[Cite as *State v. Brown*, 2019-Ohio-1112.]

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 18CA3644
vs.	:	
DOMINIQUE D. BROWN,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

James T. Boulger, Chillicothe, Ohio, for appellant.

Jeffrey C. Marks, Ross County Prosecuting Attorney, and Pamela C. Wells, Ross County Assistant Prosecuting Attorney, Chillicothe, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:3-6-19
ABELE, P.J.

{¶ 1} This is an appeal from a Ross County Common Pleas Court judgment of conviction and sentence. Dominique Brown, defendant below and appellant herein, pled no contest to a charge of possession of cocaine.

{¶ 2} Appellant assigns the following error for our review:

> "THE TRIAL COURT ERRED IN DENYING MR. BROWN'S MOTION TO SUPPRESS HIS RESPONSES TO QUESTIONS MADE DURING THE COURSE OF HIS DETENTION AND THE ITEM SEIZED FOLLOWING THE SEARCHES OF HIS PERSON AS THEY WERE OBTAINED IN VIOLATION OF RIGHTS SECURED TO HIM UNDER THE FOURTH AMENDMENT OF THE UNITED STATES

CONSTITUTION AND ARTICLE 1, SECTION 14, OF THE OHIO CONSTITUTION."

{¶ 3} On July 24, 2017, Chillicothe Police Officer Christopher King, a K-9 handler and a member of a drug-interdiction unit, was sitting in a convenience store parking lot shortly after 5:00 p.m. when he noticed a white Cadillac Escalade with distinctive chrome rims. Although King did not know the sources, he testified that the police department had received tips about this vehicle's involvement in drug activity and that the vehicle is registered to a drug trafficker. King also observed damage to the rear bumper, which obscured a portion of the license plate. King then observed the driver commit two marked-lanes violations - one striking the curb and one traveling left of center. Subsequently, King activated his pursuit lights and stopped the vehicle.

{¶ 4} Officer King opted to approach the vehicle's passenger side for safety reasons, including the fact that very dark window tint that restricted his view. King recognized the appellant when he stuck his head out the front passenger window and looked at the officer, and then King shook appellant's hand after appellant extended his hand. King knew that appellant was involved in drug activity from tips from the public, as well as reports from fellow officers. Also, during a warrant roundup, appellant had been charged with drug trafficking.

{¶ 5} Officer King also observed Shawna Smith in the driver's seat, alongside with appellant seated in the front passenger seat. When King asked for the vehicle registration, appellant told him that the vehicle had been purchased within the last three days. When appellant could not find the registration, he then explained that his cousin had title to it. Upon request, appellant gave King his social security number. Another officer, Officer Lawhorn, arrived and directed

traffic. A third officer, Officer Shipley, also a K-9 officer, arrived soon thereafter and King advised appellant that Officer Shipley intended to walk his dog around the vehicle. Approximately five minutes and 41 seconds after King stopped the vehicle, the dog made a positive alert for drugs near the driver's door. King testified that if he had run all the information concerning the vehicle's VIN to police dispatch, he believed that it would have taken over ten minutes to receive that information.

{¶ 6} Before the positive drug alert, Officer King also noticed appellant's nervous and deceptive manner: (1) he ate multiple mints and took many drinks; (2) he had an unlit cigarette in his mouth during the conversation with the officer; (3) he tried to speak for the driver and answered questions directed at her, rather than allowing her to speak; and (4) he claimed they were traveling to get the driver's nails done, but no nail salons are in the area.

{¶ 7} At that point, Officer King directed appellant to exit the vehicle for a weapons pat-down. King testified that when he performs a pat-down search for weapons, he first locates the private parts and works back from there. Appellant was wearing a t-shirt and gym shorts and, during his pat-down, which lasted less than 15 seconds, King felt an abnormality - a large bulge between Brown's legs - that, through his drug-interdiction experience, he immediately knew was contraband, although he did not know the particular type of contraband. According to King, based on his experience, suspects often keep drugs in that area of the body. Although King used his fingers to conduct the pat-down, he denied appellant's counsel's assertions that he grabbed or probed appellant, and it does appear that the body-camera footage does not establish that King grabbed or groped. King did not try to remove the contraband at that time, but instead advised another officer that they would

identify the object in a subsequent strip search. King then handcuffed appellant and advised him of his Miranda rights.

{¶ 8} After officers told the driver to exit the vehicle and performed a pat-down, they began to search the vehicle. During the search, Officer Shipley told appellant that if he was holding something and gave it up, he would probably not go to jail that day, and that he would not inform his probation officer. Officer King told appellant that taking the contraband to the Ross County Jail could also result in additional charges. Appellant, however, repeatedly denied that he had any contraband and invited the officers to search him again. After King conducted another pat-down and again felt the contraband, appellant stated that he would retrieve it. Appellant then removed the object and voluntarily placed it in a bag that Officer Shipley provided. The object tested positive for cocaine.

