

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2009-L-103
VICTOR FLOWERS, JR.,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 08 CR 000566.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Karen A. Sheppert*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

R. Paul LaPlante, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Victor Flowers, Jr., appeals the judgment entered by the Lake County Court of Common Pleas. The trial court sentenced Flowers to an aggregate prison term of 11 months for his convictions for aggravated possession of drugs and possession of cocaine.

{¶2} This case concerns the trial court's denial of Flowers' motion to suppress evidence. The specific issue in this case is whether the police officers were permitted to

search Flowers following the traffic stop of a vehicle in which he was a passenger. Because we conclude the officers had probable cause when they searched Flowers' person, the trial court did not err by denying Flowers' motion to suppress.

{¶3} On the evening of December 5, 2008, Officer Michael Gerardi of the Willoughby Hills Police Department was on routine patrol. Officer Gerardi is a K-9 officer, and his police dog was with him that evening. Officer Gerardi noticed an SUV traveling westbound on Interstate 90 with a temporary license plate. He followed the vehicle and radioed the number on the temporary tag into dispatch, and a dispatcher ran it through the state computer system. The search revealed that the temporary registration was not on file, so Officer Gerardi initiated a traffic stop on the SUV.

{¶4} There were five males in the SUV. Officer Gerardi walked to the front passenger window to speak with the driver. He stated the driver looked "particularly nervous" and appeared to be concealing something in his hand. Officer Gerardi testified the driver had a plastic cellophane wrapper containing a white substance in his right hand. The driver removed the keys from the ignition with his left hand and gave them to the front-seat passenger to open the glove box. Officer Gerardi testified he "instantly believed" the concealed substance was cocaine based on his training and experience.

{¶5} Officer Gerardi requested backup, and Sergeant Brian Jackson and Patrolman D'Eusano eventually arrived at the scene. While waiting for the other officers to arrive, Officer Gerardi ran a license check of the driver. The driver's license was not valid, so he was arrested for driving without a valid license. The driver was removed from the vehicle and placed in one of the police vehicles. He was searched

incident to the arrest, and no contraband was found on his person. Specifically, the cellophane baggie containing the white substance was not found on the driver.

{¶6} Officer Gerardi deployed his dog to conduct an exterior “sniff” of the vehicle. During the dog’s sniff, the four passengers remained in the vehicle and were instructed to place their hands on the interior roof. The dog alerted to the presence of narcotics in the vehicle, specifically near the driver’s side door.

{¶7} The passengers were removed from the vehicle and searched for weapons. Thereafter, they were placed in police vehicles.

{¶8} The passenger compartment of the suspect vehicle was searched. During the search, Officer Gerardi found small pieces of marijuana in the backseat area of the vehicle. However, the bag of suspected cocaine was not found.

{¶9} Officer Gerardi decided to search the passengers a second time. He described this search as “more intrusive,” in that he was specifically searching for narcotics during this pat-down of the individuals. During the search of Flowers, Officer Gerardi noticed an abnormal object concealed between Flowers’ buttocks. Officer Gerardi asked Flowers what the object was; Flowers did not answer the question but, instead, responded by pushing back off the patrol vehicle and into Officer Gerardi. At that point, Officer Gerardi placed Flowers in handcuffs. About that same time, Flowers admitted the substance concealed between his buttocks was cocaine.

{¶10} Flowers was transported from the scene by Sergeant Jackson and taken to the police station to be booked. At some point during the trip, the bag of cocaine concealed in Flowers’ pants ruptured, leaving white powder on the backseat of Sergeant Jackson’s patrol car. At the station, Flowers was processed. At that time, the

suspected cocaine was removed from his underwear. In addition, officers found another bag of suspected cocaine, some marijuana, and a few pills concealed in Flowers' socks. Sergeant Jackson took several photographs of the items found on Flowers. At the suppression hearing, Officer Gerardi was questioned about state's exhibit 4, a photograph of the cellophane baggie containing white powder that was found on Flowers. He testified the cellophane baggie looked like the item that was in the driver's possession when he initially stopped the suspect vehicle.

{¶11} Subsequent testing by the Lake County Crime Laboratory revealed that Flowers had the following items on his person: a total weight of approximately 7.5 grams of substances containing cocaine, one marijuana cigarette, two unit doses of Methylenedioxymethamphetamine (MDMA), and five unit doses of Methadone.

