

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellant, : CASE NO. CA2009-08-041
 :
 - vs - : OPINION
 : 4/26/2010
 :
 EARL J. CHRISTOPHER, :
 :
 Defendant-Appellee. :

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2009CR00211

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffmann, 123 N. Third Street, Batavia, Ohio 45103-3033, for plaintiff-appellant

R. Daniel Hannon, Clermont County Public Defender, Robert F. Benintendi, Assistant Public Defender, 10 S. Third Street, Batavia, Ohio 45103, for defendant-appellee

YOUNG, P.J.

{¶1} Plaintiff-appellant, the state of Ohio, appeals the decision of the Clermont County Court of Common Pleas, granting the motion to suppress of defendant-appellee, Earl J. Christopher.

{¶2} On March 2, 2009, Officer Shane Beninger of the Bethel Police Department was patrolling the Starling Road Apartment complex in Clermont County, an area reputed for high illegal drug activity. While Officer Beninger stood beside his

marked police cruiser in the apartment parking lot, appellee drove past him. As appellee passed Officer Beninger, he gripped the steering wheel with "an extremely tight grip" and avoided eye contact with the officer. Recognizing appellee from a prior marijuana-related incident, Officer Beninger continued to observe appellee as he parked his car. In the past, Officer Beninger had received at least ten tips that appellee was "one of the main suppliers of heroin in the [apartment] complex," including information from two reliable informants that appellee used a black Saturn with "front-end damage" to transport the heroin from Cincinnati back to the Starling Road Apartments, where he would "cut it up, repackage it, and resell it." Acting on this information, Officer Beninger pulled his cruiser behind appellee's vehicle to speak to him.

{¶3} As Officer Beninger approached appellee from approximately ten feet away, he witnessed appellee holding an unidentified object in his open palm. Officer Beninger testified that appellee suddenly turned away from him and placed the object into his mouth. Officer Beninger immediately placed appellee in a chokehold and ordered him to spit out the object, but appellee refused, stating that he had just lost a tooth. When the officer threatened to use his taser, appellee spit the object out of his mouth, revealing an orange balloon containing what was later determined to be heroin.

{¶4} Officer Beninger subsequently handcuffed appellee and administered his *Miranda* rights. Approximately ten minutes after appellee was arrested, the officer asked him for consent to search his apartment. Appellee signed a "consent to search" form after the officer read the form to him. Various drugs and paraphernalia were found during the search of appellee's apartment.

{¶5} Appellee was indicted for one count each of trafficking in heroin in the

vicinity of a school in violation of R.C. 2925.03(A)(2), a felony in the fourth degree, possession of heroin in violation of R.C. 2925.11(A), a felony in the fifth degree, and aggravated possession of drugs in violation of R.C. 2925.11(A), a felony in the fifth degree. Prior to trial, appellee moved to suppress all evidence obtained as a result of his seizure and subsequent search of his apartment. After holding a hearing on the matter, the trial court granted appellee's motion to suppress.

{¶6} In a lengthy written decision, the trial court concluded that the facts known to Officer Beninger at the time of the stop did not justify the warrantless seizure and search of appellee's mouth for drugs. Specifically, the trial court concluded that Officer Beninger could not have identified the item in appellee's mouth with enough specificity to reasonably conclude that the object was a heroin balloon prior to forcing appellee to spit out the item. Thus, the trial court held that without additional facts showing that a crime was being committed or that appellee was engaged in suspected drug-related activity, Officer Beninger lacked "probable cause to arrest [appellee] or probable cause to believe that the object [appellee] placed in his mouth was heroin, [therefore] the exigent circumstances and emergency aid exceptions to the warrant requirement are not applicable. As a result, the evidence obtained as a result of those actions is 'fruit of the poisonous tree' and must be suppressed."

{¶7} The state timely appealed the trial court's decision and raises one assignment of error for review:

{¶8} "THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION TO SUPPRESS."

{¶9} The state presents three arguments related to the motion to suppress. First, the state argues that the trial court's decision should be overruled because its

factual findings were not supported by competent, credible evidence. Secondly, the state argues that the trial court misapplied the "totality of the circumstances" test in determining that Officer Beninger lacked probable cause to search appellee's mouth for drugs without a warrant. Lastly, the state contends that appellee's consent to search his apartment was voluntary.

