[Cite as *State v. Morris*, 2010-Ohio-1383.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 09AP-751
v.	:	(C.P.C. No. 08CR-09-6795)
Bryan K. Morris,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 31, 2010

Ron O'Brien, Prosecuting Attorney, and *John H. Cousins IV*, for appellee.

Yeura R. Venters, Public Defender, and *Paul Skendelas*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Defendant-appellant, Bryan K. Morris, appeals from the judgment of the Franklin County Court of Common Pleas finding him guilty, pursuant to his no-contest plea, of one count of possession of cocaine, a fifth-degree felony, in violation of R.C. 2925.11, following the trial court's denial of appellant's motion to suppress evidence seized during a warrantless search of his person.

{¶2} On September 15, 2008, a Franklin County Grand Jury indicted appellant on one count of possession of cocaine, a fifth-degree felony. Appellant filed two motions

to suppress the evidence, contending it was seized pursuant to an unlawful search of his person.

{¶3} The relevant facts of this matter, which were set forth at the May 28, 2009 suppression hearing, are as follows. At approximately 9:20 p.m. on May 10, 2008, Columbus Police Officers Waltermyer and Lingofelter stopped a vehicle traveling 40 m.p.h. in a 25 m.p.h. zone in the area of East Fifth Avenue and North Fifth Street. As Officer Waltermyer approached the stopped vehicle, he noticed that the passenger, later identified as appellant, was not wearing a seat belt. The officers asked both the driver and appellant to provide identification. Both complied with the request without incident.

{¶4} A LEADS check revealed that the driver's operator's license was under suspension. The officers approached the vehicle again, ordered the driver to exit the vehicle, and arrested him for driving under suspension. At this time, Officer Waltermyer observed appellant attempting to conceal an open container of alcohol between his feet on the floorboard.

{¶5} The officers ordered appellant to remain seated in the vehicle as they escorted the driver back to their cruiser to process the arrest. Shortly thereafter, appellant attempted to exit the vehicle. The officers ordered him to remain inside. Three to four minutes later, appellant again attempted to exit the vehicle; the officers again ordered him to remain inside. Following appellant's third attempt to exit the vehicle, Officer Waltermyer surmised that there was a weapon in appellant's possession or inside the vehicle. Accordingly, he and his partner ordered appellant to exit the vehicle.

{¶6} According to Officer Waltermyer, when appellant exited the vehicle, he "grabbed" the left side of his pants as if he "didn't want us to touch that side of his body."

(Tr. 12.) Officer Waltermyer testified that appellant's conduct suggested that "he might have had a weapon on him." (Tr. 12.) Appellant also appeared to be "very nervous." (Tr. 12.)

{¶7} Based on these circumstances, Officer Waltermyer conducted a pat down search. Indeed, Officer Waltermyer testified that "I had to make sure myself and my partner were safe." (Tr. 12.) During the pat down, Officer Waltermyer felt a "long, hard, round object" (Tr. 13) and a "hard square object" (Tr. 14) in appellant's left front pants pocket. Officer Waltermyer testified that in his eight-year experience as a police officer, he had often found long cylindrical objects to be knives, box cutters, razors or pen guns. Because Officer Waltermyer could not discern from the pat down whether either or both of the objects were weapons, he removed them from appellant's pocket "to verify they weren't a weapon." (Tr. 13.) The cylindrical object was a pen; the square object was a cardboard cigarette box with the top removed. Officer Waltermyer looked inside the cigarette box and discovered a baggie containing a white rock-like substance that appeared to be crack cocaine. Thereafter, Officer Waltermyer placed appellant under arrest.

{¶8} Upon this evidence, the trial court orally denied appellant's motion to suppress, concluding that the search of appellant and subsequent seizure of the crack cocaine was reasonable. After a brief recess, appellant entered a no-contest plea to the indicted charge. The trial court accepted appellant's plea and found him guilty. On May 29, 2009, the trial court filed an entry journalizing its decision denying appellant's motion to suppress. Following a July 10, 2009 sentencing hearing, the trial court sentenced appellant to two years of community control.

