**[Cite as *State v. Purley*, 2019-Ohio-3931.]**

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

| | |
|---|---|
| State of Ohio | Court of Appeals No. WD-18-011 |
| Appellee | Trial Court No. 2016CR0530 |
| v. | |
| Roosevelt Purley | **DECISION AND JUDGMENT** |
| Appellant | Decided: September 27, 2019 |

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
David T. Harold, Assistant Prosecuting Attorney, for appellee.

Neil S. McElroy, for appellant.

* * * * *

**OSOWIK, J.**

**{¶ 1}** This is an appeal from an October 26, 2017 judgment of the Wood County Common Pleas Court denying appellant's motion to suppress.

**{¶ 2}** Procedurally, appellant was indicted on December 8, 2016, on one count of Possession of Cocaine, in violation of R.C. 2925.11(A) and 2925.11(C)(4)(c), a felony of

the third degree and one count of Trafficking in Cocaine, in violation of R.C. 2925.03(A)(2) and 2925.03(C)(4)(d), a felony of the third degree.

**{¶ 3}** On May 4, 2017, appellant filed a motion to suppress and a hearing on the motion was held on August 10, 2017. The court denied the motion to suppress on October 26, 2017. On December 22, 2017, appellant then pled no contest to the charges specified in the indictment. A sentencing hearing was held on February 9, 2018, at which time count one was merged into count two and appellant was sentenced to a 30-month prison term. Appellant appeals from the February 12, 2018 journalized sentencing order and he presents a single assignment of error as follows:

> First Assignment of Error: The trial court erred to the prejudice of Mr. Purley when it denied his motion to suppress.

**Standard of Review**

**{¶ 4}** The review of a motion to suppress is a mixed question of law and fact. *State v. Castagnola*, 145 Ohio St.3d 1, 2015-Ohio-1565, 46 N.E.3d 638, ¶ 32, citing *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. In evaluating the motion to suppress, the trial court acts as the finder of fact and, therefore, is in the best position to resolve factual questions and evaluate the credibility of witnesses. *Burnside* at ¶ 8.

"An appellate court independently reviews a challenged suppression ruling to determine whether, given the established facts, the ruling meets the appropriate legal standard. No deference is afforded the trial court's conclusions of law." *State v.*

*Barnhart*, 6th Dist. Huron No. H-10-005, 2011-Ohio-2693, ¶ 11, citing *Burnside* at ¶ 8 and *State v. Curry*, 95 Ohio App.3d 93, 96, 641 N.E.2d 1172 (8th Dist.1994).

**{¶ 5}** In this case, the only testimony that was presented was that of Officer (detective) Frederick R. Smith of the Hancock County Sheriff's Office in Findlay, Ohio.

**{¶ 6}** The detective testified that his office had initiated a truck stop prostitution investigation in cooperation with the Wood County Sheriff's Office. The undercover officers would initiate contact with various females through use of an internet site known as backpage.com where it was believed to be a "common area where people will advertise for escort services."

**{¶ 7}** In this instance a time and date for a rendezvous was established at a Petro truck stop located in Wood County, Ohio. As the clock ticked away, the female contact indicated to the task force that she was arriving at the truck stop just in time for her scheduled engagement. Surveillance noticed a female exiting a silver Lincoln sedan that pulled into the McDonald's drive-through area which was adjacent to the truck stop. Another detective met the female a slight distance away from the McDonald's, verified that she was the person with whom he spoke with, and made an agreement for a sexual act and a dollar amount. She was then arrested.

**{¶ 8}** The vehicle from which she had emerged had just departed the drive-through area and was now parked. The driver had just gotten out of the vehicle and was approaching the building. At this point, Detective Smith and Officer Webb approached the car. A third officer met with the driver. Smith testified that in the event that someone

remained in the vehicle that was the subject of surveillance, the practice would be to have them get out of the vehicle, "speak with them, make sure they don't have any weapons and try to determine if they were an active participant in arrangements or if they were just there, if they have any knowledge basically is what we're looking for."

