

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

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2010-05-128
 :
 - vs - : OPINION
 : 2/22/2011
 :
 FRANCIS JOSEPH POPP, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2009-11-1878

Michael T. Gmoser, Butler County Prosecuting Attorney, Lina N. Alkamdawi, 315 High Street, 11th Floor, Hamilton, Ohio 45012-0515, for plaintiff-appellee

Brandabur, Bowling & Crehan Co., L.P.A., Kyle Rapier, 315 South Monument Avenue, Hamilton, Ohio 45011, for defendant-appellant

HENDRICKSON, J.

{¶1} Defendant-appellant, Francis Popp, appeals his conviction in the Butler County Court of Common Pleas for one count of possession of cocaine. We affirm the conviction.

{¶2} During the early morning hours of October 30, 2009, Detective Robert Horton of the Hamilton Police Department, Vice Section, was positioned in a building across from the J&J Bar on Third Street in Hamilton, and used binoculars to surveil the

establishment. According to Horton's testimony at the motion to suppress hearing, police had received multiple complaints regarding drug sales around the bar, including one such complaint from the bar's owner regarding frequent drug transactions and the use of guns at the establishment. Including October 30, Hamilton police conducted four surveillances of the bar that month, and during that time, witnessed approximately a dozen drug deals.

{¶13} During the three prior drug surveillances, officers observed patterns of behavior indicative of drug activity. According to Horton's testimony, some of the drug deals occurred in the north parking lot of the bar, where people would walk, drive, or ride bikes into the lot and then be approached by a party who would sell them drugs. Horton also testified that other deals involved a vehicle pulling over to the curb near the bar, a person entering the vehicle, and then exiting a short time later once the transaction was complete. At least 10 drug arrests resulted from the October surveillances.

{¶14} On the 30th, the fourth surveillance of the month, Horton observed an unidentified party come outside to the front of the bar, stand on the corner, and look up and down the street. Shortly thereafter, Horton observed a Ford Ranger pick-up truck pull into the lot, at which time, the unidentified party went over and got into the passenger side of the truck. After the truck pulled approximately ten feet further into the lot, it stopped and the unidentified party exited the truck within 20 seconds of entering it, and went back into the bar. Horton radioed information regarding the pickup truck to other officers assisting in the surveillance, and Detective Daniel Stevenson began to follow the truck away from the bar in an unmarked police cruiser. Stevenson continued to relay information to other units regarding the truck's whereabouts until Officer Gary Crouch, who was in a marked police cruiser, initiated the stop.

{¶15} According to Crouch's testimony at the motion to suppress hearing, he was

working with the surveillance crew on October 30, 2009, to stop the vehicles thought to contain drugs. Crouch testified that he had been involved in similar surveillance during October 2009, and described J&J Bar and the surrounding area as "an open air drug market." Crouch also testified that there were several gun complaints associated with the bar.

{¶6} After Crouch received word that the pickup truck was involved in suspected drug activity, Crouch initiated a stop and approached the driver's side of the truck. The driver, later identified as Popp, was alone in the truck and exited the vehicle upon Crouch's request. Crouch placed Popp in handcuffs and patted down his pockets. According to Crouch's testimony, "I was alone on the stop by myself, based on the guns and drugs we had been dealing with at the location, it was for officer safety purposes. I wanted to secure his hands before I made my pat down or search of the vehicle." After the pat down, Crouch handcuffed Popp and directed him to sit in the back of his police cruiser. Crouch returned to the vehicle to check for weapons and contraband, and upon moving a coat on the front seat, observed an off-white rock on the console that he recognized as crack cocaine.

{¶7} Popp was indicted on one count of possession of cocaine, and later filed a motion to suppress the evidence Crouch collected as a result of the stop. The trial court denied Popp's motion and the case proceeded to trial. A jury found Popp guilty after a one-day trial, and the trial court sentenced him to community control for three years and fines. Popp now appeals his conviction, raising the following assignments of error.

{¶8} Assignment of Error No. 1:

{¶9} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT BY OVERRULING HIS MOTION TO SUPPRESS EVIDENCE."

{¶10} Popp argues in his first assignment of error that the trial court erred in

overruling his motion to suppress. This argument lacks merit.

