

IN THE SUPREME COURT OF OHIO
2009

ORIGINAL

State Of Ohio,

Case No. 09-1552

Plaintiff-Appellant,

vs.

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District.

Adrian L. Johnson,

Court of Appeals
Case No. 08AP-990

Defendant-Appellee.

MEMORANDUM OPPOSING JURISDICTION

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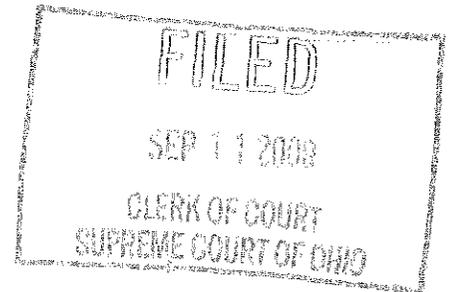


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EXPLANATION WHY THIS CASE DOES NOT MERIT FURTHER REVIEW

This is a routine search and seizure case correctly decided by the Court of Appeals. Contrary to the prosecutor's assertion, the score is no more 2-2 that it would be 2-5 if the arresting officers' assessment of the circumstances were factored in. Though each appellate judge wrote a decision, and analysis in search and seizure cases is often complex, it is a familiar task, applying standards that have become settled over the years. The reality of the situation is that the officers in this case used the apparent commission of a minor misdemeanor as a pretense to pursue the possibility one of the men confronted might be carrying a gun, possess hard drugs, or have an outstanding warrant. The person who admitted possessing the marijuana observed in a parked car was not even cited. Pretense stops are permitted, but officers may not over step the bounds of the Fourth Amendment.

This is not the case to roll back Mapp v. Ohio (1961), 367 U.S. 643. In the Court of Appeals the prosecutor argued broadly that the exclusionary rule should be abandoned. The same argument is advanced in the memorandum in support of jurisdiction. That issue was not addressed in the lead, concurring, or dissenting opinions in the Court of Appeals. Appellant's first proposition of law implies the Supreme Court's decision in Herring v. United States (2009), 129 S.Ct. 695 encourages abandonment of the exclusionary rule unless there has been a deliberate violation of Fourth Amendment rights. This is not what Herring stands for. Instead it links suppression to deterrence of unlawful police conduct, as have the Court's past cases. Appellant also calls for revival of State v. Lindaway (1936), 131 Ohio St. 166 where it was held that the exclusionary rule would not be applied to redress violations of search and seizure rights under Article I, Section 14 of the Ohio Constitution. In the Court of Appeals appellee probably should have cited the Ohio provision, but the brief only mentions the Fourth Amendment. Only in the event the U.S. Supreme Court some day abandons the exclusionary rule to redress Fourth Amendment violations would it be appropriate to revisit Lindaway.

STATEMENT OF THE CASE

Appellee Adrian L. Johnson was indicted in Franklin County for one count of possession of crack cocaine, in violation of R.C. 2925.11 of the Revised Code, and one count of possession of cocaine in violation of the same statute. The quantity of crack was alleged to be between one and five grams, making the offense a fourth degree felony. No weight was alleged with regard to the powder, making the offense a fifth degree felony.

The defense filed motions to suppress the results of the search of appellee's person, which had led to charges being filed, and to suppress his statement to the effect he found the drugs at a restaurant. Following a hearing, both motions were overruled.

Mindful of the court's ruling, appellee entered no contest pleas to both counts on August 21, 2008. The state's proffer of facts indicated the quantities involved were 1.6 grams of cocaine base, apparently referring to the crack, and 0.6 grams of cocaine in "a non-determined form." On October 10, 2008 he was sentenced to three years of community control.

An appeal was taken to the Tenth District Court of Appeals, assigning as error the trial court's rulings on the motions to suppress the drugs and the statement. Prior to submission the Court of Appeals requested supplemental briefing based on the decision of the United States Supreme Court in Arizona v. Gant (2009), 129 S.Ct. 1710, narrowing the authority of the police to search an arrestee's vehicle incident to arrest.

In a decision rendered July 14, 2009 the Court of Appeals sustained both assignments of error. State v. Johnson, Franklin App. No. 08AP-990, 2009-Ohio-3436. The Franklin County Prosecutor is seeking further review by this court.

STATEMENT OF THE FACTS

On June 11, 2007 Columbus Police officer Justin Coleman was working the 10:00 p.m. to 6:00 a.m. shift on the southeast side of the city, with Officer Greg Sanderson. They were later joined by an Officer Johnson, who did not testify at the suppression hearing. Pulling into the Dairy

Mart at Main Street and Weyant, Officer Coleman's attention was drawn to an older four door sedan parked in front of the store, with its windows down.

As we pulled into the parking lot, we parked the cruiser and got out. I walked past the vehicle and smelled the odor of burnt marijuana coming from inside that passenger compartment. Using my flashlight, I observed the inside of the vehicle and observed a marijuana blunt sitting in that vehicle.

The "blunt" was observed in the center console between the front seats. The officer said it was in plain view. The car was unoccupied.

Following this:

We observed three individuals coming outside from the store to the vehicle. I made contact with the driver, informed him about the marijuana I observed in the car and the smell, and upon making contact with him, observed Mr. Johnson begin slowly kind of walking away from the vehicle. I alerted other officers of what I saw and instructed another officer to approach Mr. Johnson and have him stopped.

Steven Pearson walked up to the driver's door. Omar Nolen approached the front passenger door. Appellee was walking towards the rear door on the driver's side. According to Officer Coleman, appellee appeared to be getting ready to enter the vehicle, but walked on as the officer spoke to the driver. The other men had already begun to open the car doors. Appellee was carrying a bag containing cans of beer. The other men were empty handed.

