[Cite as *State v. Aaron*, 2011-Ohio-6309.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

State of Ohio — Court of Appeals No. OT-10-043

Appellee — Trial Court No. 10-CR-041

v.

Terry Aaron — **DECISION AND JUDGMENT**

Appellant — Decided: December 9, 2011

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney, and
Andrew M. Bigler, Assistant Prosecuting Attorney, for appellee.

Loretta Riddle, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Terry Aaron, appeals the November 17, 2010 judgment of the Ottawa County Court of Common Pleas which, following a jury and bench trial convicting appellant, respectively, of possession of crack cocaine, R.C. 2925.11(A), and possession of drug paraphernalia, R.C. 2925.14(C)(1), sentenced appellant to three years

of community control with various restrictions. For the reasons set forth herein, we affirm the trial court's judgment.

{¶ 2} On April 26, 2010, appellant was indicted on one count of possession of crack cocaine, in violation of R.C. 2925.11(A), one count of possession of drug paraphernalia, in violation of R.C. 2925.14(C)(1), and one count failure to drive within a marked lane, in violation of R.C. 4511.35(A). The charges stemmed from a traffic stop and subsequent search of appellant's vehicle.

{¶ 3} On June 28, 2010, appellant filed a motion to suppress all evidence and statements made by appellant during the traffic stop. Appellant argued that the warrantless search of the vehicle was unconstitutional and that no exceptions to the warrant requirement existed. Specifically, appellant argued that his alleged "furtive movements" were not sufficient to justify the warrantless search.

{¶ 4} A hearing on the motion was held on August 23, 2010, and the two responding officers testified. Marblehead police officer Peter Bush testified that on April 17, 2010, at approximately 2:00 a.m., he responded as back up to a traffic stop initiated by Danbury Township police officer Brandon Taylor, in Ottawa County, Ohio.

{¶ 5} Officer Bush stated that without announcing his presence, he approached the passenger side of appellant's pickup truck and shined his flashlight through the window. At the time he approached, appellant and Officer Taylor were discussing the stop. After Taylor returned to his police cruiser, Bush continued to monitor appellant. According to Officer Bush, appellant reached into his right pocket and pulled out a shiny, six to

eight-inch object that appeared to be a pipe. Appellant then placed the object into a six-pack of beer bottles that was sitting on the passenger seat.

{¶ 6} After placing the pipe in the beer container, appellant kept looking back in his rear view mirror. According to Bush, appellant also kept placing his hand underneath the dashboard where there was a panel; this caused Officer Bush to believe that something was hidden in the panel. Bush stated that, at this time, they learned from the dispatcher that appellant had a prior assault with a weapon so they had him place his hands on the steering wheel. Officers Bush and Taylor then removed him from the vehicle and patted him down for weapons. Because Officer Taylor smelled alcohol on appellant, they had him perform a portable breath test which registered at an amount under the legal limit.

{¶ 7} Once appellant was secured in the back of Officer Taylor's cruiser, the two searched the vehicle in the areas where appellant had been reaching. Inside the six-pack of beer, they found a pipe that had white residue on it. In the panel, they found a plastic bag with rocks that appeared to be a narcotic.

{¶ 8} Officer Taylor testified that he initiated that traffic stop after observing appellant make three marked lane violations. Taylor stated that he detected an odor of alcohol coming from the vehicle as appellant spoke. After receiving appellant's driving and insurance information, he proceeded back to his patrol car to check appellant's driving status. At that point, Taylor stated that he observed appellant moving from side to side in the vehicle and opening the driver's side door to look back at the patrol unit.

The dispatcher then informed Officer Taylor that appellant had a prior firearm offense. Taylor stated this alerted him to be more cautious.

{¶ 9} Officer Taylor stated that based upon what he observed and what Officer Bush told him that he observed he felt that appellant's actions were suspicious in nature. The officers then removed appellant from the vehicle and first investigated the possible alcohol offense. After determining that appellant was not under the influence of alcohol, they informed him of the suspicious movements they observed, including appellant placing a shiny, silver object into the beer container. Prior to conducting a search of the vehicle, the officers informed appellant that he was not under arrest but that they were going to search two specific areas of the vehicle. Appellant was then placed in the back of the police cruiser.

{¶ 10} During the search, and as stated above, the officers found the pipe that Officer Bush saw appellant place in the beer container and, where appellant had been feeling, they found what appeared to be crack cocaine. Officer Taylor admitted that the vehicle was not registered to appellant and that no weapons were found either on appellant or in the vehicle.

{¶ 11} On September 16, 2010, the trial court denied appellant's motion to suppress. The court concluded that the warrantless search was lawful because the pipe was in plain view of Officer Bush and due to defendant's threatening movements and movements toward a specific panel in the dashboard.

{¶ 12} On September 21, 2010, the matter proceeded to trial. A jury was empanelled to determine whether appellant possessed crack cocaine; however, the possession of drug paraphernalia and marked lane violation charges were to be determined by the court. The jury found appellant guilty of possession of drugs; the court found appellant guilty of possession of drug paraphernalia and not guilty of the marked lanes violation. Following appellant's sentencing, he commenced the instant appeal.

