

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO

:

Plaintiff-Appellee

:
C.A. CASE NO.
24114

v.

: T.C. NO.
09CR3204

AUDREY M. HARDY

:

(Criminal appeal from
Common Pleas Court)

Defendant-Appellant

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OPINION

Rendered on the 21st day of January, 2011.

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FROELICH, J.

{¶ 1} After the trial court overruled her motion to suppress, Audrey M. Hardy was
convicted by a jury in the Montgomery County Court of Common Pleas of possession of crack

cocaine in an amount equal to or greater than 25 grams but less than 100 grams. The trial court sentenced Hardy to three years in prison; the court stayed her sentence pending appeal.

{¶ 2} Hardy appeals from her conviction, claiming that the trial court erred in denying her motion to suppress. For the following reasons, the trial court's judgment will be affirmed.

I

{¶ 3} Dayton Police Detective Ronald Velez, a member of the Narcotics Unit, was the sole witness at the suppression hearing. His testimony, which the trial court found to be credible, established the following facts.

{¶ 4} On September 28, 2009, Detective Velez was in uniform and in a marked cruiser performing duties with SETeam, which is a unit concerned with "quality of life" issues, such as drugs and prostitution. At approximately 6:50 p.m., Velez observed a vehicle at the intersection of Sperling Avenue and Second Street in Dayton. Velez followed the vehicle so that he could run the license plate number through his onboard computer.

{¶ 5} The vehicle turned right on Gaddis Boulevard, then right onto Woodley Road and traveled straight after stopping at the stop sign at North Garland Avenue and Woodley. After the vehicle came to a complete stop at the T-intersection of Woodley and North Smithville Roads, the driver signaled to make a right turn onto North Smithville. Detective Velez initiated a traffic stop due to the driver's failure to signal 100 feet from the intersection. The vehicle pulled over at the corner of North Smithville Road and Third Street.

{¶ 6} Detective Velez exited his cruiser and approached the driver, who was later identified as Hardy. Hardy had lowered her window, and Velez could smell a strong odor of burnt marijuana coming from the vehicle. Detective Velez obtained Hardy's driver's license

and obtained identification from the front-seat passenger, Marlon Garrison. (A child was sleeping in the back seat.) Both Hardy and Garrison appeared to be “very nervous” and were “kind of moving around.”

{¶ 7} Detective Velez ran the two identifications through his computer. Velez discovered that Garrison had several drug “field interviews” from the City of Dayton and had multiple arrests for drugs. He also saw that there was an arrest warrant for another individual under Garrison’s social security number with a notation “also known as Marlon Garrison.” Velez asked Garrison to sit in his cruiser while he verified whether the arrest warrant was for Garrison.

{¶ 8} After Garrison was placed in the cruiser, Detective Velez returned to Hardy’s car, advised her about the smell of marijuana, and asked if there were any illegal narcotics in the car. Hardy began to cry and told the detective that she had been at a friend’s home where they had smoked marijuana and the smell was on her coat. Detective Velez asked if he could search the car. Hardy initially responded, “No,” but she began to cry again and said, “That’s fine.” Detective Velez asked her what was wrong, and Hardy replied that “it’s been a bad day.” Hardy indicated that she had been in a car accident and now she was getting stopped by the police.

{¶ 9} Velez asked Hardy to step from the vehicle. As she got out, she did not make eye contact with the officer and kept looking down at her crotch. Once Hardy was standing, Detective Velez noticed a “big lump in her crotch.” Velez grabbed Hardy’s hands, thinking she might have a gun, and asked Hardy what the lump was. Hardy stated that it was a tampon. Detective Velez told Hardy that he had never seen a tampon stick out that way. Hardy said that she would get it out for the officer. When Velez responded that he could not

let her do that in case it were a gun, Hardy stated that it was not a weapon. Velez asked Hardy what the lump was, and Hardy responded that it was “a package with stuff.” Hardy stated that she would get it out for him. Velez released one of her hands, and Hardy reached down the front of her pants, pulled out a Newport cigarette box, and dropped it on the ground front of them.

{¶ 10} Detective Velez noticed a plastic baggie sticking out of the side of the Newport cigarette box. Velez knew that illegal narcotics were usually carried in plastic baggies. Velez handcuffed Hardy, retrieved the box from the ground, and saw a “big large chunk of white, chalky substance” that he recognized as crack cocaine.

