

IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
ROSS COUNTY

STATE OF OHIO, :  
 : Case No. 00CA2541  
Plaintiff-Appellant, :  
 :  
vs. : DECISION AND JUDGMENT ENTRY  
 :  
RANDY L. SOUTHERN, II, :  
 : Released 12/28/00  
Defendant-Appellee. :  
 :  
 :

APPEARANCES:

Scott W. Nusbaum, Ross County Prosecuting Attorney, and Steven E. Drotleff, Assistant Prosecuting Attorney, Chillicothe, Ohio, for Appellant.

J. Jeffrey Benson, Chillicothe, Ohio, for Appellee.

Harsha, J.

The State of Ohio appeals the judgment of the Ross County Court of Common Pleas granting Randy L. Southern II's motion to suppress and assigns the following error:

The Trial Court erred in suppressing evidence based on a determination that the totality of the search circumstances would have lead [sic] a reasonable person to believe that a search was required.

Finding no merit in the State's assignment of error, we affirm the judgment of the trial court.

Appellee was indicted on one count of possession of LSD in violation of R.C. 2925.11. He then filed two motions to suppress the evidence. The first motion alleged that the police officer did not have reasonable articulable suspicion to stop his

vehicle. The second motion asserted that the search itself was unconstitutional.

The trial court conducted a hearing on the motions. Captain Roger Moore of the Chillicothe Police Department, the sole witness, testified that on September 22, 1999, he was on East 2<sup>nd</sup> Street investigating complaints of drug activity. Captain Moore noticed a red Nissan with a man in the driver's seat and two passengers in the back seat parked in front of a house. Captain Moore checked the license plate number of the vehicle and the dispatcher informed him that the owner of the vehicle, Randy Southern, had an expired license. Based on this information, Captain Moore decided to stop the vehicle.

As the vehicle came to a stop, Captain Moore observed the driver make a furtive gesture, bending at his waist to the right side either to the seat or leg area of the vehicle. Because of this action, Captain Moore believed the driver had weapons or drugs. Captain Moore approached the driver and told him that he stopped him because his license was expired. Southern informed Captain Moore that his license was valid. Captain Moore looked at the license and told appellee that the license was expired. He then told appellee that he had received citizen complaints of drug activity. He asked appellee for consent to search the vehicle and his person for weapons and drugs. Captain Moore also notified appellee that he had the right to refuse the search. Appellee gave Captain Moore consent to search.

Captain Moore asked appellee to step out of the vehicle and walk towards the back of it. At this point, another officer arrived to back up Captain Moore. Captain Moore patted appellee down but found nothing unusual. He then searched appellee's pockets and found a bag of marijuana in his pants pocket. Captain Moore then told appellee to remove his shoes and noticed a small bulge near appellee's ankle. Captain Moore found a cigarette cellophane with a quarter-inch white square piece of paper that tested positive for LSD.

The following day, Captain Moore again checked appellee's license and the LEADS printout indicated that it expired on July 6, 1999. A copy of the printout was introduced into evidence.

On cross-examination, a copy of appellee's driver's license was introduced into evidence. Captain Moore testified that it was a fair and accurate copy of the license appellee presented to him. The license displays an expiration date of November 17, 1999. Captain Moore stated that he showed appellee that his license expired.<sup>1</sup>

Following the hearing, the trial court issued an oral decision. The court found that Captain Moore had reasonable articulable suspicion to stop appellee based on the license plate check that revealed an expired driver's license. Therefore, the

---

<sup>1</sup> The State argued that appellee could have shown Captain Moore a different license or an altered version of his own license. However, the court found no evidence of that and relied on Captain Moore's testimony that this was an accurate copy of the license he was shown. Therefore, it appears that Captain Moore referred to the issue date of July 7th rather than appellee's birth date of November 17<sup>th</sup>, the date the license actually expired, when he stopped

court denied appellee's first suppression motion.

The court then found that Captain Moore knew or should have known that appellee's driver's license was valid once appellee showed it to him. After appellee proved that he was not violating the law by driving with an expired license, Captain Moore should not have continued to detain appellee. The court also found that even if the continued detention was permissible because of the furtive gesture, Captain Moore could only search for weapons. However, the court did not believe that the circumstances justified such a search.

The court concluded that the continued detention of appellee was unlawful. Further, the court found that while appellee consented to a search of his person and his vehicle, the consent was not voluntary because, based on the totality of the circumstances, a reasonable person would not feel he could refuse. The court acknowledged that there was a single officer, that the officer did not have his gun drawn, and that the officer instructed appellee that he could refuse the search. However, the court also noted that appellee did not believe he was free to leave because the officer was going to write him a citation. The officer also told appellee that he was in a high drug area before asking for consent to search. The court granted appellee's second motion to suppress. The State filed a timely notice pursuant to Crim.R. 12(J).

