[Cite as *State v. Spain*, 2011-Ohio-322.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
		No. 10AP-319
v.	:	(C.P.C. No. 08CR11-8415)
Terry L. Spain,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on January 27, 2011

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

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

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Plaintiff-appellant, the state of Ohio ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas, which granted a motion to suppress filed by defendant-appellee, Terry L. Spain ("appellee"). For the following reasons, we vacate the trial court's judgment, in part, and remand the matter for further proceedings.

{¶2} Appellee was indicted on one count of crack cocaine possession. He filed a motion to suppress the drugs, and the trial court held a hearing on the motion on March 23, 2009. Columbus Police Officer Charles Radich testified as follows at the hearing. While patrolling a "high narcotic" area, Radich and his partner, Officer Kane, stopped appellee for jaywalking. (Mar. 23, 2009 Tr. 11.) Radich asked appellee if he had any drugs and if he had any prior arrests. Appellee told the officers that he did not have any drugs, but he admitted that he had prior drug-related arrests. Radich asked if appellee would consent to be searched, and appellee said yes. After a brief discussion with Kane, Radich repeated his request to search appellee, and appellee again agreed. Radich conducted the search and found crack cocaine on appellee. Afterward, appellee admitted that he also had a crack pipe, and Radich retrieved that item, too. Appellee was arrested for drug possession, but he was not cited for the jaywalking offense.

{¶3} After testifying on direct examination that appellee was free to leave at the time he consented to the search, Radich conceded on cross-examination that appellee was, in fact, not free to leave. Also on cross-examination, Radich testified that he did not feel threatened by appellee, and he was not expecting to find drugs or guns during his search of appellee.

{¶4} Appellee testified as follows. He denied jaywalking and instead said that the police officers approached him while he was walking through a gas station lot. The officers asked to search him, and he said no. The officers checked if appellee had any warrants, and they discovered that he had none. Afterward, when appellee started to

walk away, one of the officers grabbed him, pushed him against the patrol car and searched him.

{¶5} At the end of the hearing, the trial court granted appellee's motion to suppress, saying, "even if I assumed that the police officer was telling the truth about [appellee] jaywalking, I still don't think that gave him a right to search." (Mar. 23, 2009 Tr. 31.) The court also stated, "I don't know whether [appellee] said yes or no, but I don't think they had a right to demand a search." (Mar. 23, 2009 Tr. 32.)

{¶6} The trial court provided a written statement of findings pursuant to appellant's request. It noted that two police officers stopped appellee for jaywalking and twice asked if he would agree to be searched. It found that appellee "did not specifically refuse to be searched and may have even expressed agreement. However, he did so only under intimidation and unjustified duress."

{¶7} Appellant appealed, and we reversed the trial court's judgment in *State v. Spain*, 10th Dist. No. 09AP-331, 2009-Ohio-6664 ("*Spain I*"). We concluded that "the record is insufficient for this court to effectively review the trial court's decision to grant the motion to suppress" because the trial court did not make "critical determinations or findings" on the issue of whether appellee voluntarily consented to be searched. Id. at ¶29. Consequently, we remanded the matter for the trial court "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." Id., citing *State v. Ogletree*, 8th Dist. No. 86285, 2006-Ohio-448, ¶15-17.

{¶8} The trial court held a hearing on March 29, 2010 pursuant to our remand. In discussing the procedural history of the case, it stated, mistakenly, that, before remand, a bench trial occurred where it found appellee not guilty of crack cocaine possession. Next, the trial court addressed appellee's motion to suppress, stating, "I find at this time based on the testimony * * * that [appellee] did consent to the search." (Mar. 29, 2010 Tr. 7.) The court determined, however, that appellee's consent was not voluntary because the police officers "basically forced him to consent to a search" during a "wrongful detention." (Mar. 29, 2010 Tr. 8.) At the conclusion of the hearing, the court indicated that it was reinstating its not guilty finding.

{¶9} On March 31, 2010, the trial court provided a written statement of findings pursuant to appellant's request. It noted that police officers stopped appellee after they observed him jaywalking. It found that, during the stop, the officers "persisted" in asking if appellee would agree to be searched, even though the officers had no reason to fear for their safety or suspect that appellee was in possession of drugs. It concluded that appellee "gave his consent for a search, but the consent was not voluntary. His consent resulted from wrongful detention by the officers." Therefore, it held that "the evidence seized during the illegal search should be suppressed." It also said, "[u]pon remand [appellee] is again found Not Guilty."

{¶10} Additionally, on March 31, 2010, the court issued an entry stating that police officers conducted an invalid search of appellee because he "consented during the wrongful detention." And the court noted, "[t]he finding of Not Guilty is reaffirmed."

{¶11} Appellant appeals, raising the following assignments of error:

> 1. The trial court erred by finding defendant "not guilty" based on defendant's pretrial motion to suppress evidence.
>
> 2. The trial court erred in granting the motion to suppress based on findings that are contrary to law and that are unsupported by competent, credible evidence.

{¶12} Appellant's first assignment of error concerns the trial court indicating that it was reaffirming a not guilty finding. Appellant argues that the trial court erred by basing its not guilty finding on its decision to grant appellee's motion to suppress. Appellant relies on *State v. Fraternal Order of Eagles Aerie 0337 Buckeye* (1991), 58 Ohio St.3d 166, 169, which held that, when a "motion to suppress is granted, it is not for the trial court to determine the sufficiency of the state's evidence to proceed with the prosecution and hence enter a judgment of acquittal." But the trial court did not render a not guilty finding due to its decision to grant appellee's motion to suppress. Instead, the court was acting under a mistaken impression that, before our remand in *Spain I*, it had found appellee not guilty following a bench trial. Therefore, appellant's reliance on *Fraternal Order of Eagles* is misplaced.

