[Cite as *State v. Ulmer* , 2010-Ohio-695.]

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

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 09CA3283
	:	
vs.	:	**Released: February 12, 2010**
	:	
DONALD LEE ULMER,	:	DECISION AND JUDGMENT
	:	ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Richard M. Nash, Portsmouth, Ohio, and Marvin Barnett, Barnett Law Group, P.C., Detroit, Michigan, for Appellant.

Mark E. Kuhn, Scioto County Prosecutor, and Pat Apel, Scioto County Assistant Prosecutor, Portsmouth, Ohio, for Appellee.

Per Curiam:

{¶1} After pleading no contest to two drug charges, Appellant, Donald Ulmer, appeals the Scioto County Common Pleas Court judgment overruling his motion to suppress the oxycontin recovered from his vehicle after a stop of his vehicle based on an informant tip. On appeal, Appellant contends that 1) the trial court's findings of fact issued after the suppression hearing are against the manifest weight of the evidence; and 2) the trial court failed to apply the appropriate test or correct law to the findings of fact. Because we conclude that Appellant's argument set forth in his first assignment of error

fails as a matter of law, we overrule it. Further, because we conclude that law enforcement's initial investigatory stop of Appellant was based upon reasonable suspicion, and the attendant search of Appellant's vehicle and subsequent seizure of drugs was based upon probable cause, we overrule Appellant's second assignment of error. Accordingly, we affirm the trial court's denial of Appellant's motion to suppress.

FACTS

{¶2} On November 4, 2008, Investigators Timberlake and Bryant, of the Portsmouth Police Department, received information from a confidential informant, who had pending criminal charges against her, advising them that she had been receiving oxycontin from a black male from the Detroit area known as "Lee" and that she could arrange for him to make a delivery to her. The investigators had not worked with this particular confidential informant in the past; however, they arranged for the confidential informant to place a recorded phone call to Lee, in their presence, in order to set up the delivery. The officers then took the recording back to the police department where they downloaded and listened to it.

{¶3} The confidential informant further informed the officers that Lee would be driving either a gray Dodge Magnum or a gray Dodge Charger and would be arriving in Portsmouth via routes 32 and 23. Later in the day, after

having more contact with Lee, the confidential informant contacted the officers and advised that Lee would be arriving in Portsmouth around 7:45 p.m. that evening. At that point, Investigator Bryant went to Lucasville, Ohio to conduct surveillance, where he eventually observed a vehicle matching the description given, heading south on route 23 towards Portsmouth. The confidential informant contacted the officers again and informed that she was to meet Lee at the Wurster's Pharmacy parking lot in Portsmouth.

{¶4} As Appellant was approaching the designated meeting spot, the officers received another call from the confidential informant stating she was following Appellant's vehicle. Investigator Timberlake then observed Appellant park on a street just south of the designated meeting place, followed by the confidential informant. When the confidential informant exited her vehicle and entered Appellant's vehicle, which was unplanned, Investigator Timberlake placed a call to Investigator Bryant, who turned his lights on to bypass traffic and pulled in to block Appellant's parked vehicle. Investigator Timberlake, meanwhile, was approaching on foot. As Investigator Timberlake approached, through the open car window he overheard Appellant threaten and curse the confidential informant, accusing her of setting him up. At that point, Investigator Timberlake became

concerned for the safety of the informant and approached Appellant's side of the vehicle with his weapon drawn and pointed towards Appellant. He then opened the car door and removed Appellant from the vehicle.

{¶5} After removing Appellant from the vehicle, the officers noted a strong smell of marijuana. When Investigator Bryant removed the confidential informant from the vehicle, he was able to view a "blunt," or marijuana cigarette in the console ash tray. Officers were also able to view a pair of scissors and baggie in the vehicle. Upon making these findings, the officers conducted a further search of the vehicle, which resulted in the recovery of over 1000 oxycontin tablets.

