[Cite as *State v. Ewing*, 2010-Ohio-1385.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 09AP-776
v.	:	(C.P.C. No. 09CR-02-1083)
Frederick D. Ewing, Jr.,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 31, 2010

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher,* for appellee.

Yeura R. Venters, Public Defender, and *Allen V. Adair,* for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendant-appellant, Frederick D. Ewing, Jr., appeals from a judgment of the Franklin County Court of Common Pleas finding defendant guilty, pursuant to no contest plea, of one count of possession of heroin, a felony of the fifth degree, in violation of R.C. 2925.11. Defendant assigns a single error:

> The court erroneously overruled appellant's motion to suppress evidence as there was not probable cause for the

> traffic stop, and the contraband seized from appellant's person would not have been inevitably discovered.

Because the trial court did not err in overruling defendant's motion to suppress evidence, we affirm.

I. Procedural History

{¶2} On December 28, 2008, at approximately 8:30 p.m., Officer Ryan Steele was working as part of cruiser patrol on the East side of Columbus when he observed a truck traveling north in an alley between Hamilton Avenue and St. Clair Avenue, north of Buckingham Street. The truck appeared to have no license plate light, so Steele notified Officers Raymond Hatfield and Samuel Chappell of the direction the truck was traveling. When Hatfield and Chappell eventually stopped the vehicle, defendant was in the driver's seat. During the traffic stop, the officers discovered defendant possessed a small bag of heroin.

{¶3} On February 25, 2009, the state indicted defendant on one count of possession of heroin. After pleading not guilty, defendant on May 8, 2009 filed a motion to suppress evidence obtained through what defendant alleged was an unlawful search and seizure.

{¶4} The May 12, 2009 hearing on defendant's motion revealed that when Officer Steele observed defendant's truck, he did not see a light on the truck's rear license plate. He admitted he was unable to pull in behind the truck, so he sought the assistance of Officers Hatfield and Chappell. Hatfield testified that when he and Chappell pulled in behind defendant's truck, Hatfield "saw the vehicle did not have a license plate light illuminating it," leading Hatfield and Chappell to initiate the traffic stop. (Tr. 17.) Similarly,

Steele and Chappell stated they were unsure whether the truck had one or two license plate lights, but in any event, the license plate was not visible. Contrary to the officers' testimony, defendant stated the truck had one license plate light operating correctly, and he believed the license plate was clearly visible from a distance of 50 feet.

{¶5} Hatfield testified that, after stopping the vehicle, he approached the driver's side of the truck, and Chappell and Steele went to the passenger's side. Both Steele and Chappell testified they heard defendant say he was in the alley looking at roofs. Chappell found defendant's response "a little suspicious because it was nighttime, it was dark out." (Tr. 30.) Defendant, "acting a little nervous," was unable to provide "any solid answers" concerning what specific roofs or houses he had been inspecting or whether he was on a job. (Tr. 18, 30.) Steele testified the area of the traffic stop was "more or less a high-crime area" and "the alley that [defendant] was in was a known drug house." (Tr. 35.)

{¶6} After informing defendant of the reason for the traffic stop, Hatfield asked defendant whether "he had anything illegal in the car or on his person." (Tr. 18.) In Steele's experience, people buying or selling drugs often carry weapons. Defendant replied he did not. Hatfield testified he then asked defendant "if he cared if [the officer] checked. [Defendant] again stated no." (Tr. 18.) Hatfield stated he interpreted defendant's response to mean " 'no,' I don't care" if you search rather than "no, you can't." (Tr. 19.) Defendant, however, testified he intended his "no" response to mean he did not consent to the search.

{¶7} Hatfield then asked defendant to step out of the vehicle. As defendant exited the truck, Hatfield held defendant's hands "for control." (Tr. 20.) Working from the top of defendant's pants downward, Hatfield checked for weapons. He did not find any

weapons in defendant's waistband, but when he checked defendant's pockets he found a "bindle" of powdered heroin in the coin pocket of defendant's pants. (Tr. 20.) His search also yielded from defendant's right front pants pocket "two crack stems used for smoking crack cocaine." (Tr. 18.)

