

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellant	:	C.A. CASE NO. 23525
v.	:	T.C. NO. 2009 CR 1053
MARK D. BROADDUS	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellee	:	

**OPINION**

Rendered on the 12<sup>th</sup> day of February, 2010.

MELISSA M. FORD, Atty. Reg. No. 0084215, Assistant Prosecuting Attorney, 301 W. Third Street, 5<sup>th</sup> Floor, Dayton, Ohio 45422  
Attorney for Plaintiff-Appellant

L. PATRICK MULLIGAN, Atty. Reg. No.0016118 and GEORGE A. KATCHMER, Atty. Reg. No. 0005031, 28 N. Wilkinson Street, Dayton, Ohio 45402  
Attorneys for Defendant-Appellee

FROELICH, J.

{¶ 1} The State of Ohio appeals from an order of the Montgomery County Court of Common Pleas, which granted Mark D. Broaddus’s motion to suppress evidence. For the following reasons, the order will be affirmed.

{¶ 2} The State’s evidence presented at the suppression hearing

established the following facts:

{¶ 3} At approximately 7:00 p.m. on December 31, 2008, Huber Heights Police Officer Benjamin Holbrook, a four-year veteran, was heading eastbound in a marked cruiser on Powell Road in Huber Heights. Ahead of Holbrook, a white Buick sedan was traveling slower than the posted speed limit, which was unusual for that area. As the officer followed the vehicle, he observed that the car did not stop at the marked stop line at an intersection, as required, and continued through the intersection without coming to a complete stop. Holbrook activated his overhead lights to effectuate a stop.

{¶ 4} There were two people in the car, and after the officer turned on his overhead lights, Holbrook noticed the car's rear passenger make "furtive movements" by ducking down three times toward the floor board of the vehicle. Holbrook was concerned that the passenger was reaching for or hiding a weapon. The officer called dispatch for backup due to the furtive movements.

{¶ 5} Holbrook, who was in uniform, approached the vehicle. He advised the driver why he had stopped the vehicle and asked both the driver and the passenger for identification. The passenger was identified as Broaddus; the driver was his father. Holbrook recognized the men, and he knew that Broaddus had previously been arrested for drug offenses. Holbrook asked Broaddus "what he was doing when he was reaching down and coming back up in the vehicle." Broaddus responded that he was searching for a \$5 bill. Holbrook went back to his cruiser with the Broadduses' identification and waited for backup to arrive.

{¶ 6} After Officer Wunderlich arrived, Holbrook had Broaddus step out of

the car and asked him to sit in his (Holbrook's) cruiser. Holbrook performed a pat down search for weapons before placing Broaddus in the rear of the cruiser. No weapon was found. Holbrook then asked the driver to step out of the vehicle. Broaddus's father stood with Officer Wunderlich while Holbrook conducted a search of the rear passenger area where Broaddus had been sitting. He did not see a weapon. The officer picked up a black Harley-Davidson leather jacket that was on the seat next to where Broaddus had been seated "to see if something was laying underneath it or in it." Holbrook saw nothing "in plain view, so [he] kind of grabbed at the pockets to see if something had been stashed in there." Holbrook felt "a straw that had been cut down – a short straw –" in an inside pocket. Holbrook stated that, in his experience, a short straw is used to snort narcotics. When Holbrook pulled the straw out of the pocket and looked inside, he saw powder residue on the straw. Holbrook then looked under the front passenger seat where Broaddus had been leaning. No weapon was found in the vehicle.

{¶ 7} Holbrook returned to his vehicle, planning to arrest Broaddus for possession of drug paraphernalia. Holbrook got Broaddus out of the cruiser to conduct a "search incident to arrest." Holbrook found a key chain with keys and a whistle in Broaddus's pant pocket. On the inside of the whistle, Holbrook observed a white rock that he believed to be crack cocaine. A field test of the rock tested positive for cocaine. The officer charged Broaddus with possession of cocaine; he did not arrest Broaddus for possession of drug paraphernalia. Broaddus's father was not charged with any moving violations.

