[Cite as *State v. Salinas*, 2015-Ohio-3501.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 14CAA120084
	:	
AVELARDO SALINAS	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Delaware County Court of Common Pleas, Case No. 14CRI040174
JUDGMENT:	AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
DATE OF JUDGMENT ENTRY:	August 24, 2015

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
CAROL HAMILTON O'BRIEN DELAWARE CO. PROSECUTOR BRIAN J. WALTER 140 N. Sandusky St. Delaware, OH 43015	CHAD A. HEALD 125 N. Sandusky St. Delaware, OH 43015

Delaney, J.

{¶1} Appellant Avelardo Salinas appeals from the December 1, 2014 Judgment Entry of Sentence in the Delaware County Court of Common Pleas and by incorporation the judgment entries overruling his motion to suppress. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} The following facts are adduced from the suppression hearing on August 21, 2014, at which Trooper Timothy B. Williamson of the Ohio State Highway Patrol was the sole witness.

{¶3} On April 4, 2014, Williamson was on temporary assignment to the Mt. Gilead Post with the District 6 Criminal Patrol Team. The criminal patrol team focuses on major highways known to be drug-trafficking corridors. Williamson has extensive training in the Drug Interdiction Assistance Program although his primary purpose is traffic control and drug interdiction is his secondary purpose.

{¶4} Around 1:44 p.m. Williamson was in uniform and in a marked OSHP cruiser sitting stationary on U.S. 23 close to Radnor Road in Delaware County observing southbound lanes of travel. Conditions were cloudy and overcast and traffic was light. Williamson's attention was drawn to a light-colored Chevy Cavalier following the vehicle ahead of it too closely, at a distance of approximately one to one-and-a-half car lengths. Williamson opined this distance was unsafe for conditions due to the speed of the vehicles, approximately 55 to 60 miles per hour. The "rule of thumb" Williamson follows for safe stopping distance is 10 feet away for every 10 miles per hour the vehicles are traveling. Williamson acknowledged this rule of thumb is advisory only.

{¶5} Williamson's cruiser is equipped with a video camera but the first observed violation of following too close was not videotaped.

{¶6} As the driver passed the trooper, he displayed a "very rigid body posture" with his hands and arms "locked" at the 10 and 2 positions on the steering wheel. The driver, appellant, had just passed two troopers sitting stationary on the other side of the roadway and also appeared to slow his speed in response to the troopers' presence.

{¶7} Williamson pulled out to pursue appellant and again observed him following another vehicle at an unsafe distance. Willamson pulled alongside appellant's vehicle and observed "very small children" inside the vehicle not in child restraints. Williamson estimated the age of the youngest child to be two to three years old and 30 to 35 pounds.

{¶8} Williamson captured the second instance of following too closely on video, initiated a traffic stop, and made contact with appellant. Appellant admitted he did not have a driver's license and did not own the vehicle. Williamson confirmed the presence of small children in the back seat, unrestrained. Williamson advised appellant of the reason for the stop and asked him where he was going; appellant responded he was traveling to Marion.

{¶9} Williamson asked appellant to exit the car because he didn't have a driver's license, intending to place appellant in the rear of his cruiser. Appellant turned his body and took several steps away from Williamson, which concerned the trooper for officer safety. Before placing appellant in the cruiser, pursuant to his usual practice, Williamson asked appellant if he could pat him down and appellant consented.

{¶10} Williamson felt a plastic baggy containing a powdery substance in the front left pocket of appellant's pants. Based on his training and experience Williamson identified this substance as contraband. He asked appellant what was in his pocket and appellant responded "You got me" as he pulled out a baggie of suspected powder cocaine.

{¶11} Williamson asked appellant how much he had and appellant responded "10 grams." Appellant further stated in response to the trooper's questions that he was on his way to Marion to sell the cocaine and that he was in the country illegally. Williamson then Mirandized appellant.

{¶12} Appellant was subsequently arrested and charged by indictment with one count of trafficking in cocaine pursuant to R.C. 2925.03(A)(2), a felony of the third degree [Count I] and one count of possession of cocaine pursuant to R.C. 2925.11(A), also a felony of the third degree [Count II]. Appellant entered pleas of not guilty and filed a motion to suppress.

{¶13} A suppression hearing was held on August 21, 2014 and the motion was overruled by judgment entries dated September 8 and September 9, 2014.

{¶14} On September 23, 2014, appellant entered pleas of no contest upon both counts and the trial court found him guilty as charged. The parties agreed the offenses merged for purposes of sentencing, appellee elected to sentence on Count I, and the trial court imposed a prison term of 12 months on November 21, 2014.

