[Cite as *State v. Eatmon*, 2010-Ohio-5092.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
STATE OF OHIO	:	Julie A. Edwards, P.J.
	:	William B. Hoffman, J.
Plaintiff-Appellee	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. 2009 CA 0045
	:	
	:	
ADRIAN EATMON	:	O P I N I O N

Defendant-Appellant

CHARACTER OF PROCEEDING:	Criminal Appeal from Richland County Court of Common Pleas Case No. 2007-CR-322H
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 18, 2010

APPEARANCES:

For Plaintiff-Appellee

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Edwards, P.J.

{¶1} Appellant, Adrian P. Eatmon, appeals a judgment convicting him of possession of cocaine (R.C. 2925.11(A)) and possession of marijuana (Mansfield Ord. 513.03(A)). Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} At 10:47 p.m. on March 20, 2007, Patrolman Sarah Mosier of the Mansfield Police Department stopped a 1993 Ford Crown Victoria for excessive window tint. Appellant was driving the vehicle.

{¶3} Patrolman Mosier was in training at the time of the stop, and Patrolman Bamman was on patrol with her in the same vehicle. Because she did not have a tint meter, she radioed for a tint meter to be brought to the scene of the stop. Patrolman Ken Carroll and Patrolman Ronnee Bidlack, who was also in training, arrived with a tint meter. The battery was dead in the tint meter.

{¶4} Patrolman Mosier issued appellant a written warning, at which time appellant was free to leave. However, Patrolman Mosier left appellant's license and registration in the patrol vehicle and had to retrieve the items and return them to appellant. When she returned to appellant's vehicle with his license and registration, she asked for consent to search the vehicle. Appellant agreed.

{¶5} Appellant stepped out of the car and was patted down for weapons by Patrolman Carroll. During the pat down, Patrolman Carroll found a wad of $1175 in cash. During the search of the vehicle, officers found a digital scale with white residue on it.

{¶6} After officers found the scale, Patrolman Carroll asked appellant if they could search his person again. Appellant consented to the search. While searching appellant, the officer noticed an unusual bulge in the rear of his pants. From past experience, the officer knew drug dealers often hid drugs in their pants, and the bulge was consistent with hidden drugs he had felt in the past. The officer told appellant that he could pull it out or the officer could pull it out. The officer then told appellant to keep his hands on the car, and the officer pulled a bag of cocaine out of appellant's pants.

{¶7} Appellant was indicted by the Richland County Grand Jury on May 10, 2007, with one count of possession of cocaine and one count of possession of marijuana. The indictment included forfeiture specifications for the Ford Crown Victoria automobile and the $1,175.00 in cash found on appellant's person.

{¶8} Appellant filed a motion to suppress, which was overruled after an evidentiary hearing held on April 2, 2008. He then entered a plea of no contest to all charges and was convicted. He was sentenced to three years incarceration for possession of cocaine and six months incarceration for possession of marijuana, to be served concurrently. He assigns a single error on appeal:

{¶9} "THE TRIAL COURT ERRED WHEN IT DENIED MR. EATMON'S MOTION TO SUPPRESS EVIDENCE IN VIOLATION OF THE UNITED STATES AND OHIO CONSTITUTIONS."

{¶10} Appellant argues that the stop was complete prior to the point in time when Patrolman Mosier asked him for consent to search the vehicle, and there were no facts to justify his continued detention. He argues that therefore his consent to search was invalid. He also argues that Patrolman Carroll was not authorized to reach into his

pants to retrieve the baggie of cocaine because it was outside the scope of a *Terry* patdown for weapons.

{¶11} There are three methods of challenging, on appeal, a trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's findings of fact. In reviewing a challenge of this nature, an appellate court must determine whether said findings of fact are against the manifest weight of the evidence. See *State v. Fanning* (1982), 1 Ohio St.3d 19, 437 N.E.2d 583; *State v. Klein* (1991), 73 Ohio App.3d 486, 597 N.E.2d 1141; *State v. Guysinger* (1993), 86 Ohio App.3d 592, 621 N.E.2d 726. Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. See *State v. Williams* (1993), 86 Ohio App.3d 37, 619 N.E.2d 1141. Finally, assuming the trial court's findings of fact are not against the manifest weight of the evidence and it has properly identified the law to be applied, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry* (1994), 95 Ohio App.3d 93, 641 N.E.2d 1172; *State v. Claytor* (1993), 85 Ohio App.3d 623, 620 N.E.2d 906; *Guysinger,* supra. In the matter presently before us, we find appellant challenges the trial court's decision concerning the ultimate issue raised in his motion to suppress. Thus, in analyzing his sole Assignment of Error, we must independently determine whether the facts meet the appropriate legal standard.

{¶12} We first address the issue of whether appellant was improperly detained past the time required to effectuate the traffic stop.