{¶11} Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Cochran*, Preble App. No. CA2006-10-023, 2007-Ohio-3353. Acting as the trier of fact, the trial court is in the best position to resolve factual questions and evaluate witness credibility. *Id.* Therefore, when reviewing the denial of a motion to suppress, a reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Oatis*, Butler App. No. CA2005-03-074, 2005-Ohio-6038. "An appellate court, however, independently reviews the trial court's legal conclusions based on those facts and determines, without deference to the trial court's decision, whether as a matter of law, the facts satisfy the appropriate legal standard." *Cochran* at ¶12.

{¶12} The Fourth Amendment prohibits unreasonable searches and seizures, such as those without a warrant. However, specifically established exceptions exist that allow an officer to search a person without a warrant where the officer has reason to believe that "he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." *Terry v. Ohio* (1968), 392 U.S. 1, 27, 88 S.Ct. 1868. The Ohio Supreme Court has stated that "in *Terry*, the United States Supreme Court held that a police officer may stop and investigate unusual behavior, even without probable cause to arrest, when he reasonably concludes that the individual is engaged in criminal activity. In assessing that conclusion, the officer 'must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.' Furthermore, the standard against which the facts are judged must be an objective one: '[W]ould the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was

appropriate?" *State v. Andrews* (1991), 57 Ohio St.3d 86, 87, citing *Terry* at 21-22.

{¶13} Upon review, this court determines the existence of reasonable and articulable suspicion by evaluating the totality of the circumstances "through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold." *State v. Chadwell*, Montgomery App. No. 22698, 2009-Ohio-1630, ¶22.

{¶14} Based on the totality of the circumstances in the present case, detectives had a reasonable and articulable suspicion to effectuate a *Terry* stop on Popp in order to investigate the possibility of criminal activity. Detective Horton testified that he and other officers had performed surveillance of the bar during October and that several drug related arrests resulted from the surveillance. He also testified that their surveillance was the result of several complaints regarding drug activity in the area, and one such complaint from the owner of the bar regarding drug activity and gun use in his bar. Horton identified the primary ways in which the drug transactions would occur, including a party approaching a vehicle, staying for a short time in the vehicle, and then exiting to return to the bar.

{¶15} On the night of Popp's arrest, Detective Horton observed Popp's pickup truck approach the bar, an unidentified party enter the truck, and then exit within 20 seconds of getting in. This pattern of behavior, according to Horton, was indicative of a drug transaction. Based on testimony from law-enforcement, the trial court heard evidence that the J&J Bar was located in a well-known high crime area, and Officer Crouch testified that the bar had a reputation as an open-air drug market. See *Chadwell*, 2009-Ohio-1630 (finding reasonable articulable suspicion to support *Terry* stop where appellant was observed acting suspiciously in a high crime area in which drug activity was known to occur); and *State v. Manning*, Lucas App. No. L-08-1278, 2009-Ohio-2605 (finding articulable suspicion where there was a history of drug

complaints about an apartment building and an officer observed appellant at the apartment building behave in a manner that was indicative of drug transactions).

{¶16} In a case very similar to the one at bar, the Second District Court of Appeals found that law enforcement had a reasonable articulable suspicion to effectuate a *Terry* stop to investigate alleged drug activity. *State v. Pierce* (Mar. 7, 1997), Montgomery App. No. 15911, 1997 WL 102009. In *Pierce*, police had received multiple complaints regarding drug activity at a property believed to be operating as a drug house, and consequently began to surveil the location. Police effectuated several arrests at the location specific to drug transactions, and had observed parties going into the house and staying only a few moments before exiting. Officers ultimately observed Pierce visit the house and engage in the pattern previously observed by officers indicating a drug transaction, including staying momentarily and then driving away. Detectives then relayed the information to police in cruisers, and officers stopped Pierce's car to investigate further. The court concluded that the totality of the circumstances indicated that the officers had a reasonable articulable suspicion.

{¶17} Popp argues that his case is not a typical *Terry* stop situation because Crouch did not directly observe the alleged drug transaction, and had no particular facts to rely upon to initiate a lawful stop. However, the record is clear that Detective Horton relayed information regarding his direct observations to the other officers, including Crouch. Crouch also testified that the reason he initiated the stop was that Horton "relayed to me that the driver had just bought drugs at the J&J Bar."

