[Cite as *State v. Henderson*, 2008-Ohio-5007.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- TERRANCE C. HENDERSON Defendant-Appellant	JUDGES: Hon. William B. Hoffman, P.J. Hon. Sheila G. Farmer, J. Hon. W. Scott Gwin, J. Case No. 07COA031 O P I N I O N
CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 06CRI130
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 26, 2008

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
CHAD K. HEMMINGER 307 Orange Street Ashland, OH 44805	DOUGLAS A. MILHOAN 601 South Main Street North Canton, OH 44720

Farmer, J.

{¶1} On December 18, 2006, the Ashland County Grand Jury indicted appellant, Terrance Henderson, on one count of possession of marijuana in violation of R.C. 2925.11.

{¶2} On February 20, 2007, appellant filed a motion to suppress, claiming illegal stop and search. A hearing was held on March 9, 2007. By judgment entry filed March 27, 2007, the trial court denied the motion.

{¶3} On May 2, 2007, appellant filed a motion to dismiss based on speedy trial rights. By judgment entry filed May 7, 2007, the trial court denied the motion.

{¶4} A jury trial commenced on May 8, 2007. The jury found appellant guilty as charged. By judgment entry filed June 8, 2007, the trial court sentenced appellant to five years in prison, revoked his post-release control, and ordered appellant to serve an additional six hundred fifty-nine days consecutive to the five year sentence.

{¶5} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶6} "THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS FOR A VIOLATION OF HIS RIGHT TO A SPEEDY TRIAL."

II

{¶7} "THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE THAT WAS OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE ONE OF THE OHIO CONSTITUTION."

III

{¶8} "THE JURY VERDICT FINDING APPELLANT GUILTY OF POSSESSION OF MARIHUANA WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION."

I

{¶9} Appellant claims the trial court erred in denying his motion to dismiss for a violation of R.C. 2945.71(C)(2) and R.C. 2945.71(E). We disagree.

{¶10} R.C. 2945.71(C)(2) states, "A person against whom a charge of felony is pending:***Shall be brought to trial within two hundred seventy days after the person's arrest." R.C. 2945.71(E) states, "For purposes of computing time under divisions (A), (B), (C)(2), and (D) of this section, each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days. This division does not apply for purposes of computing time under division (C)(1) of this section."

{¶11} In its judgment entry filed May 7, 2007, the trial court concluded the following:

{¶12} "The primary dispute in this case is whether the time the Defendant served in jail or prison on a violation of post-release control, during the pendency of this case, should be counted under the 'three for one' provisions of O.R.C. section 2945.71. Based upon the specific language of the statute, the Court finds that the Defendant's time in prison on the post-release control violation is not time 'during which the accused is held in jail in lieu of bail ***on the pending charge***.' "

{¶13} At the time of his arrest on the indictment sub judice, December 27, 2006, appellant was under the supervision of the Adult Parole Authority, and a holder was placed on him. On January 23, 2007, appellant was sent to prison for violating the terms of his post-release control. He remained in prison on the violation until March 16, 2007. Thereafter, he was returned to the Ashland County Jail.

{¶14} We note the trial court did not hold a hearing on the motion to dismiss. The trial court stated it had "fully reviewed the pleadings and Ohio Revised Code Section 2945.71." The trial court made the following calculations in fn. 1:

{¶15} "March 14, 2006 to March 16, 2006 (3 days in jail counted as 3 days each for 9 days); December 27, 2006 to March 15, 2007 (79 days in jail or prison on post-release control violation counted at actual time of 79 days); and March 16, 2007 through May 8, 2007 (54 days in jail counted as 3 days each for a total of 162 days); less February 20, 2007 through March 27, 2007 during which the Defendant's Motion to Suppress Evidence was pending (36 days)."

{¶16} We find the times of incarceration to be established by the record of transport in the file, and the trial court was correct in its calculations.

{¶17} Upon review, we find the trial court did not err in denying appellant's motion to dismiss.

{¶18} Assignment of Error I is denied.

II

{¶19} Appellant claims the trial court erred in denying his motion to suppress. Specifically, appellant claims the stop of his vehicle was without probable cause, and

the search of his vehicle was warrantless, wholly unsupported by probable cause, and unreasonable. We disagree.

