[Cite as *State v. Cordell*, 2013-Ohio-3009.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
		No. 12AP-42
v.	:	(C.P.C. No. 11CR-04-1724)
Darrian T. Cordell,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on July 11, 2013

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

W. Joseph Edwards, for appellee.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Plaintiff-appellant, State of Ohio ("State"), appeals from an order of the Franklin County Court of Common Pleas granting a motion by defendant-appellee, Darrian T. Cordell ("appellee"), seeking suppression of evidence obtained at the time of his arrest.

{¶ 2} The Franklin County Grand Jury indicted appellee on various drug possession and firearms charges, all arising out of evidence obtained in connection with a traffic stop and search of his vehicle. Counsel for appellee filed a motion to suppress evidence on constitutional grounds. The State filed a memorandum contra, asserting that the evidence should not be suppressed because the good-faith exception to the exclusionary rule applied. Alternatively, the State argued that the evidence was properly

obtained pursuant to a protective sweep of the vehicle's interior undertaken for the protection of the responding officer.

{¶ 3} The trial court held an oral hearing on the matter in which the arresting officer, Ohio State Highway Patrol Trooper Matthew Himes, was the only witness. Trooper Himes described the circumstances of the traffic stop that initiated the matter, and subsequent events leading to appellee's arrest. The events unfolded at approximately 2:00 a.m. on November 25, 2009. Trooper Himes stated that he observed appellee's vehicle on Sullivant Avenue in Columbus following less than a half car length of the vehicle ahead. Trooper Himes turned around and began following appellee's vehicle on Sullivant Avenue to make a traffic stop for following too closely. Appellee then made a left turn onto Westgate Avenue while driving at a high rate of speed. Westgate Avenue has speed bumps and Trooper Himes saw appellee go over two speed bumps at an excessive speed, thereafter coming to an abrupt stop in front of a private residence.

{¶ 4} As Trooper Himes pulled to the curb behind appellee he turned on his pursuit lights. As Trooper Himes opened his door to exit the patrol car, appellee unexpectedly exited his own vehicle. The sole passenger in appellee's vehicle remained in the car. Trooper Himes abandoned his usual procedure of approaching the stopped vehicle to interview the driver while standing beside the vehicle, because appellee's behavior alerted Trooper Himes that an unusual and possibly unsafe situation could develop. Trooper Himes then had appellee walk back toward the patrol car, where he undertook his initial verbal exchange with appellee, asking for a driver's license. Appellee stated he did not have his I.D. with him, appeared extremely nervous, avoided eye contact with Trooper Himes, and was "moving around a lot." (Tr. 7.) Appellee did give his correct name, and stated that he was on his way to his aunt's house in the area.

{¶ 5} At this time, Trooper Himes placed appellee in the back of the patrol car and initiated a check of appellee's identification and verification of the existence of a valid driver's license. While seated in the backseat of the patrol car, appellee remained nervous. He volunteered that his abrupt stop was not in front of his aunt's house, but claimed that he stopped suddenly because he realized that he had turned on the wrong street. Appellee acknowledged that he had seen Trooper Himes make a U-turn on Sullivant Avenue and

anticipated a traffic stop. He altered his previous version of his destination and now claimed that he had been going to a "chick's house." (Tr. 8.)

{¶ 6} Trooper Himes called for another law enforcement unit to come assist him at the scene. He removed appellee's passenger from the vehicle and placed him in the backseat of the patrol car with appellee. Trooper Himes explained that, based on appellee's demeanor and conflicting stories, he planned to undertake a protective search of the passenger compartment of appellee's vehicle. Appellee denied having anything illegal in the vehicle.

{¶ 7} The driver's side door to appellee's vehicle was still open and Trooper Himes knelt down to look in front of the driver's seat, observing a Smith & Wesson semi-automatic pistol underneath the driver's seat. Trooper Himes stated that the gun was also visible through a downward view from outside the front windshield, and that he would likely have observed the gun if he had approached the vehicle with appellee still inside. Trooper Himes took a photograph without initially disturbing the gun in order to record its position, and then neutralized the weapon by removing a magazine containing 12 live rounds and removing a live round from the chamber. Further search of the vehicle revealed a small quantity of Oxycodone and a larger quantity of crack cocaine in the glove compartment, as well as another 9 mm handgun under the passenger seat.

{¶ 8} The trial court concluded the hearing by rendering a verbal decision granting suppression. The court followed by a written decision and judgment entry. The court explicitly noted in its written decision that appellee was not under arrest at the time of the vehicle search. The court held, however, that pursuant to *Arizona v. Gant*, 556 U.S. 332 (2009), the search of the passenger compartment violated appellee's Fourth Amendment rights against unreasonable search and seizure. The trial court invoked the exclusionary rule and granted appellee's motion to suppress the evidence devolving from the search.

{¶ 9} The State has timely appealed and brings the following two assignments of error for our review:

> [I.] THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT RELIED ON *ARIZONA V. GANT* [556 U.S. 332 (2009)] TO INVALIDATE A SEARCH PROPERLY CONDUCTED UNDER THE PROTECTIVE-

> SEARCH DOCTRINE OF *MICHIGAN V. LONG* [463 U.S. 1032 (1983)].
>
> [II.] THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT FAILED TO ADDRESS OR APPLY THE GOOD-FAITH EXCEPTION TO THE FEDERAL EXCLUSIONARY RULE.

{¶ 10} The State's first assignment of error asserts that the trial court applied the incorrect standard in assessing the legality of the search when the court relied on *Gant*, the most recent leading case from the United States Supreme Court governing vehicle searches incident to arrest. The State argues that *Gant* does not govern here because the search was not undertaken pursuant to appellee's arrest, but rather as a protective sweep to ensure the safety of law enforcement personnel before releasing appellee to return to his vehicle.

{¶ 11} With a few well-defined exceptions, searches and seizures conducted without a warrant are unreasonable and violate the Fourteenth Amendment "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. Once a warrantless search is established, the state bears the burden of persuasion to show the validity of the search under one of the recognized exceptions to the Fourth Amendment's warrant requirement. *State v. Atchley*, 10th Dist. No. 07AP-412, 2007-Ohio-7009, ¶ 5, citing *Xenia v. Wallace*, 37 Ohio St.3d 216, 218 (1988). "The Ohio Supreme Court has explicitly recognized the following seven exceptions to the requirement that a warrant be obtained prior to a search: (a) a search incident to a lawful arrest; (b) consent signifying waiver of constitutional rights; (c) the stop-and-frisk doctrine; (d) hot pursuit; (e) probable cause to search, and the presence of exigent circumstances; (f) the plain-view doctrine; or (g) an administrative search." *Id* at ¶ 6, citing *State v. Price*, 134 Ohio App.3d 464, 468 (9th Dist.1999).

{¶ 12} *Gant* addressed the scope of the warrantless search exception incident to arrest. *Gant* clarified the impact of the Supreme Court's prior holding in *New York v. Belton*, 453 U.S. 454 (1981), which had previously been interpreted to allow largely unrestricted warrantless searches of the passenger compartment of a vehicle incident to the arrest of the vehicle occupants. *Gant* limited the scope of the *Belton* search rule to cases in which the arrested person is both unsecured and still within reaching distance of

the passenger compartment, or to cases in which the officer may reasonably believe that evidence related to the offense of arrest will be found in the vehicle. The trial court applied *Gant* in the present case and concluded that, because appellee was detained in the back of the patrol car at the time of the search and had been stopped for a traffic offense for which no additional evidence could be discovered, pursuant to *Gant*, the search was impermissible.

{¶ 13} In contrast, the State here invokes the exception created in *Terry v. Ohio*, 392 U.S. 1 (1968), in which the United States 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. Such a limited search is not intended to discover evidence of a crime, but to allow the officer to pursue his duties "without fear of violence." *Adams v. Williams*, 407 U.S. 143 (1972).

