

[Cite as *State v. Moore*, 2009-Ohio-5927.]

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
PREBLE COUNTY

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| STATE OF OHIO, | : | |
| Plaintiff-Appellee, | : | CASE NO. CA2009-02-005 |
| - vs - | : | <u>OPINION</u> 11/9/2009 |
| DANYELL A. MOORE, | : | |
| Defendant-Appellant. | : | |

CRIMINAL APPEAL FROM PREBLE COUNTY COURT OF COMMON PLEAS
Case No. 08-CR-10157

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YOUNG, J.

{¶1} Defendant-appellant, Danyell Moore, appeals his conviction in the Preble County Court of Common Pleas for one count of possession of cocaine. We affirm the decision of the trial court.

{¶2} On the night of August 31, 2008, Trooper Christopher Ward was on

duty and driving south in his marked cruiser on Route 127. Ward received a call from Detective Wray stating that a confidential informant had advised police that the occupant of a green Oldsmobile was selling crack cocaine in the Village South Apartments. Detective Wray informed Ward that the vehicle was headed northbound on Route 127 at such excessive speeds that Wray was unable to keep pace. Ward then saw the green Oldsmobile and clocked its speed at 67 m.p.h. in a 55 m.p.h. zone. After changing direction, Ward pursued the vehicle, noticed the car weaving excessively within the travel lane, and soon initiated the traffic stop.

{¶3} Once Ward stopped the vehicle, he observed the driver, later identified as Moore, moving around and reaching toward the center seat area of the car. Leery of approaching the car for fear that Moore had a weapon, Ward directed him to exit the car. Moore, apparently unable to hear Ward's order, did not exit the car until Ward exited his cruiser, approached the car and repeated the direction. Moore then exited upon Ward's command and immediately put his left hand into his left pocket. Unable to see Moore's waistband because of his un-tucked shirt, Ward told Moore to keep his hands out of his pockets, and then patted him down for weapons when he felt safe enough to approach. After verifying that Moore had no weapons or contraband on his person, Ward placed him in the patrol car. Ward then conducted a weapons search on the inside of Moore's car, specific to Moore's "lunge area."

{¶4} According to Ward's testimony at the motion to suppress hearing, the lunge area included "the immediate reach where [Moore] could have reached inside the vehicle." When asked what he was looking for, Ward responded that he was searching for weapons. Instead of finding any weapons, Ward saw a daily pill organizer between the seats that contained what was later determined to be crack

cocaine. After finding the drugs, Ward returned to the car and handcuffed Moore. Besides being issued a traffic citation for speeding, Moore was indicted on one count of possession of cocaine.

{¶15} Moore filed a motion to suppress evidence of the cocaine found during Ward's search, and the trial court held a hearing on the issue. The trial court overruled Moore's motion, finding that the protective search was justified. Moore then pled no contest, was found guilty by the trial court, and was sentenced to 90 days in jail, four years of community control and ordered to pay a \$1,000 fine. Moore now appeals his conviction raising the following assignment of error:

{¶16} "THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SUPPRESS THE SEARCH OF HIS CAR SINCE HE WAS STOPPED ONLY FOR A MINOR MISDEMEANOR, REMOVED FROM HIS CAR AND NO WEAPONS WERE FOUND WHEN HE WAS PATTED DOWN."

{¶17} In his sole assignment of error, Moore asserts that the trial court erred in overruling his motion to suppress because the search was impermissible under the Fourth Amendment. This argument lacks merit.

{¶18} Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Cochran*, Preble App. No. CA2006-10-023, 2007-Ohio-3353. Acting as the trier of fact, the trial court is in the best position to resolve factual questions and evaluate witness credibility. *Id.* Therefore, when reviewing the denial of a motion to suppress, a reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Oatis*, Butler App. No. CA2005-03-074, 2005-Ohio-6038. "An appellate court, however, independently reviews the trial court's legal conclusions based on those facts and

determines, without deference to the trial court's decision, whether as a matter of law, the facts satisfy the appropriate legal standard." *Cochran* at ¶12.

{¶9} The Fourth Amendment prohibits unreasonable searches and seizures, such as those conducted without a warrant. However, specifically established exceptions exist that allow an officer to search a person without a warrant where the officer 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.

{¶10} In applying *Terry* to protective searches in vehicles, the Supreme Court stated, "the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.'" *Michigan v. Long* (1983), 463 U.S. 1032, 103 S.Ct. 3469, quoting *Terry* at 21.

{¶11} When determining whether a protective search is justified, we must employ an objective standard to decide if the "facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief that the action taken was appropriate.'" *State v. Bobo* (1988), 37 Ohio St.3d 177, 178-179, quoting *Terry*, 392 U.S. 21-22. Applying this objective standard, courts review the totality of the circumstances "through the eyes of a reasonable and prudent police officer on the scene who must react to events as they unfold." *State v. Wilcox*, Montgomery App. No. 22308, 2008-Ohio-3856, ¶18.

{¶12} The totality of the circumstances approach allows a court to consider factors such as the time of day the stop occurred, the officer's experience, the officer's position or proximity to his cruiser, and the high-crime nature of the area. *Bobo*. A court may also consider the defendant's suspicious activities before and during the stop, such as furtive gestures. *Id.* See *State v. Smith* (1978), 56 Ohio St.2d 405 (finding protective search justified where officers saw defendant push something under his seat after a traffic stop); and *State v. Woods* (1982), 8 Ohio App.3d 56 (finding protective search justified where police received information that defendants were armed and then saw a person in the back of the car reach down towards the driver's seat).

