[Cite as *State v. Walker*, 2012-Ohio-3303.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-T-0069**
- vs -	:	
ERIC L. WALKER,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 09 CR 655.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos,* Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Charles W. Olminsky, Jr., P.O. Box 812, Akron, OH 44309, and *Matthew P. Gaeckle,* 333 North Main Street, Suite 401, Akron, OH 44308 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Eric L. Walker, appeals his conviction, following a jury trial, in the Trumbull County Court of Common Pleas of carrying a concealed weapon, improperly handling firearms in a motor vehicle, and having weapons while under disability. At issue is whether the police were authorized to stop appellant and whether his ensuing conviction was supported by sufficient and credible evidence. For the reasons that follow, we affirm.

{¶2} Appellant was indicted for carrying a concealed weapon, a felony of the fourth degree, in violation of R.C. 2923.12(A)(2) and (F)(1); improper handling firearms in a motor vehicle, a felony of the fourth degree, in violation of R.C. 2923.16(B) and (I)(2); and having weapons while under disability, a felony of the third degree, in violation of R.C. 2923.13(A)(2) and (B).

{¶3} Appellant pled not guilty and filed a motion to suppress evidence challenging the propriety of the stop. Following a suppression hearing, the trial court denied the motion. The case was tried to a jury, which found appellant guilty of all counts in the indictment.

{¶4} At the suppression hearing, Deputy Robert Ross of the Trumbull County Sheriff's Office testified that on September 4, 2009, at about 2:30 a.m., he was on patrol driving his cruiser on Chestnut Street near East Market Street in Warren, Ohio. He saw a black Lincoln Continental pass him while driving in the opposite direction on Chestnut. The driver of the Lincoln was later identified as appellant.

{¶5} As appellant passed him, Deputy Ross did not see a license plate on the front of the vehicle. Then, as appellant drove past him, the deputy did not see a license plate on the rear of the vehicle. Deputy Ross turned around and got behind the Lincoln, which was driving north on Chestnut. Once the car reached the intersection of Chestnut and East Market, the deputy saw something in appellant's rear window, but he could not tell what it was.

{¶6} Deputy Ross activated his overhead lights and stopped appellant for failing to properly display a license plate. While Deputy Ross was still in his cruiser, he saw there were three individuals in the Lincoln. As he walked toward the car, he saw two males in the front seat and a female in the back seat. As he walked past the rear

bumper, he determined that the object he had seen in appellant's rear window was a temporary license tag. He was unable to see it from his cruiser because it was lying down at an angle and almost flat. He was only able to read the tag after he passed the rear bumper and while he was standing next to the rear door on the driver's side looking down at the tag. Deputy Ross called the numbers on the tag into dispatch. Before receiving a response, he approached the Lincoln to identify the driver and to advise him of the reason for the stop. At that time he did not intend to detain any of the occupants of the vehicle.

{¶7} While talking to appellant from outside the Lincoln, the deputy smelled marijuana coming from inside the vehicle. The deputy asked the occupants to produce their identification and they complied. The deputy learned that appellant's cousin, Scott Walker, was in the front passenger seat. The female passenger in the rear passenger seat had an outstanding warrant for a parole violation. She was arrested and placed in the rear of the deputy's cruiser.

{¶8} Deputy Ross told appellant he smelled marijuana inside the car. The deputy asked him if there was any more marijuana in the car and appellant said, "No. we just smoked it." Deputy Ross removed appellant and his front passenger from the Lincoln and placed them in front of the Lincoln. The deputy then searched the interior of the vehicle. He saw the butt of a pistol partially exposed under the driver's seat. He saw it was a .9 mm semiautomatic handgun. He then arrested appellant.

{¶9} Appellant testified at the suppression hearing. He said the Lincoln was registered to him. He said he taped the temporary license placard in his back window and it was still taped and in place when they were stopped.

