[Cite as *State v. Drumm*, 2015-Ohio-2176.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
DARKE COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 2014-CA-15
Plaintiff-Appellant	:	
	:	Trial Court Case No. 14-CR-125
v.	:	
	:	(Criminal Appeal from
TYLER Q. DRUMM	:	Common Pleas Court)
	:	
Defendant-Appellee	:	
	:	

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O P I N I O N

Rendered on the 5th day of June, 2015.

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FAIN, J.

{¶ 1} Plaintiff-appellant the State of Ohio appeals from an order of the Darke County Court of Common Pleas suppressing evidence stemming from a traffic stop and subsequent pat-down of defendant-appellee Tyler Drumm. The State contends that the trial court abused its discretion in concluding that the search exceeded the scope of a weapons pat-down.

{¶ 2} We conclude that there is evidence in the record demonstrating that Drumm voluntarily consented to the removal of his shoes prior to the pat down. Further, under the totality of the circumstances, when Drumm began to struggle upon being questioned about a bulge in his sock, the police had probable cause to believe that the bulge was either a weapon or contraband. Thus, the subsequent seizure of the object in his sock was reasonable. We conclude, therefore that the trial court erred in suppressing the evidence. Accordingly, the suppression order from which this appeal is taken is Reversed, and this cause is Remanded for further proceedings.

I. The Stop, Pat-Down and Seizure

{¶ 3} On June 14, 2014, at approximately 9:20 p.m., Darke County Sheriff's Deputy Shane Hatfield was on routine patrol when he received a dispatch regarding a vehicle traveling at a high speed.[1] Hatfield was in his cruiser, sitting stationary in an emergency turn-around area, when he spotted the vehicle. As the vehicle passed, Hatfield pulled in behind it. Hatfield observed a lane violation. At that point, Hatfield

[1] The facts are taken from the transcript of the suppression hearing and the transcript of the preliminary hearing, which Drumm asked the trial court to consider in ruling on the motion to suppress.

initiated a traffic stop.

{¶ 4} Hatfield approached the driver, and requested his license and proof of insurance. Hatfield noticed track marks on the driver's arm, which he believed to be consistent with heroin use. He then asked the driver, identified as Drumm, to keep his hands in front of him. While waiting for a return of information on Drumm's documents, Hatfield went to the back of the vehicle to speak with Sergeant Tony Royer, who had arrived on the scene. While speaking to Royer, Hatfield noticed Drumm turn toward the center of the car and reach toward the console. Hatfield then approached Drumm, and asked whether he had understood the instructions regarding his hands. At that point, Drumm began crying, and said he needed to leave. Hatfield found Drumm's behavior unusual for a traffic stop. He was also concerned because he did not know whether Drumm obtained a weapon when Drumm reached toward the console.

{¶ 5} Hatfield asked Drumm to exit the vehicle, and asked him whether he would consent to a search of the car. Drumm started crying again, and said he had a "baggie of marijuana" in the vehicle. Tr., p. 13. Hatfield then informed Drumm that he was going to perform a pat down search for weapons, and asked Drumm if he would consent to removing his shoes and socks. Drumm took off his shoes, but refused to take off his socks. During the course of the pat-down, Hatfield felt something inside Drumm's left sock. He then asked Drumm to identify the object. At that point, Drumm became physically resistant, and was secured in handcuffs. Hatfield then removed the sock and found a ball of aluminum foil containing a folded strip of paper.

II. The Course of the Proceedings

{¶ 6} Drumm was arrested, and charged with Possession of LSD, in violation of R.C. 2925.11(A)(C)(5)(a). He moved to suppress the evidence. Following a hearing, the trial court found that the officer had a reasonable justification for the traffic stop. The trial court also found that the officer had reasonable, articulable facts supporting the pat-down, pursuant to *Terry v. Ohio*, 392 U.S. 1, 27, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). However, the trial court found that the officer was not justified in removing the shoe since he did not "feel or see anything in [Drumm's] shoe that would indicate that a weapon was present." Dkt. 1, p.3. The trial court further found that Drumm did not voluntarily remove his shoe. Therefore, the trial court suppressed the LSD found in Drumm's sock. The State appeals.

