[Cite as *State v. Runyon*, 2011-Ohio-263.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellant,	:	CASE NO. CA2010-05-032
	:	O P I N I O N
- vs -		1/24/2011
	:	
DARREN L. RUNYON,	:	
Defendant-Appellee.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2009CR0853

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffman, 123 North Third Street, Batavia, Ohio 45103-3033, for plaintiff-appellant

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YOUNG, P.J.

{¶1} Plaintiff-appellant, the state of Ohio, appeals a decision of the Clermont County Court of Common Pleas granting the motion to suppress of defendant-appellee, Darren Runyon. Because we conclude that Runyon's constitutional rights were not violated, we reverse the decision of the trial court.

{¶2} Runyon was indicted in November 2009 on one count each of trafficking in cocaine and possession of cocaine. The charges stemmed from the discovery of eight baggies of cocaine in a backpack belonging to Runyon during a traffic stop. Also found in the backpack were a marijuana pipe and a bag of marijuana. Runyon moved to suppress the evidence obtained against him. At a hearing on the motion, the state presented the testimony of Milford Police Officer Russell Kenney. The officer's testimony and the videotape of the traffic stop revealed the following facts:

{¶3} On October 5, 2009, shortly before 11 p.m., Officer Kenney stopped a vehicle for a marked lane violation. The vehicle had four occupants: the driver, Runyon, who was a front seat passenger, and two passengers in the back seat. As he approached the vehicle, the officer did not smell marijuana. All four windows were rolled down; all four occupants were smoking cigarettes. Officer Kenney testified it is not unusual during nighttime traffic stops to find people using gum, air fresheners, or cigarettes to mask the odor of alcohol or drugs in a car.

{¶4} The officer asked for everyone's identification. As he asked, he noticed Runyon put his hand on a backpack that was between his right leg and the passenger door. The officer testified "the fact Runyon for some reason uncontrollably to himself touched that bag [indicated] to me that whatever he shouldn't have had was in there." The officer explained that whenever asked about the presence of alcohol, weapons, or drugs in a car, "people either look right at it, or touch it, or allude to it in other nonverbal clues." The officer also noticed the occupants' nervousness as they handed their identification. Runyon did not have any identification.

{¶5} Upon checking the occupants' identification, Officer Kenney discovered

that William Paxton, a passenger in the back seat, had an active warrant for a 30-day commitment stemming from a failure to pay child support. Upon removing Paxton from the vehicle, the officer detected the smell of burnt marijuana. The officer, however, could not tell whether the smell was coming from the car or from Paxton. The officer handcuffed Paxton and placed him in the back of his police cruiser.

{¶6} The officer returned to the vehicle, approached the driver, and asked for her consent to search the car. The officer testified he asked to search the car in part to see whether the demeanor of the three remaining occupants would change. It did. During the exchange between the officer and the three occupants, the officer repeatedly asked whether there was anything in the car he should be concerned with. Based upon the change in the occupants' demeanor, the officer also asked "what's in the car you guys don't want me to see?" The occupants denied there was anything and wondered why the officer needed to search the car. Eventually, the officer removed the three occupants from the car and directed them to a sidewalk next to the car.

{¶7} Once again, Officer Kenney asked, "What's in the car you don't want me to be concerned with?" This time, the driver admitted she had a marijuana pipe in the vehicle's center console. Officer Kenney then asked whether there was any "weed" in the car or anything like that. The driver replied "just the pipe." Officer Kenney and another officer then proceeded to search the car. Neither officer found a marijuana pipe in the center console of the vehicle. They, however, found Runyon's backpack in the front passenger seat. The bag "reek[ed] of marijuana." Inside the backpack, the officers found a marijuana pipe, a bag of marijuana, and eight baggies of cocaine.

{¶8} On April 14, 2010, the trial court granted Runyon's motion to suppress on the basis of the United States Supreme Court's recent decision in *Arizona v. Gant* (2009), __ U.S. __, 129 S.Ct. 1710. The trial court held that under *Gant*, the search conducted by Officer Kenney was an invalid search incident to an arrest.[1] The trial court further held that the officer did not act upon a reasonable suspicion of additional criminal activity when he searched the vehicle. Rather, the officer returned to the vehicle for the purpose of conducting a search incident to Paxton's arrest under a pre-*Gant* understanding of the law.

{¶9} The state appeals, raising one assignment of error:

{¶10} "THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION TO SUPPRESS."

{¶11} The state argues the trial court erred in granting Runyon's motion to suppress because the search was permissible under the Fourth Amendment. Specifically, the state asserts the search was lawful under the well-established automobile exception to the warrant requirement. The state does not address the trial court's ruling the search was an invalid search incident to an arrest under *Gant*. The parties do not dispute that Officer Kenney validly stopped the vehicle in which Runyon was a passenger for a traffic violation.

{¶12} "Appellate review of a motion to suppress presents a mixed question of

1. *Gant* addressed whether the search-incident-to-an-arrest exception to the Fourth Amendment's warrant requirement set forth in *Chimel v. California* (1969), 395 U.S. 752, 89 S.Ct. 2034, and applied to automobile searches in *New York v. Belton* (1981), 453 U.S. 454, 101 S.Ct. 2860, permitted the search of a vehicle after a motorist was arrested and placed in the back of a patrol car. The United States Supreme Court held it did not. Specifically, the Supreme Court held that police may search a vehicle incident to a recent occupant's arrest only when (1) "the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search," or (2) when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Gant*, 129 S.Ct. at 1719.

law and fact. 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 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." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8.

{¶13} Once a police officer has made a legitimate stop of a vehicle, the driver may be detained only for as long as the officer continues to have a reasonable suspicion that there has been a violation of the law. *State v. Myers* (1990), 63 Ohio App.3d 765, 771. However, "[i]f during the scope of the initial stop, an officer discovers additional specific and articulable facts which give rise to a reasonable suspicion of criminal activity beyond that which prompted the stop, the officer may detain the vehicle and driver for as long as the new articulable and reasonable suspicion continues." *State v. Waldroup* (1995), 100 Ohio App.3d 508, 513.

{¶14} 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 automobile exception to the warrant requirement. *State v. Moore,* 90 Ohio St.3d 47, 51, 2000-Ohio-10, certiorari denied (2001), 532 U.S. 908, 121 S.Ct. 1234. "[T]he 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. There need be no other tangible evidence to justify a warrantless search of a vehicle." Id. at 48.

{¶15} In the case at bar, Officer Kenney stopped the vehicle for a marked lane violation. During his initial encounter with the occupants of the car, he noticed that the four windows were rolled down, and that all four occupants were smoking cigarettes, a tactic commonly used to mask odors of alcohol or drugs. The officer also noticed the occupants' nervousness as they handed their identification, and Runyon's nonverbal cue when asked for his identification. When the officer later removed Paxton from the vehicle, he detected the smell of marijuana. Subsequently, after he removed the remaining three occupants from the vehicle, and before the search began, the driver admitted there was a marijuana pipe in the car.

{¶16} We find that the foregoing facts, and particularly the smell of marijuana detected by Officer Kenney combined with the driver's admission regarding the marijuana pipe, gave the officer probable cause to search the car. As a result, the search of the vehicle was lawfully conducted pursuant to the automobile exception to the warrant requirement. See *State v. Canter*, Franklin App. No. 09AP-47, 2009-Ohio-4837 (smell of marijuana smoke from vehicle gave officers probable cause to search vehicle under the automobile exception); *State v. Hopper*, Cuyahoga App. Nos. 91269 and 91327, 2009-Ohio-2711 (smell of marijuana as officer approached open door of the vehicle gave officer probable cause to search vehicle under the automobile exception).

{¶17} We note that in its decision, the trial court found that "[a]fter the search commenced, the Vehicle's driver informed Officer Kenney that she had a marijuana pipe in the Vehicle's center console." However, the evidence does not support the sequence of events as set forth by the trial court in its decision. The videotape of the traffic stop clearly shows that the search of the vehicle began *after* the driver

admitted there was a marijuana pipe in the car. While there was a seizure of the occupants at the time of the driver's admission, the search had not yet begun. The three occupants were not placed under arrest until after the vehicle was searched.

{¶18} As stated earlier, the trial court also found that Officer Kenney returned to the vehicle for the purpose of conducting a search incident to Paxton's arrest under a pre-*Gant* understanding of the law. The videotape of the traffic stop supports the trial court's finding. After arresting Paxton, the officer returned to the vehicle and asked the driver if he could search the car. When the driver and the other two occupants questioned why he needed to search the car, the officer told them Paxton's arrest gave him the right to search the car. However, just as an officer's underlying subjective intent or motivation for stopping a vehicle does not invalidate an otherwise valid traffic stop, Officer Kenney's characterization of the search in this case as incident to Paxton's arrest does not invalidate an otherwise valid search under the automobile exception. See *State v. Swinderman*, Tuscarawas App. No. 2009-AP-100050, 2010-Ohio-2659.

{¶19} In light of the foregoing, we find the trial court erred in granting Runyon's motion to suppress. The state's assignment of error is well-taken and sustained.

{¶20} Judgment reversed and cause remanded to the trial court for further proceedings in compliance with the applicable law and consistent with this opinion.

BRESSLER and RINGLAND, JJ., concur.