[Cite as *State v. Jackson*, 2012-Ohio-2123.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-L-107**
- vs -	:	
ROBERT LEE JACKSON,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 11 CR 000025.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Karen A. Sheppert*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Ruth R. Fischbein-Cohen, 3552 Severn Road, Suite 613, Cleveland Heights, OH 44118 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Robert Lee Jackson, appeals the judgment of the Lake County Court of Common Pleas denying his motion to suppress evidence from an alleged unconstitutional stop. He also appeals the judgment of conviction after trial by jury on the basis of insufficient evidence. For the reasons that follow, we affirm.

{¶2} On January 2, 2011, at approximately 3:00 a.m., Officer Bilicic, a Kirtland Hills police officer, observed a white Cadillac continually drifting over the center-lane

line while traveling east on a clear and dry interstate highway. The officer initiated a traffic stop of the automobile. As the officer approached, he observed three occupants in the vehicle. Appellant was the back-seat passenger, Priscilla Jones was the driver, and Ricky Woodard, the car's owner, was the front-seat passenger.

{¶3} Once Officer Bilicic approached the window of the driver's side, his attention was immediately drawn to the back seat where appellant was bending over, as if placing objects under his seat. The officer quickly learned that the driver was without a license, identification card, proof of insurance, or vehicle registration. Upon request, the driver was unable to provide any identifying information, including her social security number. Initially, she provided a false name. The officer continued to notice that appellant was still bending down and moving about in the back seat. The officer asked appellant to stop moving around as a second officer arrived on scene.

{¶4} The driver responsible for the lane departure was asked out of the vehicle. The back-up officer stood by the automobile to observe the remaining two male occupants. A frisk of Ms. Jones' person uncovered a makeshift pipe used for smoking crack cocaine hidden in her bra. She was placed under arrest and read her *Miranda* rights. After affirming she understood her rights, she began crying and informed the officer that appellant had crack cocaine in his possession.

{¶5} Appellant was then asked out of the car. As appellant exited the vehicle, the officer noticed a large knife with white residue on it near appellant's left leg and another makeshift pipe on the floor. Once out of the automobile, the officer asked appellant a series of questions, including whether he had anything on him. Appellant replied that he had a knife in his back pocket. Appellant was then searched. The

search uncovered a second folding knife, also with white residue on it, and $230 in cash. Appellant was read his *Miranda* rights and placed under arrest. Mr. Woodard was also asked out of the vehicle, frisked, and placed under arrest.

{¶6} The officers then conducted a search of the car and found a large quantity of crack cocaine in the back seat area. The crack cocaine was located in a grocery bag behind the back seat armrest. The automobile was impounded. While being transported into the intake room in the Lake County Jail, the arresting officer overheard appellant tell Mr. Woodard that they would have "gotten away with it" except for the "snitch."

{¶7} Appellant was given his *Miranda* rights a second time before questioning commenced at the station. Appellant stated that the trio was returning from Cleveland. Appellant then stated he did not want to talk to the officer and offered no further information.

{¶8} Appellant was charged with one count of possession of cocaine, a first-degree felony in violation of R.C. 2925.11, with a forfeiture specification, a major drug offender specification, and a special finding that the crack cocaine involved was 100 grams or more. He was also charged with one count of trafficking in cocaine, a first-degree felony in violation of R.C. 2925.03(A)(2), with a forfeiture specification and a special finding that the crack cocaine involved was 100 grams or more.

{¶9} Soon thereafter, appellant filed a motion to suppress, claiming the stop was unconstitutional. Officer Bilicic was the sole witness at the suppression hearing and testified to the above factual points. The traffic stop video was entered into evidence during the hearing. In the video, appellant's head can be seen bobbing in and

out of view from the vehicle's rear window. The trial court denied appellant's motion to suppress and the matter proceeded to a jury trial.

{¶10} At trial, the state presented three witnesses. First, Officer Bilicic testified to the nature of the stop, the search of appellant, and the search of the automobile. The items seized during the stop were entered into evidence: the pipe used for smoking crack cocaine and the pocket knife found on the floor of the back seat of the automobile, the pocket knife and the $230 in cash found on appellant, the white grocery bag which the crack cocaine was wrapped in, and the crack cocaine. Portions of the VHS tape of the stop were also played for the jury and entered into evidence.

{¶11} Next, Raymond Jorz, forensic fingerprint and firearms examiner for the Lake County Crime Laboratory testified. He explained that he examined the grocery bag wherein the crack cocaine was found, but he was unable to develop any friction-ridge detail for a latent-print reading. Mr. Jorz explained that plastic bags are not a good surface for developing latent prints. Mr. Jorz's report was entered into evidence.

