**[Cite as *State v. Wiegand*, 2017-Ohio-9143.]**

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

| | | |
|---|---|---|
| STATE OF OHIO | : | JUDGES: |
| | : | |
| | : | Hon. Patricia A. Delaney, P.J. |
| Plaintiff-Appellee | : | Hon. William B. Hoffman, J. |
| | : | Hon. Earle E. Wise, Jr., J. |
| -vs- | : | |
| | : | Case No. 17-CA-24 |
| | : | |
| NIKOLE L. WIEGAND | : | |
| | : | |
| | : | |
| Defendant-Appellant | : | O P I N I O N |

| | |
|---|---|
| CHARACTER OF PROCEEDING: | Appeal from the Licking County Court of Common Pleas, Case No. 16 CR 00275 |
| JUDGMENT: | AFFIRMED |
| DATE OF JUDGMENT ENTRY: | December 18, 2017 |

APPEARANCES:

| For Plaintiff-Appellee: | For Defendant-Appellant: |
|---|---|
| WILLIAM C. HAYES<br>LICKING CO. PROSECUTOR<br>JENNA E. JOSEPH<br>20 S. Second St., 4th Floor<br>Newark, OH 43055 | MICHAEL R. DALSANTO<br>33 West Main St., Ste. 106<br>Newark, OH 43055 |

*Delaney, P.J.*

{¶1} Appellant Nikole L. Wiegand appeals from the March 22, 2017 Entry of "no contest plea" and January 4, 2017 Order and Decision Overruling Defendant's Motion to Suppress Evidence of the Licking County Court of Common Pleas. Appellee is the state of Ohio.

## FACTS AND PROCEDURAL HISTORY

{¶2} The following evidence is adduced from the transcript of the suppression hearing on September 20, 2016.

{¶3} This case arose on February 16, 2016, when the Central Ohio Drug Enforcement (CODE) Task Force planned a "buy-bust" operation with a target named James Bailey. A confidential informant (CI) purchased narcotics from Bailey; the controlled buy was recorded with detectives listening in, planning to arrest Bailey shortly after the transaction. Detective Hoskinson's role in the buy-bust was to traffic-stop Bailey's vehicle after the buy. He listened to the buy and communicated with other detectives over a scrambled radio channel. Hoskinson knew Bailey was driving a 1999 Buick and had a female in the car with him.

{¶4} Hoskinson was told Bailey was on the move after the buy. He already knew that Bailey's operator's license was suspended and that a successful narcotics buy was made from Bailey's vehicle. When the Buick passed him, Hoskinson pulled out and made a traffic stop of the vehicle. As the car slowed, Hoskinson observed the female front-seat passenger, identified as appellant, moving around inside the vehicle. Hoskinson described her movements inside the vehicle as furtive and suspicious, reaching from the

floor to the center console and near her "groin area." At that point, the vehicle was still moving.

{¶5} These movements were typical of actions to hide contraband, in the detective's experience. He testified female suspects are known to sometimes hide contraband in their underwear or "vaginal area." Hoskinson was familiar with appellant from other interactions and her LEADS printout indicated her operator's license was suspended due to a drug conviction.

{¶6} As Hoskinson approached the driver's side of the Buick, he observed appellant sitting up high on the seat, with her back arched and her hand down her pants. When she realized Hoskinson was close to the car, she hurriedly sat down and put her seat belt on.

{¶7} Bailey was cuffed and taken away from the scene. Appellant at first remained inside the car. After Bailey was gone, Hoskinson told her he saw her shoving something down her pants. He then read appellant her Miranda rights and asked what she put in her pants. She answered that she stuffed a "rig" down her pants. A "rig" is a syringe used to inject narcotics. Appellant pulled out the "rig" and handed it over.

{¶8} At that point, Hoskinson summoned a female officer to the scene for a pat-down. Ptl. Fortney, a female officer, arrived on the scene and patted appellant down. Hoskinson asked appellant if she would voluntarily ride to the Heath Police Department to speak to Detective Green. Appellant was not arrested or cuffed. She agreed to go to the police department and was transported in the back of a cruiser by Fortney.