{¶13} Here, Trooper Ward pulled Moore over at night. While the record does not indicate the exact time of the stop, Ward began his shift that night at 11:00 p.m. so that the stop occurred at night and under darkness. At the time of the encounter, Ward had been employed with the highway patrol for 11 years so that we can say he was an experienced trooper. Ward was alone when he initiated the stop and became more vulnerable by exiting his cruiser to approach Moore after Moore failed to heed Ward's directions to exit the Oldsmobile. Although the area of the stop would not necessarily qualify as a high-crime area, Ward had information that Moore was coming from a drug transaction and could therefore infer that Moore was armed.

{¶14} Ward also testified regarding the furtive gestures Moore made after the traffic stop. Specifically, Ward testified that he observed Moore "reaching around, moving around a lot, reaching toward the center seat area of the vehicle." When asked why Moore's furtive movements concerned him, Ward responded that "with the possibility of narcotics being involved, weapons and narcotics go hand in hand. And

with the movements, I didn't know if he had a weapon in the vehicle or not."

{¶15} Reviewing these factors under an objective standard, and based on the totality of the circumstances, we find the facts surrounding the search warranted a man of reasonable caution to believe that searching Moore's lunge area was appropriate.

{¶16} Moore asserts that beyond the totality of the circumstances, Ward's search of his passenger compartment was unjustified because he was detained in Ward's cruiser at the time of the search. However, the Supreme Court in *Michigan v. Long*, 463 U.S. 1032, determined that a protective sweep of the area where the person could have immediate control of or obtain a weapon is justified before the police return the person to the car. In *Long*, the court noted that when the suspect is not placed under arrest and instead will be permitted to return to his or her car, an officer "remains particularly vulnerable in part *because* a full custodial arrest has not been effected." *Id.* at 1063. (Emphasis in original.) Therefore, the court held that the protective search of Long's car was warranted because the officers were taking "preventive measures to ensure that there were no other weapons within Long's immediate grasp before permitting him to reenter his automobile." *Id.* at 1051.

{¶17} Like *Long*, Moore was not under arrest at the time of the protective search. Instead, Ward placed Moore in the back of his cruiser after the pat-down revealed that Moore did not have any weapons on his person. Ward had no reason to arrest Moore because the only violation Moore had committed at that point was speeding. Because he was not under arrest, Moore would have been permitted to re-enter his car and would have had access to any weapons inside. Therefore, Ward's search for any potential weapons was valid.

{¶18} Moore also asserts that *Long* is inapplicable and that a more recent Supreme Court decision renders the protective search invalid. In *Arizona v. Gant* (2009), ___ U.S. ___, 129 S.Ct. 1710, the court clarified its holdings in *Chimel v. California* (1969), 395 U.S. 752, 89 S.Ct. 2034, and *New York v. Belton* (1981), 453 U.S. 454, 101 S.Ct. 2860, that police may conduct a warrantless search of a car due to the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement. In debunking the assumption that the search-incident-to-arrest exception applies per se, the court held that *Belton* does not authorize the search "after the arrestee has been secured and cannot access the interior of the vehicle" and instead, "circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle." *Id.* at 1714.

{¶19} Based on *Gant*, therefore, Moore argues that Ward's search was a violation of his Fourth Amendment right because he was detained, and his offense was speeding and no evidence of speeding could be found in his car. However, Moore's argument fails because Ward never arrested Moore and Moore would have been permitted to return to his vehicle, making *Gant* inapplicable to the case at bar.

{¶20} *Gant*, who was arrested for driving with a suspended license, had been handcuffed and locked in the back of the patrol car. Unlike *Gant* where there was no realistic possibility than *Gant* could access his vehicle, the possibility was great that Moore would have returned to his car.

{¶21} This significant difference is noted by the court in *Gant*. When faced with the idea that the holding in *Gant* would decrease officer safety, the court reasoned that "other established exceptions to the warrant requirement authorize a

vehicle search under additional circumstances when safety or evidentiary concerns demand." *Id.* at 1721. The court then cites *Michigan v. Long* as an example of where officers are permitted to conduct a protective search where a suspect "might access the vehicle to gain immediate control of weapons." *Id.*

{¶22} In his concurring opinion, Justice Scalia spoke very specifically to Moore's assertion and reasoned that "it must be borne in mind that we are speaking here only of a rule automatically permitting a search when the driver or an occupant is arrested. Where no arrest is made, we have held that officers may search the car if they reasonably believe the suspect is dangerous and may gain immediate control of weapons. In the no-arrest case, the possibility of access to weapons in the vehicle always exists, since the driver or passenger will be allowed to return to the vehicle when the interrogation is completed. The rule of *Michigan v. Long* is not at issue here." *Id.* at 1724. (Internal citations omitted.)

{¶23} Based on Wray's call to Ward informing him that the driver of a green Oldsmobile had been selling crack cocaine at a local apartment building and that the car described was speeding down the road, Ward's belief that Moore was dangerous was reasonable. Ward's belief that Moore could have accessed weapons upon returning to his car was also reasonable once Moore reached down between the seats and made furtive movements upon being pulled over. Because the rule in *Michigan v. Long* continues to prevail in nonarrestee cases, Ward's search of Moore's passenger compartment was valid and the trial court was correct in overruling his motion to suppress. Moore's single assignment of error is therefore, overruled.

{¶24} Judgment affirmed.

POWELL, P.J., and HENDRICKSON, J., concur.