[Cite as *State v. Rutledge*, 2009-Ohio-3646.]

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

STATE OF OHIO	:	
	:	Appellate Case No. 23108
Plaintiff-Appellee	:	
	:	Trial Court Case No. 08-CR-643
v.	:	
	:	
KEON L. RUTLEDGE	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 24th day of July, 2009.

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BROGAN, J.

{¶ 1} Keon Rutledge appeals from his conviction, in the Montgomery County Common Pleas Court, of possession of cocaine, pursuant to a no contest plea. In a single assignment of error, Rutledge contends the trial court erred in refusing to suppress the cocaine police recovered after Rutledge's vehicle was stopped.

{¶ 2} During a hearing on Rutledge's motion to suppress, the parties stipulated that if Officer Joseph Setty was called to testify he would testify to the following facts as found in his police report:

{¶ 3} "On 02/07/08 at 1633 hours, I, Unit 234B, was I [sic] the uniform of the day driving a marked cruiser in the area of Wyoming and Illinois. I was traveling westbound on Wyoming. At that time I observed the listed vehicle, a gray 2001 Buick Century bearing Ohio registration EHD2641, traveling northbound on Illinois. I observed the vehicle failed to stop at a red light when it was turning right onto Wyoming. I also noticed the windows on the vehicle had dark window tint. I then turned around to catch up with the vehicle. I turned on my overhead emergency lights and conducted a traffic stop on the vehicle at Wyoming and Phillips. The listed vehicle pulled into the lot of the United Dairy Farmers located at 1820 Wyoming Street. I exited my cruiser and approached the driver side door. As I stood next to the driver side door, with my training and experience, I detected a strong smell of marijuana emanating from the driver side window. I asked the driver for an ID and advised him the reason for the stop. The driver fumbled through his wallet for a short time and located an Ohio Driver's license with the name of Keon Rutledge. I asked Mr. Rutledge where he was going and he stated to get the car fixed at the paint shop. I noticed Mr. Rutledge was acting very nervous. I asked him for his social security number which he read off very quickly to me. I had to ask Mr. Rutledge to repeat it several times and then on the final time he repeated it to me he still gave it to me incorrectly. I returned to my cruiser and asked for Officer Bauer to come to my location with a tint meter. Once Officer Bauer arrived on scene, we approached the vehicle and Officer Bauer and [sic] tested the driver side front window which tested

thirty-three percent; a legal tint measurement would be fifty percent or more. I asked Mr. Rutledge if there were any drugs, guns, or bazookas inside the vehicle and he stated no. Based on the fact that I smelled a strong odor of marijuana emanating from the vehicle, I asked Mr. Rutledge to exit the vehicle. As he was doing so I asked Mr. Rutledge if [sic] had any drugs or guns on him and [sic] stated no. I asked Mr. Rutledge if I could search him and he stated sure. During the search I located a baggy of capsules of suspected heroin in his left jacket pocket. I asked Mr. Rutledge what was inside the capsules and he stated 'I don't know.' I also located $1,790.00 in cash in his left pants pocket. I asked Mr. Rutledge how much money he had on his person and he stated $600.00. I placed Mr. Rutledge in the rear of my marked cruiser. At this time Officer Cope, Officer Trupp, and Officer Brooks arrived on scene. Myself and Officer Bauer conducted a search of the vehicle. Officer Bauer located three (3) baggies of marijuana and a scale in the center console. The scale had suspected white cocaine residue on it. Officer Bauer also located two (2) other baggies of marijuana in a red shopping bag on the floorboard next to the driver seat. I located another baggy of heroin capsules, the same capsules and same baggy type that was located on Mr. Rutledge in his pocket. Those capsules were found in the glove box along with a baggy of crack cocaine, a baggy of powder cocaine and three (3) baggies of marijuana in the glove box (all located in the glove box). I located $15.00 wrapped around a baggy of marijuana which was located in a black book bag located on the backseat behind the driver. Officer Cope tested a capsule from both baggies of capsules with cobalt reagent which immediately turned blue signifying the presence of heroin. Officer Trupp tried to test the power [sic] cocaine with a cobalt reagent which did not turn blue. I also located a box of 150

baggies and several other baggies inside the vehicle which were throughout the vehicle. Officer Cope read Mr. Rutledge his *Miranda* rights from the card provided by the Montgomery County Prosecutor's Office. Officer Brooks placed handcuffs onto Mr. Rutledge at this time. Mr. Rutledge advised to Officer Cope that he understood his rights and did not wish to speak to officers without a lawyer present."

{¶ 4} After Rutledge was indicted on a number of drug charges, he moved to suppress the drugs found on him and in his vehicle. Rutledge contended the trial court should have suppressed the drugs found on him and in his vehicle because they were discovered after a prolonged and unreasonable detention. The trial court found the sixteen-minute detention before the drugs were found was not unreasonable because Officer Setty was waiting for another officer to deliver a tint meter, and he was involved in issuing a citation for the red light violation. The trial court also found that Rutledge had consented to the search of his person and his automobile.