III. Drumm Consented to the Removal of his Shoe

{¶ 7} The State's sole assignment of error states as follows:

> THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FOUND THAT THE SEARCH OF APPELLEE AND THE REMOVAL OF THE BALL OF ALUMINUM WHICH CONTAINED LSD, FROM HIS SOCK, WAS A VIOLATION OF APPELLEE'S FOURTH AMENDMENT RIGHT.

{¶ 8} The State argues that the LSD should not have been suppressed, because the pat-down was permissible pursuant to *Terry*, supra, and because Drumm consented to the removal of his shoes.

{¶ 9} We note that in a hearing on a motion to suppress evidence, the trial court, as trier of fact, is in the best position to resolve questions of fact and evaluate witness credibility. *State v. Hopfer*, 112 Ohio App.3d 521, 548, 679 N.E.2d 321 (2d Dist.1996).

While we must accept any findings of fact by the trial court which are supported by competent, credible evidence, we accord no deference with regard to whether those findings meet the appropriate legal standard, a question of law. *State v. Curry*, 95 Ohio App.3d 93, 96, 641 N.E.2d 1172 (8th Dist.1994).

{¶ 10} We next examine the scope of a *Terry* search. In *State v. Oborne*, 99 Ohio App.3d 577, 651 N.E.2d 453 (2d Dist.1994), this court stated:

> The permissible scope of a *Terry* search is "a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." *Terry v. Ohio* (1968), 392 U.S. 1, 27, 88 S.Ct. 1868, 1883, 20 L.Ed.2d 889, 909. "*The purpose of this limited search is not to discover evidence of crime*, but to allow the officer to pursue his investigation without fear of violence." (Emphasis added.) *State v. Evans* (1993), 67 Ohio St.3d 405, 408, 618 N.E.2d 162, 166, citing *Adams v. Williams* (1972), 407 U.S. 143, 146, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612, 617.
>
> * * * Given that an officer may have a reasonable and articulable suspicion to stop a suspect and conduct a *Terry* search for possible weapons, that officer cannot expand the protective frisk into a general search to discover evidence or contraband. *State v. Brown* (1992), 83 Ohio App.3d 673, 676, 615 N.E.2d 682, 684.
>
> Unless probable cause and exigent circumstances exist, once the

> officer determines that the object detected in the outer clothing of the suspect is not a weapon, the search must stop. *Minnesota v. Dickerson* (1993), 508 U.S. 366, [375], 113 S.Ct. 2130, 2137, 124 L.Ed.2d 334, 345-346; *State v. Evans* (1993), 67 Ohio St.3d 405, 414, 618 N.E.2d 162, 170, certiorari denied (1993), 510 U.S. 1166, 114 S.Ct. 1195, 127 L.Ed.2d 544. If the officer is unable to determine during the pat-down whether the object is a weapon, the officer may reach into the pocket and remove the object in order to examine the object visually to determine whether it is a weapon. *Dickerson* at [373], 113 S.Ct. at 2136, 124 L.Ed.2d at 344; *Evans*, *supra*, paragraph two of the syllabus.

Oborne at 581-582.

{¶ 11} We first note that we disagree with the trial court's finding that Drumm did not voluntarily consent to the removal of his shoes. The trial court concluded that a reasonable person in Drumm's position would not believe he could refuse the request to remove his shoes. This is based upon the trial court's finding that Drumm had already been removed from the car, and was "under the direct, proximate control of the deputy." Dkt. No. 31, p. 5. The trial court further stated that Drumm's freedom had "already been limited since the deputy had already placed his hands on [Drumm] pursuant to a *Terry* pat down. No passage of time or loosening of supervision had occurred by the deputy which would indicate any freedom to leave or disregard the deputy's directions." *Id.*

{¶ 12} As noted by the State, there is no evidence in this record to indicate that Hatfield placed his hands on Drumm prior to the removal of the shoes. To the contrary, the evidence is that Hatfield asked Drumm to exit the vehicle, following which he informed

Drumm that he was going to perform a pat-down for weapons. He then asked Drumm whether he would consent to removing his shoes and socks. According to the record, Drumm then removed his shoes, but refused to remove his socks. Then Hatfield began the pat-down. While Drumm was not free to leave, he was not under arrest. He was not instructed to remove his shoes and socks; he was asked whether he would consent to do so. The fact that he removed his shoes, but refused to remove his socks, indicates that Drumm was acting of his own free will, understanding that he was free to refuse the request.

