[Cite as *State v. Breisch*, 2010-Ohio-6113.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23652
v.	:	T.C. NO. 09CR262
MICHAEL A. BREISCH	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 10th day of December, 2010.

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OSOWIK, J. (by assignment)

{¶ 1} This is an appeal from a judgment of the Montgomery County Common Pleas Court, following a no contest plea, in which the trial court found appellant, Michael A. Breisch, guilty of one count of possession of cocaine, in violation of R.C. 2925.11(A), a fifth

degree felony. On appeal, appellant sets forth the following as his sole assignment of error:

{¶ 2} "The trial court committed reversible error in overruling appellant's motion to suppress; the search of appellant's vehicle was not constitutionally permissible in light of the totality of the circumstances."

{¶ 3} On January 24, 2009, at approximately 9 pm, Dayton Police Officer Raymond Dine observed a Dodge Daytona that was being driven down an alley by appellant, which displayed only a rear license plate and had only one working headlight. Dine turned on his flashing lights and siren; however, appellant did not immediately pull the vehicle over. Instead, appellant continued to drive the vehicle while leaning to the right and making movements toward the center console with his right arm. A few minutes later appellant stopped the vehicle, after Dine used his patrol car's public announcement system to verbally instruct appellant to pull over.

{¶ 4} Upon approaching the vehicle, Dine observed that appellant's hands were empty, and he was not wearing a seat belt. Dine ordered appellant to exit the vehicle and produce identification, after which he conducted a pat down search of appellant before placing appellant in his patrol car. At that point, two other Dayton Police Officers, Kyle Thomas and Chris Savage, arrived at the scene and conducted a search of appellant's vehicle. The search yielded a plastic baggie containing a small amount of crack cocaine in the center console of the vehicle. At that point, Dine read appellant his *Miranda* rights and placed appellant under arrest.

{¶ 5} On February 23, 2009, the Montgomery County Grand Jury indicted appellant on one count of possession of crack cocaine, in an amount less than one gram, in violation of

R.C. 2925.11(A). On March 31, 2009, appellant entered a not guilty plea. On June 17, 2009, appellant filed a motion to suppress both statements he made to police at the time of arrest and the crack cocaine that was found in his vehicle. A suppression hearing was held on August 28, 2009, at which testimony was presented by Officers Dine and Thomas.

{¶ 6} Dine testified at the suppression hearing that the alley in which appellant was traveling led to a "known drug house." Dine further testified that his original intent was to stop appellant's vehicle and issue a citation; however, appellant did not immediately stop the vehicle. Dine stated that, while pursuing appellant's vehicle, he observed appellant "leaning towards the center of the vehicle and manipulating something with his right arm towards the center of the vehicle." Dine further stated that appellant indicated he understood his *Miranda* rights and that, after initially denying knowledge of the drugs in his vehicle, appellant admitted that he was on his way to purchase drugs when he was pulled over.

{¶ 7} On cross-examination, Dine testified that the amount of crack cocaine in appellant's vehicle was "embarrassingly small." Dine further testified that he allowed appellant to retrieve his wallet from his hip pocket; however, Dine "kept an eye on [appellant's] hands * * * [because Dine] was being careful." Dine stated that he placed appellant in his police cruiser because he was concerned about the movements appellant made before exiting the vehicle. Dine also stated that he had encountered appellant two or three times in the past, and that appellant did not have a weapon on any of those occasions.

{¶ 8} Thomas testified at the hearing that Dine told him to search appellant's vehicle because appellant "made a lot of movements toward the center console and [Dine] wasn't sure if [appellant] * * * had been * * * trying to retrieve something or [was] hiding

something." Thomas also testified that Dine asked him to look for "weapons or contraband, something that [appellant] would've possibly been trying to grab or hide." Thomas stated that the cover of the center console was broken, allowing Thomas to see inside with the help of a flashlight. Thomas also stated that his search did not include the back seat of the vehicle, or any of its closed compartments. Thomas further stated that, in his experience, the baggie retrieved from the open console is the type frequently used to hold drugs.

