IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO,

Plaintiff(s),

-vs-

DAMAAD S. GARDNER,

Defendant(s).

CASE NO.: 2010 CR 00910

JUDGE TIMOTHY N. O'CONNELL

DECISION AND ENTRY OVERRULING DEFENDANT'S MOTION TO SUPPRESS

SETTING SCHEDULING CONFERENCE ON FEBRUARY 25, 2013 AT 1:30 AM IN COURTROOM NO.7

On May 24, 2010 Defendant, by counsel, filed a *Motion to Suppress*. On August 06, 2010 a hearing on the *Motion to Suppress* was held. On August 04, 2010 Defendant filed a *Supplement* to his *Motion to Suppress*.

Officer David House of the Dayton Police Department testified for the State of Ohio at the hearing. The Defendant testified at the hearing. One exhibit was admitted.

On August 06, 2010 the court overruled Defendant's *Motion to Suppress* on the basis of *Dayton v. Click* and it's progeny. The Defendant appealed and the Court of Appeals reversed the trial court's decision. The State of Ohio appealed the Court of Appeals' decision to the Ohio Supreme Court. The Ohio Supreme Court affirmed the Court of Appeals. The Supreme Court in *State v. Gardner*, Slip Opinion No.2012-Ohio-5683 ruled that *Dayton v. Click*, Montgomery App. No.14328, 1994 W.L. 543210 (October 05, 1994) is no longer good law and the Defendant's outstanding arrest warrant no longer cures any possible Constitutional violation and the pat-down of the Defendant and the seizure of the crack-cocaine.

On January 16, 2013 the court filed an entry setting submission dates on the *Motion to Suppress*. A submission date of February 01, 2013 was established. All memoranda and/or affidavits either in support of or in opposition to the motion were to be filed by February 01, 2013. On January 30, 2013 the State of Ohio,

through counsel, filed a *Memorandum in Opposition* to Defendant's *Motion to Suppress*. The Defendant has not filed any additional memorandum.

FINDINGS OF FACT

On the evening of March 17, 2010, Detective David House of the Dayton Police Department was patrolling in an unmarked cruiser in a high crime area, when he found himself behind a pick-up truck bearing out of county plates. Knowing it is common for buyers to come from outside of Montgomery County to that area of the City of Dayton to purchase illegal drugs, Detective House followed the truck. He checked the truck's registration through LEADS and learned that it was registered to a Clinton County man who had a 2003 conviction for a drug offense. Detective House continued to follow the truck to see if the driver was going to a known drug house.

The driver parked the truck in the driveway of a residence at 1125 Cicilion Avenue. The driver and his passenger got out and entered the residence. Detective House decided to watch the house believing that a short stay could be indicative of drug activity. Seeing no suspicious activity, Detective House left after about 15 minutes.

Approximately three hours later, Detective House drove past the residence again. The truck was still in the driveway, along with a car. The car was registered to Richard Easter, who had an active warrant for his arrest from Butler County for failure to appear for trial on a drug charge. The LEADS system described Easter as a fifty-six year old white male, approximately six feet tall, 160 pounds with brown hair and brown eyes.

Detective House moved up the street and resumed watching the house to see if Easter would emerge. Two younger (than Easter's listed age) men came out of the house. One, later identified as Gardner, sat in the passenger seat of the car, and the other sat in the back seat. A few minutes later, at approximately 11:10 pm, a man matching Easter's description came out of the house, got into the driver's seat of the car, and began to drive away. Detective House followed the car, and was going to call for a marked cruiser to conduct a stop to see whether the driver was Easter and, if so, to place him under arrest for the outstanding warrant.

Before Detective House was able to contact a marked cruiser, the driver turned into a gas station and parked, got out of the car, walked up to the window and purchased cigarettes. Detective House, who was wearing a Dayton Police Department utility vest, parked 25-30 feet away and approached the driver. The man admitted that he was Richard Easter, and Detective House placed him under arrest. As Detective House was handcuffing Easter near the driver's door, he saw Gardner moving around inside the car. Detective House walked Easter behind the car and around to the passenger's side so that the Detective could talk to the passengers. As the Detective and Easter walked around the car, Detective House could see Gardner rise out of his seat and appear to reach to the back of his shorts. Concerned that Gardner might be armed, Detective House shouted for Gardner to place his hands on the dashboard, and Gardner did so. Detective House had Easter sit on the ground with his back against the rear door and then tried to open the front passenger door, but it was locked. He ordered Gardner to get out of the car, and Gardner complied. Because he was still the only Officer on the scene, Detective House handcuffed Gardner. Detective House told Gardner that he was not under arrest and that he was being handcuffed for the Officer's safety. Detective House conducted a pat-down for weapons. He found no weapons but he did feel something that he said he immediately recognized to be crack-cocaine in Gardner's shorts. Detective House removed the item and placed Gardner under arrest. Before any Miranda Warnings were given, Gardner spontaneously stated, "'something to the effect of he gave it to me to hide it'". After other Officers appeared on the scene, they took custody of Gardner and determined that he had an outstanding traffic warrant for his arrest.

As Detective House was walking Easter behind the car he observed Gardner in the passenger seat. Gardner raised his torso up a considerable height off the seat and made shoving motions into his shorts. The Officer could not determine what Gardner was moving or adjusting. He felt Gardner could be concealing a weapon or retrieving a weapon. He did not see a weapon but it was that uncertainty among other things that heightened his concern.

The area of Cicilion and Dandridge Avenue was known at that time to police officers to be a high drug area. The area was known at that particular time for significant vehicle-to-vehicle illegal drug transactions. Further, the Officer executed a search warrant at a house in the neighborhood shortly before and illegal drugs were found.

CONCLUSIONS OF LAW

The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures.[1] Generally, searches and seizures "conducted outside the judicial process, without prior approval of a judge or magistrate, are per se unreasonable under the Fourth Amendment subject only to a few specifically established and well-delineated exceptions."[2]

If an officer has reasonable grounds to believe that the individual is armed and presently dangerous, he may conduct a limited pat-down for weapons.[3] The officer need not be absolutely certain that individual is armed; rather the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or the safety of others was in danger.[4] The Second District Court of Appeals has previously held an officer's fear of violence is a legitimate concern when investigating drug activity, which would justify a pat-down.[5]

Following his earlier investigation, Detective House pulled into the Clark gas station on Gettysburg Avenue to confirm whether the driver of the car in which Defendant was riding was Richard Easter, who had an active warrant for drug-related matter. He parked 25-30 feet away from the car and did not block the vehicle. After confirming Easter's identity, he started to place him under arrest. As he was doing so, Defendant, who was watching the Detective, reached for the door handle as though he may flee. Detective House ordered Defendant to put his hands on the dashboard and Defendant did so. Nonetheless, the Defendant raised his buttocks off the seat to a significant degree and made a shoving or pushing motion toward the back of his shorts. Based on these movements, and his prior knowledge, that this vehicle and another vehicle located at the same residence both had connections to prior drug activity, Detective House's primary concern was whether Defendant could be retrieving or concealing a weapon. Moreover, it was dark outside, Detective House was the only Officer on the scene, there were two unsecured individuals in the car (one of whom had made furtive movements) while he was arresting Easter for a drug-related warrant, and this area is known to Detective House as a high drug area. Given the overwhelming need to protect Officers,

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[1] *Terry v. Ohio*, 392 U.S., 88 S.Ct.1868, 20 L.Ed.2d 889 (1968).
[2] *Minnesota v. Dickerson*, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993).
[3] *Terry*, supra at 24.
[4] *Id* at 27.
[5] *State v. Martin*, 2nd Dist. App. No.20270, 2004-Ohio-2738, at ¶ 17; *State v. Lindsey*, 2nd Dist. App. No.18073, at 2 (June 23, 2000); *State v. Taylor*, 82 Ohio App.3d 434, 445, 612 N.E.2d 728 (1992).

Detective House had a legitimate basis to pat Defendant down for weapons. Therefore, the pat-down was justified and reasonable under the Fourth Amendment.

Handcuffing a suspect in the course of a detention does not necessarily turn the detention into an arrest, as long as the handcuffing is reasonable under the circumstances; for instance, to maintain the status quo and prevent flight.[6] In the course of an investigative detention, an officer may take reasonable measures to ensure his own safety.

Detective House was the only Officer on scene with three other individuals in a high crime area and with one individual, Easter, having drug activity connections and an active warrant. It was reasonable for Detective House to handcuff Defendant to ensure his safety based on Defendant's furtive movements, to prevent Defendant from retrieving a weapon or attempt to flee. Defendant was specifically advised by Detective House that he was not under arrest and he was handcuffed for the safety of the Officer under the circumstances. Thus, handcuffing Defendant did not turn his detention into an arrest, it was proper in this instance.

Under the plain-feel doctrine, an officer conducting a pat-down for weapons may lawfully seize an object if he has probable cause to believe that the item is contraband.[7] The incriminating character of the object must be immediately apparent, meaning that the police have probable cause to associate an activity with criminal activity.[8]

When Detective House conducted the pat-down, he immediately knew there was crack-cocaine when he felt the rock-like substance near the waistband of the Defendant's shorts. Further, Detective House had conducted pat-downs for weapons and located crack-cocaine a thousand times, and he knew the upper part of the buttocks is a common place to hide drugs. Under the plain-feel doctrine, it was immediately apparent to Detective House that Defendant was concealing crack-cocaine in his waistband to shorts area and he was entitled to remove it from his shorts.[9]

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[6] *State v. Carter*, Montgomery App. No.21145, 2006-Ohio-2823, at ¶ 20.
[7] *Minnesota v. Dickerson*, 508 U.S. 366, 375, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993); *State v. Phillips*, 155 Ohio App. 3d 149, 2003-Ohio-5742, ¶ 41-42.
[8] *Dickerson*, 508 U.S. at 375; *State v. Buckner*, Montgomery App. No.21892, 2007-Ohio-4329.

