[Cite as *State v. Wilson*, 2007-Ohio-6581.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 22001
Plaintiff-Appellant	:	
	:	Trial Court Case No. 06-CR-3230
v.	:	
	:	(Criminal Appeal from
KEITH E. WILSON	:	Common Pleas Court)
	:	
Defendant-Appellee	:	

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O P I N I O N

Rendered on the 7th day of December, 2007.

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BROGAN, J.

{¶ 1} The State of Ohio appeals, pursuant to R.C. 2945.67 and Crim.R. 12(K), from the trial court's decision and entry sustaining a suppression motion filed by Appellee, Keith E. Wilson.

{¶ 2} In its sole assignment of error, the State contends the trial court erred in suppressing a handgun and cocaine found in Wilson's possession when police approached him at gunpoint and opened the door of a car in which he was a passenger.

{¶ 3} Suppression hearing testimony reveals that law-enforcement officers from several jurisdictions were conducting undercover surveillance at a local gun and knife show. Some of the officers observed Wilson attempting to sell a handgun inside the show. They watched as Wilson talked to an individual later identified as Terrence Little. The two men proceeded outside into a parking lot, where Dayton police officer Timothy Bilinski saw Wilson sell Little a handgun. Little then got into a vehicle and drove away. Wilson went back inside the show and bought another handgun, which he unsuccessfully tried to sell.

{¶ 4} Trotwood police stopped Little for a traffic violation not long after he left the show. Upon doing so, they found the handgun he had purchased and discovered that he was a convicted felon. For his part, Wilson left the show as a front seat passenger in a rented SUV shortly after police stopped Little. Officer Bilinski testified that he ran a license registration check on the SUV and determined at that time that the vehicle was a rental. Bilinski followed the SUV in an unmarked police car. He also contacted his dispatcher and asked for a marked cruiser to stop the SUV. Bilinski advised the dispatcher that the front seat passenger in the SUV had a handgun.

{¶ 5} Bilinski testified that he wanted the SUV stopped to obtain Wilson's name. According to Bilinski, he anticipated that Wilson might be a witness in a criminal case against Little for being a felon in possession of a firearm. Bilinski conceded that when

he ordered the SUV stopped, he had no reason to believe Wilson had violated any local, state, or federal law. He testified that it was not illegal for Wilson to sell the handgun to Little, provided that Wilson was unaware of Little's status as a convicted felon. He added that he had no basis to believe Wilson was aware of Little's status. Bilinski also testified that it was not illegal for Wilson to leave in the SUV with the second handgun, provided that it was unloaded. Bilinski reiterated several times that Wilson was not suspected of committing any crime and that the sole purpose for ordering the stop was to obtain Wilson's name as a potential witness against Little.

{¶ 6} Before police could stop the SUV, it pulled into the parking lot of a Subway restaurant. The driver of the SUV went inside, leaving Wilson in the front passenger seat and an unidentified female in the back seat. Bilinski also pulled into the Subway parking lot and watched the SUV until assistance arrived. Shortly thereafter, Dayton police officer Daniel Reynolds entered the parking lot in a marked cruiser. Reynolds testified that he had been advised only to stop the SUV because the front seat passenger was armed with a handgun. He further stated that he had not observed any violations of local, state or federal law. Reynolds exited his vehicle and approached the SUV with his gun drawn and pointed at Wilson. Reynolds testified that the SUV had tinted windows, but he still could see inside because they were not extremely dark. Reynolds ordered Wilson to keep his hands up while another officer opened the passenger side door. When the door opened, Reynolds saw a pistol lying on Wilson's thigh. He also saw a baggie of cocaine between Wilson's legs. Police removed Wilson from the car and subsequently discovered that the pistol was loaded.

{¶ 7} As a result of the foregoing events, Wilson was charged with improper handling of a firearm in a motor vehicle and possession of cocaine. The trial court suppressed the evidence, however, reasoning as follows:

{¶ 8} "The officers, in this case, did not have probable cause to stop the Defendant. The officer, ordering the stop of this defendant, admitted that he did not witness the Defendant violate any local, state or federal law prior to initiating the stop of the Defendant. Further, the officer admitted he did not witness any criminal activity prior [to], during or after the stop occurred. Based on these observations, or lack thereof, the officers lacked the requisite reasonable and articulable suspicion that any violation of law occurred, traffic or otherwise. Therefore, the officer acted without probable cause to stop and detain the Defendant and all evidence seized is hereby suppressed." (Doc. #30 at 2-3).

