[Cite as *State v. Shough*, 2019-Ohio-3431.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. John W. Wise, P.J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	Case No. 19-CA-26
	:	
BENNIE BOY SHOUGH	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Court of Common Pleas, Case No. 18CR345
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	August 16, 2019

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
WILLIAM C. HAYES LICKING CO. PROSECUTOR PAULA M. SAWYERS 20 S. Second St., Fourth Floor Newark, OH 43055	STEPHEN T. WOLFE WOLFE LAW GROUP, LLC 1350 W. 5th Ave., Ste. 330 Columbus, OH 43212

Delaney, J.

{¶1} Appellant Bennie Boy Shough appeals from the April 24, 2019 judgment entry of conviction and sentence of the Licking County Court of Common Pleas, incorporating the November 13, 2018 judgment entry overruling his motion to suppress. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} The instant case has a lengthy procedural history including, e.g., withdrawals of counsel, appointments of counsel, applications for disqualification of the trial court, and appellant's repeated failures to appear. The following statement of facts and procedural history addresses the portions of the record which is relevant to the instant appeal. The following facts are adduced from the record of the suppression hearing.

{¶3} On January 3, 2018, officers of the Newark Police Department were dispatched to an address on Prior Street for a report of shots fired. Upon their arrival, they observed appellant standing outside the residence near a running car. They made contact with appellant and patted him down for weapons. As Ptl. Benner patted appellant down, Sgt. Bline observed a plastic baggie hanging out of appellant's pocket containing a granular substance. When asked what the baggie contained, appellant stated, "Speed." The substance tested positive as 19.2 grams of methamphetamine.

{¶4} Appellant's neighbor testified as a defense witness at the suppression hearing. She acknowledged she is the person who called 911 on the night in question. The neighbor agreed she does not like appellant and does not want him living in her neighborhood, but reiterated that she called police because she heard shots fired from

appellant's residence. When police arrived on the scene, she directed them to the residence, and to appellant standing in the driveway.

{¶5} Appellant was charged by indictment with one count of aggravated drug possession (methamphetamine) pursuant to R.C. 2925.11(A)(C)(1)(c), a felony of the second degree. Appellant entered a plea of not guilty.

{¶6} Appellant filed a motion to suppress and appellee filed a memorandum in opposition. The matter proceeded to evidentiary hearing on October 26, 2018. The trial court overruled the motion to suppress via judgment entry dated November 13, 2018.

{¶7} On April 24, 2019, appellant appeared before the trial court and changed his previously-entered plea of not guilty to one of no contest. The trial court deferred sentencing pending completion of a pre-sentence investigation. On April 24, 2019, the trial court sentenced appellant to a prison term of 5 years to be followed by a mandatory period of three years of post-release control.

{¶8} Appellant now appeals from the trial court's judgment entry of conviction and sentence dated April 24, 2019, incorporating the trial court's decision overruling his motion to suppress.

{¶9} Appellant raises one assignment of error:

ASSIGNMENT OF ERROR

{¶10} "THE TRIAL COURT ERRED IN FINDING THAT THE WARRANTLESS SEARCH OF APPELLANT WAS JUSTIFIED BY EITHER CONSENT, AS A LEGAL *TERRY* STOP, OR PLAIN VIEW."

ANALYSIS

{¶11} In his sole assignment of error, appellant argues the trial court should have granted his motion to suppress. We disagree.

{¶12} 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.

{¶13} 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).

{¶14} Appellant argues the search of his person which resulted in recovery of the methamphetamine was not justified by consent, as a legal *Terry* stop, or plain view. We will examine appellant's arguments out of order.

{¶15} The Fourth Amendment to the United States Constitution and Section 14, Article I, Ohio Constitution, prohibit the government from conducting unreasonable searches and seizures of persons or their property. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Andrews*, 57 Ohio St.3d 86, 87, 565 N.E.2d 1271 (1991). Even without probable cause, a police officer may stop an individual and investigate unusual behavior when the officer reasonably concludes that the individual is engaged in criminal activity. *Terry,* supra. *Terry* requires that before stopping an individual, the officer must have specific and articulable facts which, taken together with rational inferences from those facts, reasonably leads the officer to conclude that the individual is engaged in criminal activity. *Id.* at 21. In determining whether an officer's beliefs are reasonable, a court must consider the totality of the circumstances involved. *State v. Bobo*, 37 Ohio St.3d 177, 180, 524 N.E.2d 489 (1988).

