

**IN THE COURT OF APPEALS
THIRD APPELLATE DISTRICT
HANCOCK COUNTY**

STATE OF OHIO

PLAINTIFF-APPELLEE

CASE NO. 5-04-59

v.

CORY A. FRALEY

OPINION

DEFENDANT-APPELLANT

**CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas
Court**

JUDGMENT: Judgment Affirmed

DATE OF JUDGMENT ENTRY: June 20, 2005

ATTORNEYS:

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For Appellee**

ROGERS, J.

{¶1} Defendant-Appellant, Cory A. Fraley, appeals from a judgment of the Hancock County Common Pleas Court, convicting him of trafficking in cocaine. Fraley claims that the trial court erred when it denied his motion to suppress the evidence gathered as a result of a controlled drug buy. He maintains his Fourth Amendment right to be free from unreasonable searches and seizures and his Fourteenth Amendment due process rights were violated. After reviewing the entire record, we find that the trial court did not err in denying Fraley's motion to suppress. Accordingly, Fraley's sole assignment of error is overruled, and the judgment of the trial court is affirmed.

{¶2} On September 21, 2003, Marcus Vermillion contacted Detective Chris Huber of the Findlay, Ohio Police Department. Vermillion informed Huber that he could purchase a half ounce of cocaine from Fraley. As a result, Huber decided to use Vermillion as a confidential informant and had him sign an informant's agreement. The agreement precluded Vermillion from operating a motor vehicle without a driver's license while acting as a confidential informant. However, unbeknownst to Huber, Vermillion did not possess a valid driver's license at the time.

{¶3} Immediately after meeting with Huber and signing the informant's agreement, Vermillion drove to Fraley's house. Fraley got into Vermillion's

vehicle and instructed him to drive to another location where Fraley would pick up the cocaine. After picking up the cocaine, Fraley sold the cocaine to Vermillion. Vermillion then drove Fraley back home and drove the cocaine to Huber. The entire time Vermillion was driving, Huber maintained surveillance of Vermillion's vehicle.

{¶4} Subsequently, Fraley was charged with trafficking in cocaine in violation of R.C. 2925.03(A)(1). In response, Fraley filed a motion to suppress, claiming that the police had violated his Fourth and Fourteenth Amendment rights by allowing a confidential informant who did not possess a valid driver's license to drive to the controlled buy. After conducting a hearing on the motion, the trial court found that the Fourth Amendment was not applicable because no search or seizure of Fraley's person or property had occurred. The trial court also found that the negligence of the police officers in allowing Vermillion to drive without a license did not rise to the level of a Fourteenth Amendment due process violation. Therefore, the trial court denied Fraley's suppression motion. Consequently, Fraley entered a plea of no contest and was sentenced to four years of incarceration. Fraley appeals from the trial court's judgment denying his motion to suppress, presenting the following assignment of error for our review.

Assignment of Error

In an abuse of its discretion, the trial court reversibly erred by overruling Defendant's Motion to Suppress, in violation of the Defendant-Appellant's fundamental substantial constitutional

right to be secure from warrantless, unreasonable searches and seizures, guaranteed under the Fourth and Fourteenth Amendments to the United States Constitution, and under Section 14, Article I of the Ohio Constitution, and also in violation of the Defendant-Appellant's fundamental substantial constitutional right to due process of law, as guaranteed under the Fourteenth Amendment to the United States Constitution.

{¶5} In his sole assignment of error, Fraley challenges the trial court's denial of his motion to suppress. He claims that his Fourth Amendment right to be free from unreasonable searches and seizures was violated when the State allowed an unlicensed confidential informant to operate the vehicle used to facilitate his drug sale. Fraley also contends that the actions of the police in using an unlicensed driver rose to such a level that his Fourteenth Amendment due process rights were also violated.

