

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case Number 2014-1879
Appellee,	:	On Appeal from the Richland
	:	County Court of Appeals,
v.	:	Fifth Appellate District
DAVID WEHR,	:	Court of Appeals
Appellant.	:	Case No. 2014-CA-46

APPELLEE, STATE OF OHIO'S
MEMORANDUM IN OPPOSITION TO JURISDICTION

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Explanation of why this case is not a case of public or great general interest and does not involve a substantial constitutional question:

The State of Ohio submits that this case presents absolutely no unique facts, rulings, or issues. Nor does it raise any substantial constitutional questions worthy of review by this Court. The Fifth District Court of Appeals correctly applied the definition of “immediately apparent” as described by this Honorable Court in the context of plain view/plain feel searches.

On November 17, 2013, Officer Raymond Frazier of the Richland County Sheriff’s Officer was working second shift, wearing the uniform of the day, and was driving a marked cruiser. On this date, he was also working in the capacity of a K-9 officer, working with canine Odin.

Officer Frazier was performing a daily routine patrol, which normally included a check of the local hotels, something he liked to do once or twice a shift. The reason for the hotel checks was that the Sheriff’s Department has had trouble in the areas of the hotels in the past and the hotel management did not like people loitering on the property. Officers generally would drive around the parking lot to make their presence known and keep an eye out for people drinking or loitering in the parking lot.

On this particular evening, at approximately 8:54 p.m., Officer Frazier was in the parking lot of the Budget Inn located at 1336 Ashland Road, in Mansfield Ohio. While checking the parking lot, the officer observed a 2002 white Toyota four-door sitting in the parking lot with its lights off. Two occupants were visible within the vehicle. As the officer pulled behind the Toyota on his way to exit the parking lot, the passenger of the vehicle exited the vehicle and ran towards the hotel office. Officer Frazier testified that

he exited his vehicle and yelled at the man, "Hey, where are you going?" and received no response.

At this point, Officer Frazier approached the Toyota to make contact with the driver and registered owner, the Appellant David Wehr, as he was concerned that a crime might have just occurred or that the Appellant might need some further assistance. The officer then engaged in a consensual encounter with the Appellant. The Appellant expressed that he did not know why the passenger had gotten out of the vehicle and opined that perhaps he was getting a room. The Appellant would not name the passenger and merely stated that he was some friend that he had given a ride to and he did not know what the passenger was doing.

The Appellant was not under arrest and was not being detained at that time. The encounter continued to be consensual and the Appellant was free to end the conversation at any time. During the conversation, the officer noticed that the Appellant was reaching and fidgeting with something down near the floorboards of the vehicle. Officer Frazier asked the Appellant several times to stop reaching down near the floor boards. The Appellant continued to make furtive gestures near the floorboards of the vehicle and refused to show his hands, causing Officer Frazier to be concerned that the Appellant had a weapon.

Officer Frazier requested assistance, which he received within a minute or so. At that point, the Appellant was removed from the vehicle and questioned as to what he was doing reaching down near the floor. The officer briefly checked the floor to determine if there were any visible weapons. Seeing none, he became concerned that the Appellant might have secreted a weapon on his person. At that time the Appellant was patted down

for officer safety. During the pat down, an object that was immediately apparent to be a pill bottle was located in the Appellant's sock in his right pant leg. This pill bottle was removed and found to be an Advil bottle.

The Appellant was questioned as to what was in the pill bottle and the Appellant responded that he did not know. At that point the bottle was opened and individually wrapped bindles of heroin were located within as well as some Oxycodone pills. The Appellant was questioned again about the pill bottle. He indicated that he did not know what was inside of the bottle. The Appellant explained that the passenger had thrown the pill bottle on the floor prior to exiting the vehicle and that the Appellant had picked the bottle up and tucked it into his sock.

Subsequently, the passenger of the vehicle returned and was identified. A free-air canine sniff was performed of the vehicle and the canine alerted to both sides of the vehicle. During a search of the vehicle, a kitchen plate, razor blade, a cut straw and a set of digital scales were recovered from the area of the front passenger side floorboards.