{¶9} Appellant timely appeals and presents a single assignment of error for our review:

> The trial court erred in failing to suppress evidence taken in an unlawful seizure. This decision violated the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 14 of the Ohio Constitution.

{¶10} Appellant's assignment of error contends that the trial court erred in denying his motions to suppress. "A motion to suppress is a device used to eliminate from a criminal trial evidence that has been secured illegally, generally in violation of a particular amendment to the United States Constitution." *State v. Reed,* 10th Dist. No. 05AP-35, 2005-Ohio-4678, ¶8, citing *State v. French* (1995), 72 Ohio St.3d 446, 449. Appellate review of a trial court's decision regarding a motion to suppress evidence involves mixed questions of law and fact. *State v. Reedy,* 10th Dist. No. 05AP-501, 2006-Ohio-1212, ¶5, citing *State v. Lloyd* (1998), 126 Ohio App.3d 95, 100-01. Because the trial court is in the best position to weigh the credibility of the witnesses, "we must uphold the trial court's findings of fact if they are supported by competent, credible evidence." *Reedy* at ¶5, citing *State v. Klein* (1991), 73 Ohio App.3d 486, 488. We nonetheless must independently determine, as a matter of law, whether the facts meet the applicable legal standard. *Reedy* at ¶5, citing *State v. Claytor* (1993), 85 Ohio App.3d 623, 627.

{¶11} The Fourth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, and Section 14, Article I, of the Ohio Constitution prohibit the government from conducting warrantless searches and seizures, rendering them per se unreasonable unless an exception applies. *State v. Mendoza,* 10th Dist. No. 08AP-645, 2009-Ohio-1182, ¶11, citing *Katz v. United States* (1967), 389

U.S. 347, 357, 88 S.Ct. 507, 514. "Evidence is inadmissible if it stems from an unconstitutional search or seizure." *State v. Carrocce*, 10th Dist. No. 06AP-101, 2006-Ohio-6376, ¶27, citing *Wong Sun v. United States* (1963), 371 U.S. 471, 484-85, 83 S.Ct. 407, 416. The state bears the burden of establishing the validity of a warrantless search. *State v. Moyer,* 10th Dist. No. 09AP-434, 2009-Ohio-6777, ¶10, citing Xenia *v. Wallace* (1988), 37 Ohio St.3d 216, paragraph two of the syllabus.

{¶12} One exception to the warrant requirement is set forth in *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868. Under *Terry,* in order to conduct an investigative stop, a police officer must have a reasonable suspicion, based on specific and articulable facts, that an individual is or has been engaged in criminal activity. Id. at 392 U.S. at 21, 88 S.Ct. at 1878. "The propriety of an investigative stop by a police officer must be viewed in light of the totality of the surrounding circumstances." *State v. Bobo* (1988), 37 Ohio St.3d 177, paragraph one of the syllabus. The Supreme Court of Ohio reiterated this standard in *State v. Andrews* (1991), 57 Ohio St.3d 86, emphasizing that the surrounding circumstances are to be evaluated "through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold." Id. at 87-88. In this regard, a reviewing court "must give due weight to [the officer's] experience and training and view the evidence as it would be understood by those in law enforcement." Id. at 88.

{¶13} Appellant does not contest the legality of the initial stop, so we need only briefly examine it. Officer Waltermyer's testimony that the vehicle in which appellant was a passenger was traveling 40 m.p.h. in a 25 m.p.h. zone is uncontroverted. Traffic violations automatically justify a brief stop and detention. *State v. Fleeman*, 4th Dist. No. 00CA43, 2001-Ohio-2368. Thus, the initial stop of the vehicle and the investigation of the

driver and passenger were lawful. See *Arizona v. Johnson* (2009), ___ U.S. ___, 129 S.Ct. 781, 784 ("For the duration of a traffic stop * * * a police officer effectively seizes 'everyone in the vehicle,' the driver and all passengers.")

{¶14} Having concluded that the investigative stop was supported by at least a reasonable suspicion, we turn now to the propriety of the pat down. Appellant contends that Officer Waltermyer lacked any reasonable basis to perform the pat down. We disagree.