Fourth Amendment

{¶6} The pertinent portion of the Fourth Amendment to the United States Constitution provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable *searches* and *seizures*, shall not be violated ***.” (Emphasis added.) In determining whether the right against unreasonable searches and seizures has been violated, a reviewing court must first consider whether the action is “attributable to the government” and amounts to either a “search” or a “seizure.” *Relford v. Lexington-Fayette Urban County Gov.* (C.A.6, 2004), 390 F.3d 452, 457, quoting *Skinner v. Ry. Labor Executives' Ass'n*

(1989), 489 U.S. 602, 614, 109 S.Ct. 1402. Only if the contested action meets both of these requirements will a court proceed to a determination of whether the search or seizure was reasonable. *Id.*

{¶7} According to the Supreme Court, “a person has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” *United States v. Mendenhall* (1980), 446 U.S. 544, 554, 100 S.Ct. 1870. Likewise, a seizure of property occurs when “there is some meaningful interference with an individual’s possessory interests in that property.” *Soldal v. Cook County, Ill.* (1992), 506 U.S. 56, 61, 113 S.Ct. 538, quoting *United States v. Jacobsen* (1984), 466 U.S. 109, 113, 104 S.Ct. 1652. “A ‘search’ occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.” *Jacobsen*, 466 U.S. at 113, 104 S.Ct. 1652.

{¶8} Nothing in the evidence before us supports the contention that either Fraley or his property were searched or seized during the controlled drug buy. Fraley’s movements were never restricted, and the possessory interests in his property were never interfered with. Moreover, Fraley’s reasonable expectation of privacy was not infringed upon. Every action committed by Fraley, including contacting Vermillion, getting into the car with Vermillion, and selling the cocaine to Vermillion, was done voluntarily and out in the open. As such, there was

neither a search nor a seizure in the case sub judice, and Fraley has no colorable Fourth Amendment claim.

Fourteenth Amendment

{¶9} The Fourteenth Amendment, in pertinent part, provides that no State shall “deprive any person of life, liberty, or property, without due process of law.” In discussing whether a defendant’s due process rights had been violated by the method in which the police obtained evidence, the Supreme Court stated:

It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained. This was not true even before the series of recent cases enforced the constitutional principle that the States may not base convictions upon confessions, however much verified, obtained by coercion. These decisions are not arbitrary exceptions to the comprehensive right of States to fashion their own rules of evidence for criminal trials. They are not sports in our constitutional law but applications of a general principle. They are only instances of the general requirement that States in their prosecutions respect certain decencies of civilized conduct. Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend ‘a sense of justice.’

Rochin v. California (1952), 342 U.S. 165, 172-173, 72 S.Ct. 205.

{¶10} The kinds of methods that will rise to a due process violation must “do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically.” *Id.* at 172. Only those methods that shock the conscience violate due process. *Id.*

{¶11} In *Rochin* the Supreme Court found that the actions of the police shocked the conscience when officers, who saw the defendant put something in his mouth when they entered his house, directed a doctor to force an emetic solution through a tube into the defendant's stomach against his will to obtain evidence after struggling unsuccessfully with the defendant to obtain the evidence from his mouth. In contrast, the Court in *Breithaupt v. Abram* (1957), 352 U.S. 432, 77 S.Ct. 408, found that the police had not acted in a manner that shocks the conscience when they took a sample of blood from a defendant while he was unconscious. *Id.* at 435. In so ruling, the Court held that “there is nothing ‘brutal’ or ‘offensive’ in the taking of a sample of blood when done, as in this case, under the protective eye of a physician.” *Id.* Thus, the court emphasized that only those actions which rose to the level of brutality or offensiveness would shock the conscience and give rise to a due process violation. *Id.*; see, also, *Irvine v. People of State of California* (1954), 347 U.S. 128, 133, 74 S.Ct. 381 (finding that even though the police had a locksmith make a key to Irvine’s house and then entered and installed a microphone in his house while he was gone, no due process violation occurred because there was no coercive physical assault upon Irvine’s person).

{¶12} There is nothing in the record to show that the police used either brutality or coercion in obtaining the evidence from Fraley. At most, the record

reflects that the police were negligent in failing to first ascertain whether Vermillion had a valid driver's license before using him as a confidential informant. While it may have been sloppy police work to utilize an unlicensed confidential informant as the driver in an undercover investigation, it certainly does not shock the conscience and rise to the level of a due process violation. Accordingly, Fraley's argument that his Fourteenth Amendment rights were violated is without merit.

{¶13} Because there was no violation of Fraley's Fourth or Fourteenth Amendment rights, the trial court was correct in denying his motion to suppress. Therefore, his sole assignment of error is overruled.

{¶14} Having found no error prejudicial to the appellant herein, in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed.

CUPP, P.J. and BRYANT, J., concur.

/jlr