{¶ 9} On cross-examination, Thomas testified that appellant was cooperative throughout the search process. He further testified that the baggie retrieved from appellant's vehicle contained a "relatively small piece" of crack cocaine.

{¶ 10} At the close of all the evidence, the state and appellant's defense attorney presented closing arguments. Thereafter, the trial court found that probable cause existed to justify the search of appellant's vehicle, and denied appellant's motion to suppress.

{¶ 11} On September 4, 2009, appellant entered a no contest plea to one count of possession of cocaine, as charged in the indictment. That same day, the trial court issued a judgment entry in which it accepted appellant's plea and found him guilty of one count of possession of crack cocaine, in violation of R.C. 2925.11. After stating that it had reviewed the record and a pre-sentence investigative report, the trial court sentenced appellant to five years of community control sanctions, and suspended his driver's license for six months. A timely notice of appeal was filed on September 24, 2009.

{¶ 12} On appeal, appellant asserts that the trial court erred by finding that there was probable cause to search his vehicle and denying his motion to suppress the evidence obtained through that search. In support, appellant argues that no evidence was presented at

the suppression hearing to show that Officer Dine reasonably believed that appellant was dangerous or had access to a weapon. In addition, appellant argues that testimony was presented that he was cooperative during the search, and that he demonstrated no violent behavior in past encounters with Officer Dine.

{¶ 13} "Appellate review of a motion to suppress presents a mixed question of law and fact." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. When considering a motion to suppress, the trial court assumes the role of fact finder and, therefore, is in the best position to resolve factual questions and evaluate the credibility of witnesses. Id., citing *State v.* Mills (1992), 62 Ohio St.3d 357, 366; *State v. Hocker*, Belmont App. No. 03 BE 11, 2003-Ohio-5146, ¶12. On appeal, the trial court's ruling will be upheld if it is supported by competent, credible evidence. *State v. Jackson*, Ashtabula App. No. 2003-A-0005, 2004-Ohio-2920, ¶12, citing *State v. Hrubik* (June 30, 2000), Ashtabula App. No. 99-A-0024. After accepting those facts as true, the appellate court must "independently determine, without deference to the trial court's conclusion, whether the facts satisfy the applicable legal standard." *State v. Swonger*, Franklin App. No. 09AP-1166, 2010-Ohio-4995, ¶6, citing *Burnside* at ¶8.

{¶ 14} The Fourth Amendment to the United States Constitution guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures * * ." In those cases where "an officer stops a motor vehicle and detains its occupants, he has seized it and its occupants within the meaning of the Fourth Amendment." *Jackson* at ¶13, citing *Terry v. Ohio* (1968), 392 U.S. 1, 16, 88 S.Ct. 1868, 20 L.Ed.2d 889. "The validity of an investigative stop must be viewed in light

of the totality of the circumstances." Id. at ¶14, citing *State v. Namey* (Oct. 6, 2000), Ashtabula App. No. 99-A-0003.

{¶ 15} In this case, appellant does not challenge the legality of the traffic stop, which Officer Dine testified was made because appellant's vehicle had a burned-out headlight and only one license plate. See *State v. Evans*, 67 Ohio St.3d 405, 407, 1993-Ohio-186 (in which the Supreme Court of Ohio held that an officer's suppression hearing testimony that a defendant was pulled over because of a minor traffic violation, such as a burned-out headlight, is sufficient to serve as the lawful basis for a warrantless stop); *State v. Takacs* (Feb. 25, 1994), Lake App. No. 93-L-087. Appellant does, however, challenge the constitutionality of the search of his vehicle.

{¶ 16} The United States Supreme Court has held that:

{¶ 17} "'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 * * *. 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." *Adams v. Williams* (1972), 407 U.S. 143, 146, 92 S.Ct. 1921, L.Ed.2d 612, citing *Terry*, supra. See, also, *Michigan v. Long* (1983), 463 U.S. 1032, 1049, 103 S.Ct. 3469, 77 L.Ed.2d 1201 ("[A] search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer

possesses a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.")

