[Cite as *State v. Frye*, 2007-Ohio-6941.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2007-A-0023**
- vs -	:	
FRANKLIN D. FRYE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 06 CR 402.

Judgment: Reversed and remanded.

Thomas L. Sartini, Ashtabula County Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

Jane Timonere, Timonere Law Offices, 4 Lawyers Row, Jefferson, OH 44047-1099 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Franklin D. Frye appeals from the denial of his motion to suppress, in a case resulting in his conviction for having a weapon while under disability, assault of a peace officer, possession of methamphetamine, and possessing criminal tools. We reverse and remand this matter.

{¶2} September 29, 2006, Mr. Frye was indicted by the Ashtabula County Grand Jury on five counts: Count One, illegal assembly or possession of chemicals for

the manufacture of drugs, in violation of R.C. 2925.041, a third degree felony; Count Two, having weapons while under disability, in violation of R.C. 2923.13, a third degree felony; Count Three, assault of a police officer, in violation of R.C. 2903.13, a fourth degree felony; Count Four, possession of methamphetamines, in violation of R.C. 2925.11, a fifth degree felony; and, Count Five, possessing criminal tools, in violation of R.C. 2923.24, a fifth degree felony.

{¶3} October 5, 2006, Mr. Frye was arraigned, and pleaded not guilty.

{¶4} November 16, 2006, Mr. Frye moved to suppress evidence relating to a search of his recreational vehicle occurring September 9, 2006. The state filed its opposition December 21, 2006.

{¶5} A suppression hearing was held December 27, 2006. The following facts are derived from the transcript.

{¶6} September 8, 2006, Officer Michael Palinkas of the city of Geneva Police Department contacted his uncle, Mr. Robert W. Perkins, regarding the possible manufacture and distribution of methamphetamines from Mr. Perkins' property at 192 West Street, Geneva Township, by Mr. Perkins' cousin, Franklin D. Frye. Mr. Frye was living in a recreational vehicle belonging to his mother, parked on the property. Mr. Perkins signed a form consenting to the search of his property by authorities.

{¶7} September 9, 2006, not having obtained a warrant, Deputies Sheri Allen and Anthony Mino, of the Ashtabula County Sheriff's office, accompanied by Officer Palinkas, went to Mr. Frye's RV. The testimony of the three officers from the suppression hearing is consistent. Deputy Allen knocked on the door of the RV, and Mr. Frye answered, stepping out. Deputy Allen asked him if she might search the RV,

and he willingly agreed, sitting down in a chair next to a fire ring outside the vehicle. Upon entering the RV, Deputy Allen spotted various items on a table: a glass pipe with black residue inside it, razor blades, a glass with white residue on top, and a cell phone.

{¶8} In the meantime, Officer Palinkas had been speaking with Mr. Frye. Officer Palinkas testified he told Mr. Frye of their suspicion of possible methamphetamine activity, including manufacture, at his vehicle. Officer Palinkas testified that Mr. Frye told him he was terminally ill with hepatitis; that he had used drugs since childhood; and that he had discovered some items on the property he thought might be related to manufacturing methamphetamines, which he had recently burned. When asked by Officer Palinkas what his drug of choice was, Mr. Frye replied methamphetamines, which he used medicinally. Officer Palinkas asked whether there was any methamphetamine in the RV, to which Mr. Frye replied, no, but that he had some in his pocket.

{¶9} Overhearing this last exchange, Deputy Mino took possession of the methamphetamine in Mr. Frye's pocket, then asked him whether there was anything else the officers should know. Mr. Frye replied he had a gun in the RV. Deputy Mino informed Deputy Allen, and placed Mr. Frye under arrest, handcuffing him. In the RV, Deputy Allen found a shotgun, along with baggies of white crystal, acetone, matchbooks, and a probable scanner.

{¶10} The officers also found Coleman fuel outside the RV.

{¶11} Testifying on his own behalf at the suppression hearing, Mr. Frye gave a slightly different account of events. He stated he was ordered to leave the RV by the

officers, and was handcuffed immediately, without ever being told he was under arrest. He stated the methamphetamines in his pocket were found during a pat down.