{¶ 8} On April 29, 2009, Broaddus was indicted for possession of cocaine,

in violation of R.C. 2925.11(A). Broaddus moved to suppress any evidence obtained as a result of the search of the vehicle, arguing that the officers “lacked the basis upon which to justify their search incident to arrest.” On June 19, 2009, the trial court held a hearing on the motion to suppress, at which Officer Holbrook testified.

{¶ 9} On June 30, 2009, the trial court granted the motion to suppress. The court concluded that the officer had lawfully stopped the vehicle and removed the driver and passenger due to Broaddus’s furtive movements. The court determined that, under the totality of the circumstances, Holbrook had a reasonable suspicion that there may have been a weapon concealed in the rear passenger area of the vehicle. The court further stated that the officer was “entitled to resolve that suspicion by conducting a limited protective weapons search before allowing the occupants to return to the vehicle.” The court held, however, that the seizure of the straw was improper. It reasoned:

{¶ 10} “However, once the officer did not find a weapon, the search should have ended. The officer instead testified that the [sic] grabbed at the pockets of the thick leather jacket that was laying on the seat next to where the Defendant had been seated. When he grabbed the pockets, he felt a 3 inch plastic straw that he believed was used for drug activity. He then returned to the cruiser and searched the Defendant again. At that time, he found the whistle that contained the crack cocaine.

{¶ 11} “It is firmly established that the detention of an individual by a law enforcement officer must be justified by specific and articulable facts indicating that

the detention was reasonable. **Once the reason for the detention ends, the citizen must be allowed to continue on his way.'**

{¶ 12} “Once a weapon was not found, the search should have ended. There was no validation of the belief that a plastic straw in the pocket of a heavy jacket was felt and presumed to be a weapon.” (Emphasis sic.) (Internal citations omitted.)

{¶ 13} The state appeals from the suppression of the state’s evidence. The State’s sole assignment of error states that the trial court “erred in sustaining Broaddus’ motion to suppress.”

{¶ 14} On appeal, the State does not challenge the trial court’s conclusion that the initial traffic stop was lawful based on Holbrook’s observation of a traffic violation. The State further agrees with the trial court that, under the totality of the circumstances, Holbrook had a reasonable and articulable suspicion that a weapon may have been concealed in the area of the rear passenger seat of the vehicle. The State claims, however, that the trial court erred when it found that the officer exceeded the scope of the search by grabbing at the jacket pockets and retrieving the plastic straw when it was clear to the officer that the straw was not a weapon. The State argues that the officer’s actions were authorized under the plain feel doctrine.

{¶ 15} In response, Broaddus argues that the officer was not justified in believing that he might be armed or dangerous. He states: “There is no testimony that the area involved is a high crime area. There is no testimony that drug activity, or indeed, any criminal activity was suspected. In fact, as the detention

and search of [Broaddus] progresses, there is less indication of such activity. [Broaddus] is compliant. He provides identification. He does not appear nervous.

There is nothing indicating that this stop involves anything other than a routine traffic stop. \*\*\*” Broaddus further argues, citing *Arizona v. Gant* (2009), – U.S. –,129 S.Ct. 1710, 173 L.Ed.2d 485, that the officer had “no justification for going to the empty vehicle.” Alternatively, Broaddus asserts that, even if the officer had a reasonable basis to search the rear passenger compartment of the vehicle, the officer’s testimony that the criminal nature of the straw was readily apparent was not credible and was rejected by the trial court.

{¶ 16} In its reply brief, the State asserts that *Gant* is inapplicable and that this case is governed, instead, by *Michigan v. Long* (1983), 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201. It contends that Holbrook was reasonably concerned that Broaddus might be armed, justifying a limited protective search of the car before he was allowed to return to it. The State agrees with Broaddus that it is the province of the trial court to determine whether Holbrook’s testimony is credible, but it asserts that the trial court did not consider the credibility of Holbrook’s testimony concerning the plain feel doctrine.

