[Cite as *State v. Gay*, 2021-Ohio-3308.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellant,

v.

JOHNSON GAY,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 20 MA 0085

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2019 CR 949

BEFORE:
Cheryl L. Waite, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Reversed and Remanded.

Atty. Paul J. Gains, Mahoning County Prosecutor and *Atty. Ralph M. Rivera*, Assistant Chief Prosecuting Attorney, Criminal Division, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellant

Atty. James R. Wise, Hartford & Wise, Co., LPA, 91 W. Taggart, P.O. Box 85, East Palestine, Ohio 44413, for Defendant-Appellee

Dated: September 13, 2021

WAITE, J.

{¶1} Appellant, State of Ohio, appeals a July 22, 2020 decision of the Mahoning County Court of Common Pleas granting Appellee Johnson Gay's motion to suppress evidence obtained during a traffic stop without holding a hearing. The state argues that officers were justified in conducting a pat down of Appellee's person because an officer detected the odor of marijuana and observed loose marijuana inside the vehicle. For the reasons provided, the judgment of the trial court is reversed and this cause is remanded for the trial court to conduct a hearing on the motion to suppress.

Factual and Procedural History

{¶2} On October 25, 2019, Officers C. Stanley and J. Hughes observed a vehicle turn without using a turn signal. Subsequently, the officers initiated a traffic stop of the vehicle. Shane Overton was driving this vehicle. Passenger Jabari Allen was seated in the front and Appellee was seated in the back. During the stop, Officer Stanley detected an odor of marijuana emitting from the vehicle and observed loose marijuana inside. (10/28/19 Complaint, Exh. 1.) The officers ordered all passengers out of the vehicle.

{¶3} Both Overton and Allen consented to a search of their person, which revealed no contraband. The officers then asked Appellee if he had drugs or weapons on his person. Appellee immediately placed his hands inside the back of his pants. The officers instructed him to remove his hands and Officer Stanley immediately patted down the area where Appellee had reached. When Officer Stanley informed Appellee that he felt a large bulge, Appellee reached into the seat of his pants and retrieved a large baggie

containing a white powder consistent with fentanyl. Appellee handed the baggie to the officers and was subsequently arrested. The officers then searched the vehicle and seized the loose marijuana. They also seized two marijuana cigars found in the backseat. Overton was arrested on a capias. Officers did not charge Allen and released him, along with the vehicle.

{¶4} Appellee was indicted on one count of possession of a fentanyl-related compound, a felony of the second degree in violation of R.C. 2925.11(A), (C)(11)(d). He was not charged with any crime related to the marijuana.

{¶5} On March 11, 2020, Appellee filed a motion to suppress the fentanyl found on his person. On July 22, 2020, the trial court sustained the motion. This timely state's appeal followed.

ASSIGNMENT OF ERROR

> COMPETENT AND CREDIBLE EVIDENCE DID NOT SUPPORT THE TRIAL COURT'S DECISION TO GRANT DEFENDANT'S MOTION TO SUPPRESS.

{¶6} The state argues that law enforcement is permitted to initiate a traffic stop of a vehicle if the driver turns without first signaling, pursuant to R.C. 4511.39(A). During a valid traffic stop, the state explains that law enforcement is permitted to order all passengers out of the vehicle. When an officer who is trained to detect the odor of marijuana recognizes such odor, the state contends that officers are then permitted to search the vehicle.

{¶7} In addition, the state argues that officers are permitted to search any persons detained during the stop if it appears the situation presents an exception to the warrant requirement. In this case, officers detected an odor of marijuana coming from the vehicle. In order for officers to obtain a warrant to search Appellee, the state contends that the officers would have been required to allow him to leave, risking the consumption or destruction of any evidence. Thus, the state contends that the search was permissible based on the exigency exception to the warrant requirement pursuant to *State v. Moore,* 90 Ohio St.3d 47, 734 N.E.2d 804 (2000). At oral argument, the state additionally argued that the patdown of Appellee was authorized due to concerns regarding the officers' safety.

