[Cite as *State v. Ivery*, 2012-Ohio-1270.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-L-081**
- vs -	:	
JIMMIE O. IVERY,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 10 CR 000729.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

James D. Falvey, Barthol & Staley, 7327 Center Street, Mentor, OH 44060 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Jimmie O. Ivery, appeals from the judgment of the Lake County Court of Common Pleas, denying Ivery's Motion to Suppress Evidence and Statements. The issues to be determined in this case are whether an officer who finds marijuana in the interior of a vehicle may also search the trunk and whether a car is properly impounded and searched when the driver was stopped in a parking lot for

driving with a suspended license. For the following reasons, we affirm the decision of the court below.

{¶2} On December 6, 2010, Ivery was indicted on five counts of Burglary, a felony of the second degree, in violation of R.C. 2911.12(A)(2); five counts of Receiving Stolen Property, a felony of the fifth degree, in violation of R.C. 2913.51(A); three counts of Having Weapons While Under Disability, a felony of the third degree, in violation of R.C. 2923.13(A)(2); and one count of Engaging in a Pattern of Corrupt Activity, a felony of the first degree, in violation of R.C. 2923.32(A)(1). Six of the counts also had firearm specifications.

{¶3} On March 4, 2011, Ivery filed a Motion to Suppress Evidence and Statements. In the Motion, Ivery asserted that on two separate occasions in 2010, his vehicle was stopped by police and an unlawful, warrantless search occurred, leading to the discovery of tools used for burglary and stolen items. On April 4, 2011, Ivery filed a Supplemental Motion to Suppress Evidence and Statements, asserting that the police improperly searched his apartment due to misstatements made in order to obtain a search warrant.

{¶4} On April 18 and 19, 2011, a suppression hearing was held. The following testimony was presented.

{¶5} Patrolman Stephen Shum of the Wickliffe Police Department testified regarding a stop that occurred on May 22, 2010. He explained that he stopped a car driven by Kyle Perry, in which Ivery was a passenger, because the vehicle had no rear license plate. While standing at the driver's side door of the car, Shum noticed a "very strong odor of marijuana" inside of the car. He asked both men if they had been

smoking marijuana and Ivery stated that he "had smoked some earlier." Shum asked where the men were coming from, and Perry indicated that they had come from East 294th Street. Shum testified that he found this to be strange, since that was also the direction in which they were headed at the time of the stop.

{¶6} Shum asked both men to exit the car and frisked them. At this time, he observed that they were both wearing dark colored dress pants. Shum then searched the interior of the vehicle. Inside of the vehicle he found "little bits of marijuana, just tiny pieces of what [he] believe[d] was marijuana," but not a "measurable amount." Shum testified that subsequent to searching the interior of the car, he decided to search the trunk of the car for marijuana. Inside of the trunk, Shum located what he thought to be "burglary tools," including several saws, a sledge hammer, a pry bar, and several black items of clothing. He also found several electronic items, including cameras and a laptop computer. After finding these items in the trunk, Shum returned to search the interior of the car a second time, and found a pair of gloves and a black stocking cap. The items were seized by the police, Perry was given a citation for improper display of plates, and the men were allowed to leave.

{¶7} Shum acknowledged that he did have a drug sniffing dog present with him on the night of the stop, but that he did not have the dog check the car for the smell of marijuana because he knew that what he smelled was marijuana. He stated that he did not know if the smell of marijuana was burnt or not and that, "inside of a vehicle," he had not noticed any difference between the smell of burnt marijuana and raw marijuana.

{¶8} Patrolman Isaac Petric, an officer with the Wickliffe Police Department, testified regarding a stop of a vehicle driven by Ivery that occurred on July 20, 2010.