{¶ 13} These circumstances are similar to the facts in *State v. Hardin*, 2d Dist. Montgomery No. 21177, 2006-Ohio-3745, wherein a suspect seated in the back of a police cruiser following a pat-down for weapons was asked if he would "mind taking off his shoes." *Id.* at ¶ 6. The suspect kicked off his shoes, and crack fell out of one of the shoes. *Id.* In that case, we stated that "[a] court reviewing the legality of a consent search need only determine whether the abandonment of Fourth Amendment rights and the consent to search was an act of free will, voluntarily given, and not the result of duress or coercion, express or implied." *Id.* at ¶ 20. We found that the trial court did not err in finding that the suspect consented to the search of his shoes. *Id.* at ¶ 21.

{¶ 14} Given the facts in this case, and the trial court's incorrect finding of fact that Hatfield had his hand on Drumm when he asked Drumm if he would mind removing his shoes, we conclude that the trial court erred in determining that Drumm did not consent to the removal of his shoes. However, this does not end our inquiry.

{¶ 15} Upon passing his hands over Drumm's stockinged feet, Hatfield noticed what he described as an unknown bulge in the left sock. At the preliminary hearing, he

testified that he did not know what the bulge was, and that he did not know if it was a razor blade or a knife. Hatfield then questioned Drumm about the nature of the bulge, at which time Drumm began to resist. He was then cuffed, and the object was removed from the sock. Hatfield described it as a ball of aluminum that was "maybe the size of a 50 cent piece." Tr. Supp. Hrg., p. 14. He opened the ball, and found a strip of paper. When he stood up with the object, Drumm stated that it was LSD.

{¶ 16} The State argues that Drumm's actions in resisting entitled the officer to arrest him for Obstructing Official Business. Thus, the State contends that once the officers placed him in handcuffs, they were entitled to remove the item from the sock under the search-incident-to-an-arrest exception to the warrant requirement. We conclude otherwise. While the police could have arrested Drumm at that point, they did not. Nor was Drumm ever charged with Obstructing Official Business. Thus, we decline to conclude that the mere authority to arrest a person, without more, converts a search into a warrant exception. And the fact that Drumm was handcuffed does not mean he was arrested. Officers may cuff persons stopped pursuant to *Terry* for purposes of officer safety, without converting the encounter into an arrest. *State v. White*, 2d Dist. Montgomery No. 18731, 2002 WL 63294, fn. 1 (Jan. 18, 2002), citing *State v. Bradley*, 10th Dist. Franklin No. 92AP-1496, 1993 WL 69474, *2 (March 11, 1993). Accord, *State v. Hubbard*, 8th Dist. Cuyahoga No. 83385, 2004-Ohio-4498, ¶ 16-19. Finally, Hatfield specifically testified that Drumm was handcuffed for officer safety.

{¶ 17} Upon initiating contact with Drumm, Hatfield noticed track marks on his arm consistent with heroin usage. Drumm failed to follow Hatfield's instructions to keep his hands in front of him, and he reached into the vehicle's center console. When

confronted about his movements, Drumm began to cry and state that he needed to leave. When asked if he would consent to a search of his car, Drumm admitted to having a baggie of marijuana in the vehicle. When asked about the bulge in the sock, Drumm became resistant. Given the totality of the circumstances, we conclude that the police had probable cause to believe that the bulge in Drumm's sock was either a weapon or contraband.

{¶ 18} We conclude that the trial court erred in suppressing the evidence in this case. The record demonstrates that Drumm voluntarily consented to the removal of his shoes. The totality of the circumstances established probable cause to believe that Drumm was holding either a weapon or contraband in his sock, thereby justifying an examination thereof. Accordingly, the State's sole assignment of error is sustained.

