[Cite as *State v. Olden*, 2010-Ohio-215.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23137
v.	:	T.C. NO. 2008 CR 2924
JAJUAN W. OLDEN	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 22nd day of January, 2010.

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FROELICH, J.

{¶ 1} JaJuan W. Olden pled no contest to possession of cocaine (powder) in an amount less than five grams after the Montgomery County Court of Common Pleas overruled his motion to suppress evidence. The court found him guilty and sentenced him to community control. Olden appeals the denial of his motion to suppress. For the

following reasons, the trial court's judgment will be affirmed.

{¶ 2} The State's evidence at the suppression hearing established the following facts:

{¶ 3} At approximately 3:15 a.m. on July 18, 2008, Dayton Police Officer Rod Roberts and his trainee, Officer Josh Campbell, were dispatched to 3537 Otterbein Avenue on a domestic disturbance call. The dispatch indicated that Olden, the father of the complainant's child, was in the house, had been drinking, had a history of violence, and refused to leave; the complainant was fearful for her life. Because the call related to a domestic disturbance, another police officer, Officer Berger, was also dispatched to the scene.

{¶ 4} Upon arriving at 3537 Otterbein Avenue, the officers met the complainant outside the large two-story brick apartment building. After speaking with her, the three officers entered the building and proceeded upstairs to the complainant's second-floor apartment. The officer found the door to the complainant's apartment to be open. (The complainant did not accompany the officers and remained downstairs.)

{¶ 5} Olden was seated on a couch directly in front of the open door. As the officers entered the apartment, Olden looked up, startled. He leaned back and "stuffed his left hand in his pants pocket." Roberts told Olden to take his hands out of his pockets. Olden removed his left hand from his pocket, but put his right hand into his right pocket. Roberts and the other officers approached Olden, and Roberts told Olden to take his hands out of his pockets and to stand up. Olden stood up, taking his hand out of his pocket, but he immediately placed his right hand back into his pants pocket.

{¶ 6} Roberts decided to perform a patdown search for weapons. He placed himself behind Olden and put both of Olden's hands behind Olden's back. Holding Olden's hands with his left hand, Robert patted Olden down with his right hand, using an open hand and flat fingers. As Robert patted the right coin pocket of Olden's jeans, he felt a lump, which was smaller than a pencil eraser, and a plastic baggie. He looked down at the pocket and saw the plastic baggie sticking out of the top of the change pocket on the right-hand side. Without manipulating the lump, Roberts believed the lump to be crack cocaine. Roberts asked Olden what was in his pocket; Olden did not respond. Roberts removed the baggie from Olden's pocket, placed him in handcuffs, and arrested him for possession of drugs.

{¶ 7} Roberts took Olden to his cruiser and conducted a search incident to Olden's arrest. Roberts found two small oval white pills in his right-hand pocket. Roberts also tested the suspected crack cocaine with cobalt reagent; the test result was positive for the presence of cocaine. Roberts informed Olden of his *Miranda* rights, which were waived, and the officer questioned Olden. After the questioning was completed, Roberts transported Olden to jail. The suspected crack cocaine was, in fact, powder cocaine.

{¶ 8} On August 25, 2008, Olden was indicted for possession of cocaine in an amount less than five grams. Olden moved to suppress the evidence against him, claiming that the warrantless, nonconsensual search was not based on probable cause or a reasonable suspicion that he was engaged in criminal activity. A hearing on the motion was held on October 8, 2008; Roberts was the sole witness.

{¶ 9} A week later, the court announced its decision in open court. The court

overruled the motion to suppress, concluding that the patdown of Olden for weapons was permissible, because "Mr. Olden's repeated placement of a hand into a pant pocket despite requests not to do so creates an articulable objective concern that Mr. Olden was armed." Turning to whether the retrieval of the baggie with cocaine was appropriate under the plain feel doctrine, the court noted that, "without doubt, this is the most difficult part of this decision." After setting forth the plain feel doctrine under *Minnesota v. Dickerson* (1993), 508 U.S. 366, 375, 113 S.Ct. 2130, 124 L.Ed.2d 334, and discussing two of our appellate opinions – *State v. Lander* (Jan. 21, 2000), Montgomery App. No. 17898, and *State v. Grove*, 156 Ohio App.3d 205, 2004-Ohio-662, the trial court found that, based upon Roberts' experience, he immediately believed the lump in Olden's pocket to be crack cocaine. The court reasoned:

{¶ 10} "*** Application of this standard in this case is complicated by Officer Roberts' testimony on direct that upon encountering the small lump, he believed the lump was crack cocaine.

