[Cite as *State v. Oliver*, 2019-Ohio-3007.]

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. John W. Wise, P.J.
Plaintiff - Appellee	:	Hon. Craig R. Baldwin, J.
	:	Hon. Earle E. Wise, J.
-vs-	:	
	:	
GRETA J. OLIVER	:	Case No. 19 CA 2
	:	
Defendant - Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Guernsey County Court of Common Pleas, Case No. 18CR44
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	July 24, 2019

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JASON R. FARLEY Assistant Guernsey County Prosecuting Attorney 627 Wheeling Ave Cambridge, Ohio 43725	MICHAEL GROH 1938 E. Wheeling Ave. Cambridge, Ohio 43725

Baldwin, J.

{¶1} Greta J. Oliver appeals the Guernsey County Court of Common Pleas denial of her motion to suppress evidence. The State of Ohio is Appellee.

STATEMENT OF FACTS AND THE CASE

{¶2} A *Terry* search of Appellant led to the discovery of illicit drugs in Appellant's pocket and charges of two counts of Aggravated Possession of Drugs in violation of R.C. 2925.11(C)(1)(a), felonies of the fifth degree. Appellant alleged the search exceeded the parameters of a *Terry* search and filed a motion to suppress the evidence discovered during the search. The trial court disagreed and found the search was subject to the *plain feel* doctrine. After the motion to suppress was denied, Appellant entered a no contest plea and was found guilty of one count of Aggravated Possession of Drugs in violation of R.C. 2925.11(C)(1)(a).

{¶3} Detective Dustin Gerdau of the Cambridge, Ohio Police Department, was on duty watching a house for suspected drug activity. Appellant's vehicle stopped at the house, stayed for about thirty minutes and left. Detective Gerdau followed the vehicle and noticed that it did not have a functional license plate light, a misdemeanor offense. He stopped Appellant at approximately 2:00 AM and cited her for a violation of local ordinance 74.05(A)(2) which prohibits operation of a vehicle without a functioning license plate light.

{¶4} After Appellant stopped, Detective Gerdau requested her identification and the identification of her passenger, John Work. He asked if Appellant had anything illegal in the car and Appellant revealed that there was a knife in the car, but she denied having any marijuana and stated she did not do drugs. Detective Gerdau asked if he could

search the vehicle and she began exiting the car. The Detective asked her to wait and that they would have her and her passenger exit separately. During this time, another officer confirmed that her passenger, John Work, was subject to a warrant for his arrest. He was removed from the vehicle and placed under arrest and in the back of a cruiser.

{¶5} When Appellant exited the car, Detective Gerdau asked if she had anything on her and if he could search her pockets. Her response was unclear and he asked several times until she stated that she did not want him to touch her. Detective Gerdau admitted he did not have reason to search Appellant and did not do so.

{¶6} Patrolman Bridget L. Vickers arrived at the scene and was ordered to watch Appellant during the search. Patrolman Vickers was not told anything more about the situation and did not know if the Appellant was the driver or the passenger. She noticed that the Appellant was acting odd, digging in her pockets and stating she was going to get sick. She complained on several occasions of being ill and suffering intestinal distress. The Patrolman thought Appellant's behavior was suspicious and described her as "going for the same side pocket and kind of leaning. I believed she was trying to hide a weapon or something in that pocket. She didn't want me to know what she was doing." At that point she decided to conduct a search to insure that she did not have any weapons.

{¶7} Patrolman Vickers was a new officer, still in training, but she had previously served in the Guernsey County Jail for two and one half years, as well as three years in the juvenile corrections system. During this time she was responsible for searching persons coming into the jail. She testified that she performed thousands of searches during her tenure in the County Jail and the juvenile corrections system.

{¶8} During the search of Appellant, Patrolman Vickers noticed a small lump in the watch pocket of Appellant's jeans, which had the consistency of a baggie sliding underneath the cloth of the jeans. She testified that it was immediately apparent to her that this was contraband, something that should not have been there. She explained that "[g]enerally when people put things in that pocket and it's a lump, and you feel that underneath the pocket, it's drugs." She removed the item from Appellant's pocket and discovered a plastic bag containing a round tablet and a crystalline substance identified afterward as methamphetamine. The tablet was identified as Oxycodone. Patrolman Vickers testified her expectation that she would find drugs in a bag was confirmed. Appellant was arrested and charged with two counts of Aggravated Possession of Drugs in violation of R.C. 2925.11(C)(1)(a) a felony of the fifth degree.

{¶9} Appellant entered a plea of not guilty and filed a motion to suppress the evidence of the drugs, asserting that she did not voluntarily consent to a search of the car or her person and that the search of person went beyond the scope of a search for weapons. The trial court denied the motion, finding that Appellant did consent to the search of the automobile and that the *plain feel* doctrine applied to the search, rendering the search and the discovery of the drugs constitutional.

{¶10} Appellant thereafter changed her plea to no contest and she was found guilty of one count of Aggravated Possession of Drugs and sentenced to a jail term of eleven months. The sentence was suspended and Appellant was placed on three years of community control. Appellant filed a timely notice of appeal and submitted one assignment of error:

{¶11} "I. THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS."

