[Cite as *State v. Bunn*, 2021-Ohio-3636.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JERMAINE BUNN,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 21 MA 0004

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 20 CR 405

BEFORE:
Carol Ann Robb, Cheryl L. Waite, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Paul J. Gains, Mahoning County Prosecutor, *Atty. Ralph M. Rivera,* Assistant Chief, Criminal Division, Mahoning County Prosecutor's Office, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee and

Atty. Joseph W. Gardner, 19 E. Front Street, Youngstown, Ohio, 44503 for Defendant-Appellant.

Dated: September 28, 2021

Robb, J.

{¶1} Defendant-Appellant Jermaine Bunn appeals the decision of Mahoning County Common Pleas Court denying his motion to suppress. The issue before this court is whether the officer had a reasonable articulable decision to pat down Appellant. For the reasons expressed below, the trial court's decision denying the motion to suppress is affirmed.

Statement of the Facts and Case

{¶2} Around 1:00 a.m. on July 11, 2020 while patrolling, Mill Creek Metro Parks Police Department Officer Ashley Kitchen observed Appellant driving a motorcycle on Glenwood Avenue maneuver two U-turns. 11/12/20 Suppression Tr. 6. After the second U-turn she began following him, but did not activate her overhead lights. 11/12/20 Suppression Tr. 21. Officer Kitchen described Appellant's driving as reckless because he was traveling at a high rate of speed and "circling." 11/12/20 Suppression Tr. 7, 8. Officer Kitchen lost sight of Appellant. 11/12/20 Suppression Tr. 9-10. When she finally reached him, he was picking up his motorcycle and she noticed a one tire skid mark in the grass; there was damage to the motorcycle and the officer did not know if it was drivable. 11/12/20 Suppression Tr. 9-10, 24. It was at this point Officer Kitchen activated her lights. 11/12/20 Suppression Tr. 10. Officer Kitchen stated Appellant was nervous, fidgety, and sweating profusely. 11/12/20 Suppression Tr. 11. Upon questioning, he told her someone threw something at him. 11/12/20 Suppression Tr. 11. Officer Kitchen testified she believed, given the road conditions, his rate of speed, and what she observed when she reached Appellant, that he wrecked the motorcycle. 11/12/20 Suppression Tr. 13-14.

{¶3} Officer William Aaron, also an officer from Mill Creek Metro Police Department, assisted when he heard on his radio there was a man in distress. 11/12/20 Suppression Tr. 30, 39. Officer Aaron exited his vehicle to talk to Appellant. 11/12/20 Suppression Tr. 33. He described Appellant as pacing and reaching into his pockets despite Officer Aaron's instructions to Appellant to not reach into his pockets. 11/12/20

Suppression Tr. 33. When Appellant failed to abide by the instructions, Officer Aaron informed Appellant he would be patted down; Officer Aaron testified this was done for officer safety. 11/12/20 Suppression Tr. 34. Officer Aaron placed Appellant against the vehicle to pat him down. 11/12/20 Suppression Tr. 34. In Appellant's right hand pocket, Officer Aaron felt a long object that could be a weapon. 11/12/20 Suppression Tr. 34. Appellant resisted the pat down by physically trying to pull Officer Aaron's hands out of his pocket. 11/12/20 Suppression Tr. 34. This resulted in Officer Aaron taking Appellant to the ground, placing him under arrest, and performing a search incident to an arrest. 11/12/20 Suppression Tr. 34, 45.

{¶4} The search yielded a gun magazine and drugs. In Appellant's right-hand pocket a gun magazine containing 19 rounds was discovered. 11/12/20 Suppression Tr. 35. In his left-hand pocket cocaine and marijuana were recovered. 11/12/20 Suppression Tr. 35. The area surrounding Appellant was searched and a Glock 43X with one round in the chamber and 10 rounds in the magazine was found. 11/12/20 Suppression Tr. 36. The magazine found on Appellant's person matched the Glock 43X found in the vicinity of Appellant and the motorcycle. 11/12/20 Suppression Tr. 36.

