

[Cite as *State v. Johnson*, 2010-Ohio-5698.]

COURT OF APPEALS  
LICKING COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

MARCUS JOHNSON

Defendant-Appellant

JUDGES:

Hon. Julie A. Edwards, P.J.

Hon. William B. Hoffman, J.

Hon. John W. Wise, J.

Case No. 10-CA-35

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Licking County Common  
Pleas Court, Case No's. 09CR00246 and  
10CR00092

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

November 19, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

EARL L. FROST

Assistant Prosecuting Attorney  
Licking County Prosecutor's Office  
20 South Second Street  
Fourth Floor  
Newark, Ohio 43055

ANDREW T. SANDERSON

Burkett & Sanderson, Inc.  
21 West Church Street  
Suite 201  
Newark, Ohio 43055

*Hoffman, J.*

{¶1} Defendant-appellant Marcus Johnson appeals the November 30, 2009 Judgment Entry of the Licking County Court of Common Pleas denying his motion to suppress evidence. Plaintiff-appellee is the State of Ohio.

#### STATEMENT OF THE FACTS AND CASE

{¶2} On May 23, 2009, officers of the Central Ohio Drug Enforcement Task Force were working undercover at a local concert event. In the course of their activities, the officers observed Appellant, together with an acquaintance, circulate through the crowd, kneel in front of another person, and produce a baggy of suspected contraband. The officers witnessed the other person hand Appellant money.

{¶3} Appellant fled as the officers approached him, forcing the officers to tackle him. As a result, Appellant was arrested and charged with drug trafficking and obstructing official business.

{¶4} Appellant filed a motion to suppress. The trial court conducted a hearing on the motion on November 30, 2009, and denied the motion. Appellant then entered a plea of no contest to the charges. The trial court found Appellant guilty of the charges, and imposed a three year prison sentence.

{¶5} Appellant assigns as error:

{¶6} “I. THE TRIAL COURT COMMITTED HARMFUL ERROR IN DENYING THE DEFENDANT-APPELLANT’S MOTION TO SUPPRESS EVIDENCE.”

{¶7} Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 154-155, 797 N.E.2d 71, 74, 2003-Ohio-5372 at ¶ 8. When ruling on a motion to suppress, the trial court assumes the role

of trier of fact and is in the best position to resolve questions of fact and to evaluate the credibility of witnesses. See *State v. Dunlap* (1995), 73 Ohio St.3d 308, 314, 652 N.E.2d 988; *State v. Fanning* (1982), 1 Ohio St.3d 19, 20, 437 N.E.2d 583. Accordingly, a reviewing court must defer to the trial court's factual findings if competent, credible evidence exists to support those findings. See *Burnside*, supra; *Dunlap*, supra. However, once an appellate court has accepted those facts as true, it must independently determine as a matter of law whether the trial court met the applicable legal standard. See *Burnside*, supra. [Citing *State v. McNamara* (1997), 124 Ohio App.3d 706, 707 N.E.2d 539]; See, also, *United States v. Arvizu* (2002), 534 U.S. 266, 122 S.Ct. 744, 151 L.Ed.2d 740; *Ornelas v. United States* (1996), 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911. That is, the application of the law to the trial court's findings of fact is subject to a *de novo* standard of review. *Ornelas*, supra. Moreover, due weight should be given “to inferences drawn from those facts by resident judges and local law enforcement officers.” *Ornelas*, supra at 698, 116 S.Ct. at 1663.

{¶8} Appellant argues the trial court should have excluded the evidence as the State did not meet its burden in justifying his warrantless search and seizure. Appellant maintains the officers seized Appellant without probable cause prior to finding the contraband.

{¶9} A warrantless arrest done without probable cause is unconstitutional. *State v. Timson* (1974), 38 Ohio St.2d 122, 311 N.E.2d 16, paragraph one of the syllabus. Likewise, any search incident to that arrest is unconstitutional, and any primary or derivative evidence obtained subsequent to and as a result of the illegal arrest and search becomes “fruit of the poisonous tree” and must be suppressed. *Id.* at

paragraph two of the syllabus. See, also, *Segura v. United States* (1984), 468 U.S. 796, 804, 104 S.Ct. 3380, 82 L.Ed.2d 599; *Nardone v. United States* (1939), 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307. If, after being arrested, a defendant asserts probable cause was lacking at the time of arrest, the state bears the burden of proof on the issue of whether probable cause existed for a subsequent search and seizure. *Xenia v. Wallace* (1988), 37 Ohio St.3d 216, 524 N.E.2d 889, paragraph two of the syllabus.

{¶10} Probable cause exists when a reasonable, prudent person would believe the person arrested had committed a crime. See *State v. Timson* (1974), 38 Ohio St.2d 122, 127, 311 N.E.2d 16. In determining whether probable cause to arrest exists, the totality of the facts and circumstances must be “sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.” *Beck v. Ohio* (1964), 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142; *State v. Tibbetts* (2001), 92 Ohio St.3d 146, 153, 749 N.E.2d 226. Probable cause generally focuses on the actions of the accused just prior to the arrest. *State v. Papadopulos* (Oct. 4, 2004), 5th Dist. No.2004CA00069. Factors which may be considered include an officer's observation of some criminal behavior by the defendant, furtive or suspicious behavior, flight, events escalating reasonable suspicion into probable cause, or association with criminals and their locations. *Id.*

{¶11} Detective Doug Bline testified at trial:

{¶12} “Q. And what did you see the defendant do as he was circulating through the crowd?”

{¶13} “A. They were approaching people. You could - - they were doing offers. I would say it was an offer. They were - - you could see they were talking to people.”

They would show it, but no deals had occurred. They did that, like, three times as we were following them.

{¶14} “Q. Now, when you say they, are they working together? Are you seeing them interacting between each other?

{¶15} “A. Yes.

{¶16} “Q. How are they interacting?

{¶17} “A. They were talking to each other. They were just walking together. They didn’t go their separate ways or anything. They just stayed together the whole time.

{¶18} “Q. At any point did you see any contraband in either the defendant’s hand or Mr. Brown’s hands?

{¶19} “A. Yes.

{¶20} “Q. When did that occur?

{¶21} “\* \* \*

{¶22} “A. I had a better view of Mr. Johnson at that point. We were sitting there and it’s very difficult. Obviously there is a lot of foot traffic in these concerts. So it’s very difficult to sit in one spot. Actually, but I was - - and this is a rare circumstance. I was actually able to stand very still at a corner of a tent and look outward.

{¶23} “What I saw was Mr. Johnson then kind of kneel down and speak to a gentleman that was to his - - it would have been his right side, to the front. There was a space of approximately 2 feet in between the two men.

{¶24} “\* \* \*

{¶25} “Q. Okay. And is the transaction you observed, the handling of the white powder and then exchanging the white powder for currency, is that something that normally happens in a drug deal?

{¶26} “A. Yes.

{¶27} “Q. Based on your training, your education, and your experience, what was taking place?

{¶28} “A. A drug deal.

{¶29} “Q. Okay. And what happened at this point?

{¶30} “A. We continued to watch Mr. Brown actually complete his portion of the drug deal that he was doing. It appeared to be marijuana that he was dealing with at that point.

{¶31} “Once that was complete, the two men then exited that area together.

{¶32} “Q. Now, at this point - - or let me rephrase. Prior to this, had you seen any exchange of any items between the defendant and Mr. Brown?

{¶33} “A. No.

{¶34} “Q. Okay. At this point did you believe you had probable cause to arrest the defendant for any crimes?

{¶35} “A. Yes.

{¶36} “Q. What crimes would those be?

{¶37} “A. Drug trafficking.

{¶38} “Q. Is it illegal also to possess drugs?

{¶39} “A. Yes, it is.

{¶40} “Q. What occurred then?

{¶41} “A. We followed the two men as they went - - it would be to the east from that location. They walked - - let’s see how to explain it - - toward the front of the venue, which would be to the east. They continued through several locations until they eventually got to the furthest east side roadway.

{¶42} “\* \* \*

{¶43} “A. When the uniformed deputies approached the two men - - I believe it was Lieutenant Brown actually reached out and didn’t, like, physically hard grab ahold (sic) of Mr. Brown’s arm.

{¶44} “He just said, ‘Hey, you need to come with us. We need to kind of talk to you.’

{¶45} “Mr. Johnson you could see him actually leaning back. He was taking a step backwards as they approached and at that point he fled, which would be to the south.

{¶46} “\* \* \*

{¶47} “Q. And what did he appear to be looking at?

{¶48} “A. He was looking at the deputy placing his hands on Mr. Brown.

{¶49} “Q. Did he appear to give a reaction that he noticed what was taking place?

{¶50} “A. Oh, yes, absolutely.

{¶51} “Q. And was Lieutenant Brown in uniform?

{¶52} “A. Yes, he was.

{¶53} “Q. Okay. And once the defendant took off running, what happened then?

{¶154} “A. He was chased by other deputies and actually Detective Boerstler, who was closer than I was, actually was able to cut him off from one side and tackle Mr. Johnson.

{¶155} “Q. And was the defendant taken into custody at that point?

{¶156} “A. He was.”

{¶157} Tr. at 10-12; 15-16; 18-19.

{¶158} Upon review of the facts set forth above, the officers observed Appellant make a transaction in which money was exchanged for a bag containing suspected contraband at a concert. Upon approach, Appellant fled the scene escalating a reasonable suspicion of criminal activity to probable cause. Accordingly, we find the officers were justified in their arrest of the Appellant. The sole assignment of error is overruled.

{¶159} The judgment of the Licking County Court of Common Pleas is affirmed.

By: Hoffman, J. and

Wise, J. concur,

Edwards, P.J. concurs separately

s/ William B. Hoffman  
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HON. WILLIAM B. HOFFMAN

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HON. JULIE A. EDWARDS

s/ John W. Wise  
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HON. JOHN W. WISE

EDWARDS, P.J., CONCURRING OPINION

{¶60} I concur with the majority as to the disposition of this case.

{¶61} I disagree with the majority as to the statement, “Upon approach, Appellant fled the scene escalating a reasonable suspicion of criminal activity to probable cause.” I find that the officers had probable cause to arrest Appellant prior to his fleeing the scene.

s/ Julie A. Edwards

Judge Julie A. Edwards

JAE/rmn