{¶12} Finally, Douglas Rhode, the supervisor of chemistry and toxicology at the Lake County Crime Laboratory, testified. Mr. Rhode testified that the pipe found by appellant's leg in the back seat, the knife found in the back seat, and the knife found on appellant each contained crack cocaine residue. He also testified that the amount of crack cocaine found in the vehicle weighed 261.55 grams. Mr. Rhode's report was entered into evidence.

{¶13} Appellant offered his Criminal Rule 29 motion based on insufficient evidence of possession and trafficking. The motion was denied. The defense did not present any witnesses or exhibits. Appellant was convicted on both counts and

sentenced to 15 years in prison. He now timely appeals and asserts two assignments of error for consideration by this court.

{¶14} Appellant's first assignment of error is:

{¶15} "The trial court erred when it denied defendant-appellant's motion to suppress, in violation of his Fourth, Fifth, and Fourteenth Amendments to the United States Constitution."

{¶16} An appellate court's review of a decision on a motion to suppress involves issues of both law and fact. *State v. Burnside*, 100 Ohio St. 152, 2003-Ohio-5372, ¶8. During a suppression hearing, the trial court acts as the trier of fact and sits in the best position to weigh the evidence and evaluate the credibility of the witnesses. *Id*., citing *State v. Mills*, 62 Ohio St.3d 357, 366 (1992). Accordingly, an appellate court is required to uphold the trial court's finding of facts provided they are supported by competent, credible evidence. *Id*., citing *State v. Fanning*, 1 Ohio St.3d 19 (1982).

{¶17} Once an appellate court determines if the trial court's factual findings are supported, the court must then engage in a de novo review of the trial court's application of the law to those facts. *State v. Lett*, 11th Dist. No. 2008-T-0116, 2009-Ohio-2796, ¶13, citing *State v. Djisheff*, 11th Dist. No. 2005-T-0001, 2006-Ohio-6201, ¶19. Upon review of the record, we determine that the trial court's factual findings are indeed supported by competent, credible evidence. Thus, we accept the court's factual findings as accurate and proceed to determine whether, as a matter of law, the applicable legal standard was properly applied in the case.

{¶18} Appellant argues the court erred in not granting his motion to suppress for several reasons. First, appellant contends the stop of the vehicle was not based on

probable cause or reasonable suspicion. As a result, appellant argues all evidence from the stop should have been suppressed. It is well-founded that police action of stopping an automobile and detaining its occupant is a seizure under the Fourth Amendment. *Delaware v. Prouse*, 440 U.S. 648 (1979), paragraph two of the syllabus. Thus, an automobile stop is "subject to the constitutional imperative that it not be 'unreasonable' under the circumstances." *Whren v. United States*, 517 U.S. 806, 810 (1996). As appellant correctly notes, passengers have standing to challenge an automobile stop "because when the vehicle is stopped, they are equally seized, and their freedom of movement is equally affected." *State v. Carter*, 69 Ohio St.3d 57, 63 (1994).

{¶19} When a vehicle crosses the centerline, an officer can stop the vehicle based on probable cause that a traffic violation has occurred. *State v. Korman*, 11th Dist. No. 2004-L-064, 2006-Ohio-1795, ¶13; *State v. Wooten*, 11th Dist. No. 2004-L-084, 2006-Ohio-199, ¶11. This court has specifically held that an officer has probable cause to stop a motor vehicle after witnessing a marked-lane violation. *State v. Hale*, 11th Dist. No. 2004-L-105, 2006-Ohio-133, ¶18. *See also State v. Gray*, 11th Dist. No. 2007-L-114, 2008-Ohio-3394 ("When the vehicles left their lanes of travel, Officer Bilicic had probable cause to stop the vehicles for violations of the marked-lane statute."); *Village of Kirtland Hills v. Metz*, 11th Dist. No. 2005-L-197, 2006-Ohio-3413, ¶9 ("Officer Bilicic had probable cause to stop Metz's vehicle for a violation of the marked lane statute. Metz's vehicle left its lane of travel."); *State v. Gibson-Sweeney*, 11th Dist. No. 2005-L-086, 2006-Ohio-1691, ¶17 ("Officer Bilicic had probable cause to initiate the stop of Gibson-Sweeney's vehicle solely on the basis of her marked lane violation[.]").