Elaborating, Officer Coleman said Mr. Pearson admitted it was his car, apologized for having marijuana, and promised to throw it away. "I looked and thought it was odd that Mr. Johnson, upon our contact with the occupants or the individuals that came back to the vehicle, started walking away, kind of patting himself as if he was kind of, I don't know, searching for something and slowly walking away without saying anything to the other two." Officer Coleman asked Mr. Pearson if appellee was a part of the group and was told that he was. The officer's suspicions were aroused by appellee walking off and patting his pockets, which he thought might be indicative of contraband or a firearm. However, he remained occupied with the driver as other officers approached appellee.

Cross began with an attempt to pin down the officer as to how his training, specifically any

studies he had reviewed, quantified the degree to which patting pockets was associated with illicit activity, as opposed to checking for keys, cell phones, or change. He said percentages had not been covered. This line of inquiry ended with the following exchange:

Q. So, you would agree with me then that that alone, it doesn't give you probable cause to search somebody just because they're seen patting themselves?

A. MR LETSON (the prosecutor): Objection.

Argumentative, Your Honor. She's asked him to determine whether something is probable cause. It's not for him to decide today.

THE COURT: Well, I think his belief, whether or not he had probable cause, officers very frequently testify to that in suppression hearings. I'll allow him to answer.

A. To answer your question, just a pat, absent anything else, is not enough probable cause to go and search somebody.

As to his intent once appellee had been detained by the other officers:

A. My intention to have Mr. Johnson searched? At that time, my intention was to have him stopped and detained so that I could get some follow-up questions and recover the contraband from the vehicle.

Having Mr. Johnson detained with the marijuana in the car with the driver and the person saying we were all together, he was going to be searched at that time.

Q. Okay. So, just to make sure, was it your intention -- well rather than a different officer's intention, was it your intention to have Mr. Johnson searched?

A. Had I not had anyone -- maybe this will help out. Absent any other officer being there and I was able to detain Mr. Johnson myself, yes, I would have searched him myself.

Q. It was your intention to have him searched, be it from you or someone else?

A. Yes.

Q. You didn't make that decision to have him searched -- you never smelled marijuana on him, did you?

A. I did not have the contact with Mr. Johnson back there, no.

Q. Your decision to have him searched was not based on any odor of marijuana coming from him, correct?

A. Not from his person but I didn't have contact with him.

Q. So the answer would be no?

A. Correct.

Q. And you didn't observe Mr. Johnson breaking any laws, did you?

A. At that time, no.

(Emphasis added.) Counsel went on to ascertain that because appellee was thirty-two he was not suspected purchasing beer though under the lawful age for doing so.

Ultimately no one was charged with possession of marijuana. The quantity found would have been the basis for only a minor misdemeanor charge. Mr. Pearson and Mr. Nolen were allowed to leave the scene in the vehicle after the marijuana was confiscated. Officer Greg Sanderson testified that because of a history of narcotics activity it was a matter of routine to stop by the Main and Weyant Dairy Mart, "to see if anybody is standing outside there, anything that looks suspicious." Officer Coleman said, "Hey, this car smells like weed," then looked inside and saw the blunts. They decided to wait and see who came outside and entered the car. He believed appellee approached the rear door on the passenger side. As Officer Coleman spoke to the driver, Officer Sanderson stood by. When appellee walked away, Officer Coleman said, "Hey, stop him. He was in the car too."

Officer Sanderson's search of appellee began with an exterior frisk for guns or sharp objects, then went into appellee's pockets where he found small quantities of cocaine, crack and marijuana. He was not sure just where the contraband was found, though some or all may have been carried in a cigarette pack or packs.

While other officers proceeded with a search of the car, appellee was placed under arrest and put in the back of a cruiser. He signed a constitutional rights waiver. "I asked him first off where did he get the drugs. He said he found them at a restaurant. I think it was a Waffle House or

something. If I remember right, I think he said that he doesn't use hard drugs. I think he was trying to give them to somebody to sell for him or something along the lines of that."

In argument the prosecutor relied primarily upon State v. Moore (2000), 90 Ohio St. 3d 47, maintaining that officers had probable cause "to know this car was involved in something illegal," and that exigent circumstances justified a search of appellee because he was seen walking away from the scene after leaving the store with the driver and front seat passenger. The judge asked if the two individuals, who had been about to enter the car, were searched or patted down. The prosecutor said he didn't know. The judge commented, "It seems to me that there may be even more cause for searching those individuals."

RESPONSE TO APPELLANT'S FIRST PROPOSITION OF LAW: The language cited from the U.S. Supreme Court's decision in Herring v. United States already provides guidance for the interpretation of the Fourth Amendment by state courts. Applying Herring, application of the exclusionary rule properly serves as a deterrent in the circumstances presented by this case.

In Herring v. United States (2009), 129 S.Ct. 695, the defendant hoped to retrieve something from his impounded truck. There were no open warrants for his arrest in the county where the truck was located, but the computer database in an adjoining county showed an active warrant. It was soon learned that the warrant had been recalled, but in the meantime Herring had been arrested. Drugs were found on his person and a gun in the truck. Under these circumstances the Supreme Court determined officers had acted in good faith and that if the exclusionary rule were applied the costs would outweigh the benefits:

To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level.

Id. at 702.