{¶20} There are three methods of challenging on appeal a trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's findings of fact. In reviewing a challenge of this nature, an appellate court must determine whether said findings of fact are against the manifest weight of the evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19; *State v. Klein* (1991), 73 Ohio App.3d 485; *State v. Guysinger* (1993), 86 Ohio App.3d 592. Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. *State v. Williams* (1993), 86 Ohio App.3d 37. Finally, assuming the trial court's findings of fact are not against the manifest weight of the evidence and it has properly identified the law to be applied, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry* (1994), 95 Ohio App.3d 93; *State v. Claytor* (1993), 85 Ohio App.3d 623; *Guysinger*. As the United States Supreme Court held in *Ornelas v. U.S.* (1996), 116 S.Ct. 1657, 1663, "…as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal."

{¶21} The trial court predicated its decision on appellant's lack of standing:

{¶22} "The suppression of evidence obtained in violation of the Fourth Amendment can be urged only by those whose rights were violated by the search itself.

State v. Burton (Licking County Court of Appeals Case No. 00CA0013), 2000 Ohio App. LEXIS 3214. A person operating a motor vehicle without the permission of its owner has no standing to challenge the validity of a search of the automobile by law enforcement officers. ***State v. Crickon*** (1988), 43 Oho App.3d 171. The Defendant in this case was operating the rental vehicle in which the drugs were found. However, there is absolutely no evidence that he was authorized by the rental agreement to operate the motor vehicle. There is no evidence that he was even authorized by the person who legitimately rented the vehicle to operate it. The evidence did establish that Avis Rental was the person who owned the vehicle. In light of these facts, the Court finds that there is no evidence to conclude that the Defendant had any legitimate expectation of privacy in the rental vehicle and therefore he lacks standing to challenge the search of that vehicle under the Fourth Amendment of the United States Constitution or Article One of the Ohio Constitution, as urged in his motion."

{¶23} The trial court did not address the issue of probable cause to stop the vehicle. This issue is not governed by the decision on standing.

{¶24} In *Terry v. Ohio* (1968), 392 U.S. 1, 22, the United States Supreme Court determined that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." However, for the propriety of a brief investigatory stop pursuant to *Terry*, the police officer involved "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Id. at 21. Such an investigatory stop "must be viewed in the light of the totality of the surrounding circumstances"

presented to the police officer. *State v. Freeman* (1980), 64 Ohio St.2d 291, paragraph one of the syllabus.

{¶25} Ashland County Sheriff's Deputy John Hale testified he stopped appellant's vehicle for speeding, 68 m.p.h. in a 55 m.p.h. zone. March 9, 2007 T. at 7. Deputy Hale used the Genesis Radar System, but also concluded the vehicle had been speeding because he had "received training on estimating speeds of vehicles." Id. at 7-8. Once appellant's vehicle passed by Deputy Hale's stationary vehicle, the vehicle's speed dropped to the speed limit. Id. at 13.

{¶26} Based on Deputy Hale's testimony, we find there was probable cause to stop the vehicle. Once stopped, Deputy Hale discovered appellant was driving on a "temporary permit" which is a "permit that you drive on, but you can only drive on it with a licensed driver sitting with you, and you drive on that until you take your test to get an actual license." Id. at 14. While appellant did have one passenger with him, the passenger was not a licensed driver. Id. at 16.

{¶27} Upon review, we conclude the stop and seizure met the requirements of *Terry* and its progeny.

{¶28} The second issue is whether appellant had standing to object to the inventory search of the vehicle. "A person alleging as error the introduction of evidence seized during an allegedly illegal search bears the burden of showing that he has reasonable expectation of privacy in the property seized.***A person meets this burden only by establishing (1) a manifested subjective expectation of privacy in the object of the challenged search, and (2) that society is prepared to recognize that expectation as

legitimate.***" *State v. Spencer* (May 18, 1990), Montgomery App. No. 11740. (Citations omitted.)

{¶29} In this case, appellant was operating a rented vehicle, and was not an authorized driver of the vehicle. No one present at the stop was an authorized driver of the vehicle.