{¶13} When a police officer's objective justification to continue detention following a traffic stop for the purpose of searching the vehicle is not related to the purpose of the original stop, and when that continued detention is not based on articulable facts giving rise to a suspicion of criminal activity justifying extension of the detention, the continued detention to conduct a search constitutes an illegal seizure. *State v. Robinette*, 80 Ohio St.3d 234, 685 N.E.2d 762, 1997-Ohio-343, syllabus 1. However, when an individual has been unlawfully detained by law enforcement, voluntary consent, determined under the totality of the circumstances, may validate an otherwise illegal detention and search. Id. at 241, citing *Davis v. United States* (1946), 328 U.S. 582, 593-594, 66 S. Ct. 1256, 1261-1262, 90 L.Ed. 1453, 1460-1461. Once an individual has been unlawfully detained by law enforcement, for his consent to be considered an independent act of free will, the totality of the circumstances must clearly demonstrate that a reasonable person would believe that he or she had the freedom to refuse to answer further questions and could in fact leave. Id. at syllabus 3.

{¶14} This Court considered a similar fact pattern to the instant case in *State v. Bickel*, Ashland App. No. 2006-COA-034, 2007-Ohio-3517. In *Bickel*, the appellant was stopped for an improper left turn. After handing appellant a citation, the officer asked the appellant if he had anything illegal in the vehicle. The appellant replied that he did not. The officer then asked if he could search the vehicle, and the appellant consented. This Court found that the appellant had validly consented to the search:

{¶15} "We are unwilling to adopt a bright-line rule that would require law enforcement officers to cease all communication with a driver after handing him a traffic citation. Once the detention is ended by the issuance of the citation a reasonable person would at least inquire as to whether or not he is free to go on his way. We find an officer's request made at the conclusion of the traffic stop not fundamentally different then if an officer were to approach a parked car and engage the occupants in conversation and a request to search the vehicle. In both cases most citizens will respond to a police request but 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. *Delgado*, supra. As in the case at bar, an officer may request permission to search provided the officer does not convey a message that compliance with his request is required. *Florida v. Bostick* (1991), 501 U.S. 429, 434-435 111 S .Ct. 2382, 2386.

{¶16} "'[M]erely approaching an individual on the street or in another public place [,]'seeking to ask questions for voluntary, uncoerced responses, does not violate the Fourth Amendment. *United States v. Flowers* (6th Cir.1990), 909 F.2d 145, 147. The United State Supreme Court '[has] held repeatedly that mere police questioning does not constitute a seizure.' *Florida v. Bostick,* 501 U.S. 429, 434, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991); see also *INS v. Delgado,* 466 U.S. 210, 212, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984). '[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual's identification; and request consent to search his or her luggage.' *Bostick,* supra, at 434-435, 111 S.Ct. 2382 (citations omitted). The person approached, however, need not answer any question put to him, and may continue on his way.

Florida v. Royer (1983), 460 U.S. 491, 497-98. Moreover, he may not be detained even momentarily for his refusal to listen or answer. Id. An officer may request permission to search provided the officer does not convey a message that compliance with his request is required. *Florida v. Bostick* (1991), 501 U.S. 429, 434-435 111 S. Ct. 2382, 2386. Whether the request occurs before the ticket is finally written or after the officer hands the completed ticket to the driver is merely one factor in determining whether the duration of the stop can be said to invalidate the driver's consent to search." Id. at ¶33-34.

{¶17} In the instant case, the testimony at the suppression hearing demonstrates that Patrolman Mosier had not yet finished effectuating the traffic stop at the time she asked appellant for consent to search. Due to a lengthy delay between the stop and the suppression hearing, Patrolman Mossier had forgotten some of the facts of the stop and her memory was refreshed by use of the preliminary hearing transcript. However, the facts adduced at the hearing demonstrated that while she had issued the written warning and appellant therefore appeared to be free to leave, she had forgotten to return his license and registration:

{¶18} "Q. So then you actually gave a warning before the tint meter even came to the scene. You'd already given him a warning.

{¶19} "A. That could be.

{¶20} "Q. At that point in time he was free to leave.

{¶21} "A. Yes.

{¶22} "Q. And he actually - - didn't the Defendant have to request that you give him back his ID and information he had given you?

{¶23} "A. That might be. I was in training. We forget things, you know.

{¶24} "Q. I'm just wondering if you remember that or if I need to refresh your recollection that you brought him the warning but kept his ID and registration and proof of insurance back in your vehicle.

{¶25} "A. Okay.

{¶26} "Q. Does that sound - -

{¶27} "A. That could be. I've done that several times.

{¶28} "Q. I don't want to put words in your mouth. If the question was asked, Did you give him back - - when you said that he was free to go, did you give him back the driver's license and his insurance card at that time? Your answer, No. As a matter of fact, I told him that I had to go back because I left it in my vehicle.

{¶29} "A. Okay.

{¶30} "Q. Does that sound right if that was what the testimony was?

{¶31} "A. If that's what I said at that point, then that's probably correct.

{¶32} "Q. So despite being free to leave, he couldn't leave at that moment, because you still had his property.

{¶33} "A. Correct.

