

IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
SCIOTO COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	
	:	Case No. 08CA3260
v.	:	
	:	
MARTIN L. LEE,	:	<b><u>DECISION AND</u></b>
	:	<b><u>JUDGMENT ENTRY</u></b>
	:	
Defendant-Appellant.	:	File-stamped date: 8-27-09

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**APPEARANCES:**

Richard M. Nash, Portsmouth, Ohio, for appellant.

Mark E. Kuhn, Scioto County Prosecutor, and Danielle M. Parker, Scioto County Assistant Prosecutor, Portsmouth, Ohio, for appellee.

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Kline, P.J.:

{¶1} Martin L. Lee appeals his possession of crack cocaine conviction in the Scioto County Court of Common Pleas. On appeal, Lee contends that the lower court erred when it declined to suppress evidence at trial. We disagree, holding that his arrest for possession of crack cocaine was supported by probable cause. Accordingly, we affirm the judgment of the trial court.

I.

{¶2} On December 1, 2006, Steven Timberlake, a narcotics investigator for the Portsmouth Police Department, was at an establishment described in the record as “Oasis Carryout.” Timberlake observed Lee purchase two glass roses and a pack of Chore Boy.

{¶13} Timberlake stated that these items are not contraband, but are commonly used in combination to smoke crack cocaine. He explained that (1) glass roses consist of a glass tube with a flower inside, and addicts commonly remove the flower and use the tube as a pipe to smoke crack cocaine; and (2) Chore Boy is a brand of copper scouring pads commonly used as a filter in combination with the glass pipe.

{¶14} Timberlake decided to follow Lee. Lee left the store and got into a vehicle driven by a woman later identified as Cathy Skaggs. Skaggs drove the car to a nearby gas station. Timberlake observed the gas station from across the road at a bus station. Lee entered the gas station. While Lee was inside the gas station, a second car arrived and parked near Skaggs's car. Within a minute, Lee left the gas station and walked towards the second car. Lee walked up to the passenger side of the car, and Timberlake saw what appeared to be a hand to hand exchange between Lee and the occupant of the vehicle.

{¶15} Timberlake did not see money or drugs change hands, but he did see Lee reach into the vehicle's open window. Lee walked around the second car to return to Skaggs's car. At the same time, Timberlake ran towards them from across the road and placed everyone in both cars under arrest. Timberlake ordered Lee, who was in front of Skagg's car, to lie down on the ground. Lee placed his hand on Skaggs's car on his way down to the ground. Timberlake later recovered a small bag containing 0.9 grams of crack cocaine from the seam between the hood of the car and its fender.

{¶16} After a lengthy search, Timberlake arrested Lee for "a felony five possession" of crack cocaine. See Jury Trial Transcript at 71. Later, a Scioto County Grand Jury indicted Lee for possession of drugs, a fifth degree felony, in violation of R.C.

2925.11(C)(4)(a) and tampering with evidence, a third degree felony, in violation of R.C. 2921.12(A)(1).

{¶7} Lee entered not guilty pleas to both offenses. Later, Lee filed a motion to suppress. Lee contended that Timberlake lacked probable cause to arrest him, and therefore the warrantless search was unconstitutional and the fruits should be suppressed. The trial court denied this motion. At trial, the jury returned a guilty verdict for possession of drugs, a fifth degree felony, in violation of R.C. 2925.11(C)(4)(a), but the same jury found him not guilty of the tampering with evidence offense. The trial court sentenced Lee to one year in the custody of the Ohio Department of Rehabilitation and Correction; three years of post release control; a \$1,000 fine; and court costs.

{¶8} Lee appeals his conviction and asserts the following assignment of error: “The trial court erred in denying Appellant’s motion to suppress evidence illegally obtained in violation of the Fourth Amendment of the United States Constitution and Section 4,[sic] Article I of the Ohio Constitution.”

