[Cite as *State v. McLemore*, 2011-Ohio-243.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee :

C.A. CASE NO. 24211

v.

: T.C. NO. 09CR3836

DEANDREA McLEMORE : (Criminal appeal from Common Pleas Court)

Defendant-Appellant :

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O P I N I O N

Rendered on the 21st day of January , 2011.

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FROELICH, J.

{¶ 1} Deandrea McLemore appeals from a judgment of the Montgomery County Court of Common Pleas, which overruled his motion to suppress evidence and found him

guilty, on his no contest plea, of possession of crack cocaine in an amount less than one gram. For the following reasons, the judgment of the trial court will be affirmed.

I

{¶ 2} The State's evidence at the suppression hearing, which consisted of the testimony of two Dayton police officers, established the following facts:

{¶ 3} On November 15, 2009, Dayton police officers were dispatched to a BP station at 500 Salem Avenue in Dayton on a complaint that "a black male in a black jacket and black pants [was] selling drugs in the parking lot." When they arrived, police officers saw a man matching this description (later identified as McLemore) in the corner of the parking lot, near a phone bank, holding a plastic grocery bag. As the officers began to approach him, an employee came out of the BP station and told the officers that "the subject was not supposed to be on the property. And *** that he was trespassed."

{¶ 4} The officers asked for identification, and McLemore provided his name and social security number. When the officers checked this information on the computer in the cruiser, they found a "field interview card", or FIC, which stated that McLemore had, indeed, been "trespassed" from a BP station, meaning he had been informed that he was no longer allowed on the property. The FIC indicated that McLemore had been trespassed from a different BP, but one of the officers spoke with the owner of the Salem Avenue BP by phone, and the owner indicated that McLemore had also been trespassed from the Salem Avenue BP and that charges were pending.

{¶ 5} Based on the BP owner's and employee's statements and the FIC, the officers placed McLemore under arrest for trespassing. When they conducted a search of McLemore's person incident to the arrest, they found a small rock of crack cocaine in his

pocket.

{¶ 6} On February 1, 2010, McLemore was indicted on one count of possession of crack cocaine in an amount less than one gram, in violation of R.C. 2925.11(A). He pled not guilty and filed a motion to suppress evidence, arguing that he had not been properly arrested for the misdemeanor offense of trespassing because the officers had not witnessed his "previously being 'trespassed off'" the property. The trial court overruled the motion to suppress. McLemore subsequently pled no contest to possession of crack cocaine. He was convicted and sentenced to twelve months of imprisonment. There was no motion to stay the sentence or for expedited appeal, although we expedited the case on our own motion.

{¶ 7} McLemore raises one assignment of error on appeal.

II

{¶ 8} McLemore's assignment of error states:

{¶ 9} "THE TRIAL COURT COMMITTED ERROR IN OVERRULING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE SINCE THE EVIDENCE SHOWED THAT THE SEARCH OF DEFENDANT WAS PREDICATED ON A MISDEMEANOR ARREST AND THE OFFICERS DID NOT HAVE SUFFICIENT BASIS TO MAKE A MISDEMEANOR ARREST."

{¶ 10} McLemore contends that his warrantless misdemeanor arrest was based on acts not committed in the officers' presence, which is impermissible under R.C. 2935.03(A). He also claims that officers could not rely on the "hearsay" provided by the BP employee and owner and the FIC (which related to a different BP location) to conclude that he had committed a misdemeanor trespass.

{¶ 11} McLemore was arrested for trespass. R.C. 2911.21(A) states:

{¶ 12} "(A) No person, without privilege to do so, shall do any of the following:

{¶ 13} "***

{¶ 14} "(2) Knowingly enter or remain on the land or premises of another, the use of which is lawfully restricted to certain persons, purposes, modes, or hours, when the offender knows the offender is in violation of any such restriction or is reckless in that regard;

{¶ 15} "(3) Recklessly enter or remain on the land or premises of another, as to which notice against unauthorized access or presence is given by actual communication to the offender, or in a manner prescribed by law, ***."