{¶6} The Scioto County Grand Jury returned a ten count indictment charging Appellant with 1) possession of drugs/major drug offender, a felony of the first degree, in violation of R.C. 2925.11(A)&(C)(1)(e); 2) trafficking in drugs/oxycodone/major drug offender, a felony of the first degree, in violation of R.C. 2925.03(A)(2)&(C)(1)(f); 3) trafficking in drugs/oxycodone/major drug offender, a felony of the first degree, in violation of R.C. 2925.03(A)(1)&(C)(1)(f); 4) conspiracy to traffic drugs/oxycodone/major drug offender, a felony of the first degree, in violation of R.C. 2923.01(A)(1) and 2925.03(A)(2)&(C)(1)(f); 5) possession of criminal tools, a felony of the fifth degree, in violation of R.C.

2923.23(A) and 2923.24(C); 6) possession of criminal tools, a felony of the fifth degree, in violation of R.C. 2923.23(A) and 2923.24(C); 7) possession of criminal tools, a felony of the fifth degree, in violation of 2923.23(A) and 2923.24(C); 8) possession of criminal tools, a felony of the fifth degree, in violation of R.C. 2923.24(A) and 2923.24(C); 9) possession of marijuana, a misdemeanor, in violation of R.C. 2925.11(A)&(C)(3)(a); and 10) tampering with evidence, a felony of the third degree, in violation of R.C. 2921.12(A)(1).

{¶7} Appellant entered pleas of not guilty to each charge and subsequently filed a motion to suppress. In his motion to suppress, he sought to suppress the physical evidence seized as a result of the warrantless search. On January 23, 2009, the trial court held a suppression hearing. At the hearing, Investigators Timberlake and Bryant testified to the previously set forth series of events. The State argued that the officers' initial stop of Appellant was based upon their reasonable articulable suspicion of criminal activity, based upon the informant's tip. The State further argued that once Appellant was removed from the vehicle and the officers were able to smell marijuana and view of a blunt in plain view, they possessed probable cause to search the vehicle. The trial court agreed and overruled the motion to suppress.

{¶8} On January 26, 2009, Appellant changed his former pleas of not guilty to each charge in the ten count indictment and instead entered pleas of no contest to three of the counts, including possession of drugs, trafficking in drugs and tampering with evidence. The trial court sentenced Appellant to serve ten years for the possession of drugs conviction, five years on the trafficking in drugs conviction, to be served consecutively to the ten year sentence, and five years on the tampering with evidence conviction, to be served concurrently to the other sentences, for a total term of fifteen years. This appeal followed.

ASSIGNMENTS OF ERROR

"I. THE TRIAL COURT'S FINDING OF FACTS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

II. THE TRIAL COURT FAILED TO APPLY THE APPROPRIATE TEST OR CORRECT LAW TO THE FINDINGS OF FACT."

ASSIGNMENT OF ERROR I

{¶9} In his first assignment of error, Appellant contends that the trial court's findings of fact, as contained in its entry denying Appellant's motion to suppress, are against the manifest weight of the evidence. Appellant claims that in reaching its decision, the trial court relied on hearsay testimony it had previously ruled inadmissible during the suppression hearing. The State disagrees, contending that the trial court overruled

Appellant's objection to the hearsay testimony offered by Investigator Timberlake. The State further argues that hearsay testimony may be considered to determine the existence of reasonable, articulable suspicion or probable cause in suppression hearings. For the following reasons, we agree with the State.

{¶10} We initially note, with regard to Appellant's argument that the trial court relied on inadmissible hearsay in reaching its decision, "the Rules of Evidence do not apply to suppression hearings." *State v. Bozcar*, 113 Ohio St.3d 148, 863 N.E.2d 155, 2007-Ohio-1251, at ¶ 17, citing Evid.R. 101(C)(1) & 104(A); See, also, *State v. Norman*, Ross App. Nos. 08CA3059 & 66, 2009-Ohio-5458. Therefore, " '[a]t a suppression hearing, the court may rely on * * * evidence, even though that evidence would not be admissible at trial.' " *Maumee v. Weisner*, 87 Ohio St.3d 295, 298, 720 N.E.2d 507, 1999-Ohio-68, quoting *United States v. Raddatz* (1980), 447 U.S. 667, 679, 100 S.Ct. 2406, 65 L.Ed.2d 424. Accordingly, Appellant's argument fails as a matter of law.

{¶11} Further, a review of the suppression hearing transcript reveals that the trial court allowed the testimony of Investigator Timberlake, as follows:

"Q. Explain to the court how that came about?

