[Cite as *State v. Jones*, 2010-Ohio-5522.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellant	:	C.A. CASE NO. 23920
v.	:	T.C. NO. 09 CR 3421
KEVIN L. JONES	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellee	:	
	:	

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O P I N I O N

Rendered on the 12th day of November, 2010.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the State's Notice of Appeal, filed March 11, 2010. On December 4, 2009, Kevin L. Jones was indicted on one count of trafficking in marijuana, in violation of R.C. 2925.03(A)(2), a felony of the fifth degree. Jones pled not

guilty. On January 12, 2010, he filed a motion to suppress, which the trial court, after a hearing, sustained in its entirety. It is from that decision that the State appeals.

{¶ 2} The events giving rise to this matter began on October 15, 2009, when Dayton Police Officers Barnes and Coleman stopped Jones for a suspected window tint violation. Barnes testified at the suppression hearing that, upon stopping Jones, Coleman tested the level of window tint with a window tint meter, which measures the amount of light that flows through the window, on the front driver's side of the vehicle, and he determined that it was at the legal limit of 50 percent. Coleman then tested the front passenger window and obtained a reading of 48 percent. Barnes stated that he did not observe any furtive movements on the part of Jones in the course of the stop. After testing the windows, Barnes stated that Coleman asked Jones for identification, and Jones told him that he did not have identification or a valid driver's license. Coleman then asked Jones to step out of the car, and he patted him down and placed him in the cruiser.

{¶ 3} After entering Jones' social security number into their computer, the officers learned that his driver's license was suspended, and that there was a warrant out for his arrest for driving under suspension. The car did not belong to Jones. Barnes told Jones that he was under arrest, and he asked him if "there was anything illegal in the car." In response, Jones told Barnes that there were some packages of marijuana in the car that he intended to sell. Barnes admitted that Jones had not been *Mirandized* when he asked him about the contents of the car. Barnes stated that he decided to have the vehicle towed and to perform an inventory search, incident to Jones' arrest, pursuant to City of Dayton Police Department policy. Barnes recovered the marijuana from under the front passenger seat of

the car, and he returned to the cruiser and read Jones his rights. Barnes testified that Jones appeared lucid and not under the influence of "anything."

{¶ 4} On cross-examination, Barnes stated that he did not ask Jones' permission to search the car "because the vehicle was going to be towed," and that he completed an inventory of the car's contents pursuant to policy. According to Barnes, in the course of his official duties, he has performed an inventory search of every vehicle that has been towed incident to an arrest.

{¶ 5} On redirect examination, Barnes stated that Coleman asked Jones for identification prior to testing the tint of the windows. On recross-examination, defense counsel provided Barnes with the police report he completed following the stop, and Barnes testified that the report indicated that Coleman tested the windows prior to asking Jones for his identification, consistent with his initial testimony. Barnes further stated that it is "uncommon for us to sit there with a window tint meter and test it before knowing anything about the driver's ID or who the driver is. It's somewhat of an officer safety issue." Barnes also attested that his police reports are accurate.

{¶ 6} Regarding the operation of the window tint meter, Barnes testified that it is accurate "within plus or minus 2 percent." Jones was not cited for a window tint violation.

{¶ 7} In closing arguments, the State conceded that once the officers learned that Jones was driving under suspension, and that there was a warrant out for his arrest, "at that point the officer should have [M]irandized the defendant prior to asking him anything, asking him whether there was anything illegal in the vehicle." However, the prosecutor argued that since the car was going to be towed and therefore inventoried pursuant to policy,

"the subsequent location of the marijuana in the car would have been an inevitable discovery based upon the inventory search whether or not the officer had asked that first question about anything being illegal in the vehicle."

{¶ 8} Jones asserted that the scope of the stop was limited to the investigation of the window tint, and that once the tint was found to be within legal limits, the officers did not have the authority to further detain Jones to ask for his identification, since there was nothing to indicate that further investigation was necessary.

{¶ 9} In granting Jones' motion, the trial court noted that Barnes "testified inconsistently as to whether Jones was asked for identification before or after the windows were tested." After considering all of his testimony, the court found "that the windows were tested before Jones was asked for identification." Based upon that factual finding, the court determined that it was "constrained to agree with Jones that the police acted improperly in prolonging the detention, even to ascertain Jones' identity, after satisfying themselves his window tint would not have warranted their issuing a citation to Jones," in reliance upon *State v. Venham* (Sept. 8, 1994), 96 Ohio App.3d 649.

{¶ 10} The State asserts two assignment or error, which we will consider together. They are as follows:

{¶ 11} "THE TRIAL COURT'S DETERMINATION THAT THE POLICE UNLAWFULLY PROLONGED THE TRAFFIC STOP IN THIS CASE WAS ERROR." And,

{¶ 12} "THE TRIAL COURT ERRED BY SUPPRESSING EVIDENCE ON THE GROUND THAT THE DETENTION OF KEVIN JONES WAS UNLAWFULLY

PROLONGED WHERE THERE WAS AN OUTSTANDING WARRANT FOR JONES' ARREST AT THE TIME OF THE TRAFFIC STOP."

{¶ 13} "Appellate courts give great deference to the factual findings of the trier of facts. (Internal citations omitted). At a suppression hearing, the trial court serves as the trier of fact, and must judge the credibility of witnesses and the weight of the evidence. (Internal citations omitted). The trial court is in the best position to resolve questions of fact and evaluate witness credibility. (Internal citations omitted). In reviewing a trial court's decision on a motion to suppress, an appellate court accepts the trial court's factual findings, relies on the trial court's ability to assess the credibility of witnesses, and independently determines whether the trial court applied the proper legal standard to the facts as found. (Internal citations omitted). An appellate court is bound to accept the trial court's factual findings as long as they are supported by competent, credible evidence. (Internal citations omitted)." *State v. Purser*, Greene App. No. 2006 CA 14, 2007-Ohio-192, ¶ 11.