In this case one of the officers testified it was routine practice to stop by this convenience

store "to see if anybody is standing outside there, anything that looks suspicious." In such circumstances application of the exclusionary rule properly deters unlawful citizen-law enforcement interaction through deliberate, reckless, or negligent disregard of the citizen's Fourth Amendment rights. The circumstances are markedly different from the negligent records keeping at issue in Herring.

RESPONSE TO APPELLANT'S SECOND PROPOSITION OF LAW: The decision of the Court of Appeals did not turn on Article I, Section 14 of the Ohio Constitution.

Appellant's second proposition of law seeks to revive State . Lindaway (1936), 131 Ohio St. 166, paragraphs 4, 5 and 6 of the syllabus. Lindaway was the basis for this court's decision in State v. Mapp (1960, 170 Ohio St. 427, overruled by the U.S. Supreme Court in Mapp v. Ohio (1961), 367 U.S. 643. Appellant's argument under the second proposition of law does not identify what purpose would be served by this revival.

Appellee's brief in the Court of Appeals did not cite Article I, Section 14 of the Ohio Constitution. That provision was not mentioned in the lead opinion from the Court of Appeals or the dissent. The only mention of the Ohio Constitution comes at ¶35 of Judge Bryant's concurring opinion:

Ohio's Supreme Court has concluded that Ohio's constitution provides greater protection than the Fourth Amendment against warrantless arrests for minor misdemeanors, and evidence obtained as the result of an arrest for a minor misdemeanor is subject to suppression in accordance with the exclusionary rule. State v. Brown, 99 Ohio St. 3d 323, 2003-Ohio-3931; State v. Jones, 88 Ohio St. 3d 430, 2000-Ohio-374. Jackson, supra. Although in this case the presence of the marijuana blunt and an odor of freshly burnt marijuana emanating from the automobile may have provided the officers with probable cause to conduct a search of the automobile's passenger compartment, it did not provide probable cause to arrest or search Johnson incident to arrest, when Johnson, unlike the defendant in Moore, had no detectable odor of marijuana coming from him. See State v. Kelly (Dec. 7, 2001, 11th Dist. No. 2000-P-0113).

Judge Bryant rejected the state's claims the search was justified as incident to arrest or by exigent circumstances because there was not probable cause for either an arrest or a search. The paragraph

quoted further reasons that even if there had been probable cause to cite appellee for the marijuana seen in the car, he would not have been subject to arrest.

Appellant has failed to articulate how the concurring opinion turns on the availability of the exclusionary rule for violations of the state constitution. The reference is to freedom from arrest for citable offenses based on probable cause, not the differential availability of the exclusionary rule under the state and federal constitutions when there is not probable cause for arrest or search.

RESPONSE TO APPELLANT'S THIRD AND FOURTH PROPOSITIONS OF LAW: The search of appellee's person did not fall within the recognized exceptions to the Fourth Amendment's warrants requirement.

Appellant's third proposition of law seeks to justify the warrantless search of appellee's person for contraband as being based on probable cause. Argument under the fourth proposition of law seeks to vindicate the search as incident to an arrest. The best response seems to be a summary of the position taken by appellee in the Court of Appeals.

I. The Nature of the Search of appellee's person

Interactions between police officers and members of the public begin with consensual encounters, requiring no particularized justification. Cf. United States v. Drayton (2002), 536 U.S. 194. Investigative detention requires reasonable suspicion warranting detention of an individual, and further requires reasonable suspicion an individual may be armed before he or she may be frisked for weapons. Cf. State v. Skaggs (1999), 134 Ohio App. 3d 162; State v. Warren (1998), 129 Ohio App. 3d 598. Arrest requires probable cause. So does the warrantless search of a person who has not formally been placed under arrest. State v. Moore (2000), 90 Ohio St. 3d 47.

Because appellee was not allowed to continue walking, this was not a consensual encounter, nor was the search of his person by his own consent. Plainly the search conducted by Officer Sanderson was more than a protective frisk for weapons, as may be allowed pursuant to Terry v. Ohio (1968), 392 U.S. 1. While Officer Sanderson initially frisked appellee for weapons, "In this

instance, since I knew that there was physical marijuana in the car, I think I just went ahead and searched Mr. Johnson." After patting the outside, he went into appellee's pockets and found the small quantities of drugs resulting in charges. Officer Coleman had already testified that it was his intention to have appellee searched, and not merely frisked for weapons.

The search of appellee's person was justified only if it was incident to a lawful arrest based on probable cause that a specific crime had been committed, or if justified by exigent circumstances, again based on probable cause.

II. Why the search was unjustified

The officers were within their rights shining a flashlight into a parked car from which the odor of marijuana emanated. The marijuana "blunt" appeared to be contraband and was visible from outside the vehicle. It was in "open view" as that concept may be distinguished from the plain view doctrine of Coolidge v. New Hampshire (1971), 403 U.S. 443 and its progeny, which involve objects that come into view during an authorized search or other constitutionally permitted intrusion. See State v. Lang (1996), 117 Ohio App. 3d 29, 34-35. The use of a flashlight is not of constitutional significance. Lang citing Texas v. Brown (1983), 460 U.S. 730, 740. Immediate warrantless seizure of the blunt would have been permissible under the automotive exception. Cf. Pennsylvania v. Labron (1996), 518 U.S. 938.

An investigative detention must be based on reasonable suspicion. Terry v. Ohio (1968), 392 U.S. 1, 27. The objective facts known to Officer Sanderson, who conducted the search, were that Officer Coleman had detected the odor of marijuana coming from the car. As he stood by while Officer Coleman made contact with individuals approaching the front doors of the car he saw appellee begin walking away after approaching a rear door, and he proceeded to stop appellee when Officer Coleman called out. "Hey, stop him. He was in the car too."