{¶10} An appeal from a ruling on a motion to suppress "presents a mixed question of law and fact." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. When considering a motion to suppress, the trial court is the primary judge of the credibility of witnesses and the weight of the evidence. *London v. Dillion* (Mar. 29, 1999), Madison App. No. CA98-07-026, at 2. If the trial court's findings are supported by competent and credible evidence, then the appellate court must accept them. *Id.* Relying on the trial court's factual findings, the appellate court then determines "without deference to the trial court, whether the court has applied the appropriate legal standard." *Id.*

COMPETENT AND CREDIBLE EVIDENCE

{¶11} The state first contends that competent, credible evidence does not exist to support the trial court's finding that Officer Beninger was incapable of observing the size, shape and color of the object prior to forcing appellee to spit it out of his mouth. Thus, the state argues, the trial court had no basis to find that Officer Beninger was acting on a mere "hunch that the object [appellee] placed in his mouth likely contained drugs due to [appellee's] reputation."

{¶12} After careful review of the record, we accept the trial court's findings of fact as they are supported by competent, credible evidence. Here, the trial court's determination that Officer Beninger could not identify the "shape or color of the item" until after he forced appellee to spit it from his mouth is sufficiently supported by the

evidence. Specifically, appellee was standing approximately ten feet away when he turned his back to Officer Beninger and deposited a very small object into his mouth. Therefore, we will not substitute our judgment for that of the trial court on this issue. Thus, the issues before this court relate to the lawfulness of: (1) the seizure and search of appellee's mouth for drugs, and (2) the subsequent search of appellee's apartment.

SEARCH & SEIZURE OF APPELLEE

{¶13} The state argues that Officer Beninger had probable cause to seize appellee and to search his mouth for drugs, and that exigent circumstances negated the warrant requirement.

PROBABLE CAUSE

{¶14} The parties do not dispute that appellee's seizure rose to the level of a formal arrest, which must be supported by probable cause. Thus, we begin our analysis at the point where Officer Beninger seized appellee, applied a one-armed chokehold, and forced him to spit the item out of his mouth. The inquiry becomes whether the seizure and subsequent search of appellee's mouth for drugs were constitutionally justified.

{¶15} The Fourth Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment, and Section 14, Article I of the Ohio Constitution, prohibits unreasonable searches and seizures. See *State v. Moore*, 90 Ohio St.3d 47, 49, 2000-Ohio-10. In *Moore*, the Ohio Supreme Court stated: "For a search or seizure to be reasonable under the Fourth Amendment, it must be based upon probable cause and executed pursuant to a warrant. This requires a two-step analysis. First, there must be probable cause. If probable cause exists, then a search warrant must be obtained unless an exception to the warrant requirement

applies. If the state fails to satisfy either step, the evidence seized in the unreasonable search must be suppressed." *Id.* (Internal citations omitted.)

{¶16} Probable cause is generally defined as a reasonable ground of suspicion supported by facts and circumstances sufficiently strong in themselves to warrant a prudent person in believing an accused person has committed or was committing an offense. *State v. Payne* (June 1, 1999), Butler App. No. CA98-12-244, at 5. To determine whether probable cause exists, a court must examine the "totality of the circumstances" and make a "practical, commonsense decision whether, given all the circumstances there [was] a fair probability that contraband or evidence of a crime [would] be found in a particular place." *Id.*, quoting *Illinois v. Gates* (1982), 462 U.S. 213, 238, 103 S.Ct. 2317. Under the totality analysis, "[f]actors to be considered include an officer's observation of some criminal behavior by the defendant, furtive or suspicious behavior, flight, events escalating reasonable suspicion into probable cause, and association with criminals and locations." *State v. Kay*, Wayne App. No. 09CA0018, 2009-Ohio-4801, ¶9.

