[Cite as *State v. Lovins*, 2010-Ohio-3916.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 23530
Plaintiff-Appellee	:	
	:	Trial Court Case No. 08-CR-4808
v.	:	
	:	(Criminal Appeal from Common
KENNETH R. LOVINS	:	Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 20th day of August, 2010.

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VUKOVICH, J.

{¶ 1} Defendant-appellant Kenneth R. Lovins appeals the Montgomery County Common Pleas Court's decision to deny his motion to suppress. In this case we are asked to determine whether the officer's articulated reasons that Lovins' behavior was suspicious, it was cold outside, the officer was alone in a high crime area , and the officer believed that Lovins might be armed, justified patting Lovins

down prior to placing him in a cruiser for purposes of verifying his identity and issuing him a citation for jaywalking, a non-arrestable offense. If we find that the frisk was reasonable, we are then asked to decide whether the seizure of the capsule of heroin during the frisk was permissible when it clearly was not a weapon. For the reasons expressed below, we find no merit with the issues presented to us. Thus, the trial court's decision to deny Lovins' motion to suppress is hereby affirmed.

STATEMENT OF FACTS AND CASE

{¶ 2} On December 15, 2008 at approximately 5:30 p.m., Officer Osterday observed Lovins jaywalk in the middle of the intersection of North Antioch Street and West Second Street in Dayton, Ohio, which resulted in traffic almost hitting Lovins. (Tr. 4, 6). According to the officer, Lovins exited the passenger side of a green Pontiac, and jogged into the middle of North Antioch Street with his hands in his front pants pockets. (Tr. 5-7). When Lovins saw his cruiser, Lovins turned the other direction and ran to the sidewalk on West Second Street and began walking eastbound. (Tr. 5-7).

{¶ 3} A Dayton city ordinance prohibits jaywalking and makes it a minor misdemeanor. (Tr. 23-24). Due to what Officer Osterday observed, he stopped Lovins to issue him a citation for jaywalking. (Tr. 9). The officer asked Lovins for identification, asked him to remove his hands from his pockets, and asked him if he had any weapons on his person. (Tr. 8-9). Lovins did not remove his hands from his front pants pockets until after the officer asked him three times to do so. (Tr. 8). Lovins then provided Officer Osterday with identification from his back pants pocket. (Tr. 8). After

the officer asked Lovins again whether he had any weapons, Lovins answered no. (Tr. 9). The officer did not believe him and patted him down because in order to issue the citation he was going to place Lovins in his cruiser to verify his information. (Tr. 9).

{¶ 4} During the pat-down the officer did not feel any weapons, however, he did feel a capsule. (Tr. 9-10). While he did not know what was in the capsule from the feel of it, he testified that in his experience it was very common for the capsule to contain a narcotic. (Tr. 11). Officer Osterday stated that once the capsule was removed, it was apparent that it contained heroin. (Tr. 12). The field test confirmed the officer's belief. (Tr. 12-13).

{¶ 5} Lovins was then arrested and indicted on one count of possession of heroin in violation of R.C. 2925.11(A). 01/16/09 Indictment. Following the indictment, he pled not guilty and filed a motion to suppress. 02/12/09 Plea; 03/05/09 Motion to Suppress. A hearing was later held on the motion to suppress. 04/16/09 Hearing. After reviewing the parties' post-hearing memoranda in support of their respective positions, the trial court denied the motion to suppress finding that the stop was justified, the pat-down was reasonable, and the seizure of the drugs was permissible. 04/28/09 J.E.

{¶ 6} Following that decision, Lovins pled no contest to the R.C. 2925.11(A) drug possession charge. 05/22/09 J.E. He was sentenced to five years community service and his license was suspended for six months. 06/30/09 J.E.[1] Lovins then

[1]The June 30, 2009 judgment entry states that Lovins pled guilty to the crime. However, the plea entry signed by the trial court indicates that Lovins pled no contest. 05/22/09 J.E.

filed a timely notice of appeal.

ASSIGNMENT OF ERROR

{¶ 7} "THE TRIAL [COURT] ERRED IN OVERRULING KENNETH LOVINS' MOTION TO SUPPRESS THE EVIDENCE."

{¶ 8} Lovins argues that the trial court incorrectly denied his motion to suppress because the search and seizure violated the prohibition against unreasonable searches and seizures in the Fourth Amendment to the United States Constitution. His argument is set forth in two parts. First, he contends that the search was not reasonable. Second, he argues that even if the officer was permitted to frisk him, the officer could not seize the capsule of heroin because clearly by its feel it was not a weapon.