{¶15} Appellant now appeals from the judgment entry of his conviction and sentence and the incorporated judgment entries overruling his motion to suppress.

{¶16} Appellant raises two assignments of error:

ASSIGNMENTS OF ERROR

{¶17} "I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN OVERRULING THE DEFENDANT/APPELLANT'S MOTION TO SUPPRESS."

{¶18} "II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REFUSING TO PERMIT COUNSEL FOR THE DEFENDANT TO INQUIRE ABOUT A PATTERN OF STOPS WITH THE SOLE PURPOSE OF DRUG INTERDICTION."

ANALYSIS

I.

{¶19} In his first assignment of error, appellant argues the trial court should have sustained his motion to suppress. We disagree in part and agree in part.

{¶20} Appellate review of a trial court's decision to deny a motion to suppress involves a mixed question of law and fact. *State v. Long*, 127 Ohio App.3d 328, 332, 713 N.E.2d 1 (4th Dist.1998). During a suppression hearing, the trial court assumes the role of trier of fact and, as such, is in the best position to resolve questions of fact and to evaluate witness credibility. *State v. Brooks*, 75 Ohio St.3d 148, 154, 661 N.E.2d 1030 (1996). A reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Medcalf*, 111 Ohio App.3d 142, 145, 675 N.E.2d 1268 (4th Dist.1996). Accepting these facts as true, the appellate court must independently determine as a matter of law, without deference to the trial court's conclusion, whether the trial court's decision meets the applicable legal standard. *State v. Williams*, 86 Ohio App.3d 37, 42, 619 N.E.2d 1141 (4th Dist.1993), overruled on other grounds.

{¶21} There are three methods of challenging a trial court's ruling on a motion to suppress on appeal. First, an appellant may challenge the trial court's finding of fact. In reviewing a challenge of this nature, an appellate court must determine whether the trial court's findings of fact are against the manifest weight of the evidence. See, *State v. Fanning*, 1 Ohio St.3d 19, 437 N.E.2d 583 (1982); *State v. Klein*, 73 Ohio App.3d 486, 597 N.E.2d 1141 (4th Dist.1991). 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*, Williams*, supra. Finally, an appellant may argue the trial court has incorrectly decided the ultimate or final issues raised in a 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*, 95 Ohio App.3d 93, 96,620 N.E.2d 906 (8th Dist.1994).

Reasonable and Articulable Suspicion to Stop

{¶22} Appellant first argues the trial court erred in finding probable cause to support the traffic stop of appellant's vehicle. Specifically, he infers the trooper's testimony about appellant's distance from the cars in front of him is not credible because the trooper was too far away to judge the distance and the first violation was not caught on the video.

{¶23} Appellant frames his argument in terms of probable cause but the question is whether the trooper had reasonable, articulable suspicion to stop the vehicle. An investigative stop of a motorist does not violate the Fourth Amendment if the officer has a reasonable suspicion that the individual is engaged in criminal activity.

*Maumee v. Weisne*r, 87 Ohio St.3d 295, 299, 1999–Ohio–68, 720 N.E.2d 507, citing *Terry v. Ohio*, 392 U.S. 1, 22, 88 S.Ct. 1868 20 L.Ed.2d 889 (1968). Before a law enforcement officer may stop a vehicle, the officer must have a reasonable suspicion, based upon specific and articulable facts that an occupant is or has been engaged in criminal activity. *State v. Gedeon*, 81 Ohio App.3d 617, 618, 611 N.E.2d 972 (11th Dist.1992). Reasonable suspicion constitutes something less than probable cause. *State v. Carlson*, 102 Ohio App.3d 585, 590, 657 N.E.2d 591 (9th Dist.1995). The propriety of an investigative stop must be viewed in light of the totality of the circumstances. *State v. Bobo*, 37 Ohio St.3d 177, 524 N.E.2d 489 (1988), at paragraph two of the syllabus.

{¶24} Appellant was stopped for following the vehicle in front of him too closely. R.C. 4511.34(A) states in pertinent part, "The operator of a motor vehicle * * * shall not follow another vehicle * * * more closely than is reasonable and prudent, having due regard for the speed of such vehicle * * * and the traffic upon and the condition of the highway. * * * *."

{¶25} We are bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Waters*, 181 Ohio App.3d 424, 429, 2009-Ohio-1338, 909 N.E.2d 183, 187, ¶ 20 (5th Dist.), citing *State v. Guysinger*, 86 Ohio App.3d 592, 594, 621 N.E.2d 726 (1993). In this case, the uncontested testimony of the trooper established he observed appellant traveling at a distance of one to one-and-a-half car lengths behind the vehicle in front of him, a distance the trooper judged to be unsafe for conditions of the highway, particularly the speed of the vehicles. The trooper acknowledged the initial violation was not on video because the camera was not

activated until he was following appellant. We note, however, the video of the trooper's brief pursuit of appellant is in the record; this video confirms appellant's second instance of following too closely. The trial court's findings of fact, specifically, that appellant followed too closely and had unrestrained children in the back seat, is more than adequately supported by the competent, credible evidence of the videotape.