As a result of the above encounter, the Appellant, David Wehr, was indicted on January 13, 2014, with one count of possession of heroin in an amount greater than five grams but less than ten grams, in violation of R.C. § 2925.11(A) & (C)(6)(c), a felony of the third degree, one count of trafficking in heroin in an amount greater than five grams but less than ten grams in violation of R.C. § 2925.03(A)(2) & (C)(6)(d), a felony of the third degree, one count of tampering with evidence, in violation of R.C. § 2921.12(A)(1), a felony of the third degree, and one count of possession of Oxycodone (schedule II) in an amount less than bulk, in violation of R.C. § 2925.11(A) & (C)(1)(a), a felony of the

fifth degree. The Appellant was arraigned on January 28, 2014, and entered a not guilty plea.

On March 24, 2014, the Appellant filed a motion to suppress the evidence seeking to suppress evidence found on the Appellant's person as a result of a pat down of the Appellant for weapons. The State filed a response on April 21, 2014. The Appellant filed a supplemental memorandum on April 28, 2014. An oral hearing was held on April 28, 2014. During the suppression hearing, the State called one officer, Deputy Raymond Frazier with the Richland County Sherriff's Department.

The trial court issued an order on May 14, 2014, granting the Appellant's motion to suppress the evidence. The trial court did not find any issue with the officer's contact with the Appellant or the subsequent pat down of the Appellant for officer safety. The trial court found that the incriminating nature of the object, in this case an Advil bottle, was not immediately apparent to the officer and, therefore, he was not justified in removing the bottle from the Appellant's person and opening it.

The State of Ohio filed a timely notice of appeal and a Criminal Rule 12(K) Certification in this matter as the granting of the Appellant's motion to suppress in this case has rendered the State's proof in this case so weak that any possibility of effective prosecution has been destroyed. The Fifth District Court of Appeals reversed and remanded the trial court's decision on October 1, 2014, relying on this Court's decisions in *State v. Halczynszak*, 25 Ohio St.3d 301, 496 N.E.2d 925 (1986) and *State v. George*, 45 Ohio St.3d 325, 544 N.E. 2d 640 (1989) and the United State Supreme Court decision in *Texas v. Brown*, 460 U.S. 730, 103 S.Ct. 1535 (1983).

ARGUMENT OF APPELLEE, STATE OF OHIO

Response to Sole Proposition of Law: An Item's Criminal Nature is "Immediately Apparent" For the Purposes of the Plain View/Plain Feel Doctrine When There is Probable Cause to Associate the Item with Criminal Activity

The Appellant argues that the removal and search of the pill bottle in this case was illegal because a pill bottle is a legal item to possess and the illegal nature of any item inside of the pill bottle cannot be ascertained through plain feel. The Appellant relies upon the United State Supreme Court opinions in *Minnesota v. Dickerson*, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993) and *Arizona v. Hicks*, 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987). However, as quoted by the Appellant, under *Dickerson*, a warrantless seizure under the plain feel doctrine "would be justified by the same practical considerations that inhere in the plain-view context." *Dickerson*, supra at 376. Under this Honorable Court's case law involving the plain view doctrine, an object's immediate apparent criminal nature is more broadly defined by the entire circumstances of the search and not just the common everyday use of the object in question.

The Fourth Amendment of the Constitution protects people from unreasonable search and seizures. Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject to a few well recognized exceptions. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). The ultimate touchstone of the Fourth Amendment is "reasonableness," and because of this, the warrant requirement is subject to certain exceptions. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006).

This Honorable Court has explicitly recognized seven exceptions to the requirement that a warrant be obtained prior to a search. Those exceptions are: "(a) [a] search incident to a lawful arrest; (b) consent signifying waiver of constitutional rights; (c) the stop-and-frisk doctrine; (d) hot pursuit; (e) probable cause to search, and the presence of exigent circumstances[;] (f) the plain view doctrine," *State v. Akron Airport Post No. 8975*, 19 Ohio St. 3d 49, 51, 482 N.E.2d 606 (1985), certiorari denied (1986), 474 U.S. 1058, 106 S. Ct. 800, 88 L. Ed. 2d 277; or (g) an "administrative search," *Stone v. Stow*, 64 Ohio St. 3d 156, 164, fn. 4, 593 N.E.2d 294 (1992).

