[Cite as *Wickliffe v. Hancock*, 2009-Ohio-4257.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

CITY OF WICKLIFFE,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-L-174**
- vs -	:	
GERROD G. HANCOCK,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Willoughby Municipal Court, Case No. 08 CRB 02037.

Judgment: Reversed and remanded.

William C. Gargiulo, City of Wickliffe Law Director, and *Almis J. Stempuzis,* Assistant Prosecutor for the City of Wickliffe, 28730 Ridge Road, Wickliffe, OH 44092 (For Plaintiff-Appellee).

Paul R. La Plante, Lake County Public Defender, and *Vanessa R. Clapp,* Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Gerrod G. Hancock, appellant herein, appeals from the judgment of the Willoughby Municipal Court denying his motion to suppress evidence following a motor vehicle search. Given the evidence set forth in the record, the judgment of the trial court is reversed and the matter remanded for further proceedings.

{¶2} At approximately 11:30 p.m., on May 23, 2008, Officer Manus McCaffery of the Wickliffe Police Department observed a Jeep Grand Cherokee driving with broken

tail lights. The officer followed the Jeep and further observed it weave out of its lane several times without signaling. Due to the observed traffic violations, Officer McCaffery initiated a traffic stop.

{¶3} As the officer approached the vehicle, he observed the driver, Mr. Hancock, "moving around in the vehicle more than is normal for somebody to be retrieving personal items such as an insurance card." The officer testified he specifically observed Mr. Hancock reaching down into or near the vehicle's center console area. He further testified he saw Mr. Hancock turning his back toward the officer as if he were reaching for something.[1] Upon reaching the driver's side door, Officer McCaffery asked Mr. Hancock where he was coming from and where he was going. Mr. Hancock explained he had just left his home and was going to a skating party thrown by his fraternity. Mr. Hancock produced identification and the officer returned to his cruiser to check his license. Nothing in the record indicates Mr. Hancock had any problems with his license, insurance, or registration.

{¶4} Approximately two minutes passed when the officer returned and ordered Mr. Hancock from his vehicle. Mr. Hancock was instructed to move to the rear of the Jeep where the officer patted him down for weapons. No weapons nor any contraband was discovered on Mr. Hancock's person. A second officer then arrived on the scene. While Mr. Hancock remained at the rear of his Jeep with the second officer, Officer McCaffery commenced a search of the vehicle. The officer first searched the front seat/console area and, in doing so, found a partially full bottle of beer. He exited the front seat, opened the rear door, and searched the back seat. After unlatching and

1. Despite the officer's testimony, it is worth noting that his report merely indicated he observed appellant "reaching his right hand into the area of the center console near the driver's seat."

moving the rear seat, the officer recovered an unloaded .45 semi-automatic pistol. Under a near "flip-up cushion," the officer discovered a magazine with nine rounds in it.

{¶5} Appellant was subsequently handcuffed, Mirandized, and taken to the police station where he was charged with improperly handling a firearm in a motor vehicle, a misdemeanor of the fourth degree. On July 3, 2008, Mr. Hancock filed a motion to suppress the evidence seized from his vehicle.

{¶6} The evidence adduced at the suppression hearing revealed Mr. Hancock provided the officer with everything he asked for and was very cooperative. Officer McCaffery testified Mr. Hancock did not appear impaired from alcohol or drugs, i.e., he did not smell of alcoholic beverage nor did he exhibit any coordination problems. The officer's only articulated basis for the pat-down and ultimate search was Mr. Hancock's purported "furtive movements." However, the officer did not ask Mr. Hancock whether he was in possession of any contraband or weapons before executing the pat-down or search. Nor did he seek consent to search Mr. Hancock's Jeep.

{¶7} After the hearing, the trial court denied Mr. Hancock's motion. He eventually pleaded no contest to the charge and was sentenced to a 30-day suspended jail sentence and a fine of $250. His sentence was stayed pending appeal.

{¶8} Mr. Hancock now assigns the following as error on appeal:

{¶9} "The trial court erred by denying the defendant-appellant's motion to suppress in violation of his due process rights and the rights against unreasonable search and seizure as guaranteed by the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Sections 10 and 14, Article I of the Ohio Constitution."

{¶10} Appellate review of a trial court's ruling on a motion to suppress evidence presents a mixed question of law and fact. *State v. Burnside,* 100 Ohio St.3d 152, 154, 2003-Ohio-5372. During a hearing on a motion to suppress evidence, the trial judge acts as the trier of fact and, as such, is in the best position to resolve factual questions and assess the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366. An appellate court reviewing a motion to suppress is bound to accept the trial court's findings of fact where they are supported by competent, credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594. Accepting these facts as true, the appellate court independently reviews the trial court's legal determinations de novo. *State v. Djisheff,* 11th Dist. No. 2005-T-0001, 2006-Ohio-6201, at ¶19.

{¶11} Mr. Hancock's argument asserts that the trial court erred in admitting the challenged evidence because, in his view, Officer McCaffery lacked reasonable suspicion that he was involved in any criminal activity other than minor traffic offenses. Mr. Hancock concludes the officer's search of his vehicle was therefore unreasonable and a violation of his Fourth Amendment rights. We agree.