{¶8} In response, Appellee urges that a heightened analysis is required where the search of a person occurs. Appellee appears to argue that the mere presence of drugs in a vehicle does not, alone, permit the search of a passenger. Appellee does not respond to the state's exigency argument.

{¶9} The trial court did not conduct a hearing on this matter. The court's judgment entry is sparse, but it appears that the court based its decision on the "lack of probable cause and standing to search" Appellee. (7/22/20 J.E.) It is unclear what the trial court meant by the officer's "standing" to conduct a search. The court agreed with Appellee, without including specific findings of fact or any type of analysis, that Appellee was the backseat passenger in a vehicle stopped for a minor traffic infraction and was not observed committing a crime. *Id.*

{¶10} A motion to suppress presents mixed issues of law and fact. *State v. Lake*, 151 Ohio App.3d 378, 2003-Ohio-332, 784 N.E.2d 162, ¶ 12 (7th Dist.), citing *State v.*

Jedd, 146 Ohio App.3d 167, 171, 765 N.E.2d 880 (4th Dist. 2001.) If a trial court's findings of fact are supported by competent, credible evidence, an appellate court must accept them. *Id*. The court must then determine whether the trial court's decision met the applicable legal standard. *Id*.

{¶11} There are two types of valid traffic stops: (1) where police have probable cause to believe that a traffic violation has occurred or is occurring and (2) where police have reasonable articulable suspicion that criminal activity has occurred. *State v. Ward*, 7th Dist. Columbiana No. 10 CO 28, 2011-Ohio-3183, ¶ 35, citing *Dayton v. Erickson*, 76 Ohio St.3d 3, 11, 665 N.E.2d 1091 (1996); *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

{¶12} Here, the officers initiated a traffic stop after observing the vehicle turn without first activating a turn signal. "An officer's observation that a vehicle failed to properly use a turn signal constitutes both reasonable suspicion and probable cause to justify a traffic stop." *Ward, supra*, at ¶ 37, citing *State v. McComb*, 2d Dist. Montgomery No. 21963, 2008-Ohio-425; *State v. Steen*, 9th Dist. Summit No. 21871, 2004-Ohio-2369. As such, the traffic stop was valid.

{¶13} Law enforcement's ability to order passengers out of a vehicle during a traffic stop was addressed in *State v. Davis,* 2020-Ohio-4821, 159 N.E.3d 1208 (7th Dist.). Pursuant to *Davis,* "during a valid traffic stop, officers may order the occupants of a vehicle out of the vehicle pending completion of the stop without violating the Fourth Amendment." *Id.*, at ¶ 17*,* citing *State v. Chapman,* 2019-Ohio-3339, 131 N.E.3d 1036, ¶ 37 (7th Dist.); *Maryland v. Wilson*, 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997). Importantly, we have previously acknowledged the application of this rule to passengers

of a vehicle even if the reason for the traffic stop is attributable only to the driver. *State v. Koczwara*, 7th Dist. Mahoning No. 13 MA 149, 2014-Ohio-1946, ¶ 19, citing *Wilson*, 519 U.S. at 413-415, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997).

{¶14} As such, law enforcement properly ordered Appellee out of the vehicle during the encounter. Hence, the trial court's decision to suppress the evidence apparently based on the stated rationale that Appellee was a mere passenger in a vehicle stopped for a minor traffic infraction and was not observed committing a crime is clearly erroneous. This does not end our analysis, however.

{¶15} The issue remains whether the officers properly conducted a patdown search of Appellee. We note that officers did not physically remove the contraband from Appellee's pants. One of the officers informed Appellee that he discovered a large "bulge" during the patdown. Immediately thereafter, Appellee voluntarily removed the contraband and handed it to the officers.

{¶16} In order to be valid, a search must be supported by a warrant or be based on a recognized exception to the warrant requirement. *State v. Ambrosini*, 7th Dist. Mahoning Nos. 14 MA 155, 14 MA 156, 2015-Ohio-4150, ¶ 8, citing *Katz v. U.S.*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). In Ohio, there are seven recognized exceptions to the warrant requirement: (1) a search incident to a lawful arrest; (2) consent; (3) the stop-and-frisk doctrine; (4) hot pursuit; (5) probable cause plus the presence of exigent circumstances; (6) the plain view doctrine; and (7) administrative searches. *State v. McG*ee, 7th Dist. Mahoning, 2013-Ohio-4165, 996 N.E.2d 1048, ¶ 17, citing *State v. Akron Airport Post No. 8975*, 19 Ohio St.3d 49, 51, 482 N.E.2d 606 (1985).