Petric, while on patrol, saw Ivery drive by in a gray Cadillac, recognized him from past encounters, and requested dispatch to check Ivery's driving status. Upon receiving information that Ivery's driver's license was suspended, Petric conducted a stop of the vehicle, which had turned into the parking lot of Mosley Select Suites, a hotel located in Wickliffe. Ivery parked the vehicle in the driveway of the parking lot, in a "main aisle" of traffic, not in a parking space. Petric explained that there was room for cars to get through but that any traffic pulling into the driveway would encounter the vehicle. Petric testified that the vehicle was on property open to the public for the purpose of vehicular travel.

{¶9} Petric testified that he became aware that the car belonged to Perry, who subsequently arrived at the scene of the stop. Petric did not return the car to Perry. Instead, Petric wrote Ivery a citation for driving under suspension and decided to tow the vehicle. He based his decision to tow the vehicle on Wickliffe Ordinance Section 303.08(a)(9), which allows vehicles to be towed when a driver with a suspended license is operating a car on property used by the public for travel. Petric determined that an inventory search of the vehicle should be made, and requested that Patrolman Shum, who responded to the scene after the stop was conducted, perform the search.

{¶10} Shum explained that on July 20, he did an inventory of the Cadillac Ivery was driving, pursuant to a request from Petric. He found a plastic baggie full of jewelry located on the driver's side floor board, as well as a CD player and DVD players. The jewelry was taken to the police station. Shum testified that he followed the Wickliffe Police Department's procedures and policies for conducting an inventory search on an impounded car.

{¶11} Lieutenant Pat Hengst of the Wickliffe Police Department testified that the laptop and cameras were subsequently identified by several victims as having been stolen in burglaries.

{¶12} The trial court issued a Judgment Entry on May 6, 2011, denying Ivery's Motion to Suppress. Regarding the May 22 stop, the trial court found that the initial traffic stop was proper and that the continued detention of Ivery was also proper. The court found that the officer had reasonable suspicion to search the car, based on the odor of marijuana and that the officer had training and experience to identify the odor of marijuana. The court held that Shum properly searched the trunk and that the evidence related to the burglaries seized was admissible under the plain view exception to the warrant requirement.

{¶13} Regarding the July 20 stop, the court found that by sitting in a traffic lane, "the car was on property open to the public for purposes of vehicular travel," and that the officer's "testimony that the lane was open to the public was not contradicted." The court also found that the inventory search of the car was conducted in accordance with the Wickliffe Police Department towing procedures and declined to suppress evidence resulting from that search.

{¶14} On May 19, 2011, Ivery entered a plea of No Contest to five counts of Burglary, three counts of Receiving Stolen Property, and three firearm specifications.

{¶15} Ivery was sentenced to a total term of imprisonment of fifteen years and was ordered to pay restitution to the victims.

{¶16} Ivery timely appeals and raises the following assignment of error:

{¶17} "The Trial Court erred in denying Appellant's Motion to Suppress Evidence and Statements."

{¶18} "The trial court acts as trier of fact at a suppression hearing and must weigh the evidence and judge the credibility of the witnesses." (Citations omitted.) *State v. Ferry*, 11th Dist. No. 2007-L-217, 2008-Ohio-2616, ¶ 11. "[T]he trial court is best able to decide facts and evaluate the credibility of witnesses." (Citation omitted.) *State v. Wagner*, 11th Dist. No. 2010-P-0014, 2011-Ohio-772, ¶ 12. "The court of appeals is bound to accept factual determinations of the trial court made during the suppression hearing so long as they are supported by competent and credible evidence." *State v. Hines*, 11th Dist. No. 2004-L-066, 2005-Ohio-4208, ¶ 14. "Once the appellate court accepts the trial court's factual determinations, the appellate court conducts a de novo review of the trial court's application of the law to these facts." (Citations omitted.) *Ferry* at ¶ 11.

{¶19} Ivery first argues that the evidence obtained during the May 22, 2010 stop should have been suppressed. He asserts that it was improper to search the trunk of the vehicle based solely on the smell of marijuana coming from the interior of the vehicle and that Patrolman Shum did not have reasonable, articulable suspicion to perform this search.