{¶ 11} Detective Velez had Hardy sit on the curb while he “recovered [the drugs] as evidence.” Hardy was “hysterical” and talked about how she had not done anything wrong and was trying to get home to her child. Velez then placed Hardy under arrest and informed her of her *Miranda* rights. After Hardy agreed to waive her rights, Velez asked her where she had gotten the drugs. Hardy replied that she had gotten a call from Garrison to pick him up on Garland Avenue. When Garrison had gotten into the car, he gave Hardy the cigarette box; Hardy grabbed the box, put it down the front of her pants, and drove off. Hardy stated to Velez that she did not know what was in the cigarette box. When Velez asked her if she thought there were drugs in the car, Hardy began to cry again, lowered her head, and said, “Yes.”

{¶ 12} Hardy wrote and signed a written statement roughly summarizing her conversation with Detective Velez. No additional drugs were found on Hardy or in her vehicle. Detective Velez issued a ticket to Hardy for the traffic violation; the ticket was paid on November 12, 2009.

{¶ 13} Hardy was indicted for possession of crack cocaine, in violation of R.C. 2925.11(A). She moved to suppress her statements to law enforcement officers. In her supporting memorandum, Hardy argued that she committed no traffic offenses and that the officer lacked an articulable suspicion of criminal activity to justify stopping her vehicle. She further argued that she was questioned without being informed of her *Miranda* rights, and she noted that her vehicle and person were searched without a warrant and several items, including drugs, were seized.

{¶ 14} A hearing on the motion to suppress was held on December 30, 2009. At the conclusion of the hearing, the court orally overruled the motion. The same day, the trial court filed a written entry incorporating its oral pronouncement. Hardy was subsequently convicted by a jury and sentenced accordingly.

{¶ 15} Hardy appeals, raising two assignments of error.

II.

{¶ 16} Hardy's first assignment of error states:

{¶ 17} "THE COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS BECAUSE THE POLICE OFFICER ATTEMPTED TO ENFORCE A VAGUE MUNICIPAL TRAFFIC STATUTE AS A PRETEXT TO MAKE [A] LEGAL STOP AND SEARCH OF APPELLANT."

{¶ 18} In her first assignment of error, Hardy claims that Detective Velez lacked a reasonable suspicion of criminal activity to justify a stop of her vehicle, because Dayton R.C.G.O. Sec. 71.31(B), upon which the detective relied, is vague.

{¶ 19} In addressing a motion to suppress, the trial court assumes the role of the trier of fact. *State v. Morgan*, Montgomery App. No. 18985, 2002-Ohio-268, citing *State v. Curry*

(1994), 95 Ohio App.3d 93, 96. The court must determine the credibility of the witnesses and weigh the evidence presented at the hearing. *Id.* In reviewing the trial court's ruling, an appellate court must accept the findings of fact made by the trial court if they are supported by competent, credible evidence. *Id.* However, “the reviewing court must independently determine, as a matter of law, whether the facts meet the appropriate legal standard.” *Id.*

{¶ 20} The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures. *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. Under *Terry*, police officers may briefly stop and/or temporarily detain individuals in order to investigate possible criminal activity if the officers have a reasonable, articulable suspicion that criminal activity may be afoot. *State v. Martin*, Montgomery App. No. 20270, 2004-Ohio-2738, ¶10, citing *Terry*, *supra*. Pertinent to this appeal, a police officer may lawfully stop a vehicle if the officer has a reasonable articulable suspicion that the operator has engaged in criminal activity, including a minor traffic violation. *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539, ¶7-8. We determine the existence of reasonable suspicion by evaluating the totality of the circumstances, considering those circumstances “through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold.” *State v. Heard*, Montgomery App. No. 19323, 2003-Ohio-1047, ¶14, quoting *State v. Andrews* (1991), 57 Ohio St.3d 86, 87-88.

{¶ 21} Detective Velez stopped Hardy for a suspected violation of Dayton R.C.G.O. Sec. 71.31(B) and issued a citation for violating Dayton R.C.G.O. Sec. 71.31(A).¹ Those provisions state:

¹These ordinances are substantially identical to pertinent portions of R.C. 4511.39(A).

{¶ 22} “(A) No person shall turn a vehicle or trackless trolley or move right or left upon a highway unless and until such person has exercised due care to ascertain that the movement can be made with reasonable safety nor without giving an appropriate signal in the manner hereinafter provided.

{¶ 23} “(B) When required, a signal of intention to turn or move right or left shall be given continuously during not less than the last 100 feet traveled by the vehicle or trackless trolley before turning.”

{¶ 24} We find nothing vague about Dayton R.C.G.O Sec. 71.31(A) and (B). Dayton R.C.G.O Sec. 71.31(A) prohibits a driver from turning without ensuring that such turn can be performed safely and giving an appropriate signal. Dayton R.C.G.O Sec. 71.31(B) specifies that the turn signal must be given continuously for at least 100 feet prior to the turn. “[T]he ordinance has sufficient clarity and details to put a person of ordinary intelligence on notice of what conduct is prohibited ***, [and] [t]he language of the ordinance provides fair warning that failure to signal at least 100 feet prior to turning will expose a driver to liability.” *State v. Acord*, Ross App. No. 05 CA 2858, 2006-Ohio-1616, ¶19 (concluding that Chillicothe City Ordinance 331.14, which is identical to R.C. 4511.39(A), is not vague).

