

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio, :  
 :  
 Plaintiff-Appellee, :  
 :  
 v. : No. 16AP-445  
 : (C.P.C. No. 13CR-5485)  
 Adrian D. Beard, : (REGULAR CALENDAR)  
 :  
 Defendant-Appellant. :

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D E C I S I O N

Rendered on November 22, 2016

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**On brief:** *Ron O'Brien*, Prosecuting Attorney, and *Michael P. Walton*, for appellee. **Argued:** *Michael P. Walton*.

**On brief:** *Todd W. Barstow*, for appellant. **Argued:** *Todd W. Barstow*.

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APPEAL from the Franklin County Court of Common Pleas

HORTON, J.

{¶ 1} Defendant-appellant, Adrian D. Beard, entered a plea of no contest to one count of having a weapon while under disability, in violation of R.C. 2923.13, after the trial court overruled his motion to suppress. Beard had challenged the search that led to the discovery of the weapon he was charged with possessing on the grounds that the tenant of the apartment where it was discovered had not voluntarily consented to the search. For the following reasons, we affirm.

**I. FACTS AND PROCEDURAL BACKGROUND**

{¶ 2} On October 15, 2013, the state filed an indictment charging Beard with one count of carrying a concealed weapon in violation of R.C. 2923.12 and one count of having a weapon while under disability under R.C. 2923.13. (Oct. 15, 2013 Indictment.) The charges arose from allegations that Beard had possessed a handgun at 1340 Thacker

Court, Apt. F., in Columbus, Ohio. (Dec. 31, 2013 Bill of Particulars.) Beard filed a motion to suppress on February 8, 2014, arguing that the search of the apartment that led to the discovery of the weapon was unlawful because it had occurred without the consent of its tenant. (Feb. 8, 2014 Memo. in Supp. of Mot. to Suppress at 2.)

{¶ 3} The trial court held an evidentiary hearing on May 15, 2014. The state called three officers to testify: James Null, Robert Spann, and John Groom. Officer Null testified that while on patrol on February 24, 2013, he was dispatched to respond to a call at 3:22 a.m. to 1344 Cascade Court to assist a complainant alleging that she had been threatened by a person with a firearm. (May 15, 2014 Excerpt of Tr. at 8.) At that location, Kadajah Robinson stated that she and Beard had a verbal argument at the apartment of Seniqua Fagain. Robinson alleged that Beard displayed a weapon and threatened her, causing her to flee Fagain's apartment. Robinson provided Officer Null with a physical description of Beard and the weapon, a "small silver pistol." (Excerpt of Tr. at 11.)

{¶ 4} Officer Null testified that he then went to Fagain's apartment, accompanied by Officers Spann, Groom, and Green. All of the officers were armed at the door, and Officer Null held a rifle. After they "made contact" with Fagain and explained why they were there, they placed her in handcuffs outside the apartment. (Excerpt of Tr. at 11.) Officer Null explained that the handcuffing was standard procedure when investigating an allegation of a firearm, in order "to make sure everybody's hands are controlled." (Excerpt of Tr. at 12.)

{¶ 5} After handcuffing Fagain, Officer Null could see Beard inside the apartment on the couch. Beard was then brought outside the apartment and handcuffed as well. Officer Groom asked Fagain if there was anyone else in the apartment, and she replied that she believed there was no one else. However, the other officers entered the apartment to perform a protective sweep and found Alfunzo Collins in the bedroom. Collins was then brought outside the apartment and handcuffed as well. (Excerpt of Tr. at 14; Tr. Vol. II at 8.)

{¶ 6} Officer Null testified that he explained to Fagain that they were there investigating an allegation that someone had been threatened with a firearm and asked her if there were firearms in the apartment. Fagain stated that there were not, and that she did not allow firearms in her apartment. Officer Null stated that he asked Fagain for

permission to search the apartment for a firearm and that she consented. He and Officer Spann entered the apartment. Officer Spann examined the couch where they had found Beard and found a .380 caliber semiautomatic handgun underneath. (Excerpt of Tr. at 10-16.)

{¶ 7} Officers Spann and Groom also testified that Fagain gave consent for the search. (Tr. Vol. II at 10, 35.) After the weapon had been found, Beard was placed in the back of a police cruiser. Another officer brought Robinson to the scene, and she identified Beard as the man who had threatened her. Beard was then arrested and charged. (Tr. Vol. II at 37.)

{¶ 8} Fagain testified that Beard and Robinson had argued in her house, and that the officers arrived at her door with "guns in their hands" shortly afterward. (June 4, 2014 Tr. at 11-13.) Fagain testified that she and Beard had been immediately handcuffed by the officers. However, her testimony differed from the officers' in that she stated she informed them that Collins was still inside the apartment, and that they never asked her for consent to search the apartment. (Tr. at 14-16.)

{¶ 9} In a brief entry, the trial court denied Beard's motion. (Sept. 16, 2014 Decision & Entry.) Beard subsequently changed his plea to no contest on the count of having a weapon while under disability in violation of R.C. 2923.13. The state dismissed the charge of carrying a concealed weapon under R.C. 2923.12. (Sept. 17, 2014 Entry.)

