[Cite as *State v. Brewer*, 2009-Ohio-6129.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22935
v.	:	T.C. NO. 2007 CR 3389
GREGORY BREWER	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 20th day of November, 2009.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Gregory Brewer, filed September 10, 2008. On August 23, 2007, Brewer was indicted on one count of illegal manufacture of drugs (crack cocaine), in violation of R.C. 2925.04(A), a felony of the second degree; possession of cocaine (less than one gram - crack cocaine), in violation of R.C. 2925.11(A), a felony of the fifth degree; one count of possession of criminal tools (bowl), in

violation of R.C. 2923.24(A), a felony of the fifth degree, and one count of possession of cocaine (less than 5 grams - other than crack), in violation of R.C. 2925.11(A), a felony of the fifth degree.

{¶ 2} Brewer pled not guilty and filed a motion to suppress and a motion to dismiss. On October 23, 2007, a visiting judge began a hearing on Brewer's motion to suppress. At the hearing, narcotics Detectives David House and Joey Myers testified regarding their arrest of Brewer, on the evening of August 16, 2008, at approximately 6:00 p.m., following an investigatory stop of Brewer as he operated a Toyota pick up truck.

{¶ 3} Myers testified that he has been a narcotics detective for over four years. He stated that on the evening at issue he and his partner, Detective Gregory Gaier, were located in a plaza on Germantown Street, investigating a certain drug dealer. Gaier stated that the officers have made numerous arrests for drug activity in the plaza area. Gaier parked their unmarked car next to a drive-up pay phone, and Myers attempted to make contact with the dealer by means of the pay phone. As Myers repeatedly placed unanswered phone calls to the dealer, the officers observed Brewer enter the parking lot and park in a parking space ahead of them. The detectives became suspicious when Brewer did not exit his truck to conduct business in any of the nearby establishments but rather remained inside his vehicle for nine to ten minutes.

{¶ 4} Eventually, Myers observed a male in a bright orange sleeveless shirt approach Brewer's truck. Myers picked up his binoculars, and he observed Brewer extend his left hand out of his truck and hand cash to the man. In return, the black male turned and opened the door of an F-150 Ford truck parked alongside Brewer's truck. Myers testified that the black male "bent his body inside and came out within * * * maybe five seconds. Turned around, stuck his right hand into Brewer's window and then he left" on foot. At that point, Brewer pulled out of the parking lot

and drove westbound on Germantown. According to Myers, Brewer's behavior was typical of someone engaged in a drug transaction, namely, "[t]hey meet up with the drug dealer. A quick exchange is usually made and they leave the area."

{¶ 5} Gaier and Myers followed Brewer, and they observed him swerving in his lane and occasionally driving onto the yellow center line ahead of them. Brewer also repeatedly looked down into his lap area while he was driving. Myers testified he has seen situations in the past following drug activity where "somebody's got in the car and then drove away and started swerving." As Brewer turned onto Manning Road, about five miles from the parking lot where the transaction occurred, Gaier and Myers pulled in front of him and effected the stop. Gaier approached the driver's side of Brewer's truck, while Myers approached the passenger side. When Myers looked inside the truck, he "immediately saw a baggie of cocaine and next to that baggie of cocaine was a little lock-blade knife with the blade extended." Myers retrieved the knife and the cocaine, and Gaier removed Brewer from the car. Myers testified that Gaier *Mirandized* Brewer from memory, without a card. On cross-examination, Myers was unable to state specifically the rights that Gaier recited to Brewer.

{¶ 6} After Myers' testimony, the State moved the visiting judge for a continuance, stating that Gaier, who had been subpoenaed to testify at the suppression hearing, had advised the prosecutor just that morning that he would not attend due to the illness of his father. The prosecutor argued that he was unaware that Myers "hadn't heard the specific rights that were used. * * * I didn't move the Court to continue, because I didn't think he was necessary for today's hearing." Once counsel heard Myers' testimony regarding the recitation of Brewer's *Miranda* rights, he decided that Gaier's testimony was necessary on that issue. Brewer objected.