{¶20} The State argues that when taking into account the strong odor of marijuana, that pieces of marijuana were found in the car, and Ivery's admission that he had been smoking marijuana that day, probable cause existed to search the automobile pursuant to the automobile exception to the warrant requirement.

{¶21} We initially note that although Ivery states that an officer does not have unlimited time or latitude to detain a suspect once a stop has occurred, Patrolman Shum was permitted to continue investigating once he discovered that the additional illegal act of marijuana possession may be taking place. "If circumstances attending an otherwise proper stop should give rise to a reasonable suspicion of some other illegal activity, different from the suspected illegal activity that triggered the stop, then the vehicle and the driver may be detained for as long as that new articulable and reasonable suspicion continues * * *." (Citation omitted). *State v. Hale*, 11th Dist. No. 2004-L-105, 2006-Ohio-133, ¶ 40. Therefore, Shum properly detained Ivery and Perry further, after conducting the initial traffic stop, in order to investigate into the issue of marijuana possession.

{¶22} Generally, "[f]or a search or seizure to be reasonable under the Fourth Amendment, it must be based on probable cause and executed pursuant to a warrant." *State v. Moore*, 90 Ohio St.3d 47, 49, 734 N.E.2d 804 (2000) (citation omitted). However, as this court has previously noted, "there are several exceptions to the warrant requirement." *State v. Mitchell*, 11th Dist. No. 2004-L-071, 2005-Ohio-3896, ¶ 17 (citation omitted).

{¶23} The United States Supreme Court has long recognized an "automobile exception" to the Fourth Amendment's requirement that police officers must generally obtain a warrant before conducting a search. *California v. Carney*, 471 U.S. 386, 390, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985). Under the automobile exception, there is no need to demonstrate that a "separate exigency" exists to justify the search. *Maryland v. Dyson*, 527 U.S. 465, 466, 119 S.Ct. 2013, 144 L.Ed.2d 442 (1999). "If a car is readily

mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more." *Pennsylvania v. Labron*, 518 U.S. 938, 940, 116 S.Ct. 2485, 135 L.Ed.2d 1031 (1996), citing *Carney* at 393.

{¶24} Regarding the issue of the search of the trunk for marijuana, the Ohio Supreme Court has held that the smell of marijuana, "by a person qualified to recognize the odor, is sufficient to establish probable cause to conduct a search." *Moore* at 53. "Once a law enforcement officer has probable cause to believe that a vehicle contains contraband, he or she may search a validly stopped motor vehicle based upon the well-established automobile exception to the warrant requirement." *Id.* at 51, citing *Dyson* at 466.

{¶25} However, the Ohio Supreme Court has also held that "[t]he odor of burnt marijuana in the passenger compartment of a vehicle does not, standing alone, establish probable cause for a warrantless search of the trunk of the vehicle." *State v. Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985, ¶ 52 (where the officer detected only a "light" odor of marijuana and no contraband was found in the passenger compartment of the vehicle, a search of the trunk was improper).

{¶26} We hold that the search in this case falls under the automobile exception and that Shum did have probable cause to extend the search to include the vehicle's trunk. Many courts have found cases with similar circumstances to be distinguishable from *Farris*, such that a search into the trunk of the vehicle is proper under the automobile exception. *State v. Whatley*, 5th Dist. No. 10-CA-93, 2011-Ohio-2297, ¶ 25 ("the strong smell of marijuana emanating from a vehicle justifies a search of a vehicle,

including the trunk, pursuant to the automobile exception to the warrant requirement"); *State v. Stone*, 11th Dist. No. 2007-P-0048, 2008-Ohio-2615, ¶ 26, citing *United States v. Moxley*, 6th Cir. No. 99-3453, 2000 U.S. App. LEXIS 22215, *3 (Aug. 23, 2000) ("marijuana residue" found in a vehicle's interior "was sufficient to establish not just reasonable suspicion, but probable cause to detain the suspect and to conduct a full search of his car"); *State v. Griffith*, 2nd Dist. No. 24275, 2011-Ohio-4476, ¶ 21 (when other factors exist in addition to the light odor of marijuana, probable cause exists to search the trunk of an automobile).