{¶12} By a judgment entry filed January 2, 2007, the trial court accepted the account of events as related by Officer Palinkas and Deputies Allen and Mino, and overruled Mr. Frye's motion to suppress.

{¶13} The matter came on for jury trial February 12, 2007. February 13, 2007, the jury found Mr. Frye not guilty of Count One, illegal assembly or possession of chemicals for the manufacture of drugs, but guilty on the remaining counts. The trial court filed its judgment entry on the verdict February 14, 2007, and an amended judgment entry to correct a scrivener's error February 15, 2007. Sentencing hearing was held that same day, Mr. Frye being sentenced to a total term of imprisonment of five and one half years, with up to three years of post-release control.

{¶14} March 2, 2007, Mr. Frye timely noticed this appeal, assigning a single error:

{¶15} "Whether the [c]ourt erred in overruling the motion to suppress."

{¶16} Mr. Frye raises two issues in support of this assignment. First, he argues he was subjected to custodial interrogation without benefit of his *Miranda* rights. Second, he argues his consent for a search of the RV was not freely and voluntarily given.

{¶17} At a hearing on a motion to suppress, the trial court functions as the trier of fact. Accordingly the trial court is in the best position to weigh the evidence by resolving factual questions and evaluating the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366; *State v. Smith* (1991), 61 Ohio St.3d 284, 288.

{¶18} On review, an appellate court must accept the trial court's findings of fact if they are supported by some competent and credible evidence. *State v. Retherford* (1994), 93 Ohio App.3d 586, 592. After accepting the factual findings as true, the reviewing court must then independently determine, as a matter of law, whether the applicable legal standard has been met. Id. See, also, *State v. Swank*, (Mar. 22, 2002), 11th Dist. No. 2001-L-054, 2002 Ohio App. LEXIS 1345, at 8.

{¶19} Under his first issue, Mr. Frye argues he was subjected to custodial interrogation by Officer Palinkas regarding the methamphetamines in his pocket, without benefit of *Miranda*. We agree.

{¶20} "If a suspect is in custody, police officers are required to advise the suspect of his *Miranda* rights prior to questioning him. *Miranda v. Arizona* (1966), 384 U.S. 436, 478-479 ***. To determine whether one is in custody, courts must focus on how a reasonable person in the detainee's position would have felt if he was in the same position. *State v. Gaston* (1996), 110 Ohio App.3d 835, 842 ***." *State v. Curtis*, 11th Dist. No. 2002-A-0025, 2003-Ohio-6085, at ¶17. (Parallel citations omitted.)

{¶21} In this case, the testimony of the two deputies and Officer Palinkas indicates that, while Deputy Allen searched the RV, Officer Palinkas informed Mr. Frye they were investigating suspicions of drug activity; and then, that the officer asked Mr. Frye what his favorite drug was, and whether he had any. It was following this that Mr. Frye told Officer Palinkas of the methamphetamines in his pocket. Under these circumstances – with police searching his RV, and questioning him about drug use and activity – no reasonable person could conclude anything but that he or she was under arrest. Mr. Frye should have been read his rights. He was not. Any evidence

stemming from the seizure of the drugs in Mr. Frye's pocket should have been suppressed.

{¶22} The first issue has merit.

{¶23} Under his second issue, Mr. Frye, a known drug user and former felon, argues that his consent to the search of his RV was not voluntary. Essentially, his point is that no person of similar background would feel free to deny consent to search property, when three police officers show up at the door.

{¶24} "'It is a "basic principle of Fourth Amendment law" that searches and seizures inside a home without a warrant are presumptively unreasonable.' *Payton v. New York* (1980), 445 U.S. 573, 586 *** (citation omitted). The United States Supreme Court has made clear that 'in terms that apply equally to seizures of property and seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house.' Id. at 590. 'Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.' Id.; see, also, *State v. Howard* (1991), 75 Ohio App.3d 760, 768 ***; *State v. Martin*, 11th Dist. No. 2002-P-0072, 2004-Ohio-3027, at ¶17." *State v. Pape*, 11th Dist. No. 2004-A-0044, 2005-Ohio-4657, at ¶16. (Parallel citations omitted.)

