[Cite as *State v. McMullen*, 2010-Ohio-3369.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-09-235
	:	O P I N I O N
- vs -		7/19/2010
	:	
WILLIAM A. McMULLEN,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2009-04-0566

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YOUNG, P.J.

{¶1} Defendant-appellant, William McMullen, appeals his convictions in the Butler County Court of Common Pleas for single counts of possession of cocaine and possession of marijuana. We affirm the convictions.

{¶2} Officer Scott Johnson of the Trenton Police Department was on patrol

in the evening hours of March 27, 2009, when he pulled into the parking lot of Whitey's Bar. According to Johnson's testimony at the motion to suppress hearing, upon pulling into the parking lot, he noticed a parked SUV that was occupied by multiple people. When Johnson saw that some of the people in the vehicle were making furtive movements, he approached the SUV in his police cruiser and turned on his spotlight. Once Johnson shined his light into the vehicle, he noticed the front passenger "ducking underneath the dashboard" and that his head came up and down.

{¶3} Johnson also noticed that a "considerable" amount of smoke was coming from the vehicle and that the passengers continued to make furtive movements. At that point, Johnson exited his cruiser and approached the vehicle. As he walked closer, he saw some of the passengers bend over and put their hands down in the seat, and also noticed that the smoke coming from the vehicle smelled of "raw burnt marijuana." Johnson saw three people sitting in the back and two in the front of the vehicle, and continued to see smoke coming from the back corner.

{¶4} After Johnson opened the right rear door of the vehicle, he saw a man, later identified as McMullen, "taking still in mid-drag, taking a drag off of a marijuana cigarette * * *." McMullen tried to hand Johnson the still-lit marijuana cigarette, but dropped it to the ground when Johnson told him to do so. The occupants then admitted to having smoked the marijuana, and Johnson ordered them out of the car. After McMullen exited, Johnson asked him if he had any illegal substances or weapons on his person, and McMullen denied having anything on his person and consented to Johnson performing a pat-down.

{¶5} As a result of the pat-down, Johnson removed a cigarette box from

McMullen's front pocket. Johnson immediately saw that a clear plastic bag was tucked into the clear cellophane wrapper, and that the bag contained a white powdery substance.

{¶6} After all of the occupants were secured with the help of police back-up, McMullen searched the vehicle and found a bag that contained a smoking device, a pill bottle, and raw marijuana. Johnson arrested the driver (on an outstanding warrant), as well as McMullen, and then released the other occupants after issuing citations. Johnson read McMullen his rights and had him sign a *Miranda* card. After signing the card, McMullen admitted that the white powdery substance in the cigarette pack was cocaine, but later declined to answer any other questions.

{¶7} McMullen was indicted on single counts of possession of cocaine and possession of marijuana. McMullen moved to suppress all evidence resulting from Johnson's "stop, seizure, detention, and questioning." After a hearing, the trial court denied McMullen's motion, finding that Johnson's actions in the parking lot did not constitute a stop or seizure for constitutional purposes. McMullen later pled no contest to the charges, and the trial court sentenced him to three years of community control and $600 in fines. McMullen now appeals the trial court's denial of his motion to suppress, raising the following assignment of error.

{¶8} "THE TRIAL COURT ERRED IN FAILING TO SUPPRESS EVIDENCE OBTAINED FROM THE UNCONSTITUTIONAL STOP OF THE VEHICLE IN WHICH MCMULLEN WAS A PASSENGER."

{¶9} In his assignment of error, McMullen argues that the trial court erred in denying his motion to suppress. This argument lacks merit.

{¶10} Appellate review of a ruling on a motion to suppress presents a mixed

question of law and fact. *State v. Cochran*, Preble App. No. CA2006-10-023, 2007-Ohio-3353. Acting as the trier of fact, the trial court is in the best position to resolve factual questions and evaluate witness credibility. Id. Therefore, when reviewing a trial court's decision regarding a motion to suppress, a reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Oatis*, Butler App. No. CA2005-03-074, 2005-Ohio-6038. "An appellate court, however, independently reviews the trial court's legal conclusions based on those facts and determines, without deference to the trial court's decision, whether as a matter of law, the facts satisfy the appropriate legal standard." *Cochran* at ¶12.

{¶11} Essentially, McMullen argues that the trial court should have granted his motion to suppress because Officer Johnson did not have a reasonable articulable suspicion of criminal activity when he "stopped" him. According to McMullen's theory, Johnson initiated the stop at the moment he pulled up to the SUV in his police cruiser and turned his spotlight on the vehicle. However, the trial court found that Johnson shining the spotlight on the SUV did not constitute a stop, and that the events following Johnson's initial approach to the vehicle provided the necessary probable cause to arrest McMullen. We agree.