{¶30} Therefore, the issue is whether appellant's mere possessionary use, though unlawful use, can bootstrap the issue of standing. Under the very strict interpretation of the facts sub judice, we find appellant had standing to challenge the search. Appellant's possession may have been contractually unauthorized, but this was a civil wrong, not a criminal wrong. To permit the issue of standing to be a bar to all of the million of individuals who cannot establish a right to drive another's vehicle would be beyond the pale. Appellant's possession of the vehicle may be challengeable civilly, but it does not render his expectation of privacy null and void.

{¶31} Having concluded appellant had standing to challenge the search, we will address the validity of the inventory search. "To satisfy the requirements of the Fourth Amendment to the United States Constitution, an inventory search of a lawfully impounded vehicle must be conducted in good faith and in accordance with reasonable standardized procedure(s) or established routine.***" *State v. Hathman,* 65 Ohio St.3d 403, 1992-Ohio-63, paragraph one of the syllabus.

{¶32} Because there was not a licensed driver at the stop, it was unquestioned that Deputy Hale had to secure and/or impound the vehicle. March 9, 2007 T. at 16. Deputy Hale decided removal of vehicle was proper because of the high traffic volume on the highway. Id. at 17. During the inventory search, a large duffle bag containing

marijuana was discovered in the trunk of the vehicle. Id. at 21. Once the bag of marijuana was found, a decision was made to obtain a search warrant, and the standard checklist was not completed. Id. at 22-23.

{¶33} We find the initial search was a valid inventory search despite failing to complete the form, and this failure was not fatal to the validity of the search.

{¶34} Upon review, we find the trial court did not err in denying appellant's motion to suppress, albeit for different reasons.

{¶35} Assignment of Error II is denied.

III

{¶36} Appellant claims his conviction for possession of marijuana was against the manifest weight of the evidence. We disagree.

{¶37} On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine "whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Martin* (1983), 20 Ohio App.3d 172, 175. See also, *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶38} Appellant was convicted of possessing marijuana in violation of R.C. 2925.11 which states, "No person shall knowingly obtain, possess, or use a controlled substance." "A person acts knowingly, regardless of his purpose, when he is aware his conduct will probably cause a certain result or will probably be of a certain nature. A

person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B). In order to determine if a defendant knowingly possessed a controlled substance, it is necessary to look at all the attendant facts and circumstances. *State v. Teamer* (1998), 82 Ohio St.3d 490. R.C. 2925.01(K) defines "possession" as "having control over a thing or substance, but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found."

{¶39} Appellant argues there was no evidence to establish he possessed the marijuana. In support, appellant points out he was not the owner of the vehicle, and apart from his lone fingerprint on one of the bags of marijuana, there was insufficient evidence to convict him of possessing the marijuana.

{¶40} Appellant was driving the vehicle when it was stopped. T. at 210. The duffle bag containing the marijuana was found in the trunk of the vehicle. T. at 215-216. When appellant was booked, a large sum of cash was found in his pocket. T. at 219. Appellant's fingerprint was found on one of the plastic bags containing marijuana. T. at 127, 305-317.

{¶41} Further, an audiotape of a telephone call made by appellant on March 15, 2006 was played for the jury wherein appellant admitted his knowledge of the marijuana. Plaintiff's Exhibit 9. The individual appellant called asked, "How bad is it?" Appellant responded, "Not bad at all***just five," the number of bags of marijuana found in the duffle bag.

{¶42} Upon review, we find no manifest miscarriage of justice.

{¶43} Assignment of Error III is denied.

{¶44} The judgment of the Court of Common Pleas of Ashland County, Ohio is hereby affirmed.

By Farmer, J.

Hoffman, P.J. and

Gwin, J. concur.

s/ Sheila G. Farmer

s/ William B. Hoffman

S. W. Scott Gwin

JUDGES

SGF/sg 0826

IN THE COURT OF APPEALS FOR ASHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
TERRANCE C. HENDERSON	:	
Defendant-Appellant	:	CASE NO. 07COA031

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Ashland County, Ohio is affirmed.

s/ Sheila G. Farmer

s/ William B. Hoffman

S. W. Scott Gwin

JUDGES