{¶ 9} Subsequently, a Ross County Grand Jury returned an indictment that charged appellant with one count of possession of cocaine in an amount equal to or exceeding 27 grams, but less than 100 grams, in violation of R.C. 2925.11, a felony of the first degree. Appellant pled not guilty to the charge and filed a motion to suppress the testimonial, documentary, and physical evidence seized during the traffic stop, as well as statements he made to the officers after his initial detention.

{¶ 10} After the trial court held a hearing on the motion, the court ordered the parties to submit post-hearing briefs. After the court considered the evidence and counsels' arguments, the court found three reasons to deny the motion: (1) the positive canine sniff gave the officers probable cause to search the vehicle and its occupants, including appellant; (2) the *Terry* frisk enabled the police to search appellant for weapons and the immediate feel of the contraband

gave them probable cause to continue the search; and (3) appellant voluntarily consented to handing the cocaine to the police. At this point, appellant entered a no contest plea to the charge of possession of cocaine and, after the trial court accepted the plea, the court sentenced appellant to serve a mandatory five-year prison term. This appeal followed.

{¶ 11} In his sole assignment of error, appellant asserts that the search of his person violated his constitutional rights under the Ohio Constitution and the United States Constitution.

{¶ 12} In general, "appellate review of a motion to suppress presents a mixed question of law and fact." *State v. Codeluppi*, 139 Ohio St.3d 165, 2014-Ohio-1574, 10 N.E.3d 691, ¶7. "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, 797 N.E.2d 71, ¶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.'" *Codeluppi* at ¶7, quoting *Burnside* at ¶8.

{¶ 13} Appellant argues that the trial court erred by denying his motion to suppress evidence. In particular, appellant contests the propriety of the officer's pat-down search for weapons.

{¶ 14} The Fourth Amendment to the United States Constitution and the Ohio Constitution, Article 1, Section 14, prohibit unreasonable searches and seizures." *State v. Emerson*, 134 Ohio St.3d 191, 2012-Ohio-5047, 981 N.E.2d 787, ¶15. This constitutional guarantee is protected by the exclusionary rule, which mandates the exclusion at trial of evidence obtained from an

unreasonable search and seizure. *Id.*

{¶ 15} This case involves an investigatory stop, which must be supported by reasonable, articulable suspicion. See *State v. Shrewsbury*, 4th Dist. Ross No. 13CA3402, 2014-Ohio-716, ¶15, citing *United States v. Williams*, 525 Fed.Appx. 330, 332 (6th Cir.2013), and *Florida v. Royer*, 460 U.S. 491, 501-507, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). Here, the officer's observation of traffic violations justified the initial investigatory stop. See, e.g., *State v. Mays***,** 119 Ohio St.3d 406, 2008-Ohio-4539, 894 N.E.2d 1204, syllabus ("A traffic stop is constitutionally valid when a law-enforcement officer witnesses a motorist drift over the lane markings in violation of R.C. 4511.33, even without further evidence of erratic or unsafe driving"). Moreover, the officer had the authority to order appellant to exit the vehicle after the stop. See *State v. Fowler*, 4th Dist. Ross No. 17CA3599, 2018-Ohio-241, ¶17, quoting *State v. Alexander-Lindsey*, 2016-Ohio-3033, 65 N.E.3d 129, ¶14 (4th Dist.)("'Officers may order a driver and a passenger to exit a vehicle, even absent any additional suspicion of a criminal violation'"). Furthermore, "a lawfully detained vehicle may be subjected to a canine check of the vehicle's exterior even without the presence of a reasonable suspicion of drug-related activity." *State v. Debrossard*, 4th Dist. Ross No. 13CA3395, 2015-Ohio-1054, ¶18, citing *State v. Rusnak*, 120 Ohio App.3d 24, 28, 696 N.E.2d 633 (6th Dist. 1997). "'In determining if an officer completed these tasks within a reasonable length of time, the court must evaluate the duration of the stop in light of the totality of the circumstances and consider whether the officer diligently conducted the investigation.'" *Debrossard* at ¶17, quoting *State v. Aguirre*, 4th Dist. Gallia No. 03CA5, 2003-Ohio-4909, ¶36. In the case sub judice, the less-than-six-minute delay that occurred between the vehicle's initial stop and the

canine sniff is reasonable based on the totality of the circumstances, including the testimony that it would have taken over 10 minutes to receive information for a police dispatch about the vehicle's VIN number. See *State v. Cook*, 65 Ohio St.3d 516, 521-522, 605 N.E.2d 70 (1992) (15 minute detention is reasonable); *United States v. Sharp*, 470 U.S. 675, 686-687, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985) (20-minute detention is reasonable).