{¶ 17} In reviewing the trial court’s ruling on a motion to suppress evidence, this court must accept the findings of fact made by the trial court if they are supported by competent, credible evidence. See *State v. Morgan*, Montgomery App. No. 18985, 2002-Ohio-268. However, “the reviewing court must independently determine, as a matter of law, whether the facts meet the appropriate legal standard.” *Id.*

{¶ 18} The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures. *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. “A police officer may lawfully stop a vehicle if he has a reasonable articulable suspicion that the motorist has engaged in criminal activity[,] including a minor traffic violation.” *State v. Buckner*, Montgomery App. No. 21892, 2007-Ohio-4329, ¶8. Once a lawful stop has been made, the police may require the driver and any passengers to exit the vehicle pending completion of the traffic stop. *Pennsylvania v. Mimms* (1977), 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331; *Maryland v. Wilson* (1997), 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41; *State v. Evans* (1993), 67 Ohio St.3d 405, 408.

{¶ 19} We agree with the trial court that Officer Holbrook was entitled to stop the vehicle in which Broaddus was a passenger. Holbrook observed a traffic violation – the Buick’s failure to stop completely at a stop sign – which justified the stop of the vehicle. Moreover, the trial court correctly stated that the officer was entitled to ask Broaddus and his father to exit the vehicle for the duration of the traffic stop. *Mimms*, supra.

{¶ 20} “Authority to conduct a patdown search for weapons does not automatically flow from a lawful stop[.]” *State v. Stewart*, Montgomery App. No. 19961, 2004-Ohio-1319, ¶16. Once a lawful stop has been made, the police may conduct a limited protective search for concealed weapons if the officer reasonably believes that the suspect may be armed or a danger to the officer or to others. *Evans*, 67 Ohio St.3d at 408; *State v. Molette*, Montgomery App. No. 19694, 2003-Ohio-5965, ¶13. “The purpose of this limited search is not to discover

evidence of crime, but to allow the officer to pursue his investigation without fear of violence \*\*\*.” *Evans*, 67 Ohio St.3d at 408, quoting *Adams v. Williams* (1972), 407 U.S. 143, 146, 92 S.Ct. 1921, 32 L.Ed.2d 612.

{¶ 21} Similarly, the police may search the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, if an officer possesses a reasonable belief that an individual is dangerous and may gain immediate control of weapons located in the vehicle upon returning to it. *Long*, 463 U.S. 1032; *State v. Roye* (June 22, 2001), Greene App. No. 2001-CA-5.

{¶ 22} To justify a patdown search or the search of a passenger compartment, “the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Terry*, 392 U.S. at 21. However, “[t]he officer need not be absolutely certain that the individual is armed; the 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 27; *State v. Smith* (1978), 56 Ohio St.2d 405, 407. The totality of the circumstances must “be viewed through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold.” *State v. Andrews* (1991), 57 Ohio St.3d 86, 87-88, citing *State v. Freeman* (1980), 64 Ohio St.2d 291, 295.

{¶ 23} In this case, Holbrook, a lone officer, initiated a traffic stop at 7:00 p.m., which on New Year’s Eve was after dark. Holbrook testified that, after he activated his overhead lights, he observed Broaddus duck out of sight of the back window on three separate occasions. The officer stated that, based on these

furtive movements, he had concerns that the rear seat passenger, Broaddus, was reaching for or hiding a weapon. Upon approaching the vehicle, Holbrook recognized Broaddus; Holbrook knew that Broaddus had a history of narcotics violations, and the officer had participated in at least one arrest of Broaddus related to narcotics. Although Holbrook indicated that Broaddus had been compliant and had not acted aggressively toward him, under the totality of the circumstances, the officer had a reasonable basis to believe that Broaddus may have been armed and/or that a weapon may have been hidden in the rear passenger compartment of the vehicle. Accordingly, Holbrook was entitled to conduct a limited protective search for weapons for his safety.