IV. Conclusion

{¶ 19} The State's sole assignment of error having been sustained, the order suppressing evidence is Reversed, and this cause is Remanded for further proceedings.

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WELBAUM J., concurring:

{¶ 20} I do not entirely agree with the analysis at paragraph 16 of the majority opinion. The majority states that "we decline to conclude that the mere authority to arrest a person, without more, converts a search into a warrant exception." However, the key consideration is whether there was authority to arrest a person based on probable cause. The majority opinion upholds the search by concluding that, under the circumstances, the deputies had probable cause to believe that the object in Drumm's sock was either a

weapon or contraband. I agree. However, my point is that, additionally, once the State demonstrated that the deputies had probable cause that Drumm had committed the crime of Obstructing Official Business, the search of Drumm's sock was lawful, whether or not the police arrested him for that specific offense.

{¶ 21} During the course of the pat-down search for weapons, Deputy Hatfield felt something in Drumm's left sock. At that point, Hatfield asked Drumm to identify the object. Prior to answering, Drumm became "resistant, combative, and started jerking away." Transcript of Suppression Hearing, p. 14. As a result, the two deputies pinned Drumm against the car trunk and handcuffed him for purposes of officer safety. Hatfield then removed the sock and found a ball of aluminum foil containing a folded strip of paper. When this occurred, Drumm volunteered that it was LSD.

{¶ 22} Once Drumm physically resisted to the point that it required two deputies to handcuff him, the search of the sock that followed fit the warrant exception as incident to a lawful arrest. In this regard, probable cause existed for an arrest for the offense of Obstructing Official Business. *See* R.C.2921.31, which states that:

> (A) No person, without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within the public official's official capacity, shall do any act that hampers or impedes a public official in the performance of the public official's lawful duties.
>
> (B) Whoever violates this section is guilty of obstructing official business.
>
> * * *.

{¶ 23} When discussing the search incident to a lawful arrest exception, we have previously held that:

> The offense for which a defendant is ultimately arrested need not be the same offense that justified the search incident to an arrest. *State v. Hunter*, 2d Dist. Montgomery No. 20917, 2006-Ohio-2678. The key is whether there was probable cause to arrest when the search was conducted.

State v. Chase, 2d Dist. Montgomery No. 25323, 2013-Ohio-2347, ¶31. *Accord State v. Kinsell*, 9th Dist. Summit No. 25074, 2010-Ohio-3854, ¶24 (holding that drugs would have been discovered as incident to an arrest, and it was irrelevant that the defendant was not charged with possession of drug paraphernalia, which was the crime that gave officers probable cause for the arrest).

{¶ 24} In *State v. Todd*, 2d Dist. Montgomery No. 23921, 2011-Ohio-1740, we also stated that:

> In other words, if probable cause to arrest without a warrant exists prior to a search, it is irrelevant that the search incident to arrest preceded the arrest. *State v. Schickling*, Montgomery App. No. 19090, 2002-Ohio-938. Moreover, the offense for which a defendant is ultimately arrested need not be the offense that justified the search incident to arrest. *State v. Hunter*, Montgomery App. No. 20917, 2006-Ohio-2678. Again, the key is whether there was probable cause to arrest when the search was conducted. *Id.*

Id. at ¶ 32.

{¶ 25} As was noted, I agree with the majority opinion that the deputies had

probable cause to search the sock. The building blocks of probable cause quickly stacked after the traffic stop. First, Deputy Hatfield observed needle marks on Drumm's arms. Then, Drumm failed to keep his hands on the steering wheel as instructed. Drumm also engaged in furtive movements by reaching toward the console. In addition, Drumm cried and said he needed to leave. Drumm also told Hatfield that there was a baggie of marijuana in the car. When Hatfield attempted to pat down Drumm's sock, Hatfield asked Drumm to identify the object. Rather than answering the question, Drumm became combative.