Officers may not conduct a general search of those in the proximity of contraband. Appellee could only be detained for investigatory purposes if there was particularized suspicion he was the person who left the marijuana between the front seats. This is at odds with approaching a

rear door. There was no testimony that appellee smelled of marijuana or appeared to be under the influence. While Officer Coleman may have found appellee patting his pockets suspicious, his attention remained primarily focused on Steven Pearson and Omar Nolen. Officer Sanderson, who conducted the search, did not testify that he personally observed this conduct or that he was informed of it by Officer Coleman. This is not a case where appellee attempted to flee the scene. Mere avoidance of contact with the police does not give rise to reasonable suspicion. State v. Bryson (2001), 142 Ohio App. 3d 397, 403.

While appellee submits the circumstances did not establish the particularized and objective basis required for an investigative detention, that is not the ultimate issue. For Officer Sanderson's search to be valid there must have been probable cause for a search of appellee's person reaching beyond a protective pat down for weapons to a search of appellee's pockets, where contraband was found.

Officer Sanderson did not have probable cause, before the search, to warrant a man of reasonable caution believing that appellee was in possession of cocaine. Suspicion was aroused by the marijuana spotted between the front seats of an unoccupied car. He did not have probable cause to arrest appellee for possession of marijuana. Three individuals were under suspicion. The apparent driver had offered to throw the marijuana away and indicated no more than that appellee was a part of the group. There was no claim that appellee was arrested first based on probable cause he had committed one or the other of these possession offenses, then searched incident to that arrest.

As a secondary argument, appellee argued in the Court of Appeals that even if there were probable cause to charge him with possession of a small quantity of marijuana he could not have been arrested. For minor misdemeanors, R.C. 2935.26 calls for the issuance of a summons in most circumstances. See State v. Jones (2000), 88 Ohio St. 3d 430, and State v. Brown, 99 Ohio St. 3d 323, 2003-Ohio-3931, adhering to this position, notwithstanding the decision in Atwater v. Lago Vista (2001), 532 U.S. 318. Appellee claims to find encouragement in Virginia v. Moore (2008),

128 S.Ct. 1598, but that case is merely a variation on Atwater.

III. Exigent circumstances

State v. Moore (2000), 90 Ohio St. 3d 47, the case relied upon by the state at the suppression hearing, found the search of the defendant's person was justified by exigent circumstances. That term has come to take on two meanings, in the same manner "plain view" is used to refer both to objects in open view, and those that come into view during a lawful intrusion into premises subject to an expectation of privacy.

Originally exigent circumstances were tied to the official response to an emergency, such as entering a burning building to fight the fire. Cf. Michigan v. Tyler (1978), 436 U.S. 499. Probable cause is not required. Here there was no emergency warranting entry into appellee's pants pockets, such as a search for medication following a collapse on the street. The term is also applied to proceeding with a warrantless search when the flow of circumstances fairly excuses the need to first obtain a warrant.

Here probable cause as to the presence of contraband is required, and an officer's actions are constitutionally permissible only if supported by probable cause.

The syllabus to State v. Moore, supra, holds:

The smell of marijuana alone, by a person qualified to recognize the odor, is sufficient to establish probable cause to conduct a search.

In Moore a Highway Patrol officer stopped a car that had run a red light. When the defendant stepped from the car the officer noticed a strong odor of marijuana emanating both from the vehicle and the defendant's person. In the Court's view, this odor established probable cause for a search of the car, where a burnt marijuana cigarette was found in the ashtray. Smell, like the other senses, could be relied upon in establishing probable cause, and the officer had extensive training and experience in detecting the odor of marijuana. The automotive exception provided the necessary exception to the general warrants requirement.

The search of the defendant's person in Moore was more problematic for the Court, since,

"(t)he overriding function of the Fourth Amendment is to 'protect personal privacy and dignity against unwarranted intrusion by the State.'" Moore at p. 51, citing Schmerber v. California (1966), 384 U.S. 757, 767. In Moore the search of the defendant's person took place before the search of the vehicle, and went beyond the permissible scope of a patdown for weapons. However, exigent circumstances justified the search. The officer was working alone, and in order to obtain a warrant would have had to allow the defendant to leave the scene driving his car. This would have permitted the destruction of evidence. Though the circumstances excused the need to obtain a warrant, the search of Moore's person was nonetheless supported by probable cause - the smell of marijuana from the interior of the car and detected on the defendant's person. Moore at p. 52.

The facts of the present case are distinguishable. While there was an odor of marijuana from the car, there was no testimony that such an odor was detected on appellee's person, or for that matter, emanating from the persons of the two people that actually began to enter the parked car. The defendant in Moore got out of the car from which the odor of marijuana emanated. Appellee did not. The marijuana here was seen in the front seat. At most, appellee approached a rear door. In Moore the odor of marijuana was characterized as strong. Here the testimony was only that the odor of marijuana was detected. No basis was adduced for inferring recent consumption, or that the defendant was likely to be in possession of additional marijuana. In fact the apparent driver indicated that the marijuana belonged to him.

State v. Mitchell (1993), 87 Ohio App. 3d 484 presents circumstances comparable to the present case. A Highway Patrol officer stopped a car being driven by the defendant's brother for speeding. The brother was arrested for driving without a license. He told the officer cocaine had been concealed under the front seat. The defendant and another passenger were ordered out of the car. No cocaine was found. When the officer who made the stop first approached the vehicle, he noticed the defendant's shoes were untied. When he saw they had been tied by the time the defendant was standing behind the car, he ordered the defendant to remove his shoes. Packets of cocaine were found inside. As in the present case, the prosecutor argued the circumstances gave the

officers probable cause and that the search of the shoes was warranted by exigent circumstances. The appellate court disagreed.