{¶17} Here, the trial court decided the merits of the motion based solely on the parties' sparse "briefs" and a one-page investigative report in lieu of holding a hearing. It is unclear why the trial court chose to forgo holding an actual hearing. The parties suggest that a hearing on the matter may have been cancelled by the court, however, the record does not provide much guidance, as it appears that certain events may have been left off the docket. On July 17, 2020, just after the parties filed their briefs on the motion to suppress, the trial court held an unscheduled pretrial conference.

{¶18} It appears that this conference may have been held to address the motion, but in what manner is unclear from the limited record. The court's corresponding judgment entry does not provide an explanation, instead stating that "[t]he Motion to Suppress has been taken under advisement." (7/21/20 J.E.) While the specifics of the conference are unclear, it can be gleaned that counsel for the parties and the trial court discussed the motion and likely addressed details surrounding the court's decision to forgo a hearing. However, there is nothing to suggest that either party waived such a hearing. Although the parties have suggested on appeal that the trial court acted *sua sponte* for reasons related to COVID concerns, none of this information is within this record.

{¶19} Pursuant to Crim.R. 12, "[t]he court may adjudicate a motion based upon briefs, affidavits, the proffer of testimony and exhibits, a hearing, or other appropriate means." Here, the trial court relied on the parties' "briefs," each of which were limited to two pages, and a one-page investigative report. There was no proffer of testimony by any witness. Given that the report was very sparse and contained few details and gave no indication of the officers' thought processes, and given the complexity of the issues

concerned in this matter, the trial court was clearly armed with insufficient information to determine these fact-intensive issues and testimony was crucial. Because the trial court ended its analysis prematurely and the record is sparse, we are unable to conclusively analyze the parties' arguments on appeal.

{¶20} We can determine that Appellee is correct that the search of a person involves a heightened analysis. See *Moore,* 90 Ohio St.3d at 51, 734 N.E.2d 804. The state posits that the patdown was authorized based on two grounds: exigent circumstances and officer safety. Beginning with the exigency argument:

> The exigent or emergency circumstances exception to the warrant requirement applies in a variety of situations, including when entry into a building is necessary to protect or preserve life, to prevent physical harm to persons or property, or to prevent the concealment or destruction of evidence, or when officers are in "hot pursuit" of a fleeing suspect or someone inside poses a danger to the police officer's safety. (Emphasis deleted.)

State v. Reilly, 3d Dist. Seneca No. 13-19-28, 2020-Ohio-850, ¶ 12.

{¶21} "A warrantless search is also justified if there is imminent danger that evidence will be lost or destroyed if a search is not immediately conducted." *Moore*, at 52, citing *Cupp v. Murphy*, 412 U.S. 291, 294-296, 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973). "Because marijuana and other narcotics are easily and quickly hidden or destroyed, a warrantless search may be justified to preserve evidence." *Moore*, at 52, citing *United States v. Wilson*, 36 F.3d 205 (C.A.1, 1994); *United States v. Fields*, 113 F.3d 313 (C.A.2,

1997); *United States v. Grissett*, 925 F.2d 776 (C.A.4, 1991); *United States v. Gaitan-Acevedo*, 148 F.3d 577 (C.A.6, 1998); *United States v. Parris*, 17 F.3d 227 (C.A.8, 1994).

{¶22} In *Moore,* the Court found exigent circumstances existed where an officer detected the smell of burning marijuana during a traffic stop. *Id.* at 52. The Court emphasized that the officer was alone at the time of the stop and, in order to secure a warrant, would have been required to leave the vehicle unaccompanied, leading to the likely scenario that the drugs would be destroyed. Thus, the Court found "compelling reasons" supported the search: the fact that the defendant would be unaccompanied, the "dissipation of the marijuana odor," and the potential loss or destruction of evidence. *Id.* at 52.