{¶ 26} Once probable cause was present, and Drumm was handcuffed, the purposes and scope of a search incident to arrest were met under *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969). *Chimel* explained that the rationale behind the warrant exception includes a practical blend of officer safety and prevention of destruction of evidence under the arrestee's control. *Id.* at 763-764.

{¶ 27} The realities of the situation and the rationale of *Chimel* were both met by Hatfield when he searched Drumm's sock. Drumm's actions left the deputies in a precarious situation and at a point of no return. Drumm was a handcuffed person who had just recently physically resisted, with an unknown object in his sock that was probably either contraband or a weapon. At that point it would be unreasonable for officer safety and potential destruction of evidence to remove the handcuffs and let Drumm leave without searching the sock. Under the reasoning of *Chimel,* and with the presence of two layers of probable cause, Hatfield was constitutionally permitted to search Drumm's sock.

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FROELICH, P.J., dissenting:

{¶ 28} I would affirm the trial court's suppression of the drugs found in Drumm's sock.

{¶ 29} In my view, the record supports the trial court's conclusion that Drumm's removal of his shoes was not consensual. We stated in *State v. George*, 2d Dist. Montgomery No. 25945, 2014-Ohio-4853, ¶ 28:

> Consent is an exception to the warrant requirement, and requires the State to show by clear and positive evidence that the consent was freely and voluntarily given. [*State v.*] *Black* [,2d Dist. Montgomery No. 23524, 2010-Ohio-2916,] at ¶ 34. Whether a consent to search was voluntary or was the product of duress or coercion, express or implied, is a *question of fact* to be determined from the totality of all of the facts and circumstances. *Ohio v. Robinette,* 519 U.S. 33, 39, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996). Six factors are generally considered in Ohio to determine this question:
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> 1) whether the defendant's custodial status was voluntary;
>
> 2) whether coercive police procedures were used;
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> 3) the extent and level of the defendant's cooperation;
>
> 4) the defendant's awareness of his or her right to refuse consent;
>
> 5) the defendant's education and intelligence;
>
> 6) the defendant's belief that no incriminating evidence would be found.

(Emphasis added.)

{¶ 30} The State is correct that Deputy Hatfield had not begun the pat down prior to asking Drumm to remove his shoes and socks, but that factor is not controlling in this case. At the preliminary hearing, Deputy Hatfield initially testified:

> While waiting for [the K9 unit] to arrive on scene, I told the Defendant I was going to do a[n] outer perimeter check on him for weapons. And before doing so, I asked him to remove his shoes. He agreed to do so. He removed his shoes. I asked him if he agreed to remove his socks and he said no. I turned him against the trunk, started doing the outer perimeter search on him. When I got down to his socks, I felt something bulge out of his left sock. And when he felt me down there, he jerked his foot away because he'd kind of raised his foot up in a motion like this. I went on the outer perimeter search like this. I felt something bulging, I asked him what it was. He became combative. For officer safety, I didn't know what it was, I placed him against the trunk, Sergeant Royer and I both did, and we secured him in handcuffs. We then went inside the sock and we found aluminum foil, a ball of aluminum foil and inside the aluminum foil was a white paper strip suspected to be LSD on it.

Later at the preliminary hearing, Deputy Hatfield testified that he asked Drumm, "Do you care to take your shoes off?" Hatfield stated that Drumm "voluntarily took them off." (*Id*.)

{¶ 31} At the suppression hearing, Deputy Hatfield testified that he told Drumm that he was going to check him for weapons and perform a *Terry* patdown and he asked Drumm "if [Drumm] cared to consent to take his shoes off prior to me doing that, and the

Defendant agreed to do so. He voluntarily removed his socks [sic]." (Supp. Hrg. Tr. at 13). Hatfield again testified that Drumm was asked if he would remove his socks, and Drumm said no.

{¶ 32} In my view, Deputy Hatfield's testimony does not establish by clear and convincing evidence that Drumm's removal of his shoes was consensual. Drumm was removed from his vehicle and told that he was going to be patted down for weapons. Immediately after informing Drumm that he would be subject to a patdown, Deputy Hatfield "asked him to remove his shoes." A reasonable person in Drumm's situation would not find this request to be optional. And, the trial judge was entitled to weigh the believability of Deputy Hatfield's different versions as to how the request was phrased.