{¶12} Consistent with long-standing precedent, our analysis must commence with the recognition that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." (Footnote omitted.) *Katz v. United States* (1967), 389 U.S. 347, 357. One such exception, applicable to the instant case, is a limited protective search for concealed weapons conducted within the scope of a justified investigatory stop. *State v. Bobo* (1988), 37 Ohio St.3d 177, 180.

{¶13} An investigatory stop is justified when an officer has a reasonable suspicion, based upon specific and articulable facts, that criminal behavior has occurred or is imminent. See *Terry v. Ohio* (1968), 392 U.S. 1. A limited protective search occurs "when an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others * * *. 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." Id. at 24.

{¶14} In the current case, the sole basis for Officer McCaffery's search of Mr. Hancock's person and later, his vehicle, was his observation of appellant's "furtive movements." The officer testified that, as he made his way to appellant's vehicle, he noticed appellant "[t]urning away from - - turning towards the interior of the vehicle. He was reaching down and back. That's not a normal behavior for somebody who might be retrieving a driver's license. It seemed overly excessive movement." The officer explained, based upon his training and experience, such movement can be indicative of hiding or retrieving contraband or secreting or grabbing a weapon.

{¶15} The Supreme Court of Ohio has held that "[f]urtive movements alone are not sufficient to justify the search of an automobile without a warrant." *State v. Kessler* (1978), 53 Ohio St.2d 204, 208; see, also, *State v. Burgess,* 11th Dist. No. 2002-L-019, 2004-Ohio-3338, at ¶18; *State v. Severino* (May 19, 2000), 11th Dist. No. 99-L-052, 2000 Ohio App. LEXIS 2136, *6. While furtive movements are "factors" which may contribute to an officer's suspicion that a suspect is armed or engaged in a criminal enterprise, they are not dispositive unto themselves. *Bobo*, supra; see, also, *Burgess,*

supra. Thus, the mere existence of furtive movements, without more, is insufficient to support a search of one's vehicle.

{¶16} Further, in commenting on the scope of protective searches, the Supreme Court of the United States has observed: "So long as the officer is entitled to make a forcible stop, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose." (Footnote omitted.) *Adams v. Williams* (1972), 407 U.S. 143, 146. However, to conduct such a protective search, it is necessary that the officer be able to point to particular facts from which he or she could reasonably infer that the individual was armed and dangerous. *Sibron v. New York* (1968), 392 U.S. 40, 64.

{¶17} Assuming arguendo, that Officer McCaffery was constitutionally justified, for reasons of safety, in ordering Mr. Hancock from his car, removing him to the rear of the Jeep, and frisking him, this justification ended when it became manifest that Mr. Hancock had no weapons. Because the frisk revealed that Mr. Hancock had no weapons, Officer McCaffery had no reason to believe that Mr. Hancock was armed and/or dangerous. Moreover, because Officer McCaffery failed to observe or identify anything beyond Mr. Hancock's alleged furtive movements to support his suspicion of criminal activity, his eventual search of the Jeep was not justifiable under the Fourth Amendment.

{¶18} A routine traffic stop, such as the one initiated by Officer McCaffery, "must be carefully tailored to its underlying justification * * * and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel

the officer's suspicion in a short period of time." *Florida v. Royer* (1983), 460 U.S. 491, 500; see, also, *State v. Gonyou* (1995), 108 Ohio App.3d 369, 372. The rule set forth in *Royer* is designed to prevent law enforcement officers from conducting "fishing expeditions" for evidence of a crime. *State v. Molek,* 11th Dist. No. 2001-P-0147, 2002-Ohio-7159, at ¶32, citing *Gonyou*, supra; see, also, *Fairborn v. Orrick* (1988), 49 Ohio App.3d 94, 95 (holding the mere fact that a police officer has probable cause or articulable and reasonable suspicion to stop a motor vehicle does not give that police officer "open season" to investigate matters not reasonably within the scope of the stop.)

{¶19} Here, Officer McCaffery had probable cause to stop Mr. Hancock for his traffic violations. However, once it was determined he had no outstanding warrants and was neither armed nor dangerous, Mr. Hancock should have been returned to his Jeep and, at most, issued pertinent traffic citations. Instead, the officer used Mr. Hancock's purported furtive movements as a "fishing license" to look for evidence of criminal activity outside the reasonable scope and justification for the stop.[2] Officer McCaffery's actions in this case run afoul of the spirit and letter of the Fourth Amendment and any evidence obtained from the unreasonable search should have been suppressed.

{¶20} Mr. Hancock's sole assignment of error has merit.

2. It is worth noting that, in *Arizona v. Gant* (2009), 129 S.Ct. 1710, the United States Supreme Court recently held that a police officer may search the passenger compartment of a vehicle incident to an occupant's arrest only if it is reasonable to believe the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of the arrest. Id. at 1723. This case does not involve an arrest as *Gant* did. However, *Gant* illustrates that warrantless searches, even those premised on officer safety, must be strictly circumscribed so as not to compromise a citizen's Fourth Amendment rights.

{¶21} For the reasons discussed in this opinion, the judgment of the Willoughby Municipal Court denying Mr. Hancock's motion to suppress is reversed and the matter remanded for further proceedings consistent with this opinion.

COLLEEN MARY O'TOOLE, J.,

TIMOTHY P. CANNON, J.,

concur.