[Cite as *State v. Allen*, 2010-Ohio-3336.]

STATE OF OHIO, MONTGOMERY COUNTY

IN THE COURT OF APPEALS

SECOND DISTRICT

STATE OF OHIO,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	
VS.	)	CASE NO. 23738
	)	
ROOSEVELT ALLEN,	)	OPINION
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Court of Common Pleas of Montgomery County, Ohio Case No. 2009-CR-1235
JUDGMENT:	Affirmed
APPEARANCES: For Plaintiff-Appellee	Mathias H. Heck, Jr. Prosecuting Attorney Kirsten A. Brandt Assistant Prosecuting Attorney P.O. Box 972 301 West Third Street Dayton, Ohio 45422
For Defendant-Appellant	Attorney Robert Alan Brenner P.O. Box 341021 Beavercreek, Ohio 45434

JUDGES:

Hon. Gene Donofrio
(Seventh District Court of Appeals
Sitting by assignment by the Chief
Justice of the Supreme Court of Ohio)
Hon. Mike Fain

Hon. Jeffrey E. Froelich

Dated: July 16, 2010

DONOFRIO, J.

{¶ 1} Defendant-appellant Roosevelt Allen appeals his conviction in the Montgomery County Common Pleas Court for possession of crack cocaine, following his no contest plea. Allen advances two principal arguments: (1) the trial court erred in denying his motion to suppress evidence of the drugs found on his person and (2) the trial court erred in ordering him to pay a mandatory fine.

{¶ 2} On April 15, 2009, at approximately 7:15 in the evening, Dayton Police Officers Beavers and Wolpert were on patrol in the area of Linden and Huffman Avenue. (Tr. 4, 16, 17.) That area is a high crime area known for guns, drugs, and violent activity. (Tr. 6.) They observed a 1997 Oldsmobile that appeared to have no license plates and initiated a traffic stop. (Tr. 5.)

{¶ 3} Allen was seated in the front passenger seat. (Tr. 5.) As the officers arrived at the vehicle they observed a temporary tag lying flat on the rear deck beneath the rear window. (Tr. 17-18, Tr. 27-28.) As Officer Beavers approached the passenger side of the vehicle he noticed that Allen was "very fidgety" and that his arms were folded forward so that he was unable to see his hands (Tr. 6, 18.) "He kept moving in his seat back and forth and leaning forward as if he was retrieving or concealing something in-between his legs." (Tr. 6.) Allen's movements caused Officer Beavers to be concerned for his safety. (Tr. 6, 19.) Officer Beavers also observed that Allen was not wearing his seat belt and asked

him for identification, which he provided. (Tr. 7.) Officer Wolpert obtained identification from the driver of the vehicle. (Tr. 19.) The officers returned to their patrol car to run Allen and the driver's information through their computer. (Tr. 7, 20.) Officer Beavers observed Allen "fidgeting" again, his arms folded forward, "shifting his weight, leaning forward again as if he was trying to hide or retrieve something." (Tr. 7, 21.)

{¶ 4} A computer check of Allen's information revealed a recent "FIC" which indicated his involvement with drugs and guns.[1] (Tr. 8-9. 20.) That information, coupled with Allen's movements, heightened Officer Beavers' concerns for his and Officer Wolpert's safety. (Tr. 9.) The officers asked Allen to step from the vehicle and he consented to a pat down search. (Tr. 10.) Officer Beavers felt a large bulge below Allen's belt line and Allen tensed up against the vehicle. (Tr. 11, 24-25.) From his ten years of experience as a police officer, Officer Beavers immediately knew the bulge was narcotics. (Tr. 11.) The officers placed Allen in handcuffs and pulled his pants away from his body at which point a bag of crack cocaine fell out of his pant leg. (Tr. 12.) Officer Beavers then advised Allen of his *Miranda* rights. (Tr. 12-13.) The drugs weighed approximately twenty-four grams and a field test revealed a positive result (Tr. 13, 15.) The officers also recovered $820.00 in cash from his person which a canine later alerted to as having an odor

[1] "An FIC is a notation made by a police officer and placed in their computer system, which indicates a prior 'run in' with the police, including being stopped by an officer in a high drug area, being discovered with a weapon, or being arrested." *State v. Groves*, 156 Ohio App.3d 205, 2004-Ohio-662, 805 N.E.2d 146, ¶3, fn.1.

of narcotics. (Tr. 14.)

