[Cite as *State v. Ball*, 2010-Ohio-714.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-T-0013**
- vs -	:	
DARREN L. BALL,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2008 CR 250.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Michael A. Partlow, Morganstern, MacAdams & DeVito Co., L.P.A., 623 West St. Clair Avenue, Cleveland, OH 44113-1204 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Darren L. Ball, appeals his convictions following a jury trial in the Trumbull County Court of Common Pleas of carrying a concealed weapon, improperly handling firearms in a motor vehicle, having weapons while under disability, and possession of cocaine, with a firearm specification. At issue is whether the trial court erred in denying appellant's motion to suppress and whether his convictions were

against the manifest weight of the evidence. For the following reasons, we find appellant's assignments of error without merit.

{¶2} Appellant filed a motion to suppress evidence. A hearing was held wherein Officer Seth Simpson of the Warren City Police Department testified regarding the events of March 29, 2008. At said hearing, Officer Simpson stated that while on routine patrol, he received a dispatch requesting he investigate suspected drug activity at 209 Porter Street, located in the city of Warren; the dispatcher received an anonymous call that drug activity was occurring in a white vehicle parked in the driveway at said location. Officer Simpson testified this area is known to law enforcement officers for its high drug and high prostitution activity.

{¶3} Arriving at 209 Porter Street, Officer Simpson stated that he drove around to the back of the house to a parking lot area. Officer Simpson observed two individuals leaning into the passenger side of a white vehicle, which was not running, and one individual sitting in the driver's seat. When the two individuals saw the police cruiser, they immediately began to walk away. Officer Simpson stopped the two individuals and, upon requesting identification, identified them as Clause Monday Jr., a known drug dealer, and Janice Terry, a known prostitute and drug user.

{¶4} Officer Simpson then requested the individual sitting in the driver's seat of the vehicle to produce identification. The individual was identified as appellant. Officer Simpson observed an open beer bottle on the floor of the vehicle. While talking with Mr. Monday and Ms. Terry, Officer Simpson testified that he observed appellant reaching and making movements toward the floorboard of the vehicle.

{¶5} Sergeant Greg Hoso of the Warren City Police Department arrived at the scene approximately two minutes after the arrival of Officer Simpson. Sergeant Hoso testified that as he walked toward the vehicle, he observed the butt of a gun protruding from beneath the driver's seat. Sergeant Hoso testified that he ordered appellant out of the vehicle, but appellant refused to comply. After appellant was forced out of the vehicle, the gun, which contained five rounds of ammunition, was retrieved from the vehicle. A search of appellant's person revealed .3 grams of cocaine.

{¶6} The trial court denied appellant's motion to suppress stating, "[t]he Court finds that both the beer container and the hand gun were in plain view. The officers were in a place they were lawfully entitled to be and observed these items clearly through the windows of the vehicle."

{¶7} A jury trial was held, and appellant was found guilty on all counts. Appellant filed a timely notice of appeal and, as his first assignment of error, asserts the following:

{¶8} "The trial court erred by denying appellant's motion to suppress, thereby violating his rights granted under the Fourth Amendment to the United States Constitution and Article I, Section 14, of the Ohio Constitution."

{¶9} "Appellate review of a motion to suppress presents a mixed question of law and fact." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶8. The appellate court must accept the trial court's factual findings, provided they are supported by competent, credible evidence. Id., citing *State v. Fanning* (1982), 1 Ohio St.3d 19. Thereafter, the appellate court must independently determine whether those factual

findings meet the requisite legal standard. Id., citing *State v. McNamara* (1997), 124 Ohio App.3d 706.

{¶10} On appeal, appellant maintains the officers illegally obtained the gun and cocaine, and, as such, the trial court erred in denying the motion to suppress. Appellant claims the evidence was obtained in violation of the Fourth Amendment, as Officer Simpson made a "warrantless entry and search of private property."

