[Cite as *State v. Lawless*, 2009-Ohio-5405.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23126
v.	:	T.C. NO. 2008 CR 2023
BRANDON A. LAWLESS	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 9th day of October, 2009.

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MELISSA M. FORD, Atty. Reg. No. 0084215, Assistant Prosecuting Attorney, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

CHARLES W. SLICER, III, Atty. Reg. No. 0059927, 111 West First Street, Suite 205, Dayton, Ohio 45402
Attorney for Defendant-Appellant

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Brandon A. Lawless, filed December 4, 2008. Lawless appeals from his conviction and sentence after the Common Pleas Court overruled his Motion to Suppress.

{¶ 2} On June 20, 2008, Lawless was indicted on one count of possession of crack

cocaine (one gram, < five grams), in violation of R.C. 2925.11(A), a felony of the fourth degree, and he pled not guilty. After his motion to suppress was overruled, Lawless pled no contest, and he was sentenced to community control sanctions for a period not to exceed five years.

{¶ 3} At the hearing on Lawless' motion to suppress, Joseph Setty, a police officer for the City of Dayton, testified regarding the events giving rise to this matter. According to Setty, on May 11, 2008, at approximately 12:25 a.m., Setty and his partner, Officer Rhodes, were working a gang task force near the intersection of East Fourth Street and Van Lear, "a very high drug and crime area." While patrolling, the officers observed a white Oldsmobile, from a distance of about 15 to 20 feet, traveling westbound on East Fourth Street, and as the driver of the Oldsmobile approached the intersection and stop sign, "he did not stop prior to the sidewalk. He stopped approximately about five, six feet inside the intersection." Setty believed the driver "observed us coming down the street, [and] he immediately slammed on his brakes to stop." According to Setty, "[i]f there's a sidewalk available, you have to stop prior to the sidewalk at a stop sign. Before coming into the intersection."

{¶ 4} Based upon the violation, the officers initiated a traffic stop, and in doing so, they "were able to see furtive movements taking place inside the vehicle as we were exiting our cruiser. [Lawless] was leaning down. It looked like he was reaching underneath the seat. His shoulders leaned down and he was moving quickly."

{¶ 5} Setty approached the driver's side door and "immediately asked [Lawless] to show me his hands. I asked him to step outside the vehicle, asked if I could search him.

He immediately turned around, put his hands upon the car. I then did a pat down on him.

{¶ 6} "As I was going across his jacket area, right-side jacket area, I felt a hard rock-like substance. My experience and training led me to believe it to be crack cocaine." Setty further explained, "Due to the furtive movements, I did a pat down for officer safety. During that pat down, I went across his right jacket pocket and I felt a rock-like substance * * *."

{¶ 7} At the time of the patdown, Setty testified that his concerns were "guns, officer safety."

{¶ 8} Upon feeling the crack cocaine, Setty removed it from Lawless' pocket, "immediately recognized it being crack cocaine," and placed Lawless in handcuffs and under arrest. After further search, Setty located three Zanax pills in Lawless' right coin pocket. Lawless made no statements to Setty, and Setty did not interview Lawless. Setty stated that he has been involved in between 70-80 investigations or arrests involving illegal drugs.

{¶ 9} On cross-examination, Setty testified that Lawless was wearing "kind of a little puffy jacket." Setty testified that he did not squeeze the object in Lawless' pocket or manipulate it in any way prior to removing it. After feeling the "rocky bump," Setty testified, "I believed it to be crack cocaine. Immediately when I felt it, that's exactly what I thought, it was crack cocaine."

{¶ 10} In overruling Lawless' motion to suppress, the trial court determined, "Setty credibly testified that he personally observed Defendant fail to stop prior to the sidewalk at the stop sign. Furthermore, there is no evidence of any pretext with respect to the stop. Thus, the traffic stop which ultimately led to the seizure of the evidence was

constitutionally valid." The trial court further determined that Setty "was justified in conducting a pat-down of Defendant for officer safety. Setty testified that the area was a high crime and high drug area and that he had observed Defendant acting suspiciously as Setty approached the car. Thus, * * * a pat-down search of Defendant was justified for officer safety."

{¶ 11} The trial court further noted that during the pat-down, Setty felt what his knowledge and experience as a police officer indicated to be crack cocaine, and Setty lawfully retrieved it. Following the pat down and Lawless' arrest, the trial court determined, "a more thorough search was legally conducted which yielded the Zanax pills."

{¶ 12} Lawless asserts three assignments of error which we will address together. They are as follows:

{¶ 13} "OFFICERS FOR THE CITY OF DAYTON POLICE DEPARTMENT ILLEGALLY OBTAINED EVIDENCE BY MEANS OF AN ILLEGAL SEARCH AND SEIZURE: THEREFORE, THE TRIAL COURT ERRED WHEN IT OVERRULED MR. LAWLESS' MOTION TO SUPPRESS."

{¶ 14} And,

{¶ 15} "THE OFFICERS DID NOT HAVE AN OBJECTIVELY REASONABLE BELIEF THAT MR. LAWLESS WAS ARMED OR PRESENTLY DANGEROUS THAT WOULD JUSTIFY A PROTECTIVE SEARCH."

{¶ 16} And,

{¶ 17} "OFFICER SETTY EXCEEDED THE SCOPE OF A *TERRY* FRISK BY SQUEEZING, SLIDING AND/OR MANIPULATING THE OBJECT IN MR. LAWLESS'

COAT POCKET; THEREFORE, ANY EVIDENCE OBTAINED AS A RESULT SHOULD HAVE BE[EN] SUPPRESSED BY THE TRIAL COURT."