{¶25} "Generally, the Fourth Amendment to the United States Constitution prohibits the warrantless entry of a person's home ***. This prohibition, however, does not apply to situations in which voluntary consent has been given *** from the individual whose property was searched *** [.]" *State v. Corrado*, 11th Dist. No. 2004-A-0067, 2005-Ohio-6160, at ¶19. "The state bears the burden of proving that consent was given freely, voluntarily, and was not the result of coercion, express or implied. *Schneckloth*

v. Bustamonte (1973), 412 U.S. 218, 248 ***. Voluntariness is a question of fact to be determined from the totality of the circumstances. Id. at 249." *State v. Rudge* (Dec. 20, 1996), 11th Dist. No. 95-P-0055, 1996 Ohio App. LEXIS 5807, at 15. (Parallel citations omitted.)

{¶26} "'*** [W]here the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was *freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority.*' (Emphasis added.)" *State v. Robinette* (1997), 80 Ohio St.3d 234, 243, quoting *Florida v. Royer* (1983), 460 U.S. 491, 497.

{¶27} Obviously, there were no exigent circumstances pertaining to the search of Mr. Frye's RV: this was a pre-planned, warrantless search, relying for its validity solely on his consent. Under the totality of the circumstances, that consent cannot be deemed voluntary. Three police officers, without a warrant and without probable cause, showed up at Mr. Frye's door, seeking to search his home. This implies coercion. That invalidates his consent. Cf. *Robinnette* at 242-243. While the United States Supreme Court has refused to adopt a "waiver statement" as a requirement for showing a search is voluntary, see, e.g., *Robinette* at 242, in this case, the police had already obtained a written consent from Mr. Perkins to search his grounds. They could have provided a similar document to Mr. Frye when seeking to search his RV.

{¶28} In sum, "mere submission" by Mr. Frye "to a claim of lawful authority" was no substitute for a warrant.

{¶29} The second issue has merit.

{¶30} The judgment of the Ashtabula County Court of Common Pleas is reversed, and this matter is remanded for further proceedings consistent with this opinion.

{¶31} It is the further order of this court that appellee is assessed costs herein taxed. The court finds that there were reasonable grounds for this appeal.

MARY JANE TRAPP, J., concurs with Concurring Opinion,

TIMOTHY P. CANNON, J., dissents with Dissenting Opinion.

MARY JANE TRAPP, J., concurs with Concurring Opinion.

{¶32} I concur with the judgment and opinion of the court, but I write separately to further articulate dismay at the increase in the use of warrantless "consent" searches in drug cases. As I have noted in a previous opinion, we laude the courageous and valiant efforts of our police officers in combating the manufacture and trafficking of illegal drugs, especially methamphetamines, and we are aware that certain techniques used during drug investigations have been upheld by the courts when an articulable and reasonable suspicion of criminal activity is present. However, we have witnessed a retreat from the *Weeks* and *Mapp*[1] line of cases addressing Fourth Amendment protections against unreasonable searches and seizures; thus, it is imperative, now more than ever, when the Bill of Rights is viewed by some as a "technicality" that can be ignored for expediency's sake, that this type of police investigation operate within the bounds outlined by our constitution.

1. *Weeks v. U.S.* (1914), 232 U.S. 383 and *Mapp v. Ohio* (1961), 367 U.S. 643.

{¶33} As Ohio born Justice William Day wrote, "The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." *Weeks* at 393.

{¶34} This search was constitutionally infirmed from the start. Law enforcement obviously had only a mere suspicion of drug activity. The record is void of facts which would support a probable cause finding, so one must conclude that from the start the police chose to ignore the warrant requirement and avoid the process of judicial review of the probable cause foundation mandated for the issuance of a search warrant on the hope and prayer that Mr. Frye would consent to a search of his home.