{¶5} Appellant was cited for possession, obstructing official business, turning in a roadway, resisting arrest, operating a motorcycle without a valid license, and expired stickers. 11/12/20 Suppression Tr. 12. At the preliminary hearing, following the testimony of Officer Kitchen, Appellant waived the remainder of the hearing. 7/20/20 Preliminary Hearing Tr. 31. The matter was then bound over to the Mahoning County Court of Common Pleas. 7/20/20 Preliminary Hearing Tr. 31.

{¶6} For the events that occurred on July 11, 2020, the Mahoning County Grand Jury indicted Appellant for having weapons while under disability in violation of R.C. 2923.13(A)(1)(3)(B), a third-degree felony; possession of cocaine in violation of R.C. 2925.11(A)(C)(4)(b), a fourth-degree felony; and obstructing official business in violation of R.C. 2921.31(A)(B), a fifth-degree felony. 8/13/20 Indictment.

{¶7} Appellant filed a motion to suppress arguing there was no reasonable articulable suspicion for the pat down. Appellant referred to the preliminary hearing transcript where Officer Kitchen indicated the U-turns were illegal but could not cite to a statute or ordinance supporting that contention. He argued the entire basis for Officer

Kitchen following Appellant and detaining him was predicated on her incorrect belief he committed an "illegal U-turn." 10/29/20 Motion to Suppress. The state responded asserting there were multiple traffic violations and an apparent accident which was evidenced by Appellant picking up his motorcycle when Officer Kitchen caught up to Appellant. It contended Officer Kitchen did not initiate a traffic stop for the multiple violations, but rather was conducting an accident investigation. It also asserted the search was incident to a lawful arrest. 11/12/20 Motion in Opposition.

{¶8} The trial court denied the motion following the suppression hearing. 12/18/20 J.E. Given the testimony, the trial court found:

> Officer Kitchen observed Defendant a few feet away on a yellow motorcycle "circling" by making one U-turn to go southbound and then another U-turn to go northbound. Defendant then proceeded in a northbound direction. Officer Kitchen felt that this maneuver was unusual for this time of day. Officer Kitchen then turned her vehicle around to travel in a northbound direction and follow Defendant but felt he was going so fast that she wouldn't be able to catch up to him. It was dark and rainy and the pavement was wet. She pursued Defendant at a "high rate of speed." When she caught up to Defendant he was on the southbound side of the road near the entrance to Volney Rogers Park. She noticed a skid mark in the grass and it was evident that Defendant had an accident and possibly laid his motorcycle down.
>
> At this point, Officer Kitchen activated her overhead lights on the vehicle. She approached Defendant who was picking his motorcycle up off the ground and indicated to him that he was driving at a high rate of speed and was reckless. She then observed Defendant to act "nervous" and sweating profusely. Defendant told Officer Kitchen that someone threw something at him and that's why he changed course on his motorcycle and fled.

12/18/20 J.E.

{¶9} In overruling the motion to suppress the trial court explained:

> Regardless of whether Defendant made an illegal or legal U-turn, Officer Kitchen drew on her experience and training to make inferences from and deductions about the cumulative information available to her that might well elude an untrained person. Here, she perceived the Defendant's actions as unreasonable under the circumstances and cited specific and articulable facts such as Defendant's operating his motorcycle at a high rate of speed to justify following him. Upon arriving at the scene of the accident that Defendant was involved in, only then did she activate her overhead lights. When Officer Aaron arrived, Defendant's actions and lack of cooperation led to his search and subsequent arrest.
>
> Under the totality of circumstances, the officers were justified in the search and subsequent arrest of Defendant.

12/18/20 J.E.

{¶10} Thereafter, Appellant entered a no contest plea to having weapons while under disability in violation of R.C. 2923.12(A)(1)(3)(B) and possession of cocaine in violation of R.C. 2925.11(A)(C)(4)(b). 1/7/21 Plea. The state dismissed the obstructing official business charge. 1/7/21 Plea. The trial court accepted the plea and sentenced Appellant to 18 months on each charge and ordered the sentences to be served concurrent to each other, but consecutive to the sentence imposed in case number 19 CR 843. 1/7/21 Sentencing J.E. In case number 19 CR 843, Appellant pled guilty and was sentenced to 12 months for a separate having weapons while under disability charge. 12/7/20 Sentencing J.E. 19 CR 843.

{¶11} Appellant timely appealed the conviction on the basis of the suppression ruling. 1/14/21 Notice of Appeal.

