[Cite as *State v. Debrossard*, 2015-Ohio-1054.]

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

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 13CA3395
	:	
vs.	:	
	:	DECISION AND JUDGMENT
HASANI HZ DEBROSSARD,	:	ENTRY
	:	
Defendant-Appellant.	:	**Released: 03/18/15**

APPEARANCES:

Angela Wilson Miller, Jupiter, Florida, for Appellant.

Matthew S. Schmidt, Ross County Prosecuting Attorney, and Jeffrey C. Marks, Assistant Prosecuting Attorney, Chillicothe, Ohio, for Appellee.

McFarland, A.J.

{¶1} After pleading no contest to two counts of aggravated possession of drugs and one count of possession of heroin, Appellant, Hasani Debrossard, appeals the trial court's denial of his motion to suppress. On appeal, Appellant contends that the trial court erred in denying his motion to suppress as the statements he made in response to questioning and the items obtained from the body search were elicited in violation of his constitutional rights under the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio

Constitution. Because we affirm the trial court's determination that Appellant's consent to the search of his person was involuntary, and in light of our further determination that the search exceeded the scope of a limited pat-down search for weapons pursuant to *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968), the contraband seized from Appellant was obtained in violation of his constitutional rights to be free from unreasonable searches and seizures. Thus, Appellant's sole assignment of error is sustained. Accordingly, the decision of the trial court denying Appellant's motion to suppress is reversed and this matter is remanded for further proceedings.

FACTS

{¶2} On February 10, 2012, Sergeant Timothy Gay received a tip from a citizen, Tammy Peoples, that her son and his girlfriend would be meeting someone in Chillicothe that evening coming in on a Greyhound bus from Detroit, Michigan. Peoples stated that her son would be driving a white sedan and that the person arriving from Detroit would be carrying pills. Peoples' son and his girlfriend had had prior involvement with law enforcement and thus were known by Sergeant Gay. Based upon the tip, Sergeant Gay contacted Officer Gannon, who handled the canine unit for the Chillicothe Police department, and both were present at the bus stop when the bus from Detroit arrived that evening. The record reveals that although

the officers did not see a white sedan at the bus stop, nor did they see Peoples' son or girlfriend, Officer Gannon saw Appellant get into a taxi and decided to follow it.

{¶3} Upon following the taxi for a very brief period of time, Officer Gannon observed the taxi driver make a left turn without signaling one hundred feet prior to turning and activated her lights and sirens and initiated a traffic stop. Officer Gannon approached the driver within a minute of the stop and requested drivers' license information from the taxi driver and Appellant, who was a passenger. Both occupants complied and Gannon radioed dispatch with the information. During this time Sergeant Gay arrived at the scene. While waiting on a response from dispatch, Officer Gannon conducted a canine sniff of the vehicle. The canine alerted on the passenger side of the vehicle where Appellant was seated. Subsequently, dispatch responded that Appellant had an expired concealed carry permit.

{¶4} As a result of the canine alert and information regarding the expired concealed carry permit, the officers opened the driver's side door and asked Appellant if he had any weapons and he confirmed he did and reached for a black duffel bag in the seat beside him. At this point, the officers ordered Appellant out of the vehicle for officer safety, handcuffed him, Mirandized him and asked him why he had not informed them during

initial contact that he had a weapon. Sergeant Gay then requested consent to search Appellant for drugs, as well as a pat-down search for weapons. Based upon the later testimony of the officers, Appellant consented.

{¶5} The officers proceeded to search Appellant by going through all of his jacket pockets, pants pockets and then patted down his lower body. Upon patting down his lower body, Sergeant Gay felt a hard object in the area of Appellant's groin. Sergeant Gay asked Appellant what it was and Appellant responded that it was "pills." After pulling one bag with pills out of Appellant's pants, Appellant informed officers there was a second bag as well. Appellant was subsequently arrested. Three days later, law enforcement became aware that although Appellant had an expired Meigs County concealed carry permit, he had a valid permit issued in Gallia County.

{¶6} On April 13, 2012, Appellant was indicted on two counts of aggravated possession of drugs, in violation of R.C. 2925.11, first and third degree felonies, and one count of possession of heroin, in violation of R.C. 2925.11, a second degree felony. Appellant filed a motion to suppress and an evidentiary hearing was held on October 26, 2012. Sergeant Gay and Officer Gannon both testified on behalf of the State and the cruiser cam video of the stop and search was stipulated into evidence. The trial court

issued its decision on February 20, 2013, denying Appellant's motion to suppress, specifically finding that the stop and detention were valid, the Terry pat-down was valid, and that the consent to search Appellant's person was made involuntarily. Ultimately, however, finding that the contraband was seized as part of a lawful Terry search, the trial court denied Appellant's motion.

{¶7} Appellant subsequently entered pleas of no contest to the charges and was sentenced to a total prison term of five years. Appellant has now filed his timely appeal challenging the trial court's denial of his motion to suppress. He sets forth a single assignment of error as follows.