{¶35} Without consent, an officer needs probable cause that a crime has occurred before a search can be conducted. Consent, and more importantly, the voluntariness of the consent, is the core issue in this case.

{¶36} In *State v. Lyons* (2000), 11th Dist. No. 99-L-067, 2000 Ohio App. LEXIS 2532, where we reviewed the "voluntariness" of consent, we stated: "the general rule is that a warrant supported by probable cause is needed in order for a search to occur. However, a warrantless search may be conducted if an exception to the warrant requirement exists." Id. at 8, citing *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 219. "For example a warrantless search does not violate the Fourth or Fourteenth Amendments if it is performed with the voluntary consent of the person whose privacy rights are at issue. Id. Additionally voluntariness is a question of fact to be determined by considering the totality of the circumstances." Id. at 9, citing *Schneckloth,* at 248-

249. “Furthermore, consent must be shown to have been freely and voluntarily given by ‘clear and positive’ evidence, and the burden is on the state to demonstrate such consent.” Id. citing *State v. Posey* (1988), 40 Ohio St. 3d 420, 427, citing *Bumper v. North Carolina* (1968), 391 U.S. 543, 548. “That burden is ‘not satisfied by showing a mere submission to a claim of lawful authority.’” Id. citing *Royer* at 497.

{¶37} In this case, as in *Lyons*, the state has failed to carry its burden of proving clearly and convincingly that Mr. Frye freely and voluntarily consented to the search of his home. Id. at 11. The officers in this case testified that upon their knock, Mr. Frye exited his home as Deputy Mino and Deputy Allen confronted him and informed him of the reason for their visit. At their “request,” he took a seat at a table where Officer Palinkas was seated, and presumably waiting to question him, while Deputy Allen and Deputy Mino proceeded to search Mr. Frye’s motor home. Thus, whether we find the officers’ testimony in this case as more credible, as the trial court did below, or whether we believe in Mr. Frye’s drastically different version of events, the fact of the matter is that no reasonable person would feel free to leave under these circumstances, where three uniformed officers appear at the front door with questions and demands to search your home, with seeming permission from the owner of the real property.

{¶38} As to the lack of Miranda warnings in this case, it is clear that a defendant need not be under “arrest” to be “in custody”. *State v. Delmonico*, 11th Dist. No. 2003-A-0022, 2005-Ohio-2902, ¶23, *Orozco v. Texas* (1969), 394 U.S. 324, 327. The “only relevant inquiry” in determining whether a person is in custody is “how a reasonable man in the suspect’s position would have understood his situation.” *Berkemer v. McCarty* (1984), 468 U.S. 420, 442. Deputy Mino testified that Mr. Frye exited the RV

when he responded to the officers' knock. Deputy Mino then testified that he "advised Mr. Frye as to the reason we were at the property. That we had received information that there was drug activity taking place there involving methamphetamine, lot of traffic coming and going from his residence ***." Mr. Frye was then questioned as to whether anyone was inside the RV, and it was then that the officers requested to search the motor home. If three officers appear at the door, surround a person, and "request" for him to take a "seat," surely we cannot say a reasonable person would feel free to deny consent when asked to search the premises further. This scenario presents a classic example of "submission to claim of lawful authority."

{¶39} Finally, although the physical evidence seized as a result of unwarned statements of the defendant may be admissible under the Fifth Amendment to the United States Constitution pursuant to the holding in *U.S. v. Patane* (2004), 542 U.S. 630, such evidence may be inadmissible pursuant to Section 10, Article I of the Ohio Constitution.

{¶40} As the Supreme Court of Ohio held in *State v. Farris* (2006), 109 Ohio St.3d 519, 2006-Ohio-3255, "[t]he Ohio Constitution 'is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.'" *Farris* at ¶46, citing *Arnold v. Cleveland* (1993), 67 Ohio St.3d 35, 616 N.E.2d 163, paragraph one of the syllabus.