The heroin in this case was located in a pill bottle that was found during a pat down of the Appellant for officer safety. Authority to conduct a pat down does not flow automatically from a lawful stop; a separate inquiry is required. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968). The Fourth Amendment requires that an officer have had a "reasonable fear for his own or others' safety" before frisking. *Id.* at 30. Specifically, "[t]he officer ... must be able to articulate something more than an 'inchoate and unparticularized suspicion or hunch.'" *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989) (quoting *Terry*, 392 U.S. at 27, 88 S.Ct. 1868). Whether that standard is met must be determined from the standpoint of an objectively reasonable police officer, without reference to the actual motivations of the individual officers involved. *United States v. Hill*, 131 F.3d 1056, 1059 (D.C.Cir.1997) (quoting *Ornelas v. United States*, 517 U.S. 690, 696, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996)).

The trial court was correct in determining that the officer in this case had reasonable suspicion sufficient to remove the Appellant from his vehicle to perform a pat

down for officer safety. The Appellant was unable to explain why the passenger of the vehicle fled the vehicle when the officer's vehicle approached and failed to identify the passenger by name. The Appellant was reaching around the area of the floorboard of his vehicle with his hands out of sight of the officer. This is an area where weapons are easily accessible. The Appellant would not stop these furtive gestures after being requested to by the officer. It was nighttime. *State v. Bobo*, 37 Ohio St.3d 177, 179, 524 N.E.2d 489 (1988) (Finding the fact that the encounter took place at night was one of the factors to consider in determining the reasonableness of a pat down). The Appellant has not argued the legality of the pat down in this case.

During the pat down of the Appellant, Officer Frazier felt what he immediately knew to be a pill bottle tucked in the Appellant's sock and up inside his of pant leg. Under the plain feel doctrine, an officer conducting a pat down for weapons may lawfully seize an object if he has probable cause to believe that the item is contraband. *Minnesota v. Dickerson*, 508 U.S. 366, 375, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993). "Under that doctrine, if police are lawfully in a position from which they view an object, if its incriminating character is **immediately apparent**, and if the officers have a lawful right of access to the object, they may seize it without a warrant. See *Horton v. California*, 496 U.S. 128, 136-137, 110 L. Ed. 2d 112, 110 S. Ct. 2301 (1990); *Texas v. Brown*, 460 U.S. 730, 739, 75 L. Ed. 2d 502, 103 S. Ct. 1535 (1983) (plurality opinion)." *Id.* (emphasis added). The question was whether or not the incriminating character of the pill bottle was immediately apparent to justify the warrantless seizure of the bottle from the Appellant.

This Honorable Court has outlined the standard for determining the immediately apparent criminal nature of the object in question. *State v. Halczyzak*, 25 Ohio St.3d 301, 496 N.E.2d 925 (1986). This Court held that, “[t]he seizure of property in plain view involves no invasion of privacy and is *presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity.*” Such association may arise from the character of the property itself or, in the case of auto theft, from the circumstances in which the property is discovered. By the term ‘probable cause,’ the court intended a “‘practical, nontechnical’ probability that incriminating evidence is involved.” *Id.* quoting *Texas v. Brown*, 460 U.S. 730, 741-742, 103 S.Ct. 1535, 75 L.Ed. 2d 502 (1983) quoting *Payton v. New York*, 445 U.S. 573, 587, 100 S.Ct. 1371, 63 L.Ed. 2d 639 (1980) (emphasis original).

This Court held that the “immediately apparent” requirement is satisfied by “probable cause to associate an object with criminal activity as is obvious and evident to an ordinary police officer.” *Halczyzak*, *supra* at 305. Therefore, an item that might otherwise not be apparently criminal can be determined by the court to be so based on the circumstances of the search, i.e. when investigating an alleged chop shop, probable cause exists to associate car parts with the criminal activity of the car thefts. *Id.* Additionally, law enforcement may rely on their specialized knowledge, training and experience when determining whether an object is associated with criminal activity. *Id.* at paragraph four of the syllabus. “Probable cause to associate an object with criminal activity does not demand certainty in the minds of police, but instead merely requires that there be ‘a fair probability’ that the object they see is illegal contraband or evidence of a crime.” *State v. George*, 45 Ohio St. 3d 325, 544 N.E.2d 640 (1989), paragraph one of the syllabus.