**{¶ 9}** Only the appellant remained in the vehicle and he was seated in the passenger right front seat. He was eating a sandwich. There was no testimony concerning which epigastric delight was selected by appellant from the menu board at the drive-through. We are left to speculate as to whether this exquisite sandwich was an Artisan Grilled Chicken, a Big Mac® or the ever tasty Filet-O-Fish®. Regardless, appellant was completely consumed by this sandwich at that moment. As he relished each morsel, appellant made it well known that he was not going to be distracted by the officers that surrounded the vehicle. Officer Webb approached the driver's side door. Through the closed window, Webb ordered appellant to put his sandwich down and place his hands on the dash. Appellant resolutely ignored him as he religiously continued enjoying his snack, as if it were his last supper. Webb again issued his command and was met with the same cool disinterest by appellant. Ultimately, Webb reached through the window of the drivers' side and unlocked the doors. Officer Smith then opened the passenger side door where appellant was seated. At this point, appellant put his sandwich in the bag, seemingly with hopeful intent of returning and finishing this mouthwatering delight after he begrudgingly attended to the officers' inquiry. Smith grabbed hold of appellant's right hand and escorted him out of the vehicle to the back trunk area on the side of the car.

**{¶ 10}** Officer Smith noticed that appellant kept his "left hand right up against his body near his pocket and belt area." Smith instructed him to take his hands away and to "show me his hand." When appellant refused, the officer "grabbed hold of it." Smith was concerned that appellant was "trying to cover, whether it be a gun, a knife, anything, or he could be keeping it back in order to assault me."

**{¶ 11}** While engaging in a pat down and running his hands down the outside of appellant's pants to determine if he had any weapons, the officer noticed a crinkling of a plastic bag and then felt something hard in his left pocket. Smith reached into appellant's left pocket and pulled out a "bundle of money with some cards in it and also a plastic bag that had a brownish substance in it." He suspected the substance was heroin. Appellant was ultimately indicted on one count of Possession of Cocaine and one count of Trafficking in Cocaine.

**{¶ 12}** The first task in our review of appellant's sole assignment of error is to determine at what point in this encounter with the police that the Fourth Amendment becomes relevant. *Terry v. Ohio*, 392 U.S. 1, 4, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

**{¶ 13}** The Fourth Amendment to the United States Constitution, applied to the states through the Fourteenth Amendment, provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or other things to be seized."

**{¶ 14}** Article I, Section 14 of the Ohio Constitution utilizes similar language:

> The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized.

**{¶ 15}** Historically, the protections afforded by Article I, Section 14 of the Ohio Constitution have been construed as coextensive with the protections of the Fourth Amendment of the United States Constitution. *State v. Geraldo,* 68 Ohio St.2d 120, 125-26, 429 N.E.2d 141 (1981).

**{¶ 16}** However, in certain circumstances, the Supreme Court of Ohio has construed Article I, Section 14 of the Ohio Constitution as providing greater protection than the Fourth Amendment to the United States Constitution. For example, searches and seizures conducted by members of law enforcement who lack authority to make an arrest. *State v. Brown*, 143 Ohio St.3d 444, 2015-Ohio-2438, 39 N.E.3d 496, ¶ 23.

**{¶ 17}** The touchstone of any analysis under the Fourth Amendment is always the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security. *Pennsylvania v. Mimms*, 434 U.S. 106, 109, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977).

**{¶ 18}** The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable. *Katz v. United States*, 389 U.S. 347, 359, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

**{¶ 19}** In keeping with this principle, both the Fourth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, and Article I, Section 14 of the Ohio Constitution, prohibit the government from conducting warrantless searches and seizures, subject to certain exceptions. Searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions. *State v. Limoli,* 10th Dist. Franklin No. 11AP-924, 2012-Ohio-4502, ¶ 20, citing *State v. Fowler,* 10th Dist. Franklin No. 10AP-658, 2011-Ohio-3156, ¶ 11-12. Common exceptions to the warrant requirement include a consensual encounter with a police officer and an investigative detention, commonly referred to as a *Terry* stop. *State v. Wintermeyer*, 2017-Ohio-5521, 93 N.E.3d 397, ¶ 13-15 (10th Dist.), *appeal allowed,* 152 Ohio St.3d 1405, 2018-Ohio-723, 92 N.E.3d 877.

**{¶ 20}** Since there was nothing consensual about the appellant's encounter with the police, this confrontation is properly analyzed as an investigative detention.

**{¶ 21}** In *Terry,* the court held that in order to assess the reasonableness of an officer's conduct during such a detention, it is necessary to first focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen. An officer "must be able to point to specific and

articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21, 88 S.Ct. 1868, 20 L.Ed.2d 889.

**{¶ 22}** In making that assessment, "it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" *Id.* at 21-22, quoting, *Carroll v. United States*, 267 U.S. 132, 162, 45 S.Ct. 280, 69 L.Ed. 543 (1925); *compare Beck v. State of Ohio*, 379 U.S. 89, 96-97, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964).