## II.

{¶9} Lee contends in his sole assignment of error that officer Timberlake lacked probable cause to arrest him for possession of crack cocaine. As a result, Lee asserts that the trial court should have suppressed the evidence obtained as a result of the illegal warrantless search that followed his arrest.

{¶10} Our review of a decision on a motion to suppress presents mixed questions of law and fact. *State v. Hatfield* (Mar. 11, 1999), Ross App. No. 98CA2426, citing *State v. McNamara* (1997), 124 Ohio App.3d 706, 710, citing *United States v. Martinez* (C.A.11, 1992), 949 F.2d 1117, 1119. At a suppression hearing, the trial court is in the best

position to evaluate witness credibility. *State v. Dunlap* (1995), 73 Ohio St.3d 308, 314. Accordingly, we must uphold the trial court's findings of fact if the record supports them by competent, credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594. We then conduct a de novo review of the trial court's application of the law to the facts. *State v. Anderson* (1995), 100 Ohio App.3d 688, 691.

{¶11} The Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution protect the “[t]he right of the people to be secure \* \* \* against unreasonable searches and seizures[.]” Both constitutional provisions further provide that “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 things to be seized.” Section 14, Article I, Ohio Constitution.

{¶12} “[T]he state bears the burden of proving that a warrantless search or seizure meets Fourth Amendment standards of reasonableness.” *Maumee v. Weisner* (1999), 87 Ohio St.3d 295, 297, citing 5 LaFave, *Search and Seizure* (3 Ed. 1996), Section 11.2(b).

{¶13} Here, the state relies on the theory that Timberlake made a lawful arrest of Lee for possession of crack cocaine. And pursuant to that arrest, Timberlake was empowered to search Lee as well as the area in his immediate vicinity. “The right of a police officer to search a suspect incident to a lawful arrest has been a long recognized exception to the warrant requirement of the Fourth Amendment.” *State v. Scasny*, Ross App. No. 04CA2768, 2004-Ohio-4918, at ¶20, citing *Chimel v. California* (1969), 395 U.S. 752. Pursuant to this doctrine, an arresting officer may search the arrestee as well as “the area into which an arrestee might reach in order to grab a weapon or evidentiary

items[.]” *Chimel* at 763. The arrest itself must be lawful before the officer has the right to search the arrestee. See *United States v. Robinson* (1973), 414 U.S. 218, 232-33, citing *People v. Chiagles* (1923), 237 N.Y. 193, 197. An officer may make a warrantless arrest of a person in a public area so long as the arrest is supported by probable cause. *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, at ¶66.

{¶14} Probable cause is a lesser standard of proof than that required for a conviction, such as proof beyond a reasonable doubt or by a preponderance of the evidence. *State v. Young* (2001), 146 Ohio App.3d 245, 254, citing *State v. George* (1989), 45 Ohio St.3d 325, 329, citing *Illinois v. Gates* (1983), 462 U.S. 213, 235. Probable cause only requires the existence of circumstances that warrant suspicion. *Young* at 254. Thus, the standard for probable cause requires only a showing that a probability of criminal activity exists-not a prima facie showing of criminal activity. *George* at 329, citing *Gates* at 238-39.

{¶15} The question is “whether at that moment [of the arrest] the facts and circumstances within [the police officer’s] knowledge and of which [he] had reasonably trustworthy information were sufficient to warrant a prudent man in believing that [Lee] had committed or was committing an offense.” *Beck v. Ohio* (1964), 379 U.S. 89, 91. “The rule of probable cause is a practical, nontechnical conception[.]” *Id.* Probable cause is determined in the totality of the facts and circumstances within the knowledge of the police officer. *State v. Miller* (1997), 117 Ohio App.3d 750, 761.

