[Cite as *State v. Meredith*, 2010-Ohio-3121.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- TIMOTHY MEREDITH Defendant-Appellant	JUDGES: Hon. W. Scott Gwin, P. J. Hon. Sheila G. Farmer, J. Hon. John W. Wise, J. Case No. 2009 AP 10 0053 O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 2009 CR 03 0071
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	July 1, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
MICHAEL J. ERNEST ASSISTANT PROSECUTOR 125 East High Avenue New Philadelphia, Ohio 44663	GERALD A. LATANICH 153 North Broadway New Philadelphia, Ohio 44663

Wise, J.

{¶1} Defendant-Appellant Timothy Meredith appeals from the trial court's denial of his motion to suppress in a possession of drugs case.

{¶2} Plaintiff-Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶3} Appellant, Timothy Meredith, was indicted March 11, 2009, on one count of possession of drugs, in violation of R.C. §2925.11. The drug that he is suspected of possessing is Heroin.

{¶4} Following his arraignment, Appellant filed two motions seeking to suppress statements made by him, observations and opinions of the police officers who arrested Appellant, and any information about drugs in Appellant's home and drugs found in Appellant's home that may have been acquired by the City of Dover Police Department. Appellant moved to suppress the evidence under the theory that the evidence was obtained through an unlawful arrest, failure to provide Miranda warnings and that any search of Appellant's home was in violation of the Fourth Amendment.

{¶5} On May 26, 2009, a suppression hearing was held in which Appellee presented evidence in opposition to Appellant's motion. At the suppression hearing, Appellee presented testimony from Officer Jason Peters of the City of Dover Police Department. According to Peters, he observed Appellant operating a motor vehicle on Third Street in Dover on November 14, 2008 (T. at 3). Officer Peters testified that Appellant's vehicle pulled from the side of the road and immediately made an "U" turn on Third Street in front of the Dover Police Station. (T. at 4). Officer Peters testified that

he activated his overhead lights and initiated a traffic stop of Appellant's vehicle. (T. at 4).

{¶6} Upon stopping Appellant's vehicle, Patrolman Peters stated that he recognized the driver, Appellant Timothy Meredith, and further observed Richard Deere and Jeff Fox were passengers in Appellant's car. Id.

{¶7} Officer Peters testified that he was in the process of issuing a traffic citation when he called for a K-9 officer to come to the scene. Prior to the ticket being completed, a K-9 unit arrived on the scene with a dog trained to detect narcotics. According to Officer Peters, the drug-sniffing dog walked around Appellant's vehicle and indicated that narcotics were suspected of being within the vehicle. (T. at 6).

{¶8} Officer Peters testified that Appellant and two occupants of the vehicle were asked to exit the vehicle following the canine's alert in order for a search of the vehicle to take place. (T. at 6-7).

{¶9} One of the passengers, Jeff Fox, was asked to exit the vehicle first. He was handcuffed and a pat down search was conducted, revealing two hypodermic needles. (T. at 6). Fox was then placed in one of the patrol cars. Id.

{¶10} Richard Deere, whom it had been determined had an outstanding warrant for narcotics, was then asked to exit the vehicle and was placed in the patrol car. (T. at 6, 7). Another hypodermic syringe was found in Deere's coat, which had been left in the vehicle. (T. at 8).

{¶11} Appellant also exited the vehicle and was placed in handcuffs. (T. at 6, 29). After the search of the vehicle was completed, Officer Peters engaged in questioning of Appellant. (T. at 8-9). According to Officer Peters and Capt. Frank

Alesiano of the Dover Police Department, Officer Peters advised Appellant as to his Miranda rights. (T. at 8-9). According to Officer Peters, he proceeded to ask Appellant questions pertaining to suspected drug usage based on the fact that both of the passengers in Appellant's car had empty syringes on them and fresh needle marks on their arms and were found leaving Appellant's house. (T. at 8-9).

{¶12} Officer Peters testified that Appellant stated that there were no drugs inside of the vehicle, but that he did however, have drug paraphernalia in his house. (T. at 9). According to Officer Peters, Appellant asked him whether he was going to proceed to get a search warrant for Appellant's house. (T. at 12). Officer Peters stated that he would try his best to get a search warrant based on Appellant's statements that he had drug paraphernalia there. (T. at 12). At that time, Appellant told Officer Peters that he did not want the officers going through his home with a search warrant as his girlfriend was home, and he did not want the police to frighten her. (T. at 12). According to Officer Peters, Appellant stated that he would prefer to take the officers to his home in an effort to try and lessen any concern to his girlfriend. (T. at 12).

