**[Cite as *State v. Victoria*, 2010-Ohio-4536.]**

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

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| STATE OF OHIO | : | |
| Plaintiff-Appellee | : | C.A. CASE NO. 2009 CA 95 |
| v. | : | T.C. NO. 09CR325 |
| WILLIAM VICTORIA | : | (Criminal appeal from Common Pleas Court) |
| Defendant-Appellant | : | |
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**O P I N I O N**

Rendered on the 24th day of September, 2010.

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FROELICH, J.

**{¶ 1}** After the trial court overruled his motion to suppress evidence, William Victoria pled no contest in the Clark County Court of Common Pleas to one count of possession of crack cocaine in an amount equal to or greater than one gram but less than five grams. The court found him guilty, sentenced him to eighteen months in prison, and suspended his driver's

license for one year.

**{¶ 2}** Victoria appeals from his conviction, claiming that the trial court erred in denying his motion to suppress. For the following reasons, the trial court's judgment will be affirmed.

I

**{¶ 3}** Springfield Police Officers Anna Fredendall and Greg Garman testified at the suppression hearing. Their testimony established the following facts:

**{¶ 4}** On March 12, 2009, Officers Fredendall and Garman were dispatched to the area of East Pleasant and Central Alley on a report that "a rolling domestic" was occurring between William Victoria and Angela Messer in a white Ford Explorer. The dispatcher indicated that Messer, who was a passenger in the Explorer, had called the police. When the officers arrived, they observed Victoria walking northbound on Central Alley, away from a white Ford Explorer and toward the Pleasant Corners Bar. A woman, who was later identified as Messer, was in or near the vehicle.

**{¶ 5}** Officers Fredendall and Garman approached Victoria, asked him to stop, and starting questioning him about what was going on and why Messer had called the police. Victoria did not "really answer any questions" and was "pretty uncooperative." Officer Garman testified that Victoria "was very short, didn't want to talk to us. He said he didn't do nothing wrong. He kept trying to walk away from us." Officer Garman testified that Victoria did not consent to the questioning, but that he was not free to leave while he was being questioned by the officers; although the record does not detail how the officers prevented Victoria from walking away from them, it is apparent that Victoria was prevented, either by the officers' words

or conduct, from leaving.

**{¶ 6}** As the officers attempted to speak with Victoria, Victoria appeared to be intoxicated; his eyes were glassy and bloodshot, his speech was slurred, and he smelled of an alcoholic beverage.

**{¶ 7}** Soon after Victoria was stopped, three additional officers arrived at the scene. Victoria remained uncooperative, and he was "tensing up like he wanted to fight, but he wasn't fighting." In addition, Victoria repeatedly put his hands into his pockets, despite being told several times by the officers to keep his hands out of his pockets. Garman and Fredendall both testified that an individual whose hands are in his pockets poses a threat to the officers' safety.

**{¶ 8}** After Victoria put his hands back into his pockets for the fourth time, Garman placed him in handcuffs and patted him down with an open hand to search for weapons. During the patdown, Garman noticed a "rock-style substance" in one of Victoria's pockets. The officer "most likely believed it to be crack cocaine." He reached into the pocket and retrieved the crack cocaine. Garman also retrieved pills from Victoria's pocket.

**{¶ 9}** After the other officers arrived and Victoria was "under control," Officer Fredendall began to talk to Messer, who was standing by the car. Officer Garman testified that they determined, after interviewing Messer, that she had struck Victoria several times. Victoria was not cited for domestic violence.

**{¶ 10}** Victoria was subsequently charged with one count of possession of crack cocaine, in violation of R.C. 2925.11(A). On June 9, 2009, Victoria moved to suppress all evidence seized as a result of the officers' search. He claimed that the officers had lacked a reasonable and articulable suspicion of criminal activity to justify his detention. He argued that

the officers' actions were based on an anonymous tip, which was unreliable. Victoria further claimed that the subsequent patdown was unreasonable.

**{¶ 11}** After a hearing, the trial court overruled the motion to suppress. The court reasoned:

**{¶ 12}** "Officers received a tip that a domestic dispute was occurring between two individuals in a vehicle. Whether that tip was from an anonymous source or from the alleged victim at the scene,[1] the totality of the circumstances demonstrated the tipster's 'veracity, reliability, and basis of knowledge.'

**{¶ 13}** "The defendant was upset, loud, and uncooperative. He appeared to be intoxicated due to the odor of alcohol and his glassy eyes. He kept placing his hands in his pockets despite orders from the officers to remove them. He was tensed up as if he wanted to fight.

**{¶ 14}** "Based on these facts, officers had reasonable suspicion to believe that a domestic dispute was in progress or had occurred just prior to their arrival. That reasonable suspicion justified the investigative stop and the pat down for officer safety.

**{¶ 15}** "During that pat down, Officer Garman felt what appeared to him to be a rock-like substance. He removed the substance lawfully under the plain feel doctrine."