{¶ 24} Broaddus contends that Holbrook's search of the passenger compartment of the vehicle was unlawful, because he was detained in the officer's cruiser at the time of the search. Broaddus states that the search of the automobile is governed by *Gant*. The State argues that *Gant* is inapplicable, and the search of the passenger compartment was justified by *Long*.

{¶ 25} *Gant* addressed whether the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement – set forth in *Chimel v. California* (1969), 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685, and applied to automobile searches in *New York v. Belton* (1981), 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 – permitted the search of a vehicle after a motorist was arrested and placed in the back of a patrol car. The United States Supreme Court held it did not, stating that “*Belton* does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle.”

*Gant*, 129 S.Ct. at 1714.

{¶ 26} The United States Supreme Court acknowledged that *Belton* “ha[d] been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search.” *Id.* at 1718. The Court rejected this interpretation, stating that such a reading of *Belton* was “incompatible” with the basic scope of a search-incident-to-arrest set forth in *Chimel*. *Id.* at 1719. The Court held that “the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant’s arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.” *Id.* Although not based on *Chimel*, the court further held that “circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is ‘reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.’” *Id.*, quoting *Thornton v. United States* (2004), 541 U.S. 615, 632, 124 S.Ct. 2127, 158 L.Ed.2d 905 (Scalia, J., concurring in judgment).

{¶ 27} In limiting and clarifying *Belton*, the Supreme Court recognized that other established exceptions to the warrant requirement authorize the search of an automobile when safety or evidentiary concerns are implicated. *Gant*, 129 S.Ct. at 1721. The Court specifically cited to the exception set forth in *Long*, among others, stating that *Long* “permits an officer to search a vehicle’s passenger compartment when he has reasonable suspicion that an individual, whether or not the arrestee, is ‘dangerous’ and might access the vehicle to ‘gain immediate control of weapons’.” *Id.*

{¶ 28} In his concurrence, Justice Scalia reiterated that the holding in *Gant* had no effect on the viability of *Long*. He reasoned:

{¶ 29} “It must be borne in mind that we are speaking here only of a rule automatically permitting a search when the driver or an occupant is arrested. Where no arrest is made, we have held that officers may search the car if they reasonably believe ‘the suspect is dangerous and ... may gain immediate control of weapons.’ *Michigan v. Long*, 463 U.S. 1032, 1049, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). In the no-arrest case, the possibility of access to weapons in the vehicle always exists, since the driver or passenger will be allowed to return to the vehicle when the interrogation is completed. The rule of *Michigan v. Long* is not at issue here.” *Id.* at 1724.

{¶ 30} Here, neither Broaddus nor his father was under arrest at the time the Buick was searched for weapons, and there was a possibility that one or both of the men would be permitted to return to the vehicle. Unlike *Gant*, the search of the rear passenger compartment of the Buick did not involve a search incident to an arrest. Rather, Holbrook’s testimony established that the search was conducted for officer safety based on the officer’s reasonable belief that Broaddus, who had not been arrested, may have concealed a weapon inside the vehicle. Holbrook’s search of the interior of the vehicle was authorized under *Long*. See, also, *State v. Bobo* (1988), 37 Ohio St.3d 177, 180. *Gant* is inapplicable to the situation before us.

{¶ 31} Having concluded that Holbrook was entitled to conduct a limited protective search of the passenger compartment for weapons, we turn to whether

the officer lawfully seized the “short straw” from the jacket located next to where Broaddus had been seated.

{¶ 32} In permitting an officer to search the passenger compartment of an automobile, *Long* adopted *Belton*'s definition of the area into which an arrestee might reach in order to obtain a weapon. *Belton* held, in part, that “the police may examine the contents of any open or closed container found within the passenger compartment, ‘for if the passenger compartment is within the reach of the arrestee, so will containers in it be within his reach.’” *Long*, 463 U.S. at 1049, quoting *Belton*, 453 U.S. at 460. Thus, under *Long*, Holbrook was entitled to search items or containers in the area of the rear passenger seat, including the leather jacket that was found on the seat next to where Broaddus had been seated.

