[Cite as *State v. Fouch*, 2015-Ohio-1784.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. John W. Wise, P.J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	Case No. 14 CA 71
	:	
LISA FOUCH	:	
	:	
	:	
Defendant-Appellant	:	OPINION

CHARACTER OF PROCEEDING: Appeal from the Licking County Court of Common Pleas, Case No. 14 CR 00159

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: May 7, 2015

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
KENNETH W. OSWALT LICKING COUNTY PROSECUTOR	STEPHEN T. WOLFE 1350 W. 5th Ave., Suite 124 Columbus, OH 43212
JUSTIN T. RADIC 20 S. Second Street, Fourth Floor Newark, OH 43055	

Delaney, J.

{¶1} Defendant-Appellant Lisa Fouch appeals her August 14, 2014 conviction and sentence by the Licking County Court of Common Pleas. Plaintiff-Appellee is the State of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} Defendant-Appellant Lisa Fouch was indicted on March 13, 2014 for one count of possession of cocaine in violation of R.C. 2925.11(A)(C)(4)(a), a fifth-degree felony; one count of aggravated possession of drugs in violation of R.C. 2925.11(A)(C)(1)(a), a fifth-degree felony; one count of possession of drug paraphernalia in violation of R.C. 2925.14(C)(1), a fourth-degree misdemeanor; one count of petty theft in violation of R.C. 2913.02(A)(1) and/or (3), a first-degree misdemeanor; and one count of possession of drugs in violation of R.C. 2925.11(A)(C)(2)(a), a first-degree misdemeanor.

{¶3} Fouch filed a Motion to Suppress on April 16, 2014. The State filed a response on April 28, 2014.

{¶4} The trial court held a hearing on the motion on May 16, 2014. The following evidence was adduced at the hearing.

{¶5} On February 28, 2014, Heath Police Department Officer Mark Emde was called to the Wal-Mart located in Heath, Licking County, Ohio. Officer Emde met with the Wal-Mart security officer, Mike Fields. Fields stated that he observed Defendant-Appellant, Lisa Fouch, taking some items and leaving the store without paying for them. Fields stopped Fouch as she was walking to her vehicle. When Office Emde arrived, Fouch was already in custody in the Wal-Mart loss prevention office.

{¶6} Officer Emde's conversation with Fouch was recorded and submitted as evidence as Joint Exhibit A.

{¶7} Officer Emde gave Fouch her *Miranda* warnings before speaking to her. Officer Emde observed that Fouch had a cut drinking straw commonly associated with narcotics use. Office Emde asked Fouch about drug use and she stated that she snorted Percocet pills four hours earlier. He next asked Fouch if there were any stolen items, drugs, or guns in her vehicle. Fouch had initially denied having a vehicle in the Wal-Mart parking lot, but Fields observed Fouch approaching a silver Lincoln when he detained her. The police dispatch ran the license plates of the silver Lincoln and it was identified as being owned by Fouch. Fouch denied having any stolen property in the vehicle. Office Emde asked if she had a problem if any of his officers looked in the vehicle. Fouch responded that she did. Officer Emde then stated, "I'll just inventory it when we impound it." Fouch said Office Emde could search her vehicle. She then asked, "If I let you search, will you not impound the car?" Officer Emde said that he could not make an agreement like that with her because they would think he coerced her into letting him look in the vehicle.

{¶8} Officer Meade and Fouch then started discussing the items found in her possession when Fields stopped her. Officer Emde testified he finished paperwork and Fouch was eventually placed under arrest and taken to the Heath Police Department.

{¶9} Officer Emde searched Fouch's vehicle pursuant to Fouch's consent. He found a purse on the floor area of the vehicle. Inside the purse, Officer Emde found drugs and paraphernalia, including a metal pipe commonly used to smoke crack cocaine. The drugs were determined to be oxycodone, hydrocodone, and cocaine.

{¶10} Fouch's vehicle was not impounded.