ASSIGNMENT OF ERROR

"I. THE TRIAL COURT ERRED IN DENYING APPELLANT DEBROSSARD'S MOTION TO SUPPRESS AS THE STATEMENTS HE MADE IN RESPONSE TO QUESTIONING AND THE ITEMS OBTAINED FROM THE BODY SEARCH WERE ELICITED IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION"

LEGAL ANALYSIS

{¶8} In his sole assignment of error, Appellant contends that the trial court erred in denying his motion to suppress, claiming that the statements he made during questioning and the items obtained during the body search were elicited in violation of his state and constitutional rights. In making

this argument, Appellant concedes that the stop of the vehicle was lawful, but argues that it was pretextual, and contends that the officer had no reasonable suspicion to initially question and then detain him. Appellant contends that he had no obligation to provide the officer with his identification, as he was a passenger in the vehicle that was stopped. Appellant further contends that the canine alert on the passenger side of the vehicle occurred during an unlawful detention. Appellant argues that while the canine alert triggered a search of the vehicle, it did not trigger a search of his person and that the trial court found he did not voluntarily consent to be personally searched. He argues that the plain feel doctrine did not apply to justify the warrantless intrusion into his pockets and groin area. Thus, Appellant contends that the canine sniff and his subsequent detention, questioning and search far exceeded the purpose of the stop, which ultimately simply resulted in a verbal warning to the taxi driver regarding the traffic violation.

STANDARD OF REVIEW

{¶9} Initially, we note that appellate review of a trial court's decision regarding a motion to suppress evidence involves mixed questions of law and fact. See *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, ¶ 100; *State v. Long*, 127 Ohio App.3d 328, 332, 713 N.E.2d 1

(4th Dist. 1998). When ruling on a motion to suppress evidence, a trial court assumes the role of trier of fact and is in the best position to resolve questions of fact and to evaluate witness credibility. See, e.g., *Roberts* at ¶ 100. Accordingly, a reviewing court must defer to a trial court's findings of fact if competent, credible evidence exists to support the trial court's findings. See, e.g., id.; *State v. Medcalf*, 111 Ohio App.3d 142, 145, 675 N.E.2d 1268 (4th Dist. 1996). The reviewing court then must independently determine, without deference to the trial court, whether the trial court properly applied the substantive law to the facts of the case. See *Roberts* at ¶ 100. See, generally, *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657 (1996).

FOURTH AMENDMENT

{¶10} The Fourth Amendment to the United States Constitution protects individuals against unreasonable governmental searches and seizures. See, e.g., *Delaware v. Prouse* , 440 U.S. 648, 662, 99 S.Ct. 1391, (1979). "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, (1967). Once the defendant demonstrates that he was subjected to a

warrantless search or seizure, the burden shifts to the state to establish that the warrantless search or seizure was constitutionally permissible. See *Roberts* at ¶ 98; *Maumee v. Weisner*, 87 Ohio St.3d 295, 297, 720 N.E.2d 507 (1999); *Xenia v. Wallace*, 37 Ohio St.3d 216, 524 N.E.2d 889 (1988), paragraph two of the syllabus.

VEHICLE STOP

{¶11} The Supreme Court of the United States recognizes three types of police-citizen interactions in this context: 1) a consensual encounter; 2) a *Terry* stop; and 3) a full-scale arrest. *State v. Travis*, 4th Dist. Scioto No. 06CA3098, 2008-Ohio-1042, ¶ 9; citing *Florida v. Royer*, 460 U.S. 491, 501-507, 103 S.Ct. 1319 (1983) and *United States v. Mendenhall*, 446 U.S. 544, 553, 100 S.Ct. 1870, (1980). Fully addressing the issues in the case sub judice primarily requires an analysis of the first and second types of interaction, a consensual encounter and a *Terry* stop.

{¶12} The Supreme Court of Ohio has stated that " '[p]robable cause is certainly a complete justification for a traffic stop,' but the court has 'not held that probable cause is required.' " *State v. Ward*, 4th Dist. Washington No. 10CA30, 2011-Ohio-1261, ¶ 13; quoting *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539, 894 N.E.2d 1204, ¶ 23. Instead, to justify a traffic stop based upon less than probable cause, an officer must be able to

articulate specific facts that would warrant a person of reasonable caution to believe that the person has committed, or is committing, a crime, including a minor traffic violation. See *Terry v. Ohio* at 21; See, also, *Mays* at ¶ 8; *Chillicothe v. Frey*, 156 Ohio App.3d 296, 2004-Ohio-927, 805 N.E.2d 551, ¶ 14; *State v. Garrett*, 4th Dist. No. 05CA802, 2005-Ohio-5155, ¶ 10. Reasonable suspicion sufficient to conduct a stop exists if there is "at least a minimal level of objective justification for making the stop." *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S.Ct. 673 (2008). As this Court has explained:

> "A traffic stop may pass constitutional muster even where the state cannot convict the driver due to a failure in meeting the burden of proof or a technical difficulty in enforcing the underlying statute or ordinance. * * * The very purpose of an investigative stop is to determine whether criminal activity is afoot. This does not require scientific certainty of a violation nor does it invalidate a stop on the basis that the subsequent investigation reveals no illegal activity is present." *State v. Payne*, 4th Dist. Ross No. 11CA3272, 2012-Ohio-4696, ¶ 18; quoting *State v. Emerick*, 4th Dist. No. 06CA45, 2007-Ohio-4398, ¶ 15.

A court that must determine whether a law enforcement officer possessed a reasonable suspicion or probable cause to stop a vehicle must examine the "totality of the circumstances." Id.; See, e.g., *United States v. Arvizu*, 534 U.S. 266, 273, 122 S.Ct. 744 (2002). Moreover, the touchstone of a Fourth Amendment analysis is the reasonableness of the intrusion. *Emrick*, ¶ 13. See, e.g., *State v. Dunfee*, 4th Dist. Athens No. 02CA37, 2003-Ohio-5970, ¶ 25; citing *Pennsylvania v. Mimms*, 434 U.S. 106, 108-109, 98 S.Ct. 330 (1977).