{¶ 10} Beard appealed, arguing in part that Fagain's consent to the search was involuntary. After reviewing the record, we found that "the trial court did not make critical determinations or findings with respect to the voluntariness of consent," and remanded the case to the trial court for it "to render findings as to whether the consent given was voluntary under the totality of the circumstances." *State v. Beard*, 10th Dist. No. 14AP-830, 2015-Ohio-3595, ¶ 22.

{¶ 11} After remand, the trial court applied the test for determining whether "consent was freely and voluntarily given" that this court adopted in *State v. Lattimore*, 10th Dist. No. 03AP-467, 2003-Ohio-6829, ¶ 14:

Important factors in determining the voluntariness of consent are: (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse to consent; (5)

the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found.

{¶ 12} The trial court found that Fagain had voluntarily consented to the search because the officers had disclosed to her the complaint they were investigating, she was an "intelligent young lady who comprehended the nature of the request" to search the apartment, she had "assured all [the officers] that she had no knowledge of the gun, [and] she was the lessee and the Defendant was merely a visitor." (Apr. 7, 2016 Entry.) Thus, the trial court found that under "the totality of the circumstances, at the time it was sought, she did consent, irrespective of her later denial." (Apr. 7, 2016 Entry.)

{¶ 13} Beard appeals once again, asserting the following assignment of error:

THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY OVERRULING HIS MOTION TO SUPPRESS.

## II. STANDARD OF REVIEW

{¶ 14} A trial court's decision resolving a motion to suppress presents an appellate court with "a mixed question of law and fact." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. The factual component requires some deference to the trial court's findings, as that court was "in the best position to resolve factual questions and evaluate the credibility of witnesses." *Id.*, citing *State v. Mills*, 62 Ohio St.3d 357, 366 (1992). "Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence." *Id.*, citing *State v. Fanning*, 1 Ohio St.3d 19 (1982). However, applying a de novo standard, the appellate court "must independently determine whether the facts satisfy the applicable legal standard, without giving any deference to the conclusion of the trial court." *State v. Holland*, 10th Dist. No. 13AP-790, 2014-Ohio-1964, ¶ 8, citing *Burnside* at ¶ 8. "The voluntariness of a consent to a search is a question of fact and will not be reversed on appeal unless clearly erroneous." *Lattimore* at ¶ 9.

## III. ANALYSIS

{¶ 15} Both the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution prohibit unreasonable searches and seizures. Unless an exception applies, a warrantless search is "per se unreasonable." *State v. Hannah*, 10th

Dist. No. 15AP-212, 2015-Ohio-4964, ¶ 12. However, "[a] defendant waives his or her Fourth Amendment protection by consenting to a search, provided the consent is voluntary." *In re Parks*, 10th Dist. No. 04AP-355, 2004-Ohio-6449, ¶ 20, citing *Lattimore*. "Where a lawful detention occurs, the state bears the burden of demonstrating by clear and convincing evidence that consent was freely and voluntarily given, free from either express or implied duress or coercion." *Id.*

{¶ 16} In this case, there was competent and credible evidence to support the trial court's finding that Fagain voluntarily consented to the search of her apartment. All three officers testified that she had consented. Crucially, Fagain did not testify that she affirmatively refused or withheld consent; rather, she testified that she was not asked. Of the four witnesses, the trial court credited the officers over Fagain on this issue, and we defer to its evaluation of witness credibility. In reviewing her testimony, she was unable to distinguish between the officers' initial entry for the protective sweep and their subsequent entry to search. Her recollection of the timeframe is somewhat of a blur, and it could very well be that she did not remember being asked.

{¶ 17} Furthermore, although the trial court could have applied the *Lattimore* factors in more detail, we do not find that it clearly erred by reaching the ultimate conclusion that Faigan's consent to the search of her apartment was voluntary. The trial court's entry was silent on the first three *Lattimore* factors. The state concedes that Faigan's initial encounter, when she was handcuffed outside her apartment by officers with weapons drawn, was not voluntary. (Appellee's Brief at 6.) However, the detention lasted only "a matter of minutes," was conducted according to the officers' standard procedure when investigating allegations of a firearm, and the officers informed Faigan that she was not the subject of the investigation. (May 15, 2014 Excerpt of Tr. at 36.) Considering the totality of the circumstances, the coercive nature of this brief detention for officer safety does not outweigh the other factors that support the trial court's finding of voluntariness. With regard to the third factor, all testimony, including Faigan's, indicates that she cooperated with the officers.

{¶ 18} Applying the fourth and fifth *Lattimore* factors, the trial court emphasized Faigan's intelligence and ability to "comprehend[] the nature of the request." The trial court also pointed out that Faigan herself testified that she informed the officers that no

gun would be found in her apartment, which corresponds to the sixth *Lattimore* factor. These findings were supported by Faigan's testimony and that of the officers as well. Under the totality of the circumstances, her consent to the search was voluntary, and the trial court did not clearly err in reaching this result. Accordingly, we overrule Beard's assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

KLATT and LUPER SCHUSTER, JJ., concur.

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