[Cite as *State v. Branham*, 2010-Ohio-795.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
STATE OF OHIO	:	Julie A. Edwards, P.J.
	:	William B. Hoffman, J.
Plaintiff-Appellee	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. 09 COA 022
	:	
	:	
JOSEPH L. BRANHAM	:	O P I N I O N
Defendant-Appellant		

CHARACTER OF PROCEEDING:	Criminal Appeal from Ashland Municipal Court Case No. 09-CRB-108AB
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	March 3, 2010

APPEARANCES:

For Plaintiff-Appellee

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Edwards, P.J.

{¶1} Appellant, Joseph L. Branham, appeals a judgment of the Ashland Municipal Court convicting him of possession of marijuana (Ashland Ord. 513.03(C)(3)) upon a plea of no contest. Appellee is the City of Ashland.

STATEMENT OF FACTS AND CASE

{¶2} On February 7, 2009, at 2:33 a.m., Officer Brian Kunzen of the Ashland Police Department was dispatched to investigate a complaint. The caller told police that two people were fighting in the middle of the road and the caller almost hit these people.

{¶3} Initially, Officer Kunzen could not find anyone in the area where the altercation was reported. While continuing to patrol the area, he saw appellant entering an apartment complex on Cottage Street. The officer then observed appellant leaving the apartment complex. Appellant was unsteady on his feet. Assuming that appellant was "half of the argument" about which the complaint was received, the officer decided to make contact with appellant. Tr. 15.

{¶4} Officer Kunzen asked appellant for identification. Appellant had difficulty removing his identification from his wallet. Appellant told the officer that he was coming from a bar. In addition to noting that appellant was unsteady on his feet, the officer noted that appellant smelled like alcohol and his eyes were red, bloodshot and glassy. When the officer asked appellant if he knew anything about the reported disturbance, appellant admitted that his buddy had dropped him off and they argued in the street.

{¶5} The officer determined that appellant was too intoxicated to care for himself. He asked appellant if he knew anyone who would come and pick up appellant and assume responsibility for his care. Appellant responded that he was from West

Salem and knew no one in the immediate area. While appellant told the officer that he probably could get someone from West Salem to come and get him, the officer knew that West Salem was about 30 minutes away, not counting the time it takes to wake someone in the middle of the night and have that person get dressed and started on the trip.

{¶6} The officer then arrested appellant and immediately conducted a search incident to the arrest. When he opened a cigarette packet to make sure appellant was not carrying a small pocket knife or other weapon in the package, he found a rolled marijuana joint. Appellant claimed he did not know there was marijuana in the cigarette package; however, Officer Kunzen watched appellant open the cigarette package, take out a cigarette and light it as the officer approached him earlier.

{¶7} Appellant was charged with disorderly conduct (R.C. 2917.11(B)(2)) and possession of marijuana. Appellant moved to suppress the marijuana, arguing in part that the arrest for disorderly conduct was made without probable cause.[1] The court overruled appellant's motion to suppress. Appellant subsequently was convicted of possession of marijuana upon a plea of no contest. The charge of disorderly conduct was dismissed. He was sentenced to 30 days incarceration and fined $200. He assigns a single error on appeal:

{¶8} "THE TRIAL COURT ERRED BY NOT SUPPRESSING THE EVIDENCE GATHERED AS A RESULT OF THE ARREST OF THE APPELLANT, WHICH LACKED PROBABLE CAUSE AND VIOLATED APPELLANT'S FOURTH AMENDMENT RIGHT AGAINST UNREASONABLE SEARCHES AND SEIZURES."

[1] While in his motion to suppress appellant also challenged the extent of the search incident to the arrest, appellant has only assigned error to the court's ruling on the issue of probable cause to arrest.

{¶9} An appellate court's review of a ruling on a motion to suppress evidence presents a mixed question of law and fact. *State v. Long* (1998), 127 Ohio App. 3d 328, 332, 713 N.E.2d 1. During a suppression hearing, the trial court assumes the role of the trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St. 3d 357, 366, 582 N.E.2d 972; *State v. Hopfer* (1996), 112 Ohio App. 3d 521, 679 N.E.2d 321. As a result, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594, 621 N.E.2d 726. An appellate court must then independently determine without deference to the trial court's legal conclusions whether, as a matter of law, evidence should be suppressed. *State v. Russell* (1998), 127 Ohio App.3d 414, 416, 713 N.E.2d 56; *State v. Klein* (1991), 73 Ohio App.3d 486, 488, 597 N.E.2d 1141.

{¶10} The Fourth Amendment to the United States Constitution provides for "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The State bears the burden of establishing a warrantless search, which is per se unreasonable, is, nevertheless, reasonable pursuant to one or more exceptions to the Fourth Amendment's warrant requirement. *Xenia v. Wallace* (1988), 37 Ohio St.3d 216, 524 N.E.2d 889, paragraph two of the syllabus. A search incident to arrest is an exception to the general rule warrantless searches are per se unreasonable. *State v. Mims*, 6th Dist. No. OT-05-030, 2006-Ohio-862, ¶ 23. However, police may conduct a search of the arrestee's person incident only to a lawful arrest. *State v. Dillon,* 10th Dist. No. 04AP-1211, 2005-Ohio-4124, ¶ 31. Evidence obtained as a result of an illegal arrest is inadmissible at trial.

