[Cite as *State v. Rodriguez*, 2015-Ohio-571.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2014-03-073
	:	O P I N I O N
- vs -		2/17/2015
	:	
DAVON RODRIGUEZ,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM FAIRFIELD MUNICIPAL COURT
Case No. 2013 CRB 02775

Stephen J. Wolterman, Assistant Fairfield Prosecutor, 675 Nilles Road, Fairfield, Ohio 45014, for plaintiff-appellee

Michael D. Shanks, 110 North Third Street, Hamilton, Ohio 45011, for defendant-appellant

RINGLAND, P.J.

{¶ 1} Defendant-appellant, Davon Rodriguez, appeals his conviction in the Fairfield Municipal Court for minor-misdemeanor possession of drugs, following his no contest plea to that charge. Appellant argues the trial court erred in overruling his motion to suppress all evidence seized from his person by police as a result of a *Terry* pat-down search, including 1.31 grams of marijuana and $3,000 in cash. For the reasons that follow, we disagree with appellant's argument and therefore affirm the judgment of the trial court.

{¶ 2} In 2013, several DEA agents were conducting surveillance of an apartment in the city of Fairfield, Butler County, Ohio when they saw a man named Jamie Peters enter the apartment without a backpack and then leave the apartment with a backpack. The agents maintained surveillance on Peters and later stopped him, at which time they discovered five pounds of marijuana inside the backpack. The agents applied for a search warrant for the apartment.

{¶ 3} While they were waiting for the search warrant, the agents observed appellant's brother, Josue Rodriguez, drive up to the apartment building, using what appeared to be "counter-surveillance measures" in that he drove in a loop around the apartment building's parking lot before returning to the parking lot and then entering the apartment building. Josue used a key to enter the apartment building. Agent Joe Reeder, who was in a back stairwell of the apartment building, stopped Josue and detained him, and then allowed several of his fellow agents, including Agent James L. Whitehouse, to enter the apartment building.

{¶ 4} Shortly thereafter, the agents saw appellant enter the apartment building using a key. Upon seeing appellant, Josue attempted to warn him by saying, "wrong building, bud" or "wrong place, buddy" or words to that effect. The agents knew appellant from prior occasions and knew that he had a prior history of drug trafficking, and therefore the agents surmised that Josue was attempting to warn appellant. Upon hearing Josue's warning, appellant immediately turned around and walked out of the building. Agent Whitehouse told appellant to come back inside the building so they could talk to him, which appellant did. Agent Whitehouse handcuffed appellant behind his back and informed him that he was going to be patted down for purposes of officer safety.

{¶ 5} In conducting the pat-down, Agent Whitehouse first felt appellant's front right pants pocket and noticed a bulge. Agent Whitehouse did not believe that the bulge was a

firearm or a knife or that it smelled of marijuana, but instead, believed it was a large wad of money. Agent Whitehouse reached into the pocket and pulled out a large wad of cash, which was later determined to total approximately $3,000. Agent Whitehouse then felt on the outside of appellant's front left pants pocket and noticed "a box or a bulge kind of thing," and "as soon as [he] pushed on it, [he noticed] like the odor of marijuana started coming out from [appellant's] person." Agent Whitehouse described the odor as being "like fresh marijuana, not burnt marijuana." Agent Whitehouse would later testify that he was able to recognize the smell of marijuana from his training and experience, that the marijuana he found on appellant had a very pungent odor and that in his experience, the higher the grade of marijuana, the more pungent it is. Agent Whitehouse reached into appellant's front left pants pocket and retrieved a cigarette pack, and noticed that inside the cigarette pack "there was a little bit of cellophane wrapping with a little bit of marijuana, some vegetation inside." Subsequent testing revealed that the substance was 1.31 grams of marijuana.

{¶ 6} Appellant was charged by complaint in the Fairfield Municipal Court with possession of drugs in violation of R.C. 2925.11, a minor misdemeanor. Appellant moved to suppress all evidence the police obtained from him during the pat-down search. A hearing was held on appellant's motion to suppress. The only witness who testified at the hearing was Agent Whitehouse, who testified to the facts related above. The trial court overruled appellant's motion to suppress. Appellant pled no contest to the possession charge, and the trial court made a finding of guilt and imposed sentence.

{¶ 7} Appellant now appeals, assigning the following as error:

{¶ 8} THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS.

