department provides the court with the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court within the forty-five-day period specified in this division, the court shall impose upon the offender a community control sanction under division (B)(1)(a) of this section, subject to divisions (B)(1)(b)(i) and (ii) of this section. If the department does not provide the court with the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for

> persons sentenced by the court within the forty-five-day period specified in this division, the court may impose upon the offender a prison term under division (B)(1)(b)(iii) of this section.

{¶ 53} Accordingly, after H.B. 86 amended R.C. 2925.11(C)(4), a convicted defendant matching the outlined criteria may generally expect to receive community control sanctions rather than a prison sentence. *See* R.C. 2929.13(B)(1).

{¶ 54} In the case before us, the court found on August 17, 2011 that appellant was guilty of violating R.C. 2925.11, the cocaine possession statute, in that she possessed crack cocaine weighing more than five grams but less than ten grams. Because H.B. 86 significantly impacted the consequences of being found guilty of that violation, the question arose at the October 2011 sentencing hearing whether appellant was eligible to receive the benefits of the bill. The trial court applied pre-H.B. 86 law by characterizing appellant's offense as a felony of the third degree and sentencing her to a mandatory one-year sentence term.

{¶ 55} In this appeal, appellant argues that the General Assembly expressly provided that the reforms of H.B. 86 should apply to persons such as appellant who had not yet been sentenced as of the September 30, 2011 effective date of the new law and regardless of the date the criminal offense occurred. We agree.

{¶ 56} Section 3 of H.B. 86 specifically addressed the issue whether the sentencing benefits of the bill should be applied to persons convicted of crack cocaine for offenses that occurred prior to sentencing by providing in uncodified law that:

> The amendments to section[] * * * 2925.11 of the Revised Code, * * * that are made in this act apply * * * to a person to whom division (B) of section 1.58 of the Revised Code makes the amendments applicable.

{¶ 57} Accordingly, if H.B. 86 applies to appellant pursuant to R.C. 1.58(B), then appellant is entitled to the benefits provided by the statutes as amended.

{¶ 58} R.C. 1.58(B) provides that "[i]f [a] penalty, forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended." We must determine whether R.C. 1.58 applies to appellant, who had been convicted of possessing cocaine in crack cocaine form but not yet sentenced as of September 30, 2011. Because R.C. 1.58(B) applies where "[a] penalty * * * *for any offense*,

is reduced" by a statutory change, we must first decide whether the offense of which appellant was convicted was the same offense both before and after the adoption of H.B. 86. (Emphasis added.) If so, we must further compare the penalty, forfeiture, or punishment for that offense under pre-H.B. 86 law to the penalty, forefeiture, or punishment for that offense after H.B. 86. If the offense described in R.C. 2925.11 is the same both before and after H.B. 86, and H.B. 86 reduced the penalty for that offense, then R.C. 1.58(B) applies, requiring application of the reduced penalty.

{¶ 59} The state argues that R.C. 1.58(B) does not apply. It contends that H.B. 86 did not merely reduce the penalty for an existing offense but, rather, that "under H.B. 86, the crime of possessing crack cocaine is eliminated," and that the bill "substituted another offense (possession of cocaine) for it". (Appellee's brief, at 28, 30.) We reject this argument.

{¶ 60} To determine whether H.B. 86 changed or eliminated the offense of which appellant was convicted, we examine the changes made to R.C. 2925.11(C)(4) as reflected in the text of the bill itself. The bill's proposed additions and deletions to existing statutory text were indicated by under lineation of proposed new statutory text and strikethroughs of proposed deletions, as follows:

> Sec. 2925.11. (A) No person shall knowingly obtain, possess, or use a controlled substance.
>
> * * *
>
> (C) Whoever violates division (A) of this section is guilty of one of the following:
>
> * * *
>
> (4) If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is *guilty of possession of cocaine. The penalty* for the offense shall be determined as follows:
>
> * * *
>
> (b) If the amount of the drug involved equals or exceeds five grams but is less than ~~twenty-five~~ ten grams of cocaine ~~that is not crack cocaine or equals or exceeds one gram but is less than five grams of crack cocaine~~, possession of cocaine is a felony of the fourth degree, and ~~there is a presumption for a~~

> ~~prison term for the offense~~ division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.
>
> (c) If the amount of the drug involved equals or exceeds ~~twenty-five~~ ten grams but is less than ~~one hundred~~ twenty grams of cocaine ~~that is not crack cocaine or equals or exceeds five grams but is less than ten grams of crack cocaine~~, possession of cocaine is a felony of the third degree, and, except as otherwise provided in this division, there is a presumption for a prison term for the offense. If possession of cocaine is a felony of the third degree under this division and if the offender two or more times previously has been convicted of or pleaded guilty to a felony drug abuse offense, the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree.