{¶ 33} Holbrook did not find any weapons under or in the leather jacket or, for that matter, in any other part of the rear passenger compartment of the Buick. The trial court thus concluded that Holbrook should have ceased his search once he determined that the item in the jacket pocket was not a weapon. We agree with the trial court, unless a seizure of contraband was constitutionally justified.

{¶ 34} Under *Long*, “[i]f, while conducting a legitimate *Terry* search of the interior of the automobile, the officer should \*\*\* discover contraband other than weapons, he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances.” *Long*, 463 U.S. at 1050. Similarly, under the plain feel doctrine, an officer conducting a patdown for weapons may lawfully seize an object if he has probable cause to believe that the item is contraband. *Minnesota v. Dickerson* (1993), 508 U.S. 366,

375, 113 S.Ct. 2130, 124 L.Ed.2d 334; *State v. Phillips*, 155 Ohio App.3d 149, 2003-Ohio-5742, ¶41-42. The “incriminating character” of the object must be “immediately apparent,” meaning that the police have probable cause to associate an object with criminal activity. *Dickerson*, 508 U.S. at 375; *State v. Buckner*, Montgomery App. No. 21892, 2007-Ohio-4329. The officer may not manipulate the object to identify the object or to determine its incriminating nature. *Dickerson*, supra; *State v. Lawson*, 180 Ohio App.3d 516, 2009-Ohio-62, ¶25.

{¶ 35} The criminal character of an object may be immediately apparent because of the nature of the article and the circumstances in which it is discovered. *State v. Dunson*, Montgomery App. No. 22219, 2007-Ohio-6681, ¶24. “In that situation, the totality of those circumstances, including the officer’s experience and explanation, must be sufficient to present probable cause to believe that the identity of the object he feels is specific to criminal activity.” *Id.*

{¶ 36} Holbrook testified that, upon grabbing an interior pocket of the leather jacket, he felt a “short straw,” approximately three inches long, which, in his experience, “is used to snort narcotics.” Holbrook stated, without looking at the object, “[i]t was immediately apparent to me that it was a drug paraphernalia object.” In its decision, the trial court implicitly credited Holbrook’s testimony that he felt a three-inch straw when he “grabbed” an interior pocket of the leather jacket.

The trial court did not indicate whether it found that he had “manipulated” the item or whether it credited the testimony that the incriminating nature of the straw was “immediately apparent.”

{¶ 37} The parties agree that it is the province of the trial court to decide the

believability of Holbrook's testimony that the incriminating nature of the straw was immediately apparent. An officer may rely on training and experience in recognizing evidence of a crime, *Buckner*, and the police may "draw inferences and make deductions that might well elude an untrained person." *People v. Jones* (2005), 215 Ill.2d 261, 274, 830 N.E.2d 541, citing *Ornelas v. United States* (1996), 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911.

{¶ 38} The State asks that we find from the testimony that the item was not manipulated and that the officer was credible when he said that it was immediately apparent that what he felt without manipulation was associated with criminal activity and therefore reverse the trial court. However, in our view, even accepting the officer's testimony that he felt a three-inch "short straw," which he believed to be contraband, we hold, as a matter of law, that under the facts of this case, the discovery of a short straw, by itself, was insufficient to establish probable cause that the object was associated with criminal activity.

{¶ 39} "[A]n officer's mere suspicion about an ordinary object, which has common, non-criminal uses, will not support probable cause for its seizure." *State v. Ochoa* (2004), 135 N.M. 781, 93 P.3d 1286. See, also, e.g., *State v. Jones*, Cuyahoga App. No. 80685, 2002-Ohio-4785, ¶18 (holding that, although officer recognized the shape of the object as a pill bottle or film canister, he did not have probable cause to believe the bottle contained contraband simply based upon its shape and size); *Dunson*, supra (stating presence of baggie in a pocket, standing alone, is insufficient to establish the baggie's incriminating nature).

