[Cite as *State v. Earley*, 2002-Ohio-4112.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 19161

vs. : T.C. CASE NO. 01-CR-2053

JAMEEL EARLEY : (Criminal Appeal from Common Pleas Court)

Defendant-Appellant :

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O P I N I O N

Rendered on the 9th day of August, 2002.

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GRADY, J.

{¶1} Defendant, Jameel Earley, appeals from his conviction and sentence for possessing crack cocaine.

{¶2} Defendant was indicted for possessing crack cocaine, R.C. 2925.11(A), and carrying concealed weapons, R.C. 2923.12(A). Defendant filed a motion to suppress evidence, which the trial court overruled following a hearing. Subsequently, Defendant entered a no contest plea to the cocaine possession charge in exchange for a dismissal

of the concealed weapons charge. The trial court sentenced Defendant to three years imprisonment, imposed a fine of ten thousand dollars, and suspended his driver's license for three years.

{¶3} Defendant has timely appealed to this court from his conviction and sentence.

FIRST ASSIGNMENT OF ERROR

{¶4} "THE EVIDENCE SHOULD HAVE BEEN ORDERED SUPPRESSED BECAUSE THE TOTALITY OF CIRCUMSTANCES SHOWED THAT THE OFFICERS LACKED A REASONABLE SUSPICION TO THINK THAT APPELLANT MIGHT BE CARRYING A WEAPON."

SECOND ASSIGNMENT OF ERROR

{¶5} "THE TRIAL COURT ERRED IN FAILING TO ORDER THE COCAINE SUPPRESSED BECAUSE THE EVIDENCE ESTABLISHED THAT THE SEARCH WAS NOT A PROPER INVENTORY SEARCH.

{¶6} The evidence presented at the suppression hearing demonstrates that on June 21, 2001, at around 8:00 p.m., Defendant ran a stop sign at the intersection of Rosedale and Superior Avenue in Dayton. Dayton police officers Tiffany Ables and Eric Henderson observed this traffic violation, and they stopped Defendant's vehicle in an alley off of Rosedale, between Grand and Lexington.

{¶7} As the officers approached Defendant's vehicle they observed Defendant moving around inside the vehicle and leaning forward toward the floorboard. Officer Ables noticed something in Defendant's right hand. When the

officers reached Defendant's vehicle, they smelled marijuana coming from inside. Defendant was spraying the inside of his vehicle with an aerosol deodorant.

{¶8} Having smelled marijuana, and concerned that Defendant might have hidden a weapon, Officers Ables and Henderson removed Defendant from his vehicle and placed him in the police cruiser. Officer Henderson remained in the cruiser with Defendant and began writing out a citation for the stop sign violation, while Officer Ables searched the area of the vehicle where Defendant had been sitting, looking for weapons. Officer Ables found a loaded handgun underneath the driver's seat. Officer Ables returned to the cruiser and placed Defendant under arrest for carrying concealed weapons.

{¶9} With the driver and sole occupant of the vehicle now under arrest, and because the vehicle was partially obstructing traffic in the alley, the officers decided to tow Defendant's vehicle, which is consistent with the Dayton police department's tow policy under these circumstances. Prior to towing the vehicle, the officers inventoried the contents of the vehicle, looking for valuables. The glove box was locked. However, Officer Henderson found the key to the glove box in the middle console. When the officers opened the glove box they found more live ammunition for the gun previously discovered under the front seat, and crack cocaine.

{¶10} Defendant argues that his Fourth Amendment rights

were violated when police searched underneath the driver's seat of his vehicle following the traffic stop. According to Defendant, the movements or "furtive gestures" he made that police observed, coupled with the smell of marijuana emanating from inside the vehicle, do not give rise to a reasonable suspicion that Defendant might be armed and a danger to these officers or that he might gain access to a weapon if allowed to return to his vehicle, which is required to justify a search of the vehicle for weapons. See *Terry v. Ohio* (1968) 392 U.S. 1; *Michigan v. Long* (1983), 463 U.S. 1032.