{¶8} After the officers restrained defendant with handcuffs, they conducted a LEADS check of defendant's drivers' license to be sure it was valid and to search for any outstanding warrants. At that time, the officers learned not only that defendant was driving under a "license forfeiture suspension," but that the license plate on the vehicle was registered to another vehicle. (Tr. 18-19.)

{¶9} Based on the evidence at the motion hearing, defendant argued both that the officers had no probable cause for the initial traffic stop, and that defendant did not consent to the warrantless search of his person. The trial court found probable cause for the traffic stop because, even if a license plate light actually were working, "the officers believed that they could not see the license plate from 50 feet." (Tr. 61.) Although the trial court found defendant did not consent to the search, the court determined the evidence seized during the warrantless search of defendant's person nonetheless inevitably would have been discovered during a search incident to arrest. More specifically, the trial court found the officers, under the unusual circumstances surrounding the neighborhood and defendant's reasons for being there, inevitably would conduct a check on defendant's license, they then would discover defendant was driving without a license, and that discovery would lead inevitably to defendant's arrest, search incident to arrest, and discovery of the heroin defendant had in his pocket. Thus, in this particular case, the trial

court found the result was the same even though the officers did not conduct the license and warrant check through LEADS until after they searched defendant's person.

{¶10} Following the trial court's decision to deny defendant's motion to suppress, defendant on June 3, 2009 entered a no contest plea to the charge of one count of possession of heroin. The trial court found defendant guilty and sentenced him to two years of community control, the first 90 days to be served in jail. The trial court journalized its decision in a judgment entry dated July 21, 2009. Defendant timely appeals.

II. Assignment of Error

{¶11} In his sole assignment of error, defendant asserts the trial court erred in overruling his motion to suppress evidence of the heroin seized during the traffic stop.

{¶12} "[A]ppellate review of a trial court's decision regarding a motion to suppress evidence involves mixed questions of law and fact." *State v. Vest*, 4th Dist. No. 00CA2576, 2001-Ohio-2394. Thus, an appellate court's standard of review of the trial court's decision denying the motion to suppress is two-fold. *State v. Reedy*, 10th Dist. No. 05AP-501, 2006-Ohio-1212, ¶5, citing *State v. Lloyd* (1998), 126 Ohio App.3d 95, 100-01. Because the trial court is in the best position to weigh the credibility of the witnesses, "we must uphold the trial court's findings of fact if they are supported by competent, credible evidence." Id., citing *State v. Klein* (1991), 73 Ohio App.3d 486, 488. We nonetheless independently must determine, as a matter of law, whether the facts meet the applicable legal standard. Id., citing *State v. Claytor* (1993), 85 Ohio App.3d 623, 627. The state bears the burden of establishing the validity of a warrantless search. *Xenia v. Wallace* (1988), 37 Ohio St.3d 216, 218, citing *State v. Kessler* (1978), 53 Ohio St.2d 204, 207.

{¶13} On appeal, defendant contends the officers lacked probable cause for the initial traffic stop, making the contraband subsequently found in the warrantless search of his person inadmissible as fruit of the poisonous tree. Moreover, even if the officers had probable cause for the traffic stop, defendant nonetheless contends both that he did not consent to the search and that the officers would not have inevitably discovered the contraband, with the result that the search of his person violated his Fourth Amendment rights. Defendant thus argues the trial court should have granted his motion to suppress.

A. Probable Cause

{¶14} Defendant first argues police officers lacked the requisite probable cause to stop his vehicle for a traffic violation. With that premise, defendant argues the trial court should have excluded from evidence the resulting contraband discovered during the warrantless search of his person. *Wong Sun v. United States* (1963), 371 U.S. 471, 83 S.Ct. 407; *Mapp v. Ohio* (1961), 367 U.S. 643, 655, 81 S.Ct. 1684 (holding that a court must exclude evidence obtained from a stop that violates the Fourth Amendment as "fruit of the poisonous tree").

