[Cite as *State v. Spain*, 2009-Ohio-6664.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
		No. 09AP-331
v.	:	(C.P.C. No. 08CR-8415)
Terry L. Spain,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on December 17, 2009

Ron O'Brien, Prosecuting Attorney, and *John H. Cousins, IV*, for appellant.

Yeura R. Venters, Public Defender, and *David L. Strait*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} This is an appeal by plaintiff-appellant, State of Ohio, from an entry of the Franklin County Court of Common Pleas, granting a motion to suppress filed by defendant-appellee, Terry L. Spain.

{¶2} On November 25, 2008, appellee was indicted on one count of possession of cocaine, in violation of R.C. 2925.11. On February 3, 2009, appellee filed a motion to

suppress. The state filed a memorandum contra appellee's motion to suppress, and the matter came for hearing before the trial court on March 23, 2009.

{¶3} During the hearing, the state called Columbus Police Officer Charles Radich, who gave the following testimony. On June 25, 2008, Officer Radich and his partner, Officer Kane, were on patrol as part of a "Summer Strike Force Initiative," pertaining to "drugs, guns, high crimes like that." (Tr. 6.) On that date, the officers observed appellee walking on Highland Avenue in the middle of the street near a gas station, located at the corner of Sullivant and Highland Avenues. The officers pulled up in their marked cruiser beside appellee because of "the jaywalking violation where we observed him walking in the middle of the street." (Tr. 7.)

{¶4} The officers asked appellee for identification, which he produced. Officer Kane began a "LEADS" check of appellee's identification and, during this time, Officer Radich asked appellee if he had any prior arrests. Appellee stated "he had prior arrests for narcotics, at which time [the officer] asked him if he had any narcotics on him at this time." (Tr. 8.) Appellee responded "no." (Tr. 8.) Officer Radich, while still seated in the cruiser, then asked appellee for consent to search him. Appellee, who was standing beside the driver's side door of the cruiser, "stated yes." (Tr. 8.) Officer Radich had a discussion with his partner, and then asked appellee a second time for consent to search, and appellee "again stated yes." (Tr. 9.)

{¶5} Officer Radich exited the vehicle and began a search of appellee. The officer found a baggie in the right front cargo pocket of appellee's shorts; the baggie contained a white rock which appeared to be crack cocaine. At that point, appellee told the officer he "had a crack pipe in his left cargo pocket," and the officer then removed the

pipe from appellee's pocket. (Tr. 10.) Officer Kane field tested the contents of the baggie, and the test produced a positive result. The officers did not issue appellee a citation for jaywalking.

{¶6} On cross-examination, Officer Radich stated that appellee was in a "high narcotic area" at the time he was stopped for jaywalking. (Tr. 11.) Officer Radich testified that the officers ran a warrant check on appellee while he was standing beside the cruiser. According to Officer Radich, appellee "wasn't, in fact, being detained" at the time. (Tr. 16.) However, the officer responded "correct" to defense counsel's inquiry: "But he was not free to leave?" (Tr. 16.)

{¶7} Appellee testified on his own behalf, and gave the following account of the events. On the date of the incident, he was walking on Highland Avenue which, according to appellee, does not have a sidewalk. Appellee was on the gas station lot when officers pulled up beside him. The officers asked him for identification, and he responded, "Yes, sir," and asked the officers "why do you want my ID? What did I do?" (Tr. 23.) According to appellee, the officer said, "You didn't do nothing, but we've never seen you in this area before. So I want to check you out, run a 50 on you." (Tr. 23.)

{¶8} Appellee gave the officer some identification. The officer then asked if he could search appellee, and he responded, "Why would you want to search me? I haven't done anything wrong. No, you can't search me." (Tr. 23.) Appellee then gave the following testimony regarding the events:

> He ran a – he ran a 50 on me, and – no, they didn't ask me the second time could they search me again. They just both got – after they ran a 50 on me and did – and seen that I didn't have any warrants or anything, they both – I backed up

> away from the car like I was going to walk away, and both gentlemen stepped out of the car.
>
> And the officer that just got off the stand grabbed my arm and pushed me up against the car and started patting me down, told me to spread my legs and pat me down. They never—he never asked me a second time to search me. He only asked me one time, and that was before he even ran the 50 on me. And, again, like he said, why would I – if I knew I had something on me, why would I tell him yeah, you can search me?

(Tr. 23-24.)

{¶9} At the close of the testimony, the trial court announced from the bench that it would grant appellee's motion to suppress, stating in part:

> I think even if I assumed that the police officer was telling the truth about the Defendant jaywalking, I still don't think that gave him a right to search.
>
> For one thing, it's a minor misdemeanor or a low level misdemeanor, jaywalking. And * * * I don't think they had any reason to think he was dangerous. They didn't have a right to do a Terry stop. So I don't think he had a right to search him just because they had him for jaywalking if nothing more. So I don't know whether he said yes or no, but I don't think they had a right to demand a search.

(Tr. 31-32.)

{¶10} On March 24, 2009, the state requested that the trial court provide essential findings pursuant to Crim.R. 12(F). On March 26, 2009, the trial court issued a statement of findings, providing in part:

> On the date of the alleged offense, two Columbus Police Officers stopped the defendant who was jaywalking near the intersection of Highland Avenue and Sullivant Avenue. The officers knew they were in an area of high drug activity and asked the defendant if he had any drugs. After the defendant responded in the negative, the police asked the defendant at least twice if he would agree to be searched.

> At that point in time, the officers had no probable cause to believe an offense was being committed. Nor did they have a reasonable suspicion to justify even a "terry stop."
>
> The defendant did not specifically refuse to be searched and may have even expressed agreement. However, he did so only under intimidation and unjustified duress.

{¶11} On April 1, 2009, the trial court filed a judgment entry granting appellee's motion to suppress.

{¶12} On appeal, the state sets forth the following two assignments of error for this court's review:

> **FIRST ASSIGNMENT OF ERROR**
>
> THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION TO SUPPRESS BASED ON FINDINGS THAT ARE CONTRARY TO LAW AND THAT ARE UNSUPPORTED BY COMPETENT, CREDIBLE EVIDENCE.
>
> **SECOND ASSIGNMENT OF ERROR**
>
> THE TRIAL COURT ERRED WHEN IT FAILED TO MAKE AN ESSENTIAL FINDING ON THE ULTIMATE ISSUE OF CONSENT.

{¶13} The state's assignments of errors are interrelated and will be considered together. Under the first assignment of error, the state contends that the trial court's findings were against the manifest weight of the evidence, and that the court misapplied the law. The state raises the following arguments in support of reversal of the trial court's decision to grant the motion to suppress: (a) no seizure occurred for purposes of the Fourth Amendment; (b) the officers had a reasonable suspicion to stop appellee for jaywalking; (c) the trial court's finding of duress was not supported by the record; and (d) the drugs were found on appellee as the result of a search incident to a valid arrest.

Under the second assignment of error, the state argues that the trial court erred in failing to address the ultimate issue of consent.

{¶14} The Supreme Court of Ohio has held that "[a]ppellate review of a motion to suppress presents a mixed question of law and fact." *State v. Burnside,* 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. In 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." Id., citing *State v. Mills* (1992), 62 Ohio St.3d 357, 366. Thus, "an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence." Id., at ¶8, citing *State v. Fanning* (1982), 1 Ohio St.3d 19.

{¶15} We begin with the general proposition that a search conducted without a warrant issued upon probable cause violates the Fourth Amendment unless it comes within one of the "few specifically established and well-delineated exceptions" to the warrant requirement. *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 219, 93 S.Ct. 2041, 2043.

{¶16} In response to the state's argument that the search in this case can be justified as one incident to an arrest, appellee notes that the offense for which the officers made the initial stop, jaywalking, is punishable as a minor misdemeanor. Appellee argues that Ohio law permits a warrantless arrest for a minor misdemeanor offense only under limited circumstances. We agree.

{¶17} R.C. 2935.26(A) states:

> (A) Notwithstanding any other provision of the Revised Code, when a law enforcement officer is otherwise authorized to arrest a person for the commission of a minor misdemeanor,

> the officer shall not arrest the person, but shall issue a citation, unless one of the following applies:
>
> (1) The offender requires medical care or is unable to provide for his own safety.
>
> (2) The offender cannot or will not offer satisfactory evidence of his identity.
>
> (3) The offender refuses to sign the citation.
>
> (4) The offender has previously been issued a citation for the commission of that misdemeanor and has failed to do one of the following:
>
> (a) Appear at the time and place stated in the citation;
>
> (b) Comply with division (C) of this section.

{¶18} In *State v. Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931, the defendant was stopped by police officers for jaywalking and suspected drug activity, and a custodial search of the defendant resulted in the discovery of crack cocaine. The defendant was indicted for possession of cocaine, and he subsequently filed a motion to suppress. The trial court, following reconsideration, granted the defendant's motion, and the trial court's decision was affirmed on appeal.

{¶19} On further appeal, the Supreme Court addressed the issue whether the Ohio Constitution provides greater protection than the Fourth Amendment against warrantless arrests for minor misdemeanors, answering that question in the affirmative. Under the facts of *Brown,* because none of the exceptions under R.C. 2935.26(A) were applicable, the Supreme Court found the defendant's arrest for the minor misdemeanor offense of jaywalking constituted a violation of the Ohio Constitution and, thus, the evidence seized in the search incident to that arrest was subject to suppression.

Appellate courts applying *Brown* have held that "[p]olice officers may briefly detain, but may not conduct a custodial arrest, or a search incident to that arrest, for a minor-misdemeanor offense when none of the R.C. 2935.26 exceptions apply." *State v. Riggins,* 1st Dist. No. C-030626, 2004-Ohio-4247, ¶10; *State v. Golly,* 8th Dist. No. 89481, 2008-Ohio-447, ¶16, citing *Brown* at ¶25.

{¶20} The state argues that the logic of *Brown* is "highly questionable," and contends there should be no exclusionary rule for search-and-seizure violations under Section 14, Article I of the Ohio Constitution. We decline to consider those arguments, as this court is "bound to follow the law and decisions of the Supreme Court, unless or until they are reversed or overruled." *State v. Crosky,* 10th Dist. No. 09AP-57, 2009-Ohio-4216, ¶7. While we reject the state's argument that the search was justified as one incident to a valid arrest for a minor misdemeanor, this does not end our analysis.

{¶21} In the trial court's statement of findings, the court states that the officers stopped appellee "who was jaywalking." Despite subsequent findings by the trial court regarding probable cause and reasonable suspicion, we will assume the trial court made a determination that the officers were reasonably justified in making the initial stop. A law enforcement officer may stop an individual based upon "reasonable suspicion that criminal activity is afoot." *State v. Dillon,* 10th Dist. No. 04AP-1211, 2005-Ohio-4124, ¶25, citing *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868. However, as discussed above, because the stop was for a minor misdemeanor, and as none of the exceptions under R.C. 2935.26 were applicable, the officers could briefly detain, but not conduct a custodial search, or search incident to an arrest, for the jaywalking offense. *Riggins* at ¶10.

{¶22} Once an officer has reasonable suspicion that an individual may be involved in criminal activity, the officer, in addition to stopping the person for a brief time, may "take additional steps to further investigate." *Dillon* at ¶29. Further, "[i]n the ordinary course of an investigation, a police officer is free to ask a person for identification without implicating the Fourth Amendment." Id. An officer's actions must not only be "justified at its inception," but must also be " ' "reasonably related in scope" ' to the circumstances that initially justified the interference." Id., quoting *Hiibel v. Sixth Judicial Dist. Ct. of NV* (2004), 542 U.S. 177, 178, 124 S.Ct. 2451, 2454, citing *Terry*.

{¶23} The officers in the instant case requested identification from appellee, and he complied with that request. The record does not suggest that the officers were concerned for their safety, and Officer Radich acknowledged he did not recall feeling threatened by appellee, nor was he "expecting" to find weapons or drugs on appellee. (Tr. 12.) The officers never issued a citation for jaywalking. Rather, while his partner ran a warrant check, Officer Radich questioned appellee about matters unrelated to the jaywalking offense; specifically, whether he had any prior arrests, and whether he had any narcotics in his possession. The record is not clear as to when appellee's identification material was returned to him, including whether the documentation had been returned at the time Officer Radich requested permission to search. The officer himself gave conflicting testimony as to whether appellee was free to walk away, at first stating appellee was not being detained, but subsequently agreeing with defense counsel during cross-examination that he was not free to leave.

{¶24} The evidence at the hearing raises serious concern as to whether the detention was reasonably related to the scope of the circumstances. The trial court, in its

statement of findings, appears to address that issue in finding that, "[a]t that point in time" (i.e., the point in time when the officers requested to search appellee) the officers lacked a "reasonable suspicion" to justify a "Terry stop." See, e.g., *State v. Nelson,* 2d Dist. No. 22718, 2009-Ohio-2546, ¶37 (once a reasonable time for issuing a citation has passed, the officer "must have a reasonable articulable suspicion of criminal activity in order to continue the detention").

{¶25} Police officers, however, "do not need a warrant, probable cause, or even a reasonable, articulable suspicion to conduct a search when a suspect voluntarily consents to the search." *Riggins* at ¶11, citing *Schneckloth* at 219; *State v. Comen* (1990), 50 Ohio St.3d 206, 211. The Supreme Court has held that "[v]oluntary consent, determined under the totality of the circumstances, may validate an otherwise illegal detention and search." *State v. Robinette* (1997), 80 Ohio St.3d 234, 241, citing *Davis v. United States* (1946), 328 U.S. 582, 593-94, 66 S.Ct. 1256, 1261-62.

{¶26} However, when consent is "obtained during an illegal detention, the consent is negated 'even though voluntarily given if [the consent is] the product of the illegal detention and not the result of an independent act of free will.' " *State v. Melvin,* 8th Dist. No. 88611, 2007-Ohio-3779, ¶37, quoting *Florida v. Royer* (1983), 460 U.S. 491, 501, 103 S.Ct. 1319, 1326. In order for consent to be considered an independent act of free will, "the totality of the circumstances must clearly demonstrate that a reasonable person would believe that he or she had the freedom to refuse to answer further questions and could in fact leave." *Robinette*, paragraph three of the syllabus. The state "bears the burden of proving, by 'clear and positive' evidence, that consent was freely and voluntarily

given. *Melvin* at ¶37, citing *Bumper v. North Carolina* (1968), 391 U.S. 543, 548, 88 S.Ct. 1788, 1791; *State v. Posey* (1988), 40 Ohio St.3d 420, 427.

{¶27} In the instant case, the state argues that the trial court never determined the critical issue of consent. Specifically, in its statement of findings, the trial court stated: "The defendant did not specifically refuse to be searched and may have even expressed agreement." The court further found, however, that if appellee expressed agreement "he did so only under intimidation and unjustified duress." In response, appellee maintains that the trial court's finding of duress is tantamount to a finding that the state did not prove consent, but appellee acknowledges that a remand for the limited purpose of clarifying this point may be appropriate.

{¶28} We agree with the state's contention that the trial court should have addressed the issue of consent, especially given the court's general, conclusory finding of duress. The record of the suppression hearing reflects that the trial court did not deem the issue of consent pertinent on the basis that the initial stop was for a minor misdemeanor offense, and we note that the trial court did not render any findings as to consent or duress on the record during the suppression hearing. In the trial court's subsequent written findings, the court did not make a specific determination as to whether appellee consented, but the court did hold that any agreement to search only occurred under "unjustified duress." The trial court's findings, however, do not indicate which testimony, or portions thereof, the court found credible, nor did the court discuss the factual findings it found essential, based upon the totality of the circumstances, in making its finding of duress. See *State v. Roberts,* 110 Ohio St.3d 71, 2006-Ohio-3665, ¶99 ("[t]he question of whether consent to a search was voluntary or the product of duress or

coercion, express or implied, is a question of fact to be determined from the totality of the circumstances").

{¶29} Because the trial court did not make critical determinations or findings with respect to those issues, we find that the record is insufficient for this court to effectively review the trial court's decision to grant the motion to suppress. Accordingly, we vacate the trial court's decision and remand this matter to that court for further proceedings and to render findings as to whether there was consent and, if so, whether such consent was voluntary under the totality of the circumstances, and/or to further discuss the factual basis in support of its ruling on duress. See *State v. Ogletree,* 8th Dist. No. 86285, 2006-Ohio-448, ¶15-17 (noting import, under Crim.R. 12(F), for trial court to make "essential findings" on the record to provide appellate court with sufficient basis to review assignments of error relating to factual issues in pre-trial motions, and remanding case to trial court to make findings necessary to resolve "fact-intensive" issue of consent).

{¶30} Based upon the foregoing, the state's first and second assignments of error are sustained to the extent provided above, the judgment of the Franklin County Court of Common Pleas is vacated, and this matter is remanded to that court for further proceedings in accordance with law and consistent with this decision.

Judgment vacated; cause remanded with instructions.

SADLER and CONNOR, JJ., concur.

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