{¶13} A police officer may stop the driver of a vehicle after observing a de minimis violation of traffic laws. *State v. Guseman*, 4th Dist. Athens No. 08CA15, 2009-Ohio-952, ¶ 20; citing, *State v. Bowie*, 4th Dist. Washington No. 01CA34, 2002-Ohio-3553, ¶ 8, 12, and 16; citing *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769 (1996). See, also, *Dayton v. Erickson*, 76 Ohio St.3d 3, 655 N.E.2d 1091 (1996), syllabus. Further, the Supreme Court of Ohio has clearly stated: "Where a police officer stops a vehicle based on probable cause that a traffic violation has occurred or was occurring, the stop is not unreasonable under the Fourth Amendment to the United States Constitution even if the officer had some ulterior motive for making the stop[.]" *Dayton* at paragraph one of the syllabus.

{¶14} During a legitimate traffic stop, law enforcement may request identification from the driver of the vehicle, as well as identification from a passenger, followed by a computer check of that information. Such requests and checks do not constitute an unreasonable search and seizure, so long as the traffic stop is not extended in duration beyond the time reasonably necessary to effect its purpose. *State v. Morgan*, 2nd Dist. Montgomery No. 18985, 2002 WL 63196, *2 (Jan. 18, 2002); citing *State v. Chagaris*, 107 Ohio App.3d 551, 556-557, 669 N.E.2d 92 (9th Dist.1995). "A request for identification, in and of itself, is not unconstitutional, and is ordinarily characterized as a consensual encounter, not a custodial search." Id.; citing *State v. Osborne*, 2nd Dist. Montgomery No. 15151, 1995 WL 737913 (Dec. 13, 1995); *Brown* at ¶ 15. However, a passenger, unlike the driver of a vehicle, is not legally obligated to carry identification or to produce it for a police officer. *Morgan* at *2; *State v. Brown*, 2nd Dist. Montgomery No. 20336, 2004-Ohio-4058, ¶ 15. An officer "making a traffic stop may order passengers to get out of the car pending completion of the stop" because of the added danger to an officer when a passenger is present and the minimal additional intrusion on the passenger. *State v. Ross*, 2nd Dist. Montgomery No. 16135, 1997 WL 531217, *2 (Aug. 29, 1997); citing *Maryland v. Wilson*, 519 U.S. 408, 117 S.Ct. 882 (1997).

{¶15} Here, the record reflects that although law enforcement was initially acting upon an unconfirmed tip when they decided to stake out the bus station, the taxi in which Appellant was a passenger was ultimately stopped as a result of a de minimus traffic violation, namely failing to use a turn signal one hundred feet prior to turning, in violation of both R.C. 4511.39(A) and section 331.14 of the City Ordinances of Chillicothe. As such, based upon the foregoing case law, the initial stop of the taxi in which Appellant was riding was justified and legitimate. Further, although vehicle passengers are not required to carry ID or to produce it when requested by law enforcement, Appellant willingly complied with law enforcement's request for his identification information and there is nothing in the record to suggest that his compliance was anything other than voluntary. This exchange of information was consensual and we see no legal issue that arises as a result. As such, we affirm the trial court's determination that the vehicle stop was justified.

INITIAL DETENTION AND CANINE SNIFF

{¶16} The scope and duration of a routine traffic stop "must be carefully tailored to its underlying justification * * * and last no longer than is necessary to effectuate the purpose of the stop." *Florida v. Royer* at 500; see, also, *State v. Gonyou*, 108 Ohio App.3d 369, 372, 670 N.E.2d 1040 (6th

Dist. 1995) and *State v. Hughes*, 4th Dist. No. 97CA2309, 1998 WL 363850. The rule set forth in *Royer* is designed to prevent law enforcement officers from conducting "fishing expeditions" for evidence of a crime. See generally, *Gonyou*; *Sagamore Hills v. Eller*, 9th Dist. No. 18495, 1997 WL 760693; see, also, *Fairborn v. Orrick*, 49 Ohio App.3d 94, 95, 550 N.E.2d 488 (2nd Dist.1988), (stating that "the mere fact that a police officer has an articulable and reasonable suspicion sufficient to stop a motor vehicle does not give that police officer 'open season' to investigate matters not reasonably within the scope of his suspicion").

{¶17} "When a law enforcement officer stops a vehicle for a traffic violation, the officer may detain the motorist for a period of time sufficient to issue the motorist a citation and to perform routine procedures such as a computer check on the motorist's driver's license, registration, and vehicle plates." *State v. Aguirre*, 4th Dist. Gallia No. 03CA5, 2003-Ohio-4909, ¶ 36; citing *State v. Carlson*, 102 Ohio App.3d 585, 598, 657 N.E.2d 591(9th Dist. 1995); see, also *State v. Morgan* and *State v. Chagaris*, supra. "In determining if an officer completed these tasks within a reasonable length of time, the court must evaluate the duration of the stop in light of the totality of the circumstances and consider whether the officer diligently conducted the investigation." Id.; citing *State v. Cook*, 65 Ohio St.3d 516, 521-522, 605

N.E.2d 70 (1992) (fifteen-minute detention was reasonable); *United States v. Sharp*, 470 U.S. 675, 105 S.Ct. 1568 (1985), (twenty-minute detention was reasonable).

{¶18} A lawfully detained vehicle may be subjected to a canine check of the vehicle's exterior even without the presence of a reasonable suspicion of drug-related activity. *State v. Rusnak*, 120 Ohio App.3d 24, 28, 696 N.E.2d 633 (6th Dist. 1997). Both Ohio courts and the United States Supreme Court have determined that "the exterior sniff by a trained narcotics dog to detect the odor of drugs is not a search within the meaning of the Fourth Amendment to the Constitution." *State v. Jones*, 4th Dist. Washington No. 03CA61, 2004 WL 3090198, ¶ 24; *United States v. Place*, 462 U.S. 696, 103 S.Ct. 2637 (1983). Thus, a canine check of a vehicle may be conducted during the time period necessary to effectuate the original purpose of the stop. *Jones*, at ¶ 24.