{¶10} The trial court denied the motion to suppress, finding:

{¶11} Because the license plate was not in plain view, securely fastened and/or visible to the officer when he first observed the vehicle and in fact was not visible to him until he had stopped the vehicle and approached said vehicle and was standing beside the vehicle, the Court finds that the Defendant was in violation of R.C. 4503.21 of the Ohio Revised Code and the subsequent stop was based upon reasonable suspicion. It was not until the officer stopped the vehicle, exited his cruiser and approached the vehicle and was standing beside the vehicle that the license plate was visible to the officer. This is clearly not properly displayed under the terms of the statute.

{¶12} The case proceeded to jury trial. Deputy Ross repeated his testimony at the motion hearing and provided additional detail. He testified that when he approached the Lincoln, the gun was not in plain view. He first saw it after everyone was removed from the vehicle and he was conducting his search. He said the gun was only visible under the driver's seat if one was looking at it from a certain angle. After locating the firearm, he took it to his trunk to secure it. The magazine that was inserted in the gun was loaded with eight live rounds. He unloaded the gun; returned it to the same place under the driver's seat where he had found it; and photographed it there.

{¶13} After Deputy Ross arrested appellant, he placed him in the rear of his cruiser. Deputy Ross advised appellant of his Miranda warnings. Appellant said he understood his rights and was willing to talk to him. In response to the deputy's questions, appellant said that the gun was his and that he carries it for protection.

{¶14} After appellant was arrested, his cousin, Scott Walker, told the deputy the gun was his. However, the deputy did not find this comment credible. As a result, the deputy did not arrest him and allowed him to leave with appellant's vehicle.

{¶15} Appellant was taken to the Trumbull County Sheriff's Office. When Deputy Ross and appellant were in the pre-intake area where the suspects' belongings are inventoried, Deputy Ross heard one of the corrections officers ask appellant why he did not get a concealed carry permit because appellant said he carried the gun for protection. Appellant said he could not get one because he is a convicted felon.

{¶16} Detective Ross testified he test-fired the weapon at the Sheriff's Office and found it to be operable.

{¶17} Appellant called Scott Walker to testify for the defense. Walker testified that he obtained the gun in June 2009 from a friend by trading a lawn mower for it. He said that in July 2009, he took the gun to a camp site in Howland Township to shoot the gun. After shooting it, for no apparent reason, he placed it in a tree. Then, two months later, on the same day Deputy Ross stopped them, Walker picked up the gun, and put it under the driver's seat of the Lincoln without telling appellant about it knowing that appellant was a convicted felon and could not carry a gun.

{¶18} On cross-examination, Walker admitted he and appellant are cousins and have been close for four years since they have been roommates. He said he does "odds and ends" at a flea market in Warren that appellant owns. Walker said that appellant pulled over his vehicle as soon as Deputy Ross activated his overhead lights. He said appellant did not quickly accelerate or slam the brakes. The effect of this testimony was that the Lincoln made no sudden movements at the time that would have caused the position of the gun to change under the driver's seat. He admitted that if his

cousin was convicted of having weapons while under disability, that would expose appellant to a more serious punishment than Walker would face if he was charged with improperly handling a weapon in a vehicle.

{¶19} Appellant testified that he was convicted in 2002 of aggravated arson and two counts of insurance fraud. He said he did not know the gun was under the driver's seat the night they were stopped. Appellant said that after Deputy Ross found the gun, the deputy asked if it belonged to him. Appellant said he did not really answer that question. He admitted that, when asked by the deputy, appellant did not deny the gun belonged to him. Appellant admitted having a discussion at the jail with a corrections officer, but said he told the officer he does not own a gun.

{¶20} The jury found appellant guilty of each count in the indictment. Appellant appeals his conviction asserting three assignments of error. For his first assigned error, he alleges:

{¶21} "The trial court committed prejudicial error by denying appellant's motion to suppress based upon a finding that the temporary placard was not in plain view and thereby violating appellant's Fourth and Fourteenth Amendment rights and Article I, Section 14 of the Ohio Constitution against unreasonable searches and seizures * * *."

{¶22} Appellant concedes that Deputy Ross was justified in initially stopping him based on his inability to see the temporary tag in appellant's rear window. However, appellant argues that the justification for the stop ceased once the deputy reached his rear passenger door where, for the first time, he was able to decipher the numbers on the temporary license tag. We do not agree.