{¶34} "Q. Now, I believe upon returning to his vehicle to give him that property, is that when you requested consent to search his vehicle?

{¶35} "A. I don't know if it was before or if it was after. I don't know if he got his ID back at the very end when he was arrested or if he got his ID back prior to a search of the vehicle. I don't remember. I mean, it's been a long time ago.

{¶36} "Q. Now, your testimony today is when you went back to him, after he has the warning and he's free to leave, you go back to him and decide then you're going to ask to search the vehicle - -

{¶37} "A. That's not my testimony. My testimony today is I don't remember if I went back to him after I gave him his warning, brought him his ID back, or I asked him to search the vehicle and had already searched the vehicle, then he got his ID. I don't remember. I just don't remember." Tr. 24-26.

{¶38} While the officer goes on to testify that standard operating procedure is to issue the warning and tell the person that he or she is free to leave before requesting consent to search, in the instant case appellant was not free to leave after she issued the warning because she had not yet returned his license and registration. While she could not remember whether she returned these items before or after the search of the vehicle, the request to search was contemporaneous with the return of appellant's license and registration, and the officer therefore had not completed the traffic stop at the time consent was received for the search. Appellant was not unlawfully detained at the time he gave consent to search.[1]

{¶39} Further, as this Court noted in *Bickel*, supra, even if the traffic stop was completed at the time the officer asked to search the vehicle, under *Florida v. Bostick*, mere questioning by police does not constitute a seizure and an officer may request permission to search even without a basis for suspecting a particular individual, provided the officer does not convey a message that compliance is required. The record does not demonstrate that appellant was detained for a longer period of time

[1] Appellant did not challenge the voluntariness of his consent; he testified that he refused consent and they searched the vehicle anyway. Tr. 91-92.

than necessary to complete the stop, or that the officer conveyed a message that compliance was required. Even if the officer returned appellant's identification before asking him for consent to search, the detention was short in duration and not a seizure under *Bostick*, supra.

{¶40} We next address appellant's claim that Patrolman Carroll reaching into appellant's pants to remove the bag of drugs exceeded the scope of a valid weapons patdown pursuant to *Terry v. Ohio* (1968), 392 U.S. 1.

{¶41} The United States Supreme Court established the "plain feel" doctrine as it relates to a *Terry* pat-down search for weapons for officer safety in *Minnesota v. Dickerson* (1993), 508 U.S. 366, 113 S.Ct. 2130. Therein, the Court held that police may seize contraband detected through the sense of touch during a protective pat-down if its identity as contraband is immediately apparent. *Id.* at 2137. Further, once the officer determines the object detected in the outer clothing of the suspect is not a weapon, the search must stop unless probable cause and exigent circumstances exist. *Id.*

{¶42} However, in the instant case, the search in which Patrolman Carroll discovered the baggie of cocaine in appellant's pants was not a *Terry* patdown. Officer Carroll initially conducted a *Terry* pat-down for officer safety in order to ascertain whether appellant had any weapons on his person. (T. 51-52). This pat-down did not reveal the presence of any weapons.

{¶43} Patrolman Carroll testified that after officers located the digital scale in the back of the vehicle, he asked appellant whether he had anything on his person or in his pockets, and whether he could search his person again. The Appellant responded, "No,

go ahead." (T. 52, 63, 66). Because appellant consented to the search, Patrolman Carroll felt around appellant's waistband and up through his legs, which the officer knew, based on his education, training and experience as a police officer, is a place that drug dealers often hide their drugs. (T. 52). As Patrolman Carroll felt up through appellant's legs, he noticed an unusual bulge in the rear of his pants. He asked appellant what it was, to which the appellant responded that he didn't know. (T. 52, 65-68).

{¶44} Officer Carroll testified that the bulge that he felt was consistent with drugs which he had felt during past searches in his experience. (T. 52). Patrolman Carroll told appellant that either appellant could pull the baggie out himself, or the officer was going to pull it out. (T. 52). At this point in time the officer pulled the baggie out of appellant's pants. Appellant did not claim at the suppression hearing that the officer exceeded the scope of his consent to search his person. Rather, appellant claimed as with the search of the vehicle that he did not give consent and the officer searched him without consent. The court did not err in finding that the consent to search appellant's person was validly given and the drugs were discovered during the consensual search.

{¶45} The assignment of error is overruled.

{¶46} The judgment of the Richland County Common Pleas Court is affirmed.

By: Edwards, P.J.

Hoffman, J. and

Delaney, J. concur

s/Julie A. Edwards

s/William B. Hoffman

s/Patricia A. Delaney

JUDGES

JAE/r0601

[Cite as *State v. Eatmon*, 2010-Ohio-5092.]

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
ADRIAN EATMON	:	
Defendant-Appellant	:	CASE NO. 2009 CA 0045

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Richland County Court of Common Pleas is affirmed. Costs assessed to appellant.

s/Julie A. Edwards

s/William B. Hoffman

s/Patricia A. Delaney

JUDGES