{¶9} Hoskinson remained at the scene of the traffic stop briefly and then proceeded to the Heath Police Department. Green was interviewing Bailey and appellant

was standing in the parking lot. Hoskinson offered her a cigarette. He suspected appellant had an ounce of methamphetamine hidden on her person because the C.I. had indicated there were more drugs in the car. Hoskinson asked appellant about the ounce of meth and she denied having it. Hoskinson then told her if she turned over the meth voluntarily, she would not be charged with tampering.

{¶10} Appellant now told Hoskinson "It's not mine" and Hoskinson asked where the drugs were. She responded that the drugs were in her crotch, and Hoskinson asked whether she wanted to go to a private area with a female officer to retrieve them. Appellant replied that the drugs "weren't that far up there" and she could get them herself. (T. 20). Hoskinson turned away and Fortney watched while appellant retrieved a baggie of narcotics. Fortney took the baggie and handed it over to Hoskinson. Ultimately, concealed on appellant's person were two plastic baggies containing methamphetamine, oxycodone, and buprenorphine.

{¶11} Hoskinson described appellant as scared but cooperative. She had been Mirandized at the scene of the traffic stop but never requested an attorney or refused to answer questions. If appellant had not voluntarily turned over the narcotics, Hoskinson would have sought a search warrant for her body cavity, but he did not tell appellant he intended to seek a search warrant. Appellant was not arrested and was permitted to leave the police department after she spoke to Green.

{¶12} Appellant was charged by indictment with one count of aggravated drug possession (methamphetamine) pursuant to R.C. 2925.11(A)(C)(1)(b), a felony of the third degree [Count I]; one count of aggravated drug possession (oxycodone) pursuant to R.C. 2925.11(A)(C)(1)(a), a felony of the fifth degree [Count II]; one count of drug

possession (buprenorphine) pursuant to R.C. 2925.11(A)(C)(2)(a), a felony of the fifth degree [Count III]; and one count of possession of drug abuse instruments pursuant to R.C. 2925.12(A)(C), a misdemeanor of the first degree [Count IV].

{¶13} Appellant entered pleas of not guilty and filed, e.g., a motion to suppress evidence seized from her person on February 16, 2016, alleging her consent to search was involuntary. Appellee responded with a memorandum in opposition and an evidentiary hearing was held. On January 4, 2017, the trial court overruled the motion to suppress by judgment entry.

{¶14} On March 22, 2017, appellant changed her pleas to ones of no contest and the trial court found her guilty as charged. After a pre-sentence investigation, the trial court sentenced appellant to a community-control term of 4 years.

{¶15} Appellant now appeals from the trial court's entry of conviction and sentence.

{¶16} Appellant raises one assignment of error:

**ASSIGNMENT OF ERROR**

{¶17} "THE TRIAL COURT IMPROPERLY DETERMINED THAT THE CONSENT TO SEARCH APPELLANT WAS VOLUNTARILY GIVEN AND AS A RESULT ERRED WHEN IT DID NOT SUPPRESS EVIDENCE AND STATEMENTS GATHERED ON FEBRUARY 6TH, 2017."

**ANALYSIS**

{¶18} Appellant argues the trial court should have granted her motion to suppress because Hoskinson threatened appellant with a tampering charge, therefore rendering her consent to search involuntary. We disagree.

{¶19} 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.

{¶20} 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).

{¶21} Finally, as the United States Supreme Court held in *Ornelas v. U.S.,* 517 U.S. 690, 689, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996), "... as a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal." Moreover, due weight should be given "to inferences drawn from those facts by resident judges and local law enforcement officers." *Id.*

{¶22} Appellant asserts consent to a search of her person was not voluntary and was coerced by Hoskinson's threat to charge her with tampering with evidence. Appellee responds that under all of the circumstances, appellant's consent was voluntary because she was never subjected to coercive tactics by police. Our review of the record, though, established the interaction between appellant and police was a progression of events which appellant has conflated in her argument. The following sequence of events is relevant: the controlled buy; the traffic stop; observation of appellant's furtive movements; reading of appellant's Miranda rights; the ensuing conversation in which appellant admitted she had a "rig" (syringe) in her pants and pulled it out; the pat-down by Fortney; transportation to the police department; further conversation with Hoskinson asking appellant about the missing ounce of methamphetamine and appellant denies having it; Hoskinson's statement that she would not be charged with tampering if she produced it; appellant's admission that the meth was "in her crotch;" and finally, appellant's retrieval and handover of the narcotics. The premise of appellant's argument is that her consent to search was coerced by Hoskinson's threat to charge her with tampering if she didn't

turn over the missing meth, but by that point she had already produced a syringe from her person and been patted down.