{¶12} Flowers was indicted on three counts, including: one count of possession of cocaine, in violation of R.C. 2925.11 and a fourth-degree felony; one count of aggravated possession of drugs (Methylenedioxymethamphetamine), in violation of R.C. 2925.11 and a fifth-degree felony; and one count of aggravated possession of drugs (Methadone), in violation of R.C. 2925.11 and a fifth-degree felony. Flowers initially pled not guilty to these charges.

{¶13} Flowers filed a motion to suppress evidence resulting from the search of his person. The state filed a response in opposition to Flowers' motion to suppress. Thereafter, the trial court held a hearing on the motion. Officer Gerardi and Sergeant Jackson testified at the suppression hearing. Eight of the photographs taken by Sergeant Jackson were admitted as exhibits, as was the report from the Lake County

Crime Laboratory. Flowers did not present any evidence. Following the hearing, the trial court denied Flowers' motion to suppress.

{¶14} Flowers withdrew his not guilty plea and pled no contest to the charges in the indictment. The trial court found him guilty of all three offenses. On July 23, 2009, the trial court sentenced Flowers to 11-month prison terms for each of his convictions. These sentences were ordered to be served concurrently, resulting in an aggregate prison term of 11 months.

{¶15} Flowers timely appealed from the trial court's July 23, 2009 judgment entry. On August 10, 2009, the trial court filed an "amended judgment entry of sentence," which corrected the trial court's July 23, 2009 judgment entry by accurately stating that Flowers pled "no contest" instead of "guilty."

{¶16} Flowers raises the following assignments of error:

{¶17} "[1.] The trial court erred to the prejudice of the defendant-appellant when it found the officer had a reasonable and articulable suspicion to believe that the defendant-appellant was armed and it was appropriate to pat him down for weapons in violation of his right to be protected from unreasonable search and seizure as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution and Section 14, Article 1 of the Ohio Constitution.

{¶18} "[2.] The trial court erred to the prejudice of the defendant-appellant when it found the officer had probable cause to search the defendant-appellant in violation of his right to be protected from unreasonable search and seizure as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution and Section 14, Article 1 of the Ohio Constitution."

{¶19} Because Flowers' assigned errors are related, we will address them in a consolidated analysis.

{¶20} "Appellate review of a motion to suppress presents a mixed question of law and fact." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶8. The appellate court must accept the trial court's factual findings, provided they are supported by competent, credible evidence. *Id.*, citing *State v. Fanning* (1982), 1 Ohio St.3d 19. Thereafter, the appellate court must independently determine whether those factual findings meet the requisite legal standard. *Id.*, citing *State v. McNamara* (1997), 124 Ohio App.3d 706.

{¶21} Flowers concedes that the initial traffic stop of the vehicle was valid. Further, he does not challenge the length of the detention, as he acknowledges the police are permitted to detain passengers for as long as they are lawfully justified in detaining the driver. See *State v. Strozier*, 172 Ohio App.3d 780, 2007-Ohio-4575, at ¶14. (Citation omitted.)

{¶22} Generally, "[f]or a search or seizure to be reasonable under the Fourth Amendment, it must be based on probable cause and executed pursuant to a warrant." *State v. Moore* (2000), 90 Ohio St.3d 47, 49, citing *Katz v. United States* (1967), 389 U.S. 347, 357 and *State v. Brown* (1992), 63 Ohio St.3d 349, 350. However, as this court has previously noted, "there are several exceptions to the warrant requirement." *State v. Mitchell*, 11th Dist. No. 2004-L-071, 2005-Ohio-3896, at ¶17. (Citations omitted.)

{¶23} One exception to the warrant requirement is the "plain view" doctrine. *Id.* at ¶19. (Citations omitted.) This court has noted the following requirements are

necessary to invoke the plain view exception: “First, the initial intrusion must have been legitimate. Second, the police must have inadvertently discovered the object. Third, the incriminating nature of the object must have been immediately apparent.” *Id.* (Citation omitted.)

{¶24} In this matter, Officer Gerardi initially approached the SUV pursuant to a valid traffic stop, so his initial intrusion was legitimate. He inadvertently noticed the object concealed in the driver’s hand when he asked for the driver’s license and registration. Finally, he testified that he immediately believed the substance was cocaine based on his training and experience.

{¶25} Officer Gerardi’s K-9 conducted a “sniff” of the SUV. We note that a “sniff” by a police dog of the exterior of a motor vehicle does not constitute a search for constitutional purposes. *In re Dengg* (1999), 132 Ohio App.3d 360, 365. (Citations omitted.) When the dog alerted to the presence of narcotics in the vehicle, the officers had probable cause to search the vehicle. *Blue Ash v. Kavanagh*, 113 Ohio St.3d 67, 2007-Ohio-1103, at ¶26.