{¶ 9} On appeal, the State does not dispute that a Fourth Amendment "seizure" occurred in this case. Nor does the State challenge the trial court's finding of no articulable suspicion or probable cause to support the officers' actions. Instead, relying on *Illinois v. Lidster* (2004), 540 U.S. 420, 124 S.Ct. 885, 157 L.Ed.2d 843, the State asserts that no individualized suspicion was required because the sole purpose of seizing Wilson was to obtain his name as a potential witness against Little. According to the State, *Lidster* supports a finding that no individualized suspicion was required to justify this information-seeking detention. Upon review, we find the State's argument to be unpersuasive.

{¶ 10} When considering a motion to suppress, the trial court assumes the role of

the trier of facts and, as such, is in the best position to resolve conflicts in the evidence and determine the credibility of the witnesses and the weight to be given to their testimony. *State v. Retherford* (1994), 93 Ohio App.3d 586, 592, 639 N.E.2d 498. We must accept the trial court's findings of fact if they are supported by competent evidence in the record. Id. Accepting those facts as true, we independently must determine, as a matter of law and without deference to the trial court's legal conclusion, whether the trial court erred in applying the substantive law to the facts. Id.

{¶ 11} In the present case, the trial court's factual findings generally are supported by the suppression hearing testimony and are consistent with the relevant facts we have set forth above. We note, however, that one factual finding made by the trial court is not supported by the record. The trial court found that officer Bilinski ordered the SUV stopped either "to secure [Wilson] as a witness against Little" or because Wilson "had committed an offense by selling a gun to a convicted felon." Bilinski actually testified several times that the only reason he ordered the SUV stopped was because he wanted to obtain Wilson's identity as a potential witness against Little. The record contains no evidence that Bilinski ordered the vehicle stopped because he believed Wilson may have committed some crime. To the contrary, Bilinski admitted that he had no reason to believe Wilson had violated any local, state, or federal law.

{¶ 12} With regard to the trial court's legal conclusions, the State does not challenge the trial court's finding of no articulable suspicion or probable cause. As noted above, the only issue raised on appeal is whether any degree of individualized suspicion was necessary here. Unfortunately, the trial court did not address this issue in

its suppression ruling. Its failure to do so, however, appears to stem from the State's failure to clearly articulate its *Lidster* argument in proceedings below. The State's post-hearing memorandum fails to mention *Lidster* and asserts, among many other things, that reasonable, articulable suspicion did exist. Having examined the suppression hearing transcript and the State's post-hearing memorandum, we believe the State arguably waived the argument it now advances. It is axiomatic that a party cannot raise new arguments for the first time on appeal. See *State ex rel. Gutierrez v. Trumbull Cty. Bd. of Elections* (1992), 65 Ohio St.3d 175, 177, 602 N.E.2d 622.

{¶ 13} Even assuming that the State's *Lidster* argument is properly before us, we find it to be unpersuasive. In *Lidster*, the United States Supreme Court upheld the constitutionality of a highway checkpoint used by police to obtain information from motorists about a recent hit-and-run accident. While recognizing that the checkpoint stop constituted a seizure without any individualized suspicion of wrongdoing by the motorists, the majority found no Fourth Amendment violation. If the purpose of the checkpoint had been to determine whether the vehicles' occupants had committed a crime, the justices reasoned that the stop would have been presumptively unconstitutional absent individualized suspicion. Id. at 423, citing *Indianapolis v. Edmond* (2000), 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333. Because the purpose of the checkpoint was to seek information about a crime committed by others, however, the majority determined that the "lack of individualized suspicion cannot by itself determine the constitutional outcome." Id. at 424. Instead, *Lidster* held that the particular circumstances of the checkpoint stop must be judged against the Fourth

Amendment's general "reasonableness" requirement. Id. at 426. In judging reasonableness, the majority balanced " 'the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.' " Id. at 427, quoting *Brown v. Texas* (1979), 443 U.S. 47, 51, 99 S.Ct. 2637, 61 L.Ed.2d 357. The *Lidster* court then concluded that the relevant public concern (investigation of a crime involving a fatality) was great and that the checkpoint stop significantly advanced the public concern. Id. "Most importantly," the majority reasoned, "the stops interfered only minimally with liberty of the sort the Fourth Amendment seeks to protect." Id. In reaching this conclusion, the Court noted that the brief stops consisted of a request for information and the distribution of a flyer with little subjective reason "for anxiety or alarm." Id. at 428. As a result, the Court held that the checkpoint stop was constitutional.

{¶ 14} The State contends *Lidster* applies by analogy here because Wilson was seized solely for information-seeking purposes, namely to determine his identity so he could be called as a witness against Little. Applying the three-part reasonableness test set forth above, the State asserts (1) that the public concern was significant because Wilson was a witness to Little's illegal weapon purchase, (2) that the seizure of Wilson substantially advanced the public interest because it facilitated the discovery of his identity, and (3) that the seizure would have been brief if Wilson had not been sitting with a bag of cocaine between his legs. As for the officers' approach with weapons drawn, the State contends they acted reasonably because they knew Wilson had a handgun in the SUV.