{¶ 7} The visiting judge granted the continuance, and Gaier's deposition was scheduled for October 29, 2007, so that the transcript thereof could be sent to the visiting judge, who was not due back in court until March. The deposition did not occur, however, and the matter was referred back to the assigned judge. On November 5, 2007, the parties reconvened before the trial court to discuss the issue of Gaier's testimony. After hearing both parties' arguments, the trial court found that the prosecutor was not acting in bad faith when he sought a continuance but rather, "[i]t was a fluke situation." The trial court ruled that Gaier would be deposed as originally planned, with a DVD thereof to be forwarded to the visiting judge.

{¶ 8} On November 8, 2007, the trial court, upon receipt of Gaier's testimony, transmitted it in DVD form to the visiting judge. Gaier's testimony revealed that he had been a Dayton police officer for 11 years, and a narcotics detective for eight years. Consistent with Myers' testimony, Gaier stated that he believed that he had observed a drug transaction occur in the parking lot. Gaier testified, after the stop and removal of Brewer from his truck, that he read Brewer his rights "from memory from the past 11 years * * * ." Gaier testified that he covered each of Brewer's individual constitutional rights, and he thoroughly and specifically enumerated each of those rights. According to Gaier, other than reading Brewer his rights, he had no other substantive conversations with him.

{¶ 9} On February 5, 2008, the visiting judge overruled Brewer's motion to suppress, finding that the detectives had a reasonable, articulable suspicion of criminal activity justifying the stop of Brewer, and that Brewer was properly advised of his *Miranda* rights. A trial was held July 28 - 29, 2008. The relevant testimony is summarized below.

{¶ 10} Myers testified that after Gaier read Brewer his rights, Myers then took Brewer to the

rear of the officers' vehicle. Brewer agreed to answer questions, and in the course of the interview, Brewer admitted that there was cocaine on the seat beside him, but he denied buying it from the man who approached his vehicle. Detective David House, upon arriving on the scene, approached Brewer's truck on the passenger side, and after looking inside, yelled to Myers, "he's making crack." Myers then asked Brewer, "were you cooking, making crack while you were driving down Germantown. He said, yes. I said, well that explains why you were * * * swerving inside your lane and on the yellow l[i]ne and looking into your lap repeatedly. Seconds pass by. I asked him, well, what were you using to cut the cocaine with? He said, baking soda." Brewer told House the baking soda was in a small baggie House retrieved from the truck.

{¶ 11} Detective House testified that he was working alone in an unmarked cruiser when he received radio traffic from Myers and Gaier that the detectives had observed what they believed to be a drug transaction on Germantown Street. House learned that the other detectives were following Brewer down Germantown, and he caught up with them after they had stopped Brewer when he turned onto Manning Road. Upon arrival, House observed that Brewer had been removed from the truck, and House approached the passenger side of the vehicle.

{¶ 12} Upon looking into the passenger window, House observed a small, open and flat aluminum tin pie pan on the passenger seat. The pan was partially concealed by a blue sweatshirt. House removed the sweatshirt and observed some water in the tin, and he could see "white residue which appeared to be crack cocaine in that pan." House also observed a "blow torch which was sitting in the area between the seat and propped up against the seat. I could also see a cigarette lighter which was lying on the driver's side, also a bottle of water lying in the passenger side of the floorboard." House further observed a "metal tin crack pipe in the ashtray" that was

"slightly warm" when he picked it up. House stated he has burned his fingers recovering crack pipes in the past that "have just been used." On cross-examination, House stated that the pipe could have simply been warm from sitting in the vehicle in August. House observed a "small zip-lock baggie next to [the pie tin] which had a fine white powder inside that baggie which I believed to be baking soda." House concluded that Brewer "was cooking up crack."