{¶41} The court continued and found that "Section 10, Article I of the Ohio Constitution provides greater protection to criminal defendants than the Fifth Amendment to the United States Constitution. *** Only evidence obtained as the direct result of statements made in custody without the benefit of a *Miranda* warning should be excluded. We believe that to hold otherwise would encourage law-enforcement officers to withhold *Miranda* warnings and would thus weaken Section 10, Article I of the Ohio Constitution. *** We believe that the overall administration of justice in Ohio requires a law-enforcement environment in which evidence is gathered in conjunction with *Miranda,* not in defiance of it." Id. at ¶48, 49

{¶42} We must remain vigilant in safeguarding constitutional rights, and we should be ever mindful of Justice Clark's admonition in *Mapp*, "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Mapp* at 659.

TIMOTHY P. CANNON, J., dissents with Dissenting Opinion.

{¶43} I respectfully dissent from the majority opinion.

{¶44} Appellant filed a motion to suppress that challenged the authority of police officers to enter the inoperable travel trailer ("RV") in which he was living. The police officers were lawfully on the property at the request of the property owner, who had signed a written consent to search his property and all buildings due to suspicions about drug activity. In the judgment entry of the trial court, dated January 2, 2007, it is noted:

"[t]he sole issue in this case is whether or not the Defendant consented to the search of the RV, in which he was apparently living at the time."

{¶45} When reviewing the decision of the trial court on a motion to suppress, this court is presented with a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶8. As stated by the Supreme Court of Ohio:

{¶46} "When 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. *** Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *** Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." Id. (Internal citations omitted.)

{¶47} In this case, the factual question is very clear: whether appellant gave consent to the police to search his RV. The trial court assessed this issue properly. It stated in its judgment entry, "[t]he Defendant denies giving permission for the officers to search the RV." It then noted:

{¶48} "The three police officers are consistent in their testimony that the entire encounter with the Defendant was cooperative and that he freely and voluntarily consented to the search of his vehicle. Furthermore, he admitted having possession of methamphetamine in his pocket. The officers are likewise consistent that the Defendant was not in custody at the time he gave consent and made his admission, and that he was not placed under arrest and was not handcuffed until after the methamphetamine was removed from his pocket."

{¶49} In resolving the conflict between the defendant's version of the incident and that of the officers, the trial court found "that the testimony of the police officers [was] more credible."

{¶50} There are two reasons for my dissent. First, there does not appear to have been a challenge raised in the motion to suppress as to appellant's admission that he had methamphetamine in his pocket. The state has a right to be put on notice with specificity of the errors claimed in a motion to suppress. *State v. Barnett,* 11th Dist. No. 2006-P-0117, 2007-Ohio-4954, at ¶28-38. The only specific claims referenced in the suppression motion related to entering the RV without a warrant. Therefore, appellant's conviction on count four, possession of methamphetamine in violation of R.C. 2925.11, should stand. The possession charge had nothing to do with what was found in the RV. The discussion that led to discovery of the methamphetamine took place outside the RV. The testimony of Officer Palinkas clearly reveals that appellant, in response to a question about whether the sheriff's deputies would find any methamphetamine related items in the RV, responded no, but that he had some in his pocket.

{¶51} Second, if appellant consented to a search of the RV, the search was proper. *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 219. (Citations omitted.) Whether appellant consented is purely a factual issue best suited for the trier of fact. In reversing and remanding, the majority is apparently assessing the credibility of the witnesses and determining that the testimony of appellant was more credible than that of the three police officers. However, the trial court was in the best position to evaluate the credibility of the witnesses and make this assessment. Deputies Allen and Mino

were very clear in their testimony about the consent given by appellant. Therefore, we should defer to the judgment of the trial court concerning the factual resolution.

{¶52} Clearly, the officers were lawfully on the property with credible concerns of the property owner about suspected "coming and going" drug activity. A knowing, intelligent waiver has long been recognized as a valid basis to conduct a search. Requesting a consent search is a valid, vital tool employed by law enforcement in their attempt to attack a prolific problem. Therefore, I would affirm the ruling of the trial court.