{¶27} In the present case, Shum testified that he smelled a "very strong" odor of marijuana upon approaching the car. In addition, after searching the interior of the car, he saw what he described as little "bits of marijuana." Upon speaking with Ivery, Shum was also informed that Ivery had been smoking marijuana that day. When considering all of these factors together, this case is distinguishable from *Farris*, and Shum had sufficient probable cause to search the trunk of the vehicle in addition to the interior.

{¶28} Ivery appears to also assert that Shum was not qualified to detect the smell of marijuana. However, Shum testified that he had been a police officer for approximately 20 years and that he recognized the odor as the "strong" smell of marijuana. In addition, the trial court, which was in the best position to assess the credibility of Shum, accepted his testimony that he could identify the smell of marijuana "based on his training and experience." This is sufficient to establish that Shum was qualified to detect the odor of marijuana. *State v. Gonzales*, 6th Dist. No. WD-07-060, 2009-Ohio-168, ¶ 25 (where the trial court found the officer to be qualified and

experienced in identifying the odor of marijuana, the appellate court would "not disturb this factual finding on appeal").

{¶29} Ivery also takes issue with the fact that Shum had a drug sniffing dog but did not use it to check the car for the scent of marijuana. However, in light of the other circumstances, probable cause existed even in the absence of the results of a dog sniff. *See State v. Alexander*, 151 Ohio App.3d 590, 2003-Ohio-760, 784 N.E.2d 1225, ¶ 56 (8th Dist.) (a dog's failure to alert that drugs were present did not nullify the officers' probable cause based on other factors and circumstances); *Moxley*, 2000 U.S. App. LEXIS 22215, at *7 (where there was already probable cause to search the trunk of the car, "[t]he result of the dog-sniff merely added icing to the proverbial cake").

{¶30} Finally, as noted by the trial court, upon searching the trunk and discovering the items related to burglaries, Shum was entitled to seize these items under the plain view exception. Pursuant to the plain view exception, an officer may seize items in plain view in certain circumstances. "First, the initial intrusion must have been legitimate. Second, the police must have inadvertently discovered the object. Third, the incriminating nature of the object must have been immediately apparent." (Citation omitted.) *State v. Flowers*, 11th Dist. No. 2009-L-103, 2010-Ohio-2952, ¶ 23. In the present matter, the items were discovered pursuant to a legitimate search into the trunk, as discussed above. Shum discovered the items in the trunk while searching for marijuana. Finally, as found by the trial court, the facts presented at the hearing established that the nature of the items was immediately apparent. The facts showed that Shum saw the men wearing black pants and that the story they told about where they had come from seemed strange. This, coupled with the fact that the tools found in

the trunk appeared to be those used for burglary, and that several electronic items were also in the trunk, made the nature of the items immediately apparent, such that they could be taken by Shum.

{¶31} Ivery next argues that the evidence obtained from the inventory search conducted during the July 20 stop should be suppressed because the vehicle was off of the public roadway at the time the decision to tow it had been made, and because the officer failed to exercise his discretion not to impound the vehicle. Ivery asserts that the vehicle was not impeding traffic from entering or leaving the parking lot and could have been easily moved into a parking space.

{¶32} The State argues that the vehicle was on property open to the public for vehicular travel, and under the local ordinance and police procedure, it was appropriate to impound the vehicle and conduct an inventory search.

{¶33} "A car may be impounded if * * * the occupant of the vehicle is arrested, or when impoundment is otherwise authorized by statute or municipal ordinance." *State v. Duncan*, 11th Dist. No. 2006-L-154, 2007-Ohio-2577, ¶ 29. The United States Supreme Court "has consistently sustained police intrusions into automobiles impounded or otherwise in lawful police custody where the process is aimed at securing or protecting the car and its contents," if performed according to established procedures. *South Dakota v. Opperman*, 428 U.S. 364, 373, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976). "[A] routine inventory search of a lawfully impounded automobile is not unreasonable within the meaning of the Fourth Amendment * * * when the evidence does not demonstrate that the procedure involved is merely a pretext for an evidentiary search of the

impounded automobile." *State v. Robinson*, 58 Ohio St.2d 478, 480, 391 N.E.2d 317 (1979).