{¶17} The state argues that the following facts establish that Officer Beninger had probable cause to search appellee for drugs: (1) the Starling Road Apartment complex was specifically known for its high drug activity; (2) the officer recognized appellee from a prior drug-related incident; (3) appellee drove past the officer into the apartment complex appearing somewhat nervous and avoiding eye contact; (4) the officer had 15 years of law enforcement experience; (5) the officer had arrested at least 20 heroin dealers and was aware that a frequent method of transporting the drug was in small balloons, consumable upon contact with law enforcement; (6) the officer had received at least ten tips from various informants, including two reliable sources, relating to the specific vehicle appellee used to transport the drugs and that

appellee 'cut' the heroin and resold it from his apartment; and (7) when appellee saw the officer approaching, appellee turned away and placed whatever was in his hand into his mouth.

{¶18} The state contends the trial court misapplied the totality of the circumstances test when it separately analyzed each factor upon which Officer Beninger relied and concluded that the facts were individually insufficient to warrant probable cause.

{¶19} In *United States v. Arvizu* (2002), 534 U.S. 266, 274, 122 S.Ct. 744, the United States Supreme Court cautioned against a "divide-and-conquer" approach to the totality of the circumstances analysis. In *Arvizu*, the Supreme Court held that the Court of Appeals for the Ninth Circuit erred in concluding "that each observation by [the officer] that was by itself readily susceptible to an innocent explanation was entitled to 'no weight'" in the court's reasonable suspicion analysis. *Id.* at 276-277. The Supreme Court found that the appellate court erroneously reviewed the factors in isolation and failed to take into account the "totality of the circumstances" in its analysis. *Id.* After properly considering the totality of the circumstances and giving due weight to the "factual inferences drawn by the detaining officer," the Supreme Court determined that the officer had reasonable suspicion to believe the suspect was engaged in illegal activity. *Id.* at 273-274; *State v. Morgan*, Franklin App. No. 05AP-552, 2006-Ohio-5297, ¶30; *State v. Harry*, Butler App. No. CA2008-01-013, 2008-Ohio-6380, ¶20 ("While individual facts and statements themselves may not separately support a probable cause determination; a reviewing court must weigh all of the components together because '[p]robable cause is the sum total of [all] layers of information").

{¶20} In *Harry*, this court determined whether information in an affidavit in

support of a search warrant supported the issuing judge's probable cause finding. The affidavit contained tips from both reliable informants and anonymous complainants that defendant was receiving out-of-state marijuana shipments and that the drugs were stored and sold at a particular address. In analyzing the timeliness of the tips, this court found that "[w]hile there is no arbitrary time limit on how old information can be, the alleged facts must justify the conclusion that the subject contraband is probably on the person or premises searched * * * [and] a 'pattern of conduct' or indications of an 'ongoing investigation,' even where older information is concerned, can be found to be timely." *Harry*, 2008-Ohio-6380 at ¶¶12-13. In finding that probable cause existed pursuant to the affidavit, this court stated that "under a totality of the circumstances analysis," the affidavit provided a "substantial basis for the issuing judge to conclude that there was a fair probability" that drugs, weapons, and paraphernalia would be found at defendant's particular address. *Id.* at ¶25. We find *Arvizu* and *Harry* instructive in the case at bar.

{¶21} The trial court in the present case purported to review the evidence under the totality of the circumstances test. However, a thorough review of the evidence reveals a totality of the circumstances analysis very similar to that condemned by the Supreme Court in *Arvizu*. Specifically, the trial court erroneously isolated the factors known to Officer Beninger at the time of the stop and concluded that each piece of information on its own did not provide a sufficient basis for probable cause. In so holding, the trial court first reviewed the informants' tips.¹ Rather than reviewing them in light of the additional information available to Officer Beninger at the time of the stop, the trial court focused on the lack of specific

1. The trial court held that due to their unreliable and nonspecific nature, the tips "weren't [even] sufficient to warrant an investigatory stop, and certainly * * * these tips were [not] sufficient to provide the officer with probable cause to arrest the defendant and seize his person on the date in question prior to the officer being able to identify the item in the defendant's mouth as a heroin balloon."

testimony as to the tips' timeliness, the bases for the informants' knowledge, and that the tips failed to reveal whether appellee was "peddling or possessing drugs *on the day and at the time of this incident.*" (Emphasis added.)