{¶11} On June 9, 2014, the trial court denied Fouch's Motion to Suppress. The trial court found that Fouch had consented to the search of the vehicle and at no time had revoked her offer of consent or her consent to search the vehicle.

{¶12} Fouch entered a no contest plea to all five counts. The trial court found Fouch guilty and sentenced her to 18 months in prison.

{¶13} Fouch now appeals the June 9, 2014 judgment entry of the Licking County Court of Common Pleas.

ASSIGNMENTS OF ERROR

{¶14} Fouch raises two Assignments of Error:

{¶15} "I. THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT-APPELLANT'S MOTION TO SUPPRESS BASED UPON VALID CONSENT.

{¶16} "II. THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT-APPELLANT'S MOTION TO SUPPRESS BASED UPON INEVITABLE DISCOVERY."

ANALYSIS

{¶17} Fouch's two Assignments of Error argue the trial court erred in denying her motion to suppress. We disagree.

Standard of Review

{¶18} Appellate review of a trial court's decision to deny a motion to suppress involves a mixed question of law and fact. *State v. Long,* 127 Ohio App.3d 328, 332, 713 N.E.2d 1 (4th Dist.1998). During a suppression hearing, the trial court assumes the role of trier of fact and, as such, is in the best position to resolve questions of fact and to evaluate witness credibility. *State v. Brooks,* 75 Ohio St.3d 148, 154, 661 N.E.2d 1030

(1996). A reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Medcalf,* 111 Ohio App.3d 142, 145, 675 N.E.2d 1268 (4th Dist.1996). Accepting these facts as true, the appellate court must independently determine as a matter of law, without deference to the trial court's conclusion, whether the trial court's decision meets the applicable legal standard. *State v. Williams,* 86 Ohio App.3d 37, 42, 619 N.E.2d 1141 (4th Dist.1993), overruled on other grounds.

{¶19} There are three methods of challenging a trial court's ruling on a motion to suppress on appeal. First, an appellant may challenge the trial court's finding of fact. In reviewing a challenge of this nature, an appellate court must determine whether the trial court's findings of fact are against the manifest weight of the evidence. See, *State v. Fanning,* 1 Ohio St.3d 19, 437 N.E.2d 583 (1982); *State v. Klein,* 73 Ohio App.3d 486, 597 N.E.2d 1141 (4th Dist.1991). 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. *See*, *Williams,* supra. Finally, an appellant may argue the trial court has incorrectly decided the ultimate or final issues raised in a 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,* 95 Ohio App.3d 93, 96, 641 N.E.2d 1172 (8th Dist.1994).

I. Consent

{¶20} Fouch contends in her first Assignment of Error that the trial court erred when it found that Fouch consented to the search of her vehicle. We disagree.

{¶21} The Fourth Amendment to the United States Constitution protects individuals against unreasonable searches and seizures. Without a search warrant, a search is per se unreasonable unless it falls under a few established exceptions. *State v. Swetnam*, 5th Dist. Licking No. 14-CA-57, 2015-Ohio-1003, ¶ 14 citing *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Once the defendant shows the search warrantless, the burden shifts to the state to show it was permissible under one of the exceptions. *Id.* Consent is one exception to the warrant requirement. *Id.* If an individual voluntarily consents to a search, then no Fourth Amendment violation occurs. *Id.* citing *Schneckloth v. Bustamante*, 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

{¶22} A voluntary consent need not amount to a waiver; consent can be voluntary without being an "intentional relinquishment or abandonment of a known right or privilege." *State v. Camp*, 2014-Ohio-329, 24 N.E.3d 601, ¶ 23 (5th Dist.) quoting *Schneckloth*, 412 U.S. at 235. The proper test is whether the totality of the circumstances demonstrates that the consent was voluntary. *Id.* The voluntariness of a consent to a search is a question of fact and will not be reversed on appeal unless clearly erroneous. *Id.* citing *State v. Clelland*, 83 Ohio App.3d 474, 615 N.E.2d 276 (4th Dist.1992).