{¶20} The marked-lane violation is provided for in R.C. 4511.33, which states:

{¶21} (A) Whenever any roadway has been divided into two or more clearly marked lanes for traffic, or wherever within municipal corporations traffic is lawfully moving in two or more substantially continuous lines in the same direction, the following rules apply:

{¶22} (1) A vehicle * * * shall be driven, as nearly as is practicable, entirely within a single lane or line of traffic and shall not be moved from such lane or line until the driver has first ascertained that such movement can be made with safety.

{¶23} Kirtland Hills Codified Ordinance 331.08(A) mirrors this statute. The offense can be considered either a minor misdemeanor, a fourth-degree misdemeanor, or a third-degree misdemeanor, depending on whether the offender has been convicted of other traffic offenses within one year of the offense. R.C. 4511.33(B).

{¶24} Here, Officer Bilicic testified at the suppression hearing that he observed a white Cadillac traveling on Interstate 90, which has two eastbound lanes. The automobile was in the left lane. The officer observed the vehicle drift over the center dotted line into the right lane by approximately six inches. The vehicle traveled in this fashion for about 200 feet, or around three seconds. The vehicle then drifted back into the left lane. Once returning fully to the left lane, the officer observed the automobile again drifting over the center line. The officer testified that there were no impediments or defects in the roadway that would have caused the vehicle to leave its lane. In fact, the weather was clear and the roadway was dry. After witnessing the continual "weaving" of the vehicle, Officer Bilicic initiated the stop.

{¶25} Appellant argues, however, that the traffic stop was merely a pretext to search for other evidence. To this point we highlight the Ohio Supreme Court's holding in *Dayton v. Erickson*, 76 Ohio St.3d 3, syllabus (1996):

> **{¶26}** Where a police officer stops a vehicle based on probable cause that a traffic violation has occurred or was occurring, the stop is not unreasonable under the Fourth Amendment to the United States Constitution *even if the officer had some ulterior motive for making the stop, such as a suspicion that the violator was engaging in more nefarious criminal activity*. (Emphasis added.)

{¶27} Thus, the initial stop was reasonable: Officer Bilicic had probable cause to stop the vehicle because he observed the vehicle committing a marked-lane traffic offense in violation of R.C. 4511.33(A).

{¶28} Appellant next argues that his continued detention, including being asked out of the car, was unreasonable because the investigation of the initial stop had ended. Appellant argues that after the driver was arrested, he should have been free to leave and that the officer was merely going on a "fishing expedition" for more evidence. As a general rule, a routine traffic stop, such as the one initiated by Officer Bilicic, "must be carefully tailored to its underlying justification * * * and last no longer than is necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491, 500 (1983). However, "'[i]f during the scope of the initial stop an officer encounters additional specific and articulable facts which give rise to a reasonable suspicion of criminal activity beyond that which prompted the stop, the officer may detain the vehicle * * * for as long as the new articulable and reasonable suspicion continues.'" *State v. Carter*,

11th Dist. No. 2003-P-0007, 2004-Ohio-1181, ¶34, quoting *State v. Waldroup*, 100 Ohio App.3d 508, 513 (12th Dist.1995). Whether the continued seizure was reasonable is analyzed under the totality of the circumstances. *State v. Bobo*, 37 Ohio St.3d 177, 178 (1984). In this case, the driver of the vehicle informed the officer that appellant had drugs with him. This information, together with the obvious furtive movements of appellant, provided the officer reasonable suspicion to further detain appellant and investigate the claim.

{¶29} As to the order out of the car, "[o]nce a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures." *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977). This order to step out of the car—often referred to as a *Mimms* order—"applies to both passengers and drivers." *State v. Wojtaszek*, 11th Dist No. 2002-L-016, 2003-Ohio-2105, ¶17, citing *Maryland v. Wilson*, 519 U.S. 408, 414 (1997).

{¶30} Officer Bilicic was on the side of an interstate highway at 3:00 a.m. with two male occupants still seated in the automobile and only one back-up officer. He had already observed appellant bending down and going out of view several times. It was reasonable to ask appellant out of the car in order to contain the situation and to view appellant unobstructed. Further, Officer Bilicic had reasonable suspicion to investigate the driver's claim that appellant had drugs with him. Such an intrusion is minimal and meant to advance the interest of officer safety during the stop. The order to exit the car so that the purpose of the investigation can be achieved without incident is a reasonable objective. Moreover, the driver's claim that there were drugs in the vehicle, and that

appellant had them, gave the officer probable cause to believe there were, in fact, drugs in the vehicle. Thus, the officer had probable cause to search the cabin through the well-founded "automobile" exception to the warrant requirement (which appellant does not contest). Obviously, a search of an automobile is best effectuated without occupants still in the vehicle. Thus, it was reasonable to ask appellant out of the car.