{¶ 33} Unlike the testimony regarding the removal of the shoes, Hatfield testified at both the preliminary hearing and suppression hearing that he asked Drumm if he would agree to remove his socks. This request appears to have been made *after* Drumm removed his shoes; the testimony does not indicate that Drumm was asked to remove his "socks and shoes." Drumm declined the request to remove his socks, but the deputy's testimony suggests a different tone to the request to remove his socks, which was made at a different point in the process. Accordingly, the fact that Drumm declined to remove his socks does not necessarily imply that he felt he could have declined the "request" to remove his shoes.

{¶ 34} Certainly not every request to remove shoes is coerced. I agree with *State v. Hardin*, 2d Dist. Montgomery No. 21177, 2006-Ohio-3745, that the defendant's removal of his shoes under those circumstances was voluntary. However, the circumstances in *Hardin* are significantly different that those before us. *But see State v.*

Sears, 2d Dist. Montgomery No. 20849, 2005-Ohio-3880, ¶ 39 (defendant consented to removal of spoons from pocket).

{¶ 35} Second, even assuming that Drumm did consent to the removal of his shoes, I would conclude that Deputy Hatfield was not justified in reaching into the sock to remove the aluminum foil. The majority cites *State v. Oborne*, 99 Ohio App.3d 577, 651 N.E.2d 453 (2d Dist.1994) as to when a police officer may reach into clothing to retrieve the unknown object and specifically concludes that *Oborne* suggests that, under *State v. Evans*, 67 Ohio St.3d 405, 618 N.E.2d 162 (1993), a police officer can retrieve an unknown object during a *Terry* pat down whenever the officer does not know what the object is. *Evans* does not support such broad authority. *Evans* states:

> * * * The specific question raised by the facts of this appeal concerns what future actions are permissible under *Terry* if the searching officer is unable to determine from the pat down that the suspect is not carrying a weapon.
>
> In answering this question, it is important first to emphasize that *Terry* does not require that the officer be absolutely convinced that the object he feels is a weapon before grounds exist to remove the object. At the same time, a hunch or inarticulable suspicion that the object is a weapon of some sort will not provide a sufficient basis to uphold a further intrusion into the clothing of a suspect. When an officer removes an object that is not a weapon, the proper question to ask is whether that officer reasonably believed, due to the object's "size or density," that it could be a weapon. 3 LaFave, Search and Seizure (2 Ed.1987) 521, Section 9.4(c).
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> "Under the better view, then, a search is not permissible when the

> object felt is soft in nature. If the object felt is hard, then the question is whether its 'size or density' is such that it might be a weapon. But because 'weapons are not always of an easily discernible shape,' it is not inevitably essential that the officer feel the outline of a pistol or something of that nature. Somewhat more leeway must be allowed upon 'the feeling of a hard object of substantial size, the precise shape or nature of which is not discernible through outer clothing,' which is most likely to occur when the suspect is wearing heavy clothing." (Footnotes omitted.) *Id.* at 523.

(Footnote omitted.) *Evans* at 414-415. *See also Sears* at ¶ 36 (police may remove object located in weapons pat down if officer "reasonably suspects" that it is a weapon).

{¶ 36} Deputy Hatfield did not notice anything in Drumm's sock upon visual inspection. (Supp. Hrg. Tr. 30.) At the both the preliminary hearing and the suppression hearing, Deputy Hatfield testified that he felt a "bulge" on the inside portion of Drumm's left sock and that he "didn't know what it was." (Prel. Hrg. Tr. 16-17; Supp. Hrg. Tr. 13.) At the preliminary hearing, defense counsel stated to the deputy, "Well, a weapon's a pretty good size piece of metal, plastic composite, whatever you want to call it that it's made out of, wood." Hatfield responded that he "didn't know if it was a razor blade or knife." (Id. at 17.) At the suppression hearing, Hatfield made no statements about what he thought the object might be. Deputy Hatfield stated that he asked Drumm what it was; Drumm did not answer, but became resistant. At the suppression hearing, Hatfield stated that, upon retrieving the object, the object was a "ball of aluminum foil" about the size of "a 50 cent piece."