{¶22} However, as seen in *Harry*, information regarding an illegal "pattern of conduct" can still be timely. *Harry*, 2008-Ohio-6380 at ¶13. In *Harry*, this court stated that "[i]n determining whether information * * * is stale, courts should consider (1) the character of the crime; (2) the criminal; (3) the thing to be seized, as in whether it is perishable and easily transferable or of enduring utility to its holder; (4) the place to be searched; and (5) whether the information * * * relates to a single isolated incident or protracted ongoing criminal activity." *Id.*, quoting *State v. Prater*, Warren App. No. CA2001-12-114, 2002-Ohio-4487, ¶13. In the case at bar, the tipsters' information related to (1) a serious felony; (2) by a known drug offender; (3) involving the sale and transport of heroin, a highly consumable narcotic; (4) in an area reputed for illegal drug activity; and (5) involved an ongoing drug trafficking operation near a school zone. Thus, the tips were far from stale.

{¶23} Next in its process-of-elimination analysis, the trial court implied that it did not believe Officer Beninger's testimony that he was able to observe the size, shape and color of the object in appellee's hand prior to forcing him to spit it out of his mouth. Specifically, the court stated that "due to the fact that the object placed in [appellee's] mouth could not reasonably be identified as a heroin balloon by the officer until after he placed [appellee] in a chokehold and forced [him] to expel it, the intrusive search and seizure took place prior to the officer having probable cause[.]"

{¶24} In the present case, we find that Officer Beninger had a sufficient basis to believe appellee was attempting to hide evidence of illegal drug activity in his mouth on the day in question. Specifically, probable cause existed to support the

search and seizure of appellee based on: (1) specific information provided by two reliable informants; (2) additional timely tips from anonymous complainants regarding an alleged ongoing pattern of illegal drug activity; (3) appellee's furtive hand-to-mouth gesture; and (4) Officer Beninger's own surveillance, law enforcement experience, and knowledge regarding appellee's drug history - all of which corroborated and added to the details provided by the tipsters.

{¶25} In finding that probable cause existed, we note that the tips supplied Officer Beninger with crucial additional information regarding appellee that profiled him as a drug courier, including: (1) a detailed description of appellee's black Saturn with "front-end damage" that he used to transport the heroin from Cincinnati to the Starling Road Apartments, and (2) that appellee 'cut' the heroin inside his apartment and sold it throughout the complex. Further, appellee's sudden hand-to-mouth gesture constituted furtive and suspicious conduct that supplied additional evidence that appellee was attempting to avoid police detection of drug-related activity on the day in question.

{¶26} Ohio courts have held that "[n]ervous, evasive behavior is a pertinent factor in determining reasonable suspicion." See, e.g., *State v. Hill* (Apr. 17, 2000), Stark App. No. 1999CA00196, 2000 WL 492582, at *4; *State v. Smith*, Franklin App. No. 04AP-859, 2005-Ohio-2560, ¶37. In *State v. Fisher* (Feb. 13, 1996), Allen App. No. 1-93-71, 1996 WL 65487, during an investigatory stop, officers observed defendant place an "item" into his mouth, at which time the officers grabbed defendant's neck and forced him to expel the item. The Third Appellate District held that exigent circumstances existed, as defendant "was attempting to swallow the evidence to destroy it," and the officers used "reasonable force" to retrieve the unknown item. *Id.* at *3.

{¶27} Similarly, in *State v. Nieves* (Mar. 7, 1996), Cuyahoga App. No. 69284, 1996 WL 100844, a nine-year police veteran was patrolling an area known for heavy drug trafficking when he observed defendant walking toward his car with a clenched fist. When defendant saw the officer approaching, he began to walk away. When the officer called defendant over to him, defendant "turned his back to the officer and was observed putting *something* into his mouth." (Emphasis added.) *Id.* at *1. The Eighth Appellate District held "a police officer possesses the requisite probable cause to believe defendant was committing or had committed a drug offense, where the officers, after revealing their identity to the defendant, observed the defendant turn his back towards them and place something into his mouth." *Id.* at *2. See, also, *State v. Victor* (1991) 76 Ohio App.3d 372; *State v. Williams*, Cuyahoga App. No. 83574, 2004-Ohio-4476.