{¶23} The initial conversation that produced the "rig" and the ensuing patdown are a significant portion of this encounter, and appellant has not contested the validity of the pat-down pursuant to *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The United States Supreme Court recognized in *Terry* that, where a police officer is justified in believing that an individual, whose suspicious behavior he is observing, may be armed and dangerous, the officer may make a limited search in order to protect himself and the public. *State v. Evans,* 67 Ohio St.3d 405, 1993–Ohio–186, 618 N.E.2d 162, ¶ 4, citing *Terry,* 392 U.S. at 24. "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence." *Id.* The validity of a pat-down under *Terry* requires that an officer have a reasonable, objective basis for conducting a protective frisk, and is to be evaluated in light of the totality of the circumstances, when viewed through the eyes of the officers on the scene. *State v. Martin,* 2nd Dist. Montgomery No. 20270, 2004–Ohio–2738, ¶ 16.

{¶24} Appellant was Mirandized and remained willing to talk to Hoskinson at the scene of the traffic stop. It is well-recognized that the need for a protective frisk becomes more apparent where drugs are involved. *State v. Oatis*, 12th Dist. Butler No. CA2005-03-074, 2005-Ohio-6038, ¶ 23. The Ohio Supreme Court has stated that "the 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." *Evans* at ¶ 9. Further, "[r]ecognizing the prevalence of weapons in places where illegal drugs are sold and used ... an officer's fear of violence when investigating drug activity is a legitimate concern that will justify a pat-

down search for weapons." *Martin,* supra, 2004–Ohio–2738 at ¶ 17, citing *State v. Taylor*, 82 Ohio App.3d 434, 612 N.E.2d 728 (2nd Dist.1992). In the instant case, the justification for the pat-down was twofold: appellant had just been involved in a narcotics transaction and she admitted to the detective that she had a syringe stuffed down her pants, a potential risk to anyone she encountered.

{¶25} We note Hoskinson developed sufficient reasonable suspicion that appellant could be armed, and the pat-down of appellant was within the scope permitted by *Terry.* Hoskinson, a detective with the narcotics task force who was familiar with appellant, had just listened to the controlled buy of narcotics from the vehicle in which appellant was sitting, and observed appellant making furtive movements indicating possible stashing of weapons and/or narcotics. Appellant was Mirandized and admitted to Hoskinson that she concealed a syringe in her pants. The totality of the circumstances establish that the patdown effectuated by Fortney was premised upon reasonable suspicion and therefore permitted under *Terry*.

{¶26} Appellant then agreed to go to the police department, was never placed under arrest, and spoke to Hoskinson further in the parking lot. At this point he pressed her about the ounce of methamphetamine which was unaccounted for.

{¶27} Because the evidence was seized by Hoskinson without benefit of a warrant, the trial court was required to suppress the evidence on appellant's motion unless the court found an exception to the warrant requirement. One form of exception is consent. The state must show by clear and convincing evidence that any consent on which it relies to justify a warrantless search or seizure was freely and voluntarily given. *Bumper v. North Carolina*, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968). Consent

is not voluntary if it is the product of coercion. Whether the "consent" was the product of coercion must be determined from the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). The burden rests on the state to establish consent was freely and voluntarily given and not mere submission to authority. *Bumper,* supra; *State v. Cottrill,* 5th Dist. Fairfield No. 06–CA–64, 2007–Ohio–5293.

{¶28} Important factors in determining the voluntariness of consent are: (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse to consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found. *State v. Hall*, 5th Dist. Tuscarawas Nos. 2000AP030025, 2000AP030026, unreported, 2000 WL 1862650, *3 (Dec. 14, 2000), citing *State v. Webb,* 2nd Dist. Montgomery No. 17676, unreported, 2000 WL 84658 (Jan. 28, 2000).