{¶31} Appellant next argues that it was unreasonable for the officer to conduct a search of his person. "A *Mimms* order does not automatically bestow upon the police officer the authority to conduct a pat-down search for weapons." *State v. Evans*, 67 Ohio St.3d 405, 409 (1993). Typically, an ensuing frisk after a *Mimms* order is analyzed under *Terry v. Ohio*, 392 U.S. 1 (1968), and "the question we must ask is whether, based on the totality of the circumstances, the officers had a reasonable, objective basis for frisking defendant after ordering him out of the car." *Id.* at 409, following *Terry v. Ohio*, *supra*. The purpose of a limited *Terry* frisk is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence. *Id*.

{¶32} However, in this case, because the officer witnessed drug paraphernalia in plain view on the floor where appellant was sitting, he had probable cause to make an arrest and therefore could conduct not just a *Terry* frisk of appellant's outer clothing, but the more intrusive "search incident to arrest." The United States Supreme Court addressed this warrantless search of an arrestee in *United States v. Robinson,* 414 U.S. 218, explaining that "a search incident to a valid arrest is not limited to a frisk of the suspect's outer clothing and removal of such weapons[.]" *Id*., syllabus. As a custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment, "a search incident to the arrest requires no additional justification, such as

the probability in a particular arrest situation that weapons or evidence would in fact be found upon the suspect's person[.]" *Id*.

{¶33} The pipe used for smoking crack cocaine and the folding knife in plain view on the floor of where appellant was sitting provided probable cause for appellant's arrest. Thus, it was reasonable for the officer to conduct a full search of appellant before advising him of his *Miranda* rights and placing him in the police cruiser.

{¶34} Next, appellant contends that all statements to the police should have been suppressed because the officer asked him questions prior to reciting his *Miranda* rights. It is well founded that, if a suspect is in custody, police must advise the suspect of his *Miranda* rights prior to questioning. *Miranda v. Arizona*, 384 U.S. 436, 478-479 (1966). However, on-scene investigative questioning does not trigger the *Miranda* warnings requirement. *State v. Wojtaszek*, 2003-Ohio-2105, ¶17.

{¶35} Here, Officer Bilicic questioned appellant as he was searching him. Specifically, the officer asked where appellant was coming from, whether he had anything on him, and how much money he had. Appellant responded he was coming from Cleveland and that he had a knife in his back pocket. The officer told appellant not to reach for the knife. He then placed appellant under arrest and recited appellant's *Miranda* rights. As this was on-scene questioning based primarily on what the officer would find on appellant and whether appellant was armed, the *Miranda* warnings requirement was not yet triggered.

{¶36} Finally, appellant sought to exclude his statement to Mr. Woodard in the sally port, where he blamed the arrests on the "snitch." This was a spontaneous statement and not a product of a custodial interrogation; therefore, this statement is not

subject to the analysis of whether appellant waived his *Miranda* rights.

{¶37} Thus, as the search and seizure of appellant was reasonable, the trial court did not err in overruling the motion to suppress. Appellant's first assignment of error is without merit.

{¶38} Appellant's second assignment of error is:

{¶39} "The verdict was against the sufficiency of the evidence."

{¶40} The test for determining the issue of sufficiency is "whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus, citing *Jackson v. Virginia*, 443 U.S. 307 (1979). Thus, the claim of insufficient evidence invokes a question of due process, the resolution of which does not allow for a weighing of the evidence. *State v. Lee*, 11th Dist. No. 2010-L-084, 2011-Ohio-4697, ¶9. Crim.R. 29(A) requires the trial court to grant a motion for acquittal if the evidence is insufficient to sustain a conviction on the charged offenses.

{¶41} On count one (possession of cocaine), the state had the burden of proving beyond a reasonable doubt that appellant did knowingly obtain, possess, or use crack cocaine, or a substance containing crack cocaine, and the amount exceeded or equaled 100 grams. R.C. 2925.11.

{¶42} Appellant argues that there was absolutely no evidence linking him to the drugs at issue and the evidence is therefore legally insufficient to support a conviction. In support, appellant highlights several points: the automobile was not owned by him,

the drugs were hidden behind a space in the armrest, his prints were not found on the bag containing the drugs, and he denied ownership of the drugs.

{¶43} R.C. 2925.01(K) states: "'possess' or 'possession' means having control over a thing or substance, but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found."

