[Cite as *State v. Brown*, 2010-Ohio-1110.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. Julie A. Edwards, P.J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellant	:	Hon. Sheila G. Farmer, J.
	:	
-vs-	:	
	:	Case No. 2009AP050024
MELANIE BROWN	:	
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Tuscarawas County Court of Common Pleas, Case No. 2009CR010010
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	March 18, 2010

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
MICHAEL J. ERNEST Assistant County Prosecutor 125 East High Street New Philadelphia,OH 44663	MATTHEW A. PETIT 111 Second Street N.W. Suite 302 Canton, OH 44702

Gwin, J.

{¶1} Plaintiff-appellant the State of Ohio appeals from the trial court's granting of defendant-appellee Melanie Brown's motion to suppress an automobile search in a possession of drugs case.

STATEMENT OF THE FACTS AND CASE

{¶2} On June 23, 2008 the appellee, was a passenger in a vehicle stopped by Trooper Halsted of the Stark County State Highway Patrol. (T. at 5-6) Edward Dixon was also a passenger. Brian Blake was driving the vehicle.

{¶3} Trooper Halsted, while on his way home after his shift was over, performed a random license check through the Massillon Post Dispatch and received a warrant hit out of the New Philadelphia Police Department for James Blake. The warrant was for James Blake; however, the car was registered to Brian Blake. The Trooper was advised that James Blake has previously used the name Brian Blake as an alias. Trooper Halsted believed James Blake was driving the car.

{¶4} Trooper Halsted made the traffic stop in New Philadelphia, Tuscarawas County, Ohio. Sergeant Joseph Fetty of the Tuscarawas County State Highway Patrol responded to the scene of the traffic stop as backup. This was approximately 1:00 A.M. Immediately upon being stopped, Brian Blake indicated to the Troopers that they had mistaken him for his brother, James Blake. Sergeant Fetty testified that he and Trooper Halsted checked for all active warrants throughout the State of Ohio for the appellee, Mr. Dixon and Brian Blake through their LEADS computer within five minutes of the initial traffic stop. The following time line was established by the trial court:

{¶5} 1:10 a.m. Sergeant Fetty acknowledges a canine was en route.

{¶6} 1:12 a.m. Sergeant Fetty testified that both Mr. Dixon and the appellee came back with no outstanding warrants and that he did not observe from any of the three suspects furtive movements, nervousness, bloodshot eyes, slurred speech, strong odors of alcohol or controlled substances. Further, all the parties were cooperative. (T. at 37, 41-43, 68). Sergeant Fetty testified that he did not observe any contraband or signs of criminal activity in plain view.

{¶7} By 1:15 a.m., Sergeant Fetty had checked Brian Blake for identifying scars and tattoos and established that he was not James Blake, the subject of the warrant.

{¶8} Sergeant Fetty continued to detain all parties as he placed additional calls to check on "un-entered" warrants. Sergeant Fetty contended that he had received conflicting stories from the parties as to their whereabouts. Sergeant Fetty testified,

{¶9} "The fact that they were in Canton, at that time, the gas was four something a gallon, just to cruise around in an F-150 up to Canton and back doesn't make a whole lot of sense. Now being the fact that he took them to a residence and sat outside while they went inside for a short amount of time and came back out didn't quite register either so that's, there's some things that we were also putting together and that's the reasons why we called the dogs….

{¶10} "It is the point where we had the inconsistencies and just the oddity of somebody driving a truck like that at four fifty a gallon to Canton for not even that long and driving back. One said they were driving around, the other one said he got paid to drive them up. I mean, right there, it just, it started to, it started to show indicators." (T. at 17; 81).

{¶11} At approximately the same time that confirmation is made of the identity of the driver, Officer Mike Pierce of the New Philadelphia Police Department arrives. Officer Pierce can be heard on the video recording indicating that he is familiar with Ed Dixon and that in Officer Pierce's opinion Mr. Dixon is an "asshole" and a known "crack head." (T. at 74).

{¶12} At 1:23 a.m., before any response came through regarding "un-entered" warrants, the canine arrived. The canine alerted the officers to the presence of two (2) pipes with crack cocaine in the ends, a white "rock" and straight razor, all near the passengers' seats.

{¶13} After the recovery of the suspected crack cocaine, the Tuscarawas County Grand Jury indicted the appellee for one count of possession of drugs. The appellee pled not guilty and filed a motion to suppress evidence claiming that her constitutional rights were violated based upon the length of the traffic stop.

{¶14} The trial court conducted an evidentiary hearing on appellee's motion on April 2, 2009. On May 14, 2009, the court granted appellee's motion to suppress. The trial court found that,

{¶15} "The detention of the Defendant, after the officers determined that the driver of the car was not James Blake, was longer than necessary to effectuate the purpose of the stop. The available information and observations at or before 1:15 a.m. did not give rise to a reasonable, articulable suspicion of criminal activity.