{¶19} Here, a review of the suppression hearing transcript in conjunction with a review of the cruiser cam dvd indicates that the taxi in which Appellant was a passenger was stopped 47 seconds after the video footage begins. The canine officer approached the driver's side of the vehicle 1.19 seconds into the video and then radioed dispatch to request driver's information at 2.22 on the video. Another officer approached the

passenger side of the vehicle at 3.00 and while waiting for information to be provided by dispatch, the canine was taken around the vehicle at 3.55 on the video.[1] The canine alerted on the vehicle at 4.07. Thus, the canine sniff was initiated less than three minutes after the first officer initially approached the vehicle. Based upon the above-cited case law and the totality of the circumstances, we conclude, much like the trial court, that the canine sniff was conducted during the time period necessary to effectuate the original purpose of the stop.

CANINE ALERT AND CONTINUED INVESTIGATORY DETENTION

{¶20} Ohio courts have also consistently held that if an officer, during the initial detention of a motorist, ascertains additional specific and articulable facts that give rise to a reasonable suspicion of criminal activity beyond that which prompted the stop, the officer may further detain the motorist and conduct a more in-depth investigation. *State v. Robinette*, 80 Ohio St.3d 234, 241, 685 N.E.2d 762 (1997); *State v. Griffith*, 12th Dist. Madison No. CA97-09-044, 1998 WL 468803(Aug. 10, 1998). The continued investigatory detention does not violate the Fourth Amendment as

[1] Appellant argues that there is no information in the record as to when dispatch responded back to the canine officer regarding the driver's information that was radioed in. While the fact that the sound on the cruiser cam was not functioning makes it difficult to discern this information, Sergeant Gay testified that Officer Gannon walked the canine around the van while waiting on dispatch to run the information. Further, in light of the short amount of time that elapsed between Officer Gannon first contacting dispatch and conducting the canine sniff, we find the sniff was conducted in a reasonable timeframe and did not delay the initial stop.

long as it is objectively justified by the circumstances. *Griffith* at 3; *Robinette* at 241; *State v. Myers*, 63 Ohio App.3d 765, 580 N.E.2d 61 (2nd Dist. 1990). "The officer may detain the vehicle for a period of time reasonably necessary to confirm or dispel his suspicions of criminal activity." *State v. Wynter*, 2nd Dist. Miami No. 97 CA 36, 1998 WL 127092, *3 (Mar. 13, 1998); *United States v. Sharpe*, 470 U.S. 675, 685-686, 105 S.Ct. 1568 (1985); *Myers* at 771. "Once the officer is satisfied that no criminal activity has occurred, then the vehicle's occupants must be released." *Wynter* at *3.

{¶21} "In determining whether a detention is reasonable, the court must look at the totality of the circumstances." *State v. Matteucci*, 11th Dist. Lake No. 2001-L-205, 2003-Ohio-702, ¶ 30. The totality of the circumstances approach "allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.' " *State v. Ulmer*, 4th Dist. Scioto No. 09CA3283, 2010-Ohio-695, ¶ 23; *United States v. Arvizu*, 534 U.S. at 273. Thus, when an appellate court reviews a police officer's reasonable suspicion determination, "the court must give 'due weight' to factual inferences drawn by resident judges

and local law enforcement officers." *Ulmer* at ¶ 23; *Ornelas v. United States*, 517 U.S. at 699.

{¶22} During a continued, lawful detention of a vehicle, as discussed above, officers are not required to have a reasonable, articulable suspicion of criminal activity in order to call in a canine unit to conduct a canine sniff on the vehicle. See, e.g., *State v. Feerer*, 12th Dist. Warren No. CA2008-05-064, 2008-Ohio-6766, ¶ 10. "Because the 'exterior sniff by a trained narcotics dog is not a search within the meaning of the Fourth Amendment to the Constitution,' a canine sniff of a vehicle may be conducted even without the presence of such reasonable, articulable suspicion of criminal activity so long as it is conducted during the time period necessary to effectuate the original purpose of the stop." Id. See, also, *United States v. Place*, 462 U.S. 696, supra. "A drug sniffing dog used to detect the presence of illegal drugs in a lawfully detained vehicle does not violate a reasonable expectation of privacy and is not a search under the Ohio Constitution." *State v. Waldroup*, 100 Ohio App.3d 508, 514, 654 N.E.2d 390 (12th Dist. 1995).

{¶23} In the case at bar, the canine unit made the initial stop and as such, the dog was immediately present on the scene and did not need to be called for backup. The canine sniff was conducted less than four minutes

into the stop and, based upon a reading of the suppression hearing transcript, occurred immediately after the officer radioed the vehicle occupants' license information to dispatch and before dispatch replied. We have determined that under these circumstances, the canine sniff did not unreasonably extend the stop. See *State v. Batchili*, 113 Ohio St.3d 403, 2007-Ohio-2204, 865 N.E.2d 1282, ¶ 13 (drug dog alerted 8 minutes and 56 seconds into the stop, which did not make the stop "constitutionally dubious"); *State v. Forbes*, 12th Dist. Preble No. CA2007-01-001, 2007-Ohio-6412 (dog sniff conducted 11 minutes into the stop did not unreasonably prolong the stop); *State v. Bell*, 12th Dist. Preble No. CA2001-06-009, 2002-Ohio-561 (cocaine found in the vehicle when a drug dog alerted on the trunk 14 minutes after the stop, which did not prolong the detention any longer than necessary to effectuate the purpose of the stop); *Matteucci*, supra, at ¶ 35 (waiting 7 minutes for a canine unit to arrive on the scene did not infringe upon defendant's rights); *State v. Kilgore*, 12th Dist. Butler No. CA98-09-201, 1999 WL 452235 (June 28, 1999) (waiting on a drug dog for 5 minutes was reasonable).