{¶23} A motion to suppress presents a mixed question of law and fact. 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*, 62 Ohio St.3d 357, 366 (1992).

{¶24} 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*, 93 Ohio App.3d 586, 592 (2d Dist.1994). 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*.

{¶25} R.C. 4503.21(A) provides: "No person to whom a temporary license placard * * * has been issued for the use of a motor vehicle * * * shall fail to display the temporary license placard *in plain view from the rear of the vehicle* * * * in the rear window * * *." (Emphasis added.) The commission of this offense is a minor misdemeanor. R.C. 4503.21(B).

{¶26} A stop is constitutional if it is supported by either a reasonable suspicion or probable cause. *Ravenna v. Nethken*, 11th Dist. No. 2001-P-0040, 2002-Ohio-3129, ¶30-31. If a police officer observes any traffic law violation, sufficient grounds exist for the officer to stop the vehicle. *State v. Wojtaszek*, 11th Dist. No. 2002-L-016, 2003-Ohio-2105, ¶16, citing *State v. Brownlie*, 11th Dist. Nos. 99-P-0005 and 99-P-0006, 2000 Ohio App. LEXIS 1450, *6 (Mar. 31, 2000). Where a police officer witnesses a minor traffic violation, the officer is justified in making a limited stop for the purpose of issuing a citation. *Brownlie*, *supra*, citing *State v. Jennings*, 11th Dist. No. 98-T-0196, 2000 Ohio App. LEXIS 800, *8 (Mar. 3, 2000). Further, this court has held that "[o]nce a law enforcement officer has validly stopped a vehicle, he may detain the occupants for a period of time sufficient to run a computer check on the driver's license, registration, and

vehicle plates and to issue the driver a warning or citation." *State v. Molek*, 11th Dist. No. 2001-P-0147, 2002-Ohio-7159, ¶32.

{¶27} Appellant's reliance on *State v. Cooke*, 11th Dist. Nos. 98-L-160 and 98-L-162, 1999 Ohio App. LEXIS 4467 (Sept. 24, 1999), is misplaced as the facts in *Cooke* are readily distinguishable from the circumstances presented here. In *Cooke*, the officer, while following the defendant's car, saw his temporary tag in the rear window, but could not see the date of issue or expiration and the first three numbers. The officer stopped the vehicle and while approaching the vehicle was able to discern the remaining numbers. In these circumstances, this court held there was no violation of the statute, and the officer could not further detain the defendant.

{¶28} In *State v. Terry*, 130 Ohio App.3d 253 (3d Dist.1998), the officer testified he could not read the temporary license tag that was only partially taped to the rear window of the defendant's vehicle. The Third District held: "Clearly, if a temporary tag is affixed in such a manner so that it cannot be read, it is not displayed in 'plain view.' R.C. 4503.21. Therefore, under the totality of the circumstances here, Officer Isom had reasonable suspicion justifying his attempt to stop Terry." *Id*. at 257.

{¶29} Further, in *State v. Brown*, 2d Dist. No. 2817, 1992 Ohio App. LEXIS 32 (Jan. 9, 1992), the defendant was stopped because the officers could not see a license plate on his car. After stopping the defendant and upon reaching the side of the defendant's car, they viewed through the back window a valid temporary license tag directly beneath the rear window lying flat on the rear deck. After viewing the tag, the officers detained the defendant, checked his license status, and found it to be suspended. The Second District held:

{¶30} If the officers did not see the placard until they reached the side of the car, and if the placard was lying flat on the rear deck, it is hard to imagine how it could be *in plain view from the rear of the vehicle. The purpose of the statute is to require the license placard to be visible from the rear of the car*. If it was not in plain view, there was a violation of the law, the suspicion of unlawful activities did not abate, and the officer was permitted to ask to see the driver's license and check his license status. (Emphasis added.) *Id*. at *6.