{¶16} "This Court is concerned to learn that local authorities may not be entering all active warrants into "the system." In the present case, the driver was quickly

eliminated as the subject of the outstanding warrant. The facts reflect no reasonable cause for additional detention while awaiting a check of un-entered warrants."

{¶17} On May 20, 2009, the State filed its certification pursuant to Crim. R. 12(J). The State timely appeals, asserting a single assignment of error:

{¶18} "I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING THE APPELLEE'S MOTION TO SUPPRESS EVIDENCE AS THE APPELLEE'S DETENTION WAS NOT UNCONSTITUTIONALLY PROLONGED IN ORDER TO HAVE A DRUG SNIFFING DOG PRESENT."

I.

{¶19} Appellant argues in its sole assignment of error that appellee's detention was lawfully prolonged in order to conduct a canine walk-around of a vehicle based upon the trooper's reasonable suspicions. We disagree.

{¶20} Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside,* 100 Ohio St. 3d 152, 154-155, 797 N.E.2d 71, 74, 20030-Ohio-5372 at ¶ 8. When ruling on a motion to suppress, the trial court assumes the role of trier of fact and is in the best position to resolve questions of fact and to evaluate witness credibility. See *State v. Dunlap* (1995), 73 Ohio St.3d 308, 314, 652 N.E.2d 988; *State v. Fanning* (1982), 1 Ohio St.3d 19, 20, 437 N.E.2d 583. Accordingly, a reviewing court must defer to the trial court's factual findings if competent, credible evidence exists to support those findings. See *Burnside,* supra; *Dunlap,* supra. However, once an appellate court has accepted those facts as true, it must independently determine as a matter of law whether the trial court met the applicable legal standard. See B*urnside,* supra, citing *State v. McNamara* (1997), 124 Ohio App.3d

706, 707 N.E.2d 539; See, also, *United States v. Arvizu* (2002), 534 U.S. 266, 122 S.Ct. 744; *Ornelas v. United States* (1996), 517 U.S. 690, 116 S.Ct. 1657. That is, the application of the law to the trial court's findings of fact is subject to a *de novo* standard of review. *Ornelas*, supra. Moreover, due weight should be given "to inferences drawn from those facts by resident judges and local law enforcement officers." *Ornelas*, supra at 698, 116 S.Ct. at 1663.

{¶21} In the case at bar, the parties agree that appellant was lawfully stopped. The question in the case at bar is whether the lawful detention for the warrant check became an unlawful detention when the officer decided to continue to detain the occupants of the car while awaiting the arrival of a narcotics-detection dog to sniff around exterior of the vehicle. See, *State v. Batchili*, 113 Ohio St.3d 403, 865 N.E.2d 282, 2007-Ohio-2204 at ¶ 8; *State v. Woodson*, Stark App. No. 2007-CA-00151, 2008-Ohio-670 at ¶ 19.

{¶22} "'[W]hen detaining a motorist for a traffic violation, an officer may delay a motorist for a time period sufficient to issue a ticket or a warning.' " *State v. Batchili,* 113 Ohio St.3d 403, 2007-Ohio-2204, at ¶ 12, quoting *State v. Keathley* (1988), 55 Ohio App.3d 130, 131. "This measure includes the period of time sufficient to run a computer check on the driver's license, registration, and vehicle plates." Id., citing *State v. Bolden,* 12th Dist. No. CA2003-03-007, 2004-Ohio-184, ¶ 17, citing *Profuse* at 659. "Further, '[i]n determining if an officer completed these tasks within a reasonable length of time, the court must evaluate the duration of the stop in light of the totality of the circumstances and consider whether the officer diligently conducted the investigation.' " Id., quoting *State v. Carlson* (1995), 102 Ohio App.3d 585, 598-599, citing *State v. Cook*

(1992), 65 Ohio St.3d 516, 521-522, and *U.S. v. Sharpe* (1985), 470 U.S. 675. See, also *Woodson,* supra at ¶ 21.

{¶23} However, "[a]n officer may not expand the investigative scope of the detention beyond that which is reasonably necessary to effectuate the purposes of the initial stop unless any new or expanded investigation is supported by a reasonable, articulable suspicion that some further criminal activity is afoot." Id. at ¶ 34, citing *State v. Retherford* (1994), 93 Ohio App.3d 586, 600, citing *U.S. v. Brignoni-Ponce* (1975), 422 U.S. 873, 881-882. "In determining whether a detention is reasonable, the court must look at the totality of the circumstances." *State v. Matteucci,* 11th Dist. No.2001-L-205, 2003-Ohio-702, ¶ 30, citing *State v. Bobo* (1988), 37 Ohio St.3d 177, 178. See, also *Woodson,* supra at ¶ 22.