The court noted, "A person's mere proximity to others independently suspected of criminal activity does not, without more, provide a sufficient constitutional basis to search that person," citing Ybarra v. Illinois (1979), 444 U.S. 85, 91. Ybarra involved the search of a person who was in a bar being searched pursuant to a warrant. "Thus, the fact that officers have a valid constitutional basis to search one person does not, standing alone, justify the search of others in the area." Mitchell at 491-492. Any suspicion the officers may have had that Mitchell had concealed contraband in his shoes "did not rise to the level necessary to satisfy the Fourth Amendment standard." The officer had not seen the defendant make any movement to put anything in his shoes, and the fact the laces had been tied was not enough to justify the search. *Id.* at 493-494.

As a secondary argument, appellee advanced that the exigency of circumstances must be weighed against the level of suspected criminal activity. State v. Moore involved a driver operating a vehicle while apparently smoking marijuana, an arrestible offense under Ohio's operating under the influence statutes. But for appellee, the suspected illegal conduct was no more than possession of marijuana. Possession of less than 100 grams (3.5 ounces) of marijuana is a minor misdemeanor, R.C. 2925.11(C)(3)(a). The maximum penalty for a minor misdemeanor is a fine of \$150. R. C. 2929.28(A)(2)(a)(v).

In Welsh v. Wisconsin (1984), 466 U.S. 740 officers entered the defendant's home without a warrant and arrested him for first offense driving under the influence, which carried only a fine under Wisconsin law of that period. The court found though there may have been exigent circumstances, they did not permit warrantless home entry when there was only probable cause that a minor offense has been committed. Similar reasoning has been applied by Ohio courts in a variety of circumstances. Middleburg Heights v. Theiss (1985), 28 Ohio App. 3d 1; State v. Robinson (1995), 103 Ohio App. 3d 490, 496-497; State v. Davis (1999), 133 Ohio App. 3d 114; State v. Christian, Fulton App. No. F-04-003, 2004-Ohio-3000; State v. Scott M. (1999), 135 Ohio

App. 3d 253; State v. Bowe (1988), 52 Ohio App. 3d 112, 114; State v. Price (1999), 134 Ohio App. 3d 464. Mindful that these cases involve home entries, and the court in State v. Moore excused the warrantless search of the defendant's person at roadside, the dissenters in Moore found the gravity of marijuana possession did not justify the search of the defendant's person. At least in Moore the defendant smelled of marijuana and had been driving. Appellee was not the driver. At most he was a rear seat passenger, seated at the greatest distance from the contraband observed.

Both of the state's theories justifying the officers' actions required probable cause. Neither probable cause to arrest nor probable cause to search were established. The Court of Appeals properly decided this case.

CONCLUSION

For the above stated reasons, further review of this cause is not warranted.

Respectfully submitted,

Yeura R. Venters 0014879
Franklin County Public Defender

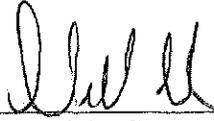
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PROOF OF SERVICE

I hereby certify that a copy of this Memorandum Opposing Jurisdiction was hand delivered to the office of the Franklin County Prosecuting Attorney, Counsel for Appellee, 373 South High Street, 13th Floor, Columbus, Ohio 43215, this 11th day of September, 2009.



Allen V. Adair, Counsel of Record
Counsel for Appellee,
Adrian L. Johnson

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FRANKLIN CO, OHIO

2009 JUL 14 PM 1:26

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

CLERK OF COURTS

State of Ohio,

Plaintiff-Appellee,

v.

Adrian L. Johnson,

Defendant-Appellant.

No. 08AP-990
(C.P.C. No. 07CR-12-8749)

(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on July 14, 2009, the assignments of error are sustained and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is reversed and this cause is remanded to that court for further proceedings in accordance with law consistent with said decision. Costs shall be assessed against appellee.

BRYANT, J., concurs separately.

By: *Gary Tyack*
Judge G. Gary Tyack

Pfeiffer, J.
FILED
COURT OF APPEALS
FRANKLIN CO. OHIO

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

2009 JUL 14 PM 1:24
CLERK OF COURTS

State of Ohio,

Plaintiff-Appellee,

v.

Adrian L. Johnson,

Defendant-Appellant.

No. 08AP-990
(C.P.C. No. 07CR-12-8749)

(REGULAR CALENDAR)

D E C I S I O N

Rendered on July 14, 2009

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

Yeura R. Venters, Public Defender, and *Allen V. Adair*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

TYACK, J.

{¶1} Adrian L. Johnson is appealing from his convictions for possession of cocaine and possession of crack cocaine. He assigns two errors for our consideration:

First Assignment of Error: The trial court erroneously overruled appellant's motion to suppress evidence seized during the warrantless search of his person.

Second Assignment of Error: The trial court erroneously overruled appellant's motion to suppress statements obtained in the aftermath of the illegal search of his person.

{¶2} On the evening of June 11, 2007, Adrian L. nson and two other men went to a Dairy Mart at the intersection of Main Street and Weyant on the east side of Columbus, Ohio. One or more of the men had been smoking marijuana in the car before they parked it outside the store with the windows open. A Columbus police officer checked the car and smelled the marijuana smoke. The officer shone his flashlight inside the car and saw what he considered to be a marijuana "blunt" sitting in the console between the front seats.