In a hearing on a motion to suppress evidence, the trial

---

appellee.

court assumes the role of trier of fact and is in the best position to resolve questions of fact and evaluate the credibility of witnesses. State v. Depew (1988), 38 Ohio St.3d 275, 277; State v. Warren (Aug. 12, 1991), Hocking App. No. 90CA7, unreported. Thus, the credibility of witnesses at a hearing on a motion to suppress evidence is a matter for the trial court. A reviewing court should not disturb the trial court's finding on the issue of credibility. State v. Fanning (1982), 1 Ohio St.3d 19; State v. Tutt (Apr. 14, 1986), Warren App. No. CA85-09-056, unreported. Accordingly, in our review we are bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting these facts as true, we normally determine as a matter of law, without deference to the trial court's conclusion, whether they meet the appropriate legal standard. State v. Shelpman (May 23, 1991), Ross App. No. 1632, unreported; State v. Simmons (Aug. 3, 1990), Washington App. No. 89CA18, unreported. However, in this instance our review is more constrained and we are required to afford a great deal of deference to the trial court's decision. Both the U.S. and the Ohio Supreme Courts have proclaimed that the issue of voluntariness in the consent to a search context presents a question of fact, rather than a question of law. See Ohio v. Robinette (1996), 519 U.S. 33, 40 and State v. Robinette (1997), 80 Ohio St.3d 234, 248-249 (Justice Cook concurring in judgment only). As Justice Cook noted, reviewing courts should defer to the trial court when it acts as a trier of fact. Id.

We are tempted to question whether voluntariness in reality presents a factual issue requiring deferential review. See, e.g. Arizona v. Fulminate (1991), 499 U.S. 279, 287 (the ultimate issue of voluntariness in a confession context is a legal question) and O'Day v. Webb (1972), 29 Ohio St.2d 215, 219 (simply because a question of law involves consideration of the facts does not turn it into a question of fact). See, also, Ruta v. Breckenbridge-Remy Co. (1982), 69 Ohio St.2d 66, 68. Nonetheless, we are duty bound to follow Ohio v. Robinette, supra, and State v. Robinette, supra, and do so here in spite of the fact that the outcome of this matter most likely would be different if we were free to treat the issue of voluntariness on a de novo basis. Thus, we proceed to review the court's finding that the state failed to prove that appellee's consent was voluntary under the familiar manifest weight of the evidence standard set forth in C.E. Morris Constr. Co. v. Foley Constr. Co. (1978), 54 Ohio St.2d 279, 280. This standard of review is highly deferential as the presence of only "some evidence" to support the trial court's finding requires us to affirm it. Id.

The State's assignment of error challenges only the trial court's finding that appellee did not voluntarily consent to the search. Therefore, we will not address whether the court erred in finding that the "furtive gesture" did not justify a search of appellee or his vehicle. Likewise, we will not review the trial court's finding that the initial stop was supported by a reasonable articulable suspicion.

"When a police officer's objective justification to continue detention of a person stopped for a traffic violation for the purpose of searching the person's vehicle is not related to the purpose of the original stop, and when that continued detention is not based on any articulable facts giving rise to a suspicion of some illegal activity justifying an extension of the detention, the continued detention to conduct a search constitutes an illegal seizure." State v. Robinette (1997), 80 Ohio St.3d 234, paragraph one of the syllabus. In other words, even when a police officer is authorized to stop a vehicle based on a reasonable articulable suspicion, the stop cannot continue, even to request permission to conduct a search, after the officer determines that the suspect was not committing a crime. However, if the officer finds some indicia that another crime is being committed after making the stop, the continued detention is justified so long as that new articulable and reasonable suspicion continues. State v. Myers (1990), 63 Ohio App.3d 765, 771.

Here, there is competent, credible evidence to support the trial court's finding that appellee provided Captain Moore with a valid driver's license when he was stopped. Consequently, Captain Moore was not justified in detaining appellee any longer absent reasonable articulable suspicion of another offense. The trial court found that the furtive gesture was not sufficient to satisfy this standard and, as noted above, the State does not challenge this finding.

The fact that a detention was unlawful does not necessarily require the suppression of any evidence recovered from a search authorized by the owner of the vehicle. Voluntary consent, determined under the totality of the circumstances, may validate an illegal detention and search. Robinette, supra, at 241. For an unlawfully detained individual's consent to be considered an independent act of free will, "the totality of the circumstances must clearly demonstrate that a reasonable person would believe that he or she had the freedom to refuse to answer further questions and could in fact leave." Id. at paragraph three of the syllabus.

When consent is obtained "during a period of illegal detention," the consent is negated "even though voluntarily given if [the consent is] the product of the illegal detention and not the result of an independent act of free will." State v. Bennett (June 21, 2000), Ross App. No. 99CA2509, unreported, citing Florida v. Royer (1983), 460 U.S. 491, 501, 103 S.Ct. 1319, 75 L.Ed.2d 229. The State has the burden of proving not only that the necessary consent was obtained, but that it was freely and voluntarily given. Royer, supra, 460 U.S. at 497. This burden is not satisfied by showing a mere submission to a claim of lawful authority. Id.

We agree with the trial court's statement that "this is a close case." The record confirms the trial court's finding that appellee was informed that he was going to receive a ticket so he knew he could not leave the scene. He was then told that he was

in an area with high drug activity and was asked to voluntarily submit to a search of both his person and his vehicle. The police officer informed appellee that he could refuse the search, but made it equally clear that appellee was not free to leave.

Because there is some evidence to support it, we defer to the trial court's finding that the State has not met its burden of demonstrating that appellee's consent to the search was voluntary and not merely the result of an illegal detention. Therefore, we overrule the State's sole assignment of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

Ross App. No. 00CA2541

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellee recover of Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, J. & Evans, J.: Concur in Judgment and Opinion

For the Court

BY: William H. Harsha, Judge

**NOTICE TO COUNSEL**

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.