A. On November 4, 2008 we received, I sat down and had an interview with a female by the name of Brooke McCoy. During that interview Ms. McCoy indicated that she had --

MR. BARNETT: Objection Your Honor, if it's offered for the truth of the matter I would assert that it would be hearsay. No objection if it's offered for only a limited purpose.

MR. APEL: If Your Honor please, we're talking about probable cause here and so forth.

THE COURT: Other than the proof it gets us to where we're going, I'll allow it for that purpose.

A. I'd received information from Ms. McCoy about a subject she believed was from Detroit that she knew as Lee. She indicated that in the past she had received, for quite some time she had been receiving oxycontin from Lee and that she could arrange for him to make a delivery of oxycontin to her."

{¶12} Thus, the record reflects that the trial court did not sustain Appellant's objection, but rather, it allowed Investigator Timberlake's hearsay testimony regarding his conversations with the confidential informant to be introduced for the purpose of illustrating how law enforcement came into contact with Appellant on the day of his arrest. Further, although Appellant objected to this testimony that was offered as part of the State's case on direct examination, Appellant's counsel elicited much of the same information from Investigator Timberlake during cross examination. For example, the following information was elicited by Appellant on cross examinations:

"Q. . . . Did Ms. McCoy ever say anything to you about drugs?

A. Ever say anything to me about drugs?

Q. In this case?

A. Yeah.

Q. What did she say?

A. She said that she had got drugs from Lee over the past year.

Q. When did she say that to you?

A. In the interview sir.

Q. Okay, anything else?

A. Told us where he hides the drugs, told us how she had met him, who she had met him through.

Q. Did she say he was bringing drugs that day?

A. Said that he brings drugs every week.

Q. Did she say that he was bringing drugs that time, this day?

A. She believed that he was bringing drugs that day.

Q. She believed. Did she ever tell you that the man is coming with some drugs now?

A. The phone conversation would lead me to believe that he was bringing drugs that night or the next morning.

Q. Sir, I'm not asking you what lead you to believe, I'm simply asking you what she said. Did she say that he was bringing drugs?

A. She said that she was confident that he was bringing drugs.

Q. Very well sir. Well then did she tell you what type of drugs he was bringing?

A. Oxycontin.

Q. Did she say oxycontin?

A. That's what she always got from him, that's what she intended to get from him."[1]

{¶13} Based on the foregoing, even if the trial court had excluded Investigator Timberlake's conversations with the confidential informant, the information would have entered the record by Appellant's counsel's line of questioning on cross examination, and any error related to this testimony would constitute invited error. Accordingly, we find no merit in Appellant's first assignment of error and therefore overrule it.

ASSIGNMENT OF ERROR II

{¶14} In his second assignment of error, Appellant contends that the trial court failed to apply the appropriate test or correct law to the findings of fact. Specifically, Appellant argues that his arrest was "erroneously based on 'reasonable articulable suspicion,' and not 'probable cause." In making this argument, Appellant claims that the trial court erred in finding the investigating officer's actions in pulling Appellant from the car were justified based upon reasonable suspicion, rather than probable cause,

[1] Because the exchange is much too lengthy to include in our opinion, we simply note that the suppression hearing transcript further includes six pages of Appellant's cross examination of Investigator Timberlake regarding the color of Appellant's Dodge Magnum, specifically whether it was gray or silver.

claiming that the officer's act of pulling him from the vehicle with weapon drawn was a seizure which was the functional equivalent of an actual arrest requiring probable cause, rather than an investigatory stop, which only would have required reasonable articulable suspicion.

{¶15} In *State v. Abernathy II*, Scioto App. 07CA3160, 2008-Ohio-2949, this Court concluded, based upon facts very similar to the ones presently before us, that police officers had reasonable suspicion to stop a defendant's vehicle based upon an informant tip. As such, we set forth the applicable standard of review and many of the legal principles discussed in *Abernathy II*, verbatim:

STANDARD OF REVIEW

{¶16} "Our analysis begins with the well-settled premise that appellate review of a trial court's decision on a motion to suppress evidence involves mixed questions of law and fact. See, e.g., *State v. Book*, 165 Ohio App.3d 511, 847 N.E.2d 52, 2006-Ohio-1102, at ¶ 9; *State v. Long* (1998), 127 Ohio App.3d 328, 332, 713 N.E.2d 1. In hearing such motions, trial courts assume the role of trier of fact and are in the best position to resolve factual disputes and to evaluate witnesses credibility. See, e.g., *State v. Burnside*, 100 Ohio St.3d 152, 797 N.E.2d 71, 2003-Ohio-5372, at ¶ 8; *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972. Appellate courts

must accept a trial court's factual findings so long as competent and credible evidence supports those findings. See, e.g., *State v. Metcalf* (1996), 111 Ohio App.3d 142, 145, 675 N.E.2d 1268; *State v. Harris* (1994), 98 Ohio App.3d 543, 546, 649 N.E.2d 7. Appellate courts then independently review whether the trial court properly applied the law to the facts. See, e.g., *Book*, supra at ¶ 9; *State v. Williams* (1993), 86 Ohio App.3d 37, 41, 619 N.E.2d 1141. With these principles in mind, we turn to the case at bar."

GENERAL FOURTH AMENDMENT PRINCIPLES

{¶17} "The Fourth and Fourteenth Amendments to the United States Constitution, and Section 14, Article I of the Ohio Constitution, protect individuals against unreasonable searches and seizures. *Delaware v. Prouse* (1979), 440 U.S. 648, 662, 99 S.Ct. 1391, 59 L.Ed.2d 660; *State v. Gullett* (1992), 78 Ohio App.3d 138, 143, 604 N.E.2d 176. Searches and seizures conducted outside the judicial process, without prior approval by either a judge or magistrate, are per se unreasonable under the Fourth Amendment subject only to specifically established and well-delineated exceptions. *Katz v. United States* (1967), 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576; *State v. Sneed* (1992), 63 Ohio St.3d 3, 6-7, 584 N.E.2d 1160; *State v. Braxton* (1995), 102 Ohio App.3d 28, 36, 656 N.E.2d 970. Once the defendant demonstrates that he was subjected to a warrantless search or

seizure, the burden shifts to the state to establish that the warrantless search or seizure was constitutionally permissible. See *Maumee v. Weisner* (1999), 87 Ohio St.3d 295, 297, 720 N.E.2d 507; *Xenia v. Wallace* (1988), 37 Ohio St.3d 216, 524 N.E.2d 889, paragraph two of the syllabus."

PROBABLE CAUSE AND REASONABLE SUSPICION EXCEPTIONS TO THE WARRANT REQUIREMENT

{¶18} "Two exceptions to the warrant requirement include (1) short, investigative stops founded upon reasonable suspicion of criminal activity and (2) searches and seizures founded upon probable cause of criminal activity. See, e.g., *Dunaway v. New York* (1979), 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824; *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. In the case at bar, Appellant argues that the probable cause standard applies. The prosecution contends, however, as did the trial court, that the reasonable suspicion standard applies.

{¶19} In *State v. Taylor* (1995), 106 Ohio App.3d 741, 748-749, 667 N.E.2d 60, the court distinguished between an investigative stop and a seizure that is the functional equivalent of an arrest, which must be founded upon probable cause:

'The investigatory detention is * * * less intrusive than a formal custodial arrest. The investigatory detention is limited in duration and purpose and can only last as long as it takes a police officer to confirm or to dispel his suspicions. *Terry*, supra. A person is seized under this category when, in view of all the circumstances surrounding the incident, by means of physical

force or show of authority a reasonable person would have believed that he was not free to leave or is compelled to respond to questions. *Mendenhall*, supra, 446 U.S. at 553, 100 S.Ct. at 1877, 1878, 64 L.Ed.2d at 508*; Terry*, supra, 392 U.S. at 16, 19, 88 S.Ct. at 1877, 1878, 20 L.Ed.2d at 903, 904.

The Supreme Court in *Mendenhall* listed factors that might indicate a seizure. These factors include a threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person, the use of language or tone of voice indicating that compliance with the officer's request might be compelled, approaching the citizen in a nonpublic place, and blocking the citizen's path. Id. at 554, 100 S.Ct. at 1877, 64 L.Ed.2d at 509. A police officer may perform an investigatory detention without running afoul of the Fourth Amendment as long as the police officer has a reasonable, articulable suspicion of criminal activity. *Terry*, supra, 392 U.S. at 21, 88 S.Ct. at 1879, 20 L.Ed.2d at 906.