{¶24} Thus, Appellant's continued detention was based on specific articulable facts giving rise to a suspicion of some separate illegal activity that warranted an extension of the detention in order to implement a more in-

depth investigation. *State v. Robinette*, 80 Ohio St.3d at 241. Specifically, prior to reaching the point of giving the driver of the taxi a verbal warning, the officers developed a reasonable suspicion of further criminal conduct based on the fact that the canine alerted on the passenger side of the vehicle, as well as the report from dispatch that Appellant had a concealed carry permit that was expired.

{¶25} Based upon the officers' training and experience, the alert by the canine officer on the passenger side of the vehicle, the concern regarding the presence of a weapon, and the nondisclosure of having a permit, the officers were justified in detaining the taxi driver as well as Appellant for additional investigation. Further, the fact that the officers ultimately failed to issue a citation for the traffic violation is not significant. The Supreme Court of Ohio has stated that "the constitutionality of a prolonged traffic stop does not depend on the issuance of a citation." *State v. Batchili* at ¶ 20-21. "The failure to issue a traffic citation when there is an indication of a potentially far more significant crime is easily excused when more pressing issues are being addressed." Id. Thus, the fact that the officers ultimately determined to let the driver off with only a warning is inconsequential.

TERRY PAT-DOWN SEARCH

{¶26} After lawfully detaining an individual under *Terry*, an officer may frisk the suspect if the officer has reasonable grounds to believe the suspect is armed. *Terry*, 392 U.S. at 25-26. However, the officer "may search only for weapons when conducting a pat down of the suspect." *State v. Evans*, 67 Ohio St.3d 405, 414, 618 N.E.2d 162 (1993). The scope of a *Terry* search is: "a narrowly drawn authority to permit a reasonable search for weapons for the protection of a police officer, where he has reason to believe that he is dealing with an armed and dangerous individual * * *." *Terry* at 27. The purpose of a *Terry* " 'search is not to discover evidence of a crime, but to allow the officer to pursue his investigation without fear of violence.' " *Evans*, supra, at 408; quoting *Adams v. Williams*, 407 U.S. 143, 146, 92 S.Ct. 1921 (1972). A *Terry* pat-down search is limited in scope to discovering weapons that might be used to harm the officer "and cannot be employed by the searching officer to search for evidence of a crime." *Evans*, supra, at 414. Thus, a *Terry* search must "be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." *Terry*, supra, at 29.

{¶27} This Court has previously recognized that " 'police officers face an inordinate risk when they approach an automobile during a traffic stop.' " *State v. Hansard*, 4th Dist. Scioto No. 07CA3177, 2008-Ohio-3349,

¶ 26; citing *State v. Williams*, 94 Ohio App.3d 538, 541 N.E.2d 239 (1994). Moreover, Ohio courts have long recognized that persons who engage in illegal drug activities are often armed with a weapon. *Hansard* at ¶ 26; citing *Evans*, supra, at 413. "[T]he right to frisk is virtually automatic when individuals are suspected of committing a crime, like drug trafficking, for which they are likely to be armed." Id.; citing *State v. Williams*, 51 Ohio St.3d 58, 554 N.E.2d 108 (1990) and *United States v. Ceballos* (E.D.N.Y.1989), 719 F.Supp. 119, 126 ("The nature of narcotics trafficking today reasonably warrants the conclusion that a suspected dealer may be armed and dangerous.").

{¶28} "When an officer is conducting a *lawful* pat-down search for weapons and discovers an object on the suspect's person which the officer, through his or her sense of touch, reasonably believes could be a weapon, the officer may seize the object as long as the search stays within the bounds of *Terry v. Ohio*." *Evans*, supra, at paragraph two of the syllabus (Emphasis added). Although *Terry* does not require that an officer be absolutely convinced that an object he feels is a weapon before grounds exist to remove the object from the suspect, a hunch or inarticulable suspicion that an object is a weapon is not a sufficient basis to uphold a further intrusion into a suspect's clothing. *Hansard*, supra, at ¶ 28; citing *State v. Harrington*, 2nd

Dist. Montgomery No. 14146, 1994 WL 285048 (June 1, 1994). "When an officer removes an object that is not a weapon, the proper question to ask is whether that officer reasonably believed, due to the object's 'size or density,' that it could be a weapon." *Evans*, supra, at 415; citing 3 LaFave, Search and Seizure (2 Ed.1987) 521, Section 9.4(c).

{¶29} Although *Terry* limits the scope of the search to weapons, the discovery of other contraband during a lawful *Terry* search will not necessarily preclude its admissibility. In *Minnesota v. Dickerson*, 508 U.S. 366, 113 S.Ct. 2130 (1993), the United States Supreme Court adopted the "plain feel" doctrine as an extension of the "plain view" doctrine. The Supreme Court stated: "If a police officer lawfully pats down a suspect's outer clothing and 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 plain view context." Id. at 375-376. If the illegal nature of the suspicious object is not immediately apparent, police are not permitted to continue touching, feeling or manipulating the object to identify its nature. Id.