{¶11} The smell of marijuana by a person who recognizes its odor is sufficient to establish probable cause to search a motor vehicle pursuant to the automobile exception to the warrant requirement. *State v. Moore*, 90 Ohio St.3d 47, 2000-Ohio-10. Both Officer Ables and Officer Henderson testified that they are familiar with the odor of marijuana, having encountered it many times in their experience as police officers. Thus, once the officers smelled marijuana coming from inside Defendant's vehicle, they were constitutionally entitled to search Defendant's vehicle for it.

{¶12} On this record, it matters not whether the facts and circumstances give rise to a reasonable suspicion that Defendant might be armed and a danger to the officers, or whether he might gain access to a weapon after being returned to his vehicle following the traffic stop, which

would justify a protective search of the passenger compartment of the vehicle for weapons. The issue is whether Defendant's Fourth Amendment rights were violated when police looked underneath the driver's seat. Because police had probable cause to conduct a warrantless search of Defendant's vehicle for marijuana, their search of the vehicle and discovery of the hidden weapon did not violate Defendant's Fourth Amendment rights.

{¶13} Defendant next challenges the validity of the inventory search police conducted that led to the discovery of crack cocaine in the closed and locked glove box.

{¶14} The Crim.R. 12(C)(3) motion to suppress evidence that Defendant filed on July 11, 2001 challenged only his stop, detention, and arrest, not the search of his vehicle. However, it appears that after the State's evidence was presented in the suppression hearing, the court agreed to consider the legality of the inventory search of Defendant's vehicle as an additional basis to suppress the evidence officers found in its glove box. The court's subsequent order of October 12, 2001, denying the motion to suppress states that the search was not unconstitutional. Therefore, any error in the court's ruling is a matter properly before us for review.

{¶15} Subsequent to the trial court's ruling on the motion to suppress, on April 3, 2002, the Supreme Court held that when a police officer has made a lawful custodial arrest of the occupant of an automobile, the officer may, as

a contemporaneous incident of that arrest, search the passenger compartment of that automobile. *State v. Murrell*, 94 Ohio St.3d 489, 2002-Ohio-1483. That holding would seem to resolve the error assigned. However, because the trial court found that the warrantless search of Defendant's automobile was justified by the inventory search exception, we will proceed to review the alleged error in that holding.

{¶16} A routine inventory search of a lawfully impounded vehicle is a valid exception to the Fourth Amendment warrant requirement when that search is conducted in good faith, not as subterfuge for an evidentiary search, and in accordance with standardized police procedures. *State v. Hathman*, 65 Ohio St.3d 403, 1992-Ohio-63; *Colorado v. Bertine* (1987), 479 U.S. 367, 107 S.Ct. 738. The State did not introduce into evidence a copy of the Dayton police department's tow policy. However, such documentary evidence is not essential to establish the validity of the inventory search that took place. Testimony by the police officers involved may be sufficient. *State v. Semanchuk* (1997), 122 Ohio App.3d 30. Even so, a police officer's bare conclusory assertion than an inventory search was conducted pursuant to police department policy is not sufficient to demonstrate the validity of that search. *State v. Wilcoxson* (July 25, 1997), Montgomery App. No. 15928. Rather, the evidence must demonstrate that the police department has a standardized, routine policy, what that policy is, and how the officer's conduct conformed to it. *Id.*

{¶17} In this case the testimony by the police officers reasonably demonstrates that the policy of the Dayton police department authorizes towing a vehicle whenever the driver and sole occupant of that vehicle has been arrested, and/or the vehicle will obstruct traffic if left where it is. Prior to towing the vehicle, an inventory of the vehicle's contents must be taken, noting any valuable items in order to protect police and the towing company from later claims of lost or stolen property.

{¶18} The decision to impound and tow the vehicle in this case was reasonable and in accordance with Dayton police department policy because Defendant, the driver and only occupant of the vehicle, was under arrest and on his way to jail, and the vehicle was obstructing traffic in the alley. The State is not required to prove that there is no alternative to towing the vehicle. *State v. Cuccia* (July 14, 2000), Montgomery App. No. 18006. The purpose of these officers in inventorying Defendant's vehicle was to make a record of any valuable items left inside the car. As for opening closed or locked containers or compartments during the inventory, Officer Henderson's testimony indicates that the policy permits not opening those items only if they cannot be opened and no key is available. If a key is available, the officer does not have the authority not to open them.