{¶ 14} In *Venham*, a sheriff's deputy stopped a vehicle he suspected might contain an individual named Ellison for whom there was an outstanding arrest warrant. After determining that Ellison was not in the vehicle, the detective asked the driver, Venham, for his driver's license for the purpose of performing a computer check. The computer indicated that the license Venham provided was not valid, and the deputy charged Venham with a violation of R.C. 4507.02(A). The trial court overruled Venham's motion to suppress, and the Fourth District reversed the trial court.

{¶ 15} The Fourth District held, "The Fourth and Fourteenth Amendments as well as Section 14, Article I of the Ohio Constitution prohibit any governmental

search or seizure, including a brief investigative stop, unless supported by an objective justification. *Terry v. Ohio* (1968), 392 U.S. 1, 19, 88 S.Ct. 1868, 1878-1879, 20 L.Ed.2d 889, 904-905; *State v. Andrews* (1991), 57 Ohio St.3d 86, 87 * * *. In order to warrant a brief investigatory stop pursuant to *Terry*, the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. *State v. Williams* (1990), 51 Ohio St.3d 58, 60 * * * . The propriety of an investigative stop by a police officer must be viewed in light of the totality of the circumstances. *State v. Bobo* (1988), 37 Ohio St.3d 177 * * *, paragraph one of the syllabus." *Venham,* at 654.

{¶ 16} As this court noted in *State v. Krum* (Sept. 1, 1993), Montgomery App. No. 13668, which was quoted in *Venham*, "Though an initial stop may * * * [be] justified, once an officer's initial suspicion has been dispelled, he may continue to detain an individual to pursue some ancillary matter only if that matter is also supported by a reasonable suspicion that some criminal activity is afoot. 'If circumstances attending an otherwise proper stop should give rise to a reasonable suspicion of some other illegal activity, different from the suspected illegal activity that triggered the stop, then the vehicle and the driver may be detained for as long as that new articulable and reasonable suspicion continues, even if the officer is satisfied that the suspicion that justified the stop initially has dissipated.' *State v. Myers* (1990), 63 Ohio App.3d 765, 771. Reasonable suspicion that the detainee is engaged in criminal activity must exist for as long as the detention does. The unlawfulness of the initial stop will not support a 'fishing expedition' for evidence of

crime. (Citations omitted).

{¶ 17} "* * *

{¶ 18} "Police have inherent authority to follow certain investigative procedures as a matter of course following a lawful traffic stop if the officers['] suspicions of criminal activity have not been dispelled. Among these are a request to see a motorist[']s driver[']s license, registration, or vehicle identification number (VIN). (Citation omitted). However, if the suspicions that triggered the initial stop are dispelled and there has been no violation of the law, then the officer has no authority to demand the driver[']s license, registration papers, or to check the VIN. See *State v. Chatton* (1984), 11 Ohio St.3d 59, 63 * * * ." *Krum*.

{¶ 19} "Thus, if a suspect's detention is prolonged and the investigation expanded beyond the scope necessary to effectuate the purpose of the initial stop, the detention must be supported by a reasonable suspicion that the suspect was engaged in some other criminal activity. If a police officer has no reasonable and articulable suspicion that a motorist is unlicensed, a vehicle is unregistered, or that the vehicle or an occupant is otherwise subject to seizure for violation of the law, the officer cannot detain the driver in order to check his operator's license. (Citations omitted). If, after talking to the driver, a reasonable police officer would be satisfied that there had been no unlawful activity, the driver must be permitted to continue on his way." (Citation omitted). *Venham*, at 656.

{¶ 20} Jones, like Venham, did not contest the validity of the initial investigatory stop but asserted that the officers improperly detained him to ask for his identification after completing their investigation of a possible window tint

violation. In other words, the officers detained him after the "initial suspicion which formed the basis of the investigatory stop had been dispelled." *Venham*, id. We accept the trial court's factual finding that Coleman tested the windows before asking Jones for his identification. Accordingly, there was no additional basis to continue Jones' detention since the officers had decided that Jones' window tint did not warrant a citation; Barnes testified that Jones was lucid, did not appear to be under the influence of anything, and did not engage in any furtive movements. Once the window tint was deemed not subject to citation, we agree with the trial court that the request for Jones' license exceeded the scope of the investigatory stop.

{¶ 21} While the State asserts that this matter is controlled by this court's decision in *State v. Harding*, 180 Ohio App.3d 497, 2009-Ohio-59, and not *Venham*, the State did not so argue below. In *Harding*, this court reversed an order suppressing evidence and held that the existence of an outstanding arrest warrant is "independent authority" for an "otherwise unjustified stop of an individual * * * and the resulting intrusion upon the individual's liberty." *Harding*, ¶ 20. The State now asserts, for the first time, upon the authority of *Harding*, that Jones had no reasonable expectation of privacy due to his outstanding warrant. Since the State did not make this argument in opposition to Jones' motion to suppress, we agree with Jones that it is waived. *State v. Coburn*, 121 Ohio St.3d 310, 2009-Ohio-834, fn.1, citing *State ex rel. Porter v. Cleveland Dept. of Pub. Safety* (1998), 84 Ohio St.3d 258, 259 ("'Ordinarily, reviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed.'") (citations

omitted).

{¶ 22} The State's assigned errors lack merit and are overruled, and the judgment of the trial court is affirmed.

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

Copies mailed to:

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