{¶15} The Fourth Amendment to the United States Constitution prohibits warrantless searches and seizures, rendering them per se unreasonable unless an exception applies. *Katz v. United States* (1967), 389 U.S. 347, 357, 88 S.Ct. 507. Two standards are applied to determine whether police legitimately stopped a vehicle. *State v. Weinheimer*, 12th Dist. No. CA2003-04-044, 2004-Ohio-801, ¶8, citing *State v. Brock*, 12th Dist. No. CA2001-03-020, 2001-Ohio-8644; and *State v. Moeller* (Oct. 23, 2000), 12th Dist. No. CA99-07-128. First, a law enforcement officer may properly stop an automobile under the investigative stop, or *Terry* stop, exception. *Delaware v. Prouse*

(1979), 440 U.S. 648, 653, 99 S.Ct. 1391; *State v. Heinrichs* (1988), 46 Ohio App.3d 63. In *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, the Supreme Court held that a police officer may stop an individual if the officer has reasonable suspicion based upon specific and articulable facts that criminal behavior has occurred or is imminent. See also *State v. Chatton* (1984), 11 Ohio St.3d 59, 61. Thus, an individual operating an automobile may be stopped if the officer possesses the requisite reasonable suspicion based on specific and articulable facts. *Dayton v. Erickson*, 76 Ohio St.3d 3, 1996-Ohio-431; *State v. Gedeon* (1992), 81 Ohio App.3d 617, 618. The propriety of an investigative stop must be viewed in light of the totality of the circumstances. *United States v. Cortez* (1981), 449 U.S. 411, 101 S.Ct. 690; *State v. Bobo* (1988), 37 Ohio St.3d 177, paragraph one of the syllabus.

{¶16} Second, "police may stop a vehicle based on 'probable cause' that a traffic violation has occurred." *Weinheimer* at ¶8, citing *Moeller* at 4. "The question whether a traffic stop violates the Fourth Amendment to the United States Constitution requires an objective assessment of a police officer's actions in light of the facts and circumstances then known to the officer." *Erickson* at 6. "Where a police officer stops a vehicle based on probable cause that a traffic violation has occurred or was occurring, the stop is not unreasonable under the Fourth Amendment to the United States Constitution even if the officer had some ulterior motive for making the stop, such as a suspicion that the violator was engaged in more nefarious criminal activity." Id. at syllabus; see also *Gedeon* (concluding an officer validly stopped a car that was weaving within its lane, with the rear window covered with snow); *State v. Shearer* (Sept. 30, 1994), 11th Dist. No. 93-P-0052

(deciding an officer executed a valid stop based on probable cause when a driver was following too closely in violation of R.C. 4511.34).

{¶17} Police officers here initially stopped defendant for failure to properly illuminate the rear license plate on his vehicle. R.C. 4513.05 provides, in pertinent part, that "[e]ither a tail light or a separate light shall be so constructed and placed as to illuminate with a white light the rear registration plate, when such registration plate is required, and render it legible from a distance of fifty feet to the rear." See also Columbus City Code Section 2137.04(A) (containing identical language). Defendant argues police officers lacked probable cause for his traffic stop because none of the officers specifically testified they were within 50 feet of the rear of defendant's vehicle when they determined his license plate was not legible. The real motivation for the stop, defendant argues, was to discover evidence of other offenses in an area the officers described as a drug neighborhood.

{¶18} Ohio courts repeatedly have held the failure to properly illuminate a license plate is a violation of R.C. 4513.05 and provides probable cause to initiate a traffic stop. See *Weinheimer* at ¶10; *State v. Held*, 146 Ohio App.3d 365, 2001-Ohio-4312; *Wilmington v. Conner* (2001), 144 Ohio App.3d 735; *State v. Bencie* (Dec. 1, 2000), 11th Dist. No. 2000-P-0004; *State v. Andrews* (Nov. 29, 1996), 2d Dist. No. 15673. Whether police officers have any other underlying intent for making the stop is of no consequence. *Erickson* at 11-12.