{¶15} Under *Terry*, a police officer may conduct a limited pat down of a person who is legally stopped if the officer reasonably believes that "the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or others." *Terry*, 392 U.S. at 24, 88 S.Ct. at 1881. Thus, "[w]here a police officer, during an investigative stop, has a reasonable suspicion that an individual is armed based on the totality of the circumstances, the officer may initiate a protective search for the safety of himself and others." *Bobo,* paragraph two of the syllabus. Furthermore, "[t]he officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry*, 392 U.S. at 27, 88 S.Ct. at 1883. "An officer cannot conduct a protective search as a pretext for a search for contraband, a search for convenience, or as part of his or her normal routine or practice." *State v. Stamper,* 7th Dist. No. 03-MA-144, 2004-Ohio-5366, ¶12. "The sole justification of the search * * * is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns,

knives, clubs, or other hidden instruments for the assault of the police officer." *Terry,* 392 U.S. at 29, 88 S.Ct. at 1884.

{¶16} Officer Waltermyer testified that appellant disobeyed police three times by repeatedly exiting the stopped vehicle and that this conduct made him "think there's a weapon in his possession." (Tr. 12.) He further testified that after he ordered appellant to exit the vehicle, appellant appeared to be "very nervous." Some degree of nervousness during interactions with police officers is not unexpected. *State v. Atchley,* 10th Dist. No. 07AP-412, 2007-Ohio-7009, ¶14, citing *State v. Ely*, 8th Dist. No. 86091, 2006-Ohio-459, ¶20. However, "nervousness can be a factor to weigh in determining reasonable suspicion." *Atchley* at ¶14*,* citing *State v. Grant*, 9th Dist. No. 06CA0019-M, 2007-Ohio-680, ¶11.

{¶17} Officer Waltermyer also testified that appellant "grabbed" at the left side of his pants as if to shield that portion of his body from him. Officer Waltermyer testified that appellant's actions in this regard suggested that he might be carrying a weapon. Ohio courts have held that similar actions by a suspect justify a pat down. See, e.g., *State v. Grundy,* 2d Dist. No. 2008 CA 62, 2009-Ohio-4950, ¶18 (act of reaching into pocket led police officer to fear for his safety, believing defendant may have been armed); *State v. Elliott*, 8th Dist. No. 92324, 2010-Ohio-241, ¶19 (officer's observing defendant making furtive gestures as if he were shoving something into his waistband, coupled with defendant acting very nervous, justified *Terry* frisk); *State v. Carlisle*, 4th Dist. No. 07CA16, 2008-Ohio-744, ¶14 (defendant's furtive movement toward right pocket, along with other factors, justified pat down for weapons). See also *State v. Ramey* (1971), 30 Ohio Misc. 89, 94 (if person made unusual movement toward pocket prior to officer's

decision to conduct pat down, search of pocket would be valid but movement toward pocket after officer started pat down could not form any part of basis justifying search).

{¶18} Furthermore, Officer Waltermyer observed additional facts that supported the reasonableness of the pat down. He described appellant's height as 5'10 or 5'11 and weight as exceeding 350 pounds. At least one court has recognized that a suspect's "large stature" may reasonably heighten an officer's concern for his safety. *State v. Armstrong* (1995), 103 Ohio App.3d 416, 423, citing *State v. Gibson* (Dec. 7, 1994), 9th Dist. No. 16699. Appellant's large size thus heightened the need for Officer Waltermyer to take reasonable precautionary measures.

{¶19} Moreover, the totality of the circumstances may include the officer's experience on the police force. *State v. Stiles,* 11th Dist. No. 2002-A-0078, 2003-Ohio-5535, ¶17, citing *Bobo* at 179; *Andrews* at 88. We note that Officer Waltermyer had eight years experience as a Columbus police officer.

