[Cite as *State v. Forest,* 146 Ohio Misc.2d 1, 2008-Ohio-1547.]

In the Common Pleas Court of Montgomery County, Ohio

The STATE OF OHIO,	**:**	**Case No. 07-CR-3919**
	:	
Plaintiff,	**:**	**Judge Jeffrey E. Froelich**
	:	
-v-	**:**	**DECISION, ORDER AND ENTRY**
	:	**GRANTING MOTION TO SUPPRESS**
FOREST,	**:**	
	:	
Defendant.	**:**	**Feb. 14, 2008**

Mathias Heck Jr., Montgomery County Prosecuting Attorney, and John M. Scott Jr., Assistant Prosecuting Attorney, for plaintiff.

Al Wilmes, for defendant.

FROELICH, Judge.

I. FACTS

{¶1} In the evening of September 12, 2007, uniformed officers in a marked cruiser observed a pickup truck make a left turn without signaling. The car came to a legal stop in front of 65 Little Street, which the officer testified he had heard from other officers was a "dope house."

{¶2} The cruiser turned on its emergency lights and pulled up in front of the pickup truck, head on, but slightly off center. Another cruiser was behind the

pickup truck with its emergency lights activated.

{¶3} Officer Velez went to the passenger side of the pickup, and Officer Chance went to the driver's side. The driver produced a form of California identification, and the passenger, later identified as the defendant Charles Forest, gave his name and Social Security number.

{¶4} The officers returned to their cruiser and ran the information on the computer; the information received was that the identifications were accurate, that the driver had a valid license, and that there were no wants or warrants for the individuals.

{¶5} Officer Velez testified that he went back and asked the passenger to step out of the car. He said he wanted to talk to him about what business they had at 65 Little Street. The officer testified that when the defendant got out, the defendant said, "I don't have anything on me." The officer testified that he asked whether he could search the defendant, and the defendant said, "Go ahead."

{¶6} The officer had the defendant put his hands on the hood of the cruiser and otherwise "assume the position." The officer testified that in his normal pat-down, as a last step, he runs the side of his hand between the defendant's buttock's cheeks to see if there are any weapons or drugs. He said that when he did this, the defendant seemed to "tense up." The officer proceeded a second time, and again

the defendant tensed up and was told to "relax." The third time the officer put his hand between the defendant's buttocks, he said he felt something. At this point, Officer Chance put on latex gloves, Officer Velez pulled the defendant's pants and underwear away from his body, and Officer Chance used a flashlight and allegedly observed a plastic baggie, which was retrieved and contained the crack cocaine that is that subject of this motion to suppress.

{¶7} The defendant testified that he was ordered out of the vehicle and that he never gave permission for any pat down.

II. REMOVAL FROM VEHICLE

{¶8} The officers can order the driver and the passenger to exit the vehicle, even absent any additional suspicion of a criminal violation. *Pennsylvania v. Mimms* (1977), 434 U.S. 106; *Maryland v. Wilson* (1997), 519 U.S. 408. However, the rationale for allowing this "minimal" intrusion on the driver or passenger is officer safety. Id. The driver had been identified and cited. The defendant passenger had given identification, which the computer verified; while it is possible that any person could give false information, there was no basis presented in this particular situation to believe that to be true. Both occupants were allowed to remain in the vehicle while the citation was written and the computer check completed. The reason at this point for having them step out of

the vehicle is unclear.

III. PAT DOWN

{¶9} Even if the defendant were constitutionally required to step from the vehicle, law enforcement is not thereby authorized to perform a pat-down search. *State v. Evans* (1993), 67 Ohio St.3d 405; *State v. Vineyard,* Montgomery App No. 22266, 2008-Ohio-204, ¶ 13

{¶10} *Terry v. Ohio* (1968), 392 U.S.1, recognized that a police officer may make a limited search in order to protect himself and the public. " 'When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others,' he may conduct a limited protected search for concealed weapons. * * * The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence, and thus the frisk for weapons might be equally necessary and reasonable, whether or not carrying a concealed weapon violated any applicable * * * law. So long as the officer is entitled to make a forcible stop, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose." *Adam v. Williams,* (1972), 407 U.S. 143, 145-

146, quoting *Terry* at 24, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889.

{¶11} Similarly, The Ohio Supreme Court has pointed out that "[a] search for weapons in the absence of probable cause to arrest, however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation. * * * Thus it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby * * *." *State v. Evans*, 67 Ohio St.3d at 414, quoting *Terry*, 392 U.S. at 25-26, 88 S.Ct. 1868, 20 l.Ed.2d 889.

{¶12} The Montgomery County Court of Appeals "has reviewed numerous cases wherein crack cocaine was located in a search that probed the area between a suspect's buttocks. The nagging question, which has yet to be answered, is how weapons might reasonably be suspected to be there. *Terry* was concerned with a limited search of a suspect's outer garments, which the Court [says] 'must surely be an annoying, frightening, and perhaps humiliating experience.' (*Terry*, 392 U.S. at 25). Searches of these far more private areas of a suspect's person can only be even more annoying, frightening, and humiliating. Some more explicit justification of them is warranted, in the context of *Terry*." *State v. Barnett* Montgomery App. No. 21619, 2007-Ohio-3694, ¶ 19.

{¶13} While it may be common that crack cocaine would be kept in such a

location, there is no evidence before the court that would tend to establish that a search of the area was necessary to discover a hidden weapon or to protect the officers. The officer testified that on the first two occasions when he put his hand between the defendant's buttocks, the defendant seemed to "tense up" or "tighten up" or "scrunch up." Such either voluntary or involuntary action on the part of the defendant certainly does not create probable cause to believe that the defendant had drugs in that area. The fact that the officer's hunch was correct in hindsight does not constitutionally justify his actions.

IV. CONSENT

{¶14} Even if the officers lacked a reasonable and articulable suspicion and even if they lacked a lawful reason to have the defendant get out of the car, voluntary consent could still have authorized the search that yielded the crack cocaine. *State v.Walker* (Dec. 15, 2000), Montgomery App. No.18233**.**

A. VOLUNTARY CONSENT

{¶15} " 'Where the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority.' " (Emphasis deleted.) *State v. Robinette* (1997), 80

Ohio St.3d 234, 243, quoting *Florida v. Royer* (1983), 460 U.S. at 497. "Whether consent is in fact voluntary * * * is a question of fact to be determined from the totality of the facts and circumstances." *State v. Sears*, Montgomery App No.20849, 2005-Ohio-3880, ¶ 37. The court cannot find that the defendant, a passenger in a vehicle stopped between two police cars with their emergency lights activated, "freely and voluntarily" consented to leaving the vehicle and to be searched.

B. SCOPE OF CONSENT

{¶16} The court must apply the "objective reasonableness" test to determine the scope of the consent, beyond the question of the existence of the consent. *Florida v. Jimeno* (1991), 500 U.S. 248, 251. This test asks what a typical reasonable person would have understood by the exchange between the officer and the suspect. Id. The court cannot find that such a person, or the defendant particularly, consented to a search that included an officer's placing his hand in the defendant's buttocks.

V. CONCLUSION

{¶17} The motion to suppress is granted.

So ordered.