{¶ 14} The *Terry* warrantless search exception was expanded to protective searches of automobiles in *Michigan v. Long*, 463 U.S. 1032 (1983). The court held in *Long* that officers could undertake a protective sweep or search of "the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, * * * 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 to believe that the suspect is dangerous and the suspect may gain immediate control of weapons." *Id.* at 1049, quoting *Terry* at 21. The test for the reasonableness of the search 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. The possibility of access or control of weapons includes situations in which the suspect, while temporarily held in a cruiser or otherwise out of reach of the passenger compartment of his own vehicle, will eventually be released to return to his vehicle, thereby regaining access to any hidden weapons. *Id.* at 1051.

{¶ 15} We acknowledge that the line between *Gant* and *Long* may be blurred by the fact that the existence of a formal arrest when determining the reasonableness of a related search can require some elaboration. *See, e.g.*, *Knowles v. Iowa*, 525 U.S. 113, 119

(1998). The trial court in the present case, however, expressly found that appellee was not under arrest at the time of the search. Neither party asks us to revisit that determination in this appeal, and the facts do not compel us to question that finding. The trial court therefore erred in applying *Gant* rather than *Long* in determining the reasonableness of the search. We will review the facts of the case and apply the correct standard to determine whether suppression of evidence was warranted.

{¶ 16} On appeal a review of the trial court's decision to grant or deny a motion to suppress presents a mixed question of law and fact. We will accept the trial court's findings of fact if they are supported by competent, credible evidence. We will then independently determine, without deference to the conclusion of the trial court whether the facts satisfy the applicable legal standard. *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, ¶ 100.

{¶ 17} Applying the standard from *Long* and *Terry* to the facts of the present case, the circumstances did support a lawful protective search by Trooper Himes of the passenger compartment of appellee's vehicle. "The propriety of an investigative stop by a police officer must be viewed in light of the totality of the surrounding circumstances." *State v. Bobo*, 37 Ohio St.3d 177 (1998), paragraph one of the syllabus. The circumstances must be evaluated from the viewpoint of a reasonable and prudent police officer who must cope with events as they unfold and a reviewing court will give due weight to the experience and training of a police officer. *State v. Morris*, 10th Dist. No. 09AP-751, 2010-Ohio-1383, ¶ 12, citing *State v. Andrews*, 57 Ohio St.3d 86, 87-88 (1991).

{¶ 18} Trooper Himes was initially alerted by the dangerous and erratic driving exhibited by appellee prior to pulling over, and the sudden manner in which appellee pulled over in the residential area. The time was 2:00 a.m., which reasonably heightened the trooper's perception of risk of this situation. Appellee then immediately exited his vehicle when Trooper Himes pulled up behind him. Trooper Himes observed that this was highly unusual in a traffic stop, and that in fact the vast majority of stopped motorists who do exit the vehicle do so simply as a precursor to immediately fleeing the scene. Another articulable factor that aroused suspicion was that appellee gave conflicting stories, and appeared extremely nervous. Although nervousness, to some extent, is to be expected

when interacting with police officers, when excessive, it is a reasonable factor when determining reasonable suspicion as a basis for protective search. *Morris* at ¶ 16.

{¶ 19} This court has recently applied *Long* and *Terry* on comparable facts to find that a protective search of a vehicle passenger compartment was permissible. *State v. Broughton*, 10th Dist. No. 11AP-620, 2012-Ohio-2526. In *Broughton*, we reviewed a case in which the responding police officer illuminated the interior of the defendant's vehicle with a flashlight and saw no evidence of weapons. The defendant could not produce his driver's license upon request, and officers placed him, unhandcuffed, in a police cruiser to ascertain his identity and conduct a computer database check. Officers observed movements and inordinate nervousness on the part of the defendant, and undertook a sweep of the passenger compartment of the vehicle. This produced a loaded handgun.

