

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2008-11-286
- vs -	:	<u>O P I N I O N</u>
	:	9/28/2009
ANDREW K. SIZEMORE,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2008-01-0097

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Fred S. Miller, Baden & Jones Bldg., 246 High Street, Hamilton, Ohio 45011, for defendant-appellant

RINGLAND, J.

{¶1} Defendant-appellant, Andrew K. Sizemore, appeals his convictions for burglary, voyeurism, theft, receiving stolen property, and unauthorized use of a computer, cable or telecommunication device.

{¶2} Around December 12, 2007, a high-end Canon EOS digital camera was discovered missing from Miami University. The university had purchased the camera in October 2007 for \$4,500. Shortly thereafter, an employee of the university discovered a listing on the internet auction site eBay for a camera of the same particular model. The

listing indicated that the camera was being sold by a person in Oxford, Ohio with the seller i.d., "thesizemores." Further investigation of the seller's history by the Miami University Police Department revealed that other computer and photography equipment had been listed by that particular seller matching other missing high-end equipment from the school.

{¶3} In conducting his investigation, Sergeant Yates of the university police department discovered that appellant was employed in the university's IT department and lived in Oxford. On December 20, 2007, Sgt. Yates went to appellant's residence located at 9 West Rose Avenue in Oxford. Sgt. Yates knocked on appellant's door, but received no response. He left the residence and called appellant on his cell phone. Appellant related that he was in Hamilton at the time taking care of some banking business. However, in the background, Sgt. Yates heard the sound of a squeaky door closing, similar to the sound of the storm door that he opened while at appellant's home. Sgt. Yates immediately returned to appellant's residence. While en route, the sergeant observed a pickup truck with Indiana plates that was parked at appellant's home driving away. He followed the vehicle, which made an erratic route through the streets of Oxford. Sgt. Yates eventually initiated a traffic stop. After a brief discussion with the officer, appellant voluntarily produced the stolen camera from the back of the truck. Also, located in the bed of the truck were numerous items of electronic equipment, some of which was still in its original packaging. Appellant was arrested and the contents of the truck were inventoried.

{¶4} The majority of the items belonged to Miami University. However, also located in the truck was a Linksys wireless router. The wireless transmitter had been previously reported stolen by a resident at 10 West Rose Avenue, located immediately across the street from appellant's residence. Four female students from Miami

University resided at 10 West Rose Avenue. Their residence had suffered two forceful break-ins; first, during Thanksgiving break and the second during Christmas break. During the November break-in, three spyware programs were loaded onto a computer owned by one of the female residents. The spyware allowed an outside individual to remotely access files and information from the computer. During the December break-in, liquor, various DVDs, underwear, personal photographs of the girls and computer and electronic equipment were stolen from the property, including the wireless router found in the bed of appellant's truck.

{¶15} A search warrant for appellant's residence was executed. Numerous items of the previously reported stolen property were discovered such as the liquor, DVDs, underwear, photographs, and electronic equipment. Additional electronic computer and photography equipment from Miami University was found in the residence. In the home office, officers found handwritten notes and papers referencing one of the female residents at 10 West Rose Avenue, including information relating to her AOL account and the directory structure of her computer where she stored personal pictures.

{¶16} Appellant was indicted on two counts of burglary, two counts of voyeurism, one count of theft, two counts of receiving stolen property, and three counts of unauthorized use of a computer, cable or telecommunication property. Appellant filed a motion to suppress the evidence obtained during the traffic stop, which was denied by the trial court. The state dismissed one count of voyeurism. Following a bench trial, the court found appellant guilty of the remaining counts, although one count of receiving stolen property was reduced from a fourth-degree felony to a fifth-degree felony based upon the value of the items stolen. Appellant was sentenced to a total of five years in prison. Appellant timely appeals, raising two assignments of error.

{¶17} Assignment of Error No. 1:

{¶18} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT OVERRULED HIS MOTION TO SUPPRESS."