Assignment of Error

"The officer who conducted a pocket search and a patdown search did not have a specific and articulable belief based upon the reasonably prudent man standard that the defendant-appellant was armed and dangerous."

{¶12} "Appellate review of a motion to suppress presents a mixed question of law and fact. When considering 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." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. "Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence." *Id.* "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.*

{¶13} Appellant asserts Officer Aaron did not have a reasonable articulable suspicion to conduct a pat down. He focuses on Officer Kitchen's admission to following him because he had maneuvered an allegedly illegal U-turn. He also states Officer Aaron reached into Appellant's pockets prior to formally patting him down.

{¶14} The Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution protects individuals from unreasonable searches and seizures. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968). A traffic stop by a law-enforcement officer must comply with the Fourth Amendment's reasonableness requirement. *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769 (1996). Under *Terry*, police officers may briefly stop and/or temporarily detain individuals in order to investigate possible criminal activity if the officers have a reasonable, articulable suspicion that criminal activity may be afoot, including a minor traffic violation. *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539, 894 N.E.2d 1204, ¶ 7-8. In justifying the stop, the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." *Terry*, 392 U.S. at 21; *State v. Bobo*, 37 Ohio St.3d 177, 178, 524 N.E.2d 489 (1988).

{¶15} Precisely defining "reasonable suspicion" is not possible, and as such, the reasonable-suspicion standard cannot be "reduced to a neat set of legal rules.'" *Ornelas v. United States*, 517 U.S. 690, 695-696, 116 S.Ct. 1657 (1996), quoting *Illinois v. Gates*, 462 U.S. 213, 231, 103 S.Ct. 2317 (1983). The level of suspicion required to meet the reasonable-suspicion standard "is obviously less demanding than that for probable cause" and "is considerably less than proof of wrongdoing by a preponderance of the evidence" but is "something more than an 'inchoate and unparticularized suspicion or "hunch."'" *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581 (1989), quoting *Terry*, 392 U.S. at 27. To determine whether an officer had reasonable suspicion to conduct a *Terry* stop, the "totality of circumstances" must be considered and "viewed through the

eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold." *State v. Andrews*, 57 Ohio St.3d 86, 87-88, 565 N.E.2d 1271 (1991). "This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" *United States v. Arvizu*, 534 U.S. 266, 273, 122 S.Ct. 744 (2002), quoting *United States v. Cortez*, 449 U.S. 411, 418, 101 S.Ct. 690 (1981). "A determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct." *Id*. at 277. In permitting detentions based on reasonable suspicion, "*Terry* accepts the risk that officers may stop innocent people." *Illinois v. Wardlow*, 528 U.S. 119, 126, 120 S.Ct. 673 (2000). "A court reviewing the officer's actions must give due weight to his experience and training and view the evidence as it would be understood by those in law enforcement." *Andrews*, 57 Ohio St.3d at 88.

{¶16} Appellant begins his argument by focusing on Officer Kitchen's reason for following him. She testified she witnessed Appellant at approximately 1:00 in the morning make two U-turns and described this action as "circling." 11/12/20 Suppression Tr. 6-7. She stated it had rained, the pavement was wet, and Appellant was driving his motorcycle at a high rate of speed. 11/12/20 Suppression Tr. 8. It was after his second U-turn that she turned around to follow him. 11/12/20 Suppression Tr. 21. She did not activate her lights at that time. When she reached Appellant it looked as if he had wrecked his motorcycle; he was picking up his motorcycle and there was a one tire skid mark in the grass. 11/12/20 Suppression Tr. 9-10. She stated Appellant was nervous, fidgety, and sweating profusely and told her someone threw something at him. 11/12/20 Suppression Tr. 11. She testified at both the suppression hearing and the preliminary hearing that doing a U-turn was illegal, but she was unable to point to a statute or ordinance indicating as such. Appellant contends the U-turns were not illegal.

{¶17} The legality of the U-turns misses the point in this instance. When Officer Kitchen began following Appellant she did not activate her lights. Her lights were not activated until she came upon Appellant and saw him picking up his motorcycle and a skid mark in the grass.