{¶ 16} Here, although appellant does not contest the propriety of the vehicle's investigatory stop, the officer's direction for him to exit the vehicle, or the stop's duration, we conclude that they were indeed proper.

A. *Terry* Frisk/Pat-Down Search for Weapons

{¶ 17} Appellant first asserts that a K-9 alert on a motor vehicle should not support a reasonable suspicion that the vehicle's occupants are engaged in drug trafficking so as to support a pat-down search for weapons. In *Terry v. Ohio*, 392 U.S. 1, 29-30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the Supreme Court of the United States held that a police officer may conduct a limited search for weapons in order to protect himself and others within the immediate vicinity.

> [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

{¶ 18} Therefore, "[w]here 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." *State v. Bobo*, 37 Ohio St.3d 177, 524 N.E.2d 489 (1988), paragraph two of the syllabus.

{¶ 19} Although appellant argues that the positive K-9 alert, by itself, could not provide the requisite reasonable suspicion that he was armed, the Supreme Court of Ohio has consistently recognized that " '[t]he right to frisk is virtually automatic when individuals are suspected of committing a crime, like drug trafficking, for which they are likely to be armed.' " *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, ¶ 61,[1] quoting *State v. Evans*, 67 Ohio St.3d 405, 413, 618 N.E.2d 162 (1993); *see also* Katz, Martin, and Macke, *Baldwin's Ohio Criminal Law*, Section 15:7 (2018) (citing *Evans* as one example for when the Ohio Supreme Court "has adopted automatic rules"). The reason for this view is because "'police officers face an inordinate risk when they approach an automobile during a traffic stop.' " *State v. Hansard*, 4th Dist. Scioto No. 07CA3177, 2008-Ohio-3349, ¶ 26, quoting *State v. Jones*, 4th Dist. Washington No. 03CA61, 2004-Ohio-7280, ¶ 33. "Ohio courts have long recognized that persons who engage in illegal drug activities are often armed with a weapon." *Hansard* at ¶ 26.

{¶ 20} Moreover, in the instant case additional factors also support Officer King's reasonable suspicion that Brown could be armed. Here, King testified that appellant acted nervously and deceptively during the investigatory stop, including not allowing the driver to talk and giving a false reason for their trip. Appellant also initially could not give King clear information about the vehicle's registration. *Alexander-Lindsey*, 2016-Ohio-3033, 65

[1] *Jordan* has been legislatively overruled insofar as the General Assembly subsequently provided a statutory remedy for the failure of a trial court to properly impose post-release control, but not for the pertinent part of the opinion here. See *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, ¶22-23.

N.E.2d 129, at ¶ 23, quoting *State v. Simmons*, 2013-Ohio-5088, 5 N.E.3d 670, ¶ 17 (12th Dist.) ("While '[some] degree of nervousness during interactions with police officers is not uncommon, * * * nervousness can be a factor to weigh in determining reasonable suspicion"). Furthermore, King testified that reports from other police officers had noted appellant's involvement in drug activity, and that during a warrant roundup appellant had been charged with drug trafficking. *See State v. Kelley*, 4th Dist. Ross No. 10CA3182, 2011-Ohio-3545, ¶ 20 (information received from other police officers can justify a *Terry* pat-down search).

{¶ 21} Therefore, based upon the foregoing reasons, we conclude that the trial court correctly rejected appellant's contention that Officer King lacked the requisite reasonable suspicion for the pat-down search.

B. Scope of *Terry* Frisk; Plain-Feel

{¶ 22} Appellant next argues that Officer King's initial pat-down search exceeded the permissible scope of the *Terry* frisk. "The pat-down search is limited to discovering weapons that might be used to harm the officer." *Fowler*, 2018-Ohio-241, ¶ 17. "The protective pat down under *Terry* is limited in scope to this protective purpose and cannot be employed by the searching officer to search for evidence of the crime." *Evans*, 67 Ohio St.3d at 414, 618 N.E.2d 162.