{¶ 13} Appellant presents two assignments of error for our review:

{¶ 14} "Assignment of Error No. I: The trial court committed prejudicial error and abused its discretion by allowing the introduction of evidence into the jury trial that the appellant was to be 'approached with caution' to demonstrate the officer's state of mind in a drug possession case.

{¶ 15} "Assignment of Error No. II: The trial court erred by not granting appellant's motion to suppress evidence when there is no search warrant and the basis of the search was based on furtive movements of the appellant and officer safety when appellant is secured."

{¶ 16} In appellant's first assignment of error, he contends that the court erred when, during trial, it allowed, over objection, testimony from Officer Bush that the police dispatcher stated to "approach the subject with caution." At a discussion at the bench, appellant's counsel argued that the statement was prejudicial because it left the jury to speculate why caution was needed. Conversely, the state argued that the testimony was

not hearsay because it was offered only to explain the officers' state of mind and the actions they took during the investigation. The court overruled the objection.

{¶ 17} We first note that the admission or exclusion of evidence rests within the sound discretion of the trial court and, therefore, such decisions will not be reversed on appeal absent an abuse of discretion. *State v. Sage* (1987), 31 Ohio St.3d 173, 180. To be considered hearsay, there must be an out-of-court statement offered to prove the truth of the matter asserted. *State v. Maurer* (1984), 15 Ohio St.3d 239, 262; Evid.R. 801(C). "[T]estimony which explains the actions of a witness to whom a statement was directed, such as to explain a witness' activities, is not hearsay." Id. Further, "[w]here statements are offered to explain an officer's conduct while investigating a crime, such statements are not hearsay." *State v. Munn*, 6th Dist. No. L-08-1363, 2009-Ohio-5879, ¶ 26, citing *State v. Thomas* (1980), 61 Ohio St.2d 223, 232 and *State v. Blevins* (1987), 36 Ohio App.3d 147, 149.

{¶ 18} In the present case, we conclude that the trial court did not abuse its discretion when it allowed Officer Bush's testimony. The testimony was elicited to explain why, in part, the officers decided to search appellant and his vehicle. Accordingly, appellant's first assignment of error is not well-taken.

{¶ 19} In appellant's second assignment of error, he argues that the trial court erroneously denied his motion to suppress. An appellate court's review of a motion to suppress presents mixed questions of law and fact; therefore, the court must accept the trial court's findings of fact where they are supported by competent, credible evidence.

State v. Roberts, 110 Ohio St.3d 71, 2006-Ohio-3665, ¶ 100. "'Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard.'" Id., quoting S*tate v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8.

{¶ 20} In this assignment of error, appellant states that appellant's "furtive movements" alone failed to justify the officers' warrantless search of his vehicle. While this is a correct statement of the law, we further note that "furtive movements are factors which may contribute to an officer's suspicion that a suspect is armed or engaged in criminal activity." *State v. Burgess*, 11th Dist. No. 2002-L-019, 2004-Ohio-3338, ¶ 18, citing *State v. Bobo* (1988), 37 Ohio St.3d 177, 189.

{¶ 21} The Fourth Amendment requires that a search be conducted based on probable cause and pursuant to a warrant, unless an exception to the warrant requirement applies. *State v. Moore* (2000), 90 Ohio St.3d 47, 49.

{¶ 22} The automobile exception to the warrant requirement is "well-established." Id. at 51. (Citations omitted.) The "inherent mobility of the automobile created a danger that the contraband would be removed before a warrant could be issued." Id. at 52, citing *South Dakota v. Opperman* (1976), 428 U.S. 364, 367. Thus, once an officer has probable cause to believe that a vehicle may contain contraband, an officer may search the vehicle without a warrant.

{¶ 23} Additionally, a warrantless search of an automobile is also allowed where contraband is in plain view of the officer. The Ohio Supreme Court has held that, in order for the plain view exception to apply, the state must show that:

{¶ 24} "(1) [T]he initial intrusion which afforded the authorities the plain view was lawful; (2) the discovery of the evidence was inadvertent; and (3) the incriminating nature of the evidence was immediately apparent to the seizing authorities." *State v. Williams* (1978), 55 Ohio St.2d 82, paragraph one of the syllabus.

{¶ 25} In its September 16, 2010 judgment entry denying appellant's motion to suppress, the court found that, in addition to making movements that appeared threatening to officer safety, Officer Bush saw appellant place what appeared to be a pipe used in smoking narcotics into a six-pack of beer. The court further noted that Bush observed appellant repeatedly touch a specific spot under the dashboard and it was reasonable to believe that contraband or evidence would be found in that location.

{¶ 26} Upon independent review, we agree that the officers' warrantless search of the vehicle was constitutionally valid. The incriminating nature of the pipe combined with appellant's furtive movements and repeated touching of the dashboard provided probable cause that contraband would be found in the vehicle. Appellant's second assignment of error is not well-taken.

{¶ 27} On consideration whereof, we find that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Ottawa County Court of

Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE