

a vehicle on the north side of the lot, lean inside the vehicle, and count money as he walked away from the vehicle. He could not see if anything was handed to the person inside the vehicle. He had not seen any money in the defendant's hands before or as he approached the vehicle. According to Kopchak, the defendant kept tapping his waistband, which in his experience and training, is characteristic of someone with a gun. No effort was made to stop the vehicle that the defendant leaned into. Kopchak did not see a gun on the defendant and did not see if anything was handed by the defendant to the occupant of the vehicle.

Durichko testified that he is a detective with the gun suppression detail and has taken two classes concerning the characteristics of an armed gunman, to include their mannerisms and body language. He has taken numerous classes regarding drug and gang interdiction. On March 22, 2016, he was patrolling the area of E. 156th St. and Lakeshore Blvd. in an unmarked car because he was undercover. He saw the defendant at the Valero gas station, a hot spot for drug sales, and specifically saw the defendant approach two separate cars and move from one car to the next quickly. The defendant did not lean into either of these first two vehicles. After Durichko turned around and went by the gas station again, he saw the defendant approach a "third vehicle" and put his hands into the vehicle, hand something to the occupant of the vehicle – he could not see what it was - and then walk away quickly while counting money. He had not seen the defendant with money in his hands before he walked away from the third vehicle. In his training and experience, it was the way the defendant briefly, and with a sense of secrecy, approached all three vehicles, reached in the third vehicle quickly and left as soon as he had the money in hand that led Durichko to believe that a hand to hand transaction had occurred. Durichko testified that the area is riddled with drug sales and robberies and he has

seen hundreds of hand to hand transactions. He has arrested 100 individuals after witnessing hand to hand transactions and there was no innocent reason for the hand to hand transaction associated with all of those arrests. Durichko testified that he watched the defendant for about five minutes during which the defendant was continually reaching towards an item in his waistband and pulling his shirt down. In his opinion, and based upon his training and experience, this was a characteristic of someone with a gun. According to Durichko, the anonymous tip about someone carrying a gun and selling drugs at the gas station had not come in that day, but days before. No effort was made to stop the third vehicle as it left the gas station. Durichko did not actually see a gun before the defendant was stopped.

The defendant was located standing or leaning against a black truck where a group of people were congregating and when the police approached, he took off running. This black truck was not the third vehicle that Durichko had seen in the Valero gas station lot. Durichko testified, and Crosby confirmed through her testimony, that Durichko did not ask that King or Crosby search that black truck. According to Crosby, no other officer asked her to search the truck. She decided to search it and conducted the search to see if the defendant had thrown or put anything in that truck. No contraband was found in the truck.

The defendant argues that the testimonies of the police officers are not credible since, or because of, respectively: they differ with respect to certain details like their respective locations at the time they saw the defendant, their purpose or reason for being near the Valero gas station, the number of vehicles the defendant approached while at the gas station, and the timing of the anonymous tip; and the reasons or explanations given for not having the third vehicle stopped, and for failing to wear their body cameras. However, this Court finds their

testimonies credible regarding the facts relevant to the issues presented by Defendant's Motion to Suppress. Their credible testimonies, separately and together, established the following relevant facts or circumstances: the defendant was at the Valero gas station, a place known for drug trafficking and a multitude of arrests associated therewith, and the location of a man with a gun who was selling drugs per an anonymous tipster; the defendant approached two vehicles quickly and then approached a third where he leaned into the car, handed something to the occupant, and then quickly walked away while counting money that had not been seen in his hand prior to him approaching the third vehicle; the defendant repeatedly tapped or checked his waistband and pulled down his shirt, which according to their training and experience, was characteristic of a person with a gun.

Given this totality of circumstances, the Court finds that there was reasonable, articulable suspicion justifying a stop of the defendant. Although the defendant cites three cases in support of his argument that the totality of circumstances did not give rise to a reasonable, articulable suspicion to stop the defendant, those cases are distinguishable from the instant matter.

In both *State v. Pettegrew*, 8th Dist. Cuyahoga No. 91816, 2009-Ohio-4981, and *State v. Carmichael*, 8th Dist. Cuyahoga No. 95618, 2011-Ohio-2921, and as subsequently explained in *State v. Clayton*, 8th Dist. Cuyahoga No. 102277, 2015-Ohio-4370, at ¶21, the Eighth District Court of Appeals "reversed the trial court's denial of a motion to suppress evidence found as a result of an investigative stop when a police officer witnessed a hand-to-hand transaction between two parties, but could not say that he saw anything illegal exchanged." In distinguishing the facts of *Pettegrew* and *Carmichael* from those before it in *Clayton*, the Court

explained, and relied in part upon the fact, that "in both of the cases the *only* fact offered as the basis for reasonable suspicion was the officer's observation of the hand-to-hand transaction." *Clayton, id.* at ¶22.

Moreover, in *State v. Coleman*, 8th Dist. Cuyahoga No. 93451, 2009-Ohio-6471, at ¶22 (citing *Pettegrew*, at P18), the Eighth District Court of Appeals further explained that "[b]ecause the officer in *Pettegrew* could not 'say outright that he observed the exchange of something, [the] case rest[ed] solely on the character of the area.'"

In *City of Cleveland v. Fields*, 8th Dist. Cuyahoga No. 82070, 2003-Ohio-1965, and given the fact that the police report did not mention any hand-to-hand transaction between the defendant and another individual, the Court of Appeals found no reason to dispute the trial court's determination that the police officer was not believable when he testified that he witnessed a hand-to-hand transaction or that the defendant was engaged in suspicious activity. Here, the police report did include mention of what the officers perceived or believed to be a hand-to-hand transaction and of the movement of the defendant or favoring of his right hip that led the officers to believe that he had a gun. (Police Report, Defendant's Exhibit "A".)

The totality of circumstances established at the hearing is more akin to those established in *State v. Agee*, 8th Dist. Cuyahoga No. 94035, 2010-Ohio-5074, at ¶16, where the Court found that the totality of the circumstances, specifically that the defendant had made sudden, furtive movements after seeing the police vehicle, coupled with the high drug area and the officer's experience, lead to reasonable suspicion that criminal activity was afoot. Therein, the Court explained that in examining the totality of the circumstances to determine whether the detaining officer had an objective basis for suspecting criminal activity and under this

approach, "police officers are permitted to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person." *Id.*, at ¶20, citing *State v. Scales*, Cuyahoga App. No. 87023, 2006 Ohio 3946, P11. The Court further stated that, "[t]hus, a court reviewing an officer's reasonable-suspicion determination must give due weight to the officer's trained eye and experience and view the evidence through the eyes of law enforcement." *Id.*, at ¶21, citing *State v. Andrews* (1991), 57 Ohio St.3d 86, at 87-88, 565 N.E.2d 1271.

Moreover, the evidence presented that the wrong license plate of the black truck not involved in the hand-to-hand transaction was run, or that the identity of the owner of that truck was not included in the police report, is a red herring and irrelevant because, as the Court also explained in *State v. Agee, supra*, at ¶21, "[t]he question that must be answered is whether the facts available to the officer **at the moment of the stop** support a person of reasonable caution in the belief that the action taken was appropriate." (Emphasis added.) And, for the reasons already set forth above, that question is answered in the affirmative.

Accordingly, the defendant's Motion To Suppress is **DENIED**.

IT IS SO ORDERED.


JUDGE PAMELA A. BARKER 10-20-16
DATED