{¶28} While appellee did not attempt to 'flee,' or walk away from Officer Beninger, he did turn away from the officer to place an object in his mouth as soon as he became aware that a uniformed police officer in a marked cruiser was approaching. Further, appellee's gesture was coupled with an experienced officer's familiarity with the modus operandi of heroin dealers, the fact that the activity occurred in an area under investigation for appellee's own alleged drug sales, the officer's familiarity with appellee's drug history, and numerous tips regarding appellee's drug sales and mode of transport for the drugs.

{¶29} In sum, we find that the accumulated observations of Officer Beninger sufficiently established probable cause for the seizure and subsequent search of appellee's mouth for drugs.

EXIGENT CIRCUMSTANCES

{¶30} The state next argues that Officer Beninger's forcible search of

appellee's mouth fell within an exception to the warrant requirement, to wit: searches conducted in exigent circumstances.

{¶31} In general, warrantless searches are per se unreasonable, subject to a few specifically established exceptions. *Katz v. United States* (1967), 389 U.S. 347, 357, 88 S.Ct. 507. "Once a warrantless search is established, the burden of persuasion is on the state to show the validity of the search." *State v. Smith*, 124 Ohio St.3d 163, 2009-Ohio-6426, ¶25; *Chimel v. California* (1969), 395 U.S. 752, 762, 89 S.Ct. 2034.

{¶32} In *Schmerber v. California* (1966), 384 U.S. 757, 86 S.Ct. 1826, "the United States Supreme Court set forth the criteria to be considered in determining the reasonableness of an intrusive search: (1) the government must have a clear indication that incriminating evidence will be found; (2) the police officers must have a warrant, or, there must be exigent circumstances, such as the imminent destruction of evidence; and (3) the method used to extract the evidence must be reasonable and must be performed in a reasonable manner." *Fisher*, 1996 WL 65487 at *3. For the exigent circumstances exception to apply, the state must establish both probable cause and "some real likelihood that the evidence is in danger of being moved or destroyed in the time that it would take to get a warrant." *State v. Hatfield*, Ross App. No. 98CA2426, 1999 WL 158472, at *5.

{¶33} Because we have already held that probable cause existed under the totality of the circumstances, we next consider whether there was a "real likelihood" that the evidence in appellee's mouth was in danger of being moved or destroyed in the time it would have taken to get a warrant. See *id.*; *State v. Evans*, Cuyahoga App. No. 89242, 2008-Ohio-2032, ¶101-102.

{¶34} The Ohio Supreme Court has held that "[b]ecause marijuana and other

narcotics are easily and quickly hidden or destroyed, a warrantless search may be justified to preserve evidence." *Moore*, 90 Ohio St.3d at 52. Consequently, many Ohio courts have upheld warrantless searches of a defendant's mouth based upon an officer's inability to secure a search warrant prior to the destruction of the evidence. See, e.g., *State v. Burnett*, Hamilton App. No. C-040386, 2005-Ohio-1323.

{¶35} In *Burnett*, police officers stopped defendant because he was "looking into car windows" in an area of downtown Cincinnati not known for high drug activity. The officers testified defendant was "very cooperative," but noticed that during the stop, defendant turned away from the officers and suddenly appeared to be "concealing something in his mouth." *Id.* at ¶5-8. When asked what was in his mouth, defendant replied that he had recently been punched; however, the officers had not seen any evidence of injury when they first approached defendant. The officers grabbed defendant's arms, bent him over the police car and threatened to spray him with mace unless he spit the item out of his mouth. Defendant then spit out the object, which "appeared to be a baggy of crack cocaine." *Id.* at ¶11. The First Appellate District held that exigent circumstances existed, allowing the officers to search defendant's oral cavity without a warrant. *Id.* at ¶29-32. The court stated that although "[t]he police may not go willy nilly down the street ordering people to spit things out of their mouths, * * * under these circumstances, the bulge [in defendant's cheek] was more than just a bulge * * * already suspecting [defendant] of criminal activity, [the officer] reasonably concluded that [defendant] was lying to conceal from him whatever was in his mouth." *Id.* at ¶24.