{¶19} Contrary to Defendant's assertions, an inventory search is not invalid just because it is conducted before

the vehicle is impounded. *Cuccia, supra*; *State v. Peagler*, 76 Ohio St.3d 496, 1996-Ohio-73. Indeed, the purpose of the search is to avoid the loss of property after the vehicle has been impounded. Moreover, the inventory search is not limited to items in plain view. Officers may inventory the contents of closed containers and compartments so long as the search is administered in accordance with reasonable police procedures. *Id.*; *South Dakota v. Opperman* (1976), 428 U.S. 364, 96 S.Ct. 3092.

{¶20} On this record the inventory search conducted by Officers Ables and Henderson was undertaken in good faith and in accordance with their department's standard policy. Thus, the inventory search was valid. Even assuming, arguendo, that some deficiency existed in the inventory procedures used in this case, the search of Defendant's vehicle, including the glove box, nevertheless did not violate Defendant's Fourth Amendment rights because as we previously noted, police already had probable cause to conduct a warrantless search of that vehicle for marijuana as a result of having smelled it. *Moore, supra*.

{¶21} The first and second assignments of error are overruled.

THIRD ASSIGNMENT OF ERROR

{¶22} "THE CONVICTION SHOULD BE REVERSED BECAUSE APPELLANT WAS CHARGED UNDER A STATUTE THAT HAS SINCE BEEN RULED UNCONSTITUTIONAL, AND PART OF THE PLEA AGREEMENT CALLED FOR THE DISMISSAL OF THAT UNCONSTITUTIONAL CHARGE."

{¶23} Defendant argues that he is entitled to a reversal of his conviction because of the decision in *Klein v. Leis,* 146 Ohio App.3d 519, 2002-Ohio-1634. In that case the Hamilton County Court of Appeals held that Ohio's carrying concealed weapons statute, R.C. 2923.12, is unconstitutional.

{¶24} Defendant claims that his decision to accept the State's plea offer in this case and enter a no contest plea to the cocaine possession charge in exchange for a dismissal of the carrying concealed weapons charge was not knowingly, intelligently, and voluntarily made. This is so, Defendant asserts, because he was not aware that the carrying concealed weapons charge was constitutionally invalid, that the State could not lawfully prosecute him for that offense, and thus that the State's concession in dismissing that charge as part of the plea bargain was meaningless. Defendant argues that the plea bargain he entered into should be invalidated because he was under a misapprehension that the State could lawfully prosecute him for carrying concealed weapons.

{¶25} We note that Defendant's no contest plea in this case was entered on or about December 6, 2001, some four months before the decision in *Klein v. Leis* was handed down on April 10, 2002. Absent misrepresentation by State agents, a voluntary plea of guilty, intelligently made in light of the then applicable law, does not become invalid because later judicial decisions indicate that the plea

rested upon a faulty premise. *Brady v. United States* (1970), 397 U.S. 742, 756.

{¶26} Moreover, because the decision in *Klein v. Leis* was handed down before recent revisions to the Supreme Court Rules for the Reporting of Opinions went into effect on May 1, 2002, that decision is clearly not controlling authority upon the courts in Montgomery County. See: S.Ct.R. Rep.Op.2(G). In any event, the Ohio Supreme Court has issued a stay of the Court of Appeals decision in *Klein v. Leis* on April 25, 2002. Ohio Supreme Court Case No. 2002-0585. Defendant did not challenge the constitutionality of R.C. 2923.12 in the trial court below, and thus we cannot consider a claim of unconstitutionality made for the first time on appeal. *Peagler, supra*.

{¶27} The third assignment of error is overruled. The judgment of the trial court will be affirmed.

WOLFF, P.J., and YOUNG, J., concur.