{¶3} The occupants of the car returned. Steven Pearson approached the door by the driver's seat. Omar Nolen approached the front passenger's seat. Johnson started toward the door behind the driver's door or the rear door on the passenger side, but decided to walk away when a police officer began asking Pearson about the marijuana in the car.

{¶4} Pearson admitted the car was his, apologized for having the marijuana and offered to throw it away. No one was ever charged with a marijuana offense, which is a minor misdemeanor in Ohio.

{¶5} Columbus Police Officer Justin Coleman was the officer who smelled the marijuana smoke and who questioned the driver. When Johnson began to walk away, Coleman directed a fellow officer, Greg Sanderson, to stop Johnson because "he was in the car, too." (Tr. 33.)

{¶6} Officer Sanderson frisked Johnson for weapons and found none. Officer Sanderson then searched Johnson's pockets and found small quantities of marijuana, cocaine and crack cocaine in a cigarette case.

{¶7} Johnson was placed in the back of a police cruiser and questioned. He acknowledged having the drugs; claiming he had found them at a restaurant earlier.

{¶8} The first question to be addressed is whether the police officer had the right to stop and search Johnson.

{¶9} The Fourth Amendment to the United States Constitution states that individuals have the right to be free of unreasonable searches and seizures. The Supreme Court of the United States has held in *Katz v. United States* (1967), 389 U.S. 347, 88 S.Ct. 507, that warrantless searches are per se unreasonable, subject to a few, well-delineated exceptions. However, a police officer can stop and frisk a citizen if the officer has a reasonable articulable suspicion of the citizen being involved in illegal activity. See *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868.

{¶10} Officer Sanderson went well beyond a frisk of Johnson. Having conducted a frisk, the officer searched Johnson's pockets. Officer Sanderson's action was beyond that authorized by *Terry*, so legal justification for the search must be found elsewhere if the search of Johnson's pockets is to be considered a reasonable, legal search.

{¶11} Because no warrant was involved, the burden falls upon the government to set forth one of the well-delineated exceptions which justify the search of Johnson's pockets. In the trial court, the State asserted two grounds for the search to be considered reasonable and legal. First, the assistant prosecuting attorney asserted that the police officer had "probable cause to know that this car was involved in something illegal. That's all that's required under these circumstances." (Tr. 41.) Second, the assistant prosecuting attorney asserted that "exigent circumstances" justified the search of Johnson's pockets after the frisk for weapons had revealed no weapons.

{¶12} Addressing the motor vehicle exception to the warrant requirement, first we find the exception not to apply here. The motor vehicle exception requires the search of a motor vehicle. The exception also requires that probable cause to search be present. See *Carroll v. United States* (1925), 267 U.S. 132, 45 S.Ct. 280, and its progeny.

{¶13} The issue in Johnson's case is not the search of a motor vehicle, but the search of Johnson's pockets outside the motor vehicle. For this reason alone, the motor vehicle exception to the warrant requirement does not apply.

{¶14} Further, no probable cause to believe that Johnson had contraband in his pockets existed. Probable cause to search one location (the car) does not automatically result in probable cause to search another location (Johnson's pockets).

{¶15} The second justification for the search asserted below was "exigent circumstances." The exigent circumstances exception has consistently required probable cause to search the location to be searched or to seize the object to be seized. Also, the exigent circumstances exception has only been applied by the United States Supreme Court in circumstances far more exigent than one in which it is possible that a person is walking away with a small amount of marijuana in his pocket. Thus, in *Ker v. California* (1963), 374 U.S. 23, 83 S.Ct. 1623, the issue before the United States Supreme Court was whether police action was illegal with respect to a known drug dealer who had recently made a drug sale of a pound of marijuana to an undercover police officer. The drug dealer complained about police officers using a passkey to enter his apartment to seize a sizeable quantity of drugs when a serious risk existed that the drugs would be distributed before a warrant could be procured.

{¶16} In *Schmerber v. California* (1966), 384 U.S. 757, 86 S.Ct. 1826, officers were permitted to have blood drawn from a man who smelled of alcohol on his breath, had bloodshot eyes, and had caused serious injury to a passenger as a result of a motor vehicle collision.

{¶17} In *Mincey v. Arizona* (1978), 437 U.S. 385, 98 S.Ct. 2408, the United States Supreme Court struck down a prosecution theory that the severity of an offense, including murder, automatically created exigent circumstances such that a warrant was not required.

{¶18} In *Welsh v. Wisconsin* (1984), 466 U.S. 740, 104 S.Ct. 2091, the United States Supreme Court held that the warrant requirement should rarely be disregarded when minor offenses are involved, especially in the context of entering residences.

{¶19} The state has argued that the case of *State v. Moore*, 90 Ohio St.3d 47, 2000-Ohio-10, applies and supports a finding of exigent circumstances with respect to the search of Johnson's pockets. The syllabus for the *Moore* case reads:

The smell of marijuana, alone, by a person qualified to recognize the odor, is sufficient to establish probable cause to conduct a search.

{¶20} If the issue before us were the search of the car, *Moore* would apply. However, no testimony at the hearing on the motion to suppress indicated that Johnson had any odor of marijuana smoke on him. At most, Johnson had been in a car while someone smoked marijuana earlier, but his presence in the car did not provide probable cause to believe he possessed marijuana at the time he was searched, especially in light of the driver's acknowledgement that the marijuana belonged to him (the driver). There

was no probable cause to believe that more marijuana or any other controlled substance was in the possession of anyone outside the car.