{¶ 5} In his sole assignment of error, he contends the trial court erred by overruling his motion to suppress. Relying upon *Illinois v. Caballes* (2005), 543 U.S. 405, he contends his prolonged detention of sixteen minutes for a routine red light violation and window tint violation was an unreasonable seizure. Rutledge also contends , citing our decision *State v. Connors-Camp*, Montgomery App. No. 20850, 2006-Ohio-409, that the trial court committed clear error in finding consent from the stipulated evidence because it is unclear from the video if he actually consented. The State must show, by clear and convincing evidence, that the consent was voluntary. Id.

{¶ 6} The State responds by asserting that the trial court was correct in overruling Rutledge's motion to suppress. The State argues that the length of the stop

was reasonable and in light of the circumstances (odor of marijuana, Rutledge's nervous actions, the need for another officer and routine matters involved with the stop), the officer diligently conducted the investigation. See *State v. Chatton*, 11 Ohio St.3d 59, *State v. Aguirre*, Gallia App. No. 03CA5, 2003-Ohio-4909. The State also asserts that Rutledge was asked by the officer if he could be searched and Rutledge said "sure." The State points out that there is no evidence present suggesting the officer coerced or threatened Rutledge to obtain consent. Additionally, the State argues that the odor of marijuana detected by the officer was sufficient for probable cause to search the vehicle. See *State v. Moore*, 90 Ohio St.3d 47, 2000-Ohio-10.

{¶ 7} It is well settled law that an investigative detention must be temporary and last no longer than necessary to be effective for the purpose of the stop. *Florida v. Royer* (1983), 460 U.S. 491; *State v. Kerns* (March 16, 2001), Montgomery App. No. 18439. The officer is required to diligently pursue a means of investigation that is likely to confirm or dispel his or her suspicion quickly, during the time it was necessary to detain the defendant. *United States v. Sharpe* (1985), 470 U.S. 675. In order to determine if an officer completed his or her task within a reasonable length of time, the Court must evaluate the length of the stop in light of the totality of the circumstances and consider whether the officer diligently conducted the investigation. See *State v. Carlson* (1995), 102 Ohio App.3d 585.

{¶ 8} In this case, Rutledge was searched and drugs were found on him sixteen minutes after the stop occurred. Looking at the circumstances, given the routine matters involved in a citation for a red light violation, locating another officer for the tint meter, the odor of marijuana smelled by the officer, and the nervous actions of Rutledge,

sixteen minutes was a reasonable time for Officer Setty to detain Mr. Rutledge. Rutledge relies on *United States v. Blair*, 524 F.3d 740, 752. In *Blair*, the Sixth Circuit held that a police officer impermissibly extended the scope and duration of a traffic stop beyond that necessary to issue a traffic citation for a tag light violation, when, after bing denied consent to search the defendant's car, the officer informed the defendant that he believed drugs were in the car and that he would call a canine unit to the scene.

{¶ 9} Unlike *Blair*, it was impossible for Officer Setty to complete the stop immediately because he had to wait for another officer to bring the tint meter so that he could test the car windows. With the tint on the car windows being one of the purposes of the stop, it was necessary to wait on the meter. There was no practical way the stop could have concluded more expeditiously than it did. Therefore, the sixteen minute detention, in this case, was necessary and efficient. Accordingly, the length of the stop was not an unreasonable seizure of Rutledge.

{¶ 10} The general rule of law for a suspect's consent to search is the consent must be voluntary based on the totality of the circumstances. *Schneckloth v. Bustamonte* (1973), 412 U.S. 218. The State must prove voluntary consent was given by clear and convincing evidence. *Bustamonte*, supra; *Connors-Camp*, supra. In the instant action, the trial court found that in the unrebutted, stipulated evidence, obtained from Officer Setty's offense report, the officer asked if it was okay to search Rutledge and Rutledge responded by saying "sure." The trial court also found in the stipulated video tape that Rutledge appeared to say, "that's all right."

{¶ 11} Rutledge argues, under our decision in *Connors-Camp*, that the responses on the tape were "muffled and inaudible", and by speculating as to what was said, the

trial court ignored the State's heavy burden of proof because it was not clear and convincing evidence. The trial court was, however, free to believe Officer Setty's account of the facts as set out in his report, and Rutledge did not offer any testimony on the consent issue. From Setty's report and the court's view of the tape, the trial court could conclude there was clear and convincing evidence Rutledge consented to the search.

{¶ 12} In addition, voluntary consent was not needed by Setty to search the vehicle. The smell of marijuana, alone, by a person qualified to recognize the odor, is sufficient to establish probable cause to conduct a search. See *Moore*, supra. In this case, the stipulated testimony gathered from the trial court stated, "with my [Officer Setty] training and experience, [I] detected a strong smell of marijuana emanating from the driver side window." Under *Moore*, once Officer Setty, being a person qualified to recognize the odor, detected the smell of marijuana, at that point forward, he had the requisite evidence needed for probable cause to search Rutledge. Regardless, the issue of Rutledge voluntarily consenting to the search is superfluous because his consent was no longer needed after the detection of the odor of marijuana by Officer Setty. Therefore, the search of Rutledge was lawful.

{¶ 13} Appellant's assignment of error is Overruled. The judgment of the trial court is Affirmed.

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

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