In a similar case from the Second District Court of Appeals, the court found that there was probable cause to believe that the bulge (a piece of paper later found to contain heroin) in the defendant's sock was some form of contraband based on the totality of the circumstances. *State v. Cook*, 2nd Dist. Montgomery No. 25302, 2013-Ohio-2014, ¶ 26. In *Cook*, the defendant was first observed in the vehicle in a manner consistent with trying to conceal something and later was seen attempting to manipulate his sock with the other foot. *Id.* The court concluded that “[the officer] may not have had probable cause to believe that it was heroin, or that it was any particular kind of contraband, but he did have probable cause to believe that the bulge in Cook's sock was contraband of some sort. Therefore, [the officer] was entitled to seize the contraband from Cook's sock.” *Id.*

Clermont County Common Pleas Court denied a motion to suppress involving a small metal container that had fallen out of the defendant's pants during an investigation. *State v. Suter*, 132 Ohio Misc. 2d 6, 2005-Ohio-3461, 831 N.E.2d 1093 (C.P.). The court went through a detailed analysis to determine whether the container was validly searched. The court ultimately determined that “[t]he circumstances surrounding the seizure and search of the container, [the officer's] experience that narcotics are often transported in such containers, the suspicious area from which the container came--suggesting that it was hidden -- and the fact that one of the passengers was known to [the officer] to be a drug dealer, combined to create probable cause.” *Id.* at ¶ 19. The court went on to find that the officer was justified in opening this container without a warrant based on that probable cause. *Id.* at 23.

The Eleventh District, in *State v. Mitchell*, 11th Dist. Lake No. 2004-L-071, 2005-Ohio-3896, specifically analysis the "immediately apparent" requirement as concerns pill bottles.

In *State v. Vaughn*, this court held that the police officer had probable cause to open a pill bottle where: the defendant matched the description given by an anonymous tip, the area was a high drug area, the defendant refused to keep his hands in the location instructed by the officer, and the officer testified that he had discovered crack cocaine in similar bottles in the past. 1997 Ohio App. LEXIS 2817, at *12-13. In *State v. Hapney*, the Fourth Appellate District held there was not probable cause to open a film container. *State v. Hapney*, 4th Dist. Nos. 01CA30 and 01CA31, 2002 Ohio 3250, at P40. In its analysis, the Fourth District noted that the Ninth Appellate District held an officer has probable cause to open a pill bottle based, in part, on the officer's testimony that such containers were commonly used to carry illegal drugs. *Id.* at P39, citing *State v. Lee* (1998), 126 Ohio App.3d 147, 709 N.E.2d 1217. On the other hand, the court noted the Second Appellate District held an officer did not have probable cause to open a film canister, where no evidence was presented showing the officer had probable cause to believe the container contained contraband. *Id.* at P38, citing *State v. Osborne*(1994), 99 Ohio App. 3d 577, 651 N.E.2d 453.

In addition, the Fourth District held: "In the case at bar, no evidence exists to show that the trooper possessed probable cause that the film container contained contraband. Unlike the situation in [*State v. Lee*], the officer in the case sub judice did not offer testimony to the trier of fact that, based upon his prior years of experience, he knew film containers were used to transport illegal drugs." *Id.* at P40.

In the instant matter, Officer Armstrong testified that he has seen crack cocaine transported in "Chapstick containers, Tick Tac containers, film containers and pill bottles." Officer Armstrong had probable cause to believe the pill bottle contained contraband based on this testimony and the remaining facts of the situation, including: (1) Mitchell and Dunlap were in the same general location for more that one half hour, (2) the area was a high-drug area; (3) Mitchell tried to conceal his hands and did not comply with Officer DeCaro's request to show them, and (4) Mitchell attempted to "flag down" Officers Simmons and Smith. We note these factors constituting probable cause are very similar to the factors this court found sufficient in *Vaughn*.