{¶19} In his first assignment of error, appellant argues insufficient probable cause existed for Sgt. Yates to initiate the traffic stop in this case and conduct the subsequent search. Further, appellant argues the fruits of the search and resulting search of his home should have been suppressed.

{¶10} Appellate review of a ruling on a motion to suppress evidence presents a mixed question of law and fact. *State v. Long* (1998), 127 Ohio App.3d 329, 332. When considering a motion to suppress, the trial court assumes the role of the trier of fact and is therefore in the best position to resolve factual questions and evaluate witness credibility. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. A reviewing court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Bryson* (2001), 142 Ohio App.3d 397, 402. The appellate court then determines as a matter of law, without deferring to the trial court's conclusions, whether the trial court applied the appropriate legal standard. *Id.*

{¶11} The Fourth Amendment to the United States Constitution protects all persons against unreasonable searches and seizures. *Arizona v. Evans* (1995), 514 U.S. 1, 10, 115 S.Ct. 1185. The stop of a motor vehicle, even if for a limited purpose or a brief amount of time, constitutes the seizure of a person under the Fourth Amendment. *United States v. Martinez-Fuerte* (1976), 428 U.S. 543, 556-558, 96 S.Ct. 3074.

{¶12} As explained in previous decisions by this court, two different types of "traffic" stops are recognized in Ohio, each with a different applicable constitutional standard. See *State v. Moeller* (Oct. 23, 2000), Butler App. No. CA99-07-128, at 3. A noninvestigatory stop is reasonable for Fourth Amendment purposes where an officer

has probable cause to believe a traffic violation has occurred, such as where the officer observes a traffic violation. See *Whren v. United States* (1996), 517 U.S. 806, 810, 116 S.Ct. 1769; *Dayton v. Erickson*, 76 Ohio St.3d 3, 11, 1996-Ohio-431.

{¶13} The second type is referred to as an investigatory stop or "*Terry*" stop, which allows an officer to briefly stop and detain an individual, without an arrest warrant and without probable cause, in order to investigate a reasonable and articulable suspicion of criminal activity. See *Terry v. Ohio* (1967), 392 U.S. 1, 19-21, 188 S.Ct. 1868; *State v. Bobo* (1988), 37 Ohio St.3d 177, 178. "The propriety of an investigative stop by a police officer must be viewed in light of the totality of the surrounding circumstances" as "viewed through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training." *State v. LeClaire*, Clinton App. No. CA2005-11-027, 2006-Ohio-4958, ¶9, quoting *State v. Freeman* (1980), 64 Ohio St.2d 291, syllabus, and *Bobo* at 179.

{¶14} Throughout his brief, appellant attempts to categorize the stop in this case as a noninvestigatory traffic stop, urging that no probable cause existed for the stop since the officer did not observe a traffic violation. Appellant's argument lacks merit as the stop in this case was clearly an investigatory "*Terry*" stop.

{¶15} After review of the record, we find that Sgt. Yates had a reasonable, articulable suspicion to initiate the investigatory stop. After the university discovered the missing camera, a listing for the same particular make and model appeared on eBay. The listing indicated that the item was being sold by an individual in Oxford with appellant's last name in the seller i.d. The sergeant discovered that appellant lived in Oxford and worked in the IT department at Miami from which the camera had been reported missing.

{¶16} Based upon these findings, Yates went to appellant's residence, but there

was no answer. After leaving the residence, the sergeant immediately contacted appellant on his cell phone. Appellant claimed that he was in Hamilton at the time, but the sergeant believed he heard the squeak of the screen door that he had opened moments earlier at appellant's home. As a result, Yates turned his cruiser around to return to the residence. Along the way, the officer observed an individual driving the pickup truck with Indiana plates which was parked at appellant's residence. After following the truck through Oxford, Yates initiated a traffic stop and informed appellant about the suspicion of the stolen camera. The stolen camera was discovered in the back of the vehicle. Further, the remaining stolen electronic items that were discovered during the investigatory stop were in plain view in the bed of appellant's pickup truck. Based on the totality of the circumstances, Sergeant Yates was justified in conducting the investigatory stop.

{¶17} Appellant's first assignment of error is overruled.

{¶18} Assignment of Error No. 2:

{¶19} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT ADMITTED INTO EVIDENCE CERTAIN DOCUMENTS ATTRIBUTABLE TO APPELLANT."

{¶20} At issue in the second assignment of error are two handwritten notes discovered in appellant's office during the search of his residence which were admitted as exhibits at trial. The notes, presumably in appellant's handwriting, listed a phone number, screen name, and the location of photographs on the victim's hard drive. In response to appellant's discovery request in this case, the state disclosed that it had in its possession "misc photos + notes" taken from appellant's residence. Appellant argues that "hundreds of handwritten notes and documents" ranging from "post-it notes to sheets of paper" were recovered during the search and that he did not have notice as

to what "misc. photos + notes" were going to be used at trial.

{¶21} The applicable portions of Crim.R. 16(B)(1)(a) state, "[u]pon motion of the defendant, the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph any of the following which are available to, or within the possession, custody, or control of the state, the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney: (i) Relevant written or recorded statements made by the defendant or co-defendant, or copies thereof; * * *."

{¶22} In *State v. Parker* (1990), 53 Ohio St.3d 82, the Ohio Supreme Court examined the discovery requirements of Crim.R. 16(B). "Where, in a criminal trial, the prosecution fails to comply with Crim.R. 16(B) * * * and the record does not demonstrate (1) that the prosecutor's failure to disclose was a willful violation of Crim.R. 16(B), (2) that the foreknowledge of the statement would have benefited the accused in the preparation of his defense, or (3) that the accused was prejudiced by admission of the statement, the trial court does not abuse its discretion under Crim.R. 16(E)(3) by permitting such evidence to be admitted." *Id.* at 86, citing *State v. Parson* (1983), 6 Ohio St.3d 442, syllabus.

{¶23} *Parker* involved the prosecution's failure to disclose an oral recording of the defendant which the victim used to identify the individual who raped her. *Id.* at 84. The court found no violation of the discovery rules since "the prosecution complied in good faith with defendant's discovery request." *Id.* at 86. The court noted that the tape was mislabeled; however, "[i]t cannot be said that the mislabeling of the tape was willful." *Id.*

{¶24} Further, the court held that Crim.R. 16 did not require the prosecution to specifically disclose to the defendant the intent to use the recording as evidence at trial.

The court concluded, "The record indicates that the prosecution disclosed, and gave defendant permission to obtain, the information sought by the defendant. Crim.R. 16(B) does not require the prosecution to disclose to the defendant the significance to the prosecution of information sought to be discovered by the defendant. The rule only requires the prosecution to disclose, and to permit the defendant to obtain the information sought. * * * There is no constitutional mandate that the prosecution disclose to the defense how it intended to use the police investigatory work sought to be discovered by the defense." Id. at 86-87.

{¶25} In this case, appellant does not dispute that the prosecution made the notes available for inspection or to be copied. Instead, appellant insists that the prosecution was required to identify the specific handwritten notes it planned to use during trial and provide a copy to him.

{¶26} Crim.R. 16(B) imposes no obligation upon the prosecution to provide a copy of each document that will be introduced at trial to the defendant. Rather, as described in *Parker*, the rule only requires the prosecution to disclose and permit the defendant to inspect, copy or photograph the information sought. The prosecution in this case complied with the rule. Although not explicitly identified, the notes at issue in this case were properly disclosed by the prosecution. Specifically, in response to appellant's discovery request, the prosecution disclosed that "misc photos + notes" were recovered during the search of appellant's home and, as appellant concedes, the notes were available to the defense. Appellant's trial counsel failed to inspect or copy the evidence. Accordingly, we find no willful violation by the prosecution.

{¶27} Appellant's second assignment of error is overruled.

{¶28} Judgment affirmed.

BRESSLER, P.J., and POWELL, J., concur.