[Cite as *State v. Greene*, 2002-Ohio-5530.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 19193

vs. : T.C. CASE NO. 01CR1910

DALE L. GREENE : (Criminal Case from Common Pleas Court)

Defendant-Appellant :

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O P I N I O N

Rendered on the 11th day of October, 2002.

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GRADY, J.

{¶1} Defendant, Dale Greene, appeals from his conviction and sentence for carrying concealed weapons.

{¶2} On June 7, 2001, at approximately 1:00 p.m., Kettering Police Officer Larry Tobias was dispatched to the intersection of Jaybee Court and Wilmington Pike to assist Officer Gary Collins with the stop of an intoxicated person. When Officer Tobias

arrived on the scene, Officer Collins was speaking with Defendant. Several restaurants and commercial businesses are in that area, and the traffic volume was very heavy at the time.

{¶3} Officer Tobias noted that Defendant appeared to be under the influence of alcohol. Defendant had a strong odor of alcohol about his person, he was unsteady and swaying on his feet, and he exhibited bloodshot eyes and slurred speech.

{¶4} Defendant told the officers that he had dropped his car off at a nearby Pep Boys garage to be serviced, and after that walked to Blair's Lounge, where he drank five beers, and was then on his way back to Pep Boys to pick up his car. The officers administered a horizontal gaze nystagmus test, and after Defendant failed he was arrested for public intoxication. A subsequent search of Defendant's person produced a loaded semi-automatic pistol concealed under his jacket near the small of his back. Defendant told police he did not want to leave the gun in his car while it was being serviced.

{¶5} Officer Tobias testified that Defendant was not able to properly care for himself in his impaired state, and he was therefore arrested because he posed a danger to himself and others. In order to return to Pep Boys, Defendant would have had to cross five lanes of heavy traffic. Police were concerned that Defendant might stumble into the heavy traffic flow and be hit or cause a traffic accident. While the officers were investigating Defendant they also discovered that he had no driving privileges. There was no other person with Defendant, and they decided to not allow Defendant to get into his car and drive off.

{¶6} Defendant was subsequently indicted on one count of carrying concealed

weapons. R.C. 2923.12(A). Defendant filed a motion to suppress the evidence, arguing that his arrest for public intoxication, a minor misdemeanor offense, violated R.C. 2935.26(A). Following a hearing the trial court overruled Defendant's motion to suppress. Defendant then entered a no contest plea to the carrying concealed weapons charge and was found guilty. The trial court sentenced Defendant to five years of community control sanctions.

{¶7} Defendant timely appealed to this court from his conviction and sentence. He presents one assignment of error challenging the trial court's judgment overruling his motion to suppress.

ASSIGNMENT OF ERROR

{¶8} "THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS THE GUN WHEN THERE WAS NO PROBABLE CAUSE FOR AN ARREST."

{¶9} Defendant argues that his arrest for the minor misdemeanor offense of public intoxication is unlawful because it violates R.C. 2935.26(A), as well as his Fourth Amendment rights. Therefore, the gun recovered from his person as a result of that unlawful arrest should have been suppressed by the trial court as fruit of the poisonous tree. See: *State v. Jones*, 88 Ohio St.3d 430, 2000-Ohio-374.

{¶10} Officer Tobias testified at the suppression hearing that when he first encountered Defendant on the sidewalk at the intersection of Jaybee Court and Wilmington Pike, he noticed that Defendant was unsteady and swaying on his feet, had a strong odor of alcohol about him, and had bloodshot eyes and slurred speech. Police administered a horizontal gaze nystagmus test that Defendant failed, exhibiting all six

clues for intoxication. Accordingly, these officers clearly had probable cause to believe that Defendant was intoxicated and the record supports that conclusion.

{¶11} Defendant does not dispute that police had probable cause to believe he was committing the offense of public intoxication. That offense, however, is a minor misdemeanor. Police are prohibited from making an arrest for a minor misdemeanor offense. R.C. 2935.26(A); *State v. Lowe* (June 19, 1998), Montgomery App. No. 16854. There are exceptions to that rule, however, one of which involves situations where an offender is unable to provide for his own safety. *Lowe, supra*; R.C. 2935.26(A)(1). Defendant argues that the record lacks sufficient evidence to support the trial court's conclusion that police had probable cause to believe that Defendant, in his intoxicated state, posed a danger to himself or others and could not provide for his own safety, justifying his arrest pursuant to R.C. 2935.26(A)(1).

{¶12} Defendant told the officers that he had dropped his car off at Pep Boys to be serviced, that he walked up to Blair's Lounge where he drank five beers, and that he was then on his way back to Pep Boys to pick up his car. It was reasonable for the officers to believe that Defendant posed a very real danger to himself or others because of his impaired condition, given the officers' observations of Defendant, his poor performance on the horizontal gaze nystagmus test, the heavy volume of traffic in the area where Defendant was located, and the fact that Defendant would have to cross five lanes of traffic in order to get back to Pep Boys. *Lowe, supra*. Removal of a highly impaired person from along the side of the highway is a perfect example of a situation for which the "safety" exception in R.C. 2935.26(A)(1) was created. See *State v. Mullins* (May 19, 2000), Montgomery App. No. 17892.

{¶13} It was also reasonable under all of the existing facts and circumstances for these officers to believe that Defendant was alone and about to get into his vehicle and drive off in an obviously impaired stated, thus posing a danger to himself or others. *State v. Greene* (April 19, 2002), Montgomery App. No. 19163, 2002-Ohio-1886. Defendant's arrest pursuant to the "safety" exception in R.C. 2935.26(A)(1) was lawful. Having been lawfully arrested, the subsequent search of Defendant's person incident to that arrest did not violate his Fourth Amendment rights. *Chimel v. California* (1969), 395 U.S. 752, 89 S.Ct. 2034; *United States v. Robinson* (1973), 414 U.S. 218, 94 S.Ct. 467.

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

BROGAN, J. and FAIN, J., concur.

Copies mailed to:

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Hon. Barbara Pugliese Gorman