{¶ 9} The respective roles of trial and appellate courts in reviewing motions to suppress are well established. In ruling on a motion to suppress, the trial court "assumes the role of the trier of fact, and, as such, is in the best position to resolve questions of fact and evaluate the credibility of the witnesses." *State v. Retherford* (1994), 93 Ohio App.3d 586, 592. Accordingly, when we review suppression decisions, "we are bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting those facts as true, we must independently determine as a matter of law, without deference to the trial court's conclusion, whether they meet the applicable legal standard." Id.

{¶ 10} The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures. *Terry v. Ohio* (1968), 392 U.S. 1. Searches conducted outside the judicial process, by officers lacking a prior judicial

warrant, are per se unreasonable, subject to a few specifically established exceptions. *Katz v. United States* (1967), 389 U.S. 347. One of those exceptions is the rule regarding investigative stops announced in *Terry*. 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, ¶10, citing *Terry,* supra. A police officer may lawfully stop a vehicle, motorized or otherwise, if he has a reasonable articulable suspicion that the operator has engaged in criminal activity, including a minor traffic violation. See *State v. Buckner,* Montgomery App. No. 21892, 2007-Ohio-4329, ¶8.

{¶ 11} Here, the record clearly reflects that the officer observed Lovins jaywalking in violation of a Dayton City Ordinance and that his reason for stopping him was to issue a citation for that violation. Consequently, based on the above, the officer was permitted to stop Lovins.

{¶ 12} That said, the authority to stop an individual does not necessarily equate to authority to search the individual and place him or her in the back seat of the cruiser to verify the individual's identification. *State v. Roberts*, Montgomery App. No. 23219, 2010-Ohio-300, ¶16, quoting *State v. Stewart,* Montgomery App. No. 19961, 2004-Ohio-1319, ¶16. See, also, *State v. Evans* (1993), 67 Ohio St.3d 405, 409 (stating a *Mimms* order does not automatically bestow upon the police officer the authority to conduct a pat-down search for weapons). Instead, we must consider whether, based on the totality of the circumstances, the officer had a reasonable, objective basis to believe that the motorist is armed and dangerous before patting him

down for weapons in anticipation of placing him in the cruiser. *Evans*, supra, citing *State v. Andrews* (1991), 57 Ohio St.3d 86. See, also, *State v. Dozier*, Montgomery App. No. 23841, 2010-Ohio-2918, ¶8.

{¶ 13} Here, Officer Osterday testified that Lovins' activity was suspicious. (Tr. 7). When Lovins exited the green vehicle he exited it at a jog . (Tr. 5, 7). Instead of walking on the sidewalk, he ran down the middle of the street. (Tr. 5, 7). Then, when he saw the officer, he immediately changed directions and walked on the sidewalk. (Tr. 5, 7). While he was doing all of the above, Lovins' hands remained pushed in his front pants pockets. (Tr. 5, 7). The officer had to ask Lovins three times to remove his hands from his pockets before Lovins complied. (Tr. 8). The officer additionally testified that Lovins seemed nervous and that he believed Lovins was armed. (Tr. 7, 9). Officer Osterday specifically testified:

{¶ 14} "A. He stated - first he did not answer me and I had to ask him again. He stated, no, he did not have any weapons.

{¶ 15} "Q. Okay.

{¶ 16} "A. And I asked if it was okay for me to check.

{¶ 17} "Q. Okay. Did you not believe him?

{¶ 18} "A. I didn't believe him. There was a reason why his hands were in his pockets and he was hesitant to take them out." (Tr. 9).

{¶ 19} The officer also indicated that he was a one man unit, and this stop was performed in a high crime area during the winter at dusk when it was chilly. (Tr. 4, 19, 34).

{¶ 20} The United States Supreme Court has stated:

{¶ 21} "'When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others,' he may conduct a limited protective search for concealed weapons. * * * 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, and thus the frisk for weapons might be equally necessary and reasonable, whether or not carrying a concealed weapon violated any applicable state law. So long as the officer is entitled to make a forcible stop, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose." *State v. Dickerson*, 179 Ohio App.3d 754, 2008-Ohio-6544, ¶19, quoting *Adams v. Williams* (1972), 407 U.S. 143, 145-146, quoting *Terry,* 392 U.S. at 24, 30.