{¶19} Here, Officer Steele initiated his contact with Officers Chappell and Hatfield because "he observed a truck traveling north with what appeared to be no license plate light." (Tr. 6.) Chappell testified that when he and Hatfield initially saw defendant's car,

they were "almost a block," or about 25 yards, behind defendant's vehicle. (Tr. 33.) With that testimony, defendant argues that because the statute requires legibility from a distance of 50 feet, Chappell's testimony establishes the officers were not close enough to defendant's vehicle to formulate probable cause for the stop. Chappell further testified, however, that once he and Hatfield "pulled up behind" defendant, they could not read the license plate. (Tr. 33.) Additionally, Hatfield testified unequivocally that when they positioned themselves behind defendant's vehicle, they saw "the vehicle did not have a license plate light illuminating it." (Tr. 17.)

{¶20} Based on the officer's testimony, the trial court factually found "the officers believed that they could not see the license plate from 50 feet." (Tr. 61.) Although some testimony at the hearing suggested the vehicle may have had a functioning light that was bent out of place so it no longer was illuminating the license plate, the officers testified they could not read the license plate, the trial court believed their testimony, and the testimony is competent, credible evidence to support probable cause. Because we defer to the trial court's factual findings so long as some competent, credible evidence supports those findings, we will not disturb the trial court's finding that the license plate was not legible from a distance of 50 feet. See *Reedy* at ¶5. As a result, the police officers had the requisite probable cause to initiate the traffic stop.

B. Inevitable Discovery

{¶21} Defendant next argues that even if the police officers had probable cause for the initial traffic stop, the subsequent warrantless search of his person did not fall within any of the exceptions to the Fourth Amendment.

{¶22} One of the exceptions to the Fourth Amendment's warrant requirement is valid consent. *Davis v. United States* (1946), 328 U.S. 582, 593, 66 S.Ct. 1256. The question of whether a defendant voluntarily consented is a question of fact to be determined from the totality of the circumstances. *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 227, 93 S.Ct. 2041.

{¶23} The trial court found that defendant did not consent to the search of his person. Even though Hatfield testified he understood defendant's responses and demeanor to mean defendant consented to the search, defendant testified he did not consent. We will not disturb the trial court's factual findings that find support in some competent, credible evidence. Because the trial court's conclusion is supported in the evidence defendant offered, the consent exception does not apply here. See *Reedy* at ¶5.

{¶24} Another exception to the Fourth Amendment's warrant requirement is the *Terry* stop and frisk. A police officer who has detained a person for investigation or to issue a citation may perform a limited search of that person's outer garments for weapons "if the officer possesses a reasonable and articulable suspicion that the person may pose a danger to the officer or others around them." *State v. Gillis*, 2d Dist. No. 21868, 2007-Ohio-3456, ¶19, citing *Terry*. The scope of such a search is strictly limited to the discovery of weapons. Id. "If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed." *Minnesota v. Dickerson* (1993), 508 U.S 366, 373, 113 S.Ct. 2130, citing *Sibron v. New York* (1968), 392 U.S. 40, 65-66, 88 S.Ct. 1889. If, however, in the course of the weapon's search the officer feels an object he immediately recognizes as

contraband, the officer is authorized to seize it for use in a criminal prosecution. Id. at 376; see also *Gillis*, citing *State v. Driscoll* (Sept. 19, 1997), 2d Dist. No. 16207.

{¶25} Here, the state does not attempt to justify its search of defendant as a legitimate *Terry* weapons frisk. Indeed, the officers' testimony suggests the officers may have lacked a reasonable, articulable suspicion that defendant was armed. Hatfield, who conducted the actual search of defendant's person, testified he "did not feel [defendant] was armed at the time." (Tr. 22.) The trial court, however, denied defendant's motion to suppress based not on *Terry*, but on the inevitable discovery doctrine.

{¶26} Under the inevitable discovery doctrine, evidence obtained unconstitutionally is admissible if it "would have been ultimately or inevitably discovered during the course of a lawful investigation." *State v. Perkins* (1985), 18 Ohio St.3d 193, 196, following *Nix v. Williams* (1984), 467 U.S. 431, 444, 104 S.Ct. 2501 (holding that under the inevitable discovery doctrine, if the evidence "ultimately or inevitably would have been discovered by lawful means," it is admissible). "[T]he burden is on the prosecution to demonstrate, within a reasonable probability, that law enforcement would have discovered the evidence in question apart from the unlawful conduct." *State v. Coston*, 168 Ohio App.3d 278, 2006-Ohio-3961, ¶17, citing *Perkins* at 196.