{¶ 11} "On cross, he, based upon [defense counsel's] questioning, agreed that he suspected the lump was crack cocaine, and his confession during questioning from the Court then in his mind there is not really a distinction between the words 'believe' and 'suspicion,' though if you look at their definitions in the dictionary, there certainly is a distinction between the two words.[1]

[1] Two sets of transcripts, with different transcribers, were filed. The transcripts differ primarily in the placement of paragraph breaks and the manner that sentences are divided with commas and periods, which we found to be nonsubstantive. With respect to this paragraph, the transcript filed on April 15, 2009, states "*then* in his mind" and that the officer saw no distinction between

{¶ 12} "Though a close call created by good lawyering on [defense counsel's] part, given Mr. Roberts' use of the term 'believe' during direct examination and, more importantly, his testimony concerning why he reached that belief provided during direct examination and also during questioning from the Court leads this Court to the conclusion that when Officer Roberts felt the lump, he immediately – based upon what he felt, and also upon what he observed, the baggie, and his experience – possessed probable cause that what he felt was contraband.

{¶ 13} "Again, it's a close call based upon that which Officer Roberts said during cross examination, and also given that which was said by the Second District in *Groves* and also *Lander*.

{¶ 14} "However, I'm going back to the case of *State v. Phillips* which I cited to. *** [I]n that case, the officer indicated that it was his belief that the item that he felt was crack cocaine, and the *Phillips* court found that to be sufficient for the appropriate probable cause conclusion that the item was probably contraband.

{¶ 15} "So, again, when you look at the totality of circumstances – those circumstances being Officer Roberts' testimony, that which he felt, that which he observed – all those things come together in my mind to form the conclusion that there was on the part of Officer Roberts an immediate determination that what he felt was in all likelihood crack cocaine

{¶ 16} "Therefore, there was probable cause to retrieve the item from the coin

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"*believe*" and suspicion. The transcript filed on January 13, 2009, omits the word "then" and says "believed" rather than "believe." These differences are also nonsubstantive.

pocket of the jeans Mr. Olden was wearing on that early July 18 morning. Therefore, it was constitutionally appropriate as indicated for the cocaine, the baggie, to be retrieved which contained the cocaine, and this portion of Mr. Olden's motion is overruled." (Footnote added.)

{¶ 17} The court further overruled Olden's motion to suppress any statements that he had made. On October 17, 2008, the trial court filed a written entry adopting its oral reasoning and denying the motion to suppress. Shortly thereafter, Olden pled no contest to the charge of possession of cocaine. The court sentenced him accordingly.

{¶ 18} Olden appeals from the denial of his motion to suppress. His sole assignment of error states:

{¶ 19} "THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION TO SUPPRESS THE EVIDENCE RECOVERED AS A RESULT OF THE ILLEGAL SEARCH AND SEIZURE OF DEFENDANT."

{¶ 20} Olden claims that the trial court should have suppressed the evidence against him, because the police officer lacked a reasonable and articulable suspicion that he might be armed and/or dangerous, and it was not immediately apparent to the officer that the items in the coin pocket of his jeans were contraband.

{¶ 21} In reviewing the trial court's ruling on a motion to suppress evidence, this court must accept the findings of fact made by the trial court if they are supported by competent, credible evidence. See *State v. Morgan*, Montgomery App. No. 18985, 2002-Ohio-268. However, "the reviewing court must independently determine, as a matter of law, whether the facts meet the appropriate legal standard." Id.