{¶18} Contrary to Popp's argument, Crouch was aware that Popp was suspected of drug activity, and knew what vehicle Popp was driving. Testimony established that Detective Stevenson followed Popp's truck until Crouch could catch up, and that Stevenson did not break his pursuit until Crouch sighted Popp and began following him.

Crouch testified that "there were very few vehicles on the road ***. Detective Stevenson was behind [Popp's] vehicle, I would say probably several blocks away I could see the vehicle and Detective Stevenson. Detective Stevenson moved out of the way, I pulled behind the vehicle and initiated the stop." The record is clear that Popp's vehicle was followed from the moment it left the bar's parking lot, and that Officer Crouch knew which vehicle to stop.

{¶19} Popp next argues that Crouch violated his Fourth Amendment right when he searched the truck as Popp sat in the police cruiser. Popp argues that Crouch did not have probable cause to arrest him, and did not have probable cause to search his vehicle under the search incident to arrest warrant exception. Popp's argument assumes that he was arrested at the time Crouch conducted his search, and also that the search was incident to that arrest. However, the record indicates otherwise.

{¶20} This court has consistently held that an officer does not effectuate an arrest by merely placing a person in the back of a police cruiser. "Having an individual sit in a police cruiser for a short time to answer a few questions does not necessarily elevate the situation to something greater than an ordinary traffic stop. This is true whether the individual is being requested to stay while an accident report is completed or relevant facts are ascertained. An individual may also be temporarily restrained either for his own safety or that of the officer." *State v. Johnson* (May 1, 2000), Clermont App. No. CA99-06-061, 8-9. "Confining an individual to the police cruiser is not a custodial placement if it is part of the investigation, even if the suspect in the police cruiser is not free to leave." *In re M.D.*, Madison App. No. CA2003-12-038, 2004-Ohio-5904, ¶18.

{¶21} According to Crouch's testimony, he asked Popp to exit the truck and secured him in the back of his police cruiser. On cross-examination, Crouch stated that

Popp was secured "until I made sure there was no weapons in the vehicle," and that "for officer safety reasons, [Popp] was not free at that point [to leave]." Officer Crouch had already testified on direct examination that he was alone on the stop and was aware that complaints were made regarding guns at the bar. Crouch also testified that he had effectuated several hundred drug arrests, and that in his experience, weapons are often associated with and found during drug investigations.

{¶22} Officer Crouch expressly stated that he searched the truck, not incident to arrest, but in order to check for weapons. When determining whether a protective search is justified, we must employ an objective standard to decide if the "facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief that the action taken was appropriate.'" *State v. Bobo* (1988), 37 Ohio St.3d 177, 178-179, quoting *Terry*, 392 U.S. 21-22. The totality of the circumstances approach allows a court to consider factors such as the time of day the stop occurred, the officer's experience, the officer's position or proximity to his cruiser, and the high-crime nature of the area. *Id.* A court may also consider the defendant's suspicious activities before and during the stop, such as furtive gestures. *Id.*

{¶23} Here, the totality of the circumstances demonstrates that Crouch was justified in using a protective sweep to ensure that no weapons were in Popp's truck. The stop occurred at night, and Crouch was alone during his investigation. As discussed above, Crouch was an experienced officer who had effectuated several hundred arrests, many of which involved weapons. The high-crime nature of the area was undisputed, and drugs and guns had been the focus of several complaints and constituted the very reason for the surveillance conducted that night.

{¶24} We note that the trial court expressed hesitation regarding the likelihood of Popp returning to his truck to get a weapon to use on Crouch. However, the Supreme

Court in *Michigan v. Long*, (1983) 463 U.S. 1032, 103 S.Ct. 3469, determined that a protective sweep of the area where the person could have immediate control of or obtain a weapon is justified before the police return the person to their car. In *Long*, the court noted that when the suspect is not placed under arrest and instead will be permitted to return to their car, an officer "remains particularly vulnerable in part because a full custodial arrest has not been effected." *Id.* at 1052. (Emphasis in original.) Therefore, the court held that the protective search of Long's car was warranted because the officers were taking "preventive measures to ensure that there were no other weapons within Long's immediate grasp before permitting him to reenter his automobile." *Id.* at 1051; see, also, *State v. Moore*, Preble App. No. CA2009-02-005, 2009-Ohio-5927.

