

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Sheila G. Farmer, J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	
-vs-	:	
	:	Case No. 2009-AP-100050
JUSTIN SWINDERMAN	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING:	Criminal appeal from the Tuscarawas County Court of Common Pleas, Case No. 2009CR010032
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JUDGMENT:	Affirmed
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DATE OF JUDGMENT ENTRY:	June 10, 2010
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APPEARANCES:

For Plaintiff-Appellee

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Tusc. Co. Prosecuting Attorney
BY: MICHAEL J. ERNEST
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For Defendant-Appellant

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Gwin, P.J.

{¶1} Defendant-appellant Justin K. Swinderman appeals the August 10, 2009 Judgment Entry of the Tuscarawas County Court of Common Pleas denying his motion to suppress evidence. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶2} On January 2, 2009 at approximately 3:54 P.M., while on patrol on Interstate Route 77 in Tuscarawas County, Ohio, Sergeant Timothy J. Timberlake, Jr. stopped the appellant's vehicle after noticing the vehicle's loud exhaust system. Sergeant Timberlake approached the vehicle on the passenger side and retrieved appellant's driver's license and registration. Sergeant Timberlake confirmed through his in-car computer that appellant's driver's license had been suspended, effective that day. Appellant was ordered out of his vehicle, placed under arrest for driving under suspension, handcuffed and led back to the trooper's cruiser. Sergeant Timberlake waited for assistance from Trooper Maddox and then proceeded back to appellant's vehicle to conduct a search incident to arrest while Trooper Maddox remained with appellant.

{¶3} Sergeant Timberlake indicated that he opened the door to appellant's car and observed marijuana and pieces of a torn plastic bag strewn throughout the vehicle. Sergeant Timberlake also discovered a pack of rolling papers on the door panel. Finally, Sergeant Timberlake located two syringes, a spoon and a bag of tan powder later identified as heroin between the headliner and windshield.

{¶4} Sergeant Timberlake testified that he was able to identify the marijuana based upon his experience as a state highway patrol officer. Sergeant Timberlake

testified that he previously had worked on a drug interdiction team for approximately two years and was a canine officer for nine years with the highway patrol. Further, he has attended numerous schools for the DEA concerning drug interdiction. Sergeant Timberlake testified that based upon his training and experience, contraband is often packaged in small plastic baggies, tied at the top and then torn so that the entire bag is not used. Sergeant Timberlake further indicated that based on his training and experience, people often transport or ship drugs in small baggie similar to what was found in the appellant's vehicle.

{¶15} Sergeant Timberlake testified that after conducting the initial search of the vehicle, an inventory of the vehicle was conducted. The car could not be driven due to the defective exhaust system and appellant was under arrest. Accordingly, the vehicle needed to be towed from the side of Interstate 77 and impounded.

{¶16} Sergeant Timberlake testified that procedure employed by the State Highway Patrol required a vehicle be inventoried prior to it being moved. The reason for this procedure is to protect the vehicle owner's property and to protect the wrecking company that tows the vehicle from fraudulent damage or missing property claims. According to Sgt. Timberlake, all inventories conducted by the Ohio State Highway Patrol encompass all areas of the vehicle including containers, passenger compartments, the trunk and under the hood. All items are inventoried and all items of value are listed on the inventory list.

{¶17} In the present case, the search of the appellant's vehicle took place prior to the actual inventory.

{¶8} On January 5, 2009, appellant was indicted for one count of Possession of Drugs a felony of the Fifth Degree pursuant to Ohio Revised Code 2925.11. On June 29, 2009, Defendant-Appellant filed a Motion to Suppress Evidence. The trial court held an evidentiary hearing on appellant's motion to suppress on July 15, 2009. At the conclusion of the hearing the trial court requested the parties prepare post-hearing legal memoranda ostensibly based upon the United States Supreme Court decision issued April 21, 2009 in *Arizona v. Gant* (2009), --- U.S. ----, 129 S.Ct. 1710, 1723, 173 L.Ed.2d 485. The trial court overruled appellant's motion to suppress by Judgment Entry filed August 10, 2009.