{¶26} Appellant argues the driving described by the trooper does not constitute a traffic violation but we disagree. Here, as in *State v. Harris*, the trial court used a higher standard in considering the motion to suppress, finding Trooper Williamson had probable cause to make the stop when he needed only reasonable, articulable suspicion. *State v. Harris*, 2012-Ohio-4237, ¶¶ 16-17 (4th Dist. Ross). The *Harris* court noted that "[a]n officer's direct observation that a vehicle is following another vehicle too closely provides probable cause to initiate a lawful traffic stop." Id., citing *State v. Kelly,* 188 Ohio App.3d 842, 2010–Ohio–3560, 937 N.E.2d 149, at ¶ 15, internal citation omitted. We note several Ohio courts and federal courts applying Ohio law have held that police may use a general rule of one car length for every 10 m.p.h. the car is traveling as an indicator that a driver has violated the statute. *Kelly*, supra, 2010-Ohio-3560 at ¶ 18, citing *State v. Meza,* Lucas App. No. L–03–1223, 2005-Ohio-1221, 2005 WL 635028, ¶ 19 and *United States v. Dukes*, 257 Fed.Appx. 855, 858 (C.A.6, 2007).

{¶27} The trooper's testimony is corroborated by the video and the stop of appellant's vehicle in the case sub judice is fully supported by reasonable, articulable suspicion.

Pat down and Discovery of Cocaine on Appellant's Person

{¶28} We turn to the pat down search of appellant's person. The authority to conduct a pat down search does not flow automatically from a lawful stop and a separate inquiry is required. *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The Fourth Amendment requires an officer to have a "reasonable fear for his own or others' safety" before frisking. Id. Specifically, "[t]he officer ... must be able to articulate something more than an 'inchoate and unparticularized suspicion or hunch.'" *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989), citing *Terry*, supra, 392 U.S. at 27. Whether that standard is met must be determined from the standpoint of an objectively reasonable police officer, without reference to the actual motivations of the individual officers involved. *United States v. Hill*, 131 F.3d 1056, 1059 (D.C.Cir.1997), citing *Ornelas v. United States*, 517 U.S. 690, 696, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996).

{¶29} Williamson testified he patted appellant down for weapons prior to placing him in the cruiser out of a concern for officer safety. The frisk, or protective search, approved in *Terry* is limited in scope to a pat down search for concealed weapons when the officer has a reasonable suspicion that the individual whose behavior he is investigating at close range may be armed and dangerous. *Terry*, supra, 392 U.S. at 27. Williamson was about to place appellant in the close range of the interior of the cruiser, but appellant turned his body and took several steps, evasive action leading the trooper to question the safety of placing appellant in the cruiser. The United States Supreme Court has recognized traffic stops involve inherent danger and law enforcement officers may exercise authority over a driver and passengers to maintain a sense of safety. See

Arizona v. Johnson, 555 U.S. 323, 330, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009) (noting "'[t]he risk of harm to both the police and the occupants [of a stopped car] is minimized * * * if the officers routinely exercise unquestioned command of the situation.'") (internal citations omitted). The pat down of appellant is supported by Williamson's reasonable belief appellant might have been armed and dangerous. *Terry*, supra, 392 U.S. at 28.

{¶30} In this case, the trooper articulated circumstances that objectively would lead a reasonable officer to conclude appellant might be armed and dangerous. During the pat down, the trooper immediately recognized the object in appellant's pocket as contraband, and upon questioning what he had, appellant immediately withdrew the baggie from his pocket and said "You got me." In *Minnesota v. Dickerson* (1993), 508 U.S. 366, the U.S. Supreme Court extended the rationale of *Terry* to include contraband. "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 375-76. The incriminating nature of the object must be immediately apparent in order to justify its seizure. Id. at 375. The seizure of the baggie here is justified.

{¶31} The evidence further indicates appellant consented to the pat down, but the question of consent is superfluous in light of our finding reasonable suspicion existed. *State v. Radcliff*, 5th Dist. Licking No. 13-CA-118, 2014-Ohio-3221, ¶ 27. Generally an appellate court would reach the question of the voluntariness of consent

only after determining appellant was unlawfully detained. Id., citing *State v. Hawkins*, 2nd Dist. Montgomery No. 25712, 2013-Ohio-5458, at ¶ 13.