* * * *

* * * To perform [a seizure that is the functional equivalent of an arrest] the police officer must have probable cause. *State v. Barker* (1978), 53 Ohio St.2d 135, 7 O.O.3d 213, 372 N.E.2d 1324. A seizure is equivalent to an arrest when (1) there is an intent to arrest; (2) the seizure is made under real or pretended authority; (3) it is accompanied by an actual or constructive seizure or detention; and (4) it is so understood by the person arrested. Id . at syllabus.' "

{¶20} Much like our determination in *Abernathy II*, here, we conclude that the officers' conduct demonstrates that they subjected Appellant to an investigative stop. Although one of the officers used his vehicle to block Appellant's vehicle resulting in Appellant believing he was not free to leave, no evidence exists that the officers intended to arrest Appellant. Instead, the testimony at the suppression hearing reveals that the officers approached

Appellant's vehicle to investigate whether he possessed drugs.[2] It was not until Investigator Timberlake overheard Appellant making threatening comments to the confidential informant, accusing her of setting him up, that Investigator Timberlake moved, with gun drawn, to open the car door and immediately remove Appellant from the vehicle. We therefore believe that the reasonable suspicion analysis provides the proper framework for disposing of this appeal.

INVESTIGATIVE STOP EXCEPTION

{¶21} "The investigative stop exception to the Fourth Amendment warrant requirement allows a police officer to stop and briefly detain an individual if the officer possesses a reasonable suspicion, based upon specific and articulable facts, that criminal activity 'may be afoot.' Terry, 392 U.S. at 30; see, also, *United States v. Arvizu* (2002), 534 U.S. 266, 122 S.Ct. 744, 151 L.Ed.2d 740; *Illinois v. Wardlow* (2000), 528 U.S. 119, 123, 120 S.Ct 573, 145 L.Ed.2d 570; *State v. Andrews* (1991), 57 Ohio St.3d 86, 565 N.E.2d 1271; *State v. Venham* (1994), 96 Ohio App.3d 649, 654, 645 N.E.2d 831, 833. To justify an investigative stop, the officer must be able to articulate specific facts that would warrant a person of reasonable caution in

[2] The record also reveals that Investigator Timberlake approached Appellant's vehicle with his weapon unholstered and, in fact, pointed his weapon towards Appellant's head as he approached the vehicle and removed Appellant. However, "[w]e have previously recognized that 'police officers face an inordinate risk when they approach an automobile during a traffic stop.' " *State v. Hansard*, Scioto App. No. 07CA3177, 2008-Ohio-3349 (further noting that "the nature of narcotics trafficking today reasonably warrants the conclusion that a suspected dealer may be armed and dangerous.") (citations omitted).

the belief that the person stopped has committed or is committing a crime. See *Terry*, 392 U.S. at 27.

{¶22} A valid investigative stop must be based upon more than a mere 'hunch' that criminal activity is afoot. See, e.g., *Arvizu*; *Wardlow*, 528 U.S. at 124; *Terry*, 392 U.S. at 27. Reviewing courts should not, however, 'demand scientific certainty' from law enforcement officers. *Wardlow*, 528 U.S. at 125. Rather, a reasonable suspicion determination "must be based on commonsense judgments and inferences about human behavior." Id. Thus, "the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard." *Arvizu*; *Wardlow*, 528 U.S. at 123.

{¶23} A court that is determining whether a law enforcement officer possessed reasonable suspicion to stop an individual must examine the 'totality of the circumstances.' See, e.g., *Arvizu*, 534 U.S. at 273. The totality of the circumstances approach '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." ' Id. (quoting *United States v. Cortez* (1981), 449 U.S. 411, 418, 101 S.Ct. 690, 66 L.Ed.2d 621). Thus, when a court reviews an officer's reasonable suspicion determination, a court must give 'due weight'

to factual inferences drawn by resident judges and local law enforcement officers. Id.