{¶21} The state also has submitted that the warrant exception of a search incident to a lawful arrest applies here. The lawful arrest posited is an arrest for possession of the marijuana left in the car when the men went into the Dairy Mart.

{¶22} To possess a controlled substance in Ohio, the individual must have control over the controlled substance. R.C. 2925.01(K) defines "possess" as follows:

"Possess" or "possession" means having control over a thing or substance, but 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.

At most, Johnson previously had access to the marijuana blunt left in the console between the front seats of the car. Police officers had no basis for believing that Johnson had control over it, especially after Pearson claimed responsibility for it.

{¶23} Further, the Ohio Legislature has specifically barred arrest for minor misdemeanors, subject to exceptions which do not apply here. See R.C. 2935.26.

{¶24} In addition, the Supreme Court of Ohio has ruled that custodial arrests are prohibited unless compliance with R.C. 2935.26 is demonstrated.

{¶25} The Supreme Court of the United States has recently restricted the doctrines of searches incident to a lawful arrest in the case of *Arizona v. Gant*, ___ S.Ct. ___, 2009 WL 1045962 (U.S. Ariz.), 77 USLW, and narrow the scope of permissible searches under *New York v. Belton* (1981), 453 U.S. 454, 101 S.Ct. 2860.

{¶26} In short, no lawful arrest of Johnson was occurring, so no search incident to a lawful arrest could occur.

{¶27} Since none of the well-delineated exceptions to the warrant requirement apply, the search of Johnson's pockets was illegal per se and unreasonable. Hence, the trial court should have suppressed the small amount of controlled substances which was found and seized.

{¶28} The first assignment of error is sustained.

{¶29} The custodial interrogation of Johnson was a result of the search of Johnson's pockets and hence a fruit of the proverbial poisonous tree. See *Wong Sun v. United States* (1962), 371 U.S. 471, 83 S.Ct. 407. Therefore, the statement obtained as a result of the illegal search and seizure also should be suppressed.

{¶30} The second assignment of error is sustained.

{¶31} Both assignments of error having been sustained, the judgment of the Franklin County Court of Common Pleas is reversed and the case is remanded for further proceedings.

*Judgment reversed and remanded
for further proceedings.*

BRYANT, J., concurs separately.
McGRATH, J., dissents.

BRYANT, J., concurring separately,

{¶32} I concur in the majority's judgment reversing the judgment of the Franklin County Court of Common Pleas that denied defendant's motion to suppress, but because I do so for different reasons than does the majority, I write separately.

{¶33} Even if we assume the police officers were justified under *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct 1868, in conducting an investigative stop and frisk of Johnson, the police officer who detained and searched Johnson exceeded *Terry's*

constitutionally permissible bounds when he reached into Johnson's pockets and seized the small quantities of marijuana, cocaine and crack cocaine. The "plain feel" exception to the warrant requirement of the Fourth Amendment does not apply here because Officer Sanderson testified at the suppression hearing the contraband was not detected during his patdown search of Johnson's outer clothing. See *Minnesota v. Dickerson* (1993), 508 U.S. 366, 113 S.Ct. 2130, and *State v. Evans* (1993), 67 Ohio St.3d 406 (stating a police officer conducting a lawful *Terry*-type search may seize nonthreatening contraband, such as controlled substances, when its incriminating nature is "immediately apparent" to the searching officer through his sense of touch during a patdown search). See also *State v. Daugherty*, 8th Dist. No. 89373, 2007-Ohio-6822, and *State v. Crusoe*, 150 Ohio App.3d 208, 2002-Ohio-6389 (concluding police exceeded the bounds of a lawful *Terry* search in seizing crack cocaine and drug paraphernalia from pockets). A police officer must have probable cause, not just reasonable suspicion to believe that an item is contraband before seizing it to "ensure * * * against excessively speculative seizures." *Dickerson* at 376; *State v. Moore* (2000), 90 Ohio St.3d 47.

{¶34} The state argues the search was proper as incident to arrest or because exigent circumstances were present. The suspected illegal conduct that gave rise to the investigatory stop and frisk of Johnson was, by Officer Coleman's own testimony at the suppression hearing, possession of a "very small amount of marijuana" which, if charged, would have been the basis only for a minor misdemeanor offense. R.C. 2935.26 prohibits police officers from arresting individuals for a minor misdemeanor unless one of four statutory exceptions applies, and none is applicable here. Because Johnson would not have been subject to lawful arrest even if the marijuana blunt found in the car were his,

the exception for search incident to a lawful arrest does not apply. See *State v. Jackson*, 8th Dist. No. 85639, 2005-Ohio-5688; *State v. Richardson* (Dec. 7, 1999), 10th Dist. No. 98AP-1500.

{¶35} Ohio's Supreme Court has concluded that Ohio's constitution provides greater protection than the Fourth Amendment against warrantless arrests for minor misdemeanors, and evidence obtained as the result of an arrest for a minor misdemeanor is subject to suppression in accordance with the exclusionary rule. *State v. Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931; *State v. Jones*, 88 Ohio St.3d 430, 2000-Ohio-374; *Jackson*, supra. Although in this case the presence of the marijuana blunt and an odor of freshly burnt marijuana emanating from the automobile may have provided the officers with probable cause to conduct a search of the automobile's passenger compartment, it did not provide probable cause to arrest or search Johnson incident to arrest, when Johnson, unlike the defendant in *Moore*, had no detectible odor of marijuana coming from him. See *State v. Kelly* (Dec. 7, 2001), 11th Dist. No. 2000-P-0113.