{¶ 40} We have found no legal authority in Ohio that has held that a straw,

even a short one, is so associated with criminal activity that its presence, alone, constitutes probable cause for its seizure as drug paraphernalia. Where straws have been lawfully seized as drug paraphernalia, other indicia of criminal activity were also present. E.g., *State v. Ghiloni*, Licking App. No. 08 CA 91, 2009-Ohio-2330 (stating probable cause existed to arrest defendant for possession of drug paraphernalia when he pulled out clear sandwich bag with hypodermic needle, shoestring, and short straw). See, also, *State v. Scasny*, Ross App. No. 04CA2768, 2004-Ohio-4918, ¶14 (stating discovery of the small piece of plastic straw with apparent drug residue created a reasonable suspicion that the defendant had engaged in criminal behavior).

{¶ 41} The sole authority that we have found to the contrary is *Carson v. Commonwealth* (1991), 12 Va.App. 497, 404 S.E.2d 919, affirmed en banc (1991), 13 Va.App. 280, 410 S.E.2d 412, affirmed (1992), 244 Va. 293, 421 S.E.2d 415. In *Carson*, the arresting officer, who was standing at a toll booth located on an interstate highway, noticed a cut-off one-and-one-half to two-inch straw between the driver's legs. From the officer's past experience in drug enforcement work, the officer recognized the straw as the type "that people use to ingest cocaine through their nose." The officer retrieved the straw, noticed a white powder residue on it, and instructed the driver to pull to the side of the road. The officer searched the trunk of the car and found marijuana and cocaine.

{¶ 42} Addressing whether the officer had lawfully seized the straw, the Virginia Supreme Court concluded that "the distinctive character of the straw coupled with the officer's experience 'would warrant a man of reasonable caution'

to believe that the straw might be useful as evidence of a crime.” *Id.* at 502. The court distinguished the straw from a film canister, which certain people use to store narcotics, but law-abiding citizens routinely use to store film. The court reasoned:

{¶ 43} “\*\*\* In contrast, the item seized in this case is a one and one-half to two inch straw. The uniqueness of the straw’s size distinguishes it from straws one would usually encounter for legitimate purposes. See [*Texas v. Brown*] [(1983)], 460 U.S. [730] at 746, 103 S.Ct. [1535] at 1545[, 75 L.Ed.2d 502] (concurring opinion).

{¶ 44} “Although possible, it is highly unlikely that a straw this size would have a legitimate use. Even assuming a legitimate use exists for a straw this size, probable cause to believe the straw is evidence of a crime may nonetheless be established. Even the uninflated, tied-off balloon in *Texas v. Brown* may have been simply a remnant of a birthday party and not an item used for carrying narcotics. However, an investigating officer does not have to ‘deal with hard certainties, but with probabilities,’ and is permitted to make ‘common-sense conclusions about human behavior’ in assessing a situation. *Id.* at 742, 103 S.Ct. at 1543.

{¶ 45} “\*\*\*

{¶ 46} “\*\*\* [I]n this case, opportunities for the lawful use of a one and one-half to two inch straw are ‘rare indeed.’ [*United States v. Truitt*] [(C.A.6, 1975)], 521 F.2d [1174] at 1177. Since no showing is required that the officer’s belief was ‘more likely true than false,’ *Brown*, 460 U.S. at 742, 103 S.Ct. at 1543, we hold that the officer’s common-sense along with his law enforcement experience

made it immediately apparent to him that the straw might be evidence of a crime.

{¶ 47} “In sum, we conclude that the officer met both requirements of the plain view doctrine and was justified in seizing the straw.” *Carson*, 12 Va.App. at 502-503.