[9] *Dickerson*, supra.

This is not a situation where the officer meant to manipulate the item to recognize it. The court had the opportunity to view the Detective when he testified. The court has also reviewed the DVD of the August 06, 2010 hearing. The court finds the Officer credible. Although the Defendant testified that the crack was between his two buttocks area, the court finds the crack was actually above the separated skin area and more in the waistband rear area. Thus, the Officer did not have to work the baggie to get a feel of the item. What happened here was that the Officer upon immediate touch felt a rock, which he then immediately recognized as crack based on his experience. This is not a situation where there has to be some manipulation to come to a conclusion about what the item was. This is not a situation where the Officer had the suspicion of what might possibly be present, the Officer knew immediately that the substance was crack-cocaine.

Interrogation includes express questioning as well as any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to illicit an incriminating response from the suspect.[10] Police officers are not responsible for unforeseen incriminating responses.[11] Statements made on the subject's own initiative, in the absence of questions or other conduct by police do not constitute "interrogation".[12]

The United States Supreme Court held that statements stemming from custodial interrogations are admissible only if it is shown that the police gave the suspect certain prescribed warnings before commencing the custodial interrogation, and if the warnings were not given, the statements must be suppressed.[13] A suspect's decision to waive his privilege against self-incrimination and make an admission is voluntary absent evidence that his will was overborne and his capacity for self determination was critically impaired because of coercive police conduct.[14]

It is the state's burden to show the defendant knowingly, voluntarily, and intelligently waived his Miranda Rights.[15] An express written or oral statement of waiver of the right to remain silent or the right to counsel is usually strong proof of validity of that waiver, but is not inevitably either necessary or sufficient to

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[10] *State v. Fair*, Montgomery App. No.24120, 2011-Ohio-3330, ¶ 40, citing *State v. Strozier*, 172 Ohio App.3d 780, 2007-Ohio-4575, 876 N.E.2d 1304, ¶ 16 and *Rhode Island v. Innis*, 446 Ohio St.291, 100 S.Ct.1682, 64 L.Ed.2d 297 (1980).

[11] *Fair*, at ¶ 40, citing *State v. Waggoner*, 2nd Dist., Montgomery Case No.12245, 2006-Ohio-844, 2006 W.L. 441622, at ¶ 14.

[12] *State v. Johnson*, 2nd Dist. Montgomery Case No.20624, 2005-Ohio-1367, 2005 W.L. 678922, citing *City of Akron v. Milewski*, 21 Ohio App.3d 140, 47 N.E.2d 582 (9th Dist. 1985).

[13] *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

[14] *State v. Otte*, 74 Ohio St.3d 555, 562 (1996), citing *Colorado v. Connley*, 479 U.S. 157 (1986).

establish waiver. Waiver can be inferred by the actions and words of the person interrogated.[16] Where a suspect's speaks freely to police after acknowledging that he understands his rights, the court may infer that the suspect implicitly waived his rights.[17] A suspect's decision to waive his privilege against self-incrimination is made voluntarily absent evidence that his will was overborne and his capacity for self-determination was critically impaired because of coercive police conduct.[18]

A review of the totality of the circumstances reveals that the Defendant made an unsolicited statement to the effect of "he told me to hide it for him" that statement was in response to Detective House's comment to the Defendant that he was under arrest for crack-cocaine. A statement advising the suspect of the reason for his arrest, undoubtedly, is a statement normally attendant to arrest and custody and it is not a statement that would be likely to illicit an incriminating response. No questions were asked of the Defendant prior to making the statement, the statement was spontaneous and was not the product of police coercion.

Following Miranda Warnings, Defendant then knowingly, voluntarily, and intelligently waived his rights and agreed to speak to Detective House. Defendant acknowledged he understood, orally waived his right, appeared to be coherent, and answered the Detective's questions freely. There were no threats or promises made to the Defendant, and he was questioned only briefly by the Detective. At no time did the Defendant ask to stop, refuse to answer questions, or request an attorney. Based upon the evidence presented, the Defendant's statements were knowing, voluntary, and intelligently made and were properly obtained by Detective House.

Therefore, the Defendant's *Motion to Suppress* is not well taken and is hereby OVERRULED.

The matter is set for a scheduling conference on **February 25, 2013 at 1:30 pm** in courtroom number 7. Counsel and Defendant is ordered to be present.

SO ORDERED:

Timothy N. O'Connell

JUDGE TIMOTHY N. O'CONNELL

Copies of the above were sent to all parties listed below by ordinary mail this date of filing.

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[15] *En Re Gault*, 387 U.S. 1, 87 S.Ct.1428, 18 L.Ed.2d 527 (1967).
[16] *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S.Ct.1755, 60 L.Ed.2d 286 (1979).
[17] *State v. Murphy*, 91 Ohio St.3d 516, 519, 2001-Ohio-112, 747 N.E.2d 765.
[18] *State v. Sapp*, Clark County App. No.99CA84, 2002-Ohio-6863, ¶ 47.

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