{¶ 5} When Officer Beavers asked another officer what degree of felony possession of twenty-four grams of crack cocaine constituted, Allen volunteered that the cutoff amount for a second-degree felony was twenty-five grams. (Tr. 15.) Allen was arrested and later indicted for possession of between ten and twenty-five grams of crack cocaine in violation of R.C. 2925.11(A)(C)(4)(d), a second-degree felony. The driver was cited for failing to properly display the temporary tag and for not wearing a seatbelt.

{¶ 6} Allen pleaded not guilty and the case proceeded to discovery and other pre-trial matters. On May 5, 2009, Allen filed a motion to suppress the drugs discovered on his person and the statements he made during the arrest. Allen argued that the police lacked reasonable suspicion or probable cause to detain and arrest him and that the subsequent search of his person was in violation of his Fourth Amendment right against unreasonable searches and seizures. The trial court held a hearing on the motion on June 22, 2009, and heard testimony from Officer Beavers. On July 13, 2009, the court overruled the motion reasoning the search was justified based on three factors: (1) the high crime area; (2) Allen's body movements; and (3) the FIC tying Allen to guns and drugs.

{¶ 7} On October 7, 2009, Allen withdrew his previous plea of not guilty and pleaded no contest as charged. The trial court sentenced Allen to a mandatory three-year term of imprisonment, a mandatory three-year term of post-release control, six-months driver's license suspension, and a fine of $820.00. This appeal followed.

{¶ 8} Allen raises two assignments of error. Allen's first assignment of error states:

{¶ 9} "THE TRIAL JUDGE ERRED BY OVERRULING DEFENDANT/APPELLANT'S MOTION TO SUPPRESS."

{¶ 10} The standard of review in an appeal of a suppression issue is two-fold. *State v. Lloyd* (1998), 126 Ohio App.3d 95, 100-101, 709 N.E.2d 913. Since the trial court is in the best position to evaluate witness credibility, an appellate court must uphold the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Winand* (1996), 116 Ohio App.3d 286, 288, 688 N.E.2d 9, citing *Tallmadge v. McCoy* (1994), 96 Ohio App.3d 604, 608, 645 N.E.2d 802. However, once an appellate court has accepted those facts as true, the court must independently determine as a matter of law whether the trial court met the applicable legal standard. *State v. Clayton* (1993), 85 Ohio App.3d 623, 627, 620 N.E.2d 906. This determination is a question of law of which an appellate court cannot give deference to the trial court's conclusion. *Lloyd*, supra.

{¶ 11} "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. A traffic stop by a law-enforcement officer must comply with the Fourth Amendment's reasonableness requirement. *Whren v. United States* (1996), 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89. A police officer may stop and detain a motorist when he observes a violation of the law, including any traffic offense, and no independent reasonable and articulable suspicion of other criminal activity is required under *Terry*. E.g., *State v. Stewart,*

Montgomery App. No. 19961, 2004-Ohio-1319, 2004 WL 541162, ¶13; *Dayton v. Erickson* (1996), 76 Ohio St.3d 3, 665 N.E.2d 1091." *State v. Lawson* 180 Ohio App.3d 516, 2009-Ohio-62, 906 N.E.2d 443, ¶18 (2d Dist.)

{¶ 12} First, Allen claims that the officers had no basis to continue the stop once they observed the temporary license tag lying on the rear deck. Allen relies heavily on *State v. Chatton* (1984), 11 Ohio St.3d 59, 63, 11 OBR 250, 463 N.E.2d 1237, where the Ohio Supreme Court held that "where a police officer stops a motor vehicle which displays neither front nor rear license plates, but upon approaching the stopped vehicle observes a temporary tag which is visible through the rear windshield, the driver of the vehicle may not be detained further to determine the validity of his driver' s license absent some specific and articulable facts that the detention was reasonable."