{¶ 13} According to House, there are only a few things necessary to make crack. "You need the powder cocaine itself, baking soda, water and heat." The ingredients are mixed together, and then heat is applied until the mixture boils. When the mixture is allowed to cool, "it congeals into what is commonly referred to as rocks." House testified, when he first observed the pie tin, "there [was] a smaller quantity of what appeared to be visible crack cocaine. As time went by, you could just see the crack forming * * * more of the actual solid crack that you could witness inside the tin itself." House testified that he has never seen drugs sold packaged inside a pie tin.

{¶ 14} Gaier testified that when he observed the drug transaction, the man reached into Brewer's truck with a closed fist, and he did not observe anything reflective like the pie plate in his hand. Gaier also testified regarding the process he used to *Mirandize* Brewer, stating that Brewer did not appear to be under the influence of crack cocaine when he spoke to him. Gaier stated he was present for most of Brewer's interview with Myers, and he corroborated Myers' testimony regarding Brewer's admissions.

{¶ 15} Gaier stated that he removed the pie plate from the truck, and he testified that there "was crack cocaine forming around the outer edges, bottom of it. Basically it appeared as if it was being, it was in the hardening phase of crack cocaine. * * * when it hardens, it forms to

whatever the material is that it's placed in." When Gaier returned to his office, he scraped the crack out of the pie pan. Gaier also stated that he had never seen crack cocaine or cocaine packaged in a pie tin. He further stated that the tin was not crumpled when it was recovered, but that he folded it in half after scraping the substance so that the tin would fit inside an evidence envelope. Gaier stated that it would take "under five minutes" to produce the amount of crack cocaine recovered from the pie tin.

{¶ 16} Finally, Brewer testified on his own behalf. He stated that he was employed by SK Construction, in Middletown, Ohio. Brewer testified that he purchased a small amount of cocaine and a small amount of crack from the man who approached his truck. The man and Brewer worked together, and Brewer stated he had purchased drugs from him in the past. Brewer testified that the cocaine was in a baggie, and the crack was in a tin foil bowl that was folded in half. He stated the crack was typically in a tin bowl when he purchased it, and that it was "always just loose in the bowl when I got it from him."

{¶ 17} After he left the parking lot, Brewer opened up the tin bowl, cut a piece of crack with his knife, put it in his pipe and smoked it. Brewer stated that the little baggie containing residue that the officers suspected was baking soda "must have already been in the truck from an earlier time," and that it had previously held cocaine. He denied telling the officers that it contained baking soda. Regarding the blow torch, Brewer stated it was in his car because he had used it to help his mother with a plumbing problem. Brewer denied touching the torch from the time he purchased the drugs until he was pulled over. Brewer denied that he was asked if he was cooking crack, and he stated that the officers only asked him if he was smoking crack. He stated that when he "was loading the rock of crack in my pipe I was probably looking in my lap."

{¶ 18} Brooke J. Ehlers, a forensic chemist at the Miami Valley Regional Crime Laboratory testified regarding the testing she performed on certain items retrieved from Brewer's truck. Ehlers testified that the small baggie of suspected baking soda contained cocaine, but that she did not test it for the presence of baking soda because there was only a trace amount of substance in the bag. Ehlers testified that the presence of baking soda cannot be determined from residue. Ehlers further testified that she did not test the residue left in the pie tin after Gaier had scraped out the crack cocaine.

{¶ 19} Following trial, Brewer was found guilty as charged, and he was sentenced to two mandatory years for illegal manufacture of drugs, with six month sentences imposed on each on the remaining counts, to be served concurrently.

{¶ 20} Brewer asserts three assignments of error. His first assignment of error is as follows:

{¶ 21} "THE TRIAL COURT ERRED BY GRANTING APPELLEE'S MOTION TO CONTINUE THE MOTION TO SUPPRESS HEARING."

