[Cite as *State v. Noteboom*, 2020-Ohio-1223.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. Craig R. Baldwin, J.
	:	Hon. Earle E. Wise, Jr., J.
-vs-	:	
	:	
MICHAEL NOTEBOOM	:	Case No. 2019 CA 0026
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 2018-CR-0540
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	March 23, 2020

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOSEPH C. SNYDER 38 South Park Street Mansfield, OH 44902	JOHN C. O'DONNELL, III 10 West Newlon Place Mansfield, OH 44902

Wise, Earle, J.

{¶ 1} Defendant-Appellant, Michael Noteboom, appeals his March 21, 2019 sentence by the Court of Common Pleas of Richland County, Ohio. Appellant also challenges the trial court's denial of his motion to suppress. Plaintiff-Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶ 2} On July 27, 2018, the Richland County Grand Jury indicted appellant on two counts of trafficking (cocaine and heroin) in violation of R.C. 2925.03, six counts of possession of drugs (cocaine, heroin, and LSD) in various degrees in violation of R.C. 2925.11, and one count of illegal use or possession of drug paraphernalia in violation of R.C. 2925.14. Said charges arose from a motor vehicle stop for speeding wherein appellant was a passenger in the backseat.

{¶ 3} On January 11, 2019, appellant filed a motion to suppress, claiming an illegal stop and search. A hearing was held on March 6, 2019. By judgment entry filed March 12, 2019, the trial court denied the motion.

{¶ 4} On March 12, 2019, appellant pled no contest to the charges. By sentencing entry filed March 21, 2019, the trial court found appellant guilty, and sentenced him to an aggregate term of eleven years in prison.

{¶ 5} Appellant filed an appeal. On December 5, 2019, this court remanded the matter to the trial court for additional rulings on the motion to suppress. The trial court filed a judgment entry on December 20, 2019. This matter is now before this court for consideration. Assignments of error are as follows:

I

{¶ 6} "THE TRIAL COURT ERRED IN FAILING TO GRANT DEFENDANT/APPELLANT'S MOTION TO SUPPRESS."

II

{¶ 7} "THE TRIAL COURT ERRED IN SENTENCING DEFENDANT/APPELLANT SEPARATELY ON TRAFFICKING AND POSSESSION."

I

{¶ 8} In his first assignment of error, appellant claims the trial court erred in denying his motion to suppress. We disagree.

{¶ 9} As stated by the Supreme Court of Ohio in *State v. Leak,* 145 Ohio St.3d 165, 2016-Ohio-154, 47 N.E.3d 821, ¶ 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. In ruling on a motion to suppress, "the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses." *Id.,* citing *State v. Mills,* 62 Ohio St.3d 357, 366, 582 N.E.2d 972 (1992). On appeal, we "must accept the trial court's findings of fact if they are supported by competent, credible evidence." *Id.,* citing *State v. Fanning,* 1 Ohio St.3d 19, 20, 437 N.E.2d 583 (1982). Accepting those facts as true, we must then "independently determine as a matter of law, without deference to the

conclusion of the trial court, whether the facts satisfy the applicable legal standard." *Id.*

{¶ 10} As the United States Supreme Court held in *Ornelas v. U.S.,* 517 U.S. 690, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 94 (1996), "…as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal."

{¶ 11} The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The stop of a vehicle and the detention of its occupants by law enforcement, for whatever purpose and however brief the detention may be, constitutes a seizure for Fourth Amendment purposes. *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-558, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976). "Where a police officer stops a vehicle based upon probable cause that a traffic violation has occurred or was occurring, the stop is not unreasonable under the Fourth Amendment to the United States Constitution[.]" *Dayton v. Erickson*, 76 Ohio St.3d 3, 11-21, 665 N.E.2d 1091 (1996).

