

[Cite as *State v. Thomasson-Hogan*, 2009-Ohio-3428.]

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY**

STATE OF OHIO

Plaintiff-Appellee

v.

MICHAEL THOMASSON-HOGAN

Defendant-Appellant

Appellate Case No. 23228

Trial Court Case No. 07-CR-1010

(Criminal Appeal from  
Common Pleas Court)

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**OPINION**

Rendered on the 10<sup>th</sup> day of July, 2009.

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BROGAN, J.

{¶ 1} Michael Thomasson-Hogan appeals from his conviction and sentence following a no-contest plea to charges of drug possession and carrying a concealed weapon. In his sole assignment of error, the appellant contends the trial court erred in overruling his motion to suppress the evidence against him.

{¶ 2} The charges against the appellant stemmed from the discovery of a handgun and drugs in his car during a traffic stop. Following an evidentiary hearing, the trial court initially overruled the appellant's suppression motion in a July 2007 decision and entry. The appellant then obtained a videotape of the traffic stop and successfully moved to re-open his suppression motion. After reviewing the videotape and hearing additional testimony, the trial court filed a January 2008 decision and entry reaffirming its denial of the motion. The appellant subsequently entered no-contest pleas and received an aggregate sentence of two years in prison.

{¶ 3} Suppression-hearing testimony reflects that the appellant's vehicle was stopped for a window-tint violation on March 16, 2007. At the time of the stop, the appellant had a passenger in the seat beside him. The police officers who made the traffic stop, Michael Baker and Dan Mamula, were the only witnesses to testify. Baker testified that he activated his overhead lights and that the appellant responded by pulling into a restaurant parking lot. Baker then saw the appellant's "head ducking down as if he was sticking something underneath the seat." Mamula described it as a "leaning over kind of motion." Baker referred to the move as "furtive" because it was "not ordinary to what's normal[.]" He suspected that the appellant might have been hiding a weapon.

{¶ 4} The officers exited their cruiser and approached the appellant's vehicle with

Baker on the driver's side and Mamula on the passenger's side. Baker noticed that the appellant had put his hands straight out and that they were shaking. The appellant was "acting very nervous" and was "breathing hard." Baker testified that the passenger also was "breathing very hard" and that he could see the passenger's "heart beating through his chest[.]" Mamula testified that the appellant and the passenger were "more nervous than normal in a traffic stop." He noted that their speech was "kind of choppy," they were breathing heavily, and their hearts were beating fast. Baker testified that the passenger also was stuttering.

{¶ 5} While Baker obtained the appellant's driver's license and registration, Mamula asked the passenger for identification. When the passenger pulled out a wallet, Mamula noticed that he had two different identifications for different people. The passenger was trying to shield one of them from Mamula while retrieving the other. As a result, Mamula ordered the passenger out of the car to identify him. Baker assisted Mamula in placing the passenger in the back of the police cruiser, where he remained throughout the remainder of the stop.

{¶ 6} While the appellant waited in his stopped vehicle, Baker used a meter to measure the window tinting. To do so, Baker had the appellant raise his lowered side window. Baker confirmed a window-tint violation, and the appellant lowered his window again. Baker then returned to the police cruiser to write a ticket. At that time, Mamula was in the cruiser attempting to confirm the passenger's identity. The officers ultimately discovered that the passenger had arrest warrants for an open-container violation and driving without a license.

{¶ 7} While the two officers were seated in the cruiser together, they agreed to

remove the appellant from the stopped car. Baker testified that he and Mamula had decided to check the “lunge area” of the appellant’s car for their own safety. The officers were concerned based on the appellant’s act of leaning forward at the outset of the stop and the extraordinary nervousness displayed by the appellant and the passenger. Baker feared that the appellant might have a gun in the vehicle. As a result, the officers approached the stopped car and asked the appellant to step out. The appellant initially refused to cooperate, insisting that he “didn’t do anything.” Baker observed that the appellant was “almost hyperventilating.”

{¶ 8} After being told to do so several times, the appellant exited his vehicle. Mamula stayed with the appellant while Baker looked underneath the driver’s seat and found a .9 millimeter handgun. At the time of this discovery, Baker had not completed writing the window-tint ticket. He explained that he wanted to check the appellant’s vehicle first “to make sure that after giving him the ticket he doesn’t turn around and shoot us.” Upon discovering the gun, Baker handcuffed the appellant and put him in the cruiser. Baker then searched the appellant’s vehicle further and found drugs located in the center console. While Baker was speaking to an evidence technician, the appellant voluntarily stated that there was no bullet in the handgun’s chamber. A videotape taken from the officers’ cruiser reflects that approximately ten minutes passed from the commencement of the traffic stop to the discovery of the handgun.