{¶16} The authority to conduct a pat down search does not flow automatically from a lawful stop and a separate inquiry is required. *Terry,* supra, at 30. 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).

{¶17} In the instant case, officers were dispatched to appellant's residence for shots fired. The neighbor directed them to the residence, where appellant was in the driveway. At that point officers had reason to believe appellant could possibly be armed and dangerous. Upon encountering appellant, officers asked if they could pat him down and he assented. As Benner patted him down, Bline observed a plastic baggie protruding from appellant's coat pocket. Bline didn't have to feel the contents; he could see with his flashlight that the baggie contained contraband. A protective search of a detainee's outer clothing may constitutionally occur if the officer reasonably believes that the detainee is armed and dangerous. See *Terry,* supra, at 24, 27. The United States Supreme Court established the "plain feel" doctrine as it relates to a Terry pat-down search for weapons for officer's safety in *Minnesota v. Dickerson*, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993). Therein the court held the police may seize contraband detected through the sense of touch during a protective pat-down if the officer has probable cause to believe that the item is contraband before seizing it. *Id.* at 376. See, also *State v. Howard,* 5th Dist. Licking No.2003–CA–0058, 2004–Ohio–2914.

{¶18} In the instant case, officers were responding to a call of shots fired, so there was a heightened concern for safety. The neighbor directed police to appellant and his residence as the source of the shots fired, therefore police could reasonably believe appellant might be armed and dangerous. The pat down of appellant is supported by the officers' reasonable belief appellant might have been armed and dangerous. *State v. Salinas*, 5th Dist. Delaware No. 14CAA120084, 2015-Ohio-3501, ¶ 29, citing *Terry,* supra, 392 U.S. at 28.

{¶19} In the instant case, the patdown ensued and Bline observed the knotted plastic baggie protruding from the oversized pocket of appellant's coat. Based on Bline's training and experience, he visually recognized the package in appellant's pocket as contraband and pointed it out. See, *State v. Majors*, 5th Dist. Licking No. 04 CA 5, 2004-Ohio-4713, ¶ 12. Appellant acknowledged the substance was "speed."

{¶20} In *Minnesota v. Dickerson*, 508 U.S. 366 (1993), 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.

{¶21} Accordingly, we hold that the officers' actions in apprehending appellant and conducting a pat-down search were reasonable under the totality of the circumstances, and were not violative of appellant's Fourth Amendment rights. *Majors*, supra, 2004-Ohio-4713, at ¶ 13.

{¶22} The evidence further indicates appellant consented to the patdown, although 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. Appellant argues on appeal that he did not give consent to search, or that he did not affirmatively assent to the patdown. The uncontroverted evidence at the suppression hearing established otherwise. T. 9-11, 21. We disagree with appellant's claim that the record shows he did not willingly comply and was simply told that he would be searched, without regard for his response. The record reflects that the officers testified they asked if they could pat appellant down and he consented. Both officers testified before the trial court that appellant consented to the patdown. T 9-11, 21. On issues of credibility, we must defer to the trial court's decision. *State v. Copeland*, 5th Dist. Stark No. 2004CA00208, 2005-Ohio-1067, ¶ 19, citing *State v. Jamison*, 49 Ohio St.3d 182, 552 N.E.2d 180 (1990), certiorari denied, 498 U.S. 881, 111 S.Ct. 228, 112 L.Ed.2d 183 (1990).

{¶23} On a similar note, appellant also argues the baggie was not in plain view in appellant's pocket, although Bline specifically testified that it was. T. 22-23, 26, 31. Benner testified that he saw the baggie hanging out of appellant's pocket, but the contents

weren't visible from his perspective until he removed it. T. 9. 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. Reed*, 5th Dist. No. 16CA50, 2017-Ohio-2644, 90 N.E.3d 222, ¶ 25, citing *State v. Brooks*, 75 Ohio St.3d 148, 154, 661 N.E.2d 1030 (1996). We are 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). The trial court in the instant case found that the officers were lawfully on the premises after the call of shots fired; they legally confronted appellant; and appellant voluntarily cooperated with them. We find the record of the suppression hearing contains competent, credible evidence in support of the trial court's findings.

{¶24} Upon review, we find, given the facts of this case, the trial court did not err in denying appellant's motion to suppress.

{¶25} The sole assignment of error is denied.

CONCLUSION

{¶26} The sole assignment of error is overruled and the judgment of the Licking County Court of Common Pleas is affirmed.

By: Delaney, J.,

Wise, John, P.J. and

Baldwin, J., concur.