{¶34} Ivery does not dispute that an inventory search is proper upon impounding a vehicle but instead questions whether the vehicle he was driving was improperly impounded. In the present case, there was a municipal ordinance dictating when impoundment is proper. The applicable provision of the Wickliffe Ordinances, Section 303.08 (a)(9), states that "[p]olice officers are authorized to provide for the removal of a vehicle * * * [w]hen any vehicle has been operated by any person who is driving * * * while his license has been suspended or revoked and is located upon a public street or other property open to the public for purposes of vehicular travel or parking." The Wickliffe Police Department's Towing Procedures state that "[t]hose vehicles impounded by the Wickliffe Police Department shall be carefully inventoried and documented by the impounding officer or an assisting officer," and that all accessible areas or areas where items of value would be stored should be checked.

{¶35} The trial court found that Ivery did not present any evidence to dispute the officers' claims that the property on which the car was parked at the time Petric decided to impound the car was "open to the public for purposes of vehicular travel or parking." Although it may not have been a public street, it is an area where individuals drive to access the hotel and to park. Moreover, Petric testified that the car was in a lane of travel where individuals entered and exited from the roadway. Several courts have allowed police to impound vehicles in parking lots where the language of the applicable statute or ordinance, as in the present case, stated that an impound was authorized when the vehicle was located on "property open to the public for purposes of vehicular

travel or parking." *State v. Grigsby*, 2nd Dist. No. 24081, 2011-Ohio-2062**,** ¶ 21 (an insurance agency's parking lot qualifies as property open to the public for purposes for travel or parking and the car was properly impounded from such property when the driver's license was suspended); *State v. Colopy*, 5th Dist. No. 09 CA 105, 2010-Ohio-2804, ¶ 13-15 (impoundment was proper when vehicle was located in a parking lot of a grocery store); *State v. Mercer*, 12th Dist. No. CA94-06-133, 1995 Ohio App. LEXIS 1125, *4-5 (Mar. 27, 1995) (inventory search based on the impound of a vehicle conducted in the parking lot of a restaurant was upheld). In the present case, the car driven by Ivery was on property open to the public for the purposes of vehicular travel and parking and Ivery's license was suspended. Therefore, the impound of the vehicle was proper under the Wickliffe Ordinances.

{¶36} Moreover, the search was conducted in accordance with the Wickliffe Police Department's Towing Procedures, which allow an inventory search of the vehicle, including a search of the passenger compartment, where the jewelry was found, to be conducted in such circumstances. Both officers testified that the search was conducted in accordance with these procedures and no evidence was presented to the contrary.

{¶37} Ivery asserts that the car could have easily been moved into a parking space and that Petric had discretion to order that the car not be towed. However, even if the foregoing is true, Petric had justification under the ordinance to tow or impound the car and was not required to allow the car to be moved into a parking space. It is reasonable for police to exercise their discretion and impound a vehicle, rather than leave it, "so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity." *Colorado v.*

Bertine, 479 U.S. 367, 375, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987). In the present case, there was no indication by the officers that the search was performed in order to find evidence of criminal behavior, but instead they indicated that the vehicle was towed because it was in the middle of the parking lot and because Ivery, the driver, had a suspended license. Therefore, the impound and the inventory search were in compliance with the law and the trial court did not err in denying Ivery's Motion to Suppress as it related to the July 20, 2010 stop and search.

{¶38} The sole assignment of error is without merit.

{¶39} Based on the foregoing, the judgment of the Lake County Court of Common Pleas, denying Ivery's Motion to Suppress Evidence and Statements, is affirmed. Costs to be taxed against appellant.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.,

concur.