**[Cite as *State v. Winters*, 2004-Ohio-2591.]**



IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

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| STATE OF OHIO | : | |
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| Plaintiff-Appellant, | : | Case No. 02CA42 |
| | : | |
| vs. | : | |
| | : | DECISION AND JUDGMENT ENTRY |
| MICHAEL WINTERS | : | |
| | : | |
| Defendant-Appellee. | : | |

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APPEARANCES:

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EVANS, J.:

**{¶1}** This is an appeal from the judgment of the Athens County Common Pleas Court granting a motion to suppress evidence filed by Defendant-Appellee Michael Winters. The State of Ohio appeals pursuant to Crim.R. 12(J) and asserts that the trial court erred by granting defendant's motion for two separate reasons: 1) the warrantless search of defendant's person was properly consented to by defendant; and 2) assuming that defendant did not consent, the search was valid pursuant to the "plain feel" doctrine.

**{¶2}** After a careful review of the record below, this Court disagrees with the state's arguments. Accordingly, we affirm the judgment of the trial court.

## Facts and Proceedings Below

**{¶3}** On May 21, 2001, Defendant-Appellee Michael Winters was indicted for possession of psilocybin, a fifth-degree felony in violation of R.C. 2925.11. On October 7, 2002, defendant moved to suppress the state's evidence asserting that it was obtained as the result of an illegal search.

**{¶4}** On September 24, 2002, the trial court held a suppression hearing on defendant's motion. At the hearing, the state offered the testimony of just one witness,

Trooper Travis Woodyard of the Ohio State Highway Patrol. Woodyard testified to the events that led to the charges against defendant.

**{¶5}** On Thursday, October 26, 2000, at 9:06 a.m., defendant was a passenger in a 1976 Volkswagen Microbus van driven by his girlfriend, Bethany Canada. Trooper Woodyard stopped the automobile for failing to display a front license plate. Woodyard testified that he approached the passenger side of the van, advised Bethany why he made the stop, and asked for each occupant's identification. Woodyard also noted that, during this exchange, both Bethany and defendant displayed a nervous demeanor, and defendant would not make eye contact with him.

**{¶6}** Following that exchange, Trooper Woodyard returned to his cruiser, called in Bethany's and defendant's information to dispatch, and proceeded to write a traffic citation for the license plate violation. Woodyard testified that, at this time, his unit was working with four or five others, as well as two canine units in Athens, specifically for the traffic coming into Athens for the Halloween weekend. Based on this, Woodyard called for a canine unit to assist his investigation. Woodyard testified that he was not sure if he suspected any other criminal activity, just that any suspicion he may have had was based on the occupants' nervous behavior and failure to make eye contact.

**{¶7}** At 9:00 a.m., Sergeant Alwine, who was following a few miles behind Trooper Woodyard, arrived on the scene to make sure everything was in control. Woodyard testified that at that point he requested a criminal history check for both defendant and Bethany. The criminal history check revealed that defendant had prior arrests for theft and criminal damaging. Woodyard indicated that he thought that defendant's prior arrests may have been the reason for the nervous behavior but was not sure.

**{¶8}** At 9:20 a.m., Trooper Ball arrived on the scene with a canine unit. Trooper Woodyard testified that Trooper Ball walked his drug-sniffing dog Ringo around the van and it reacted aggressively at the left side of the van behind the driver's door. Woodyard testified that Ringo made a "hit" on the driver's side of the van and at that point Woodyard ceased writing the license plate citation and initiated a drug investigation. Woodyard testified that he notified Bethany that Ringo indicated the presence of drugs and asked her if there were any narcotics in the vehicle. Bethany replied that there was not and that he could check. At that time, Sergeant Alwine requested that Bethany exit the van, while Woodyard requested the same from defendant.