{¶26} There were two distinct intrusions relative to Flowers in the instant matter. Officer Gerardi conducted an initial pat-down frisk of Flowers prior to placing him in the police vehicle for the search of the SUV. Then, Officer Gerardi conducted a “more intrusive” pat-down frisk of Flowers, during which he was specifically searching for narcotics.

{¶27} We begin with an analysis of the first pat-down frisk. Officer Gerardi initially testified that the first encounter with the passengers was a pat-down frisk for “weapons and contraband.” However, he later clarified his testimony, stating:

{¶28} “The first time when [Flowers] was taken out of the car, he was given a general pat down for weapons. Things of that nature after the search of the vehicle. Just outside of the clothes. Hard items, hard objects, the pockets, side pockets of the clothing. Above his feet, ankles; holsters, knives, things like that. Anything that causes harm immediately. Anything I would be able to articulate or testify in my training, experience what I thought was a controlled substance or not. Then he was put in the car.”

{¶29} The trial court did not make a specific factual finding as to what was the focus of Officer Gerardi’s initial pat-down frisk. Instead, the trial court found the first pat-down frisk was “[r]eally not even an issue here.” However, our review of the entire transcript, including the above-quoted portion of his testimony, reveals that the primary focus of Officer Gerardi’s initial encounter was a search for weapons. Moreover, if, during the pat-down frisk, Officer Gerardi had discovered an item whose criminal nature was immediately apparent, he would have been justified in seizing that item pursuant to the plain-feel exception to the warrant requirement. See *State v. Evans* (1992), 67 Ohio St.3d 405, 414, fn. 5. Thus, we believe Officer Gerardi was merely acknowledging the practical realities of the plain-feel doctrine, since there was a possibility that he might discover narcotics or other contraband during his protective pat-down frisk for weapons.

{¶30} In support of his argument, Flowers cites the Supreme Court of Ohio’s opinion in *State v. Evans*, supra. In *Evans*, the court held that when a police officer conducts a protective pat-down search for weapons, once the officer has “satisfied himself or herself that the suspect has no weapon, [the officer] is not justified in employing *Terry* as a pretext for a search for contraband.” *Id.* at 414.

{¶31} Officer Gerardi was permitted to conduct the initial pat-down frisk of Flowers. In an investigatory stop, an officer may briefly detain an individual if the individual is engaged in suspicious behavior. *Terry v. Ohio* (1968), 392 U.S. 1. Moreover, as the state notes, the Supreme Court of Ohio has held:

{¶32} “During a routine traffic stop, it is reasonable for an officer to search the driver for weapons before placing the driver in a patrol car, if placing the driver in a patrol car during the investigation prevents officers or the driver from being subjected to a dangerous condition and placing the driver in the patrol car is the least intrusive means to avoid the dangerous condition.” *State v. Lozada* (2001), 92 Ohio St.3d 74, paragraph one of the syllabus.

{¶33} In this matter, after the driver was removed from the vehicle and arrested, there were four additional passengers in the SUV, including Flowers. It was late at night, on the side of an interstate. At this point, Officer Gerardi had seen what he believed to be cocaine in the vehicle. In addition, his K-9 partner had alerted to the presence of narcotics in the vehicle. Accordingly, Officer Gerardi had probable cause to search the vehicle. See *Blue Ash v. Kavanagh*, 2007-Ohio-1103, at ¶26.

{¶34} As the state notes, Officer Gerardi was permitted to place Flowers in a patrol car for safety purposes during the search of the SUV. Flowers cites *State v. Isbele* for the proposition that the officers were not permitted to conduct a pat-down search and place him in the police vehicle. *State v. Isbele* (2001), 144 Ohio App.3d 780. However, this matter is distinguishable from *Isbele*. In *Isbele*, there was a single, female passenger. *Id.* at 783. The trial court granted the motion to suppress based on the facts it found to be true, and the state appealed. *Id.* at 782. The officers stated that

they did not consider the female passenger a safety threat. *Id.* at 783. In the instant matter, there were four male passengers. Therefore, under *Lozada*, it was permissible, in the interest of safety, for the officers to briefly detain the passengers in patrol cars to facilitate the search of the SUV. In addition, the court in *Isbele* specifically found that the only reason the officers suspected the passenger may be in possession of drugs is that they found cocaine on the driver when he was arrested. *Id.* at 786.