{¶ 37} There is nothing in Deputy Hatfield's testimony that indicates that he

reasonably believed, due to the shape, size, and/or density of the object in Drumm's sock, that the unknown object was a weapon, and the State conceded as much at oral argument. Drumm was wearing short, ankle-height, form-fitting athletic socks when he was patted down, and Hatfield did not see a visible bulge that may be a weapon. Although Hatfield stated at one hearing that he didn't know if it was a razor blade or knife, the object was repeatedly described as a "ball." Absent additional testimony indicating that the deputy reasonably believed that the object might be a weapon, the deputy was not permitted under *Evans* to retrieve the object from Drumm's sock.

{¶ 38} The State asserts that Deputy Hatfield was entitled to reach into Drumm's sock to remove the object once Drumm was handcuffed. It is well established that a suspect may be handcuffed as part of an investigatory detention, and the mere fact that a suspect is handcuffed does not necessarily equate to an arrest. *E.g.*, *State v. Walker*, 2d Dist. Montgomery No. 24542, 2012-Ohio-847 (under the totality of the circumstances, the detective's action of drawing his gun and handcuffing two individuals for his safety while initiating an investigatory detention did not constitute an arrest). Deputy Hatfield stated that he handcuffed Drumm for his (the deputy's) safety prior to retrieving the item from Drumm's sock and, under the totality of the circumstances, the deputy's action did not rise to the level of an arrest. I agree with the majority that the deputy's retrieval of the aluminum foil was not pursuant to a search incident to a lawful arrest.

{¶ 39} The majority concludes, however, that Drumm's actions after Deputy Hatfield asked him what was in his sock provided probable cause for the deputy to believe that Drumm's sock contained a weapon or contraband. Probable cause exists when an officer has information sufficient in nature and character to warrant a prudent person to

believe that a violation of law has occurred. *See Brinegar v. United States*, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949); *State v. Wilcox*, 177 Ohio App.3d 609, 2008-Ohio-3856, 895 N.E.2d 597, ¶ 12 (2d Dist.); *State v. Carter*, 2d Dist. Montgomery No. 19105, 2002 WL 538871 (Apr. 12, 2002).

{¶ 40} Drumm's resistance upon the deputy's feeling of an object in his (Drumm's) sock added nothing to the deputy's evaluation of whether the object was a weapon. Drumm's actions merely reinforced the obvious fact that Drumm did not want the deputies to look inside his sock. There was no additional information about the object from which the deputy could reasonably conclude that Drumm was armed.

{¶ 41} As for whether there was probable cause to believe that the item in Drumm's sock was contraband, *State v. Dunson*, 2d Dist. Montgomery No. 22219, 2007-Ohio-6681, is both instructive and distinguishable. In *Dunson*, the officer performed a weapons pat down on an individual when the officer knew the defendant had engaged in prior drug activity, smelled marijuana coming from inside the defendant's vehicle, and had seen the defendant and his companion "duck down" to avoid being seen by police. During the course of the pat down, the defendant "turned quickly and violently away" as the officer patted down the defendant's right rear pants pocket. The officer then "grabbed that area once more, and when he did he felt what he believed to be a plastic baggie inside the pocket." *Id*. at ¶ 7. The officer testified that "[b]aggies are often the choice method of people who carry drugs to conceal drugs." The officer retrieved the baggie from the pocket and discovered crack cocaine inside.

{¶ 42} In addressing whether the officer lawfully retrieved the baggie from Dunson's pocket, we recognized:

> "In *Terry,* the officer who reasonably suspected that Terry had a weapon found a knife inside his coat pocket. That was in 1963. Since then, with the great increase in illicit drug activity, many pat-down searches have yielded not weapons but drugs or drug paraphernalia of various kinds. Concern with potential abuses in that trend prompted the Supreme Court in *Minnesota v. Dickerson* to prescribe limits on methods used in weapons pat-downs that yield contraband. Building on the 'plain view' exception to the warrant requirement, *Dickerson* held that an officer who is engaged in a weapons pat-down lacks the probable cause required to seize nonthreatening contraband detected through his sense of touch when its criminal character is not immediately apparent to him upon touching it."