{¶ 13} Allen's reliance on *Chatton* is misguided. At the time when *Chatton* was decided, the statute that governed the display of license plates did not address temporary tags and the statute that did address temporary tags did not require that they be displayed in any particular fashion or that they be visibly displayed at all. *Chatton*, 11 Ohio St.3d at 60, 11 OBR 250, 463 N.E.2d 1237. Subsequent to *Chatton*, the statute that governs the display of license plates was amended to require operators of vehicles for which a temporary license tag has been issued to "display the temporary license placard in plain view from the rear of the vehicle either in the rear window or on an external rear surface of the motor vehicle." R.C. 4503.21.

{¶ 14} This court has twice observed that this amendment supersedes the

Ohio Supreme Court's holding in *Chatton*. *State v. Rose* (June 14, 1993), Clark App. No. 2960; *State v. Phillips*, 155 Ohio App.3d 149, 2003-Ohio-5742, 799 N.E.2d 653. Indeed, in *Phillips* this court observed that the amendment "would appear to exclude the circumstance in *Chatton,* because a tag lying on the rear deck at the rear window is ordinarily not positioned 'in the rear window' of a motor vehicle such that it is visible 'from the rear of the vehicle.' Some closer inspection is required. " *Phillips* at ¶18.

{¶ 15} Allen does acknowledge the amendment to R.C. 4503.21, but nonetheless argues that in this case the temporary tag was displayed in such a way that it complied with the statute's requirements. Allen argues that R.C. 4503.21 does not require that the tag be visible from "behind" the vehicle or that it be placed "on" or "upon" the rear window or that be "attached," "affixed," or "propped up in" the rear window. Allen argues that once the officers observed the tag in plain view when they reached the car, any justification for the stop dissipated and the driver and Allen should have been sent on their way.

{¶ 16} Again, this district's case law does not support his position that the temporary tag was displayed in compliance with the statutes. Like in *Phillips*, the temporary license tag in this case was lying on the rear deck at the rear window. As this court has observed, such placement "is ordinarily not positioned 'in the rear window' of a motor vehicle such that it is visible 'from the rear of the vehicle.' Some closer inspection is required." *Phillips* at ¶18. So too in *State v. Brown* (Jan. 9, 1991), Clark App. No. 2817, where the officers did not see the temporary tag until they reached the side of the vehicle and observed the tag lying flat on the rear

deck beneath the rear window. There, this court explained:

{¶ 17} "If the officers did not see the placard until they reached the side of the car, and if the placard was lying flat on the rear deck, it is hard to imagine how it could be in plain view from the rear of the vehicle. The purpose of the statute is to require the license placard to be visible from the rear of the car." Id.

{¶ 18} In this case, the officers did not observe the temporary tag until they approached the car where they observed the tag lying flat on the rear deck below the rear window. Consequently, the temporary tag was not in plain view from the rear of the vehicle making the driver of the car in violation of R.C. 4503.21(A) and justifying a traffic stop of the vehicle.

{¶ 19} Next, Allen argues that the officers were not justified in continuing to detain him for the seatbelt violation because there was no evidence that he was not wearing his seatbelt while the car was being operated. In response, the state argues that there was sufficient evidence to justify probable cause that Allen was not wearing his seat belt. The state also argues that Officer Beavers was separately justified in detaining Allen solely by virtue of the traffic stop of the driver.

{¶ 20} R.C. 4513.263 governs the requirement for seat belt use and provides:

{¶ 21} "(B) No person shall do any of the following:

{¶ 22} "* * *

{¶ 23} "(3) Occupy, as a passenger, a seating position on the front seat of an automobile being operated on any street or highway unless that person is wearing all of the available elements of a properly adjusted occupant restraining device[.]"

{¶ 24} As Allen points out, to sustain a conviction for failure to wear a seat belt there must be sufficient evidence that the defendant was not wearing the seat belt while the vehicle was being operated. Citing *Village of Newburgh Heights v. Halasch* (1999), 133 Ohio App.3d 640, 647, 729 N.E.2d 464. In *Halasch*, the officer testified that the defendant was not wearing his seat belt when he approached the defendant's vehicle. At the time of the officer's approach to the defendant's vehicle the testimony demonstrated that the car was pulled to the side of the road and was stopped. No testimony was presented to show that the defendant was seen driving his vehicle without the proper occupant restraint in place. Consequently, the appellate court held that there was insufficient evidence to sustain the defendant's conviction for failure to wear his seat belt.