{¶ 22} The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures. *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. Under *Terry*, police officers may briefly stop and/or temporarily detain individuals in order to investigate possible criminal activity if the officers have a reasonable, articulable suspicion that criminal activity may be afoot. *State v. Martin*, Montgomery App. No. 20270, 2004-Ohio-2738, at ¶10, citing *Terry*, supra; *State v. Molette*, Montgomery App. No. 19694, 2003-Ohio-5965, at ¶10. "Reasonable suspicion entails some minimal level of objective justification for making a stop – that is, something more than an inchoate and unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause." *State v. Jones* (1990), 70 Ohio App.3d 554, 556-557, citing *Terry*, 392 U.S. at 27. We determine the existence of reasonable suspicion by evaluating the totality of the circumstances, considering those circumstances "through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold." *State v. Heard*, Montgomery App. No. 19323, 2003-Ohio-1047, at ¶14, quoting *State v. Andrews* (1991), 57 Ohio St.3d 86, 87-88; see *State v. Bobo* (1988), 37 Ohio St.3d 177 (setting forth factors to consider in determining whether a reasonable suspicion to make a stop exists).

{¶ 23} In this case, the officers approached Olden based on a report from the mother of Olden's child that Olden was in her apartment, that he refused to leave, that he was intoxicated, and that she feared for her life. The complainant consented to the officers' entry into her apartment. Olden has not challenged the lawfulness of the officers' entry in the apartment and/or Roberts' demands that Olden remove his hands from his pockets, and we find the officers' actions to be proper.

{¶ 24} However, "[a]uthority to conduct a patdown search for weapons does not automatically flow from a lawful stop[.]" *State v. Stewart*, Montgomery App. No. 19961, 2004-Ohio-1319, ¶16. Once a lawful stop has been made, the police may conduct a limited protective search for concealed weapons if the officer reasonably believes that the suspect may be armed or a danger to the officer or to others. *State v. Evans* (1993), 67 Ohio St.3d 405, 408; *State v. Molette*, Montgomery App. No. 19694, 2003-Ohio-5965, ¶13. "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence ***." *Evans*, 67 Ohio St.3d at 408, quoting *Adams v. Williams* (1972), 407 U.S. 143, 146, 92 S.Ct. 1921, 32 L.Ed.2d 612.

{¶ 25} To justify a patdown search, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21. "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." Id. at 27; *State v. Smith* (1978), 56 Ohio St.2d 405, 407.

{¶ 26} Roberts' testimony established that he responded to the complainant's Otterbein apartment on a domestic disturbance call. The dispatch had informed the officers that Olden had been drinking, refused to leave, and had a history of violence, and that the complainant feared for her life. Upon entering the apartment, Olden repeatedly placed a hand inside one of his pants pockets, contrary to Roberts' repeated instructions for Olden to remove his hands from the jeans pocket. Based on the information in the dispatch about Olden, Olden's non-compliance, and his repeated reaching into his pockets, Roberts had a

reasonable and articulable belief that Olden may have been armed and posed a danger to the officers. Accordingly, Roberts was entitled to conduct a limited protective search for weapons for his safety.

{¶ 27} As recognized by the trial court, the closest question is whether, in the course of the patdown for weapons, Roberts lawfully seized the baggie with cocaine from Olden's pocket.

{¶ 28} Under the plain feel doctrine, an officer conducting a patdown for weapons may lawfully seize an object if he has probable cause to believe that the item is contraband. *Minnesota v. Dickerson* (1993), 508 U.S. 366, 375, 113 S.Ct. 2130, 124 L.Ed.2d 334; *State v. Phillips*, 155 Ohio App.3d 149, 2003-Ohio-5742, ¶41-42. The "incriminating character" of the object must be "immediately apparent," meaning that the police have probable cause to associate an object with criminal activity. *Dickerson*, 508 U.S. at 375; *State v. Buckner*, Montgomery App. No. 21892, 2007-Ohio-43392. The officer may not manipulate the object to identify the object or to determine its incriminating nature. *Dickerson*, supra; *State v. Lawson*, 180 Ohio App.3d 516, 2009-Ohio-62, ¶25.

{¶ 29} The criminal character of an object may be immediately apparent because of the nature of the article and the circumstances in which it is discovered. *State v. Dunson*, Montgomery App. No. 22219, 2007-Ohio-6681, ¶24. "In that situation, the totality of those circumstances, including the officer's experience and explanation, must be sufficient to present probable cause to believe that the identity of the object he feels is specific to criminal activity." Id.