{¶ 12} Trooper Shane Morrow was the sole witness at the suppression hearing. Trooper Morrow testified on the day in question, he clocked a motor vehicle driving in excess of the speed limit. T. at 9, 25, 29-31. He stopped the vehicle and approached the passenger side. T. at 11. The vehicle was a small hatchback car, and all he could see was a driver, a front seat passenger, and luggage stacked to the roof. *Id.* Trooper Morrow is trained in detecting the odor of raw and burnt marijuana. T. at 8. He detected

the odor of burnt marijuana emitting from the vehicle and while speaking with the driver, noticed the driver's "speech was slurred and he was possibly impaired." T. at 12. He had the driver exit the vehicle and conducted a pat-down for weapons. *Id.* Trooper Morrow could smell the odor of burnt marijuana on the driver's person. T. at 12, 20-21, 37. Eventually the front seat passenger was removed from the vehicle and a pat-down was conducted on that individual as well. T. at 13. About five minutes after Trooper Morrow stopped the vehicle, another trooper arrived to assist. T. at 39.

{¶ 13} Based on the odor of burnt marijuana, Trooper Morrow conducted a search of the vehicle for any marijuana. T. at 14. Almost immediately he found a plastic bottle containing what he believed to be marijuana, and what he suspected was "an electronic smoking device." T. at 15. After searching the front of the vehicle for a few minutes, Trooper Morrow detected a passenger in the rear of the vehicle surrounded by the luggage. T. at 15-16. The rear passenger was appellant herein. T. at 16. Appellant appeared to be passed out and sleeping. T. at 17. After waking up, appellant was removed from the vehicle, patted down for weapons, and searched. *Id.* He was searched because of the "odor of burnt marijuana emitting from the passenger compartment" and the "found contraband loose within the vehicle." *Id*. The marijuana found in the vehicle was within appellant's arm reach. T. at 49. Trooper Morrow believed exigent circumstances existed to search appellant's person. T. at 43. Appellant "possibly could have contraband on his person that could be destroyed or tampered with, or he could also ingest while we are up searching the vehicle and then harm himself." T. at 44. Upon searching appellant's person, Trooper Morrow found a plastic bag in his pants pocket containing smaller bags each holding "a brown powder." T. at 17. At that point, appellant

was "cuffed and arrested." T. at 18. Trooper Morrow did not detect an odor of marijuana on appellant's person. T. at 51.

{¶ 14} In his motion to suppress, appellant argued Trooper Morrow did not have a reasonable suspicion to stop the vehicle for speeding and did not have probable cause to search the vehicle, his person, and his backpack.

{¶ 15} In its March 12, 2019 judgment entry denying appellant's motion, the trial court found Trooper Morrow had probable cause to stop the vehicle and was justified in searching the vehicle after detecting the odor of burnt marijuana. We concur with the trial court's decision. Trooper Morrow had probable cause to stop the vehicle for speeding. Upon stopping the vehicle, Trooper Morrow detected the odor of burnt marijuana coming from the vehicle. He is trained in detecting the odor of burnt as well as raw marijuana. "The smell of marijuana, alone, by a person qualified to recognize the odor, is sufficient to establish probable cause to conduct a search" of a defendant's vehicle and person. *State v. Moore,* 90 Ohio St.3d 47, 51, 734 N.E.2d 804 (2000), syllabus. Trooper Morrow had probable cause to believe there was contraband in the vehicle and therefore had probable cause to search the vehicle.

{¶ 16} In its December 20, 2019 judgment entry after remand, the trial court found Trooper Morrow had probable cause to search appellant's person and the backpack found in the vehicle. The trial court found the pat-down of appellant's person was justified to ensure officer safety. As testified by Trooper Morrow, "drugs and weapons go together." T. at 49. The trial court further found "the drugs found during the pat-down were properly seized."