{¶27} The trial court concluded the police officers inevitably would have discovered the heroin in defendant's coin pocket as a result of another exception to the Fourth Amendment, a search incident to arrest. A search incident to arrest "allows officers to conduct a search that includes an arrestee's person and the area within the arrestee's immediate control." *State v. Smith*, 124 Ohio St.3d 163, 2009-Ohio-6426, ¶11, citing *Chimel v. California* (1969), 395 U.S. 752, 762-63, 89 S.Ct. 2034. "This exception 'derives

from interests in officer safety and evidence preservation that are typically implicated in arrest situations.' " Id., citing *Arizona v. Gant* (2009), 556 U.S. ___, 129 S.Ct. 1710, 1716, citing *United States v. Robinson* (1973), 414 U.S. 218, 230-34, 94 S.Ct. 467, and *Chimel* at 763. Both the Ohio Supreme Court and the United States Supreme Court have held such searches may extend to the personal effects of an arrestee. Id. at ¶13, citing *State v. Mathews* (1976), 46 Ohio St.2d 72, 75 (holding the search of an arrestee's purse is reasonable under the Fourth Amendment in certain circumstances), and *Illinois v. Lafayette* (1983), 462 U.S. 640, 103 S.Ct. 2605 (holding police reasonably may search any container on a defendant's person, including a shoulder bag, in accordance with well-established inventory procedures).

{¶28} Defendant, however, notes that both the Columbus City Code provision under which he was charged and the parallel Revised Code section classify the failure to provide proper illumination of a rear license plate as a minor misdemeanor. Violation of a minor misdemeanor ordinarily is not an arrestable offense; rather, a summons will suffice in most circumstances unless an exception, not pertinent here, applies. See R.C. 2935.26 (stating that "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"); see also *State v. Spain*, 10th Dist. No. 09AP-331, 2009-Ohio-6664, ¶21 (finding arrest for a minor misdemeanor improper where "none of the exceptions under R.C. 2935.26 were applicable"). Defendant argues the officers here would not have conducted a search incident to arrest since the offense for which police initially stopped him was not an arrestable offense.

{¶29} Although police initially stopped defendant for failing to properly illuminate the license plate on his vehicle, the LEADS check of the license plate revealed the tags did not belong to the vehicle defendant was driving. A check of defendant's license also revealed defendant was driving with a suspended driver's license. Pursuant to R.C. 4510.11, any person who operates a vehicle "upon any public or private property used by the public for purposes of vehicular travel or parking" while that person's driver's license is under suspension is "guilty of driving under suspension, a misdemeanor of the first degree." R.C. 4510.11(A) and (C). A first degree misdemeanor is an arrestable offense. See, e.g., *State v. Rippy*, 10th Dist. No. 08AP-248, 2008-Ohio-6680, ¶11 (stating driving with a suspended license "is an arrestable offense" pursuant to R.C. 4510.11(B)); *State v. Singleton*, 8th Dist. No. 90003, 2008-Ohio-3557, ¶8 (stating "driving with a suspended license is an arrestable first degree misdemeanor").

{¶30} Although defendant's license plate light violation is not an arrestable offense, his driving with a suspended license is an arrestable offense, and the trial court applied the inevitable discovery doctrine based on the suspended license offense. The trial court reasoned the combination of "the high-crime area, * * * the traffic license plate light violation, and the statements that were attributed to [defendant] that he was driving down the alley, inspecting roofs at 8:30 at night at the end of December when it was dark," would have led reasonable officers to conduct a LEADS search, as did the officers here, albeit after the search. (Tr. 61.) The LEADS search, in turn, would have revealed, as it did here, that defendant was driving with a suspended license. Under the circumstances, the trial court concluded, the information inevitably would have led to

defendant's arrest for driving with a suspended license, a search incident to arrest, and discovery of the heroin in defendant's coin pocket.