{¶23} Here, there were two officers involved, Officers C. Stanley and J. Hughes. The officers observed the vehicle turn without using a turn signal and initiated a traffic stop. As the officers spoke to the driver, Officer Stanley detected the odor of marijuana and observed loose marijuana in plain sight inside the vehicle. Overton acknowledged that he and his two passengers had smoked marijuana earlier that day, however, there is no indication that the officers smelled marijuana burning during the encounter.

{¶24} Allen and Overton each consented to a search of their person and no contraband was found on either. When the officers asked Appellant if he had marijuana or weapons on his person, he immediately placed his hands inside the back of his pants. The officers instructed him to remove his hands and conducted a patdown around the area where he had just placed his hands. Officers felt a "large bulge" and relayed this finding to Appellee who then voluntarily reached into the seat of his pants and retrieved

a large baggie containing a white powder and handed it to the officers. (10/28/19 Complaint, Exh. 1.)

{¶25} The state heavily relies on *Moore* to establish exigent circumstances. However, the *Moore* Court relied on the fact that only one officer was present at the scene. The court rationalized that a single officer risked the possibility of the consumption or destruction of evidence if forced to leave the scene to secure a warrant. In the instant matter, there were two officers present. As such, one officer could have secured a warrant while the other waited with Appellee and the vehicle to prevent the destruction of evidence, although we note that there were three persons detained in this stop and this course of action may, in itself, raise safety concerns. The *Moore* Court also relied on the fact that the officers smelled burning marijuana, thus the increased potential for the consumption and destruction of evidence. Here, there is no testimony and so no specific evidence that the smell detected by the officers was of marijuana burning. Consequently, and again without testimony from the officers, this record may not establish the existence of exigent circumstances.

{¶26} At oral argument, the state additionally argued that the officers conducted a valid patdown of Appellee for purposes of officer safety, and Appellee then voluntarily produced the drugs. We note that Appellee did not contest the search of his person in his motion to suppress. Instead, he argued that law enforcement improperly ordered him out of the car and placed him in a position where a patdown may occur. The trial court apparently agreed with Appellee. However, as earlier discussed, the officers properly initiated the traffic stop and ordered the passengers out of the vehicle.

{¶27} According to the United States Supreme Court;

> “When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others,” the officer may conduct a patdown search “to determine whether the person is in fact carrying a weapon.” “The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence ...” Rather, a protective search - permitted without a warrant and on the basis of reasonable suspicion less than probable cause - must be strictly limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby.” If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed. (Internal citations omitted.)

Minnesota v. Dickerson, 508 U.S. 366, 373, 113 S.Ct. 2130, 2136, 124 L.Ed.2d 334 (1993).

{¶28} Here, Officer Stanley stated in his report that after asking Appellee if he had drugs or weapons on his person he “immediately placed both of his hands inside his pants near his buttocks which we advised him to remove them.” (10/28/19 Complaint, Exh. 1.) Based on this behavior, “[a] pat down of Appellee by Officer Hughes revealed a large bulge not constituent with the male anatomy near his buttocks, which is where he reached his hands prior.” (10/28/19 Complaint, Exh. 1.)

{¶29} However, the bare recitation of these facts, alone, does not allow us to conclusively determine whether the officers had reason to fear for their safety. This finding on our part would be speculative based on this very limited record. Again, the trial

court did not hold a hearing on this issue or hear testimony by the officers. Instead, the trial court ended its analysis after apparently determining, erroneously, that the officers improperly ordered Appellee out of the vehicle. Because this decision is erroneous and the record incomplete absent an evidentiary hearing, the decision of the trial court is reversed and this matter is remanded for further proceedings.

Conclusion

{¶30} The state argues that the trial court improperly suppressed evidence seized as a result of a lawful traffic stop. For the reasons provided, the state's arguments have partial merit. The decision of the trial court is reversed and the matter is remanded for purposes of holding a suppression hearing.

Donofrio, P.J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is sustained and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is reversed. We hereby remand this matter to the trial court for further proceedings according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellee.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.