{¶44} "Possession of drugs can be either actual or constructive." *State v. Rollins*, 3d Dist. No. 11-05-08, 2006-Ohio-1879, ¶22, citing *State v. Haynes*, 25 Ohio St.2d 264 (1971). Even if the contraband is not in a suspect's immediate physical possession, the suspect may still constructively possess the item, so long as the evidence demonstrates that he or she "was able to exercise dominion and control over the controlled substance." *State v. Lee*, 11th Dist. No. 2002-T-0168, 2004-Ohio-6954, ¶41, citing *State v. Wolery*, 46 Ohio St.2d 316, 329 (1976). Thus, "presence in the vicinity of contraband, coupled with another factor or factors probative of dominion or control over the contraband, may establish constructive possession." *State v. Blevins*, 4th Dist. No. 10CA3353, 2011-Ohio-3367, ¶20.

{¶45} The Supreme Court of Ohio has long held that "circumstantial evidence and direct evidence inherently possess the same probative value and therefore should be subjected to the same standard of proof." *State v. Jenks*, 61 Ohio St.3d 259, paragraph one of the syllabus. Moreover, this court has continually noted that constructive possession of contraband may be supported solely by circumstantial evidence. *State v. Herman*, 11th Dist. No. 2008-P-0067, 2009-Ohio-1318, ¶39; *State v. Fogle*, 11th Dist. No. 2008-P-0009, 2009-Ohio-1005, ¶30; *State v. Gray*, 11th Dist. No.

2007-L-113, 2008-Ohio-3394, ¶55; *State v. Klaue*, 11th Dist. No. 2007-A-0046, 2007-Ohio-6933, ¶33.

{¶46} At trial, several pieces of evidence linked appellant to the drugs. First, the white grocery bag containing a large quantity of crack cocaine was located in the back seat where appellant was seated. Douglas Rhode, supervisor of chemistry and toxicology at the Lake County Crime Laboratory, concluded that the substance was indeed crack cocaine, weighing 261.55 grams. The bag was stuffed behind the back seat armrest; thus, appellant had access to the contraband from where he was seated.

{¶47} Second, Officer Bilicic testified to appellant's various furtive movements while in the back seat of the car during the stop. He explained: "[A]t one point, [appellant] totally went out of view of the back window, I couldn't see him anymore. And he was constantly moving the whole entire time until the vehicle came to a stop, and even after that he was constantly moving around in the vehicle." The officer further testified that appellant was moving towards the center of the vehicle, or towards the spot where the drugs were ultimately located.

{¶48} Third, a pipe used for smoking crack cocaine was found on the floor of the car where appellant was seated. Officer Bilicic testified that the pipe was located by appellant's legs. He further testified that appellant was seen bending down, as if to put an object on the floor. The video recording of the stop shows appellant's head bending down from the rear window. The pipe located near appellant's leg had crack cocaine residue in it.

{¶49} Fourth, a folding knife was found on appellant and a similar folding knife was found where appellant was sitting—both knives contained white residue on the tip.

Lab tests confirmed the residue was, in fact, crack cocaine. Additionally, $230 in cash was found on appellant.

{¶50} Fifth, Officer Bilicic testified to hearing appellant tell Mr. Woodard that they would have "gotten away with it" had it not been for the "snitch" while in the sally port of the local jail. The officer also observed appellant calling Ms. Jones a snitch and other names through the cell door.

{¶51} Based on the abundance of circumstantial evidence on the element of possession, we determine that the state's evidence was legally sufficient to sustain the guilty verdict on count one, possession of crack cocaine.

{¶52} On count two (trafficking in cocaine), the state had the burden of proving beyond a reasonable doubt that appellant did knowingly prepare for shipment, ship, transport, deliver, or distribute crack cocaine, or a substance containing crack cocaine, when he knew or had reasonable cause to believe that the substance was intended for sale. R.C. 2925.03(A)(2).

{¶53} Here, the large quantity of drugs, the large amount of cash found on appellant, and appellant's incriminating comments referring to a plan or scheme provided a sufficient evidentiary basis on which to conclude that appellant knew or had reasonable cause to believe the crack cocaine was intended for sale. Thus, we likewise determine that the state's evidence was legally sufficient to sustain the guilty verdict on count two, trafficking in cocaine.

{¶54} After viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of both charges proven beyond a reasonable doubt. Appellant's second assignment of error is without merit.

{¶55} The judgment of the Lake County Court of Common Pleas is therefore affirmed.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.