{¶ 25} *Halasch* can be distinguished from the present case on two grounds. First, there is a difference in the quantum of proof necessary to sustain a conviction and that which constitute probable cause for an arrest. Second, in this case, there was more evidence presented than in *Halasch*. In this case, Officer Beavers testified that as the vehicle was being pulled over, he observed Allen "moving in his seat back and forth and leaning forward as if he was retrieving or concealing something in-between his legs." (Tr. 6.) That, coupled with Officer Beavers' observation that Allen was not wearing his seat belt as he approached the vehicle, was enough evidence to constitute probable cause that Allen had failed to wear his seat belt in violation of R.C. 4513.263(B)(3).

{¶ 26} Additionally, as the state aptly points out, this court has observed that "so long as a legitimate traffic stop is not extended in duration beyond the time

reasonably necessary to effect its purpose, a request for identification from the passengers, followed by a computer check * * * does not constitute an unreasonable search and seizure." *State v. Morgan* (Jan. 18, 2002), Montgomery App. No. 18985.

{¶ 27} Lastly, Allen argues that Officer Beavers was not justified in patting him down. In response, the state argues that a patdown search was justified based on Allen's presence in a high crime area, his continued suspicious movements, and the information that he had previously been involved with guns and drugs.

{¶ 28} For a search or seizure to be reasonable under the Fourth Amendment, it generally must be based upon probable cause and executed pursuant to a warrant. *Katz v. United States* (1967), 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576. But, the law does allow for reasonable police searches and seizures in certain circumstances such as the investigatory stop. A police officer may make a brief, warrantless, investigatory stop without probable cause when the officer has a reasonable suspicion that the individual is or has been involved in criminal activity. *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. Reasonable suspicion means that the investigating officer must be able to point to specific, articulable facts that, when coupled with any rational inferences that may be drawn from those facts, warrant the investigation. Id. Moreover, during such an encounter, an officer is authorized to perform a limited patdown search for weapons as a safety precaution if there is a reasonable suspicion that the person stopped may be armed and dangerous. Id. Also, "a police officer conducting a pat-down

frisk for weapons is permitted to retrieve any contraband that he feels during the course of the frisk, so long as its nature as contraband is immediately apparent through the officer's sense of touch." *State v. Lander* (Jan. 21, 2000), Montgomery App. No. 17898, citing *Minnesota v. Dickerson* (1993), 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334.

{¶ 29} The reasonableness of a *Terry* stop is based on the totality of the circumstances. *State v. Andrews* (1991), 57 Ohio St.3d 86, 87, 565 N.E.2d 1271. Additionally, these circumstances are to be viewed through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold. Id. at 87-88, 565 N.E.2d 1271.

{¶ 30} In this case, Officer Beavers had a reasonable suspicion to conduct a patdown search of Allen for weapons. Officer Beavers testified that the area where Allen was stopped is a high crime area known for guns, drugs, and violent activity. (Tr. 6.) "'The reputation of an area for criminal activity is an articulable fact upon which a police officer may legitimately rely in determining whether an investigative stop is warranted. *United States v. Magda* (C.A.2, 1976), 547 F.2d 756, 758, certiorari denied (1977), 434 U.S. 878, 98 S.Ct. 230, 54 L.Ed.2d 157; *United States v. Brignoni-Ponce* (1975), 422 U.S. 873, 884-885, 95 S.Ct. 2574, 2581-2582, 45 L.Ed.2d 607; *United States v. Hall* (C.A.D.C.1976), 525 F.2d 857, 859. Cf. *United States v. White* (C.A.D.C.1981), 655 F.2d 1302, 1304: 'Past incidents of numerous law violations of a particular character definitely constitute a fact that officers may consider in the totality of circumstances they rely upon in arriving at a conclusion that they have probable cause to make an arrest.' '* * *

[T]he "high-crime" character of an area is a relevant factor, in determining probable cause.' *Id.* See, also, *United States v. Thomas* (C.A.D.C.1976), 551 F.2d 347, 348; *United States v. Brown* (C.A.D.C.1972), 463 F.2d 949, 950; and *United States v. Davis* (C.A.D.C.1972), 458 F.2d 819." *State v. Bobo* (1988), 37 Ohio St.3d 177, 179, 524 N.E.2d 489.