{¶18} The act of following Appellant in this instance did not violate the Fourth Amendment; a "seizure" requires either "some application of physical force" or "a show of

authority to which the subject yields." *State v. Collier*, 2d Dist. Clark No. 2018-CA-104, 2019-Ohio-3197, ¶ 33, citing *State v. Thomas*, 2017-Ohio-8606, 100 N.E.3d 899, ¶ 11 (2d Dist.) (officer did not detain defendants when he drove up to defendant's vehicle without lights, sirens, or commands and parked without blocking in defendant's vehicle); *State v. Carter*, 2d Dist. Montgomery No. 19833, 2004-Ohio-454, ¶ 19-20 (an officer's act of pulling into a parking lot, stopping behind a defendant's parked car without blocking it in, illuminating the vehicle with a spotlight, and approaching to ask questions did not constitute a *Terry* stop); *State v. Lopez*, 2d Dist. Greene No. 94-CA-21, (Sept. 28, 1994) (merely approaching individuals seated in a parked car does not constitute a seizure, particularly when the vehicle is parked in a public parking lot). The act of following Appellant without her lights activated after she witnessed him do two U-turns is not a show of force.

{¶19} At the point that Officer Kitchen came upon Appellant and activated her lights, she had a reasonable articulable suspicion of criminal activity. She testified Appellant was driving at a high rate of speed on wet pavement. She indicated it took her awhile to catch up to Appellant. Also, given his demeanor, his statement, the fact he was picking up his motorcycle, and she observed one tire skid mark in the grass she had a reasonable articulable suspicion his driving or someone throwing something at him had caused him to have an accident. However, even if there was not a reasonable articulable suspicion of criminal activity, at that point she was also engaged in the community caretaking function.

{¶20} In the community caretaking role, an officer may intrude on a person's privacy to carry out community-caretaking functions to enhance public safety. *State v. Stanberry*, 11th Dist. Lake No. 2002-L-028, 2003-Ohio-5700, ¶ 23. The Third Appellate District has explained, "[w]hile *Terry* and much of its progeny stand for the proposition that a police officer generally needs a reasonable suspicion, based on specific and articulable facts, that an occupant of a vehicle is or has been engaged in *criminal* activity, nothing in the Fourth Amendment requires that the 'specific and articulable facts' relate to suspected criminal activity." *State v. Norman*, 136 Ohio App.3d 46, 53, 735 N.E.2d 953 (3d Dist.1999). Insisting that every vehicle stop be supported by a reasonable articulable suspicion of criminal activity would "overlook the police officer's legitimate role

as a public servant designed to assist those in distress and to maintain and foster public safety." *Id.* Thus, "under appropriate circumstances[,] a law enforcement officer may be justified in approaching a vehicle * * * without needing any reasonable basis to suspect criminal activity * * * to carry out 'community caretaking functions' to enhance public safety." *Id.* at 54. The key to such permissible police action, is the reasonableness required by the Fourth Amendment. *Stanberry; Norman*. If the law enforcement officer is "able to point to reasonable, articulable facts upon which to base her safety concerns," the brief seizure of an automobile and its occupants will be deemed reasonable.

{¶21} Here, the facts justified the belief that an accident had occurred and the officer was permitted to detain Appellant. Under the community-caretaking/emergency-aid exception to the Fourth Amendment warrant requirement, Officer Kitchen had objective reasonable grounds to believe there was an immediate need for her assistance. *See State v. Dunn*, 131 Ohio St.3d 325, 2012-Ohio-1008, 964 N.E.2d 1037, ¶ 26.

{¶22} Therefore, her actions did not violate the Fourth Amendment.

{¶23} Officer Aaron arrived on the scene after hearing on the radio a man was in distress. Officer Aaron exited his vehicle to talk with Appellant. 11/12/20 Suppression Tr. 33. Appellant was pacing, repeating the same thing, and reaching into his pockets. 11/12/20 Suppression Tr. 33. Officer Aaron told Appellant three times to not reach into his pockets; however, Appellant continued the behavior. 11/12/20 Suppression Tr. 33. Officer Aaron informed Appellant he would be conducting a pat down. 11/12/20 Suppression Tr. 33-34. Officer Aaron testified officer safety was the reason for the pat down. 11/12/20 Suppression Tr. 34. Appellant immediately tried to resist the pat down; Appellant was placed against the vehicle and the pat down began. 11/12/20 Suppression Tr. 34.