{¶ 20} In *Broughton*, we concluded that a protective sweep was justified based both upon the circumstances of the stop, the conduct of the defendant and, as in the case before us, the likelihood that the defendant, after verification of his identity, would simply be returned to the vehicle at some point to be released after the traffic stop. We noted the practical likelihood that, without any further grounds for detaining a traffic violator under such conditions, police are likely to return the individual to the vehicle, where access to weapons would be possible. We rejected the defendant's contention that the officers could not perform a protective search until they were certain he would be returned to his vehicle. *Id.* at ¶ 24. Regardless of whether the detainee is secured in a police vehicle, the likelihood that he would return to his own vehicle and gain access to any concealed weapons may justify, in conjunction with the other factors pertinent to a *Terry* stop, a protective search. *Id.*, citing *Long* at 1051.

{¶ 21} We note that the trial court decision in this case states that "Trooper Himes stated that at the time of the search defendant posed no danger to him." (Decision, 3). Because *Terry* and *Long*, in keeping with their roots emphasizing the *protective* nature of the authorized search, require a reasonable belief that the suspect is dangerous and may gain control of weapons, we closely examine this finding by the trial court. Examining the testimony upon which this finding is based, it is clear that the trooper was referring to the self-evident fact that appellee posed no immediate threat only so long as he was confined to the back of the cruiser:

> THE COURT: What danger did this defendant pose to you since he was at your cruiser or in your cruiser and was not - - had no capability to go to [his] vehicle, correct?
>
> THE WITNESS: Correct, sir.
>
> THE COURT: So what danger did he - - did he pose to you?
>
> THE WITNESS: At this time, the defendant, at this point in time, he did not pose a danger, no.

(Tr. 18.)

{¶ 22} There remained, therefore, the distinct possibility that appellee could gain access to weapons upon returning to the vehicle, which Trooper Himes clearly testified could yet occur at the conclusion of the traffic stop:

> Q. Now, when Mr. Cordell was in the backseat of your cruiser, when you walked up to do the protective sweep, obviously he was in the backseat of your cruiser, and that's locked. Was he going to be released, or was he going to be arrested, or have you made that determination yet?
>
> A. At this point, there was no determination made on whether or not the defendant was going to be arrested at that point or released.

(Tr. 11-12.)

{¶ 23} In accordance with our prior decision in *Broughton*, we find that, based upon the trial court's conclusion that appellee was not under arrest, and thus applying the correct standard based upon *Long* and *Terry* to the facts described at the suppression hearing, the protective search of appellee's vehicle by Trooper Himes was not illegal and suppression of the evidence obtained thereby was not warranted. The State's first assignment of error is sustained, and the judgment of the Franklin County Court of Common Pleas will be reversed on this basis.

{¶ 24} Based upon our disposition of the State's first assignment of error, the issues raised in the State's second assignment of error relating to whether the good-faith exception to the exclusionary rule must apply is rendered moot, as are all further arguments regarding whether the weapon in the present case was in plain view at the time of the stop.

{¶ 25} Based upon the foregoing, the State's first assignment of error is sustained, the second assignment of error is rendered moot, and the judgment of the Franklin County Court of Common pleas suppressing evidence obtained pursuant to the search of appellee's vehicle is reversed. The matter is remanded for further proceedings in accordance with law and this decision.

Judgment reversed;
cause remanded.

DORRIAN, J., concurs.
TYACK, J., concurs in part and dissents in part.

TYACK, J. concurring in part and dissenting in part.

{¶ 26} I understand the rationale of the majority with respect to the search for the firearms which were arguably in plain view. I do not agree that the search of the rest of the vehicle which revealed the presence of controlled substances in the glove compartment is justified by a clearly delineated exception to the warrant requirement. Once the firearms were discovered the traffic stop converted to a felony arrest and *Arizona v. Gant*, 556 U.S. 332 (2009), clearly applied. I would overturn the suppression of the search and seizure of the firearms, but not the seizure of the controlled substances. To that extent, I respectfully dissent.

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