{¶ 15} Upon review, we agree with the State that a significant public concern was involved. Although the present case did not involve a fatality like *Lidster*, it did involve the investigation of a crime nonetheless. However, seizing Wilson to obtain his identity was not necessary to advance the public interest. In the alternative, the officers could have followed the driver of the SUV into the Subway restaurant and inquired about Wilson's identity. They also potentially could have followed the SUV to see where Wilson or the driver lived or obtained the rental information about the SUV and ultimately discovered Wilson's identity by speaking to whomever rented the vehicle.

{¶ 16} Furthermore, the present case bears no similarity to *Lidster* with regards to the severity of the officers' interference with Wilson's individual liberty. The severity of the interference with individual liberty is gauged by the " 'objective' intrusion, measured by the duration of the seizure and the intensity of the investigation," and by the " 'subjective' intrusion," measured by the "fear and surprise engendered in law-abiding motorists by the nature of the stop." *Michigan Dept. of State Police v. Sitz* (1990), 496 U.S. 444, 452, 110 S.Ct. 2481, 110 L.Ed.2d 412.

{¶ 17} The seizure in *Lidster* involved stopping motorists at a checkpoint, and the officers' contact with the motorists lasted only a few seconds and involved a simple request for information. The *Lidster* court stressed that the systematic stops "provided little reason for anxiety or alarm." 540 U.S. at 428. Conversely, the seizure here involved at least one officer approaching Wilson at gunpoint and ordering him to keep his hands up. Moreover, the officers did not ask Wilson his name, which was the stated justification for the stop. Instead, one officer effectively conducted a limited search of

the SUV by opening the passenger-side door at which time he observed cocaine and a handgun in Wilson's lap.[1] We question whether the United States Supreme Court would have approved the checkpoint stop in *Lidster* if the officers there had engaged in similar conduct.

{¶ 18} We are not unsympathetic to the State's argument that the officers approached Wilson as they did out of concern for their own safety. Although their actions are understandable, the fact remains that the seizure in the present case was avoidable, and it interfered with Wilson's liberty significantly more than the seizure in *Lidster*. See *Walker v. City of Orem* (C.A.10, 2006), 451 F.3d 1139, 1149. Furthermore, unlike *Lidster*, we cannot say the seizure provided Wilson with "little reason for anxiety or alarm." As for the officer-safety issue, we note too that nothing compelled police to approach Wilson as he sat in the SUV. If the officers feared for their safety, they certainly could have chosen to exercise one of the alternatives we discussed above.

{¶ 19} In any event, officer Bilinski testified that it was not illegal for a person in a vehicle to be transporting a handgun, which is all the officers knew Wilson was doing. If the mere presence of the gun made the officers nervous, they were free to avoid an information-seeking encounter with Wilson, who was not suspected of any criminal activity. Cf. *Terry v. Ohio* (1968), 392 U.S. 1, 32-33, 88 S.Ct. 1868, 20 L.Ed.2d 889,

[1]Although the State argued below that the cocaine was in plain view, the record contains no testimony establishing that officers observed it until after one of them opened the SUV's door.

Harlan, J., concurring ("Any person, including a policeman, is at liberty to avoid a person he considers dangerous. If and when a policeman has a right instead to disarm such a person for his own protection, he must first have a right not to avoid him but to be in his presence. That right must be more than the liberty (again, possessed by every citizen) to address questions to other persons, for ordinarily the person addressed has an equal right to ignore his interrogator and walk away; he certainly need not submit to a frisk for the questioner's protection.").

{¶ 20} In sum, we conclude that the present case is distinguishable from *Lidster* insofar as seizing Wilson was not the only means of advancing the public's concern toward the purchase of illegal weapons. Moreover, the intrusion on Wilson's liberty was significantly greater than the intrusion created by the checkpoint at issue there. Viewed objectively, the circumstances surrounding the seizure of Wilson fairly can be described as intense. Viewed subjectively, the fear and surprise engendered by the nature of the seizure were significant. *Sitz*, supra. Thus, having examined the "individual circumstances" of this case, as *Lidster* instructs, we hold that the seizure of Wilson for purposes of obtaining his identity was not reasonable under the Fourth Amendment. Accordingly, we overrule the State's assignment of error.

{¶ 21} The judgment of the Montgomery County Common Pleas Court is affirmed.

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GRADY, J., and DONOVAN, J., concur.

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