{¶24} Moreover, a particular factor under the totality of the circumstances test need not be criminal in and of itself. See *Arvizu*; United States v. *Sokolow* (1989), 490 U.S. 1, 9, 109 S.Ct. 1581, 104 L.Ed.2d 1 (stating that factors that are "consistent with innocent" activity may collectively amount to reasonable suspicion); *Terry*, 392 U.S. at 22 (stating that a series of act "perhaps innocent in itself" may together add up to reasonable suspicion). Additionally, "[a] determination that reasonable suspicion exists * * * need not rule out the possibility of innocent conduct." *Arvizu*. Instead, the totality of the circumstances, whether innocent or not, must indicate that criminal activity is afoot. See e.g., *Terry*, supra.

{¶25} An informant's tip may provide officers with the reasonable suspicion necessary to conduct an investigative stop. When officers base reasonable suspicion upon an informant's tip, the Supreme Court of Ohio has identified several factors including 'the informant's veracity, reliability and basis of knowledge' that are considered to be 'highly relevant in determining the value of [the informant's] report.' *Maumee v. Weisner* (1999), 87 Ohio St.3d 295, 300, 299, 720 N.E.2d 507 (quoting *Alabama v. White* (1990), 496

U.S. 325, 328, 110 S.Ct. 2412, 110 L.Ed.2d 301). The *Weisner* court elaborated:

'Where * * * the information possessed by the police before the stop stems solely from an informant's tip, the determination of reasonable suspicion will be limited to an examination of the weight and reliability due that tip. See Id. The appropriate analysis, then, is whether the tip itself has sufficient indicia of reliability to justify the investigative stop. Factors considered " 'highly relevant in determining the value of [the informant's] report' " are the informant's veracity, reliability, and basis of knowledge. Id. at 328, 110 S.Ct. at 2415, 110 L.Ed.2d at 308, quoting *Illinois v. Gates* (1983), 462 U.S. 213, 230, 103 S.Ct. 2317, 2328, 76 L.Ed.2d 527, 543.

To assess the existence of these factors, it is useful to categorize informants based upon their typical characteristics. Although the distinctions between these categories are somewhat blurred, courts have generally identified three classes of informants: the anonymous informant, the known informant (someone from the criminal world who has provided previous reliable tips), and the identified citizen informant. While the United States Supreme Court discourages conclusory analysis based solely upon these categories, insisting instead upon a totality of the circumstances review, it has acknowledged their relevance to an informant's reliability. The court has observed, for example, that an anonymous informant is comparatively unreliable and his tip, therefore, will generally require independent police corroboration. *Alabama v. White*, 496 U.S. at 329, 110 S.Ct. at 2415, 110 L.Ed.2d at 308. The court has further suggested that an identified citizen informant may be highly reliable and, therefore, a strong showing as to the other indicia of reliability may be unnecessary: "[I]f an unquestionably honest citizen comes forward with a report of criminal activity-which if fabricated would subject him to criminal liability-we have found rigorous scrutiny of the basis of his knowledge unnecessary." *Illinois v. Gates*, 462 U.S. at 233-234, 103 S.Ct. at 2329-2330, 76 L.Ed.2d at 545. Id. at 299-300, 720 N.E.2d 507.'

{¶26} In *Abernathy II* at ¶27 and 28, we recounted, at length, our prior decision in *State v. Tarver*, Ross App. No. 07CA2950, 2007-Ohio-4659, where we held that law enforcement officers had reasonable suspicion to

stop a suspected drug dealer's vehicle based upon information obtained from a confidential informant. As explained in *Abernathy II*, in *Tarver*, "the informant advised officers that the defendant was driving from Dayton to Ross County to sell crack cocaine to the informant. The informant told the officers that the defendant typically drives a 'gold Malibu.' The defendant contacted the informant and requested that he meet him at a Dairy Queen store. The officers drove the informant to the Dairy Queen. Upon their arrival, the informant exited the vehicle, met with the defendant, and then entered a vehicle with him. The informant and the defendant then drove up the alley and turned onto another street. At that point, the officers stopped the vehicle. The officers searched the defendant and discovered a bag of 'green leafy vegetation' in one pocket and a bag of 'white rocks' in the other pocket. The defendant subsequently was charged with drug possession. He filed a motion to suppress evidence, arguing that the officers lacked reasonable suspicion to stop the vehicle.