**{¶9}** Trooper Woodyard testified that he asked defendant if he was carrying any weapons, drugs, or any other contraband on his person. Defendant replied that he

was not. Woodyard asked defendant if he could check and defendant said yes. At that point, defendant began emptying his pockets to show Woodyard their contents. Woodyard testified that, although defendant was not under arrest at the time, he performed a pat down of defendant. When Woodyard began his pat down procedure, defendant asked Woodyard why he was being patted down. Woodyard testified that he told defendant that he had asked for defendant's permission to do so, and that if he desired Woodyard not to continue, he would stop. Woodyard further testified that defendant's response was "no, that's okay, I was just asking."

**{¶10}** Trooper Woodyard continued to pat down defendant when he felt a soft item in defendant's front left pocket. Woodyard testified that he asked defendant what the item was and that defendant told him it was change. Disputing defendant's explanation, Woodyard told defendant that he knew the item was not change because it was soft and did not make any noise, and he again asked defendant what it was. Defendant dropped his head and did not answer. At that point, Woodyard reached into defendant's pocket and removed the soft item, which was a single psilocybin mushroom. Shortly after that, Sergeant Alwine read Bethany and defendant their rights and the other officers conducted a search of the van. The search of the van uncovered only a wooden smoking pipe in Bethany's purse. Woodyard testified that

Bethany and defendant were released after Woodyard issued citations for their offenses.

**{¶11}** In its judgment entry filed November 7, 2002, the trial court granted defendant's motion to suppress. The trial court found that Trooper Woodyard possessed the necessary reasonable, articulable suspicion to stop the van for a license plate violation. The court further held that the canine sniff of the vehicle was not a search since Woodyard had not fulfilled the purpose of the traffic stop at the time Ringo alerted to the presence of drugs. The court found that the fourteen-minute time frame between the initial stop of the van and the subsequent canine sniff was not unreasonable. Further, no facts indicated that Woodyard procrastinated in the performance of his duties in order to give the canine unit time to arrive.

**{¶12}** The trial court also held that once Ringo alerted to the presence of drugs, probable cause existed to search the vehicle. Because they were occupying the vehicle at the time, the court found that Trooper Woodyard had at least reasonable suspicion to further detain and investigate the driver and defendant. However, the court found that in the absence of an exception to the warrant requirement, a warrantless search of his person was not permitted. The court found that none of the exceptions applied in this case. The court noted that the "plain feel" doctrine was inapplicable since Woodyard admitted that the nature of the object was not "immediately apparent."

**{¶13}** Unconvinced by the testimony of Trooper Woodyard, the court found that the totality of the circumstances suggested that the defendant did not consent to a search of his person by an independent act of free will. The court found that defendant was never informed there was any focus on him for illegal activity, that he would have a basis to consent or not consent to the request to search, and was presented with an overwhelming show of force. During the pat down, Woodyard discovered something other than a weapon. Defendant never gave Woodyard consent to go into his pocket to explore for something other than a weapon. Accordingly, the trial court found that the totality of the circumstances failed to indicate that defendant consented by an independent act of free will. Thus, the court granted defendant's motion to suppress.

## The Appeal

**{¶14}** The state timely filed an appeal and assigned the following error for our review.

**{¶15}** "The trial court erred by granting defendant's motion to suppress evidence."

**{¶16}** The state's arguments are twofold: 1) defendant voluntarily consented to a warrantless search of his person; and 2) assuming defendant's consent was not voluntary, evidence found during a "pat down" search could be seized under the "plain feel" doctrine.

**{¶17}** We find that the warrantless search of defendant's pocket was unjustified because the "plain feel" doctrine is not applicable. Accordingly, we affirm the judgment of the trial court.

