[Cite as *State v. Smith*, 2015-Ohio-1204.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2013-P-0054**
- vs -	:	
JUSTIN M. SMITH,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 2011 CR 0730.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Kristina Drnjevich*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Dennis Day Lager, Portage County Public Defender, 449 South Meridian Street, Fourth Floor, Ravenna, OH 44266 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Justin M. Smith, appeals the judgment of the Portage County Court of Common Pleas, denying his Motion to Suppress. The issue before this court is whether a police officer who witnesses a potential domestic violence case may detain the defendant to investigate the nature of the confrontation. For the following reasons, we affirm the decision of the court below.

{¶2} On November 29, 2011, the Portage County Grand Jury indicted Smith for Trafficking in Cocaine (Count One), a felony of the fifth degree in violation of R.C.

2925.03(A)(2) and (C)[(4)](a), and Possession of Cocaine (Count Two), a felony of the fifth degree in violation of R.C. 2925.11(A) and (C)(4)(a).

{¶3} On July 2, 2012, Smith was arraigned and entered a plea of not guilty.

{¶4} On October 11, 2012, Smith filed a Motion to Suppress.

{¶5} On December 3, 2012, a suppression hearing was held, at which Patrolman Dominic Poe of the Kent Police Department testified on behalf of the State.

{¶6} On December 17, 2012, the trial court entered an Order and Journal Entry Nunc Pro Tunc, denying the Motion to Suppress. The court made the following findings of fact:

> Officer Poe of the Kent Police Department was on routine patrol on May 9, 2009, at 10:42 a.m. on East Main Street in front of the Kent State Main Campus. He noted a red mini-van pulled over to the side with the hazard lights on and the driver arguing with the Defendant, who was outside the vehicle.
>
> Officer Poe then pulled a u-turn and pulled up to the Defendant. At that time, the van had left. Officer Poe asked the Defendant what was going on. Defendant stated he and his baby mama were arguing and that she left to go back to Summit Gardens.
>
> Defendant was dressed in baggy clothing, was fidgety and kept asking to leave the area in a loud voice. Officer Poe, upon noting bulges in the Defendant's pants, decided to pat the Defendant down for weapons. In patting the Defendant down, he found money in one pocket, along with rolls of quarters, and felt a

bag of marijuana in the other pocket, and upon removing that, also found some cocaine.

This area of Kent State Campus, during the daytime, is not a high crime area. Officer Poe testified, because he was investigating a domestic, that he thought, for his safety, he needed to pat down the Defendant to see if he had any weapons.

The issue presented for the Court is, is this a reasonable search under the Fourth Amendment of the Constitution of the United States.

The Court finds, considering the totality of the circumstances, the search was reasonable for officer protection and safety.

{¶7} On February 21, 2013, Smith entered a Written Plea of No Contest to Trafficking in Cocaine and Possession of Cocaine, as charged in the Indictment.

{¶8} On May 20, 2013, a sentencing hearing was held.

{¶9} On June 10, 2013, the trial court entered an Order and Journal Entry, memorializing Smith's sentence. The court ordered Smith to be placed under the general control of the Portage County Adult Probation Department in the Intensive Supervision Program for a period of one year and one additional year under the General Division of Adult Probation. The court further suspended Smith's driver's license for six months and ordered the forfeiture of $634 in Smith's possession at the time of arrest.

{¶10} On June 12, 2013, Smith filed a Notice of Appeal. On appeal, Smith raises the following assignment of error:

{¶11} "[1.] The trial court erred to the prejudice of Defendant-Appellant by denying his motion to suppress evidence at trial on the grounds that his detainment, the search of his person, and resulting seizure of certain evidence incident thereto was in violation of Amendments to the Constitution of the United States and by Article I, Section 14 of the Constitution of the State of Ohio."

{¶12} At a suppression hearing, "the trial court is best able to decide facts and evaluate the credibility of witnesses." *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, 833 N.E.2d 1216, ¶ 41. "Its findings of fact are to be accepted if they are supported by competent, credible evidence, and we are to independently determine whether they satisfy the applicable legal standard." *Id.*, citing *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8; *State v. Wysin*, 11th Dist. Portage No. 2013-P-0037, 2013-Ohio-5363, ¶ 27 ("[o]nce the appellate court accepts the trial court's factual determinations, the appellate court conducts a de novo review of the trial court's application of the law to these facts") (citation omitted).

{¶13} The Fourth Amendment to the United States Constitution provides for "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[1] The Fourth Amendment generally prohibits federal and state governments from seizing or searching an individual, even for the purpose of a brief investigative stop. *State v. Andrews*, 57 Ohio St.3d 86, 87, 565 N.E.2d 1271 (1991). "[A] law enforcement official is permitted," however, "to stop and briefly detain a person for investigative purposes if the officer has a reasonable

1. Article I, Section 14 of the Ohio Constitution provides as follows: "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." Except in certain circumstances not relevant here, the Ohio Supreme Court "has interpreted Section 14, Article I of the Ohio Constitution as affording the same protection as the Fourth Amendment." *State v. Robinette*, 80 Ohio St.3d 234, 238, 685 N.E.2d 762 (1997).

suspicion supported by articulable facts that 'criminal activity may be afoot' * * *." *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, ¶ 11, quoting *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Accordingly, "[a]n investigative stop does not violate the Fourth Amendment to the United States Constitution if the police have reasonable suspicion that 'the person stopped is, or is about to be, engaged in criminal activity.'" *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, ¶ 35, quoting *United States v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981).