H.B. 86. (Italicized emphasis added.)

{¶ 61} The text of H.B. 86 is significant for purposes of this appeal in two ways. First, the text illustrates that, both before and after the enactment of H.B. 86, R.C. 2925.11(C)(4) provided that a person who violated R.C. 2925.11(A) by possessing cocaine (without distinguishing between the powdered or solid form of cocaine) was "guilty of possession of cocaine." Second, all of the relevant H.B. 86 amendments to R.C. 2925.11 follow the phrase in R.C. 2925.11(C)(4) providing that "[t]he *penalty* for the offense shall be determined as follows: * * *." Construed together, these two phrases require the conclusion that H.B. 86 did not change the elements of the criminal offense of possession of cocaine but only changed the penalty for that offense.

{¶ 62} Accordingly, we reject the state's assertion that H.B. 86 eliminated the offense of "possession of crack cocaine" and created a new offense of "possession of either powdered or crack cocaine.[2]" Both before and after enactment of the bill, the offense created by R.C. 2925.11(C)(4) was "possession of cocaine." By the express language of the bill, H.B. 86 accomplished only a change in the penalty for that offense. Accordingly, R.C. 1.58(B) applies, and the trial court was required to impose the penalty for that offense "according to the statute as amended" by H.B. 86. *Accord State v. Sullivan*, 10th Dist. No.

[2] We note that the state's argument, if accepted, might additionally create significant double jeopardy and other issues should the state hereafter attempt to prosecute appellant for violation of what it characterizes as a "new" offense subsequent to H.B. 86.

11AP-414, 2012-Ohio-2737, ¶ 23, citing *State v. Banks,* 10th Dist. No. 11AP-1134, 2012-Ohio-2328, ¶ 8 (holding that inmates sentenced prior to the September 30, 2011 effective date of H.B. 86 do not benefit from its changes, but observing that "R.C. 1.58(B) allows those upon whom a sentence has not yet been imposed to benefit from the statutory changes").

{¶ 63} The state additionally argues that the amended penalty provisions implemented by H.B. 86 should not be applied to appellant pursuant to the holding in *State v. Kaplowitz*, 100 Ohio St.3d 205, 2003-Ohio-5602. In that case, the Supreme Court of Ohio held that "R.C. 1.58(B) does not apply to give a criminal defendant the benefit of a reduced sentence if, by applying it, the court alters the nature of the offense, including specifications to which the defendant pled guilty or of which he was found guilty." *Id*. at syllabus. This argument hinges on the state's characterization of possession of crack cocaine as constituting a different offense than possession of powder cocaine. But, as previously discussed, H.B. 86 did not change the nature of the offense of which appellant was found guilty but only changed the penalty for that offense. *Kaplowitz* therefore is inapposite. *Compare State v. Jones*, 5th Dist. No. 2011CA00284, 2012-Ohio-2900, ¶ 19 (H.B. 86 did not substantively alter the nature of the offense of which defendant was convicted, i.e., escape in violation of R.C. 2921.34(A)(1); *Kaplowitz* is distinguishable, and the trial court erred in not imposing a sentence consistent with the provisions of H.B. 86 even though the defendant committed the crime 16 days before the effective date of H.B. 86.).

{¶ 64} Finally, the state directs us to R.C. 1.58(A), which establishes that the repeal of a statute does not affect the prior operation of the statute and that the amendment of a statute does not affect the enforcement of any proceeding, or the penalty or punishment that may be imposed, if the statute had not been repealed or amended. The state argues that R.C. 1.58(A) thereby preserves the availability of pre-H.B. 86 sanctions for appellant. But the state's argument fails because R.C. 1.58(A) is applicable only "except as provided in division (B)" of R.C. 1.58. Accordingly, R.C. 1.58(A) is only of relevance if R.C. 1.58(B) does not apply. We have determined, however, that R.C. 1.58(B) does apply to appellant, and the state's reliance on R.C. 1.58(A) is therefore misplaced.

{¶ 65} Appellant's second assignment of error is also sustained.

IV. Disposition

{¶ 66} For the foregoing reasons, we sustain appellant's first assignment of error in part and also sustain appellant's second assignment of error. We reverse the judgment of the Franklin County Court of Common Pleas and remand this case to that court with instructions to make additional findings relative to the voluntariness of appellant's consent to be searched, so as to allow meaningful appellate review of the court's ultimate disposition of appellant's motion to suppress. Should the trial court determine on remand, and in light of the totality of the circumstances, that appellant's consent was voluntarily given, resulting in conviction and resentencing, the trial court shall sentence appellant pursuant to the provisions of R.C. 2929.11 and 2929.13 as amended by H.B. 86.

Judgment reversed and cause remanded with instructions.

BROWN, P.J., and BRYANT, J., concur.