{¶ 18} According to Lawless, in appealing the trial court's ruling, he "challenges the pat-down, search, and seizure."

{¶ 19} "Appellate courts give great deference to the factual findings of the trier of facts. (Internal citations omitted). At a suppression hearing, the trial court serves as the trier of fact, and must judge the credibility of witnesses and the weight of the evidence. (Internal citations omitted). The trial court is in the best position to resolve questions of fact and evaluate witness credibility. (Internal citations omitted). In reviewing a trial court's decision on a motion to suppress, an appellate court accepts the trial court's factual findings, relies on the trial court's ability to assess the credibility of witnesses, and independently determines whether the trial court applied the proper legal standard to the facts as found. (Internal citations omitted). An appellate court is bound to accept the trial court's factual findings as long as they are supported by competent, credible evidence. (Internal citations omitted)." *State v. Purser*, Greene App. No. 2006 CA 14, 2007-Ohio-192, ¶ 11.

{¶ 20} "Under *Terry* [*v. Ohio* (1968), 392 U.S. 1] an officer is entitled to conduct a limited patdown search of a suspect's outer clothing for weapons if the officer reasonably believes that the suspect might be armed and a danger to the safety of the officer or others. Id. at 28. The officer need not believe that the suspect probably is armed. The test is whether, because of the possibility that the suspect is armed, a reasonably prudent person under the circumstances would be warranted in the belief that his safety or the safety of others was in danger. Id., at

27. A *Terry* weapons frisk must be confined in scope to an intrusion reasonably designed to discover knives, clubs, or other hidden weapons which may be used to assault the officer. Id. It cannot be used as a pretext to search for contraband or evidence of a crime. *State v. Evans*, 67 Ohio St.3d 405, * * * 1993-Ohio-186." *State v. Sears*, Montgomery App. No. 20849, 2005-Ohio-3880, ¶ 32.

{¶ 21} Here, Lawless' furtive and quick movements, leaning down and reaching under the seat inside his vehicle, created a reasonable suspicion that he could be armed and pose a danger to Setty and Rhodes. See *State v. Taylor*, Montgomery App. No. 21839, 2007-Ohio-2413, ¶ 9 ("Furtive movements can provide an officer with reasonable suspicion required to continue the detention because the potential of attack portrays possible criminal activity."); *State v. Neighbors* (Oct. 18, 1996), Montgomery App. No. 15663 ("[T]he forcible stop was justified by the traffic violation. * * * And the unusual movements of the defendant as the officer approached the truck justified his removal from the vehicle.") Further, Lawless was stopped in an area known for high crime and drug activity.

{¶ 22} "Under the plain-feel doctrine, an officer conducting a pat-down for weapons may lawfully seize an object if he has probable cause to believe that the item is contraband. *Minnesota v. Dickerson* (1993), 508 U.S. 366, 375, 113 S.Ct. 2130, L.Ed.2d 334; *State v. Phillips*, 155 Ohio App.3d 149, 2003-Ohio-5742 * * * ¶ 41-42. The 'incriminating character' of the object must be 'immediately apparent.' Id. The officers may not manipulate the object to determine its incriminating nature. Id." *State v. Lawson*, Montgomery App. No. 22557, 2009-Ohio-62, ¶ 25.

{¶ 23} In the course of the pat-down, Setty testified that he felt "a hard,

rock-like substance" that his knowledge and experience indicated was crack cocaine. Lawless draws our attention to the following exchange during Setty's recross-examination to suggest that the identity of the contraband was in fact not immediately apparent to Setty:

{¶ 24} "Q. When you've done pat downs in the past, isn't it true that you felt what you thought to be crack, retrieved it and it's really not. Could be a pill, could be some other substance?

{¶ 25} "A. In all the pat downs I've done, that's correct."

{¶ 26} Our review of the record reveals that the above exchange is taken out of context. Immediately preceding Lawless' recross-examination, the following exchange occurred during redirect:

{¶ 27} "Q. Officer Setty, have you been involved in pat downs in your career where crack cocaine was recovered from an individual's pocket?

{¶ 28} "A. Yes, several.

{¶ 29} "Q. And * * * with regards to those cases, the rocky chunky substance that you felt in the Defendant's pocket, was it consistent with the crack cocaine that you've recovered in your training and experience?

{¶ 30} * *

{¶ 31} "A. Yes."

{¶ 32} Having thoroughly reviewed the record, and deferring to the trial court's assessment of Setty's credibility and the weight of the evidence, we conclude that the trial court's factual findings are supported by competent, credible evidence. Further, we independently conclude that the trial court applied the

correct legal standard to the facts as found. Given Lawless' furtive movements in the course of the traffic stop, Setty was entitled to remove Lawless from the vehicle and conduct a limited patdown. Setty unequivocally testified that the feel of the "hard rock-like" substance in Lawless' jacket was consistent with that of crack cocaine that he has previously recovered. Upon feeling the contraband, Setty was entitled to remove it. Setty testified that he did not squeeze or manipulate the substance, the trial court determined Setty to be credible, and we defer to the trial court's assessment of credibility. Upon arrest and further search, as the trial court correctly noted, Setty was entitled to seize the Zanax pills.

{¶ 33} Since the trial court did not err in overruling Lawless' motion to suppress, Lawless' assigned errors are overruled, and the judgment of the trial court is affirmed.

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BROGAN, J. and GRADY, J., concur.

Copies mailed to:

Melissa M. Ford
Charles W. Slicer, III
Hon. Barbara P. Gorman