**{¶ 16}** Victoria subsequently pled no contest to the possession of crack cocaine charge. He was sentenced accordingly.

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[1]In its decision, the trial court stated that "[t]here is some question as to whether the call was made by the alleged victim or by some anonymous tipster." Both officers testified, however, that dispatch informed them that the caller was Ms. Messer, the passenger in the vehicle. We see no indication that the tip was made by an anonymous person.

II

**{¶ 17}** Victoria's sole assignment of error states:

**{¶ 18}** "ALL CONSIDERATIONS RELEVANT TO FOURTH AMENDMENT ANALYSIS DICTATE THE CONCLUSION THAT THE STOP AND FRISK IN THIS CASE VIOLATED DEFENDANT[']S CONSTITUTIONAL RIGHT TO BE SECURE AGAINST UNREASONABLE SEARCH AND SEIZURES."

**{¶ 19}** Victoria asserts that he was subject to an unreasonable search and seizure, because the officers lacked a reasonable suspicion that he was involved in criminal activity or was armed or dangerous. Victoria argues that the officers acted in response to an unreliable and uncorroborated tip, which did not justify his detention.

**{¶ 20}** In addressing a motion to suppress, the trial court assumes the role of the trier of fact. *State v. Morgan*, Montgomery App. No. 18985, 2002-Ohio-268, citing *State v. Curry* (1994), 95 Ohio App.3d 93, 96. The court must determine the credibility of the witnesses and weigh the evidence presented at the hearing. Id. In reviewing the trial court's ruling, an appellate court must accept the findings of fact made by the trial court if they are supported by competent, credible evidence. Id. However, "the reviewing court must independently determine, as a matter of law, whether the facts meet the appropriate legal standard." Id.

**{¶ 21}** 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, ¶10, citing *Terry*, supra. An individual is subject to an investigatory detention when, in view of all the circumstances surrounding the incident, by means of physical force or show of authority, a reasonable person would have believed that he was not free to leave or was compelled to respond to questions. *United States v. Mendenhall* (1980), 446 U.S. 544, 553, 100 S.Ct. 1870, 64 L.Ed.2d 497; *Terry*, 392 U.S. at 16, 19.

**{¶ 22}** "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 of criminal activity 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, ¶14, quoting *State v. Andrews* (1991), 57 Ohio St.3d 86, 87-88.

**{¶ 23}** When an investigative stop is made in sole reliance upon a police dispatch, the State must demonstrate at the suppression hearing that the facts precipitating the dispatch justified a reasonable suspicion of criminal activity. Id. If the dispatch is based solely on an informant's tip, the determination of reasonable suspicion will be limited to an examination of the weight and reliability due that tip. *Maumee v. Weisner* (1999), 87 Ohio St.3d 295. The appropriate analysis is whether the tip itself has sufficient indicia of reliability to justify the investigative stop. Id. Factors considered highly relevant are the informant's veracity, reliability, and basis of knowledge. Id.; *State v. Reed*, Montgomery App. No. 23357, 2010-Ohio-299, ¶43.

**{¶ 24}** In assessing the reliability of a tip, courts have generally recognized three categories of informants: (1) the identified citizen informant, (2) the known informant, i.e., someone from the criminal world who has a history of providing reliable tips, and (3) the anonymous informant. *Weisner*, 87 Ohio St.3d at 300; *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, ¶36. "An anonymous informant is generally regarded as comparatively unreliable, and his tip, therefore, will ordinarily require independent and objective corroboration. Ohio courts have generally accorded the identified citizen informant greater credibility. Id. Information from an ordinary citizen who has personally observed what appears to be criminal conduct carries with it indicia of reliability, and is therefore presumed to be reliable. *State v. Carstensen* (Dec. 18, 1991), Miami App. No. 91-CA-13; *City of Centerville v. Gress* (June 19, 1998), Montgomery App. No. 16899." *Reed* at ¶44.

**{¶ 25}** Victoria asserts that this case is governed by *Florida v. J.L.* (2000), 529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254, in which an anonymous caller reported to the police that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun. Officers went to the bus stop and found three black males, one of whom, J.L., was wearing a plaid shirt. Apart from the tip, the officers had no reason to suspect any of the three of criminal activity. The officers did not see a firearm or observe any unusual movements. The officers approached J.L, frisked him, and seized a gun. *J.L.*, 529 U.S. at 268.

**{¶ 26}** The United States Supreme Court reversed J.L.'s conviction. It held that an anonymous tip that a person is carrying a gun is not, without more, sufficient to justify a police officer's stop and frisk of that person. Id. at 271. The Court concluded

that the anonymous tip lacked the indicia of reliability necessary to justify a stop, noting that the tip must be reliable in its assertion of illegality, not just its tendency to identify a determinate person. Id. at 272. We have followed the reasoning in *J.L.* in numerous cases. See, e.g., *State v. Davis*, Montgomery App. No. 22775, 2009-Ohio-2538; *State v. Riley* (2001), 141 Ohio App.3d 409; *State v. Black*, Montgomery App. No. 19695, 2003-Ohio-6231; *State v. Kemp*, Montgomery App. No. 19099, 2002-Ohio-2059 (all cases holding that an anonymous or otherwise unverified tip giving a description of a person alleged to be involved in criminal activity was an insufficient basis for a search).