{¶ 48} If *Carson* holds anything beyond that an experienced drug officer’s observation of a short, altered (i.e., cut-off) straw between the legs of a driver, with no evidence of food or drink, may allow a trier of fact to conclude it was immediately apparent that the straw was associated with criminal activity, we decline to follow *Carson* in this case. Although Holbrook testified that “short straws” are commonly used to snort narcotics, we cannot conclude that the mere presence of a three-inch straw is indicative of criminal activity. Moreover, even accepting that Holbrook knew that Broaddus had a least one prior arrest for a drug offense, there was no indication at the time the officer searched the jacket and felt the straw that he even suspected Broaddus of drug activity or that Broaddus’s straw was used for criminal purposes. Contrast *Dunson*, *supra* (holding that, while a plastic baggie alone is insufficient to demonstrate the object’s criminal character, the baggie in conjunction with a smell of marijuana and the defendant’s attempts to avoid discovery of the contents of his pocket supported a finding of probable cause). No other evidence of drugs or drug paraphernalia was found during the officer’s search of the vehicle. There was no evidence that the officer smelled drugs of any kind on Broaddus’s person or in the vehicle.

{¶ 49} In the absence of additional indicia, at the time of Holbrook’s search, that the straw was used for illegal purposes, the mere presence of the straw was

insufficient to create probable cause that the straw was contraband. Holbrook was not permitted to seize the straw under the plain feel doctrine. Accordingly, even though the trial court did not address the plain feel doctrine, the trial court's granting of Broaddus's motion to suppress was proper.

{¶ 50} The State's assignment of error is overruled.

{¶ 51} The judgment of the trial court will be affirmed.

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BROGAN, J., concurs.

DONOVAN, P.J., concurring separately:

{¶ 52} I write separately to emphasize that the possibility of an innocent explanation for possession of the straw does not necessarily deprive an officer of the capacity to entertain a reasonable suspicion of criminal activity. The majority finds a lack of additional indicia that the straw was used for illegal purposes, thus a lack of probable cause. Although the State argues that a three-inch straw in all probability does not have a legitimate use, this position is weakened by recognition that stir straws (coffee straws), for example, are shorter than a traditional soda straw, albeit narrower.

{¶ 53} Based on my review, the real difficulty with this case is that the trial court failed to address the plain feel and immediately apparent arguments advanced by the State. Instead, the trial court's rationale was "once the reason for the detention ends, the citizen detained must be allowed to continue on his way." The trial court also concluded, "once a weapon was not found, the search should have ended. There was no validation of the belief that a plastic straw in the pocket

of a heavy jacket was felt and presumed to be a weapon.” Trial Ct. Decision, pg. 4 (June 30, 2009). It was never argued that Officer Holbrook thought the straw was a weapon. Nor was the length of detention truly at issue. These holdings fail to address the central issue which is: whether the plain feel doctrine permitted seizure of the straw because its discovery was purportedly inadvertent and its criminal use immediately apparent. I would conclude that since the jacket lay next to appellee, given the furtive gesture, the officer was permitted to look beneath the jacket and feel it for weapons. The question is, could such a limited feeling of the jacket yield discovery of a short straw? The common sense answer is “no.”

{¶ 54} Accordingly, I am able to concur in the majority’s ultimate judgment on this record because in applying the Fourth Amendment, “common sense and ordinary human experience” take precedence over legal abstractions and rigid criteria. *United States v. Sharpe*, 470 U.S. 675, 685, 105 S.Ct. 1568, 84 L.Ed. 2d 605 (1985). The lack of discussion of the plain feel and immediately apparent doctrines may be overlooked on this particular set of facts, but under different circumstances such an omission may be fatal to affirmance.

{¶ 55} In my view, given the evidence adduced, the officer’s testimony regarding the straw’s discovery simply defies credulity. There are instances when this needs to be said, this is one of them.

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Copies mailed to:

Melissa M. Ford  
L. Patrick Mulligan  
George A. Katchmer

Hon. Connie S. Price