{¶36} Similarly, in the case at bar, when asked what was in his mouth, appellee told Officer Beninger that he had lost a tooth; yet the officer did not testify to seeing appellee display any oral discomfort prior to the search. Officer Beninger

testified that "[b]ased on my training and experience, heroin is typically packaged in a balloon wrapper * * * they take the heroin – it's a very small amount, usually a \$20-\$40 rock * * * put it in the base of the balloon, tie it up real right, stretch it, and it's a very tight-knit ball that's consumable. And it's also typically ingested if there's any contact with law enforcement." Like the officers in *Burnett*, Officer Beninger already suspected appellee of criminal activity and was "aware that drugs often are ingested to protect them from seizure." *Burnett*, 2005-Ohio-1323 at ¶28. Thus, at the time he applied the chokehold, Officer Beninger reasonably concluded that he must act immediately to prevent appellee from chewing or swallowing the evidence. *Id.* Therefore, exigent circumstances existed that justified a warrantless search of appellee's mouth for drugs.

{¶37} The last step in determining the reasonableness of an intrusive search requires that the method used to extract the evidence be reasonable and be performed in a reasonable manner. See *Schmerber*, 384 U.S. at 770-772. The test for reasonableness is objective and focuses on the officer's actions in light of the facts and circumstances facing him or her at the time. *Graham v. Connor* (1989), 490 U.S. 386, 396-397, 109 S.Ct. 1865. Where the method employed by the police to obtain evidence "shocks the conscience," a due process violation has occurred. *Rochin v. California* (1951), 342 U.S. 165, 172, 72 S.Ct. 205.

{¶38} In the case at bar, Officer Beninger used reasonable force to open appellee's mouth. The officer's use of force (and threatened force) escalated only after appellee refused to spit out what the officer believed to be heroin. Because the evidence was small and easily consumable, the circumstances compelled immediate action to prevent its destruction. Therefore, Officer Beninger's one-armed choke hold was not excessive for purposes of the Fourth Amendment. Further, given that the

threats of more dire measures, such as the use of a taser, were never carried out, the use of force does not shock the conscience. See, e.g., *Fisher*, 1996 WL 65487 (force used was "reasonable" where two officers placed their hands around defendant's throat for "approximately three to five seconds" before defendant spit out the object, defendant remained standing throughout the incident, and no injury was reported); *State v. Davis*, Franklin App. No. 08AP-102, 2008-Ohio-5756 (force used was "reasonable" when defendant refused to spit out a cellophane bag in his mouth and the officer performed a "basic pain compliance" on defendant's jaw, which involved the "application of pressure on the part of defendant's jaw near his ear").

{¶39} Based upon the totality of the circumstances, Officer Beninger had probable cause to believe appellee was engaged in drug-related activity and that appellee would immediately consume and destroy the evidence thereof. Under such circumstances, police may complete a lawful seizure and search for drugs without first securing a warrant. Further, the search was performed in a manner consistent with the "reasonable" requirements of the Fourth Amendment. Because Officer Beninger did not illegally detain appellee or illegally search his mouth for drugs, the trial court erred in granting the motion to suppress on that basis. The only remaining issue is whether the trial court correctly concluded that appellee's consent to the search of his apartment was not free and voluntary.

CONSENT SEARCH

{¶40} As previously noted, roughly ten minutes after his arrest, appellee signed a "consent to search" form permitting the officers to search his apartment. The trial court held that appellee's consent was involuntary because appellee's "consent was not obtained when he was free to leave" and there were "no intervening circumstances between the [illegal] search and seizure and [appellee]

providing his consent * * * sufficient to dissipate the taint of the prior unlawful action." The state argues, however, that appellee's consent was voluntary and that it followed a constitutional arrest.

{¶41} Because we have already held that appellee's warrantless seizure and search were lawful, it is clear that the search of appellee's apartment was not the "fruit" of an unconstitutional arrest. However, we must still review the trial court's finding that appellee's consent was not voluntary.

{¶42} It is well-settled that in order to waive the Fourth Amendment privilege against unreasonable searches and seizures, the accused must give consent which is voluntary under the totality of all the surrounding circumstances. *State v. Vitatoe* (Oct. 15, 2001), Clermont App. No. CA2001-03-031, at 5; *State v. Dodson* (Feb. 10, 1997), Warren App. No. CA96-07-058, at 3. The United States Supreme Court has found that consent is not voluntary if it is "the product of duress or coercion, express or implied." *Dodson* at 3, quoting *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 227, 93 S.Ct. 2041.