{¶11} Under the Fourth Amendment, searches and seizures conducted without a warrant based on probable cause are unreasonable unless the search falls within an exception to this requirement. *Katz v. United States* (1967), 389 U.S. 347, 357. There are three general categories in which encounters between citizens and police officers are classified. The first is a consensual encounter; the second is a brief investigatory stop pursuant to *Terry v. Ohio* (1968), 392 U.S. 1; and the third is formal arrest. *State v. Long* (1998), 127 Ohio App.3d 328, 333. Each category requires a heightened level of evidence to be valid under the Fourth Amendment.

{¶12} With respect to the location of the parked vehicle, Officer Simpson and Sergeant Hoso described it as a "driveway," "parking area," and "parking lot area." It is well-settled that "[a]n encounter may be consensual when a police officer approaches and questions individuals in or near a parked car." *State v. Staten*, 4th Dist. No. 03CA1, 2003-Ohio-4592, at ¶18. (Citations omitted.) Further, an encounter may be consensual "if it occurs on private property." Id.

{¶13} ""(N)o Fourth Amendment search occurs when police officers who enter private property restrict their movements to those areas generally made accessible to visitors - - such as driveways, walkways, or similar passages." LaFave, *Search and*

Seizure (1978), at §2.3 at pp.322-23, as cited in *United States v. Reed* (8th Cir., 1984), 733 F.2d 492, 501.' The Fourth Amendment 'protects people, not places,' and '(w)hat a person knowingly exposes to the public, even in his own home or office, is not the subject of Fourth Amendment protection.' (Internal citation omitted). *Katz v. United States* (1967), 389 U.S. 347, 351." *State v. Lungs*, 2d. Dist. No. 22704, 2008-Ohio-4928, at ¶20.

{¶14} Further, "[w]hen a police officer merely approaches a person seated in a parked car, no 'seizure' of the person occurs so as to require reasonable suspicion supported by specific and articulable facts." *State v. Woodgeard*, 1st Dist. No. 01CA50, 2002-Ohio-3936, at ¶34. (Citation omitted.) A consensual encounter is not a seizure, therefore no Fourth Amendment rights are invoked. *Florida v. Bostick* (1991), 501 U.S. 429, 434.

{¶15} In the instant case, Officer Simpson approached appellant, who was the sole occupant of the vehicle. When asking appellant for identification, Officer Simpson observed an open beer bottle in the vehicle. Officer Simpson then spoke with Mr. Monday and Ms. Terry, who were outside of the vehicle. Officer Simpson testified that Mr. Monday and Ms. Terry provided inconsistent stories as to the events taking place. Officer Simpson stated that as he was talking with Mr. Monday and Ms. Terry, he observed appellant "leaning forward in the vehicle towards the floorboard." At that time, Sergeant Hoso, a senior officer, arrived at the scene of the incident. Officer Simpson noted that as the senior officer, Sergeant Hoso chose to investigate further.

{¶16} "To justify an investigatory detention, a law enforcement officer must 'demonstrate specific and articulable facts which, when considered with the rational

inferences therefrom, would, in light of the totality of circumstances, justify a reasonable suspicion that the individual who is stopped is involved in illegal activity.'" *State v. Woodgeard*, 2002-Ohio-3936, at ¶36. (Citation omitted.)

{¶17} Sergeant Hoso testified that based on what Officer Simpson had relayed to him, he chose to further question appellant. Sergeant Hoso stated he was aware of the dispatch call regarding suspected drug activity from a white vehicle; two individuals were leaning into the white vehicle; appellant was the sole occupant of the vehicle; an open container of alcohol was in the vehicle; and appellant was making furtive movements toward the floorboard of the vehicle. Sergeant Hoso also testified that this area was a high-crime area, and appellant's conduct of moving toward the floorboard after an officer arrived at the scene is consistent with drug activity. We therefore find that, based on the totality of the circumstances, Sergeant Hoso had a reasonable, articulable suspicion to justify further investigation.

{¶18} To further investigate, Sergeant Hoso began to walk towards the vehicle from the front. Sergeant Hoso testified that he immediately noticed the butt of a gun protruding from beneath the driver's seat, where appellant was sitting. Sergeant Hoso was properly conducting a further investigation, thus his discovery of the gun was permissible as it was in "plain view." *State v. Brown*, 11th Dist. No. 2001-L-168, 2002-Ohio-6930, at ¶21-26. A .357 magnum containing five rounds of ammunition was recovered from beneath the driver's seat of the vehicle.