{¶24} These facts indicate Officer Aaron was justified in attempting to conduct a pat down of Appellant. During a *Terry* stop, it is sometimes considered reasonable for the investigating officer to conduct a "protective search" by patting down the suspect to discover and remove weapons. *State v. Robinette*, 80 Ohio St.3d 234, 685 N.E.2d 762 (1997); *Andrews*, 57 Ohio St.3d at 89. "Pursuant to *Terry,* police officers are allowed to perform limited protective searches for concealed weapons when the surrounding circumstances create a suspicion that an individual may be armed and dangerous." *State*

v. Harding, 180 Ohio App.3d 497, 2009-Ohio-59, 905 N.E.2d 1289 (2d Dist.), overruled on other grounds, *State v. Gardner*, 2d Dist. Montgomery No. 24308, 2011-Ohio-5692. "[T]he standard to perform a protective search, like the standard for an investigatory stop, is an objective one based on the totality of the circumstances. The rationale behind the protective search is to allow the officer to take reasonable precautions for his own safety in order to pursue his investigation without fear of violence." *Andrews*, 57 Ohio St.3d at 89.

{¶25} Here, as stated above, Appellant was pacing and reaching into his pockets. Officer Aaron told him to stop reaching into his pockets, but Appellant continued. A firearm can be concealed in pockets. Thus, Appellant's actions created a reasonable suspicion that he could be armed and dangerous; it was 1:00 a.m., Appellant was circling and driving at a high rate of speed, Appellant exhibited a nervous demeanor, and he failed to stop reaching into his pockets where a firearm could be concealed despite repeated instructions to stop reaching into his pockets.

{¶26} In Officer Aaron's attempt to pat down Appellant, he felt a long object that could be a weapon in Appellant's right pocket. 11/12/20 Suppression Tr. 34. When Officer Aaron attempted to retrieve that object, Appellant tried to pull Officer Aaron's hands out of his pocket. 11/12/20 Suppression Tr. 34. Although Appellant suggests that Officer Aaron tried reaching in Appellant's pocket prior to the pat down, the testimony belies that assertion. Due to Appellant physically trying to stop the discovery of the item in his pocket during the pat down, Officer Aaron had to perform a take-down technique. 11/12/20 Suppression Tr. 34. Appellant was taken to the ground, placed under arrest, and a search incident to arrest was then performed. 11/12/20 Suppression Tr. 35.

{¶27} During the search, Officer Aaron removed the object in Appellant's right pocket that he thought could be a weapon. 11/12/20 Suppression Tr. 35. It was an extended magazine with 19 rounds in it. 11/12/20 Suppression Tr. 35. In Appellant's left pocket was marijuana and cocaine. 11/12/20 Suppression Tr. 35. Approximately 6 to 8 feet away from Appellant, a Glock 43X was found with one round in the chamber and 10 rounds in the magazine. 11/12/20 Suppression Tr. 36. The magazine in the Glock matched the magazine found on Appellant's person. 11/12/20 Suppression Tr. 36. The Glock 43X found on the ground did not have an overgrowth of vegetation on the weapon

and it was visible without having to take any other action to uncover it. 11/12/20 Suppression Tr. 37. Officer Aaron testified no one normally carries a magazine in his or her pocket without also having a gun for the magazine. 11/12/20 Suppression Tr. 37.

{¶28} The search incident to arrest for obstructing official business by refusing to allow the pat down by physically preventing Officer Aaron from completing the pat down did not violate the Fourth Amendment. The Second Appellate District has explained, "Although an unlawful pat down may have resulted in exclusion of any evidence discovered, "'absent bad faith on the part of a law enforcement officer, [a defendant] cannot obstruct the officer in the discharge of his duty, whether or not the officer's actions are lawful under the circumstances.'" *State v. Lewis*, 2d Dist. Montgomery No. 27152, 2017-Ohio-1195, ¶ 12, quoting *State v. Burns*, 2d Dist. Montgomery No. 22674, 2010–Ohio–2831, ¶ 19. As stated above, the pat down, given the circumstances, was permissible under Fourth Amendment standards.

{¶29} For those reasons, the trial court's decision to deny the motion to suppress is supported by the record and the law, and therefore, is affirmed. The sole assignment of error is overruled.

Waite, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.