{¶35} Based on the totality of the circumstances, including the number of passengers, the positive alert of the drug dog, and Officer Gerardi's observation of a substance he believed to be cocaine in the vehicle, we conclude the initial pat-down frisk of Flowers was permissible, as it was conducted in the interest of the officers' safety.

{¶36} Next, we analyze the second pat-down frisk of Flowers. We conclude Officer Gerardi had probable cause to conduct this search.

{¶37} By the time Officer Gerardi decided to search Flowers a second time, he was aware of the following facts. First, he had observed the driver attempting to conceal an item he believed to be cocaine. Second, when the driver was searched incident to his arrest, the suspected cocaine was not found on his person. Third, the police dog positively alerted to the presence of narcotics during its exterior sniff of the vehicle. Fourth, when the officers thoroughly searched the SUV, they did not find the baggie of suspected cocaine. Finally, during the search of the SUV, the officers found small pieces of marijuana in the vehicle. Taken together, these facts constituted probable cause to search Flowers for narcotics.

{¶38} While Officer Gerardi had probable cause to search Flowers for narcotics at this point, he still needed a search warrant unless one of the exceptions to the warrant requirement applied. *State v. Moore*, 90 Ohio St.3d at 51. In *State v. Moore*, the Supreme Court of Ohio analyzed the exigent circumstances exception to the warrant requirement in the context of an officer's search of an individual's person for narcotics. *Id.* at 52. The court held, "[b]ecause marijuana and other narcotics are easily and quickly hidden or destroyed, a warrantless search may be justified to preserve evidence." *Id.* The court explained that an individual would have the chance to destroy the evidence if he or she were permitted to leave the scene while the officer obtained a search warrant. *Id.* Accordingly, the court held the exigent circumstances exception to the warrant requirement permitted the warrantless search of the suspect's person. *Id.* at 53.

{¶39} In the case sub judice, Officer Gerardi noticed a substance he believed to be cocaine in the driver's possession upon his initial approach of the vehicle. Upon searching the vehicle, the substance was not found—creating the inference that one of the passengers of the vehicle was concealing it. Since one of the passengers had presumably concealed the substance, the possibility existed that the evidence would be abandoned and/or destroyed if Officer Gerardi left the passengers of the vehicle unattended to obtain a search warrant. Accordingly, for the reasons stated in *State v. Moore* and pursuant to the exigent circumstances exception to the warrant requirement, Officer Gerardi was justified in searching Flowers. *State v. Moore*, 90 Ohio St.3d at 52. (Citations omitted.)

{¶40} Flowers claims Officer Gerardi did not have probable cause because he mentioned in his police report that the driver had a “white plastic baggie” in his possession. However, at the suppression hearing, Officer Gerardi clarified that the object in question was a clear plastic baggie containing a white substance.

{¶41} Flowers argues that a negative search of the interior of a motor vehicle does not provide an officer with probable cause to search the passengers of the vehicle. As support for his contention, he cites a recent decision from the Ninth Appellate District, *State v. Kay*, 9th Dist. No. 09CA00018, 2009-Ohio-4801, at ¶16. In *State v. Kay*, the Ninth District held:

{¶42} “A negative search of the vehicle does not necessitate the conclusion the drugs must therefore be with one of the occupants of the vehicle. The equally valid and possible conclusion is that the drug dog alerted to the residual odor of narcotics from past occupants of the vehicle or to drug particles too small to humanly detect.” *Id.*

{¶43} This matter is readily distinguishable from *State v. Kay*, in that, in addition to the alert from the police dog, Officer Gerardi had personally viewed an item in the vehicle that he believed was cocaine. Thus, there was a significant probability that the dog’s positive alert was not merely based on the “residual odor” from past narcotics being in the vehicle.

{¶44} Flowers also cites to *State v. Lawson*, 180 Ohio App.3d 516, 2009-Ohio-62 in support of his second assignment of error. *Lawson* is also readily distinguishable. In that case, the officer identified an unusual object in the course of a pat-down search of a passenger. The object was not a weapon, and the officer had no reason to suspect it was cocaine prior to manipulating the object. *Id.* at ¶34. The court ruled that since

the officer had no reason to suspect cocaine prior to manipulating the object, his subsequent questioning was improper. Id. at ¶40. However, in this case, as noted above, Officer Gerardi had seen the suspected cocaine and had every reason to believe that it was on the person of one of the passengers.

{¶45} Flowers' first and second assignments of error are without merit.

{¶46} The judgment of the Lake County Court of Common Pleas is affirmed.

MARY JANE TRAPP, P.J.,

DIANE V. GRENDALL, J.,

concur.