**{¶ 23}** There is no encroachment on the Fourth Amendment when an officer approaches a person, in an appropriate manner, for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest. *Terry* at 22.

**{¶ 24}** An appellate court reviews the propriety of an investigative detention in light of the totality of the surrounding circumstances. *State v. Bobo*, 37 Ohio St.3d 177, 524 N.E.2d 489 (1988), paragraph one of the syllabus, *approving and following State v. Freeman*, 64 Ohio St.2d 291, 414 N.E.2d 1044 (1980), paragraph one of the syllabus.

**{¶ 25}** Applying these principles to this case, we will first consider the nature and extent of the governmental interests involved in the initial detention of the vehicle and whether the detention was supported by reasonable suspicion that appellant was engaged in or was about to be engaged in criminal activity. "Reasonable suspicion entails some minimal level of objective justification for making a stop -- that is, something more than an inchoate and unparticularized suspicion or 'hunch,' but less than the level of suspicion

required for probable cause." *State v. Jones*, 70 Ohio App.3d 554, 556-57, 591 N.E.2d 810, 811 (2d Dist.1990), quoting *Terry* at 27. Reasonable suspicion can arise from information that is less reliable than that required to show probable cause. *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000) (finding that although a reasonable suspicion "requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop").

**{¶ 26}** In this case, appellant argues that his mere presence in the passenger seat while eating his sandwich is not enough to support a reasonable, particular suspicion that he is committing a crime or had been somehow involved in the prostitution enterprise.

**{¶ 27}** While these factors, standing alone, are not necessarily indicative of criminal behavior and can be consistent with innocent conduct, *Terry* recognized that officers may briefly detain individuals to resolve ambiguity in their conduct. *Id.* at 125. Appellant was in the passenger seat of a vehicle that was just used to transport a woman to explicitly engage in prostitution. Officer Smith testified, "So we didn't know if he was an active participant or if he was just along for the ride or anything at that point while we were speaking with him initially."

**{¶ 28}** One general governmental interest is that of effective crime prevention and detection and the recognition that an officer may, in appropriate circumstances and in an appropriate manner, approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest provided the police

officer can point to specific and articulable facts which warrant that intrusion. *Terry*, 392 U.S. at 21-22, 88 S.Ct. 1868, 20 L.Ed.2d 889.

**{¶ 29}** Given the surveillance and the arrest of the female that exited the vehicle, the detention of the vehicle and its occupants was a legitimate investigative function.

**{¶ 30}** We will next narrow the inquiry even further to evaluate whether the order to appellant to get out of the car was reasonable and permissible under the Fourth Amendment.

**{¶ 31}** Officer Smith testified that, in his opinion, after twenty years of experience and training, the refusal of a command "indicates to me that the subject is delaying things, thinking of what he's going to do next, either fight or flight, is the way we describe it."

**{¶ 32}** Having permissibly detained appellant, the only question remaining is whether he would stay seated or exit the vehicle while the officer continued his investigation. Given the choice, and the fact that appellant was non-responsive to the officers' commands to place his hands on the dash, the inconvenience to appellant cannot prevail when balanced against the legitimate concerns for the safety of the officer. *State v. Wilson*, 3d Dist. Hancock No. 5-07-47, 2008-Ohio-2742, ¶ 29 (handcuffing and placement in police cruiser reasonable based on defendant's unusual behavior).

**{¶ 33}** "Once a lawful stop has been made, asking the driver and passengers to exit the vehicle pending completion of the traffic stop is merely a continuation of the original stop and the officer is not required to articulate any reasonable suspicion prompting his

request that the occupants exit the vehicle." *State v. Maddux*, 6th Dist. Wood No. WD–08–065, 2010-Ohio-941, ¶ 6. A police officer may order a motorist to step out of a vehicle which has been properly stopped for a traffic violation. *Id.*

**{¶ 34}** Our final analysis concerns the question of the propriety of the search of the appellant's person once he was out of the vehicle.

**{¶ 35}** Officer Smith testified that "I noticed that he kept his left hand right up against his body near his pocket and belt area." He further instructed appellant to "take his hands away, show me his hand. He didn't take it away. And then I grabbed ahold of it." The officer thought, "There's something he's trying to cover, whether it be a gun, a knife, anything, or he could be keeping it back in order to assault me."

**{¶ 36}** While conducting the pat down, Smith heard a crinkling of a plastic bag and then felt something hard in appellant's pocket. He reached into appellant's left pocket and pulled out a "bundle of money with some cards in it and also a plastic bag that had brownish substance in it." He then reached into another pocket and removed a couple of bags of a white substance that Smith recognized as cocaine or crack cocaine.