{¶32} We find the trooper had reasonable suspicion to pat down appellant, thereby locating the contraband.

Appellant's Incriminating Statements Elicited in Violation of Miranda

{¶33} Finally, appellant argues his statements regarding the cocaine were obtained in violation of his right to remain silent and we agree. *Miranda* mandates that all individuals who are taken into police custody must be advised of certain constitutional rights upon custodial interrogation. *State v. Tucker,* 81 Ohio St.3d 431, 435, 692 N.E.2d 171 (1998). Appellee concedes appellant was subject to custodial interrogation upon being placed in handcuffs. Our review of the videotape indicates a voluntary, routine interaction initially between appellant and the trooper: appellant agrees to the pat down and the trooper asks what the object is in his pocket. Appellant states words to the effect of "you've got me" and pulls a baggie of white powder from his pocket.

{¶34} The encounter then becomes custodial when appellant is handcuffed and the trooper asks questions eliciting the following statements: the powder constitutes ten grams of cocaine, appellant intended to sell the cocaine in Marion, and he is in the country illegally. Only upon the conclusion of these incriminating statements did the trooper Mirandize appellant.

{¶35} We find the statements subsequent to the handcuffing, as appellee concedes, were obtained in violation of appellant's Miranda rights and should therefore have been suppressed. The trial court found the statements were admissible pursuant

to our decision in *Sexton*, but that decision involved a public-safety exception wherein the officer on a traffic stop asked a defendant what he was reaching for in his pocket, believing it might be a weapon, and the defendant responded with an incriminating answer. *State v. Sexton*, 5th Dist. Ashland No. 11-COA-033, 2012-Ohio-658. The scope of the questioning here exceeds the scope of any public-safety exception to the *Miranda* requirement and was clearly intended to elicit incriminating responses.

{¶36} Appellant's first assignment of error is thus overruled in part and sustained in part. We find the statements subsequent to the handcuffing should have been suppressed as described infra and therefore vacate the judgment of the trial court and remand this matter for further proceedings consistent with our opinion herein.

II.

{¶37} In his second assignment of error, appellant argues the trial court should have permitted him to admit a report prepared by another trooper into evidence and to question Williamson about the actions of the other trooper in an unrelated case. We disagree.

{¶38} We note appellant proffered the report of a different trooper pertaining to an unrelated traffic stop but did not state the purpose of seeking to admit this evidence. Appellant's purpose is not described in his brief in the instant appeal, either, and he argues only that the trial court should have allowed him to present evidence of a "pattern of stops" by the Ohio State Highway Patrol. We infer appellant's argument to be troopers conducted drug interdiction by means of pretextual traffic stops but this argument is not supported by appellant's proposed exhibits A or B, and we have already

found the stop here was supported by reasonable, articulable suspicion in our discussion of appellant's first assignment of error.

{¶39} Appellant's second assignment of error is thus overruled.

CONCLUSION

{¶40} The judgment of the Delaware County Court of Common Pleas is affirmed in part and reversed in part. This matter is remanded to the trial court for further proceedings consistent with this opinion.

By: Delaney, J. and

Wise, J., concur;

Hoffman, P.J., concurs separately.

Hoffman, P.J., concurring

{¶41} I concur in the majority's analysis regarding the trooper's reasonable and articulable suspicion to stop Appellant's vehicle and regarding Appellant's incriminating statements elicited in violation of *Miranda*.

{¶42} I concur in the majority's disposition regarding the pat down and discovery of cocaine on Appellant's person, but do so for a reason different from that adopted by the majority.

{¶43} Although unclear, it appears the majority uses the result of the pat down as a justification of the trooper's conclusion Appellant might be armed and dangerous (Majority Opinion at ¶30). If so, I suggest that puts the proverbial "cart before the horse." I find the trooper had reasonable grounds to conduct a pat down prior to the discovery of the plastic bag and, further, that Appellant consented to the pat down.

{¶44} The majority also appears to justify seizure of the plastic bag under the "plain feel" doctrine in *Minnesota v. Dickerson*, supra. I am not persuaded the identification of the powdery substance in the plastic bag in Appellant's pocket as contraband was immediately apparent by merely feeling its contour or mass.

{¶45} However, I concur in the majority's conclusion the plastic bag was properly seized because Appellant voluntarily removed the plastic bag from his pocket saying "You got me." Such action by the Appellant moves the analysis from one of "plain feel" to "plain view" coupled with an inculpatory statement.

{¶46} Finally, I concur in the majority's analysis and disposition of Appellant's second assignment of error.

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HON. WILLIAM B. HOFFMAN