{¶30} The trial court, in its decision denying Appellant's motion to suppress, determined that the contraband at issue was recovered during the course of a lawful *Terry* pat-down search. As set forth above, the primary purpose of *Terry* is to permit a frisk of a suspect believed to be armed. Further, a *Terry* search is limited in nature and is designed primarily to facilitate officer safety. "The frisk described by the *Terry* Court, * * * is a limited search for weapons, requiring that the intrusion be limited to a pat-down of the suspect's outer clothing. A police officer may not order a suspect to empty his pockets instead of a pat-down." *Ohio Arrest, Search and Seizure*, §16.1, Lewis R. Katz., 2013 Edition; citing *State v. Todd*, 2nd Dist. Montgomery No. 23921, 2011-Ohio-1740. Further, "[e]vidence secured when defendants are not frisked but ordered to empty their pockets will not be admissible when the only authority is a search for weapons [footnote omitted]. Similarly, where a police officer reaches into a pocket without first frisking the suspect, evidence retrieved is not admissible under *Terry*." Id. at §16.3; citing *State v. Linson*, 51 Ohio App.3d 49, 554 N.E.2d 146 (8th Dist. 1988); *State v. Franklin*, 86 Ohio App.3d 101, 619 N.E.2d 1182 (1st Dist. 1993); and *State v. Kratzer*, 33 Ohio App.2d 167, 293 N.E.2d 104 (10th Dist. 1972).

{¶31} Here, a review of the transcript from the suppression hearing as well as the video from the cruiser cam reveals that the officers' search of Appellant was directed at more than just discovering weapons. In fact, during direct examination, Sergeant Tim Gay expressly stated that he asked Appellant for consent to search his person for drugs. Sergeant Gay later stated on cross-examination that the search was conducted as both a weapons pat-down and for drugs. Likewise, Officer Tonya Gannon testified on direct examination that Appellant was asked for consent to search for weapons and drugs. Thus, the goal of the search was to discover more than simply weapons.

{¶32} Further, a review of the video indicates that at no point did law enforcement conduct a preliminary or initial frisk of Appellant prior to digging into his pockets. In fact, there was no initial pat-down at all, but rather, a male officer began immediately emptying out Appellant's pockets while he was cuffed. As the male officer continued to empty out Appellant's pockets, the female officer, presumably Officer Gannon, began to go through the contents, including opening up various papers and seemingly reading them. It was not until the officer went through and emptied all of Appellant's jacket and pants pockets that a male officer appeared to conduct a limited pat-down of Appellant's lower body. Thus, there seemed to be no

concern at all that Appellant possessed a weapon on his body at the time he was being searched. As a result, we disagree with the trial court's determination and instead conclude that the search of Appellant's person in this case far exceeded the scope of a limited pat-down search for weapons under *Terry*. See *State v. Scott*, 61 Ohio App.3d 391, 394, 572 N.E.2d 819 (1989) (finding the warrantless search of the defendant's person was illegal where the search was not limited to a pat-down, but rather extended to reaching into defendant's pockets for evidence.) As such, the discovery of the contraband at issue cannot be justified under a *Terry* stop and frisk analysis. Therefore, the only reason the discovery of the narcotics and heroin should not have been suppressed is if the trial court determined that Appellant consented to the search. As will be discussed more fully below, the trial court found that Appellant's consent to search was involuntary and therefore, invalid.

CONSENT

{¶33} One well-established exception to the warrant requirement is the consent search. Thus, no Fourth Amendment violation occurs when an individual voluntarily consents to a search. See *United States v. Drayton*, 536 U.S. 194, 207, 122 S.Ct. 2105 (2002) (stating that "[p]olice officers act in full accord with the law when they ask citizens for consent"); *Schneckloth*

v. Bustamonte, 412 U.S. 218, 219, 93 S.Ct. 2041 (1973) ("[A] search conducted pursuant to a valid consent is constitutionally permissible"); *State v. Comen*, 50 Ohio St.3d 206, 211, 553 N.E.2d 640 (1990). Consent to a search is "a decision by a citizen not to assert Fourth Amendment rights." Katz, *Ohio Arrest, Search and Seizure* (2004 Ed.), Section 17:1, at 341. In *Schneckloth*, the United States Supreme Court acknowledged the importance of consent searches in police investigations and noted that "a valid consent may be the only means of obtaining important and reliable evidence" to apprehend a criminal. Id. at 227-228.

{¶34} " '[C]onsent [to search] may be implied by the circumstances surrounding the search, by the person's prior actions or agreements, or by the person's failure to object to the search.' " *State v. Lane*, 2nd Dist. Montgomery No. 21501, 2006-Ohio-6830, ¶ 40; quoting *Kuras, et al.*, Warrantless Searches and Seizures (2002), 90 Geo.L.J. 1130, 1172. " 'Thus, a search may be lawful even if the person giving consent does not recite the talismanic phrase: "You have my permission to search." ' " Id.; quoting *United States v. Better-Janusch* (C.A.2, 1981), 646 F.2d 759, 764.

{¶35} A court that is determining whether a defendant voluntarily consented to a search must consider the totality of the circumstances. *United States v. Drayton*, 536 U.S. at 207; *United States v. Watson*, 423 U.S. 411,

424, 96 S.Ct. 820 (1976). Some important factors for a court to consider include: (1) the suspect's custodial status and the length of the initial detention; (2) whether the consent was given in public or at a police station; (3) the presence of threats, promises, or coercive police procedures; (4) the words and conduct of the suspect; (5) the extent and level of the suspect's cooperation with the police; (6) the suspect's awareness of his right to refuse to consent and his status as a "newcomer to the law"; and (7) the suspect's education and intelligence. *Watson* at 424-425; *State v. Fry*, 4th Dist. Jackson No. 03CA26, 2004-Ohio-5747, ¶ 23; *State v. Riggins*, 2nd Dist. Hamilton No. C-030626, 2004-Ohio-4247, ¶ 15; see, also, *State v. Sanchez*, 2nd Dist. Greene No. 97CA32 1998 WL 199618 (Apr. 24, 1998).