{¶ 9} On appeal, the appellant contends the trial court erred in overruling his suppression motion. He raises two arguments in support. First, he claims Baker and Mamula had no more than a hunch he might gain control of a weapon and might pose a threat to their safety. He argues that this was insufficient to justify a protective search.

Second, he asserts that the officers' testimony about fearing he might retrieve a weapon was belied by the record and was a pretext to perform an otherwise unconstitutional search. Upon review, we find both arguments to be unpersuasive.

{¶ 10} A trial court's suppression decision presents a mixed question of fact and law. *State v. McNamara* (1997), 124 Ohio App.3d 706, 710. We accept the trial court's view of the facts, provided they are supported by competent, credible evidence, because "[w]hen considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. But we determine independently whether the evidence satisfies the applicable legal standard. *State v. Mackey*, Montgomery App. No. 22244, 2008-Ohio-3621, ¶9.

{¶ 11} In the present case, the appellant cites a number of alleged factual errors in the trial court's suppression ruling. Having reviewed the hearing transcript, we agree that the trial court did make several findings that are not supported by the evidence. Most of these errors are insignificant, however, and none of them undermines the correctness of the trial court's legal conclusion. The appellant first disputes the trial court's finding that Baker tested the car window with a tint meter and then discovered that the appellant had a prior tint violation. In fact, the record reveals that Baker discovered the prior violation and then tested the window. The correct sequence of these events, however, is immaterial for present purposes.

{¶ 12} The appellant next takes issue with the trial court's finding that "[b]oth occupants made furtive movements upon the initial stop." In reality, the record contains no testimony that the passenger made any furtive movements. The only questionable

movement at all was the appellant's act of leaning forward or ducking his head down at the beginning of the stop. Therefore, for purposes of our analysis herein, we will proceed on the basis that the passenger did not make any furtive movements.

{¶ 13} The appellant also challenges the trial court's finding that one of the officers "saw the Defendant reaching down." This finding is not supported by the evidence. Baker initially testified that he saw the appellant's "head ducking down." He could see only "forward motion." Likewise, Mamula saw a "leaning over kind of motion." After the trial court reopened the suppression hearing, Baker testified that he saw the appellant "making gestures down to the front." He later clarified, however, that what he saw was the appellant's head and "the top part of his shoulders." There is no testimony that either officer observed the appellant actually reaching down. Instead, based on the appellant's forward motion, they suspected, and feared, that he might be reaching down and concealing a weapon. For present purposes, then, we will not credit the trial court's finding that the officers saw the appellant "reaching down."

{¶ 14} The appellant next disputes the trial court's findings that the passenger was stuttering in the back of the cruiser and that an evidence technician searched the center console. In reality, Baker testified that the passenger was stuttering while seated in the appellant's car. Baker also testified that he personally checked the center console after finding a weapon under the seat. These discrepancies, however, are immaterial to our analysis.

{¶ 15} The appellant also takes issue with the trial court's finding that one of the officers asked him whether there was a bullet in the chamber of the handgun. The evidence does not support this finding. Baker testified that he asked an evidence

technician, not the appellant, whether there was a bullet in the chamber. Overhearing the question, the appellant volunteered that there was no bullet. Once again, however, this error is immaterial.

{¶ 16} The appellant next challenges the trial court's finding that five minutes elapsed from the commencement of the traffic stop to the discovery of the handgun. Although the record contains testimony to support this conclusion, the appellant stresses that a videotape from the police cruiser shows approximately ten minutes elapsing from the beginning of the stop to the discovery of the handgun. For purposes of our analysis, we will accept that ten minutes elapsed.

{¶ 17} The appellant also disputes the trial court's finding that the passenger "provided the identification of another person." In reality, Mamula testified that he observed two pieces of identification, one of which the passenger appeared to be trying to hide. Mamula did not testify that the passenger ever presented him with a false identification. The passenger's mere possession of multiple identifications prompted Mamula to remove him from the vehicle for further investigation. Mamula's suspicions arguably might have been even more aroused if the passenger had provided the identification of another person as opposed to simply possessing two identifications. For purposes of our Fourth Amendment analysis, however, the distinction is of little importance. Nevertheless, we will proceed on the basis that the passenger possessed multiple identifications and tried to hide one of them.