{¶14} A reasonable suspicion is derived from "specific reasonable inferences which [a police officer] is entitled to draw from the facts [of the situation] in light of his experience," but may not be based on the officer's "inchoate and unparticularized suspicion or 'hunch.'" *Terry* at 27. "The propriety of an investigative stop by a police officer must be viewed 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.

{¶15} "Where a police officer, during an investigative stop, has a reasonable suspicion that an individual is armed based on the totality of the circumstances, the officer may initiate a protective search for the safety of himself and others." *Id.* at paragraph two of the syllabus. "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 * * *." *Adams v. Williams*, 407 U.S. 143, 146, 92 S.Ct. 1921, 32 L.E.2d 612 (1972); *Terry* at 27 ("a reasonable search for weapons for the protection of the police officer [is permissible] where he has reason to believe that he is dealing with an armed and dangerous individual").

{¶16} Although limited in scope, a police officer may, during a protective search for weapons, seize contraband whose character is immediately apparent under the "plain feel" doctrine. "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." *Minnesota v. Dickerson*, 508 U.S. 366, 375-376, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993).

{¶17} In the present case, the initial encounter between Officer Poe and Smith was consensual. Smith told Officer Poe that the woman in the van was his "baby's mama," they had been arguing, and she was returning to Summit Gardens where they lived together. Officer Poe testified that he suspected Smith and his baby's mother were involved in "some type of domestic dispute." Officer Poe wanted "to go talk to the female half to check her well-being," and "to stay with [Smith] until we made contact with the female and made sure everything was okay." To this end, Officer Poe dispatched another police officer to Summit Gardens.

{¶18} Officer Poe's decision to detain Smith until the well-being of his child's mother was confirmed was entirely consistent with the stated purpose of a valid *Terry* stop:

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may

> be the essence of good police work to adopt an intermediate response. * * * A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

(Citations omitted.) *Adams*, 407 U.S. at 145-146, 92 S.Ct. 1921, 32 L.E.2d 612.

{¶19} Thereafter, Smith became loud and wanted to leave the scene, variously explaining that he needed to catch a bus to go to Ravenna and/or the Akron Children's Hospital. Smith was also "moving around and waving his arms around," behavior that Officer Poe described as not "normal." Officer Poe noted that Smith was wearing "baggy" clothes and had several bulges in the pockets of his pants. Officer Poe had to order Smith to keep his hands out of his pockets.

{¶20} At this point, Officer Poe decided to conduct a pat down of Smith as a safety precaution. According to Officer Poe: "Given * * * his clothing, the bulges in his pockets, him wanting to leave, and his behavior and everything, I just decided to do a *Terry* pat for weapons at that time." *Terry*, 391 U.S. at 24, 88 S.Ct. 1868, 20 L.Ed.2d 889 ("[w]hen 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, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm").

{¶21} Officer Poe patted Smith's right pocket and felt "a large amount of money." As Officer Poe began the pat down of the left pocket, Smith made a "sudden movement" and "jerk[ed]." Officer Poe felt what he believed was a baggie containing

marijuana. With his hand on the left pocket, Officer Poe looked up at Smith who told him, "go ahead," indicating his consent for Officer Poe to empty the pocket.

{¶22} Smith challenges Officer Poe's testimony that he gave consent to have the marijuana taken out of his pocket, based on the video recording of the incident from Officer Poe's police cruiser. Neither Officer Poe nor Smith is visible in the video recording, although their voices are audible. Smith asserts that he cannot be heard to say "go ahead," or give any other verbal indication that Officer Poe was allowed to place his hand into the pocket.

{¶23} We find the issue of whether Smith gave consent to be immaterial with regard to the seizure of the marijuana. As noted above, a police officer is entitled to seize contraband whose character is immediately apparent to the officer. *Dickerson*, 508 U.S. at 375-376, 113 S.Ct. 2130, 124 L.Ed.2d 334. Here, Officer Poe testified that, "right when [he] touched it," he felt what he suspected was "marijuana in his pocket." It has often been held that when an officer encounters what he believes to be contraband during the course of a pat down search for weapons, the officer is entitled to seize the contraband. *State v. Bales*, 2nd Dist. Montgomery No. 24897, 2012-Ohio-4968, ¶ 27; *State v. Williams*, 4th Dist. Ross No. 10CA3162, 2011-Ohio-763, ¶ 18; *State v. Parsley*, 10th Dist. Franklin No. 09AP-612, 2010-Ohio-1689, ¶ 17.

{¶24} The sole assignment of error is without merit.

{¶25} For the foregoing reasons, the judgment of the Portage County Court of Common Pleas, denying Smith's Motion to Suppress, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J., concurs,

THOMAS R. WRIGHT, J., concurs in judgment only.