{¶ 30} On appeal, Olden argues the incriminating nature of the lump in his pocket

was not immediately apparent to Roberts "because the officer had to ask the Defendant what the lump was." Olden asserts that Roberts did not know what the lump was when he felt it in Olden's coin pocket; rather, Roberts merely "suspected" that the lump was crack cocaine.

{¶ 31} Whether an officer "believes," as opposed to "suspects," an item to be contraband is an important distinction. "'Suspicion' is defined in Webster's Third New International Dictionary, unabridged, as being: '1 a: the act or an instance of suspecting: imagination or apprehension of something wrong or hurtful without proof or on slight evidence ... 2: INKLING, INTIMATION, HINT....' By contrast, 'belief' is defined in the same authority as: '3 a: conviction of the truth of some statement or the reality of some being or phenomenon esp. when based on an examination of the grounds for accepting it as true or real ... 4: immediate assurance or feeling of the reality of something < _ in sensation>.'" *State v. Pullen*, Montgomery App. Nos. 22022, 22038, 2008-Ohio-2894, ¶33. An officer's mere suspicion does not rise to the level of probable cause. *Groves* at ¶43; *Lander*, supra; *Lawson* at ¶34.

{¶ 32} As discussed by the trial court, Roberts testified that he did not "know" what was in Olden's pocket. On direct examination, Roberts testified that he "believed" the item in Olden's pocket was crack cocaine. In contrast, Roberts used the term "suspected" on cross-examination:

{¶ 33} "Q Okay. And then don't you at that time ask my client what is it?

{¶ 34} "A I believe I did.

{¶ 35} "Q Okay. So you didn't know what it was at that time.

{¶ 36} "A Uh-uh.

{¶ 37} "Q No, correct?

{¶ 38} "A I suspected it was crack cocaine.

{¶ 39} "Q Okay. You suspected.

{¶ 40} "A Yes, ma'am.

{¶ 41} "Q Okay. It's a guess. You had to guess. All right?

{¶ 42} "A An educated guess, ma'am.

{¶ 43} "Q Okay. But it was you suspected it.

{¶ 44} "A Yes, ma'am.

{¶ 45} "Q You weren't for sure.

{¶ 46} "A Correct."

{¶ 47} On redirect examination, the prosecutor asked Roberts:

{¶ 48} "Q *** [Y]ou said when the defendant didn't respond to your question 'what is this object,' you then removed the object. Why did you do that?

{¶ 49} "A I believed it was contraband at that time.

{¶ 50} "Q Okay. Specifically what –

{¶ 51} "A Crack cocaine.

{¶ 52} "Q – contraband?

{¶ 53} "A Yes."

{¶ 54} The prosecutor further asked Roberts "how many times [he] had this exact experience where you have felt an object that was immediately apparent to you to be crack cocaine *** but it turns out *** it was cocaine." Roberts responded, "numerous." Roberts stated that he had spent his entire Dayton career in the Fifth District, and three of those years

were spent in the area of the Phoenix Project, where he made numerous drug arrests.

{¶ 55} The court attempted to clarify Roberts' testimony about whether he believed or suspected the item was cocaine with the following exchange:

{¶ 56} "COURT Could get into a bit of a semantic argument here, Officer, and I guess I want to try to get some clarification. You've used the word that when you initially felt the lump, you suspected it to be crack cocaine. You believed it to be contraband. In your mind, is there any difference between the word 'suspected' and the word 'believed'?

{¶ 57} "WITNESS No, I believe they're about the same thing.

{¶ 58} "COURT Okay, all right. In fact, you – when you felt that which you felt, you concluded or you came to the belief that it was contraband.

{¶ 59} "WITNESS Yes, sir.

{¶ 60} "COURT Did you come to that belief immediately upon feeling the object?

{¶ 61} "WITNESS When I felt it in his pocket and saw the baggie sticking out, my experience is that cocaine – crack cocaine is packaged in, you know, plastic sandwich baggies and it's a hard rocky substance."