{¶12} The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures. In order to conduct an investigatory stop that comports with the Fourth Amendment, police must be able to cite to articulable facts that give rise to a reasonable suspicion that an individual is currently engaged in, or is about to engage in, criminal activity. *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868. However, not all encounters between police and citizens

are "seizures" that implicate *Terry* or require that officers have reasonable suspicion of criminal activity. *Florida v. Bostick* (1991), 501 U.S. 429, 111 S.Ct. 2382.

{¶13} "The inquiry used to determine whether a particular encounter is a seizure is whether, taking into account all of the surrounding circumstances, a reasonable person would feel free to decline the officer's request or terminate the encounter." *State v. Lunce* (May 21, 2001), Butler App. No. CA2000-10-209, 5. Specific to encounters involving parked vehicles, "an officer's approach and questioning of the occupants of a parked vehicle does not constitute a seizure and does not require reasonable, articulable suspicion of criminal activity." Id.

{¶14} McMullen asserts that although he was in a parked vehicle, he was unable to terminate the encounter once Officer Johnson pulled by the SUV in his police cruiser, shined his spotlight into the vehicle, and approached to ask questions. However, this assertion stands in direct conflict with previous holdings of this and other courts.

{¶15} In *State v. Schwab* (Jan. 29, 2001), Clermont App. No. CA2000-07-055, we reversed the trial court's decision granting Schwab's motion to suppress, and found instead that the encounter between the officer and Schwab did not implicate the Fourth Amendment. "The facts of this case show that the officer shined the spotlight into the car, parked at an angle behind the vehicle, and began to approach. Nothing in these actions constitutes a show of authority or constitutes a use of physical force. * * * The fact that the officer shined the spotlight into the car does not change the analysis, nor does the fact that the officer parked at an angle behind the vehicle." Id. at 7. See, also, *Lunce*, Butler App. No. CA2000-10-209 at 6 (reversing the trial court's decision to suppress evidence and restating that "an officer does not

necessarily seize the occupants of a parked car by shining a spotlight into the car or by parking a police cruiser perpendicular to the car").

{¶16} The Second District Court of Appeals adopted our reasoning in *Schwab* when it decided *State v. Carter*, Montgomery App. No. 19833, 2004-Ohio-454. Carter argued on appeal that the trial court erred in denying his motion to suppress where the officer's act of shining a spotlight into his parked car constituted a stop under the Fourth Amendment. The court rejected Carter's argument, and found that "the fact that [the police] used the cruiser spotlight to illuminate the vehicle before [approaching] did not constitute a show of force or authority sufficient to make this encounter a stop." Id. at ¶20. The court also noted that the incident did not become a stop until the police approached "and ordered [Carter] out of the car for a pat-down search for weapons." Id. at ¶2.

{¶17} As in *Schwab* and *Carter*, McMullen was an occupant in a parked vehicle, and Officer Johnson did not need an articulable suspicion of criminal activity when he shined his spotlight and approached the SUV. Instead, the occupants were free to leave, and could have terminated the encounter because they were not seized by Johnson at that time. However, once Johnson detected the marijuana odor, saw smoke coming from the vehicle, and saw McMullen smoking the marijuana cigarette he had the necessary suspicion to investigate further.

{¶18} Although McMullen does not contest the probable cause leading to his arrest, he does challenge Johnson's seizure of the cigarette pack containing cocaine. Essentially, McMullen argues that Johnson was not permitted to seize the pack of cigarettes because a pat-down search can only be used to protect the officer's safety by determining whether the suspect is armed and dangerous.

{¶19} McMullen relies on *Terry*, for the proposition that "the sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." 392 U.S. at 29. McMullen therefore asserts that the seizure was unconstitutional because Johnson found a pack of cigarettes instead of the dangerous weapons mentioned in *Terry*.

{¶20} However, we need not reach the merits of McMullen's argument because he has waived the issue on appeal. In McMullen's motion to suppress, he argued primarily that Johnson's "stop" was not based on articulable facts suggestive of criminal activity. McMullen then concluded his motion by arguing that even if the stop was valid, Johnson executed the pat-down in an unconstitutional manner. The motion then briefly summarized the proper scope of *Terry* stops, and then asserted that Johnson improperly seized the cigarette pack.