{¶16} Lee contradicted Timberlake’s testimony at trial, but he makes no argument in regard to the facts considered and decided by the trial court. Rather he argues that cited case law demonstrates that the police officer lacked probable cause. Lee states

that the key issue is “whether Timberlake’s observation of hand to hand contact between [Lee] and the passenger amount[s] to probable cause.” However, we frame the key issue as whether the hand to hand contact (between Lee and the other car’s passenger) combined with the previous purchase of glass roses and a pack of Chore Boy constitutes probable cause for possession of crack cocaine.

{¶17} Lee cites three cases for the principle that probable cause did not support his arrest. In the first case, the court of appeals held that an officer who merely sees furtive hand movements without seeing anything exchanged in a high crime area does not have probable cause to believe the participants have engaged in criminal behavior. *State v. Nelson* (1991), 72 Ohio App.3d 506, 507-08. In the second case, the court of appeals found a search unconstitutional where the officers relied on “*nothing more* to justify their search than the fact that two occupants of a car were engaged in some sort of conversation with an individual leaning against the vehicle.” *State v. Crosby* (1991), 72 Ohio App.3d 148, 151 (emphasis in original). However, both of these cases are distinguishable on the facts. Here, Timberlake observed Lee purchase items that had little in common aside from their known usage in smoking crack cocaine. This is an element not present in *Nelson* or *Crosby*.

{¶18} In Lee’s third cited case, police officers observed an individual flagging down passing motorists. *State v. Delagraza* (2001), 144 Ohio App.3d 474, 476. The officers saw the individual stop a total of four cars. The individual merely talked with the occupants of the first and fourth cars, but he leaned into the second and third cars and conducted what appeared to be some sort of hand transactions. The court of appeals affirmed the order of the trial court suppressing the evidence. However, the opinion

neither states where the relevant contraband was found nor does it state whether it was analyzing the issue as a *Terry* stop requiring reasonable suspicion or a search of a vehicle without a warrant requiring probable cause. See *Id.* at 479. The appellate court concluded that “the trial court determined that, as a factual matter, the officer acted on a hunch.” *Id.* But, whether a police officer is motivated by a hunch is entirely irrelevant if the stop is supported by the requisite reasonable suspicion or probable cause. See *Whren v. United States* (1996), 517 U.S. 806, 813 (“Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”). Because the *Delagraza* court never concluded that probable cause or reasonable suspicion did or did not exist, it is not helpful in determining whether probable cause exists in the present case.

{¶19} Instead, we find an eighth district case more persuasive. In *State v. Benton*, Cuyahoga App. No. 88099, 2007-Ohio-1142, officers observed a van drive into a parking lot and watched a middleman approach the van to talk with the driver. After the conversation, the middleman walked to a second man and retrieved something. He then went back to the van and made an exchange. Based on these observations, other officers arrested the middleman. The *Benton* court held that probable cause existed based on the totality of the circumstances: “high drug area, at night, in a parking lot where the stores were closed.” *Id.* at ¶17. Here, the state’s case against Lee does not involve a high drug crime area or a parking lot at night, but the officer had just observed Lee purchase two objects, which in conjunction were frequently used to smoke crack cocaine. Either object, by itself may not have aroused suspicion, but the combination of the two certainly warrants some suspicion. The officer then observed Lee engage in activity consistent with the purchase of drugs from a third party. Under the totality of

these circumstances, a reasonable person would be warranted in the belief that Lee was engaged in the purchase of drugs, specifically crack cocaine. Therefore, we find Timberlake's arrest of Lee for possession of crack cocaine was supported by probable cause.

{¶20} Accordingly, we overrule Lee's sole assignment of error and affirm the judgment of the trial court.

**JUDGMENT AFFIRMED.**



**JUDGMENT ENTRY**

It is ordered that the JUDGMENT BE AFFIRMED, and that Appellant pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, J.: Concurs in Judgment and Opinion.

McFarland, J.: Concurs in Judgment Only.

For the Court

BY: \_\_\_\_\_  
Roger L. Kline, Presiding Judge

**NOTICE TO COUNSEL**

**Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.**