**{¶ 37}** The permissible scope of a *Terry* search is a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. *Terry*, 392 U.S. at 27, 88 S.Ct. 1868, 20 L.Ed.2d 889.

**{¶ 38}** It is clear in this case that the purpose of this limited search was not to discover evidence of crime, but to allow Officer Smith "'to pursue his investigation without fear of violence.'" *State v. Evans*, 67 Ohio St.3d 405, 408, 618 N.E.2d 162 (1993), quoting *Adams v. Williams*, 407 U.S. 143, 146, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972).

**{¶ 39}** This final analysis of the officer's search of appellant's pant pocket turns on the application of the plain feel doctrine first described by the United States Supreme Court in *Minnesota v. Dickerson*, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993).

**{¶ 40}** In that case, the court was presented with the question as to whether police officers may seize nonthreatening contraband detected during a protective pat down search of the sort permitted by *Terry*. The court held, "We think the answer is clearly that they may, so long as the officers' search stays within the bounds marked by *Terry*." *Id.* at 373. 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 373-75. If during a traffic stop, an officer has a reasonable belief that his or her safety or that of others is in danger, the officer may initiate a protective pat down search for weapons. *Id.* at 373. If during such a search an officer feels something that when touched is immediately apparent to be incriminating, it is lawful for the officer to seize such contraband. *See State v. Purley*, 6th Dist. Lucas No. L-11-1116, 2012-Ohio-3734, ¶ 19.

**{¶ 41}** Smith testified that he recognized the crinkling sound of a plastic bag. "It made me think that he's got drugs on him. And he answered my question, do you have any dope, with an uh huh. I took that as a yes. And he dropped his head. At that point I reached into his left pocket. * * * And I asked him if it was heroin. And he said he didn't know."

**{¶ 42}** Appellant argues that he should have been *Mirandized* before being asked whether he had drugs on his person as he was handcuffed and should have been considered to be in custody. However, his argument is temporally misplaced. Officer Smith testified that it was only after the drugs were discovered that Officer Sheeks then placed him in handcuffs. Any interaction up to that point was a permissible and reasonable protective pat down search for weapons for the safety of the police officer.

**{¶ 43}** Whether the object in appellant's pants was "immediately apparent" to the police to be associated with criminal activity is a question of fact for the trial court. An officer may rely on training and experience in recognizing evidence of a crime. *State v. Smith*, 5th Dist. Stark No. 1998CA00322, 1999 WL 744168, *4 (June 21, 1999); *State v. Paschal*, 2d Dist. Montgomery No. 15394, 1996 WL 430870, *2 (Aug. 2, 1996). In this case, Officer Smith relied on his experience to make that determination.

**{¶ 44}** The facts of this case are remarkably similar to those recently presented to the Second District Court of Appeals. In *State v. Oliver*, a *Terry* search of appellant led to the discovery of illicit drugs in appellant's pocket. In that instance, the patrolman described appellant's behavior 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." During the search of appellant, the patrolman noticed a small lump in the watch pocket of appellant's jeans. The patrolman testified that it was apparent that this object was contraband of some sort as in her experience, "when people put things in that and it's a lump, and you feel that underneath the pocket, its drugs." The patrolman discovered a plastic bag containing a round tablet and a crystalline substance later identified as methamphetamine. That court held that whether the nature of the item is "immediately apparent" is a question for the trial court. In that instance, like in this case, there was unrefuted testimony. *See State v. Oliver*, 5th Dist. Guernsey No. 19 CA 2, 2019-Ohio-3007. In this case, the testimony of Officer Smith was unrebutted.

**{¶ 45}** This is not appellant's first rodeo in which he has attempted to ride this argument to the stadium gates of reversal. Seven years ago, under uncannily similar circumstances in another county, we held that it was lawful for a police officer to seize contraband without a warrant from appellant that was discovered during a pat down search. *See Purley*, 6th Dist. Lucas No. L-11-1116, 2012-Ohio-3734. This could be considered, in a literal sense, to be beating a dead horse of an argument.

**{¶ 46}** We hold that there is competent, credible evidence to support the trial court's factual findings and, further, that the trial court correctly applied the law to those facts.

## Conclusion

**{¶ 47}** We find appellant's assignment of error to be not well-taken and denied. The decision of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

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.

Thomas J. Osowik, J. _____
JUDGE

Christine E. Mayle, P.J. _____
JUDGE

Gene A. Zmuda, J. _____
CONCUR.
JUDGE