**{¶18}** The decision to grant or deny a motion to suppress involves a question of law. This Court's review of the trial court's judgment granting or denying such a motion involves mixed questions of law and fact. *State v. Bennett* (June 21, 2000), Ross App. No. 99CA2509. Thus, we defer to the trial court's findings of fact, if supported by competent, credible evidence, as it is in the best position to evaluate the veracity and reliability of witnesses. *State v. Clay* (1973), 34 Ohio St.2d 250, 298 N.E.2d 137; *State v. Metcalf* (1996), 111 Ohio App.3d 142, 675 N.E. 2d 1268. We are ordained with the task of independently determining whether the trial court applied the appropriate legal standard. *State v. Anderson* (1995), 100 Ohio App.3d 688, 654 N.E. 2d 1034.

**{¶19}** It is uncontested that Trooper Woodyard possessed the requisite probable cause to justify stopping the van for a license plate violation. While driving on the highway, Woodyard noticed that the van defendant was riding in failed to display a license plate in the front of the vehicle, as required by Ohio law. Therefore, Woodyard had probable cause to believe that the driver of the van committed a traffic offense.

**{¶20}** After briefly speaking with the defendant and Bethany about why he stopped their van, Trooper Woodyard returned to his cruiser to enter their information and process the violation. During this time, Woodyard called for a canine unit, which arrived some fourteen minutes after Woodyard first stopped the van. We are presented with two issues that arise with respect to the dog sniff of Bethany's van. The first is whether Woodyard was required to have reasonable suspicion of drug-related activity before requesting Trooper Ball bring the drug dog to the scene. The second is whether Ringo's positive "hit" on the driver's side of the vehicle amounted to probable cause for Woodyard to search the van.

**{¶21}** In its opinion, the trial court correctly found that the dog sniff of the van was not a search within the meaning of the Fourth Amendment. Therefore, Trooper Woodyard did not need any suspicion of drug-related activity before requesting the canine unit to the scene. In *United States v. Place* (1983), 462 U.S. 696, 103 S.Ct. 2637, the United States Supreme Court held that the exterior canine sniff of an item located in a public place did not constitute a search within the meaning of the Fourth Amendment. Considering the courts' treatment of *Place* in Ohio, a drug sniff of the exterior of a legally detained automobile is not a search within the meaning of the United States Constitution or the Ohio Constitution. *State v. Carlson* (1995), 102 Ohio App.3d 585, 657 N.E. 2d 591; *State v. Palicki* (1994), 97 Ohio App.3d 175, 181-182,

646 N.E.2d 494; *State v. Riley* (1993), 88 Ohio App.3d 468, 476, 624 N.E.2d 302. In other words, if a vehicle is lawfully detained, an officer does not need a reasonable suspicion of drug-related activity in order to request that a drug dog be brought to the scene or to conduct a dog sniff of the vehicle. Thus, Woodyard did not need a reasonable, articulable suspicion of criminal activity beyond that which justified the initial stop in order to radio Trooper Ball and have him conduct a canine sniff of Bethany's vehicle during its lawful detainment. See *State v. Shook* (June 15, 1994), 9th Dist. No. 93CA005716. Accordingly, once Bethany and defendant were lawfully detained for the license plate violation, Woodyard did not need a reasonable suspicion of drug-related activity in order to request that Trooper Ball bring Ringo to the scene. Likewise, Trooper Ball could conduct the actual dog sniff of the van without reasonable suspicion of drug-related activity.

**{¶22}** The issue now becomes whether Ringo's positive "hit" to the driver's side of the van gave Trooper Woodyard probable cause to search the van. Once Ringo alerted police to the odor of drugs, the officers then had probable cause to search Bethany's van. See *State v. Coonrod* (Feb. 2, 1999), Ross App. No. 98CA2411; *State v. Palicki*, 97 Ohio App.3d at 181; *State v. French* (1995), 104 Ohio App.3d 740, 749, 663 N.E.2d 367 (abrogated on different grounds, see *City of Warren v. Smith*, 11th Dist. No. 2002-T-0063, 2003-Ohio-2003); see, also, *United States v. Blaze* (C.A. 10 1998),

143 F.3d 585, 592; *United States v. Reed* (C.A.6 1998), 141 F.3d 644, 649; *United States v. Williams* (C.A.5 1995), 69 F.3d 27, 28. To facilitate a proper search of the van, the officers ordered both Bethany and defendant out of the vehicle. At this point, Woodyard asked defendant if he was carrying any weapons, drugs, or anything of that nature. After defendant answered no, Woodyard testified that he asked defendant if he could check and that defendant said yes. We note that Woodyard was within his authority to inquire as to the presence of weapons and other contraband. However, Woodyard was not required to seek defendant's consent to conduct a pat down search for weapons.