{¶ 62} The trial court found, based on Roberts' experience as an officer and the bases for Roberts' belief that the items in Olden's pocket were contraband, that Roberts' belief rose to the level of probable cause; further, we do not retroactively hold an officer to a semanticist's precision. We find no fault with the trial court's conclusion. Roberts was not required to "know" what was in Olden's pocket in order to seize the baggie with cocaine; "probable cause" does not require absolute certainty and, without looking at the item, it

would have been difficult, if not impossible, for Roberts to "know" what Olden had placed in his coin pocket. Even then, the "suspected" cocaine was tested with cobalt reagent at the scene.

{¶ 63} Roberts testified that he felt a lump and a plastic baggie in Olden's coin pocket. He looked down and saw a portion of the baggie sticking out of the pocket. Although Roberts used the word "suspected" on cross-examination, Roberts had also testified that he "believed" the lump to be crack cocaine. He explained: "Just in my experience working in the Fifth District and being a police officer for 12 years, crack cocaine is packaged in plastic sandwich baggies, and it's a hard rock substance." Roberts' testimony on direct examination, on redirect examination, and upon questioning by the court indicated that the officer concluded, without manipulating the object in Olden's pocket, that the hard lump in the plastic baggie was contraband, based on his extensive experience as a police officer with drug activity and arrests. This testimony, which the trial court reasonably credited, supports the conclusion that the incriminating nature of the items in Olden's pocket was immediately apparent to Roberts; as in *Pullen*, the officer's "testimony that he 'believed' the item to be crack cocaine is entirely consistent with his having probable cause for that belief." *Pullen* at ¶34. Roberts' seizure of the plastic baggie and its contents was authorized under the plain feel doctrine.

{¶ 64} Olden asserts that the incriminating nature of the lump was not immediately apparent to the officer, because the officer had to ask Olden what the object was. Olden cites *Lawson* to support his assertion that questioning a defendant about an object felt during a patdown indicates that the incriminating nature of the object is not immediately apparent.

{¶ 65} In *Lawson*, a police officer conducted a protective patdown search for weapons of a passenger of a vehicle that had been stopped for a traffic violation. The officer felt a large lump, which he initially believed to be a golf ball. The officer manipulated the lump in an attempt to determine what it was, and he asked the defendant what was in his pocket. Other police officers who were present also felt and squeezed the lump and asked Lawson what it was. Lawson ultimately admitted having controlled substances on his person. After his admission, the officers recovered a large bag of powder cocaine.

{¶ 66} Although *Lawson* and this case both involve an officer who asked the defendant to identify a lump felt during a patdown for weapons, we find the circumstances to be distinguishable. Under the facts in *Lawson*, the officer clearly did not know what the object was or its incriminating nature when he asked the defendant to identify the object; the officer initially believed the lump was a golf ball, he manipulated the object in an attempt to identify it, and he asked other officers to feel the object because he did not know what it was. The officer's question to Lawson was merely one indication, among several, that the incriminating nature of the large lump was not immediately apparent to the officer.

{¶ 67} Here, Roberts testified that he felt a small lump and a plastic baggie in Olden's pocket and, upon looking, saw a portion of the plastic baggie sticking out of the pocket. Roberts, an experienced officer who had made numerous drug arrests, knew that crack cocaine was often packaged in sandwich baggies, and he immediately associated the hard rocky lump, which he felt without manipulation, and the baggie with crack cocaine. Although Roberts asked Olden what was in his pocket, this question simply sought

confirmation of the officer's belief that Olden's pocket contained contraband. We note that, unlike in *Lawson*, Roberts proceeded to remove the baggie from Olden's pocket based on his belief that the object was contraband without Olden's answering the officer's question and confirming that he had cocaine in his pocket.

{¶ 68} Because Roberts had probable cause to believe that the lump that he felt in Olden's right coin pocket was contraband, Roberts was entitled to remove the lump from Olden's pocket under the plain feel doctrine.

{¶ 69} The assignment of error is overruled.

{¶ 70} The judgment of the trial court will be affirmed.

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DONOVAN, P.J. and BROGAN, J., concur.

Copies mailed to:

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