{¶ 22} According to Brewer, the visiting judge "erred in granting the State's motion for continuance because it was not timely made, it was inconvenient for the Appellant and it was unfair to him to have [a] videotape reviewed by the Visiting judge, rather than * * * in person testimony to evaluate the demeanor and credibility of the witness. The State contributed to the delay by failing to request the continuance prior to the hearing, knowing that Detective Gaier was an integral part of the motion hearing."

{¶ 23} The State responds, "the reason for the continuance was not dilatory, purposeful or contrived. * * * The prosecutor was not informed until the morning of the hearing that Gaier was

unable to appear and testify that day. And he was given to understand that Detective Myers would be able to testify sufficiently about Brewer's being [*Mirandized*] and voluntarily waiving his rights." The State further asserts that the continuance did not significantly delay the proceedings. Finally, the State asserts that Brewer was not prejudiced since Myers' testimony alone was sufficient to establish that Brewer was *Mirandized* and voluntarily waived his rights.

{¶ 24} "The grant or denial of a continuance is a matter which is entrusted to the broad, sound discretion of the trial judge. An appellate court must not reverse the denial of a continuance unless there has been an abuse of discretion. (Internal citations omitted). As the Supreme Court stated in *Ungar v. Sarafite* [(1964), 376 U.S. 575, 389, 84 S.Ct. 841, 11 L.Ed.2d 921]: 'There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.'

{¶ 25} * * *

{¶ 26} "In evaluating a motion for a continuance, a court should note, inter alia: the length of the delay requested; whether other continuances have been requested; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of the each case." *State v. Unger* (1981), 67 Ohio St.2d 65, 67-68.

{¶ 27} We see no abuse of discretion. The prosecutor explained to the visiting judge that he only learned the morning of the hearing that Gaier was unavailable to testify. Initially believing that Myers' testimony would be sufficient to establish that Brewer was properly

Mirandized, the prosecutor did not ask for a continuance at the start of hearing. As the State asserts, the delay occasioned by the continuance was brief; the suppression hearing was begun on October 23rd, and Gaier's testimony was made part of the record on November 8th, twelve business days after the hearing began. The State had requested no other continuances of the suppression hearing. While having Gaier testify as originally scheduled would have been more convenient, Gaier's deposition was brief and addressed to a limited issue, namely the administration of Brewer's *Miranda* rights. Since the visiting judge received Gaier's testimony in DVD format, his ability to assess Gaier's credibility was not compromised by the delay. Due to Gaier's unexpected absence at the hearing, and given the prosecutor's subsequent doubts about the sufficiency of Myers' testimony on the *Miranda* issue, we conclude that the prosecutor had a legitimate reason for seeking the continuance.

{¶ 28} Although the trial court noted that the prosecutor "maybe could be criticized for not asking Detective Myers ahead of time" about his testimony, such that he would have been on notice that a continuance was necessary at the start of the hearing, the prosecutor advised the trial court that Gaier "was subpoenaed to be here. And when I asked him, when I was determining whether I should continue it or not, [Gaier] said I think that Detective Myers was there and probably heard what I said."

{¶ 29} Having considered all relevant factors under the unique facts of this case, and there being no abuse of discretion, Brewer's first assignment of error is overruled.

{¶ 30} Brewer's second assignment of error is as follows:

{¶ 31} "THE TRIAL COURT ERRED BY OVERRULING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE BECAUSE THE TRAFFIC STOP THAT LED TO THE ARREST

AND SEARCH WAS UNLAWFUL."

{¶ 32} According to Brewer, "the State failed to show any specific traffic violation that Appellant allegedly violated to justify a stop."