{¶43} The state bears the burden of proving by clear and convincing evidence that the defendant's consent was "freely and voluntarily given." See *In re Lester*, Warren App. No. CA2003-04-050, 2004-Ohio-1376, ¶17, quoting *Florida v. Royer* (1983), 460 U.S. 491, 497, 103 S.Ct. 1319; *State v. Simmons*, Highland App. No. 05CA4, 2006-Ohio-953, fn. 2 ("in the absence of an illegal detention, the state need only demonstrate that the totality of the circumstances establishes that the individual voluntarily consented to the search"). The state has not met its burden when all it has proven is "mere submission to a claim of lawful authority." *Lester*, 2004-Ohio-1376 at ¶17. Whether an individual voluntarily consented to a search is a question of fact, not a question of law. *Id.* at ¶18. Since this inquiry requires an assessment of

the credibility of the evidence, the trier of fact is in the best position to make this determination, and its decision will not be reversed on appeal unless it is clearly erroneous. *Id.*

{¶44} In the case at bar, the state correctly notes that Officer Beninger's detention and search of appellee were lawful. Only ten minutes after appellee was arrested and *Mirandized*, Officer Beninger read the contents of the "consent to search form" to appellee and asked him for consent to search his apartment. The trial court noted that appellee was "very cooperative" at this time, and that appellee's handcuffs were moved to the front of his body "at some point" during the short detention. From these facts, it is clear that officers did not detain appellee for an unusually long period prior to obtaining his consent, nor are there any allegations that appellee was threatened or induced into providing his consent to the search. Further, the fact that appellee was under arrest and was therefore not "free to leave" at the time he provided consent does not destroy the voluntariness of his consent. See, e.g., *State v. Henson*, Highland App. No. 05CA13, 2006-Ohio-2861, ¶25; *State v. Keggan*, Greene App. No. 2006 CA 9, 2006-Ohio-6663, ¶ 47 ("citizens may elect to provide voluntary statements or give consent to searches during any encounter with law enforcement officers regardless of whether that encounter constitutes a consensual encounter, a *Terry* stop, or an arrest"); *State v. Clelland* (1992), 83 Ohio App.3d 474, 481 ("Even though consent obtained after arrest may be suspect, the fact of arrest does not necessarily vitiate what otherwise appears to be a valid consent; in other words, the dispositive question is whether the officers used coercive tactics or took unlawful advantage of the arrest situation to obtain consent"); *State v. Tobias* (Sept. 15, 2000), Montgomery App. Nos. 17975, 99-CR-803; *Schneckloth*, 412 U.S. at 248-249.

{¶45} In *Schneekloth*, the United States Supreme Court set forth several factors that a trial court must consider in determining whether a consent was voluntary. They 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. *Id.*; *Henson*, 2006-Ohio-2861 at ¶28.

{¶46} In reviewing the record in the case at bar, we find no evidence that appellee's consent to the search was involuntary. Appellee gave his consent in a public parking lot, however, we find nothing relative to this factor that relates to the voluntariness of the consent. Further, there is no evidence of any threats, promises, or coercive tactics by the police. In fact, the police even moved appellee's handcuffs to a more comfortable position in front of his body during the detention. Appellee's words and actions also indicate that the consent was voluntary; the trial court even noted that appellee cooperated with the police during his detention. Further, as far as appellee's status as a "newcomer" to the law, he has a prior criminal history involving drug possession. Although there is no information in the record regarding appellee's educational level or intelligence, there is nothing to indicate that appellee was of low intelligence. Thus, under the totality of the circumstances, appellee's consent was voluntary.

{¶47} Because we find that the consent exception to the warrant requirement is applicable in the case at bar, we conclude that the trial court also erred in granting appellee's motion to suppress on these grounds. The state's assignment of error is

sustained as it relates to the evidence obtained as a result of the search of appellee's person and the search of his apartment. The matter is remanded to the trial court for further proceedings in accord with this decision.

{¶48} Judgment reversed and remanded.

BRESSLER and POWELL, JJ., concur.