STANDARD OF REVIEW

{¶12} Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 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 witness credibility. See *State v. Dunlap*, 73 Ohio St.3d 308, 314, 1995-Ohio-243,652 N.E.2d 988; *State v. Fanning,* 1 Ohio St.3d 19, 20, 437 N.E.2d 583 (1982). 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*, quoting *State v. McNamara*, 124 Ohio App.3d 706, 707 N.E.2d 539 (4th Dist. 1997); See, also, *United States v. Arvizu*, 534 U.S. 266, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002); *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). 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*. Due weight should be given "to inferences drawn from those facts by resident judges and local law enforcement officers." *Ornelas*, *supra* at 698.

{¶13} This case turns on the application of the *plain feel doctrine* described by the United States Supreme Court in *Minnesota v. Dickerson*, 508 U.S. 366, 373, 113 S.Ct. 2130, 2136, 124 L.Ed.2d 334 (1993): "The question presented today is whether police officers may seize nonthreatening contraband detected during a protective pat-down

search of the sort permitted by *Terry*. We think the answer is clearly that they may, so long as the officers' search stays within the bounds marked by Terry." The "bounds marked by *Terry*" include a requirement that the "incriminating character" of the object must be "immediately apparent," meaning that the police have probable cause to associate an object with criminal activity. *Id*. at 375; *State v. Buckner*, 2d Dist. Montgomery No. 21892, 2007–Ohio–4329, ¶ 9. *State v. Wheeler,* 2nd Dist. Montgomery No. 27282, 2017-Ohio-4013, ¶ 31, appeal not allowed, 152 Ohio St.3d 1408, 2018-Ohio-723, 92 N.E.3d 879.

{¶14} "Ultimately, whether the nature of the items is "immediately apparent" is a question of fact for the trial court, which is in a much better position than this Court to gauge police credibility." (Citations omitted.) *State v. Hansard*, 4th Dist. Scioto No. 07CA3177, 2008-Ohio-3349, ¶¶ 31-32,

ANALYSIS

{¶15} Patrolman Vicker's actions and testimony are the focus of this case. Appellant does not argue that the officer's search of her person was improper, but only that once she confirmed that the item in her watch pocket was not a weapon she was obligated to end her search. Removing the bag with its illicit contents was, according to Appellant, a violation of her Fourth Amendment Rights. In support of her argument she cites to *State v. Milhouse*, 133 Ohio App.3d 527, 728 N.E.2d 1123 (1st Dist.1999), but that case is distinguishable on its facts. In *Milhouse,* the State failed to establish that the product of the search was immediately apparent to the officer as contraband. The First District Court of Appeals found that "the officer's testimony belies the fact that it was

immediately apparent that the object was contraband. It was only after squeezing and breaking the object that he determined that it was crack cocaine." *Id.* at 531.

{¶16} The Appellant also cites *State. v. Evans*, 67 Ohio St. 3d 405, 414, 1993 Ohio 186 (1993) but the focus of that case was the arresting officer's belief that the item he felt during the *Terry* search was a weapon. The *Evans* court expressly noted that the arresting officer removed the item he discovered for reasons of personal safety and that there was no issue that it was immediately apparent the nature of the mass discovered during the search was contraband. The *Evans* court was aware of *Dickerson*, but concluded it was not applicable to the facts of the case before it.

{¶17} We arrive at a different conclusion in this case and find that *Dickerson* and its progeny are controlling and when applied to this case, support the conclusion of the trial court.

{¶18} Patrolman Vickers testified to her experience conducting searches, claiming she has completed thousands in her career. She described the behavior of Appellant as odd and perceived her behavior as an attempt to conceal something in her right pocket while her car was being searched for contraband. Out of concern that she may be concealing a weapon, the officer conducted a pat down of Appellant and noticed a small rounded lump in her watch pocket. She also noted that during the search, but without further manipulation other than what was necessary to identify the lump as not a weapon, the mass was slippery. She testified that the nature of the item as contraband was immediately apparent to her because "when people put things in that pocket and it's a lump, and you feel that underneath the pocket, it's drugs."

{¶19} The testimony of the officer was unrebutted, and while the Appellant may attack the credibility of the officer, "*** whether the nature of the items is "immediately apparent" is a question of fact for the trial court, which is in a much better position than this Court to gauge police credibility." *Hansard*, *supra at* ¶ 32.

{¶20} The trial court accepted the testimony of Patrolman Vickers that it was immediately apparent that the object felt was contraband, that the plain feel exception to the search warrant requirement applied during the limited search of Appellant for weapons and that the motion to suppress must be denied. We hold that there is competent, credible evidence to support the trial court's factual findings and that the trial court correctly applied the law to those facts.

{¶21} Appellant's assignment of error is denied. The decision of the Guernsey County Court of Common Pleas is affirmed.

By: Baldwin, J.

Wise, John, P.J. and

Wise, Earle, J. concur.