{¶ 33} "Appellate courts give great deference to the factual findings of the trier of facts. (Internal citations omitted). At a suppression hearing, the trial court serves as the trier of fact, and must judge the credibility of witnesses and the weight of the evidence. (Internal citations omitted). The trial court is in the best position to resolve questions of fact and evaluate witness credibility. (Internal citations omitted). In reviewing a trial court's decision on a motion to suppress, an appellate court accepts the trial court's factual findings, relies on the trial court's ability to assess the credibility of witnesses, and independently determines whether the trial court applied the proper legal standard to the facts as found. (Internal citations omitted). An appellate court is bound to accept the trial court's factual findings as long as they are supported by competent, credible evidence. (Internal citations omitted)." *State v. Purser*, Greene App. No. 2006 CA 14, 2007-Ohio-192, ¶ 11.

{¶ 34} "The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures. *Terry v. Ohio* (1968), 392 U.S. 1, 88S.Ct. 1868, 20 L.Ed.2d 889. Not all interactions between citizens and the police, however, constitute a seizure. Rather, the interactions between citizens and law enforcement officers can fall within three distinct categories: a consensual encounter, an investigative detention, and an arrest. *State v. Taylor* (1995), 106 Ohio App.3d 741, 747-749 * * * .

{¶ 35} * *

{¶ 36} "An individual is subject to an investigatory detention when, in view of all the circumstances surrounding the incident, by means of physical force or show of authority, a reasonable person would have believed that he was not free to leave or is compelled to respond to questions. (Internal citations omitted). Under *Terry*, police officers may briefly stop and/or temporarily detain individuals in order to investigate possible criminal activity if the officers have a reasonable, articulable suspicion that criminal activity may be afoot. (Internal citation omitted). 'Reasonable suspicion entails some minimal level of objective justification for making a stop - that is, something more than an inchoate and unparticularized suspicion or "hunch," but less than the level of suspicion required for probable cause.' (Internal citation omitted). We determine the existence of reasonable suspicion by evaluating the totality of the circumstances, considering those circumstances 'through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold.' *State v.* Heard, Montgomery App. No. 19323, 2003-Ohio-1047, at ¶ 14, quoting *State v. Andrews* (1991), 57 Ohio St.3d 86, 87-88 * * * ; see *State v. Bobo* (1988), 37 Ohio St.3d 177 * * * (setting forth factors to consider in determining whether a reasonable suspicion to make a stop exists)." State *v. Lewis,* Montgomery App. No 22726, 2009-Ohio-158, ¶ 20, 22.

{¶ 37} Our evaluation of several factors herein leads us to conclude that Gaier and Myers had a reasonable articulable suspicion of criminal activity to justify the stop of Brewer's vehicle. First, Brewer was in an area well-known for drug activity where the officers have made numerous drug-related arrests. Brewer's behavior was consistent with drug activity; Brewer pulled into a parking space but did not exit his truck, a brief hand-to-hand exchange occurred involving cash, and Brewer immediately left the area.

Finally, Brewer was observed with his head bowed in his lap, driving his truck in a swerving fashion. Based upon the officer's training and experience, under the totality of the circumstances, Gaier and Myers were justified in stopping Brewer, and the trial court did not err in overruling Brewer's motion to suppress. See *State v. Oglesby*, Montgomery App. No. 21648, 2006-Ohio-6229.

{¶ 38} There being no merit to Brewer's second assignment of error, it is overruled.

{¶ 39} Brewer's third assignment of error is as follows:

{¶ 40} "THE TRIAL COURT ERRED IN UPHOLDING THE CONVICTIONS [WHICH] WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 41} According to Brewer, his convictions for illegal manufacture of drugs and possessing criminal tools are not supported by the manifest weight of the evidence. Brewer asserts, "there was no evidence that [he] could have been cooking the crack as he was driving for the five miles before he was pulled over. * * * No baking soda was recovered from [Brewer's] truck. * * * There was no testimony that the torch was hot[,] and the pie plate was not hot when it was recovered." Finally, Brewer argues, the fact that House testified that the crack pipe in the truck was warm supports Brewer's assertion that he was merely smoking crack while driving down Germantown.