{¶ 9} Appellant argues the trial court erred by overruling his motion to suppress, because the police did not have a reasonable, articulable suspicion to believe he had

committed a crime or was about to commit a crime, and therefore they were not permitted to make a *Terry* stop of him in order to briefly investigate whatever suspicions they may have had. Appellant also argues that because the police did not have a reasonable basis to believe he was armed and dangerous, the police were not permitted to perform a pat-down search of him, and therefore the seizure of the money and the cigarette pack containing the marijuana from his pockets clearly exceeded the scope of a search authorized under *Terry*.

{¶ 10} Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Cochran*, 12th Dist. Preble No. CA2006-10-023, 2007-Ohio-3353, ¶ 12. The trial court, acting in its role as trier of fact, is in the best position to resolve factual questions and evaluate the credibility of the witnesses. *Id*. Therefore, when reviewing a trial court's denial of a motion to suppress, an appellate court must accept the trial court's findings of fact as correct so long as they are supported by competent, credible evidence. *Id*. However, an appellate court must independently review the trial court's legal conclusions based on those facts and determine, "without deference to the trial court's decision, whether as a matter of law, the facts satisfy the appropriate legal standard." *Id*.

{¶ 11} A police officer who has a reasonable, articulable suspicion that an individual is currently engaged in, or is about to engage in, criminal activity may briefly stop and detain that individual in order to investigate the officer's reasonable suspicion that criminal activity is afoot. *Terry v. Ohio*, 392 U.S. 1, 21-22, 27, 88 S.Ct. 1868 (1968). A reasonable, articulable suspicion of criminal activity is something more than an "unparticularized suspicion" or "hunch." *Id*. The police officer must be able to cite specific, articulable facts, which, taken together with the rational inferences that can be drawn from those facts, reasonably warrant the intrusion. *State v. Andrews*, 57 Ohio St.3d 86, 87 (1991), citing *Terry* at 21–22. The propriety of an investigative stop by a police officer must be viewed in light of the totality of the surrounding circumstances as seen through the eyes of a reasonable and cautious police

officer on the scene, guided by his experience and training. *State v. Bobo*, 37 Ohio St.3d 177, 179-180 (1988).

{¶ 12} Here, a review of the totality of the circumstances shows that the police had a reasonable, articulable suspicion to believe that appellant was engaged in, or was about to engage in, criminal activity, and therefore the police were permitted to briefly stop and detain him in order to investigate their reasonable suspicion that criminal activity was afoot. Among other things, appellant was seen arriving at an apartment where, earlier that day, another person had been seen entering the apartment without a backpack and then leaving the apartment with a backpack that was later discovered to contain five pounds of marijuana; the apartment is in a high crime area where the law enforcement officers involved in this matter had conducted investigations and executed search warrants before; appellant had a history of being involved in drug trafficking; and appellant attempted to flee when his brother tried to "warn" him by saying "wrong building, bud" or "wrong place, buddy" after appellant came to the apartment.

{¶ 13} Additionally, the police in this case were allowed to frisk or pat-down appellant for weapons to ensure their safety. *Terry* provides that when a police officer engages in a lawful investigative stop, the officer may frisk or pat-down the suspect if the officer has reasonable grounds to believe the suspect is armed or dangerous. *Terry* at 27. The Ohio Supreme Court has stated that "[t]he right to frisk is virtually automatic when individuals are suspected of committing a crime, like drug trafficking, for which they are likely to be armed." *State v. Evans*, 67 Ohio St.3d 405, 413 (1993). *See also State v. Dickerson*, 179 Ohio App.3d 754, 2008-Ohio-6544 (2d Dist.) (Ohio courts have long recognized that persons engaged in illegal drug activities are often armed with weapons).

{¶ 14} Further, courts have upheld the use of handcuffs during investigative stops and detentions where it is justifiable for reasons such as officer safety and preventing the suspect

from leaving. *See, e.g., State v. Hopper*, 8th Dist. Cuyahoga Nos. 91269, 91327, 2009-Ohio-2711, ¶ 21-24. *See also State v. Allen*, 2d Dist. Montgomery No. 22663, 2009-Ohio-1280, ¶ 27 (upholding decision of police to handcuff suspect behind his back as police officer testified that a suspect handcuffed behind his back could still access weapons on the suspect's person). Here, other agents were present when Agent Whitehouse detained appellant, and Agent Whitehouse was not alone. However, Agent Whitehouse knew that appellant had an extensive criminal record, the agents were also detaining appellant's brother, and at least one other person had been seen that day entering the apartment without a backpack and then leaving the apartment with a backpack that was later found to contain five pounds of marijuana.