{¶36} Although "exigent circumstances" may provide an exception to the Fourth Amendment warrant requirement, probable cause to arrest or to search must be present. *Moore*; *State v. Robinson* (1995), 103 Ohio App.3d 490, 497, citing *Steagald v. United States* (1981), 451 U.S. 204, 101 S.Ct. 1642. Because police had no probable cause to arrest Johnson or to conduct more than a *Terry*-type patdown search of him during a lawful investigative detention, the question of whether "exigent circumstances" existed to excuse the warrant requirement is not reached, and the controlled substances seized from Johnson's pockets, together with statements made by him after the illegal search

and seizure, must be suppressed. *Wong Sun v. United States* (1962), 371 U.S. 471, 83 S.Ct. 407.

{¶37} Accordingly, I agree with the majority's conclusion that the motion to suppress should have been granted. Because the trial court did not, I agree that the judgment of the trial court be reversed.

McGRATH, J., dissenting.

{¶38} Being unable to agree with the majority or concurring opinions herein, I respectfully dissent. Essentially, both the majority and concurring opinions find that, under the facts of this case, the police officers had neither a reasonable suspicion nor probable cause to believe that the defendant possessed a controlled substance at the time of the search of the defendant's pockets. Both opinions conclude that the odor of burning marijuana in a vehicle in which the defendant was a passenger and the observing of a "blunt" marijuana cigarette on the center console of the vehicle does not give rise to probable cause or reasonable suspicion as there was no specific odor of marijuana coming from the defendant's body once he was out of the car and being addressed by the searching police officer.

{¶39} Probable cause requires a fair probability of criminal activity, not a showing by preponderance of the evidence or beyond a reasonable doubt. Moreover, in assessing probable cause or reasonable suspicion, a court must consider the facts in their *totality*. *State v. Gantz* (1995), 106 Ohio App.3d 27, 35. Police officers may draw inferences based upon their experience and training in order to decide whether probable cause exists and, of course, those inferences may not be obvious to an untrained person. *United States v. Cortez* (1981), 449 U.S. 411, 417, 101 S.Ct. 690, 694.

{¶40} I believe additional factors here support the reasonableness of the officers' conduct. Not only did the defendant arrive in the vehicle a short time before the search took place in the company of two other men, the vehicle was one in which the odor of burnt marijuana was present, and marijuana was observed on the front console. The defendant and the other two men had exited the car and entered the Dairy Mart store. The officers knew this to be a particular location of heavy narcotics activity and it was 1:30 a.m. The officers waited to see if anyone approached the car. All three men returned to the car to their respective doors as if to get into the vehicle. As the police then approached, the driver spoke to Officer Coleman, acknowledged the marijuana, apologized for it, and offered to throw it away. The defendant, approaching a rear passenger door as if to enter the vehicle, saw the driver's encounter with the police and changed course as he turned and started to walk away and distance himself from the vehicle and from the police. As the driver identified the defendant as being an occupant of the vehicle and that the three men had all arrived together, Officer Coleman saw the defendant attempting to exit the area and patting his pockets. Officer Coleman relayed what he had seen to his fellow officer, Officer Sanderson, who ultimately stopped the defendant and searched him. Officer Coleman testified that police training and his experience both indicate that, in drug possession situations, persons very often pat the areas of the body where they may have drugs or other contraband. Such is considered by police to be a telltale sign or body cue indicative of possession of an illegal or controlled substance.

{¶41} Although I agree that the officers did not testify to smelling marijuana on the defendant's person, the facts here seem even stronger to indicate the likelihood of

possession by this defendant than existed in *State v. Moore*, 90 Ohio St.3d 47, 2000-Ohio-10, or *State v. Taylor* (Oct. 22, 1997), 9th Dist. No. 96CA006592.

{¶42} Officer Coleman was emphatic that the smell of marijuana here was of burnt marijuana, not simply the odor of marijuana itself. Thus, the defendant was among one of three individuals in the vehicle where a blunt producing burnt marijuana odor was plainly visible. The defendant had arrived in the car and obviously had left the car and had come back with a grocery bag containing beer. As he was about to enter the car, the defendant saw the police and then attempted to vacate the area. As he did so, he gave one of the "body cues" or telltale signs known to police with respect to drug possession situations—the defendant was patting his pockets and leaving the area.

{¶43} Under these circumstances and the cases of *Moore*, supra; *State v. Perryman*, 8th Dist. No. 82965, 2004-Ohio-1120; *State v. Garcia* (1986), 32 Ohio App.3d 58; *State v. Simmons*, 8th Dist. No. 85297, 2005-Ohio-3428; or *State v. Bird* (1992), 4th Dist. No. 92 CA 2, I believe these officers had more than sufficient probable cause to search the defendant's pockets for marijuana.

{¶44} Furthermore, though rejected by the majority and separate concurring opinions, the state has argued the exigency exception to the warrantless search. If there is probable cause to believe that a defendant possesses a controlled substance, then his exiting the area and getting out of the sight of the police officers produces an "exigent" situation by the mere fact that the drugs could easily then be disposed of and the police officers would not be aware that they had been thrown away. In essence, the drugs are going down the street and out of the possible controlled situation of the officers similar to a vehicle going down the street with controlled substances.

(¶45) Therefore, I would find that, not only did the officers have probable cause, but an exigent circumstance did exist justifying a warrantless search. Accordingly, I would agree with the trial court's disposition of the matter and would affirm the trial court's denial of the motion to suppress.