{¶ 22} The officer's testimony indicates that the pat-down was reasonable. Considering Lovins' conduct that the officer observed, the officer's conclusion that the offender's conduct was suspicious was justified. Furthermore, while we held that mere presence in a high crime area alone is not sufficient to justify a frisk, in this instance, considering the offender's conduct and the fact that the officer was alone, the area that the stop occurred in is a valid circumstance to be considered in determining and finding that the pat-down was reasonable. *State v. Roberts*, Montgomery App. No. 23219, 2010-Ohio-300, at ¶18-19, citing *State v. Carter* (1994), 69 Ohio St.3d 57, 65 ("Although the investigative stop took place in a high crime area, that factor alone is not sufficient to justify an investigative stop"). Likewise, the stop occurred during the winter. We have previously held that inclement weather may reasonably justify the officer to pat-down and place the offender in the cruiser when the offender of a

non-arrestable offense (jaywalking) cannot produce identification. *State v. Edwards* (Nov. 12, 1999), Montgomery App. No. 17735 (explaining that offender was stopped in winter when there was snow, ice and cold). Consequently, taking into account all the circumstances and our prior case law, the pat-down was reasonable and did not violate the Fourth Amendment's prohibition against unreasonable searches.

{¶ 23} The next issue is whether the officer was permitted to seize the capsule found during the pat-down when it was obvious that it was not a weapon.

{¶ 24} During the suppression hearing, the officer testified that during the pat-down he felt an object in Lovins' front pants pocket that he immediately knew to be a capsule. (Tr. 10). He then explained that he did not know what was in the capsule from the pat-down, but that in his experience it was very common for the capsule to contain a narcotic. (Tr. 10-11). He even added that it had crossed his mind that it was possibly heroin in the capsule. (Tr. 10). Prior to removing the capsule from Lovins' person, Officer Osterday asked Lovins if he could take the object out of Lovins' pocket. (Tr. 12). Lovins indicated that he could. (Tr. 12). Upon retrieval, the officer looked at the capsule and it was apparent to him that the capsule contained heroin. (Tr. 12). The field test confirmed this. (Tr. 13).

{¶ 25} We have recently explained:

{¶ 26} "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; *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.

{¶ 27} "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.*" *State v. Olden*, Montgomery App. No. 23137, 2010-Ohio-215, ¶28-29.

{¶ 28} Therefore, although it was apparent that the capsule was not a weapon, it was immediately apparent to the officer that it was contraband. Considering the totality of the circumstances, there was sufficient probable cause to believe that the capsule was specific to criminal activity and the officer did not violate the Fourth Amendment in its seizure.

{¶ 29} Furthermore, we note that the testimony also indicates that Lovins consented to having the officer remove the capsule from his pocket. The state bears the burden to prove that consent was freely and voluntarily given. *State v. Sears*, Montgomery App. No. 20849, 2005-Ohio-3880, ¶34, citing *Bumper v. North Carolina* (1968), 391 U.S. 543. Here, the state does not assert consent, however, the record supports such finding.

{¶ 30} We have previously explained the standard for determining whether

consent is voluntary:

{¶ 31} "Whether consent is in fact voluntary or the product of duress or coercion, either express or implied, is a question of fact to be determined from the totality of the facts and circumstances. *Schneckloth v. Bustamonte* (1973), 412 U.S. 218. Knowledge of the right to refuse consent is not a prerequisite to establishing voluntary consent, but is a relevant factor to be taken into account. Consent to a search that is obtained by threats or force, or granted only in submission to a claim of lawful authority, is invalid. *Id.* Such 'lawful authority' is an express or implied false claim by police that they can immediately proceed to make the search in any event. *Bumper v. North Carolina*." *Sears*, supra at ¶37.

{¶ 32} In *Sears*, we indicated that the officer asking the offender if he could remove the contraband from the offender's pocket was not coercive or threatening and that nothing in the record indicated that consent was given in response to a claim by the officer that the officer had the lawful authority to remove the contraband even if consent was not given. Id. at ¶39. The same reasoning could equally apply in this case.

{¶ 33} Consequently, the officer's seizure of the capsule was lawful not only because the record reveals that given the officer's experience there was sufficient probable cause to believe that the capsule contained an illegal narcotic, but also because Lovins consented to the removal of the capsule from his person. There is no Fourth Amendment violation in seizing the capsule.

{¶ 34} In conclusion, this assignment of error lacks merit. The trial court correctly denied the motion to suppress. The officer was warranted in frisking Lovins and the seizure of the capsule was permitted given the facts in the record. The trial

court's decision is hereby affirmed.

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DONOVAN, P.J., and FAIN, J., concur.

(Hon. Joseph J. Vukovich, Seventh District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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