{¶31} We find the holding of the Third District in *Terry* and the Second District's holding in *Brown* to be persuasive. Here, while Deputy Ross was following appellant, he did not see a license plate on the front or rear of the vehicle. After the deputy turned around and was following appellant, he saw something in appellant's rear window, but he could not tell if it was a license plate. After the deputy stopped appellant, and while the deputy was still in his cruiser, he still did not see a temporary tag in appellant's rear window because it was at an angle and lying almost flat. The deputy then left his cruiser and was only able to see the tag when he walked past the rear bumper. He was only able to read the numbers on the tag when he was standing next to the rear door on the driver's side, standing over and looking down at the tag. Thus, Deputy Ross was not able to read the tag from the rear of appellant's vehicle, as required by R.C. 4503.21(A). Appellant therefore committed a violation of R.C. 4503.21, and Deputy Ross was justified in stopping appellant and detaining him for a period of time sufficient to run a computer check on appellant's driver's license, registration, and vehicle plates and to issue appellant a warning or citation. *Wojtaszek*, *supra*; *Molek*, *supra*. When Deputy Ross approached appellant, he was waiting for a response from dispatch. As a

result, Deputy Ross was justified in approaching appellant to determine his identity and to advise him regarding the reason for the stop.

{¶32} During this brief detention, Deputy Ross detected the odor of marijuana emanating from appellant's vehicle and discovered that the female passenger had an outstanding arrest warrant. As the Supreme Court of Ohio held in *State v. Moore*, 90 Ohio St.3d 47 (2000), "the smell of marijuana, alone, by a person qualified to recognize the odor, is sufficient to establish probable cause to search a motor vehicle, pursuant to the automobile exception to the warrant requirement." *Id.* at 48. Deputy Ross testified that he smelled marijuana inside the vehicle. He said he was familiar with the smell of marijuana and that he had come into contact with it in the past. Moreover, we note that appellant did not object to the officer's testimony regarding the odor of marijuana emanating from inside the vehicle. Thus, any error resulting from such testimony was waived. *State v. Awan*, 22 Ohio St.3d 120, 122 (1986). The officer therefore had probable cause to search appellant's vehicle.

{¶33} We therefore hold the trial court did not err in denying appellant's motion to suppress.

{¶34} Appellant's second and third assignments of error are related and shall be considered together. They allege:

{¶35} "[2.] The trial court erred in failing to grant Mr. Walker's motion for judgment of acquittal on all charges, as the evidence presented was not legally sufficient to support a conviction.

{¶36} "[3.] "Mr. Walker's convictions are against the manifest weight of the evidence."

{¶37} Crim.R. 29(A) provides that a defendant may move the trial court for a judgment of acquittal "if the evidence is insufficient to sustain a conviction." "'[S]ufficiency' is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury," i.e. "whether the evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997), quoting Black's Law Dictionary (6 Ed. 1990), 1433. Sufficiency is a test of adequacy that challenges whether the state's evidence has created an issue for the jury to decide regarding each element of the offense. *Id*.

{¶38} "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259 (1991), at paragraph two of the syllabus. In reviewing the sufficiency of the evidence to support a criminal conviction, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Id*.

{¶39} A "sufficiency" argument raises a question of law as to whether the prosecution offered some evidence concerning each element of the charged offense. *State v. Windle*, 11th Dist. No. 2010-L-0033, 2011-Ohio- 4171, ¶25.

{¶40} In contrast, a manifest weight challenge concerns:

{¶41} "[T]he inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the [finder of fact] that the party having the burden of proof will be entitled to [its] verdict, if, on weighing the

> evidence in [its] mind[], [it] shall find the greater amount of credible evidence sustains the issue which is to be established before [it]. Weight is not a question of mathematics, but depends on its effect in inducing belief." (Emphasis deleted.) *Thompkins*, *supra*, at 387, quoting Black's Law Dictionary (6th Ed. 1990), 1594.

{¶42} In determining whether the judgment is against the manifest weight of the evidence, the court, reviewing the entire record, weighs the evidence and all reasonable inferences, and considers the credibility of the witnesses. *Thompkins, supra*. The court determines whether, in resolving conflicts in the evidence and deciding witness credibility, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *Id*. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *Id*.

{¶43} Witness credibility rests solely with the finder of fact, and an appellate court is not permitted to substitute its judgment for that of the jury. *Awan*, *supra*, at 123.

{¶44} Further, it is well-settled that "[c]ircumstantial evidence and direct evidence inherently possess the same probative value. * * *." *Jenks*, *supra*, at paragraph one of the syllabus.