{¶36} Although an individual's awareness of the right to refuse consent is a factor under the totality of the circumstances test, it "is not a prerequisite of a voluntary consent." *Schneckloth*, 412 U.S. at 234. Thus, the state need not establish such knowledge "as the sine qua non of an effective consent." Id.; see, also, *Drayton* at 206-207. "The Court has rejected in specific terms the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search." Drayton at 206; citing *Ohio v. Robinette*, 519 U.S. 33, 39-40, 117 S.Ct. 417 (1996); *Schneckloth*, 412 U.S. at 227. "Nor

do this Court's decisions suggest that even though there are no per se rules, a presumption of invalidity attaches if a citizen consented without explicit notification that he or she was free to refuse to cooperate. Instead, the Court has repeated that the totality of the circumstances must control, without giving extra weight to the absence of this type of warning. See, e.g., *Schneckloth*, supra; *Robinette*, supra." Id. at 207.

{¶37} Furthermore, an officer's request for an individual's consent does not render consent involuntary. *State v. Rose*, 4th Dist. Highland No. 06CA5, 2006-Ohio-5292, ¶ 39. " 'While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response.' " *Drayton*, supra, at 205; quoting *INS v. Delgado*, 466 U.S. 210, 216, 104 S.Ct. 1758 (1984). However, consent to a search that is "coerced by threats or force, or granted only in submission to a claim of lawful authority," is invalid. *Schneckloth* at 233. Such "lawful authority" is a law enforcement officer's express or implied false claim that the officer can immediately proceed to make the search regardless of consent. See *State v. Sears*, 2nd Dist. Montgomery No. 20849, 2005-Ohio-3880, ¶ 37; citing *Bumper v. North Carolina*, 391 U.S. 543, 88 S.Ct. 1788 (1968) (holding that

consent not valid when obtained after law enforcement officer stated that he had a warrant to search).

{¶38} Moreover, "[a] suspect's expression of consent to perform a warrantless search of his person is not involuntary because he calculates that it is in his best interests to consent. It is involuntary because it is coerced; that is, the product of compulsion arising from physical force or a threat of physical force ." *State v. Sears* at ¶ 38. Additionally, although an individual's custodial status is a relevant factor in the totality of the circumstances analysis, "the fact of custody alone has never been enough in itself to demonstrate a coerced * * * consent to search." *Watson,* 423 U.S. at 424. "Even suspects who are handcuffed may voluntarily consent to a search." *State v. Riggins*, supra, at ¶ 18; citing *United States v. Crowder* (C.A.6, 1995), 62 F.3d 782, 788.

{¶39} The state has the burden to prove, by "clear and positive" evidence, not only that the necessary consent was obtained, but that it was freely and voluntarily given. *Florida v. Royer* at 497; *Bumper v. North Carolina* at 548; *State v. Posey,* 40 Ohio St.3d 420, 427, 534 N.E.2d 61 (1988). "Clear and positive evidence" is the substantial equivalent of clear and convincing evidence. *State v. Ingram,* 82 Ohio App.3d 341, 346, 612

N.E.2d 454 (1992). The Supreme Court of Ohio has defined "clear and convincing evidence" as follows:

> "The measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal."

In re Estate of Haynes, 25 Ohio St.3d 101, 103-04, 495 N.E.2d 23 (1986); see, also, *State v. Schiebel* at 74. In reviewing whether the lower court's decision was based upon clear and convincing evidence, "a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof." *Schiebel* at 74. If the lower court's judgment is "supported by some competent, credible evidence going to all the essential elements of the case," a reviewing court may not reverse that judgment. Id.

{¶40} Ordinarily, the issue of whether an individual voluntarily consented to a search is a question of fact, not a question of law. See *State v. Fry*, supra, at ¶ 21; citing *Ohio v. Robinette* at 40; *Schneckloth* at 227; *State v. Southern*, 4th Dist. Ross No. 00CA2541, 2000 WL 33226310 (Dec. 28,

2000). Because a reviewing court should generally defer to a trial court when it acts as the trier of fact, an appellate court should generally defer to a trial court's finding regarding whether a defendant voluntarily consented to a search. *Fry* at ¶ 21. Thus, appellate courts generally review trial court findings that a defendant voluntarily consented to a search under the weight of the evidence standard set forth in *Schiebel* at 74; see also *Fry*.

{¶41} Even though the state's burden of proof is "clear and convincing," this standard of review is highly deferential and the presence of "some competent, credible evidence" to support the trial court's finding requires us to affirm it. *Schiebel*. Moreover, the weight to be given the evidence and the credibility of the witnesses is primarily for the trier of the facts. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. This principle applies to suppression hearings as well as to trials. See *Fry* at ¶ 22; citing *State v. Fanning*, 1 Ohio St.3d 19, 437 N.E.2d 583 (1982). "The 'rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.' " *In re J.Y.*, 2nd Dist. Miami No. 07-CA-35, 2008-

Ohio-3485, ¶ 33; quoting *Seasons Coal Co., Inc. v. City of Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984).