{¶24} A canine walk-around of a vehicle, which occurs during a lawful stop and does not go beyond the period necessary to effectuate the stop and issue a citation does not violate the individual's constitutional rights. *Illinois v. Caballes* (2005), 543 U.S. 405, 409, 125 S.Ct. 834, 838. This is so because the detention was not illegally prolonged in order to make the walk-around. See, *State v. Batchili,* 113 Ohio St.3d 403, 2007-Ohio-2204.

{¶25} "What is sought to be justified here is not an arrest, but a *Terry* stop for investigation. Logically, there must be some set of circumstances short of probable cause but sufficient for reasonable suspicion which will warrant the officer in proceeding further in his or her investigation; the evidence needed for a *Terry* stop is by definition less than probable cause for arrest. *United States v. Sokolow,* 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989)". *United States v. Frantz* (SD OH 2001), 177 F.Supp.2d

760, 762-763; *Batchili*, supra 2007-Ohio-2204 at ¶15. (Citing *State v. Howard,* Preble App. Nos. CA2006-02-002 and CA2006-02-003, 2006-Ohio-5656 at ¶16).

{¶26} In the case at bar, appellant attaches some significance to the fact that Officer Mike Pierce of the New Philadelphia Police Department can be heard on the video recording indicating that he is familiar with Ed Dixon and that he is a known "crack head". [Appellant's Brief at 8 -9].

{¶27} However, we note, "knowledge of a person's prior criminal involvement (to say nothing of a mere arrest) is alone insufficient to give rise to the requisite 'reasonable suspicion' to justify a shift in investigatory intrusion from the traffic stop to a firearms or drugs investigation." *United States v. Sandoval* (10th Cir 1994)*,* 29 F.3d 537, 542; *State v. Whitman*, Holmes App. No. 09-CA-03, 2009-Ohio-5647 at ¶ 15. As the Court explained in *Sandoval:*

{¶28} "If the law were otherwise, any person with any sort of criminal record-or even worse, a person with arrests but no convictions-could be subjected to a *Terry*-type investigative stop by a law enforcement officer at any time without the need for any other justification at all. Any such rule would clearly run counter to the requirement of a *reasonable* suspicion, and of the need that such stops be justified in light of a balancing of the competing interests at stake." Id*.* at 543. Accord, *Joshua v. Dewitt* (6th Cir 2003)*,* 341 F.3d 430, 446. Accordingly, a person's reputation or past record does not, standing alone, provide an officer with a reasonable suspicion to support a *Terry*-type investigative stop or search. *State v. Whitman*, supra. The Tenth Circuit noted in *United States v. Sandoval* that it had found "no case elsewhere that even suggest[s] the contrary." 29 F.3d at 542.

{¶29} In the case at bar, we find that the totality of the circumstances beyond the suspicion of a warrant violation did not give Sergeant Fetty sufficient indicia of drug or other criminal activity to establish a reasonable suspicion to continue to detain the occupants of the car while awaiting the arrival of a narcotics-detection dog to sniff around exterior of the vehicle.

{¶30} The Ohio Supreme Court has identified certain specific and articulable facts that would justify an investigatory stop by way of reasonable suspicion, factors that fall into four general categories: (1) location; (2) the officer's experience, training or knowledge; (3) the suspect's conduct or appearance; and (4) the surrounding circumstances. *Bobo,* 37 Ohio St.3d at 178-79; *State v. Andrews* (1991), 57 Ohio St.3d 86, 87-88. No single factor is dispositive; the decision must be viewed based on the totality of the circumstances. *Bobo,* 37 Ohio St.3d at paragraph one of the syllabus; *State v. White,* 9th Dist. No. 05CA0060, 2006-Ohio-2966 at ¶ 16. We see no reason why these factors could not also be used to justify a continued detention such as occurred in this case.

{¶31} Location relates to whether the confrontation occurred in a reputed “high crime" area, an area of known drug activity, or perhaps a location under police surveillance. *Bobo,* 37 Ohio St.3d at 179 (heavy drug activity); *Andrews,* 57 Ohio St.3d at 88 (high crime). But, see, *State v. Crosby* (1991), 72 Ohio App.3d 148, syllabus (holding that individuals talking in or near a car, even when parked in an area known for drug activity, does not, without more, justify a search); *State v. Davis* (2000), 140 Ohio App.3d 659, 664-65 (stating that merely departing a house that is under surveillance is insufficient to justify a search); *State v. White,* supra at ¶ 17.

{¶32} In the case at bar, the State did not present any evidence that appellant had been in a high crime area, a drug house or anywhere where drug or other criminal activity was taking place.