{¶31} Defendant argues the trial court's rationale is flawed, as the officers easily could have issued defendant a summons for driving with a suspended license. Defendant further contends that because the state relied primarily on consent to support the warrantless search, the record from the motion hearing lacks the requisite evidentiary foundation for the trial court's conclusions about inevitable discovery.

{¶32} Although defendant is correct that the state argued consent at the motion hearing, the state also contended the inevitable discovery principles applied to the facts developed at the hearing. Defendant also is correct that, even though the record suggests and the state argued defendant ultimately was charged for driving with a suspended license, the officers did not specifically testify they inevitably would have arrested defendant for driving with a suspended license. Application of the inevitable discovery exception, however, does not hinge on the states' witnesses forging such an explicit connection.

{¶33} In *State v. Miller,* 2d Dist. No. 20513, 2005-Ohio-4203, the state did not produce evidence of a procedure requiring an inventory of impounded vehicles that inevitably would lead to discovery of contraband in the trunk of a car. Defendant had a key to the car in sweatpants he was wearing just prior to his arrest, and the car was going to be towed because it was illegally parked and did not match the car to which its license plates were registered. The appellate court determined the trial court properly allowed the contraband evidence under the inevitable discovery doctrine, even though it was discovered before the car was towed and inventoried pursuant to the routine procedure.

The Second District concluded that where "an outstanding warrant for [defendant's] arrest either had already been discovered, or was shortly going to be discovered," which, in turn, inevitably would have led to the discovery of the car key in defendant's sweatpants during a lawful search incident to arrest and, then in turn, led to a subsequent search of the car trunk after the car was towed and in the possession of the police, the search of the car trunk did not violate the Fourth Amendment. Id. at ¶23-25.

{¶34} Similarly, here, the state's witnesses did not testify explicitly that they necessarily would have arrested defendant and searched his person as a result of the license suspension violation. Their testimony, however, indicates they applied their routine procedure in dealing with defendant, and part of that procedure was to check the operator of a motor vehicle in the LEADS system. Officer Steele testified that "normally, the driver doesn't run the LEADS part of it. As I'm driving, if I got a partner, he's the one that's typing it in on the computer." (Tr. 24.) With the information derived from the LEADS search, the officers in all reasonable probability would have arrested defendant since defendant had no valid license to drive, and the vehicle he was driving did not have proper tags or lighting.

{¶35} The state's evidence thus supports the trial court's conclusion that law enforcement inevitably would have discovered the evidence apart from the unlawful search. Any doubt about whether defendant was charged with the suspended license violation does not undermine the trial court's decision, as "the failure to issue a traffic citation when there is an indication of a potentially far more significant crime is easily excused when more pressing issues are being addressed." *State v. Batchili*, 113 Ohio St.3d 403, 2007-Ohio-2204, ¶20 (finding the constitutionality of a traffic stop "does not

depend on the issuance of a citation"); see also *State v. Preston* (Apr. 6, 1998), 12th Dist. No. CA97-08-085 (holding officer's failure to issue a citation for traffic violation does not require suppression of the evidence seized during the traffic stop where the officer had probable cause for the initial stop), citing *Erickson* at 8-11.

{¶36} Based on the foregoing, the trial court did not err in applying the inevitable discovery doctrine. Because the LEADS check would have revealed, and in fact did reveal, defendant was driving with a suspended license, the officers inevitably would have searched defendant incident to a lawful arrest for the first-degree misdemeanor offense of driving with a suspended license. Although a *Terry* protective frisk may not warrant an officer's searching the inside of a coin pocket, a search incident to arrest "is not limited to the discovery of weapons, but may include evidence of a crime as well." *Rippy* at ¶11, citing *Gustafson v. Florida* (1973), 414 U.S. 260, 94 S.Ct. 488.

III. Disposition

{¶37} In the final analysis, the trial court did not err in denying defendant's motion to suppress. The officers had probable cause to initiate the traffic stop, and the contraband subsequently seized falls within the inevitable discovery doctrine. We thus overrule defendant's sole assignment of error and affirm the judgment of the trial court.

Judgment affirmed.

KLATT and McGRATH, JJ., concur.

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