{¶ 18} Finally, the appellant notes the trial court's error about which party cited the case of *State v. Smith*, Montgomery App. No. 22279, 2007-Ohio-7156. The trial court stated that the defense mentioned it. In reality, the prosecution cited it. We find it

immaterial, however, which party brought the case to the trial court's attention.

{¶ 19} With the modifications set forth above, we conclude that the trial court's factual findings are supported by the evidence. The remaining issue is whether, in light of those facts, the trial court properly found the officers justified in searching under the driver's seat.<sup>1</sup> The U.S. Supreme Court has recognized that "the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on 'specific and articulable facts, which taken together with the rational inferences from those facts, reasonably warrant' the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons." *Michigan v. Long* (1983), 463 U.S. 1032, 1049-1050, quoting *Terry v. Ohio* (1968), 392 U.S. 1, 21. "[T]he issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id.* at 1050, quoting *Terry*, *supra*, at 27. The standard is an objective one based on the totality of the circumstances. *State v. Andrews* (1991), 57 Ohio St.3d 86, 89.

{¶ 20} Upon review, we believe Baker and Mamula had an objectively reasonable basis for searching under the seat for a weapon. Contrary to the appellant's argument on appeal, the officers had more than a hunch that he might gain control of a weapon and might pose a threat to their safety. Immediately after making the traffic stop, Baker, an

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<sup>1</sup>The appellant does not dispute the legality of the traffic stop for a window-tint violation. See, e.g., *Dayton v. Erickson*, 76 Ohio St.3d 3, 1996-Ohio-431. A police officer who, based upon his observations and experience, has a reasonable, articulable suspicion that the windows on a motor vehicle are excessively tinted may stop the vehicle to issue a citation. *State v. Courts*, Montgomery App. No. 20328, 2004-Ohio-3789.

officer with seven years of experience who had made hundreds of traffic stops, saw the appellant's "head ducking down as if he was sticking something underneath the seat." Based on his experience, Baker considered this a furtive movement. It caused Baker to suspect that the appellant might be concealing a gun. Mamula described the appellant's action as a "leaning over kind of motion." He too was concerned about his and Baker's safety. Those concerns only intensified as the officers witnessed signs of extraordinary nervousness while interacting with the appellant and the passenger. The fact that the passenger had multiple identifications and warrants for his arrest did nothing to alleviate the officers' concerns.<sup>2</sup>

{¶ 21} We believe the appellant's suspicious movement inside a vehicle with excessively tinted windows, particularly when combined with the extreme nervousness of the vehicle's occupants, gave the officers an objectively reasonable suspicion that the appellant might be armed. Therefore, the protective search for weapons under the driver's seat did not violate the Fourth Amendment. Cf. *Mackey*, supra, at ¶16 ("Defendant's furtive movements, coupled with the officers' restricted view into the vehicle due to the darkly tinted windows, gave rise to a reasonable suspicion that Defendant might be armed and that he posed a danger to the officers which justified their protective search of the center console area of the vehicle for weapons."). *State v. Harden*, Montgomery App. No. 19880, 2004-Ohio-664 (finding a pat-down for weapons justified where police observed the defendant making movements toward the floorboard during a traffic stop).

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<sup>2</sup>The State also emphasizes the fact that the traffic stop occurred in a high-crime area where Baker previously had confiscated many guns. We will give little weight to this fact, however, because the officers themselves selected the location of the stop when they activated their overhead lights. They just as easily might have followed the appellant's vehicle out of the high-crime area before making the stop.

{¶ 22} The appellant's assertion about the officers' safety concerns being pretextual fails to persuade us otherwise. The appellant claims Baker and Mamula could not have been genuinely concerned about their safety because they permitted him to remain in his vehicle for approximately ten minutes while they checked the window tint, dealt with the passenger, and began writing a citation. Mamula's testimony indicates, however, that the appellant's hands remained straight out and that at least one of the officers continued watching him throughout the stop. Therefore, it would have been difficult for the appellant to retrieve a weapon from under the seat during the stop. Baker testified, however, that he was concerned about the appellant retrieving a weapon and shooting them after receiving a ticket. As a result, he and Mamula decided to search under the seat before concluding the stop. In hindsight, it probably would have been safer for the officers to have conducted the protective search sooner. But their delay does not negate the fact that they had an objectively reasonable basis for conducting the search before turning the appellant loose.

{¶ 23} Based on the reasoning set forth above, we overrule the appellant's sole assignment of error and affirm the judgment of the Montgomery County Common Pleas Court.

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FROELICH AND HARSHA, JJ., concur.

(Hon. William H. Harsha, from the Fourth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio)

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