{¶13} In any event, it is problematic that the trial court's March 31, 2010 entries journalized its inaccurate depiction of the proceedings. Because a court speaks through its entries, it is imperative that they reflect the truth. *State ex rel. Worcester v. Donnellon* (1990), 49 Ohio St.3d 117, 118. A court abuses its discretion by issuing an inaccurate entry. Id. at 120. See also *Hill v. Briggs* (1996), 111 Ohio App.3d 405, 411 (holding that "[i]f an entry does not reflect what actually happened in the case, then the court has the right, and even the duty, to vacate the erroneous entry and put on a

correct one.") Consequently, the trial court abused its discretion when it issued inaccurate entries on March 31, 2010, indicating that it was reaffirming a not guilty finding, and we sustain appellant's first assignment of error.

{¶14} In its second assignment of error, appellant contends that the trial court erred by granting appellee's motion to suppress. We disagree.

{¶15} When presented with a motion to suppress, the trial court assumes the role of the trier of fact. *State v. Mills* (1992), 62 Ohio St.3d 357, 366. Thus, the trial court is in the best position to resolve questions of fact and evaluate witness credibility. *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, ¶41, citing *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. On review, we must accept the trial court's factual findings if they are supported by competent, credible evidence. *State v. Stokes*, 10th Dist. No. 07AP-960, 2008-Ohio-5222, ¶7. Accepting those facts as true, we must then independently determine, as a matter of law and without deference to the trial court's conclusion, whether the court applied the correct law and whether the facts meet the applicable legal standard. *State v. Luke*, 10th Dist. No. 05AP-371, 2006-Ohio-2306, ¶12-13.

{¶16} The Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution prohibit unreasonable searches. Generally, warrantless searches are unreasonable. *State v. Jones*, 188 Ohio App.3d 628, 2010-Ohio-2854, ¶11. Nevertheless, a person waives his protections against unreasonable searches by consenting to a warrantless search. *State v. Barnes* (1986), 25 Ohio St.3d 203, 208. The state has the burden to show by " 'clear and positive' " evidence that

consent was " 'freely and voluntarily' " given. *State v. Posey* (1988), 40 Ohio St.3d 420, 427, quoting *Bumper v. North Carolina* (1968), 391 U.S. 543, 548, 88 S.Ct. 1788, 1791. Whether a person gave voluntary consent is a question of fact. *State v. Mays*, 10th Dist. No. 09AP-942, 2010-Ohio-3289, ¶8.

{¶17} The trial court concluded that appellee's consent was involuntary because it was obtained during an illegal detention. In *Spain I*, we recognized that consent is involuntary if the product of an illegal detention. Id. at ¶26. We now address whether appellee was illegally detained when he consented to be searched.

{¶18} We have already concluded that the fact that appellee was jaywalking did not provide a basis for Radich to prolong the stop he made for that offense in order to conduct a search. Id. at ¶21. Stated another way, the search was unrelated to appellee's jaywalking offense. When an officer prolongs a detention to conduct a search, and the search is not related to the original purpose of the stop, the prolonged detention constitutes an illegal seizure if the officer does not have "articulable facts giving rise to a suspicion of some illegal activity." *State v. Robinette*, 80 Ohio St.3d 234, 1997-Ohio-343, paragraph one of the syllabus. There is nothing in the record to establish that Radich had articulable facts allowing him to suspect that appellee was involved in some illegal activity beyond jaywalking. In fact, Radich testified that he did not expect to find guns or drugs on appellee, and he said that he did not feel threatened by appellee. Thus, Radich had no basis to prolong appellee's detention for a search, and the trial court correctly concluded that appellee was being illegally detained when he consented to be searched.

{¶19} Even if a person is being illegally detained, he is considered to have voluntarily consented to a search if the consent is the result of an independent act of free will rather than of the illegal detention. *Spain I* at ¶26. 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* at paragraph three of the syllabus.

{¶20} Radich testified on cross-examination that appellee was not free to leave when he consented to be searched, and appellee's version of events also established that fact. Because appellee consented to be searched under circumstances where a reasonable person would not believe that he was free to leave, the trial court had a proper basis for concluding that appellee's consent was not voluntary.

{¶21} Having upheld the trial court's finding that appellee did not voluntarily consent to be searched, we need not disturb the trial court's conclusion that the search was unconstitutional. Under the exclusionary rule, courts may suppress evidence obtained from an unconstitutional search. *State v. Banks*, 10th Dist. No. 09AP-1087, 2010-Ohio-5714, ¶39. Although appellant argues that the exclusionary rule should not apply here, we did not include that issue in our limited remand in *Spain I*. Therefore, in this appeal following our limited remand, we decline to address appellant's arguments against the applicability of the exclusionary rule. See *State ex rel. Natl. Elec. Contrs. Assn., Ohio Conference v. Ohio Bur. of Emp. Serv.*, 88 Ohio St.3d 577, 579, 2000-Ohio-

431 (holding that issues beyond the scope of a previous remand are beyond the scope of review following a return of the case from remand).

{¶22} Accordingly, we conclude that the trial court did not err by granting appellee's motion to suppress. Thus, we overrule appellant's second assignment of error.

{¶23} In summary, we sustain appellant's first assignment of error, but overrule its second assignment of error. Consequently, we affirm the judgment of the Franklin County Court of Common Pleas granting appellee's motion to suppress, but we vacate the portion of that court's entries indicating that it was reaffirming a not guilty finding, and we remand the matter for further proceedings consistent with this decision.

Judgment affirmed in part
and reversed in part;
cause remanded.

BRYANT, P.J., and TYACK, J., concur.