{¶ 42} "When an appellate court analyzes a conviction under the manifest weight of the evidence standard it must review the entire record, weigh all of the evidence and all the reasonable inferences, consider the credibility of the witnesses and determine whether in resolving conflicts in the evidence, the fact finder clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and

a new trial ordered. (Internal citations omitted). Only in exceptional cases, where the evidence 'weighs heavily against the conviction,' should an appellate court overturn the trial court's judgment." *State v. Dossett*, Montgomery App. No. 20997, 2006-Ohio-3367, ¶ 32.

{¶ 43} The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve. *State v. DeHass* (1997), 10 Ohio St.2d 230, 231, 227 N.E.2d 212. "Because the factfinder * * * has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness." *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288.

{¶ 44} This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of fact lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

{¶ 45} R.C. 2925.04(A) provides, "No person shall * * * knowingly manufacture or otherwise engage in any part of the production of a controlled substance." R.C. 2925.01(J) provides, "'Manufacture' means to plant, cultivate, harvest, process, make, prepare, or otherwise engage in any part of the production of a drug, by propagation, extraction, chemical synthesis, or compounding, or any combination of the same, and includes packaging, repackaging, labeling, and other activities incident to production." R.C. 2923.24(A) provides, "No person shall possess or have under the person's control

any substance, device, instrument, or article, with purpose to use it criminally."

{¶ 46} Having reviewed the entire record, weighed all of the evidence and all the reasonable inferences, and having considered the credibility of the witnesses, we conclude that Brewer's convictions for illegal manufacture of drugs and possessing criminal tools are not against the manifest weight of the evidence. Myers testified that Brewer told him he was cooking crack in the truck while driving down Germantown, and that the small baggie found next to the pie plate contained baking soda. Gaier's testimony regarding Brewer's interview corroborated Myers' testimony that Brewer admitted that he was cooking crack and that the small baggie contained baking soda.

{¶ 47} House recovered a blow torch, a pie tin containing crack, and a small baggie containing what House believed was baking soda in Brewer's truck, and he concluded that Brewer was cooking crack. House stated that the crack in the tin was in the process of "forming." Gaier also testified that the crack cocaine in the tin was "in the hardening phase of crack cocaine." Based upon the officers' testimony, a reasonable juror could conclude that the crack had been recently manufactured by Brewer, by means of the blow torch, water and baking soda, and that it was in the process of solidifying in the pie tin. The fact that there was no testing done to confirm the presence of baking soda, a necessary ingredient in the manufacture of crack, is not fatal to Brewer's conviction. A reasonable juror could infer that any baking soda that had been in the small baggie had been consumed in the manufacturing process. While Brewer testified that the blow torch had been used to help his mother with a plumbing problem, the jury was free to discredit his testimony. Brewer initially told Myers that he did not buy drugs from the man in the parking lot, and then he admitted that he did so at trial,

and his credibility is accordingly suspect. Although there was no evidence that the tin and blow torch were hot, the crack was clearly in the cooling phase. Further, the crack could not have been actively "forming" to the tin had it not been in recent contact with a heat source.

{¶ 48} Finally, House, with 10 years of narcotics experience, testified that he has never seen drugs packaged for sale in a pie tin, and a reasonable juror could infer that Brewer had the pie tin in his truck as part of the cooking process. Gaier's testimony that the individual reached into Brewer's truck with a closed fist supports the inference that the pie tin was already in the truck and thus not some kind of packaging for the drugs. Brewer's testimony that he always purchased "loose" crack in a bowl was further belied by the fact that Gaier had to scrape the bowl to remove the crack.

{¶ 49} We find that Brewer's convictions for illegal manufacture of drugs and possessing criminal tools are not against the manifest weight of the evidence. Accordingly, his third assignment of error is overruled. The judgment of the trial court is affirmed.

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BROGAN, J. and GRADY, J., concur.

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