Officer Armstrong had probable cause to open the pill bottle.

Id. at ¶ 22-25. See also *State v. Waddy*, 63 Ohio St. 3d 424, 588 N.E.2d 819 (1992) (The criminal nature of gloves and tape was immediately apparent based on the known circumstances of the underlying crime).

In the instant matter, the Appellant was first contacted when the passenger in his vehicle suddenly fled at the sight of the police cruiser. Upon questioning the Appellant, he could not satisfactorily explain the behavior of the passenger and would not name the passenger. {T. at 9, 21}. During this contact, Deputy Frazier noted that the Appellant continued to reach down near the floor boards of the car and appeared to be fidgeting with his clothing. He was told several times to stop his furtive movements and he failed to comply. {T. at 10-11, 22}. At this point, the Appellant was removed from the vehicle due to the concern of the officer that the Appellant was handling a weapon. {T. at 11}. Prior to patting down the Appellant, the officer glanced into the driver's side floorboards and did not see a weapon, making the officer concerned that the Appellant had secreted a weapon on his person. {T. at 23}. A pat down search was conducted of the Appellant for weapons. {T. at 11, 24}. During this pat down, a bulge was noted in the Appellant's sock, tucked up under his pant leg. The officer testified that it was immediately apparent that this bulge was a pill bottle. {T. at 11, 28, 29}. Taking into consideration all of the above facts, there was probable cause to believe that whatever the bulge was in Appellant's sock, it was contraband, not only because it is an unusual storage place for such an item, clearly he was trying to hide it, but also because of his furtive moments in this same area.

The removal of the pill bottle was, therefore, supported by probable cause to believe that the pill bottle was associated with criminal activity. The probable cause not

only allows the bottle to be removed from the Appellant's person, but extends to opening the bottle as discussed above in *Suter*.

The Fifth District Court of Appeals did not err in finding that the criminal nature of the pill bottle was immediately apparent upon based upon the location of the same secreted in the Appellant's sock, in the area where he had been making furtive movement. Under totality of the circumstances and all of the information known to the officer at the time of the incident, the Fifth District was correct in determining that there was probable cause to associate the pill bottle with criminal activity and that the officer had probable cause to open the bottle.

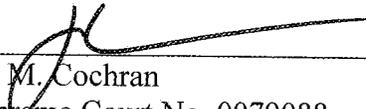
The Appellant's reliance upon *Arizona v. Hicks*, 480 U.S. 321, 107 S.Ct. 1149, 94 L.E.2d 347 (1987) is misplaced. This case is distinguishable as the search in *Hick* was based upon a shooting and involved a search for weapons, the shooter or possible victims. While the expensive stereo equipment may have seemed out of place, the criminal nature of the same was not immediately apparent when the crime being investigated was a shooting. Had the police been investigating the home owner on complaints of burglary, then under this Court's ruling in *Halczyzak*, the criminal nature out of place stereo equipment would have been immediately apparent.

In the instant matter, there were two men sitting in a parked car in the parking lot of a motel. One of the men fled upon sight of the police cruiser. The remaining individual was engaged in furtive movements in the area of the floorboard and was found to have secreted a pill bottle in his sock. It was obvious and evident to an ordinary police officer that a drug transaction or drug use was going on inside of the car and there was probable cause to associate the secreted pill bottle with illegal drug activity.

CONCLUSION

For the foregoing reasons, the State of Ohio respectfully requests that the Court deny Appellant jurisdiction to pursue his appeal.

Respectfully Submitted,

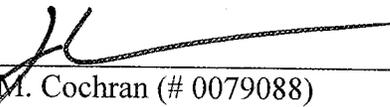


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CERTIFICATE OF SERVICE

I hereby certify that a true copy of Appellee's Memorandum in Opposition to Jurisdiction was sent to Assistant Public Defender, Peter Galyardt, Office of the Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, by regular U.S. Mail, this 12th day of November, 2014.



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