[Cite as *State v. Tooson*, 2009-Ohio-6269.]

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

STATE OF OHIO	:	
	:	Appellate Case No. 23290
Plaintiff-Appellee	:	
	:	Trial Court Case No. 08-CR-2276
v.	:	
	:	(Criminal Appeal from
DAMEON J. TOOSON	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 25th day of November, 2009.

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Defendant-Appellant, *pro se*

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FAIN, J.

{¶ 1} Defendant-appellant Dameon Tooson appeals from his conviction and sentence for Having Weapons Under Disability. He presents two assignments of error, arguing that his motion to suppress should have been granted and that his indictment should have been dismissed as defective. We conclude that the trial

court properly denied Tooson's motion to suppress and that his indictment is not defective. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 2} On the night of June 4, 2008, Tooson was parked on Emmet Street, a public road adjacent to Five Rivers Metro Park property. Most of the houses on the street were abandoned, and the area had a reputation for a high amount of criminal activity, including drug, alcohol, and weapons violations. Due to ongoing citizen complaints, Five Rivers Metro Park Sergeant John Rieder was on patrol in the area. Upon seeing Tooson's truck, the officer called for back up and parked on another street about half a mile away. As Sergeant Rieder approached the truck on foot, he noticed that the window was rolled down, and he could smell burnt marijuana. Once at the truck, the officer also noticed the odor of alcohol.

{¶ 3} Sergeant Rieder advised Tooson that he could smell the marijuana and alcohol and asked Tooson to step out of the vehicle. Tooson admitted to having had a glass of wine, but denied having marijuana. By this time, Five River Metro Parks Officer Gaby had arrived. While Officer Gaby waited with Tooson, Sergeant Rieder walked to the passenger side of the truck and illuminated the interior with his flashlight. He saw what he recognized to be a marijuana cigarette in the ashtray.

{¶ 4} Sergeant Rieder asked Tooson about the marijuana, and Tooson admitted that it was his, expressing concern about being arrested, which he feared would put his job in jeopardy. Sergeant Rieder advised him that possession of a marijuana cigarette was not an arrestable offense. Sergeant Rieder returned to the

truck and opened the driver's door. He saw a gun in plain view on the floor between the driver's seat and the door. At that point, Tooson was placed under arrest, and the truck was searched.

{¶ 5} Tooson was indicted on one count of Carrying a Concealed Weapon and one count of Having Weapons Under Disability. He filed a motion to suppress, which the trial court overruled. Tooson decided to proceed without the benefit of counsel, and his attorney withdrew. Tooson filed a motion to dismiss the indictment and two additional motions to suppress, all of which the trial court overruled. Tooson pled no contest to Having Weapons Under Disability, and the Carrying a Concealed Weapon charge was dismissed. He was sentenced to up to five years of community control.

{¶ 6} From his conviction and sentence, Tooson appeals.

II

{¶ 7} Tooson's First Assignment of Error is as follows:

{¶ 8} "THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS OR DISMISS."

{¶ 9} In his First Assignment of Error, Tooson argues that the trial court should have granted his motion to suppress, because the officer stopped him outside of the officer's jurisdiction, without reasonable articulable suspicion of criminal activity. He also claims that the stop was pretextual, and that his car was searched without probable cause, as a result of an illegal detention. We conclude that Sergeant Rieder was acting within his jurisdiction when he initiated a consensual encounter with Tooson, who was parked on a public road adjacent to Metro Parks property. Once Sergeant Rieder

smelled the odor of marijuana coming from the truck, he had probable cause to search it. Moreover, when he opened the driver's door, he saw a gun in plain view on the floor between the driver's seat and the door. Accordingly, the trial court properly overruled Tooson's motion to suppress.

{¶ 10} When deciding a motion to suppress evidence, an appellate court is bound to accept the trial court's factual findings if they are supported by competent and credible evidence, and the appellate court must then independently determine as a matter of law if the minimum constitutional standard has been met. *State v. Williams* (1993), 86 Ohio App.3d 37, 41, 619 N.E.2d 1141. In this case, the trial court gave no written factual findings, and its findings on the record are slim. However, the evidence offered by the State's witnesses at the suppression hearing was undisputed. The officers' testimony was plausible, and we have no reason to assume that the trial court disbelieved any of it.

{¶ 11} Tooson begins by arguing that Sergeant Rieder was outside of his jurisdiction when he stopped Tooson. Park district law enforcement officers are authorized to "exercise all the powers of a police officer within *and adjacent to* the lands under the jurisdiction and control of the board" of park commissioners. R.C. 1545.13(B) (emphasis added). See, e.g., *State v. Nunnally* (1992), 83 Ohio App.3d 741, 744. Sergeant Rieder's unrefuted testimony was that Tooson's truck was parked on a public street immediately adjacent to the Metro Parks property. There was testimony that the place where Tooson parked was used as a place for people to park who wished to enter the park, rendering that area functionally adjacent to the park. Therefore, Sergeant Rieder was not acting outside of his jurisdiction when he

approached Tooson's truck.