{¶25} Like *Long*, and as discussed above, Popp was not under arrest at the time of the protective search. Because he was not under arrest before Crouch conducted the search, and assuming Crouch had not found drugs in the truck, Popp would have been permitted to re-enter his truck and would have had access to any weapons inside. Therefore, Crouch's search for any potential weapons was valid, and was not an unlawful search incident to arrest.

{¶26} In lieu of a protective sweep, the trial court stated that the evidence supported a finding of probable cause to search the car. Although the trial court did not perform a complete analysis regarding the vehicle search exception, it noted that Crouch had probable cause to search Popp's truck because it was "very likely" to contain drugs. Although the search was justified under a protective sweep analysis, we agree with the trial court that the vehicle exception would apply as well.

{¶27} "If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without

more." *Pennsylvania v. Labron* (1996), 518 U.S. 938, 940, 116 S.Ct. 2485; *State v. Runyon*, Clermont App. No. CA2010-05-032, 2011-Ohio-263. Specific to an automobile search, probable cause is "a belief reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction." *State v. Kessler* (1978), 53 Ohio St.2d 204, 208.

{¶28} The record is clear that Popp's truck was readily mobile in that he was traveling in it before Crouch pulled him over. As previously discussed, Crouch had a reasonable belief that Popp's truck contained drugs, a substance subject to seizure and destruction, because Detective Horton specifically recounted his observations regarding the exchange indicative of a drug transaction. Whether based on a protective sweep or the vehicle search exception, the search was lawful, and Popp's first assignment of error is overruled.

{¶29} Assignment of Error No. 2

{¶30} "DEFENDANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF EVIDENCE."

{¶31} In his second assignment of error, Popp argues that his conviction was against the manifest weight of the evidence because he did not have possession of the cocaine. There is no merit to this argument.

{¶32} "In determining whether a conviction is against the manifest weight of the evidence, the court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the tier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Cummings*, Butler App. No. 2006-09-224, 2007-Ohio-4970, ¶12.

{¶33} While appellate review includes the responsibility to consider the credibility

of witnesses and weight given to the evidence, "these issues are primarily matters for the trier of fact to decide since the trier of fact is in the best position to judge the credibility of the witnesses and the weight to be given the evidence." *State v. Walker*, Butler App. No. CA2006-04-085, 2007-Ohio-911, ¶26. Therefore, an appellate court will overturn a conviction due to the manifest weight of the evidence only in extraordinary circumstances to correct a manifest miscarriage of justice, and only when the evidence presented at trial weighs heavily in favor of acquittal. *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52.

{¶34} Popp was convicted of possession of cocaine in violation of R.C. 2925.11, which states that "no person shall knowingly obtain, possess, or use a controlled substance." R.C. 2925.01(K) defines possession as "having control over a thing or substance" but it "may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found."

{¶35} The accused may be in actual or constructive possession or control of the drug. *State v. Contreras*, Butler App. No. CA2004-07-181, 2006-Ohio-1894, ¶21. Constructive possession exists when one is conscious of the presence of the object and able to exercise dominion and control over it, even if it is not within one's immediate physical possession. *State v. Gaefe*, Clinton App. No. CA2001-11-043, 2002-Ohio 4995, ¶9. The discovery of readily accessible drugs in close proximity to a person constitutes circumstantial evidence that the person was in constructive possession of the drugs. *Contreras* at ¶24.

{¶36} During Popp's trial, Crouch testified that during his search of Popp's truck, he moved a jacket off of the truck's front-seat console and observed a single off-white rock under the jacket. Crouch further testified that the rock, later confirmed to be

cocaine, was located "probably less than a foot away from where [Popp] had been sitting." The jury was free to infer from this evidence that Popp had constructive possession of the cocaine. The jury could draw a reasonable inference that the cocaine's location under Popp's jacket, approximately a foot away from him, would indicate that he was conscious of its location, and was able to exercise dominion and control over it. Crouch's discovery of the readily accessible cocaine in close proximity to Popp's position as the driver also established circumstantial evidence that Popp was in constructive possession of the drugs.

{¶37} After a review of the record, we are unable to say that the tier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. Neither can we say that the evidence presented at trial weighed heavily in favor of acquittal. Accordingly, Popp's second assignment of error is overruled.

{¶38} Judgment affirmed.

POWELL, P.J., and YOUNG, J., concur.