{¶ 31} Also, Officer Beavers observed Allen making "furtive movements" as he approached the passenger side of the vehicle. He observed that Allen was "very fidgety" and that he was "moving in his seat back and forth and leaning forward as if he was retrieving or concealing something in-between his legs." (Tr. 5-6.) The officers observed similar movements on the part of Allen when they returned to the patrol car to run his and the driver's information through the computer. (Tr. 7-8.) A furtive gesture may be defined as a situation where "police see a person in possession of a highly suspicious object or some object which is not identifiable but which because of other circumstances is reasonably suspected to be contraband and then observe that person make an apparent attempt to conceal that object from police view[.] * * *" 2 LaFave, Search and Seizure (1987) 58, Section 3.6(d) (footnotes omitted). Regarding furtive movements, the Ohio Supreme Court has noted that they alone are not sufficient to justify the search of an automobile without a warrant. *State v. Kessler* (1978), 53 Ohio St.2d 204, 208, 373 N.E.2d 1252. However, they are "factors" which may contribute to an officer's reasonable suspicion that a suspect is armed or engaged in criminal activity. *Bobo,* supra. This court too has relied on similar behavior to uphold patdowns in the past. See *State v. Lawless*, Montgomery App. No. 23126, 2009-Ohio-5405, ¶21

(Defendant's "furtive and quick movements, leaning down and reaching under the seat inside his vehicle, created a reasonable suspicion that he could be armed and pose a danger to" the officers.); *State v. Harden*, Montgomery App. No. 19880, 2004-Ohio-664, ¶13 ("[T]he officers were justified in conducting a pat-down search for weapons for their own safety because of [the defendant's] movements of raising his body off the seat and reaching toward the floorboard as they approached his car.")

{¶ 32} In sum, based on the totality of the circumstances, there was a reasonable suspicion to support a patdown search of Allen pursuant to *Terry*. Those circumstances include that it was a high crime area, Allen's furtive movements, and information of Allen's past involvement with gun and drugs. Thus, the trial court properly overruled Thomas's motion to suppress.

{¶ 33} Accordingly, Allen's first assignment of error is without merit.

{¶ 34} Allen's second assignment of error states:

{¶ 35} "THE TRIAL JUDGE ERRED BY ORDERING DEFENDANT/APPELLANT TO PAY A MANDATORY FINE."

{¶ 36} In this case, the trial court ordered Allen to pay a mandatory fine of $820.00. Allen argues that the trial court could only find him indigent and order no fine *or* impose a mandatory fine of at least $7,500.00. He argues that the court was not authorized to order to him to pay a fine of $820.00 *after* finding him indigent. The state argues that Allen agreed to pay a $820.00 fine and, therefore, cannot raise this as error on appeal.

{¶ 37} The trial court conducted Allen's sentencing hearing on November 4,

2009. At that hearing, the court indicated that it was imposing a fine of $7,500.00. In response, Allen's trial counsel stated, "Your Honor, and I had been -- and I don't think it's been filed yet, but as long as I file an indigency before the termination entry, could we have fines waived at that point because he has no income, no assets." (Sentencing Tr. 3-4.) The court responded, "If I see the motion, yes." (Sentencing Tr. 4.)

{¶ 38} Later that day, and before the judgment entry of sentence was filed, Allen filed a motion for determination of indigency. (Docket 27.) That same day, shortly after Allen filed his motion for determination of indigency, the trial court filed an entry stating:

{¶ 39} "Upon application of the Defendant, and pursuant to *State v. Gipson*, 80 Ohio St.3d 626, 1998-Ohio-659, 687 N.E.2d 750, the Defendant's Motion for Determination of Indigency is WELL TAKEN. There shall be no mandatory fine or court costs ordered in this matter, except for the $820.00 that was taken form [sic] the Defendant's person upon his arrest." (Docket 28.)

{¶ 40} Because this entry was prepared by Allen's trial counsel, the state argues that he effectively agreed to pay an $820.00 fine.