{¶13} Appellant was then taken to the Dover Police Station to complete a "consent to search" form for his home. (T. at 10-11, 13). Officer Peters and Capt. Alesiano indicated that Appellant was informed of his rights within the consent to search form and that he was not required to consent to this search. (T. at 13, 27). Both Officers Peters and Alesiano indicated that Appellant freely signed the consent to search form. (T. at 13, 27). Both officers indicated that Appellant merely wanted to speak with his girlfriend first and explain to her why the Dover Police Officers would be searching their house. (T. at 14, 27). Officers Peters and Alesiano indicated that they then proceeded to

Appellant's home, and that Appellant was permitted to speak with his girlfriend prior to a search taking place. (T. at 14, 27). Upon conducting a search of Appellant's home, the officers found Heroin. (T. at 14).

{¶14} On August 21, 2009, the trial court issued a Judgment Entry in which it denied Appellant's Motions to Suppress. Following this Judgment Entry, Appellant changed his plea to "No Contest" to the Indictment and was sentenced on October 14, 2009.

{¶15} Appellant now appeals, asserting the following assignments of error for review:

ASSIGNMENTS OF ERROR

{¶16} "I. THE TRIAL COURT ERRED WHEN IT OVERRULED THE MOTION TO SUPPRESS DUE TO THERE BEING NO PROBABLE CAUSE TO ARREST THE DEFENDANT.

{¶17} "II. THERE WAS NO VALID CONSENT TO SEARCH GIVEN. MERELY [SIC] ACQUIESCENCE TO POLICE AUTHORITY IS NOT CONSENT."

I.

{¶18} Appellant in his first assignment of error argues that his motion to suppress should have been granted based on a lack of probable cause to arrest. We disagree.

{¶19} 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, 2003-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.

{¶20} In the case at bar, while appellant does not argue that he was not lawfully stopped, he claims that no probable cause existed to detain or arrest him. The question in the case at bar is whether the lawful detention for time necessary to write the traffic citation became an unlawful detention when the officer decided to continue to detain the occupants of the car after the narcotics-detection dog indicated that the drugs were present at the scene.

{¶21} "'[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.

{¶22} 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.

{¶23} 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.

{¶24} "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).

{¶25} In the case at bar, we find that the totality of the circumstances gave the officers sufficient indicia of drug or other criminal activity to establish a reasonable suspicion to continue to detain Appellant after the narcotics-detection dog gave a positive indication for drugs. The search of the vehicle then revealed empty drug syringes. During this time, Appellant made statements to the officers that there was drug paraphernalia in his house.

{¶26} 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.

{¶27} After careful review of the record, we find the trial judge's findings to be supported by competent, credible evidence. The facts above provide a sufficient basis for continuing to detain Appellant after the initial stop.

{¶28} Therefore, we find that the officer had reasonable suspicion to detain Appellant as articulable facts existed to support the officer's contention that criminal activity was afoot. The trial court correctly denied the motion to suppress.

{¶29} Appellant's first assignment of error is overruled.

II.

{¶30} In his second assignment of error, Appellant argues that his consent to search his house was illegal. We disagree.

{¶31} The Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution protect individuals against unreasonable governmental searches and seizures. Warrantless searches are per se unreasonable unless one of the well-delineated exceptions applies. *Katz v. United States* (1967), 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576. One such exception to the warrant requirement is a search conducted pursuant to consent. *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854. When the state seeks to establish consent for a warrantless search, it is not limited to proving that the defendant himself consented, but it may also show that the consent was obtained from a third party who possessed common authority or other sufficient relationship over the premises to be inspected. *United States v. Matlock* (1974), 415 U.S. 164, 171, 94 S.Ct. 988, 39 L.Ed.2d 242; *Schneckloth v. Bustamonte*, supra. Law enforcement officers do not need a warrant, probable cause or even reasonable, articulable suspicion to conduct a search when

consent for a search is voluntarily given. *State v. Riggings*, 1st Dist. No. C-030626, 2004-Ohio-4247, at paragraph 11, citing *Schneckloth v. Bustamonte* (1973), 412 U.S. at 219; *State v. Comen* (1990), 50 Ohio St.3d 206, 211, 553 N.E.2d 640.

{¶32} "The question whether consent * * * was in fact voluntary or was the product of duress or coercion, express or implied, is to be determined by the totality of all the circumstances, and is a matter which the government has the burden of proving" by clear and convincing evidence. *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854; *Bumper v. North Carolina* (1968), 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797); *State v. Posey* (1988), 40 Ohio St.3d 420, 427, 534 N.E.2d 61; *State v. Comen* (1990), 50 Ohio St.3d 206, 553 N.E.2d 640.