{¶ 16} It is well established that a warrantless arrest without probable cause is unconstitutional. *State v. Timson* (1974), 38 Ohio St.2d 122, paragraph one of the syllabus. Probable cause arises when "the facts and circumstances within [a police officer's] knowledge and of which [he has] reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief" that criminal conduct was afoot. *Carroll v. United States* (1924), 267 U.S. 132, 162, 45 S.Ct. 280, 69 L.Ed. 543, 555; see, also, *State v. Heston* (1972), 29 Ohio St.2d 152, 156. If, after being arrested, a defendant asserts that probable cause was lacking at the time of arrest, the State bears the burden of proof on the issue of whether probable cause existed at the time of arrest. *Xenia v. Wallace* (1988), 37 Ohio St.3d 216, 524 N.E.2d 889, paragraph two of the syllabus.

{¶ 17} A police officer is permitted to make an arrest without a warrant for a misdemeanor committed in his presence. *United States v. Watson* (1976), 423 U.S. 411, 418, 96 S.Ct. 820, 46 L.Ed.2d 598. The basic rule is that, to be lawful, a warrantless misdemeanor arrest must be committed in the presence of the officer. *State v. Lewis* (1893), 50 Ohio St. 179; *State v. Henderson* (1990), 51 Ohio St.3d 54, 56; *Columbus v. Lenear* (1984), 16 Ohio

App.3d 466, 468. See, also, *State v. Mason*, Montgomery App. No. 20243, 2004-Ohio-5777, ¶13. This is codified in R.C. 2935.03(A)(1), which permits a police officer to arrest and detain, until a warrant can be obtained, a person "found violating" a state law or municipal ordinance, which would include trespass; this is as opposed to R.C. 2935.03(B), which permits detention and arrest based on "reasonable cause" for certain offenses (not including trespass), and to R.C. 2935.04, which authorizes detention and arrest by "any person without a warrant" if there is "reasonable cause" to believe the person is guilty of a felony offense.

{¶ 18} The word "found" in R.C. 2935.03(A) means that the officer must actually see the offense being committed or, from surrounding circumstances, including admissions from the defendant, be able to reasonably conclude that an offense has been committed. *Oregon v. Szakovits* (1972), 32 Ohio St.2d 271. "What is required for a valid warrantless arrest is not that the officer have absolute knowledge that a misdemeanor is being committed in the sense of possessing evidence sufficient to support a conviction after trial, but, rather, that he be in a position to form a reasonable belief that a misdemeanor is being committed, based upon evidence perceived through his own senses. In other words, if, based upon circumstances perceivable by his own senses, a reasonable person would be justified in concluding that a misdemeanor is being committed in his presence, then, the warrantless arrest is valid." *Lenear*, 16 Ohio App.3d at 468.

{¶ 19} McLemore's argument is premised on his belief that, because the prior incident -- by virtue of which he was "trespassed off" and no longer permitted at the BP -- was not committed in the officers' presence, they did not have authority to arrest him for trespass on the day of his arrest.

{¶ 20} Because McLemore was charged with the drug offense and not trespass as a

result of his actions of November 15, 2009, neither the police nor the State classified McLemore's offense under a particular section of this statute, but it appears that either one might have applied. The central question presented by these sections, under the facts of this case, was whether McLemore knew he did not have permission to be at the BP station, or was reckless in that regard.

{¶ 21} When the officers responsed to the Salem Avenue BP station, an employee of the station told them that McLemore was not permitted to be on the premises because he had been "trespassed" in the past. Although the officers could not verify on their computer that McLemore had been trespassed from this particular station, they talked with the owner of the station by phone, and the owner provided information about a pending trespassing case against McLemore related to the Salem Avenue station. The claims of the owner and the BP employee were bolstered by the FIC on the officers' computer, which confirmed that McLemore had been trespassed from another BP in the area. Based on all of this information, the officers reasonably concluded that McLemore was trespassing on the day of his arrest, and they observed him doing so. In other words, the officers reasonably concluded that a misdemeanor trespass was occurring in their presence, and McLemore's warrantless arrest for a misdemeanor offense was not unlawful.