{¶ 23} Here, appellant claims that Officer King's initial search consisted of "vigorous groping" and "clearly exceeded the scope of a weapons pat down." However, King's initial pat-down search lasted less than 15 seconds, and he testified that he did not grab or probe appellant. During the limited pat-down search, King felt the abnormality, i.e., a large bulge between

appellant's legs, which he immediately knew was contraband, based on his experience in drug investigations. " 'Under the "plain feel" doctrine, if in the process of conducting a limited pat down search for weapons an officer detects an object whose criminal character is immediately apparent to him, he is justified in seizing the object from the * * * person being searched.' " *Fowler*, 2018-Ohio-241, ¶ 17, quoting *State v. Crayton*, 2017-Ohio-705, 86 N.E.3d 77, ¶ 29 (11th Dist.). Although during a pat-down search for weapons an officer cannot squeeze or manipulate an object to determine whether it is contraband, here we see no evidence that King either squeezed or manipulated the object to determine its identity as contraband. Once King felt the contraband during the pat-down search, he could seize the object, although here he actually waited until appellant eventually handed it to him during the second pat-down search. *See Fowler* at ¶ 17; *State v. Billups*, 1st Dist. Hamilton No. C-150500, 2017-Ohio-4309, ¶ 14, quoting *State v. Milhouse*, 133 Ohio App.3d 527, 530, 728 N.E.2d 1123 (1st Dist.1999) ("If, during the course of a *Terry* pat-down search of a subject's clothing for weapons, 'a police officer feels an object whose contour or mass makes its incriminating character as contraband immediately apparent, and the officer has a lawful right of access to the object, the officer is entitled to seize the object' under the plain-feel doctrine"); *see also Minnesota v. Dickerson*, 508 U.S. 366, 375, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993).

C. Inevitable Discovery

{¶ 24} Moreover, even if we assume that Officer King would not have been justified in seizing the contraband after his initial pat-down search, we believe that the evidence that appellant sought to suppress would have nevertheless been admissible under the inevitable-discovery

exception to the exclusionary rule. "Under that exception, illegally obtained evidence may be admitted in a proceeding once the state establishes that the evidence would inevitably have been discovered in the course of a lawful investigation." *State v. Banks-Harvey*, 152 Ohio St.3d 368, 2018-Ohio-201, 96 N.E.3d 262, ¶ 27. Here, once King felt the contraband, he had probable cause to arrest Brown and the cocaine would have been discovered in a search incident to arrest at the jail. *See State v. Hapney*, 4th Dist. Washington Nos. 01CA30 and 01CA31, 2002-Ohio-3250, ¶ 45 (although *Terry* pat down was improper, the inevitable-discovery exception permitted the contraband to be introduced at trial because the officer would have discovered it during a search incident to arrest).

{¶ 25} Consequently, because the trial court correctly denied appellant's motion to suppress evidence, we overrule his sole assignment of error.

D. Alternative Grounds for Trial Court's Decision

{¶ 26} In the case sub judice, the trial court also found additional, alternative grounds for its decision to deny Brown's motion to suppress evidence. The court concluded that the positive canine sniff gave the officers probable cause to search the vehicle and its occupants,[2] including appellant, and that appellant voluntarily consented to handing the cocaine to the police. Because we have already determined that the trial court correctly denied appellant's suppression motion as the *Terry* frisk enabled the police to search appellant for weapons and the immediate feel of the contraband gave them the authority to seize it, we need not address

[2]In *Debrossard*, 2015-Ohio-1054, ¶47 (Abele, J., concurring), the author of this opinion expressed the view that "when probable cause does indeed exist to search a motor vehicle for drugs or contraband, I do not think it unreasonable for the authorities to have the ability to expand the search of the vehicle's passengers beyond the scope of a terry pat-down frisk for weapons." See also *State v. Urdiales*, 2015-Ohio-3632, 38 N.E.3d 907, ¶29 (3rd Dist.) ("There appears to be a disagreement between courts over whether a canine alert to the vehicle, alone, is sufficient to

these additional grounds. *See State ex rel. Asti v. Ohio Dept. of Youth Servs.*, 107 Ohio St.3d 262, 2005-Ohio-6432, 838 N.E.2d 658, ¶ 34, quoting *PDK Laboratories, Inc. v. United States Drug Enforcement Administration* (D.C.Cir.2004), 362 F.3d 786, 799 (Roberts, J., concurring in part and in the judgment) (" 'This is a sufficient ground for deciding this case, and the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more—counsels us to go no further" '); *see also State v. Brewer*, 2014-Ohio-1903, 11 N.E.3d 317, ¶ 31 (4th Dist.).

V. Conclusion

{¶ 27} Accordingly, based upon the foregoing reasons, we overrule appellant's assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

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constitute probable cause to search an occupant of the vehicle"[emphasis sic]).

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Court of Common Pleas 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.

Hess, J.: Concurs in Judgment & Opinion
Smith, J.: Concurs in Judgment Only

For the Court

BY: _____
Peter B. Abele, 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.