**{¶ 27}** Although Officers Garman and Fredendall both testified that their suspicions that Victoria had engaged in criminal activity arose from the details of the dispatch and not from any observations at the scene, the present case is factually distinguishable from *J.L.* *J.L.* concerned a tip from an anonymous caller; nothing was known about the informant. In contrast, Officer Frendendall testified that "[d]ispatch advised that the victim made the call." She stated that she believed "dispatch said that it was the passenger in the car" and she believed "they said it was Angela Messer that was making that call." Officer Garman testified that he believed Victoria had engaged in some type of unlawful conduct based on "[d]ispatch telling us – They were relaying the phone call with Ms. Messer inside the vehicle that they were going at a high rate of speed and a rolling domestic tip."

**{¶ 28}** Although Officers Fredendall and Garman immediately approached Victoria without first speaking with Messer regarding her report, the officers had a reasonable suspicion of criminal activity to justify detaining Victoria. The dispatch was from an identified citizen, Messer, who indicated that she was a passenger in the

vehicle and was the victim of then-occurring domestic abuse. Messer provided the dispatcher with a description of the vehicle, which was a white Ford Explorer. Upon arriving at the location to which they were dispatched, the officers saw a white Ford Explorer; the officers had not seen any other white Ford Explorers on the road at that time. The officers further observed that Victoria was walking away from the Explorer and that a female was at the scene "right by the car."

**{¶ 29}** Because the caller's identity, the basis of her knowledge, and her motivations were known, Messer's report was presumed reliable. The fact that Messer might have been subject to criminal penalties for making a false police report, if her allegations had proven false, supported the reliability of her report. See *Illinois v. Gates*, 462 U.S. 213, 233-34, 103 S.Ct. 2317, 76 L.Ed.2d 527; *State v. Ulmer*, Scioto App. No. 09CA3283, 2010-Ohio-695, ¶29. Moreover, the officers' independent observations served to corroborate, in part, the citizen informant's information. Accordingly, under the totality of the circumstances, the police officers had a reasonable suspicion of criminal activity, which justified an investigatory detention of Victoria.

**{¶ 30}** That said, the "[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, a police officer 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.

**{¶ 31}** 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. However, "[t]he 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. The totality of the circumstances must "be viewed through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold." *State v. Andrews* (1991), 57 Ohio St.3d 86, 87-88, citing *State v. Freeman* (1980), 64 Ohio St.2d 291, 295.

**{¶ 32}** According to Officers Fredendall's and Garman's testimony, Victoria was uncooperative with the officers, his body language suggested that he wanted to fight, he had reportedly committed domestic violence in the vehicle he had just exited, and he refused to remove his hands from his pockets despite repeated requests from Officer Garman. Based on the totality of the circumstances, Officer Garman had a reasonable and articulable belief that Victoria may have been armed and posed a danger to the officers. Accordingly, Officer Garman was entitled to conduct a limited protective search for weapons for his safety.

**{¶ 33}** Our conclusion is not altered by the fact that Victoria was handcuffed when the patdown occurred. Although the handcuffs would have hindered Victoria's

movements, it is possible that Victoria could have accessed a weapon even while handcuffed. Accordingly, the need for the patdown was not eliminated by Officer Garman's use of handcuffs. Rather, given Victoria's demeanor, his lack of cooperation, and his intoxication, Officer Garman reasonably handcuffed Victoria so that he (the officer) could more safely conduct the patdown for weapons. Had Officer Garman failed to discover a weapon or contraband during the patdown, the officers may have removed the handcuffs while they completed their investigation of the domestic violence complaint.

**{¶ 34}** Finally, Victoria has not challenged the trial court's conclusion that Officer Garman's seizure of the crack cocaine was lawful under the "plain feel" doctrine. Even if Victoria had raised such an argument, we would agree with the trial court.

**{¶ 35}** 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.

**{¶ 36}** Here, the trial court's finding was supported by Officer Garman's testimony that he patted down Victoria with an open hand and felt a "rock-style

substance" in one of Victoria's pockets. The officer stated that he had felt such a substance several times before and he believed the substance in Victoria's pocket to be crack cocaine. There was no suggestion that Officer Garman manipulated the object.

**{¶ 37}** Based on the record, the trial court properly concluded that the police lawfully seized the crack cocaine from Victoria. Consequently, the trial court did not err in denying Victoria's motion to suppress evidence.

**{¶ 38}** The assignment of error is overruled.

III

**{¶ 39}** The trial court's judgment will be affirmed.

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FAIN, J. and OSOWIK, J., concur.

(Hon. Thomas J. Osowik, Sixth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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