State v. Henderson (1990), 51 Ohio St.3d 54, 56, 554 N.E.2d 104, citing *Wong Sun v. United States* (1963), 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441.

{¶11} In the instant case, the determinative issue is whether Officer Kunzen had probable cause to arrest appellant for disorderly conduct due to intoxication. If the officer lacked probable cause, the marijuana seized during the search incident to the arrest must be suppressed. Probable cause to conduct a warrantless arrest exists when police have, at the moment of arrest, knowledge of facts and circumstances grounded in reasonably trustworthy information to warrant a belief by a prudent person that an offense has been committed by the person to be arrested. *Beck v. Ohio* (1964), 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142.

{¶12} R.C. 2719.11(B)(2) provides:

{¶13} "(B) No person, while voluntarily intoxicated, shall do either of the following:

{¶14} "(2) Engage in conduct or create a condition that presents a risk of physical harm to the offender or another, or to the property of another."

{¶15} The 1974 Committee Comment to Am.Sub.H.B. No. 511 states: "It is a violation if [the offender] imbibes too much and, while in public or with others, becomes offensively noisy, coarse, or aggressive, or becomes uncontrollably nauseated between the entrée and dessert. It is also a violation if, when alone and drunk or under the influence of drugs, he attempts a tightrope act on a bridge parapet or curls up to sleep in a doorway in freezing weather."

{¶16} The law focuses, not on the drunken state of the accused, but rather upon his conduct while drunk. *State v. Pennington* (Nov. 16, 1998), 5th Dist. No.

1998CA00137, 1998 WL 818632. The law requires some affirmative behavior on the part of the defendant and does not prohibit merely being intoxicated. *State v. Jenkins* (Mar. 31, 1998), 6th Dist. No. L-97-1303, 1998 WL 161190; *State v. Parks* (1990), 56 Ohio App.3d 8, 10-11, 564 N.E.2d 747. "Risk" is statutorily defined as "a significant possibility as contrasted with a remote possibility, that a certain result may occur or that certain circumstances exist." R.C. 2901.01(A)(7).

{¶17} Appellant argues that based on this Court's holding in *State v. Waters*, 181 Ohio App. 3d 424, 909 N.E.2d 183, 2009-Ohio-1338, the officer lacked probable cause to arrest him for disorderly conduct because he did not create a risk of harm to himself or to others.

{¶18} The *Waters* case involved the warrantless arrest of three defendants: Waters, McLaughlin and Gatewood. The officer was dispatched at 1:20 a.m. after a report of a revving engine. When the police officer arrived at the residence, he observed a man positioned by a parked vehicle near an open garage. When the man, later determined to be Gatewood, saw the officer, he ran into the garage and threw something. The officer approached the garage and saw McLaughlin standing in the garage. When the officer asked McLaughlin if he heard a revving engine, he responded that he had not heard anything. The officer noted that McLaughlin's speech was slow and slurred and he smelled alcohol on McLaughlin's breath. McLaughlin was unsteady on his feet. The officer then noted Waters sitting inside the garage. Waters looked pale and intoxicated. The officer asked Waters if he was okay, and Waters vomited before he could answer. Gatewood was also unsteady on his feet and smelled like alcohol.

{¶19} This Court held that the arrest of Waters, McLaughlin and Gatewood for disorderly conduct while intoxicated lacked probable cause. Id. at ¶33. We concluded that although there always exists some risk of harm when people are intoxicated, there was no "significant possibility" of harm. Id. at ¶32. While the appellants were visibly intoxicated, with Waters intoxicated to the point of vomiting, they were not intoxicated to the point of unconsciousness nor did the officers seek medical attention for any of them. Id.

{¶20} In the instant case, police received a report of two men arguing in the middle of the street, nearly being struck by a passing vehicle. Appellant admitted that he was one of the men arguing in the street. By appellant's own admission, he had created a substantial risk of harm to himself and to passing motorists by standing in the middle of a dark street. Unlike the defendants in *Waters* who were in a private garage, appellant was wandering around with no place to go, and told the officer he knew no one in the immediate area who could pick him up and take responsibility for him. Appellant stated that he could "probably" get someone from West Salem to come and get him, but West Salem was a 30 minute drive away. The facts and circumstances of this case warranted the officer's belief that appellant's intoxication had created a substantial risk of harm to himself and others. The officer had probable cause to arrest appellant for disorderly conduct.

{¶21} The assignment of error is overruled.

{¶22} The judgment of the Ashland Municipal Court is affirmed.

By: Edwards, P.J.

Hoffman, J. and

Delaney, J. concur

s/Julie A. Edwards

s/William B. Hoffman

s/Patricia A. Delaney

JUDGES

JAE/r0114

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IN THE COURT OF APPEALS FOR ASHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
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Plaintiff-Appellee	:	
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-vs-	:	JUDGMENT ENTRY
	:	
JOSEPH L. BRANHAM	:	
	:	
Defendant-Appellant	:	CASE NO. 09 COA 022

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Ashland Municipal Court is affirmed. Costs assessed to appellant.

s/Julie A. Edwards

s/William B. Hoffman

s/Patricia A. Delaney

JUDGES