{¶33} Clear and convincing evidence is evidence that would produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established. To meet the clear and convincing standard requires a higher degree of proof than a preponderance of the evidence, but less evidence than reasonable doubt. *State v. Wilson* (2006), 113 Ohio St.3d 382, 865 N.E.2d 1264. We will not substitute our judgment for that of the trial court when competent and credible evidence exists to support the trial court's findings of fact and conclusions of law. Id. at 74-75, 564 N.E.2d 54, citing *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273; *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578.

{¶34} "[W]hen the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be

determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent." *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 248-49 93 S.Ct. 2041, 2059, 36 L.Ed.2d 854, 875.

{¶35} Important factors for a court to consider in determining whether consent is voluntary include: (1) the suspect's custodial status and the length of the initial detention; (2) whether the consent was given in public or at a police station; (3) the presence of threats, promises or coercive police procedures; (4) the words and conduct of the suspect; (5) the extent and level of the suspect's cooperation with the police; (6) the suspect's awareness of his right to refuse to consent and his status as a "newcomer to the law"; and (7) the suspect's education and intelligence. See *Schneckloth* supra at 226. See *State v. Cottrill,* Fairfield App. No. 06-CA-64, 2007-Ohio-5293 at ¶ 20; see *State v. Lattimore,* Franklin App. No. 03AP-467, 2003-Ohio-6829, at ¶ 14; and *State v. Dettling* (1998), 130 Ohio App.3d 812, 815-816, 721 N.E.2d 449. Voluntariness cannot be established by a mere showing that the person simply acquiesced to a claim of lawful authority. *Bumper v. North Carolina*, supra; See, e.g., *Amos v. United States*, 255 U.S. 313, 317, 41 S.Ct. 266, 267, 65 L.Ed. 654; *Johnson v. United States*, 333 U.S. 10, 13, 68 S.Ct. 367, 368, 92 L.Ed. 436; *Higgins v. United States*, 93 U.S.App.D.C. 340, 209 F.2d 819; *United States v. Marra*, D.C., 40 F.2d 271; *MacKenzie v. Robbins,* D.C., 248 F.Supp. 496.

{¶36} In the case sub judice, Appellant argues that he did not voluntarily give his consent to the police to search his home but rather that such was a "mere acquiescence to authority." (Appellant's brief at 9).

{¶37} The record clearly reveals that while Officer Peters did testify that the appellant was in handcuffs, no coercion, either through threats or physical violence, was ever employed against appellant, nor has he alleged that such was the case. Officer Peters' testimony established that Appellant first gave an oral consent for the search of his house and then voluntarily signed a "consent to search" form. Officer Peters further testified that after consenting to the search, Appellant was cooperative and that his main concern was not disturbing his girlfriend. Officer Peters stated that Appellant was read the consent form and signed same. Officer Peters further testified that upon arriving at Appellant's home, Appellant was given the opportunity to speak with his girlfriend prior to any search being commenced by the police. Officer Peters stated that Appellant then led the police to where he kept his drugs and drug paraphernalia.

{¶38} The other possibility, that Appellant acquiesced or assented "only in submission to a claim of lawful authority," is similarly not present. Officer Peters did not falsely claim possession of a search warrant, but rather candidly informed Appellant that he would try to get a warrant in this case based on Appellant' admission that drug paraphernalia was present in Appellant's home. It appears that Appellant clearly understood that he had the constitutional right to withhold his consent. A further indication that Appellant's consent was voluntary was the fact that he showed the officers where he kept his drugs and drug paraphernalia in his house.

{¶39} Based upon all of the facts and circumstances, we conclude that Appellant's consent was voluntarily given.

{¶40} We find that the trial court did not err in finding that Appellant consented to the search of his house and in overruling appellant's Motion to Suppress.

{¶41} We therefore find that Appellant's second assignment of error is not well-taken and hereby overrule same.

{¶42} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas of Tuscarawas County, Ohio is hereby affirmed.

By: Wise, J.

Gwin, P. J., and

Farmer, J., concur.

/S/ JOHN W. WISE

/S/ W. SCOTT GWIN

/S/ SHEILA G. FARMER

JUDGES

JWW/d 0624

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
TIMOTHY MEREDITH	:	
	:	
Defendant-Appellant	:	Case No. 2009 AP 10 0053

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

Costs assessed to Appellant.

/S/ JOHN W. WISE_____

/S/ W. SCOTT GWIN_____

/S/ SHEILA G. FARMER_____

JUDGES