{¶21} Although McMullen referenced the pat-down in his motion, at the hearing McMullen only argued issues specific to whether shining the spotlight on the parked SUV constituted a stop. When the trial court specifically asked McMullen's counsel to expand on the pat-down issue, counsel replied, "Judge, I think for purposes of what I will be arguing – I'm not even sure I am contesting anything involving the pat-down search at that point in time. I think the case law is pretty clear that at the point in time he believes there's probable cause to search, whether it's a pat-down or a search of pocket or even cigarette container. I think he's allowed to do that. I don't think that is what my contention of the search is."

{¶22} Before the trial court delivered its opinion, it revisited the pat-down

issue. "The thing that I thought this was going to hinge on is what is a pat-down? * * * I thought the case was going to hinge on whether the officer had the right to pull the cigarette package out of the pocket, but that's been conceded, that's not in issue. The state did not have to argue against that potential theory of the motion to suppress." The trial court then ruled, and McMullen did nothing to express a desire to have the pat-down issue considered or to have the trial court rule on the constitutionality of Johnson's seizure of the cigarette pack.

{¶23} On appeal, and in response to the state's waiver argument, McMullen now asserts that his argument in the motion to suppress placed the state on notice that he was challenging the pat-down and seizure. However, we agree with the state that McMullen's decision to challenge only the initial "stop" at the hearing constituted a waiver of the additional argument made in his motion to suppress.

{¶24} "The prosecutor must know the grounds of the challenge in order to prepare his case, and the court must know the grounds of the challenge in order to rule on evidentiary issues at the hearing and properly dispose of the merits. Therefore, the defendant must make clear the grounds upon which he challenges the submission of evidence pursuant to a warrantless search or seizure. Failure on the part of the defendant to adequately raise the basis of his challenge constitutes a waiver of that issue on appeal." *Xenia v. Wallace* (1988), 37 Ohio St.3d 216, 218. (Internal citations omitted.)

{¶25} Although McMullen referenced the pat-down and seizure issues in his motion, his specific statement disregarding those arguments at the hearing eliminated the state's need to address the constitutionality of the pat-down and seizure. McMullen expressly waived the argument by telling the trial court that in his

opinion, Johnson was "allowed" to pat-down and to seize the cigarette pack. Because of the express waiver, the trial court specifically stated that the legality of the pat-down and seizure had "been conceded" and were "not in issue." The trial court also recognized that because of the waiver, "the state did not have to argue against that potential theory of the motion to suppress."

{¶26} In light of his deliberate statements and acquiescence to the trial court's recognition of waiver, McMullen cannot now claim that he did not waive the issues. See, also, *State v. Johnson*, Montgomery App. No. 23017, 2009-Ohio-6136, at ¶12 (finding waiver where appellant's "decision to rely solely on his *Miranda* argument at the suppression hearing constituted a waiver of the additional arguments made in his motion to suppress * * *").

{¶27} Notwithstanding the waiver, and even if we were to consider the pat-down and seizure as raised in McMullen's motion to suppress, the pat-down and seizure would stand because McMullen consented to the search. It is well-established that where consent is freely and voluntarily given, the resulting search is constitutional. *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 93 S.Ct. 2041. "[W]hether consent to search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined by the totality of the circumstances." Id. at 227.

{¶28} During his testimony, Officer Johnson stated that after McMullen exited the car, he asked him if he "had anything else illegal on him, guns, drugs, knives, bombs, hand grenades, any of that great stuff * * *." Johnson testified that McMullen answered his question by saying that he did not have anything. Johnson later testified that he asked McMullen for his consent to perform a pat-down, and that

McMullen agreed.

{¶29} Although McMullen specifically understood that Johnson would be looking for weapons, drugs, or anything illegal, McMullen permitted the pat-down. Johnson's testimony did not indicate that any of his actions were coercive, and instead established that McMullen and the other occupants had been cooperative throughout the incident of their own accord. Moreover, McMullen did not assert in his motion to suppress that Johnson used any sort of deceptive practices to elicit the consent, or that he felt duress during the exchange leading up to the pat-down. Absent the showing of any indicia of coercion, we cannot say that McMullen's consent was invalid or that Johnson's pat-down search was impermissible.

{¶30} Having found that the trial court properly overruled McMullen's motion to suppress, and that the pat-down and seizure issues were expressly waived at the hearing and were otherwise permissible, McMullen's assignment of error is overruled.

{¶31} Judgment affirmed.

POWELL and RINGLAND, JJ., concur.