{¶ 25} Hardy argues that she was not required to use a turn signal prior to turning onto North Smithville Road, because the intersection of Smithville and Woodley was a T-intersection, which required her to turn. Dayton R.C.G.O Sec. 71.31(A) contains no exception for T-intersections (in fact, signaling in which direction a turn will be made would be helpful to other drivers or pedestrians at the intersection), and the ordinance is not rendered vague merely because the configuration of a particular intersection requires the driver to make a turn. See *State v. Bartone*, Montgomery App. No. 22920, 2009-Ohio-153, ¶20 (stating that

the “Dayton City Commission, in enacting Ordinance 71.31, could have expressly made the duty to signal dependent on traffic conditions but did not.”)

{¶ 26} Detective Velez observed Hardy approach and come to a complete stop at the intersection of Woodley and North Smithville Roads without using a turn signal. Although Hardy signaled a right-hand turn after stopping at the intersection, the detective had not only a reasonable suspicion, but also probable cause to believe, that Hardy had violated Dayton R.C.G.O Sec. 71.31 by failing to signal for 100 feet prior to the turn. It is very possible that the traffic stop was a pretext to investigate suspected drug activity. However, since the officer had probable cause to believe that Hardy committed a traffic violation, the stop was valid regardless of the officer’s subjective motive. *Whren v. United States* (1996), 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89; *Dayton v. Erickson* (1996), 76 Ohio St.3d 3, 7. Accordingly, Detective Velez’s stop of Hardy’s vehicle was lawful.

{¶ 27} The first assignment of error is overruled.

III.

{¶ 28} Hardy’s second assignment of error states:

{¶ 29} “THE COURT ERRED IN OVERRULING APPELLANT’S MOTION TO SUPPRESS BECAUSE THE OFFICER VIOLATED APPELLANT’S MIRANDA WARNINGS.”

{¶ 30} In her second assignment of error, Hardy argues that Detective Velez should have provided *Miranda* warnings prior to asking her any questions and that he continued to ask her questions after she had become hysterical. Hardy thus claims that the trial court should have suppressed her statements to the officer.

{¶ 31} In *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694,

the United States Supreme Court held that the State may not use statements stemming from a defendant's custodial interrogation unless it demonstrates the use of procedural safeguards to secure the defendant's privilege against self-incrimination. *Id.* at 444. Police are not required to give *Miranda* warnings to every person that they question, even if the person being questioned is a suspect. *State v. Biros* (1997), 78 Ohio St.3d 426, 440. Instead, *Miranda* warnings are only required for custodial interrogations. *Id.* "Custodial interrogation" means questioning initiated by the police after the person has been taken into custody or otherwise deprived of his freedom in any significant way. *State v. Wilson*, Montgomery App. No. 22665, 2009-Ohio-1279, ¶18, citing *State v. Steers* (May 14, 1991), Greene App. No. 89-CA-38. In order for a defendant's statements made during a custodial interrogation to be admissible, the State must establish that the accused knowingly, voluntarily, and intelligently waived his or her rights. *Miranda*, *supra*; *State v. Edwards* (1976), 49 Ohio St.2d 31, 38, overruled on other grounds, (1978), 438 U.S. 911, 98 S.Ct. 3147, 57 L.Ed.2d 1155.

{¶ 32} Even when an individual is not in custody and *Miranda* warnings are not required, a defendant's statement may be involuntary and subject to exclusion. *State v. Porter*, 178 Ohio App.3d 304, 2008-Ohio-4627, ¶14, citing *Dickerson v. United States* (2000), 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405. "In deciding whether a defendant's confession is involuntarily induced, the court should consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement." *Edwards*, 49 Ohio St.3d at paragraph two of the syllabus. See, also, *State v. Brewer* (1990), 48 Ohio St.3d 50, 58; *State v. Marks*, Montgomery App. No. 19629, 2003-Ohio-4205. A defendant's statement to police is

voluntary absent evidence that his will was overborne and his capacity for self-determination was critically impaired due to coercive police conduct. *Colorado v. Spring* (1987), 479 U.S. 564, 574, 107 S.Ct. 851, 93 L.Ed.2d 954; *State v. Otte*, 74 Ohio St.3d 555, 562, 1996-Ohio-108.