Dunson at ¶ 12, quoting *State v. Justus*, 2d Dist. Montgomery No. 20906, 2005-Ohio-6540.

{¶ 43} Based on the totality of the particular circumstances before us, we held that the incriminating nature of the baggie was immediately apparent to the officer. We reasoned:

> Officer Abney testified that he could smell the odor of marijuana coming from inside the vehicle in which Defendant had been seated. Sergeant Abney further testified that Defendant was a person known to him for engaging in drug activity, and that he had seen Defendant and his companion "duck down" to avoid being seen by police. During the weapons pat-down, Defendant moved violently away when Abney patted the pocket where the baggie was located. Sergeant Abney further testified

that "[b]aggies are often the choice method of people who carry drugs to conceal drugs." These facts, in their totality, present probable cause for Officer Abney to believe that the baggie felt inside Defendant's pocket contained illegal drugs, and the officer was therefore authorized by law to seize it as he did.

The logic of *Dickerson* suggests that the required criminal character of an object the officer feels during a weapons pat-down ought to be physical features of an object which identify it as a weapon. However, when the object is clearly not a weapon, its criminal character may yet be apparent because of the nature of the article and the circumstances in which it is discovered. In that situation, the totality of those circumstances, including the officer's experience and explanation, must be sufficient to present probable cause to believe that the identity of the object he feels is specific to criminal activity.

We emphasize that our holding is based on the totality of these particular circumstances. Detecting a plastic baggie inside Defendant's pocket, standing alone, or even in combination with secondary facts such as the reputation of the area for drug activity, would likely be insufficient to demonstrate that the criminal character of the article Sergeant Abney felt was immediately apparent to him. The odor of marijuana, and especially, Defendant's attempt to avoid discovery of what was inside his pants pocket, add critical support to the finding of probable cause we make.

Dunson at ¶ 23-25.

{¶ 44} In this case, Drumm was stopped for erratic driving; Deputy Hatfield did not know Drumm and was unaware of any criminal history that Drumm had. The deputy did notice track marks on Drumm's arms, which the deputy believed were related to heroin use, and Drumm admitted to having a "baggie of marijuana," although this admission had not been substantiated by a search of the vehicle. But Deputy Hatfield did not testify, at *any* point prior to removing it from the sock, that he suspected that the object in Drumm's sock was related to drug activity. To the contrary, Hatfield repeatedly testified that he did not know what the object in Drumm's sock was (Prelim. Hrg. Tr. 16-17; Supp. Hrg. Tr. at 13, 30). Once Hatfield felt the object in Drumm's sock, Drumm started "jerking away and pulling backwards," which resulted in Drumm's being handcuffed for officer safety. Hatfield testified that, once he opened the aluminum foil, he suspected, based on his training and experience, that the paper in the aluminum foil was LSD; however, he reached that conclusion after removing the foil from Drumm's sock. (Prelim. Hrg. Tr. at 17).

{¶ 45} In my view, the record does not contain sufficient facts to support a conclusion, based on the totality of the circumstances, that Deputy Hatfield had probable cause to believe that the object in Drumm's sock was contraband. There were indications that Drumm was involved in drug activity and Drumm resisted when Hatfield felt the object in his sock, but there was no evidence, based on Hatfield's experience with objects similar to the object in Drumm's sock, that the incriminating nature of the object in Drumm's sock was immediately apparent to Deputy Hatfield when he took off Drumm's sock and retrieved the item inside. *See State v. Gorby*, 2014-Ohio-2445, 14 N.E.3d 422 (2d Dist.) (distinguishing *Dunson*); *State v. Vaughn*, 2d Dist. Montgomery No. 25304,

2012-Ohio-6227 (distinguishing *Dunson*).

{¶ 46} I would affirm the trial court.

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