{¶ 18} The standard to be employed in determining whether a protective search is justified is "an objective standard: '[W]ould the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate?'" *State v. Wilcox*, 177 Ohio App.3d 609, 2008-Ohio-3856, ¶ 18, quoting *State v. Bobo* (1988), 37 Ohio St.3d 177, 178-179. In making such a determination, "courts look at the totality of the circumstances, as viewed through the eyes of a reasonable and prudent police officer on the scene who must react to events as they unfold." Id., citing *State v. Andrews* (1991), 57 Ohio St.3d 86, 87, in turn citing *United States v. Hall* (C.A.D.C.1976), 525 F.2d 857. Factors to be considered include "the high-crime nature of the area, the time of day, the experience of the officers involved, whether the officer was away from his cruiser, and suspicious activities by the defendant, such as furtive gestures." Id., citing *Bobo*, supra; *Andrews*, supra.

{¶ 19} In *State v. Baccus*, Montgomery App. No. 21025, 2006-Ohio-771, a vehicle driven by the suspect, Robert Baccus, was observed driving over a curb to get around a closed portion of the roadway. Dayton police officer Timothy Gould and his partner observed the traffic violation and attempted to pull the vehicle over; however, Baccus continued driving. Gould pursued the vehicle, which had darkly tinted windows and at least three occupants other than the driver, who were observed moving around in the vehicle. When the vehicle finally came to a stop, the occupants had to be repeatedly told to exit the

vehicle. When they finally did exit the vehicle, Gould and his partner searched it for weapons and recovered a gun. Baccus and the other passengers were placed under arrest. After a brief period of questioning, Baccus admitted that he owned the weapon.

{¶ 20} Gould testified at the suppression hearing that, due to Baccus' delay in stopping the vehicle and his observation of the occupants moving around behind the tinted windows, he was concerned for his own safety. Consequently, Gould decided that it was necessary to search the vehicle for weapons. After hearing the testimony presented at the suppression hearing, the trial court denied the motion to suppress. Baccus entered a no contest plea, was found guilty, and was sentenced to five years of community control sanctions.

{¶ 21} On appeal, this court upheld Baccus' conviction, after finding that "[t]he totality of these facts created the necessary reasonable suspicion that the occupants might be armed and concealing weapons inside the vehicle, and therefore that the occupants of the vehicle posed a danger to the officers. Officer Gould's safety concerns were reasonable and supported by specific and articulable facts." Id. at ¶19.

{¶ 22} As set forth above, in this case, Officer Dine observed appellant driving in an alley that led to a known drug house, at 9 p.m. Appellant was driving a vehicle that had only one license plate and one working headlight. When Dine turned on his lights and siren, appellant did not pull over and stop the vehicle. Instead, he continued driving, while making gestures with his right arm toward the center console of the vehicle. It was only after Dine addressed appellant verbally through his public announcement system that appellant stopped his vehicle. Dine testified at the suppression hearing that, although his

prior contacts with appellant did not involve violence, he nevertheless was concerned that appellant was attempting to retrieve or conceal a weapon before stopping his vehicle. Thomas testified that, when he shined a flashlight inside appellant's vehicle to check for weapons, a baggie containing cocaine was visible inside the damaged center console.

{¶ 23} On consideration of the entire record of the trial court's proceedings, and our decision in *State v. Baccus*, we find that the record contains competent, credible evidence to support the trial court's conclusion that the police officers reasonably believed it was appropriate to search appellant's vehicle for weapons before returning appellant to his vehicle. Accordingly, the trial court did not err by denying the motion to suppress, and appellant's sole assignment of error is not well-taken.

{¶ 24} The judgment of the Montgomery County Common Pleas Court is hereby affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

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FAIN, J. and FROELICH, 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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