{¶ 15} We also conclude that the search and seizure of the marijuana located in appellant's front left pants pocket was not constitutionally impermissible. Agent Whitehouse testified that when he patted down appellant's front left pants pocket, he "felt something like a little bit of a, like box or a bulge kind of thing," and "as soon as [he] pushed on it," he noticed the odor of marijuana "coming out from [appellant's] person." Agent Whitehouse testified that he did not smell the odor of marijuana on appellant when appellant first came in the building, but as he continued to be in appellant's presence he "could smell like just a faint odor, but then it was really unleashed" when he pressed on appellant's front left pants pocket.

{¶ 16} In *State v. Moore*, 90 Ohio St.3d 47, 50 (2000), the Ohio Supreme Court recognized the doctrine of "plain smell" as a corollary to the doctrines of "plain view" and "plain feel," and held that "if the smell of marijuana, as detected by a person who is qualified to recognize the odor, is the sole circumstance, this is sufficient to establish probable cause." The court explained the rationale for its decision as follows:

> The use of one's sense of smell is no less reliable than other

> senses upon which we rely. A familiar or distinctive odor, such as freshly cut grass, a bouquet of flowers, a hot apple pie, or the scent of perfume, evokes a vivid and accurate image in our minds. We draw factual conclusions about our surroundings from the use of our sense of smell. Consequently, we agree with the appellate court that a law enforcement officer, who is trained and experienced in the detection of marijuana, should not be prohibited from relying on his or her sense of smell to justify probable cause to conduct a search for marijuana.

Id. at 51.

{¶ 17} The *Moore* court also determined that "exigent circumstances" existed in that case "to justify the warrantless search of defendant's person once [the police officer] had probable cause based upon the odor of marijuana detected on the defendant." *Id*. at 48. The court stated:

> Because marijuana and other narcotics are easily and quickly hidden or destroyed, a warrantless search may be justified to preserve evidence.
>
> Here, Sergeant Greene was alone at the time he stopped defendant's vehicle. He had probable cause to believe that defendant had been smoking marijuana from the strong odor of burnt marijuana emanating from the vehicle and on the defendant. In order to obtain a warrant before searching defendant's person for possible narcotics, he would have had to permit defendant to leave the scene in defendant's vehicle. Having to permit defendant to leave the scene alone, unaccompanied by any law enforcement officer, the dissipation of the marijuana odor, and the possible loss or destruction of evidence were "compelling reasons" for Sergeant Greene to be able to conduct a warrantless search of defendant's person. We find these to be exigent circumstances that would justify the warrantless search of defendant's person.

(Citations omitted.) *Id*. at 52-53.

{¶ 18} In this case, Agent Whitehouse is a law enforcement veteran with nearly 17 years of experience. For ten of those years, Agent Whitehouse has been assigned to the DEA Task Force. Agent Whitehouse testified that as soon as he pushed on the bulge in appellant's front left pants pocket, he noticed that the odor of marijuana started coming out from appellant's person. Agent Whitehouse described the odor as being "like fresh

marijuana, not burnt marijuana." Agent Whitehouse testified that he was able to recognize the smell of fresh marijuana from his training and experience, that the marijuana he found on appellant had a very pungent odor and that in his experience, the higher the grade of marijuana, the more pungent it is. Appellant, on the other hand, presented no evidence at the suppression hearing to rebut Agent Whitehouse's expertise at smelling fresh marijuana. Compare *State v. Pfaff* (S.D.1990), 456 N.W.2d 558,[1] (trial court's decision to grant defendant's motion to suppress after rejecting police officer's testimony that he could smell marijuana on defendant's person and in his car was not clearly erroneous where defendant presented expert testimony that, given the prevailing winds and the packaging of the contraband, an officer could not have smelled marijuana on the defendant's person or in his car).