{¶27} On appeal, we determined that the officers possessed reasonable suspicion to stop the vehicle and disagreed with the defendant that the officers were required to possess probable cause. In finding that the officers possessed reasonable suspicion, we explained:

'[T]he drug task force received informa[tion] from an informant that someone named "Darnell" was driving from Dayton to Ross County to

deliver crack-cocaine in exchange for money. The informant spoke with "Darnell" several times on a cell phone in the presence of task force members. The informant also described "Darnell" as a "black male." During the last conversation, "Darnell" directed the informant to meet him behind a Dairy Queen. The task force then drove the informant to that exact location. There, the informant met with an African-American male, entered a vehicle with that man and the vehicle proceeded to exit the parking lot. We agree with the trial court's conclusion that the information received from the informant, together with the task force's own observation of the cell phone calls and events at the Dairy Queen, established a reasonable belief of criminal activity and provided sufficient justification for an investigative stop.' Id. at ¶ 10."

{¶28} As in *Abernathy II* and *Tarver*, here, the informant's tip provided the officers with sufficient reasonable suspicion to stop Appellant's vehicle. The informant contacted officers and told them that she could arrange for Appellant to make a drug delivery on the evening in question. Although the officers had not worked with this particular informant in the past, the informant made a recorded call to Appellant to arrange the deal and the officers were able to verify the call. Furthermore, the informant stated that Appellant had been her drug supplier for the past year. The informant further identified the type of vehicle Appellant would be driving, the color of the vehicle and the route Appellant would be driving. As the evening progressed, the officers were able to corroborate the information provided to them by the informant as they conducted surveillance and did, in fact, observe a vehicle matching the description given to them by the informant, arrive along the route described at the time reported by the informant. This

independent observation helped establish the reliability of the informant's tip.

{¶29} Thus, even though the facts in the case at bar differ slightly from those in *Abernathy II* and *Tarver*, the totality of the circumstances available to the officers suggested that Appellant was engaged in criminal activity. See, also, *State v. Isabell*, Cuyahoga App. No. 87113, 2006-Ohio-3350 (finding officers possessed probable cause to stop and search the defendant's vehicle based upon similar facts). Moreover, as we recognized in both *Tarver* and *Abernathy II*, if the information had proven to be false, the informant might have been subject to criminal penalties for making a false police report. See R.C. 2917.32(A)(3). Generally, the risk of arrest helps to establish an informant's reliability. See *Adams v. Williams* (1972), 407 U.S. 143, 146-147, 92 S.Ct. 1921, 32 L.Ed.2d 612.

{¶30} Consequently, we disagree with Appellant that the officers were required to have probable cause to remove him from his vehicle. As set forth above, based upon the informant's tip and the officers' corroboration of that tip, the officers' initial investigatory stop of Appellant was based upon reasonable suspicion. Once Appellant was removed from the vehicle and the smell of marijuana was apparent, accompanied with drug paraphernalia in the vehicle, which was in plain view of the officers, the

officers certainly had probable cause to further search the vehicle. As such, we overrule Appellant's second assignment of error and affirm the trial court's denial of Appellant's motion for suppression.

JUDGMENT AFFIRMED.

Kline, J., concurring in part.

{¶31} I concur in judgment and opinion as to the first assignment of error. However, I respectfully concur in judgment only as to the second assignment of error.

{¶32} In his second assignment of error, appellant contends that the trial court applied the wrong legal standard. Appellant claims that the court should have applied the "probable cause" standard instead of the "reasonable, articulable suspicion" standard. Appellant claims that the "probable cause" standard applies because he was under arrest. I agree with appellant. However, the trial court went on to make extensive findings of fact, which show that probable cause existed. Thus, I find the trial court's error harmless. See Crim.R. 52(A).

{¶33} Accordingly, I concur in judgment only as to the second assignment of error.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellee recover of Appellant 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 Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

McFarland, P. J. & Abele, J.: Concur in Judgment and Opinion.
Kline, J.: Concurs in Judgment and Opinion as to Assignment of Error I; Concurs in Judgment Only with Attached Opinion as to Assignment of Error II.

For the Court,

BY: _____
Judge Matthew W. McFarland
Presiding Judge

BY: _____
Judge Peter B. Abele

BY: _____
Judge Roger L. Kline

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.