{¶29} Appellant asserts she only consented to search because of the threat to charge her with tampering, but "[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." *State v. Sears*, 2nd Dist. Montgomery No. 20849, 2005-Ohio-3880, ¶ 38. It is involuntary because it is coerced; that is, the product of compulsion arising from physical force or a threat of physical force. *Id*. We find no such compulsion in Hoskinson's statement. Appellant first denied possession of the narcotics and only produced them after the statement was made, but a suspect's refusal to hand over incriminating evidence is not necessarily determinative of coercion. *State v. DeCaminada*,

148 Ohio App.3d 213, 2002-Ohio-2917, 772 N.E.2d 701, ¶ 44 (2nd Dist.). Such refusal is one factor in determining whether coercion was applied to obtain it through further demands. *Id*. Also significant is the subject's vulnerability, the reasonableness of the officer's other conduct, as well as the time of day, location, and proximity of other persons. *Id*.

{¶30} On the totality of those circumstances in the instant case, we agree with the trial court that appellant was not coerced into producing the evidence. See, *State v. Luckeydoo*, 5th Dist. Licking No. 2004CA00105, 2005-Ohio-3823. Appellant was informed several times she had the right not to speak with officers but chose to do so. She was 27 years old at the time of the offense, and "she had previously been convicted of felony and misdemeanor offenses, and therefore was familiar with the workings of the criminal justice system" (Entry, 2). She never expressed any hesitation in speaking to Hoskinson or in traveling to the police department, and her interviews with police "were brief and afterwards she was permitted to leave." (Entry, 2).

{¶31} We find appellant knowingly and freely relinquished first the "rig," and subsequently the baggies of narcotics, all of which she had placed in her pants or "crotch area." She was never in custody, was Mirandized, and never expressed any unwillingness to speak to Hoskinson. See, *State v. Bishop*, 5th Dist. Ashland No. 16-COA-014, 2016-Ohio-7593, ¶ 12; *State v. Cottrill*, supra, 2007-Ohio-5293.

{¶32} We disagree with appellant's assertion that the instant case is identical to *State v. Myer*, 5th Dist. Perry No. 16-CA-00007, 2017-Ohio-1046, in which the trial court suppressed evidence because it found the police activity to be coercive. *Id.* In agreeing with the trial court, we expressly noted we are bound to accept factual determinations of

the trial court so long as they are supported by competent and credible evidence, and the evaluation of evidence and the credibility of the witnesses are issues for the trier of fact in the hearing on the motion to suppress. *Id*. at ¶ 15, citing *State v. Mills*, 62 Ohio St.3d 357, 582 N.E.2d 972 (1992). Our role in reviewing a trial court's ruling on a motion to suppress is not to reevaluate the evidence or the credibility of the witnesses, but to determine whether the trial court's application of the law to the facts, as the trial court found them to be, is appropriate. *Myer*, supra, at ¶ 16, citing *Mills*, 62 Ohio St.3d at 366; *State v. Williams*, 86 Ohio App.3d 37, 41, 619 N.E.2d 1141 (4th Dist. 1993).

{¶33} The circumstances of the police-citizen encounter in *Myer* were completely different from the instant case. The defendant in *Myer* was stopped only for a traffic violation; no argument existed that law enforcement had probable cause to search the defendant's car, or that the officer had reason to believe contraband was hidden on the defendant's person or in the car. *Myer* is thus similar to *State v. Deemer*, 5th Dist. Tuscarawas No. 2015 AP 01 0006, 2015-Ohio-3199, appellant's other cited case, in which we also agreed with a trial court's finding of coercive police conduct arising from an ordinary traffic stop. *Id.* at ¶ 24. *Myer* and *Deemer* are distinguishable, though, from the instant case, in which the circumstances of the police-citizen encounter were considerably less innocuous. In the instant case, the traffic stop arose from a "buy-bust" operation. Appellant had already produced a syringe from her person, and Hoskinson had reason to believe she also possessed missing methamphetamine. Although he could have sought a search warrant for the body cavity, he did not tell appellant of his intention to do so (T. 24-25).

{¶34} Based upon the totality of the circumstances, we find the trial court's determination that appellant's consent was freely and voluntarily given was not clearly erroneous. The trial court did not err in overruling appellant's motion to suppress.

**CONCLUSION**

{¶35} Appellant's sole assignment of error is overruled and the judgment of the Licking County Court of Common Pleas is affirmed.

By: Delaney, P.J.,

Hoffman, J. and

Wise, Earle, J., concur.