{¶ 41} Allen was convicted of possession of between ten and twenty-five grams of crack cocaine in violation of R.C. 2925.11(A)(C)(4)(d), a second-degree felony. Conventional or discretionary fines for felonies are provided for in R.C. 2929.18(A)(3):

{¶ 42} "(A) Except as otherwise provided in this division * * * the court imposing a sentence upon an offender for a felony may sentence the offender to

any financial sanction or combination of financial sanctions authorized under this section * * *. Financial sanctions that may be imposed pursuant to this section include, but are not limited to, the following:

{¶ 43} "(3) *Except as provided in division (B)(1)*, (3), or (4) *of this section*, a fine payable by the offender to the state, to a political subdivision when appropriate for a felony, or as described in division (B)(2) of this section to one or more law enforcement agencies, in the following amount:

{¶ 44} "* * *

{¶ 45} "(b) For a felony of the second degree, not more than fifteen thousand dollars[.]" (Emphasis added.)

{¶ 46} As the emphasized language indicates, conventional fines are subject to the exception set forth in R.C. 2929.18(B)(1). R.C. 2929.18(B)(1) specifically governs the imposition of fines for first, second, and third degree drug felonies:

{¶ 47} "[T]he sentencing court shall impose upon the offender a mandatory fine of at least one-half of, but not more than, the maximum statutory fine amount authorized for the level of the offense pursuant to division (A)(3) of this section. If an offender alleges in an affidavit filed with the court prior to sentencing that the offender is indigent and unable to pay the mandatory fine and if the court determines the offender is an indigent person and is unable to pay the mandatory fine described in this division, the court shall not impose the mandatory fine upon the offender."

{¶ 48} Therefore, the decision to impose a fine for a drug felony is not a discretionary one, but a mandatory requirement. In order to avoid the mandatory

fine, the offender must (1) allege in an affidavit filed with the court prior to sentencing that the offender is indigent and unable to pay the mandatory fine, and (2) the court must determine that the offender is, in fact, indigent.

{¶ 49} Because Allen was convicted of a second-degree felony, the maximum statutory fine amount authorized for the level of the offense pursuant to division (A)(3) of that section is $15,000.00. Therefore, absent a finding of indigency, the trial court was required to impose a fine upon Allen of at least $7,500.00.

{¶ 50} In this instance, the trial court made a finding of indigency. The court did not impose a mandatory fine, but assessed Allen the $820.00 in drug money recovered from his person during the arrest. Due to the wording of the entry as prepared by Allen's counsel, it is unclear exactly what the $820.00 constitutes – a fine or a forfeiture.

{¶ 51} Regardless of how that $820.00 is characterized – as a fine or as a forfeiture – Allen agreed to pay it as evidenced by his counsel preparing and submitting the entry to the trial court for its approval. Assuming that it could be viewed as error, it was invited error. Invited error is a well-settled principle under which "[a] party will not be permitted to take advantage of an error which he himself invited or induced." *State v. Kovac*, 150 Ohio App.3d 676, 2002-Ohio-6784, 782 N.E.2d 1185, ¶45 (2d Dist.) quoting *State v. Bey* (1999), 85 Ohio St.3d 487, 493, 709 N.E.2d 484. See, also, *State v. Jones* (1996), 114 Ohio App.3d 306, 322, 683 N.E.2d 87 ("A party who invites an error may not demand from the appellate court comfort from its consequences"). As the Ohio Supreme Court explained:

{¶ 52} "The law imposes upon every litigant the duty of vigilance in the trial of a case, and even where the trial court commits an error to his prejudice, he is required then and there to challenge the attention of the court to that error, by excepting thereto, and upon failure of the court to correct the same to cause his exceptions to be noted. It follows, therefore, that, for much graver reasons, a litigant cannot be permitted, either intentionally or unintentionally, to induce or mislead a court into the commission of an error and then procure a reversal of the judgment for an error for which he was actively responsible." *Lester v. Leuck* (1943), 142 Ohio St. 91, 92-93, 50 N.E.2d 145, quoting *State v. Kollar* (1915), 142 Ohio St. 89, 91, 49 N.E.2d 952.

{¶ 53} Accordingly, Allen's second assignment of error is without merit.

{¶ 54} The judgment of the trial court is hereby affirmed.

. . . . . .

Fain, J., concurs.

Froelich, J., concurs.

Copies mailed to:

Kirsten A. Brandt
Robert Alan Brenner
Hon. Barbara P. Gorman