{¶33} The suspect's conduct or appearance includes suspicious, inexplicable, or furtive movements, such as watching-out, ducking, hiding, fleeing, or discarding an object. *Bobo,* 37 Ohio St.3d at 178-79 (suspect ducking out of sight and other furtive movements); *Andrews,* 57 Ohio St.3d at 88 (suspect running through a dark courtyard threw an object to the ground); *State v. Lee* (1998), 126 Ohio App.3d 147, 148 (cracked and burnt lips indicative of smoking crack cocaine); *State v. White,* supra at ¶ 19.

{¶34} In the case at bar, Sergeant Fetty testified that both Mr. Dixon and the appellee came back with no outstanding warrants and that he did not observe from any of the three suspects furious movements, nervousness, bloodshot eyes, slurred speech, strong odors of alcohol or controlled substances and all the parties were cooperative. (T. at 37, 41-43, 68). Sergeant Fetty testified that he did not observe any contraband or signs of criminal activity in plain view.

{¶35} The surrounding circumstances include the time of day or night, because certain activities would ordinarily occur late at night or because weapons would be less obvious in the dark. *Bobo,* 37 Ohio St.3d at 178-79 (night); *Andrews,* 57 Ohio St.3d at 88 (after nightfall, in a darkened area). Circumstances may also include an officer being out of a vehicle, away from protection, or without backup. *Bobo,* 37 Ohio St.3d at 178-79; *Andrews,* 57 Ohio St.3d at 88; *State v. White,* supra at ¶ 20.

{¶36} In the case at bar, Sergeant Fetty was not alone. Trooper Halsted, Trooper Gaskill and Officer Pierce were on scene. Trooper Halsted was permitted to go

home before the stop had been cleared. At all times that the parties were detained by the Troopers, appellee, Mr. Blake and Mr. Dixon were cooperative, not nervous, made eye contact, did not smell of the odor of alcohol or drugs, didn't make any furious movements. Additionally, the Troopers did not see anything in plain sight that would lead them to believe that criminal activity was afoot. Trooper Fetty testified that he had no personal information as to where the parties had been prior to the stop.

{¶37} As an appellate court, we neither weigh the evidence nor judge the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St. 3d 357, 582 N.E. 2d 972. Our role is to determine whether there is relevant, competent and credible evidence, upon which the fact finder could base its judgment. *Cross Truck Equipment Co., Inc. v. Joseph A. Jeffries Co.* (February 10, 1982), Stark App. No. CA-5758. Reviewing courts should accord deference to the trial court's decision because the trial court has had the opportunity to observe the witnesses' demeanor, gestures, and voice inflections that cannot be conveyed to us through the written record, *Miller v. Miller* (1988), 37 Ohio St. 3d 71.

{¶38} In *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 81, 461 N.E.2d 1273, the Ohio Supreme Court explained: "[a] reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not." See, also *State v. DeHass* (1967), 10 Ohio St.2d 230, syllabus 1.

{¶39} We conclude that the trial court's factual findings do not constitute clear error. Due weight has been given to the inferences drawn by the trial court and the testifying law enforcement officer. After careful review of the record, there is no indication that the trial court has made a mistake. The trial court has the authority to decide in whose favor the weight of the evidence will lie. Here, the trial court decided in favor of the appellee. Such a choice is not clearly erroneous. *Yellow Cab,* 338 U .S. at 342; *Prigmore*, supra at ¶ 17.

{¶40} We find the trial judge's findings to be supported by competent, credible evidence. The mere fact that the vehicle was driving between Tuscarawas and Stark counties at a time when gasoline prices were high is not a sufficient basis for continuing to detain the occupants of the vehicle. We agree with the trial court's conclusion that in the present case, the driver was quickly eliminated as the subject of the outstanding warrant. The facts reflect no reasonable cause for additional detention while awaiting a check of un-entered warrants.

{¶41} Therefore, we cannot say that the officer had reasonable suspicion to detain appellee because no specific or articulable facts existed to support the officer's contention that criminal activity was afoot. The trial court correctly granted the motion to suppress.

{¶42} Appellant's sole assignment of error is overruled.

{¶43} The judgment of the Court of Common Pleas of Tuscarawas County, Ohio is hereby affirmed.

By Gwin, J.,

Edwards, P.J., and

Farmer, J., concur

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

_____

HON. SHEILA G. FARMER

WSG:clw 0224

[Cite as *State v. Brown*, 2010-Ohio-1110.]

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
MELANIE BROWN	:	
Defendant-Appellee	:	CASE NO. 2009AP050024

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Tuscarawas County, Ohio is hereby affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

_____
HON. SHEILA G. FARMER