**{¶23}** For their own protection police offices may, during investigative stops, conduct pat down searches for weapons if the officers have reason to believe the suspect is armed and dangerous. See *Terry v. Ohio* (1968), 392 U.S. 1, 27, 88 S.Ct. 1868; *Adams v. Williams* (1972), 407 U.S. 143, 146, 92 S.Ct. 1921; see, also, *State v. White* (1996), 110 Ohio App.3d 347, 353, 674 N.E.2d 405; *State v. Bobo* (1988), 37 Ohio St.3d 177, 524 N.E.2d 489, paragraph two of the syllabus. These sorts of *Terry*-type pat downs generally raise two separate and distinct issues: (1) whether the pat down was justified in the first place; and (2) if it was justified, whether the police conducted themselves within the lawful scope of the pat down. *State v. Kennedy* (Sept. 30, 1999), Ross App. No. 99CA2472.

**{¶24}** As it pertains to the first issue, there is a line of authority law from the Federal Fourth Appellate Circuit recognizing that guns often accompany drugs. See *United States v. Sakyi* (C.A.4 1998), 160 F.3d 164, 169; *United States v. Stanfield* (C.A.4 1997), 109 F.3d 976, 984; *United States v. Perrin* (C.A.4 1995), 45 F.3d 869, 873. Therefore, a proper pat down is supported simply by the officer's objectively reasonable belief that drugs are in the vehicle. *United States v. Sakyi*, 160 F.3d at 169. The Supreme Court of Ohio has concurred that drug dealers are usually armed and that the right to frisk is "virtually automatic" when approaching suspected traffickers. See *State v. Evans* (1993), 67 Ohio St.3d 405, 413, 618 N.E.2d 162. Thus, when Ringo positively "hit" to the presence of narcotics, Trooper Woodyard was justified in conducting a weapons pat down without defendant's consent. The fact that defendant did consent, however, did not transform the search from a *Terry* pat down to something more extensive.

**{¶25}** As it pertains to the second issue, the scope of a pat down is limited to a narrow protective search of a detainee's person for concealed weapons. *City of Mentor v. Fedor* (Sept. 15, 2000), 11th Dist. No. 99-L-166, citing *State v. Evans*, 67 Ohio St.3d at 408. "The purpose of this limited search is to allow an officer to pursue his or her investigation without fear of violence; it is not intended to provide the officer with an opportunity to ascertain evidence of crime." Id. In *Terry*, the United States Supreme

Court outlined the standard for a pat down "frisk" in this way: "there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless if he has probable cause to arrest the individual for a crime." *Terry v. Ohio*, 392 U.S. at 27.

**{¶26}** When police officers conduct a lawful *Terry* search for weapons, they may "seize non-threatening contraband when its incriminating nature is 'immediately apparent' to the searching officer through his sense of touch." *State v. Evans*, 67 Ohio St.3d at 414, fn. 5, citing *Minnesota v. Dickerson* (1993), 508 U.S. 366, 113 S.Ct. 2130. This has become known as the "plain feel" doctrine. In *Dickerson*, the United States Supreme Court reasoned that if a police officer "feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plainview context." *Minnesota v. Dickerson*, 508 U.S. at 375-376.

**{¶27}** Under the "plain feel" doctrine, the nature of the contraband must be "immediately apparent" to the officer at the time it is felt, rather than being determined after the search. *Minnesota v. Dickerson*, 5089 U.S. at 379. The "police officer is

prohibited from handling the object previously determined not to be a weapon in order to establish its incriminating nature." *Fedor*, supra. Furthermore, whether the item felt by police is "immediately apparent" as contraband is a question of fact for the trial court. *Kennedy*, supra.

**{¶28}** The trial court found, and we agree, that the "plain feel" doctrine would not apply in this case. Trooper Woodyard testified that during the pat down of defendant, he felt an item in his pocket that was soft. Woodyard further testified that "I didn't know what it was." Thus, because the criminal nature of the object was not immediately apparent to Woodyard, the "plain feel" doctrine does not apply. Further, Woodyard testified that he knew the object was not a weapon. Under these circumstances, the warrantless intrusion into defendant's pocket was not justified under the "plain feel" doctrine for a *Terry* "frisk".

**{¶29}** We reiterate that defendant's supposed consent to the pat down is superfluous. Trooper Woodyard was well within his authority to conduct a *Terry* pat down for weapons. Defendant merely consented to a pat down that Woodyard already had authority to do. Thus, defendant's consent did not extend the scope of Woodyard's pat down into a more intrusive search for evidence of crime. Moreover, while defendant consented to a pat down, he never consented to Woodyard invasively digging his hands into defendant's pocket for something other than weapons.

**{¶30}** According, the state's assignment of error is overruled.

## Conclusion

**{¶31}** For the foregoing reasons we affirm the decision of the trial court granting defendant's motion to suppress the evidence obtained as a result of the unlawful search.

**JUDGMENT AFFIRMED.**

Abele, J., Concurring only in the judgment:

**{¶32}** Because I agree with the principal opinion's result, but disagree with the rationale used to support the opinion's conclusion, I concur only in the judgment to affirm the trial court's decision to grant appellee's (defendant's) motion to suppress evidence.

**{¶33}** The principal opinion maintains that the arresting officer requested the appellee to submit to a patdown search for weapons. The opinion then notes that an officer need not obtain a suspect's consent for a patdown search for weapons if the officer has reason to believe that the suspect is armed and dangerous and that in the instant case, the officer did possess ample reason to conduct a weapon patdown search. Thus, the opinion reasons, the appellee's "consent to the patdown is superfluous." The opinion then concludes that the officer unlawfully exceeded the scope of the patdown search because the officer seized nonthreatening contraband from appellee's pocket

when the contraband's nature was not immediately apparent (i.e. the small, soft hallucinogenic mushroom did not appear to be a weapon).

**{¶34}** The prosecution, however, argues that the appellee did not limit his consent to a patdown search for weapons. Rather, the prosecution contends that the appellee consented to a full search of his person and thereby waived his Fourth Amendment protections.

**{¶35}** After my review of the transcript, I conclude that the prosecution's argument is correct on this point. Trooper Woodyard's suppression hearing testimony does not support the principal opinion's view that the appellee consented to a limited patdown weapons search rather than a full search of his person. The testimony, if believed, indicates that the appellee did not limit the officer's search in any manner.1 This point does not end the inquiry, however.

**{¶36}** The trial court's basis for granting the appellee's motion to suppress evidence centered on the appellee's consent to search, not the scope of the search. The

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1. **{¶a}** The transcript reveals the following response from Trooper Woodyard concerning his actions after the drug dog indicated that narcotics were in the vehicle:

> **{¶b}** "Then I asked Mr. Winters to exit the vehicle and asked him if he had any weapons, drugs, anything of that nature on him. He said no. I asked him if I could check and he said yes. At that point he began taking stuff from his pockets and showing me what he had in his pockets. Then I began to pat him down. He asked me why I was searching him and I told him that I asked him permission and he gave me permission to do so, and if he didn't want me to continue I could stop. He responded with no, that's okay, I was just asking. Then I felt an item in his pocket that was soft. I didn't know what it was. I asked him what it was. He said it was change in his pocket. I told him it was soft, and that it was not change, and asked him was it was. And he dropped his head and looked away from me. Then he wouldn't respond to anything I said to him after that. I removed an item and it was a mushroom. Shortly after that Sgt. Allwine read Bethany and Michael their constitutional rights."

trial court held, after hearing the facts adduced at the motion hearing, that the appellee's will to consent was overborne by the authorities' "overwhelming show of force." Appellant asserts that the record in the instant case does not support the trial court's conclusion.

**{¶37}** Initially, the appellant contends that the trial court erred by analyzing the consent to search issue under the "unlawful detention" standard espoused in *State v. Robinette* (1997), 80 Ohio St.3d 234, 685 N.E.2d 762 (i.e. once a person has been unlawfully detained, in order for that person's consent to be an independent act of free will, the totality of the circumstances must clearly demonstrate that a reasonable person would believe that she or she had the freedom to refuse to answer further questions and could in fact leave the scene).2 In *Robinette*, the Ohio Supreme Court held that the totality of the circumstances test controls in an unlawful detention setting and courts must determine whether the consent to search is voluntary. An important consideration in an unlawful detention setting is the detainees knowledge that he or she is free to withhold consent.

**{¶38}** In *Florida v. Royer* (1983), 450 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229, that court held that when consent is obtained during an illegal detention, the

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2. The trial court's decision states "herein, the totality of the circumstances suggests to us the court that defendant did not consent by an independent act of free will."

consent is negated, even though voluntarily given, if the consent is the product of the illegal detention and not the result of an independent act of free will. Thus, a detainee's consent to search during an unlawful detention is not valid unless the prosecution can show that the detainee's consent was an independent act of free will that would have purged the taint of the unlawful detention. See, also, *State v. Piens* (2000), 140 Ohio App.3d 535, 748 N.E.2d 146.

**{¶39}** Appellant aptly notes, however, that this case involves, and the trial court so found, a lawful detention, not an unlawful detention.3 Thus, appellant asserts that the proper test is whether, in accordance with general consent to search authorities, the circumstances indicate that the suspect voluntarily consented to the search, rather than whether the suspect was free to leave the scene and possessed knowledge of his right to refuse consent. Again, I agree with the appellant's position. The central issue in the case at bar is whether the appellee voluntarily consented to the search of his person, or whether appellee's consent was the product of duress or coercion, either express or implied.

**{¶40}** In *State v. Dettling* (1998), 130 Ohio App.3d 812, 815, 721 N.E.2d 449, 451, the court discussed the requirements for valid consent searches:

> "When the prosecution seeks to justify a search based on consent, it has the burden of proving 'that the consent was in fact voluntarily given, and not the

3. I also note that State v. Hatfield (1999), Ross App. No. 98CA2426, cited by the trial court in its decision, involved an unlawful detention scenario.

> result of duress or coercion, express or implied.' Id., 412 U.S. at 248, 93 S.Ct. at 2059, 36 L.Ed.2d 875."
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> * * *
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> "Voluntariness is to be determined from the totality of the circumstances. *Bustamonte*, 412 U.S. at 226, 93 S.Ct. at 2047, 36 L.Ed.2d at 862. Among the circumstances to be considered are the length of the detention, the repeated and prolonged nature of the questioning, and the use of physical punishment. Id."

See, also, *State v. Barnes* (1986), 25 Ohio St.3d 203, 495 N.E.2d 922; *United States v. Shabazz* (C.A.5, 1993) 993 F.2d 431; *United States v. Olivier-Becerril* (C.A.5, 1988), 866 F.2d 424, which list additional factors that may be considered when determining whether a suspect voluntarily consented to a search. Thus, courts must ensure that consent is not the product of police coercion.