{¶ 19} Here, the trial court implicitly found credible Agent Whitehouse's testimony that he smelled marijuana emanating from appellant as soon as he pressed on appellant's front left pants pocket. While we consider Agent Whitehouse's testimony that he was able to smell 1.31 grams of marijuana that was wrapped in cellophane and placed inside a cigarette pack and then placed in one of appellant's front pants pockets to be open to question, our standard of review in ruling on a trial court's finding of fact in a motion to suppress requires us to be mindful that the trial court, acting in its role as trier of fact, is in the best position to resolve factual questions and evaluate the credibility of witnesses, and therefore, to defer to the trial court's findings of fact so long as they are supported by competent, credible evidence. *Cochran*, 2007-Ohio-3353 at ¶ 12. Since Agent Whitehouse testified that he smelled marijuana immediately when he pressed on the bulge in appellant's front left pants pocket, and since the trial court implicitly found Agent Whitehouse's testimony to be credible,

1. *See also State v. Woljevach*, 160 Ohio App.3d 757, 2005-Ohio-2085, ¶ 24 (6th Dist.), citing and discussing *Pfaff*.

we defer to the trial court's implicit finding of fact on this matter. Therefore, we conclude that under *Moore*, when Agent Whitehouse smelled the odor of marijuana coming from appellant, he had probable cause to believe that a crime had been committed.

{¶ 20} Additionally, as in *Moore*, we find that there were exigent circumstances in this case that justified the warrantless search of appellant's person. While Agent Whitehouse was not by himself in this situation as was the police officer (Sergeant Greene) in *Moore*, we conclude that "the dissipation of the marijuana odor, and the possible loss or destruction of evidence were 'compelling reasons' for" Agent Whitehouse to be permitted to conduct a warrantless search of appellant's person. *Id*.

{¶ 21} Agent Whitehouse did exceed the scope of a lawful *Terry* pat-down search when he retrieved the large wad of cash, totaling $3,000, from appellant's front right pants pocket. Agent Whitehouse testified that he believed he was justified in seizing the cash because it was in his "plain feel" and because it was his belief that a law enforcement officer is permitted to seize any object in a suspect's pocket that the officer finds during a *Terry* pat-down search that may be evidence of a crime or a weapon. However, under *Terry* and its progeny, the police may search only for weapons when conducting a pat-down search of the suspect and not for evidence of crime. *Evans*, 67 Ohio St.3d at 414.

{¶ 22} Additionally, Agent Whitehouse's reliance on the "plain feel" doctrine was misplaced. That doctrine provides that if a police officer, while conducting a lawful *Terry* pat-down of a suspect's clothing, feels an object whose contour or mass makes its incriminating character as contraband immediately apparent, and the officer has a lawful right of access to the object, the officer is entitled to seize the object. *Minnesota v. Dickerson*, 508 U.S. 366, 113 S.Ct. 2130 (1993). The police officer is not permitted to manipulate the object to ascertain its identity, but is allowed to slide or manipulate the object until the officer is able, reasonably, to eliminate the possibility that the object is a weapon. *United States v. Yamba*,

506 F.3d 251, 259 (3d Cir.2007); *State v. Lawson*, 180 Ohio App.3d 516, 524, 2009-Ohio-62, ¶ 25. However, once the officer determines the object is not a weapon, the pat-down frisk must stop. *Yamba*; *Lawson* at ¶ 35-37. Here, once Agent Whitehouse recognized that the bulge in appellant's front right pants pocket was not a weapon or contraband, but instead, a large wad of cash, he was obligated to end that part of his search, and therefore he acted impermissibly by retrieving the large wad of cash instead. *Evans*; *Lawson*.

{¶ 23} Nevertheless, the $3,000 in cash would have been admissible under the "inevitable discovery" rule as there is a reasonable probability that the police would have searched appellant's front right pants pocket as well as his front left pants pocket once Agent Whitehouse pressed on appellant's front left pants pocket and immediately smelled the odor of marijuana emanating from appellant, which gave him probable cause under *Moore* to conduct a search for marijuana. *Id*. at 48. *See generally State v. Perkins*, 18 Ohio St.3d 193 (1985), following *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501 (1984) and adopting the "inevitable discovery" exception to the exclusionary rule that allows illegally obtained evidence to be properly admitted at trial once the state establishes that it is reasonably probable that the evidence would have been inevitably discovered during the course of a lawful investigation. In any event, since the minor misdemeanor drug possession charge brought against appellant was not dependent on the $3,000 in cash found in his front right pants pocket, the trial court's refusal to suppress the cash from evidence was, at most, harmless error.

{¶ 24} In light of the foregoing, appellant's assignment of error is overruled.

{¶ 25} Judgment affirmed.

HENDRICKSON and PIPER, JJ.