{¶42} Here, the trial court determined that Appellant gave verbal consent to the search of his person only after he had been removed from the vehicle, had his bag confiscated by law enforcement, and had been handcuffed and advised of his *Miranda* rights. The trial court determined that under these circumstances, the verbal consent given to the officers was not voluntary. As set forth above, a trial court's determination regarding the voluntariness of a consent to search is a factual determination that is entitled to the utmost of deference by this Court, as a reviewing court. Even if this Court would have decided the factual question differently based upon our review of the record, the trial court is in a better position to judge the credibility of the witnesses and make factual determinations. Further, we are instructed that we cannot reverse a trial court's decision regarding the voluntariness of consent as long as the trial court's decision is supported by some, competent, credible evidence.

{¶43} The trial court's reference to the facts that Appellant had been removed from the vehicle, separated from his belongings, *Mirandized* and handcuffed, constitutes some competent, credible evidence upon which the trial court based its decision. Although there are other factors to be

considered, such as the extent of Appellant's cooperation with law enforcement, the presence of threats or coercion by law enforcement, Appellant's words and conduct, as well as the suspect's education and intelligence, this Court as well as the trial court's review is limited due to the fact that the audio function in the cruiser cam did not work. As a result, we cannot hear Appellant's words, whether police used any coercive language or made verbal threats regarding a search, and we cannot gauge Appellant's intelligence or understanding of his right to refuse. In light of the foregoing and bearing in mind the standard within which we must review this factual determination, we affirm the determination of the trial court with respect to the issue of the voluntariness of the Appellant's consent and therefore hold that, under the totality of the circumstances, the State failed to carry its burden to demonstrate the consent was voluntary.

{¶44} Having found that Appellant's consent to search was involuntary and that law enforcement exceeded the scope of the limited *Terry* pat-down search for weapons, the contraband seized from Appellant's person during the search and any statements Appellant made to law enforcement regarding the seizure of the contraband were inadmissible and therefore should have been suppressed. As such, the trial court erred in denying Appellant's motion to suppress. Thus, we find merit to this portion

of Appellant's sole assignment of error. Accordingly, the decision of the trial court is reversed and this matter is remanded to the trial court for further proceedings.

JUDGMENT REVERSED AND REMANDED.

Abele, J., concurs with concurring opinion:

{¶45} I reluctantly concur in both the judgment and opinion. Unfortunately, the opinion correctly sets forth the parameters and scope of a Terry pat-down frisk or search for weapons. However, in light of current realities and recent developments concerning canine detection and probable cause to search vehicles for drugs or contraband, I believe that it is now unreasonable to strictly limit the scope of a search of a vehicle's passengers to a pat-down frisk for weapons.

{¶46} Recently, in *Florida v. Harris* (2013), 568 U.S., ____, 133 S.Ct. 1050, the supreme court reaffirmed the proposition that a drug dog's alert that a vehicle contains drugs or contraband provides probable cause to search the entire vehicle. See, also, *State v. Eatmon*, 4th Dist. Scioto No. 12CA3498, 2013-Ohio-4812; *State v. Johnson*, 6th Dist. Lucas No. L-06-1035, 2007-Ohio-3961; *State v. Williams*, 4th Dist. Highland No. 12CA7, 2013-Ohio-594. However, in *United States v. DiRe* (1948), 332 U.S. 581, 68 S.Ct. 222, the supreme court held that even if probable cause exists to search a vehicle for contraband, occupants may not be subject to a search for that contraband. This holding has been questioned over the years, including criticism expressed in the Model Code of Pre-Arraignment Procedure 551-52 (1975) (the *DiRe* reasoning should not apply to emergency searches of

vehicles and it seems absurd to say that a vehicle's occupants can stuff narcotics in their pockets and drive away after a fruitless vehicle search). In *Wyoming v. Houghton* (1999), 526 U.S. 295, 119 S.Ct. 1297, the court later held that if probable cause exists to search for contraband in a vehicle, law enforcement officers may examine packages and containers without demonstrating an individualized probable cause for each container. This decision continued to recognize the heightened protection of vehicle passengers as distinguished from containers and packages. See, e.g., *State v. Wallace* (2002), 372 Md. 137, 812 A.2d 291 (vehicle passengers could not be searched after a drug dog alert); also see *State v. Gefroh* (N.D. 2011), 801 N.W. 429.

{¶47} I believe, however, that this view is unrealistic and unreasonable. If law enforcement authorities possess probable cause to search a vehicle, shouldn't the vehicle's passengers be subject to a more expansive search beyond the strict limits of a Terry pat-down frisk for weapons? If probable cause exists to believe that illegal drugs are in a vehicle, I do not believe that it is unreasonable for authorities to examine a passenger's pockets or determine the nature of unusual protrusions or other items concealed under a passenger's clothing. I recognize that in *Minnesota v. Dickerson* (1993), 508 U.S. 366, 113 S.Ct. 2130, the supreme court

further refined the pat-down frisk for weapons and stated that law enforcement officers may confiscate contraband that is immediately apparent to the officer by using touch or feel if the officer can determine simultaneously that the object is not a weapon and that the item is contraband (e.g. crack pipe, pill bottles). However, we see many cases in which passengers serve as drug couriers and conceal drugs on their persons in order to escape detection. Once again, when probable cause does indeed exist to search a motor vehicle for drugs or contraband, I do not think it unreasonable for the authorities to have the ability to expand the search of the vehicle's passengers beyond the scope of a Terry pat-down frisk for weapons.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED AND CAUSE REMANDED and that the Appellant recover of Appellee any costs herein.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hoover, P.J.: Concurs in Judgment and Opinion.
Abele, J.: Concurs in Judgement and Opinion with Opinion.

For the Court,

BY: _____
Matthew W. McFarland,
Administrative Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.