{¶ 33} Hardy suggests that Detective Velez should have informed her of her *Miranda* rights upon smelling an odor of marijuana coming from her car. She further states that the detective should have read her *Miranda* rights when she was ordered from the car. We disagree.

{¶ 34} When Detective Velez stopped Hardy's vehicle for the traffic violation, Hardy was subject to an investigatory detention and was not "in custody" for purposes of *Miranda*. An individual is subject to an investigatory detention when, in view of all the circumstances surrounding the incident, by means of physical force or show of authority, a reasonable person would have believed that he was not free to leave or was compelled to respond to questions. *United States v. Mendenhall* (1980), 446 U.S. 544, 553, 100 S.Ct. 1870, 64 L.Ed.2d 497; *Terry*, 392 U.S. at 16, 19. As stated above, a police officer may initiate an investigatory detention if the officer has a reasonable, articulable suspicion that criminal activity may be afoot. *Terry*, *supra*.

{¶ 35} In contrast, a person is in "custody" for purposes of *Miranda* when she is placed under formal arrest or her freedom of action is restrained to a degree associated with a formal arrest. *State v. Simpson*, Franklin App. No. 01AP-757, 2002-Ohio-3717, ¶ 33, citing *Minnesota v. Murphy* (1984), 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409. "A seizure is equivalent to an arrest when (1) there is an intent to arrest; (2) the seizure is made under real or pretended authority; (3) it is accompanied by an actual or constructive seizure or detention;

and (4) it is so understood by the person arrested.” *State v. Taylor* (1995), 106 Ohio App.3d 741, 749, citing *State v. Barker* (1978), 53 Ohio St.2d 135, at syllabus. An arrest must be based on probable cause.

{¶ 36} Upon approaching Hardy’s vehicle and detecting an odor of burnt marijuana, Detective Velez had a reasonable suspicion that Hardy might possess an illegal drug, such as marijuana, and he was entitled to investigate that possibility. The detective reasonably asked Hardy if he could search her vehicle. Although Hardy initially said that the detective could not search her car, she changed her mind and told Velez, “That’s fine.” Given Hardy’s consent, Detective Velez was entitled to ask Hardy to exit her vehicle so that he could conduct a search.² At this juncture, nothing had occurred that would convert the investigatory detention into the equivalent of an arrest. Stated differently, Hardy was not yet under arrest, and Detective Velez was not yet required to inform her of her *Miranda* rights before asking her additional questions.

{¶ 37} When Hardy stepped out of her vehicle, Detective Velez noticed a large lump in her crotch area, causing the detective to believe that Hardy may be armed. Detective Velez grabbed Hardy’s hands and questioned her about the lump, but this conduct did not constitute an arrest. The conversation between Hardy and Velez made clear that Velez was merely concerned that the lump may be a weapon. And, when Hardy indicated that the protrusion was “a package with stuff” and offered to retrieve it, Velez released one of Hardy’s hands and permitted her to remove the cigarette box from the front of her pants.

²We note that a police officer may order a motorist who is stopped for a traffic violation to get out of his or her car, even without suspicion of criminal activity. *State v. Evans* (1993), 67 Ohio St.3d 405, 407, citing *Pennsylvania v. Mimms* (1977), 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331.

{¶ 38} Upon seeing the plastic baggie protruding from the box, Velez handcuffed Hardy, had her sit on the curb, retrieved the drugs, and arrested her. Detective Velez informed Hardy of her *Miranda* rights at this time. Based on the record, the statements made by Hardy prior to her being read her *Miranda* rights were made before she was placed in custody. Accordingly, the trial court did not err in denying her motion to suppress those statements under *Miranda*.

{¶ 39} Hardy further asserts that she was hysterical when Detective Velez informed her of her *Miranda* rights and that she did not voluntarily waive those rights or voluntarily make subsequent statements. Detective Velez testified that he read the *Miranda* rights, one by one, from a card provided by the Montgomery County Prosecutor's Office. He stated that he asked Hardy if she understood after each right, got a verbal response, and then read the next one. Hardy acknowledged that she understood each right; she had no questions about them and agreed to waive them. Velez stated that Hardy was able to answer him, despite her emotional state, and she did not appear to be under the influence of drugs or alcohol or to have any disability that would prevent her from understanding her rights. The detective denied promising her anything, threatening her, or coercing her to waive her rights. Nothing in the record suggests that the detective engaged in any coercive police conduct. Based on Velez's testimony, which the trial court found to be credible, we agree with the trial court's conclusion that Hardy voluntarily waived her *Miranda* rights and voluntarily made subsequent statements to Detective Velez.

{¶ 40} The second assignment of error is overruled.

IV.

{¶ 41} The trial court's judgment will be affirmed.

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GRADY, P.J. and FAIN, J., concur.

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Hon. Dennis J. Langer