{¶ 12} Furthermore, Sergeant Rieder did not "stop" Tooson. Sergeant Rieder testified that he walked up to Tooson's truck, which was parked on the public road. A police officer may approach a person in a public place without implicating the Fourth Amendment, as long as "the police officer has not, by physical force or a display of authority, restrained the person's liberty such that a reasonable person would not feel free to walk away." *State v. Schott* (May 16, 1997), Darke App. No. 1415, citing *United States v. Mendenhall* (1980), 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497; *Terry v. Ohio* (1968), 392 U.S. 1, 21-2, 88 S.Ct. 1868, 20 L.Ed.2d 889. See, also, *Florida v. Bostick* (1991), 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389, citing *Florida v. Royer* (1983), 460 U.S. 491, 497, 103 S.Ct. 1319, 75 L.Ed.2d 229. Tooson claims for the first time in his reply brief that the encounter was not consensual because Sergeant Rieder approached him with his gun drawn and threatened to "blow [his] head off." However, there is no evidence in the record to support this claim. To the contrary, Sergeant Rieder testified that the encounter was calm and uneventful, at least until the point at which the gun was discovered. Therefore, the evidence supports a conclusion that Sergeant Rieder's initial contact with Tooson was not a stop, but a consensual encounter.

{¶ 13} As Sergeant Rieder initiated the contact with Tooson, he smelled burnt marijuana coming from Tooson's truck. As Tooson concedes, the odor of marijuana coming from a vehicle is sufficient in itself to provide probable cause for a search of that vehicle. *State v. Greenwood,* Montgomery App. No. 19820, 2004-Ohio-2737, ¶11,

citing *State v. Moore,* 90 Ohio St.3d 47, 51, 2000-Ohio-10. Thus, even before Sergeant Rieder saw the marijuana cigarette in the ashtray, the smell of marijuana provided the probable cause necessary to justify a search of Tooson's truck and to warrant the removal of Tooson from that truck.

{¶ 14} When Sergeant Rieder opened the door of Tooson's truck, he saw a gun in plain view between the seat and the door. The plain view exception to the Fourth Amendment warrant requirement allows the warrantless seizure of evidence found in plain view if the officer was legally in a place from which the evidence could be seen and the incriminating character of the object was immediately apparent. *State v. Waddy* (1992), 63 Ohio St.3d 424, 442, 588 N.E.2d 809. Sergeant Rieder was justified in opening the driver's door, either to begin a search of the truck based on the probable cause established by the smell of marijuana, or to retrieve the illegal marijuana cigarette from the ashtray.

{¶ 15} Finally, despite Tooson's claim to the contrary, we conclude that Tooson was not placed under arrest until after Sergeant Rieder found the gun in Tooson's truck. Once Sergeant Rieder saw the gun, he had probable cause to arrest Tooson.

{¶ 16} Because the trial court properly denied Tooson's motion to suppress, his First Assignment of Error is overruled.

III

{¶ 17} Tooson's Second Assignment of Error is as follows:

{¶ 18} "THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING DEFENDANT'S MOTION TO QUASH THE INDICTMENT."

{¶ 19} In his Second Assignment of Error, Tooson insists that the trial court should have dismissed the indictment against him because it contained the wrong date for his prior conviction, and that date is an essential element of the offense of Having Weapons Under Disability. Tooson argues that, as a result of the incorrect date, the indictment failed to conform with R.C. 2941.22 and Crim.R. 7(B). We disagree.

{¶ 20} Revised Code Section 2941.22 states that an indictment alleging a prior conviction should "allege that the accused was, at a certain stated time, in a certain stated court, convicted of a certain stated offense, giving the name of the offense, or stating the substantial elements thereof." On the other hand, Crim.R. 7(B) requires that, "[t]he indictment shall * * * be made in ordinary and concise language without technical averments or allegations not essential to be proved. The statement may be * * * in words sufficient to give the defendant notice of all of the elements of the offense with which the defendant is charged." Clearly Crim.R. 7(B) demands less specificity than R.C. 2941.22. To the extent that the statute and the rule are in conflict, Ohio courts have found that "Crim.R. 7(B) effectively supersedes R.C. 2941.22." *State v. Midwest Pride IV, Inc.* (1998), 131 Ohio App.3d 1, 21, citation omitted. Therefore, compliance with Crim.R. 7(B) merely requires that the defendant be put on notice that the State intends to prove the existence of a prior conviction. Id., citing *State v. Larsen* (1993), 89 Ohio App.3d 371, 379.

{¶ 21} While Tooson's indictment did contain the wrong date for his prior conviction, both the case number and the name of the offense were accurate. If any doubt remained in Tooson's mind as to what prior conviction the State intended to prove, we point out that he signed a stipulation acknowledging the prior conviction (with

the corrected date) prior to entering his plea.

{¶ 22} In overruling the motion to dismiss the indictment, the trial court correctly explained that "[t]he fact of a prior conviction is the necessary element to this crime. The date of such is not germane to the proof of that element, but serves simply to help identify the conviction." Therefore, the indictment complied with Crim.R. 7(B), sufficiently putting Tooson on notice of the State's intent to prove his prior conviction.

{¶ 23} Accordingly, Tooson's Second Assignment of Error is overruled.

IV

{¶ 24} Both of Tooson's assignments of error having been overruled, the judgment of the trial court is Affirmed.

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FROELICH and WOLFF, JJ., concur.

(Hon. William H. Wolff, Jr., retired judge from the Second District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

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