{¶20} Viewing Officer Waltermyer's observations though the eyes of an experienced, reasonable and prudent police officer who must react to events as they unfold, appellant's behavior could reasonably have led Officer Waltermyer to suspect that appellant posed a danger to his and his partner's safety. The record contains competent, credible evidence that Officer Waltermyer was aware of specific facts that suggested that appellant might be armed and dangerous. Indeed, Officer Waltermyer testified that he performed the pat down "to make sure myself and my partner were safe." (Tr. 12.) Thus, the trial court properly found that the pat-down search was constitutionally permissible.

{¶21} Appellant next contends that even if the pat down was constitutionally permissible, the scope of the search violated the Fourth Amendment. Specifically,

appellant contends that Officer Waltermyer had no reasonable belief that the objects discovered during the pat down were weapons. We disagree.

{¶22} When a police officer conducts a protective *Terry* frisk, the pat down is limited to its protective purpose and cannot be used to search for evidence of crime. *State v. Evans*, 67 Ohio St.3d 405, 414, 1993-Ohio-186. In *Evans,* the Supreme Court of Ohio noted, at 415:

> [I]t is important first to emphasize that *Terry* does not require that the officer be absolutely convinced that the object he feels is a weapon before grounds exist to remove the object. At the same time, a hunch or inarticulable suspicion that the object is a weapon of some sort will not provide a sufficient basis to uphold a further intrusion into the clothing of a suspect. When an officer removes an object that is not a weapon, the proper question to ask is whether that officer reasonably believed, due to the object's "size or density," that it could be a weapon. 3 LaFave, Search and Seizure (2 Ed. 1987) 521, Section 9.4(c).
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> "Under the better view, then, a search is not permissible when the object felt is soft in nature. If the object felt is hard, then the question is whether its 'size or density' is such that it might be a weapon. But because 'weapons are not always of an easily discernible shape,' it is not inevitably essential that the officer feel the outline of a pistol or something of that nature. Somewhat more leeway must be allowed upon 'the feeling of a hard object of substantial size, the precise shape or nature of which is not discernible through outer clothing,' which is most likely to occur when the suspect is wearing heavy clothing." (Footnotes omitted.) *Id.* at 523.

{¶23} The court further stated that " '[i]f by touch the officer remains uncertain as to whether the article producing the bulge might be a weapon, he is entitled to remove it.' " Id. at 416, quoting *United States v. Oates* (C.A.2, 1977), 560 F.2d 45, 62. The court held that "when an officer is conducting a lawful pat-down search for weapons and discovers an object on the suspect's person which the officer, through his or her sense of

touch, reasonably believes could be a weapon, the officer may seize the object as long as the search stays within the bounds of *Terry*." *Evans* at 416.

{¶24} In *Evans,* the officer conducting a pat-down search felt a "hard" object in Evans' pocket and was unable to conclude whether the object was a knife or other weapon. Id. at 415. Although the object in *Evans* ultimately turned out to be a wad of money and a small packet of crack cocaine, the Supreme Court of Ohio upheld the search. Because the object found in Evans's pocket was of such size and density that the officer could not discount the possibility that it was a weapon, the court found that the search complied with *Terry.* Id.

{¶25} In the present case, Officer Waltermyer testified that during the pat down he felt a "long, hard, round object" and that he "could not identify what it was inside of his pocket." (Tr. 13.) He also felt a "hard square object" that he "couldn't tell what that was at all. * * * I couldn't tell if it was a weapon or not. I couldn't identify it." (Tr. 13-14.) He further stated that he had "no idea" what the objects could be. (Tr. 14.) He also testified that in his experience, long, cylindrical items can often be knives, box cutters, razors or pen guns. Since Officer Waltermyer remained uncertain, through his sense of touch, as to whether the articles were weapons, and reasonably believed, from his experience, that they could be weapons, he was entitled to remove them.

{¶26} Appellant argues that Officer Waltermyer's testimony that he was unable to identify the objects in appellant's pocket as a pen and cigarette box lacks credibility. However, in suppression hearings, credibility determinations are left to the trier of fact. *Reedy* at ¶5. The trial court apparently found Officer Waltermyer's testimony to be

credible, and appellant points to no other evidence suggesting that such testimony was untruthful.