{¶9} On September 11, 2009, Defendant-Appellant entered a No Contest Plea to the criminal charge in the Indictment with a finding of Guilty by the Trial Court. The Trial Court imposed sentence immediately but granted a stay of execution of its sentence pending appeal.

{¶10} Appellant timely appeals raising as his sole assignment of error:

{¶11} "I. THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS."

I.

{¶12} In his sole assignment of error, appellant contends that the trial court committed reversible error in denying his motion to suppress the drug evidence obtained as a result of an illegal search of his automobile. We disagree.

{¶13} Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 154-155, 797 N.E.2d 71, 74, 20030-Ohio-5372 at ¶ 8. When ruling on a motion to suppress, the trial court assumes the role

of Trier of fact and is in the best position to resolve questions of fact and to evaluate witness credibility. See *State v. Dunlap* (1995), 73 Ohio St.3d 308, 314, 652 N.E.2d 988; *State v. Fanning* (1982), 1 Ohio St.3d 19, 20, 437 N.E.2d 583. Accordingly, a reviewing court must defer to the trial court's factual findings if competent, credible evidence exists to support those findings. See *Burnside*, supra; *Dunlap*, supra. However, once an appellate court has accepted those facts as true, it must independently determine as a matter of law whether the trial court met the applicable legal standard. See *Burnside*, supra, citing *State v. McNamara* (1997), 124 Ohio App.3d 706, 707 N.E.2d 539; See, also, *United States v. Arvizu* (2002), 534 U.S. 266, 122 S.Ct. 744; *Ornelas v. United States* (1996), 517 U.S. 690, 116 S.Ct. 1657. That is, the application of the law to the trial court's findings of fact is subject to a *de novo* standard of review *Ornelas*, supra. Moreover, due weight should be given “to inferences drawn from those facts by resident judges and local law enforcement officers.” *Ornelas*, supra at 698, 116 S.Ct. at 1663.

{¶14} In the case at bar, appellant does not challenge either the initial stop of his motor vehicle for having a loud, defective exhaust or his arrest for driving while his driver's license was under suspension. Therefore, the only question in the case at bar is whether Sergeant Timberlake was justified in conducting a warrantless search of the interior of appellant's automobile.

{¶15} On April 21, 2009, the Supreme Court held that a warrantless search of a car incident to arrest violates the Fourth Amendment unless “the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search,” or “it is reasonable to believe evidence relevant to the crime of arrest might be found in

the vehicle.” *Arizona v. Gant* (2009), --- U.S. ----, 129 S.Ct. 1710, 1723, 173 L.Ed.2d 485. *Gant*’s holding must undoubtedly apply to all cases pending on direct review. See *Griffith v. Kentucky* (1987), 479 U.S. 314, 328, 107 S.Ct. 708; *United States v. Johnson* (1982), 457 U.S. 537, 562, 102 S.Ct. 2579; *United States v. Gonzales*(9th Cir 2010), 598 F.3d 1095; *United States v. Lopez*(6th Cir 2009), 567 F.3d 755; *United States v. Peoples*(WD Mich 2009), 668 F.Supp.2d 1042; *State v. Gilbert*, Clark App. No. 08-CA-82, 2009-Ohio-5528 at ¶ 18.¹

{¶16} In the case at bar, Sergeant Timberlake unequivocally testified that he discovered the contraband inside appellant’s car during a “search incident to arrest.” (T. at 6; 15-17). An inventory search of the vehicle occurred after the search incident to arrest and after the contraband was discovered and removed from the car by Sergeant Timberlake. (T. at 8; 9; 15-18).

{¶17} In *Gant*, the Supreme Court held that “[p]olice may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.” 129 S.Ct. at 1723. It further held that a search incident to arrest is unreasonable if neither of these circumstances exists. *Id.* at 1723-24. Accordingly, under the new standard established in *Gant*, Sergeant Timberlake was not justified in conducting a warrantless search of the automobile incident to appellant’s arrest for driving while under a suspended license.