{¶19} The search of appellant's person was also not a violation of the Fourth Amendment, as a search incident to a lawful arrest is an exception to the warrant requirement. Unless an arresting officer has probable cause to make an arrest, a

warrantless arrest is constitutionally invalid. *State v. Timson* (1974), 38 Ohio St.2d 122, 127. Probable cause exists when the arresting officer has "sufficient information, derived from a reasonably trustworthy source, to warrant a prudent man in believing that a felony has been committed and that it has been committed by the accused." Id. (Citations omitted.) In making this determination, the trial court will examine the totality of the facts and circumstances surrounding the arrest. See *State v. Miller* (1997), 117 Ohio App.3d 750, 761. (Citations omitted.)

{¶20} After observing the gun under the driver's seat, Sergeant Hoso and Officer Simpson ordered appellant out of the vehicle. After appellant was forcibly removed from the vehicle, Sergeant Hoso conducted a pat down search and recovered approximately .3 grams of cocaine from the jacket appellant was wearing. It is clear from a review of the record that the facts of the instant case support the search of appellant's person, as it was a search incident to a lawful arrest.

{¶21} Based on the foregoing, the trial court did not err in denying appellant's motion to suppress evidence. Appellant's first assignment of error is without merit.

{¶22} Appellant's second assignment of error states:

{¶23} "The appellant's convictions for carrying concealed weapon, improperly handling firearms in a motor vehicle, having weapons while under disability, and the firearm specification to Count 4 are against the manifest weight of the evidence."

{¶24} In determining whether a verdict is against the manifest weight of the evidence, the Supreme Court of Ohio has adopted the following language as a guide:

{¶25} "'The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in

resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.'" *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. (Citations omitted.)

{¶26} Appellant maintains that ownership of the white vehicle was never established and that Claude Monday Jr. had previously driven the vehicle. Further, appellant points to his testimony at trial that he did not own the gun nor did he know who owned the gun. Appellant also challenges the evidence of the gun because he states the police officers did not preserve any fingerprint or DNA evidence that may be on the gun, and further, the gun was not submitted for fingerprint or DNA analysis. Our review of the evidence, however, reveals that the manifest weight weighs heavily in support of the jury's finding of guilt.

{¶27} The jury also heard testimony from Officer Simpson and Sergeant Hoso, from the Warren City Police Department. Officer Simpson testified that appellant was the only individual occupying the vehicle, and appellant made furtive movements toward the floorboard of the vehicle. Sergeant Hoso also testified that he observed the butt of the gun sticking out from beneath the driver's seat, where appellant was sitting. After appellant failed to heed the orders of the officer, he was forcibly removed from the vehicle. Sergeant Hoso recovered a .357 magnum, containing five rounds of ammunition, from under the driver's seat. The jury also heard testimony from Mr. Tom Skoczylas, commander of the narcotics division for the Warren City Police Department, who testified that the retrieved gun was operable.

{¶28} We recognize that the weight to be given to the evidence and the credibility of witnesses are primarily matters for the trier of fact to decide. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. In assessing the witnesses' credibility, the jury, as the trier-of-fact, had the opportunity to observe the witnesses' demeanor, body language, and voice inflections. *State v. Miller* (Sept. 2, 1993), 8th Dist. No. 63431, 1993 Ohio App. LEXIS 4240, at *5-6. Thus, the jury was "clearly in a much better position to evaluate the credibility of witnesses than [this] court." Id. Therefore, after reviewing the record and weighing the evidence and all reasonable inferences, we cannot conclude the jury lost its way and created such a manifest miscarriage of justice that the convictions must be reversed and a new trial ordered.

{¶29} For the reasons stated in the opinion of this court, appellant's assignments of error are without merit. It is the judgment and order of this court that the judgment of the Trumbull County Court of Common Pleas is hereby affirmed.

MARY JANE TRAPP, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.