{¶ 17} We concur the search of the backpack was justified. A search of the vehicle includes the right to search the containers therein. *U.S. v. Ross,* 456 U.S. 798, 799, 825, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982) ("[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search" "including all containers and packages, that may conceal the object of the search.") *Accord California v. Acevedo,* 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991). This right to search containers and packages extends to those belonging to a passenger:

> When there is probable cause to search for contraband in a car, it is reasonable for police officers-like customs officials in the founding era-to examine packages and containers without a showing of individualized probable cause for each one. A passenger's personal belongings, just like the driver's belongings or containers attached to the car like a glove compartment, are "in" the car, and the officer has probable cause to search for contraband in the car.

Wyoming v. Houghton, 526 U.S. 295, 302, 119 S.Ct. 1297, 143 L.Ed. 408 (1999).

{¶ 18} The backpack contained documentation inside from the DMV from California with appellant's name on it. T. at 51. As a result, Trooper Morrow concluded the backpack belonged to appellant. T. at 50. Drugs were found inside the backpack.

{¶ 19} We also concur the pat-down of appellant for weapons was justified. *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The more troublesome issue is the search of appellant's person beyond a routine pat-down. No testimony was presented as to the "plain feel" exception. *Minnesota v. Dickerson,* 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993). Trooper Morrow agreed he did not smell marijuana on appellant's person, and he did not witness appellant make any furtive movements. In fact, appellant was asleep until awakened by the troopers. Appellant did not make any admissions of possessing any contraband and Trooper Morrow admitted to not asking him any questions at that point because he believed he had exigent circumstances to conduct the search. He was concerned any contraband on appellant's person could have been destroyed or tampered with or ingested. However, Trooper Morrow was not alone, as two other troopers arrived on the scene, one five minutes after the stop of the vehicle.

{¶ 20} Although we do not find the search of appellant's person was justified, we find the inevitable discovery rule to apply. Under the inevitable discovery rule, "illegally obtained evidence is properly admitted in a trial court proceeding once it is established that the evidence would have been ultimately or inevitably discovered during the course of a lawful investigation. (*Nix v. Williams* [1984], 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377, followed.)." *State v. Perkins,* 18 Ohio St.3d 193, 480 N.E.2d 763 (1985), syllabus.

{¶ 21} The discovery of the backpack containing drugs and appellant's identification during the lawful investigation of the vehicle would justify placing appellant under arrest. He would have been searched incident to a lawful arrest, and the contraband in his pocket would have been discovered.

{¶ 22} Upon review, we find the trial court did not err in denying appellant's motion to suppress.

{¶ 23} Assignment of Error I is denied.

II

{¶ 24} In his second assignment of error, appellant claims the trial court erred in sentencing him separately on trafficking and possession.

{¶ 25} "Ohio courts have found that possession and trafficking are not always allied offenses when the offenses are committed separately or where a different animus or motivation is apparent." *State v. Crowell,* 5th Dist. Ashland No. 18 COA 018, 2018-Ohio-5226, ¶ 32, citing *State v. Rodriguez,* 12th Dist. No. CA2015-02-024, 2016-Ohio-452, ¶ 30.

{¶ 26} Appellant pled no contest and was found guilty of nine counts. Of the nine counts, one was trafficking in cocaine, one was possession of cocaine, one was trafficking in heroin, and one was possession of heroin. Pursuant to a sentencing entry filed March 21, 2019, the trial court sentenced appellant on each of the nine counts, to be served concurrently, as agreed to by the parties. The issue of allied offenses was never raised to the trial court. The parties waived a reading of the facts. March 13, 2019 T. at 18. In his appellate brief at 7-8, appellant merely recites the law regarding allied offenses and merger. The brief is silent as to how the trafficking and possession counts constitute allied offenses in this case.

{¶ 27} Drugs were found in appellant's backpack and his person. Because the record is silent as to the drugs involved in the individual counts and appellant's brief does

not elaborate in any way, we are unable to review whether the counts are allied offenses for sentencing purposes.

{¶ 28} Assignment of Error II is denied.

{¶ 29} The judgment of the Court of Common Pleas of Richland County, Ohio is hereby affirmed.

By Wise, Earle, J.

Gwin, P.J. and

Baldwin, J. concur.

EEW/db