{¶ 22} McLemore's argument focuses on whether the officers observed each one of the elements of his offense. McLemore's complaint is with the officers' reliance on the statements of the BP employee and owner as to whether McLemore had previously been told that he was not allowed on the property in finding probable cause; i.e., whether he had knowingly or recklessly entered the premises when he had been told that he did not have permission to do so. However, unless a prudent individual would have reason to doubt the

veracity of such representations, an officer may reasonably rely on them in assessing whether a trespass is occurring in their presence.

{¶ 23} McLemore relies on *State v. Dillon*, Cuyahoga App. No. 84607, 2005-Ohio-1016, in support of his claim that the officers improperly relied on the hearsay statements of the BP employee and owner. McLemore asserts that *Dillon* is "factually identical," but we find it to be distinguishable.

{¶ 24} In *Dillon*, police officers who happened to come into a drugstore to make a purchase were told by the manager that a man who had allegedly just left the store had taken some items without paying for them. The manager said that the man had shoplifted from the store before, and he gave the officers a description of the man. The police located the suspect at a neighboring business and approached him, at which point he said: "I don't have anything on me, and you can't prove I stole anything." The police then arrested him for criminal trespass. When they searched him incident to the arrest, they found drug paraphernalia, but no stolen items from the store.

{¶ 25} In affirming the trial court's suppression of the evidence, the appellate court reasoned: "[T]he officers arrested Dillon for criminal trespass, not theft. Because they did not witness the alleged offense, we must consider from the surrounding circumstances whether the officers could have reasonably concluded that an offense had been committed. [The manager] informed the officers that Dillon had a history of shoplifting at the store and was not allowed on the premises. This is the only information provided to the officers. Despite [the manager's] statement that Dillon was not permitted in the store, [the manager] did not present any documentation to that effect, and because the store was open to the public for business, the logical assumption is that Dillon had a right to be in the store."

{¶ 26} Although *Dillon* refers to a lack of "documentation" that the defendant had been banned from the store, it states the foundational question to be "whether the officers could have reasonably concluded that an offense [trespass] had been committed." In doing so, the court noted its consideration of the "surrounding circumstances" and followed the general rule that probable cause for an arrest must be assessed under the totality of the circumstances. *Illinois v. Gates* (1983), 462 U.S. 213, 230-232, 103 S.Ct. 2317, 76 L.Ed.2d 527. In other words, if a reasonable person would be justified in concluding, under the circumstances presented, that a trespass was occurring in their presence, the lack of "documentation" of the owner's intent to exclude the trespasser from the property should not preclude making an arrest.

{¶ 27} The real problem in *Dillon* was that the employee accused Dillon of theft, but he was arrested for trespass. Dillon was allegedly inside the store when it was open to the public, and there was no evidence that the employee had tried to eject Dillon from the store. The employee's complaint to the police officers was that Dillon had committed a theft, not a criminal trespass. Although the employee stated that Dillon was "not allowed on the premises" because of prior shoplifting, there is no suggestion in the case that the store had taken legal action to trespass Dillon from the premises, and the officers never saw Dillon on the premises.

{¶ 28} Finally, McLemore argues that the State was not permitted to rely, as it did in closing argument at the suppression hearing, on his admission at the suppression hearing that he had been trespassed from the Salem Avenue BP station prior to the day of his arrest, because he did not admit the prior trespass to the officers before his arrest. We agree with this position. However, the judge specifically said the "[s]tatements were not an issue," and

there is no indication in the record that the trial court relied on McLemore's statement at the suppression hearing in finding that the officers had probable cause at the time of the arrrest, so McLemore was not prejudiced by the State's references to it at the suppression hearing.

{¶ 29} We note our previous holdings that the exclusionary rule need not be applied to statutory violations falling short of constitutional violations, such as R.C. 2935.03's prohibition of arrest for a misdemeanor that did not occur in the officer's presence. *Mason*, 2004-Ohio-5777, ¶21, citing *State v. Neal* (Jan. 28, 1982), Montgomery App. No. 7426. Thus, even if McLemore's trespass had not been observed by the officers and his warrantless arrest had been contrary to R.C. 2935.03(A)(1), there was no constitutional violation that required suppression of the evidence against him.

{¶ 30} The assignment of error is overruled.

III

{¶ 31} The judgment of the trial court will be affirmed.

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

Copies mailed to:

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