¹ In the case at bar, the trial court recognized the applicability of *Gant* and requested the parties submit post-hearing memorandum’s discussing the applicability of *Gant* to the facts of this case. (T. at 20).

{¶18} However, in *Gant* the Court recognized that, even if a search incident to arrest was not justified, the other established exceptions to the warrant requirement might nevertheless apply depending on the circumstances. 129 S.Ct. at 1721; 1723-24.

{¶19} Inventory searches conducted in accordance with a standard procedure and for the purpose of protecting police and to protect and identify the owner's property while it is in custody, are lawful and do not violate the Fourth Amendment's prohibition against warrantless searches. See *Colorado v. Bertine* (1987), 479 U.S. 367, 372, 107 S.Ct. 738; *Illinois v. Lafayette* (1983), 462 U.S. 640, 103 S.Ct. 2605; *South Dakota v. Opperman* (1976), 428 U.S. 364, 369, 96 S.Ct. 3092; *State v. Peagler* (1996), 76 Ohio St.3d 496, 668 N.E.2d 489. Further, an inventory search is valid if the government did not act in bad faith, see, e.g., *United States v. Hurst* (6th Cir. 2000), 228 F.3d 751, 758; *State v. Hathman* (1992), 65 Ohio St.3d 403, 604 N.E.2d 743 or if the items seized would have been inevitably discovered. See, e.g., *United States v. Robinson* (6th Cir. 2004), 390 F.3d 853, 872.

{¶20} In the case at bar, Sergeant Timberlake testified that the vehicle could not be driven due to the loud, defective exhaust system. Further, appellant's driver's license was under suspension and he was under arrest. The vehicle was located on the side of Interstate 77 necessitating that it be towed for impoundment. Sergeant Timberlake testified that the purpose of conducting an inventory search of a vehicle is to protect the vehicle owner's property and further to protect the towing entity from fraudulent damage or missing property claims by the owner or operator of the vehicle. Under the rationale of *Harris v. United States* (1968), 390 U.S. 234, 88 S.Ct. 992 this was a proper police function. Sergeant Timberlake describe the Ohio State Highway

Patrol procedure for conducting an inventory search and utilized that department's official form during the inventory of appellant's vehicle.

{¶21} Once the door had been lawfully opened, the marijuana and the torn plastic bags were plainly visible. It has long been settled that objects falling within the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced as evidence. *Ker v. California* (1963), 374 U.S. 23, 83 S.Ct. 1623; *State v. Williams* (1978), 55 Ohio St.2d 82, 85, 377 N.E.2d 1013. Upon observing the presence of contraband and the evidence of drug packaging Sergeant Timberlake had probable cause to continue to search the vehicle.

{¶22} In the instant case, the police decided to tow, impound and inventory the vehicle in accordance with a routine procedure and for the purpose of protecting the police and to identify and protect the owner's property while the property was in police custody. Sergeant Timberlake discovered contraband in plain view while conducting a lawful inventory search. The inventory search was lawful and did not violate the Fourth Amendment.

{¶23} Just as an officer's underlying subjective intent or motivation for stopping a vehicle does not invalidate an otherwise valid traffic stop where an officer has an articulable reasonable suspicion or probable cause to stop a motorist for any criminal violation, including a minor traffic violation, we find Sergeant Timberlake's characterization of the search in this case as "incident to arrest" does not invalidate an otherwise valid inventory search. See e.g. *City of Dayton v. Erickson* (1996), 76 Ohio St.3d 3, 665 N.E.2d 1091.

{¶24} Accordingly, we overrule appellant's sole assignment of error.

{¶25} The judgment of the Court of Common Pleas for Tuscarawas County, Ohio is affirmed.

By Gwin, P.J.,

Farmer, J., and

Wise, J., concur

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

HON. JOHN W. WISE

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IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-VS-

JUSTIN SWINDERMAN

Defendant-Appellant

JUDGMENT ENTRY

CASE NO. 2009-AP-100050

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas for Tuscarawas County, Ohio is affirmed. Costs to appellant.

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

HON. JOHN W. WISE