**{¶41}** It is important to again note that the prosecution bears the burden to prove that consent was, in fact, freely and voluntarily given. *Dettling*, supra; *Bumper v. North Carolina* (1968), 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797; *Florida v. Jimeno* (1991), 500 U.S. 248, 111 S.Ct. 1801, 114 L.Ed.2d 297. The standard for measuring the scope of a suspect's consent under the Fourth amendment is that of "objective" reasonableness—what would a reasonable person have understood by the exchange between the officer and the suspect? *Jimeno*.

**{¶42}** Although I agree with the appellant that in the case at bar the trial court

articulated the wrong standard in its decision (unlawful detention standard rather than the standard applied to a lawfully detained suspect), I do not believe, after my review of the evidence adduced at the suppression hearing, that the trial court's judgment must be reversed. In my view, the result in this case would be the same under either standard. The trial court ultimately concluded that the appellee did not voluntarily consent to the search of his person. The trial court also correctly noted that in consent to search cases, the prosecution has the burden to justify the warrantless search and seizure. In its decision, the trial court wrote:

> "Herein, the totality of the circumstances suggests to the Court that defendant did not consent by an independent act of free will. It might have been helpful to have the videos from the three cruisers present when this incident occurred. Trooper Woodyard testified no one requested that they be preserved, and, therefore, they were destroyed consistent with Highway Patrol policy. The videos of the discussion between Trooper Woodyard and defendant might have added something to the issue of whether the consent expressed by defendant was indeed an independent act of free will. The Court heard the testimony of Trooper Woodyard and was not convinced that it was an act of free will. It is the State's burden to justify a warrantless search and seizure.
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> The authority for talking to defendant is tenuous at best. At no time was defendant informed there was any focus on him for illegal activity, and that he would have a basis to consent or not consent to a request to search him. He was presented with an overwhelming show of force. There were a number of officers at the scene. Trooper Woodyard ostensibly searching for weapons discovered something other than a weapon. He unconvincingly argues he had consent to go into defendant's pocket to explore for something other than a weapon. The totality of the circumstances fails to indicate an independent act of free will on defendant's part."

**{¶43}** Thus, the trial court made a factual determination, in light of the paucity of evidence adduced to demonstrate appellee's consent, that the prosecution failed to meet its burden to prove consent. Generally, factual determinations are matters reserved for the trier of fact. Factual determinations regarding a suspect's voluntary consent to search are specifically entrusted and reserved to the triers of fact. *Robinette*. Appellate courts should defer to the triers of fact in assessing witness credibility and the weight of the evidence. In the case sub judice, my review of the transcript reveals little, if any, evidence to support the appellant's claim that the appellee freely and voluntarily consented to a search of his person. Additional evidence, including the officers' specific and detailed activities during the investigative stop, could have shed more light on this topic. On a largely silent record I cannot conclude that the prosecution satisfied its burden and the trial court erred. Thus, under either standard, I believe that the evidence adduced at the suppression hearing fails to satisfy the prosecution's burden to prove consent.

**{¶44}** Additionally, I note that the authority to search a motor vehicle's passenger during an investigative stop is limited. For example, the discovery of drugs in a driver's pocket, which may provide a basis to search the vehicle, does not necessarily authorize the search of a passenger absent other factors. See *State v. Taylor* (2000), 138 Ohio App.3d 139, 740 N.E.2d 704. In *State v. Isbele* (2001), 144 Ohio

App.3d 780, 784, 761 N.E.2d 697, 701, citing *Taylor*, supra, the court discussed the issue of a search of passengers during investigative traffic stops:

> In the context of passengers of motor vehicles involved in investigatory traffic stops, an officer may order the passengers to get out of the vehicle pending completion of the stop. *Maryland v. Wilson* (1997), 519 U.S. 408, 414, 117 S.Ct. 882, 886, 137 L.Ed.2d 41, 47-48. However, once a passenger has left the vehicle, the officer must possess specific and articulable facts to believe that a passenger is armed and dangerous, or is engaged in criminal activity, to justify any further intrusions. See, e.g., *State v. Taylor* (2000), 138 Ohio App.3d 139, 145, 740 N.E.2d 704, 708-709. For example, furtive movements by a passenger may provide a reasonable basis for an officer to conduct a protective frisk, *State v. Williams* (1994), 94 Ohio App.3d 538, 544, 641 N.E.2d 239, 243, as can an officer's observation of bulges in the passenger's clothing that are indicative of concealed weapons. See *Pennsylvania v. Mimms* (1977), 434 U.S. 106, 111-112, 98 S.Ct. 330, 334, 54 L.Ed.2d 331, 337-338. Where a passenger is cooperative and gives no indication that he is armed and dangerous, an officer may not conduct a protective frisk. See, e.g., *State v. Cantelupe* (June 28, 2000), Harrison App. No. 99-511CA, unreported, 2000 WL 875356; *State v. Caldwell* (Sept. 29, 2000), Huron App. No. H-00-13, unreported, 2000 WL 1434118. In addition, where an officer has no reasonable articulable suspicion that a passenger is or has been involved in criminal activity, the officer may not detain the passenger beyond the scope of the original traffic stop. *Taylor*, 138 Ohio App.3d at 146, 740 N.E.2d at 709-710. A passenger's mere propinquity to others in the vehicle whom are independently suspected of criminal activity does not, without more, give reasonable cause to search that person. Id.; *State v. Cantelupe*; see, also, *Ybarra v. Illinois* (1979), 444 U.S. 85, 91, 100 S.Ct. 338, 342, 62 L.Ed.2d 238, 245-246.
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> In *Taylor*, an officer initiated a traffic stop of a vehicle after his laser instrument indicated that the vehicle was speeding. *Taylor* at 142, 740 N.E.2d at 706-707. Upon investigation, the officer discovered that the driver's license was suspended and arrested him. Id. While conducting a search of the driver incident to arrest, the officer discovered two grams of marijuana. Id. at 143, 740 N.E.2d at 707. The officer noticed a can of air freshener and a cellular phone in the car and that the car generally 'looked

> lived in.' Id. at 148, 740 N.E.2d at 711. On the basis of his observations and the fact the driver had marijuana on his person, the officer detained the passenger, searched him, and eventually discovered cocaine. Id. at 144, 740 N.E.2d at 707-708. In reversing the trial court's decision denying a motion to suppress, the Second District Court of Appeals rejected the notion that the discovery of a minimal amount of drugs in the possession of one occupant of a vehicle creates a reasonable basis to suspect criminal activity on the part of another. Id. at 147, 740 N.E.2d at 710. The court further concluded that the condition of the interior of the car did not justify a search and detention of its passengers:
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> 'These may be articulable facts but they certainly do not provide reasonable grounds for conducting the search. * * * [I]f a cellular phone in the unkempt passenger compartment of a vehicle constitutes reasonable articulable facts sufficient to justify an investigation of the occupants for drug trafficking, then we are all at risk.' Id. at 148-149, 740 N.E.2d at 711.
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> In this case, Officers Ezerski and Mynhier testified that there was no evidence that appellee was engaged in criminal activity. The officers freely conceded that they believed appellee posed no threat of harm to them. Rather, the officers detained appellee only because they assumed that since the driver of the truck possessed drugs, she must possess them too. Although the officers' assumption proved to be correct, the officers lacked reasonable articulable suspicion to detain or search appellee. The officers had no reason to detain appellee after they arrested the driver of the vehicle. Consequently, the detention of appellee was unreasonable under the circumstances."

See, also, *Wyoming v. Houghton* (1999), 526 U.S. 295, 119 S.Ct. 1297, 143 L.Ed.2d 408. If, however, the drug dog had independently identified the passenger as the possessor of narcotics, a different outcome may have resulted.

**{¶45}** Accordingly, I agree with the trial court's judgment that the evidence seized in this case must be suppressed.

Kline, P.J.: Concurs in Judgment Only and with Concurring Opinion.

Abele, J.: Concurs in Judgment Only with Concurring Opinion.