{¶45} Appellant was convicted of carrying a concealed weapon, improper handling of firearms in a motor vehicle, and having weapons while under disability. R.C. 2923.12(A)(2), carrying a concealed weapon, provides: "No person shall *knowingly* carry or have, concealed on the person's person or concealed ready at hand * * * [a] handgun * * *." (Emphasis added.) R.C. 2923.16(B), improper handling firearms in a motor vehicle, provides: "No person shall *knowingly* transport or have a loaded firearm

in a motor vehicle in such a manner that the firearm is accessible to the operator * * * without leaving the vehicle." (Emphasis added.) R.C.2923.13(A)(2), having weapons while under disability, provides: "[N]o person shall *knowingly* * * * have * * * any firearm * * * if [t]he person * * * has been convicted of any felony offense of violence * * *." (Emphasis added.)

{¶46} The only sufficiency argument raised by appellant is that the state failed to produce any evidence that he acted knowingly with respect to each of the offenses of which he was convicted. "Knowingly" is defined at R.C. 2901.22(B), which provides: "A person acts knowingly * * * when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶47} Based on our review of the record, the state presented ample evidence, both direct and circumstantial, that appellant committed these offenses knowingly.

{¶48} First, the gun was found in appellant's vehicle; appellant was the driver of the vehicle, and the gun was found directly beneath him under the driver's seat. From this circumstantial evidence, an inference can be drawn that appellant was aware the gun was present and within his reach during this time. Second, the evidence is undisputed that the gun was partially exposed to appellant. Deputy Ross testified that after he removed the occupants from the vehicle, he saw the butt of the gun protruding from beneath the driver's seat. If the deputy saw the gun, it can be inferred that appellant saw it. This additional circumstantial evidence also supports the inference that appellant was aware the gun was ready at hand. Third, after appellant was advised of the Miranda warnings, he admitted to Deputy Ross that the gun was his and that he

carries it for protection. This direct evidence is compelling proof that the gun belonged to appellant and that he was aware the gun was in his possession.

{¶49} Based upon the foregoing evidence, the trial court did not err in denying appellant's motions for acquittal.

{¶50} Turning now to appellant's challenge to the weight of the evidence, appellant concedes that "the State's account of the crucial events is believable." However, he argues that Deputy Ross' testimony is in conflict with the testimony "provided by all other witnesses." The "other witnesses" to whom he is referring are himself and his cousin, Scott Walker. It bears repeating that appellant has previously been convicted of aggravated arson, insurance fraud, and drug abuse, and that he has served time in prison. Also, when stopped, he admitted that he and his associates had just smoked all their marijuana while driving around the city of Warren at 2:30 a.m. Further, Scott Walker is appellant's cousin. His sole means of income was appellant. His sole means of transportation was the car appellant allowed him to use. Walker testified that he and appellant have had a close relationship during the four years they were roommates. Scott thus had a strong motivation to bend the truth in his cousin's direction. In contrast, there is no evidence of any motivation on the part of Deputy Ross to fabricate his testimony, including appellant's admission that the gun was his and that he carries it for protection

{¶51} Appellant argues that, while the state attempted to elicit testimony from Scott Walker that he had a close relationship with appellant, the state failed to produce any evidence of such a relationship. Appellant apparently chose not to hear the testimony of his cousin about the close relationship he has with appellant.

{¶52} Next, appellant argues that in the prosecutor's closing argument, he unfairly commented on appellant's failure to deny a remark made to him by a corrections officer that appellant had said he carries the gun for his protection. However, appellant failed to object to this exchange or to the prosecutor's comment on it at trial. The issue is therefore waived on appeal. *Awan*, *supra*.

{¶53} In resolving conflicts in the evidence, the jury obviously found Deputy Ross to be more credible than appellant and his cousin. In doing so, we cannot say the jury clearly lost its way and created a manifest miscarriage of justice.

{¶54} For the reasons stated in this opinion, the assignments of error are overruled. It is the judgment and order of this court that the judgment of the Trumbull County Court of Common Pleas is affirmed.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.,

concur.