{¶27} Appellant also argues that the cigarette box was pliable, and thus it was unreasonable for Officer Waltermyer to have believed it to be a weapon. However, Officer Waltermyer testified that both objects were hard, and his testimony is subject to the trial court's credibility determination. Regardless, the objects in appellant's pocket were similar in nature to those in *Evans.* The officer in *Evans* testified that he felt a "large bulk" in Evans's left pocket that felt "like a rock substance." *Evans* at 415. While the "bulk" was actually a wad of money and a baggie of crack cocaine, the officer stated that he could not rule out that it was not a knife because he had "seen knives come in all shapes and sizes." Id. Based on this uncertainty, the court upheld the search, concluding that "it was reasonable for [the officer] to believe the object could be a weapon." Id.

{¶28} Appellant correctly points out that *Evans* cautions against authorizing the removal of a soft object that the officer knows or reasonably should know is not itself a weapon on the grounds that it may contain a small weapon such as a razor blade. However, as appellee notes, the court did not create a gun-only justification. Indeed, the court accepted the officer's belief that the wad of money could have been a knife. Further, Officer Waltermyer did not testify that the objects he felt were soft and could have contained a small weapon such as a razor blade. Rather, Officer Waltermyer stated that the objects he felt were hard and consistent in size and density with a knife, box cutter, razor or pen gun.

{¶29} Appellant further contends that even if the pat down and seizure of the items was constitutionally permissible, Officer Waltermyer should not have been permitted to further examine the contents of the cigarette box. The state urges that such examination was permissible under the plain-view doctrine. We agree.

{¶30} "Under the plain-view doctrine, an officer may seize an item without a warrant if the initial intrusion leading to the discovery of the item was lawful and it was immediately apparent that the item was incriminating." *State v. Suber* (1997), 118 Ohio App.3d 771, 779, citing *State v. Waddy* (1992), 63 Ohio St.3d 424, 442. We have already determined that the initial intrusion leading to the discovery of the cigarette box was lawful. Officer Waltermyer testified that the top of the cigarette box had been removed, revealing what he immediately recognized as crack cocaine. No evidence suggests that the baggie of crack cocaine was concealed in any way within the cigarette box.

{¶31} Appellant's case citations are unavailing. In *State v. Cantelupe* (June 28, 2000), 7th Dist. No. 99-511 CA, the court invalidated the search on separate grounds, holding that the police lacked reasonable suspicion to conduct the pat down. The court stated that "[t]he officer admitted that after appellee was removed from the vehicle and his hands were placed on the hood of the car, he was no longer concerned for his safety. Yet, he continued to frisk appellee." Then, in a footnote, the court noted that it was questionable whether the officer properly opened the pack of cigarettes. The court's dicta does not affect the present case. As explained above, the stop, pat down and retrieval of the items were all justified, and, unlike the officer in *Cantelupe,* Officer Waltermyer did not "open" the box of cigarettes. The top of the box had already been removed, revealing what was "immediately apparent" to Officer Waltermyer to be crack cocaine.

{¶32} The other cases upon which appellant relies are similarly distinguishable. In *State v. Ciszewski* (Jan. 29, 1999), 5th Dist. No. 97GCA17, the court held that a frisk exceeded the permissible scope where the officer, who did not suspect that a cigarette package felt like a weapon or contained a weapon, removed and opened it. In *State v. Krum* (Sept. 1, 1993), 2d Dist. No. 13668, the court held that the trooper was not justified in deliberately removing a cigarette package from the appellant's front jeans pocket when he was certain that the package was not and did not contain a weapon. The court in *State v. Stoken* (Jan. 25, 1989), 1st Dist. No. C-880006, found that because the officers did not feel that the defendant was armed and dangerous, were not fearful for their safety, and were not concerned that the retrieved cigarette pack contained weapons, the search was outside the boundaries of a *Terry* stop and frisk. Based on the circumstances here, Officer Waltermyer properly seized the crack cocaine pursuant to the plain-view doctrine.

{¶33} For all the foregoing reasons, we conclude that the trial court did not err in overruling appellant's motion to suppress. Accordingly, we overrule appellant's single assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and KLATT, JJ., concur.

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