{¶23} Fouch argues she did not consent to the search of her vehicle, but rather gave Officer Emde conditional consent to search her vehicle. She states that she gave

the officer consent to search her vehicle if he agreed not to impound her vehicle. Officer Emde replied that he could not make that agreement. Fouch argues because Officer Emde would not agree, Fouch's consent to search the vehicle was rendered invalid.

{¶24} "When a claim of conditional consent is raised, it is incumbent upon the court to consider all of the surrounding circumstances to determine what were the terms of the consent. When a claim of conditional consent is raised and supported in the evidence, the burden is on the state to demonstrate the consent was unconditional or, if conditional, the search was conducted within the limits of the consent." *State v. Perry*, 4th Dist. Jackson No. 479, 1985 WL 9481, *4 (June 7, 1985). "The scope of a search that rests on consent is limited to the extent of that consent. A person consenting can set limits on the time, duration, area, and intensity of the search, as well as the conditions governing the search." *State v. Howard*, 2nd Dist. Montgomery No. 20321, 2004-Ohio-5287, ¶ 38 citing *State v. Perry, supra*. "An intrusion beyond those limitations would not be based on an intentional relinquishment of the right. However, a defendant's general consent to search his car has been held to include a consent to search closed containers found inside, *Florida v. Gagman* (1991), 500 U.S. 248, 111 S.Ct. 1801, 114 L.Ed.2d 297, as well as underneath the front seat and into all compartments. *State v. Patterson* (1993), 95 Ohio App.3d 255, 642 N.E.2d 390." *State v. Howard, supra*.

{¶25} The State argues, and the trial court agreed in its judgment entry, that Fouch initially gave Officer Emde her unconditional consent to search her vehicle. In her statement of facts, Fouch states the exchange between Fouch and Officer Emde went as follows:

> Officer Emde asked the Appellant if he could search her vehicle, and the Appellant declined. *Id.* at 10. Officer Emde stated that he would impound her vehicle and do an inventory search. *Id.* at 11. The Appellant then stated that Officer Emde could search her car, but asked, "If I let you search, will you not impound the car?" Id. Officer Emde stated that he could not make that agreement. *Id.*

Appellant's Brief, p. 2. Officer Emde testified he searched Fouch's vehicle based on her consent.

{¶26} The trial court found the facts showed that Fouch consented to the search of her vehicle and at no time revoked her offer of consent to search the vehicle. Fouch argues her consent to search the vehicle was conditional. However, the evidence shows there is no dispute of fact that Fouch made three separate statements to Officer Emde as to her consent to search her vehicle. She stated: (1) Officer Emde could not search her vehicle, (2) Officer Emde could search her vehicle, and (3) If she let Officer Emde search the vehicle, would he not impound the vehicle. Officer Emde replied he could not make that agreement with her. After hearing Officer Emde's response, at no time did Fouch revoke her unconditional consent to search her vehicle.

{¶27} Considering the totality of the circumstances, we find the evidence supports the trial court's finding that Fouch initially gave her unconditional consent to search her vehicle. The evidence shows that after she gave her unconditional consent to search her vehicle, she next made a conditional offer of her consent to search her vehicle, which Officer Emde rejected. Fouch did not then revoke her initial unconditional consent to search her vehicle.

{¶28} Fouch next argues her consent to search the vehicle was not voluntary because she was in custody and Officer Emde threatened to have the vehicle impounded. We first find that because Fouch was in custody, it did not affect the voluntariness of Fouch's consent to search. While in custody, Officer Emde asked Fouch if she would allow his officers to search her vehicle. She initially denied his request.

{¶29} Officer Emde then made a statement that he would search the vehicle after he impounded the vehicle. Fouch argues this statement coerced her into giving Officer Emde consent to search the vehicle. As we stated above, after Officer Emde made the statement, Fouch unconditionally consented to the search and then conditionally consented to the search. Officer Emde stated that he could not agree to condition of not impounding the car because that could be considered coercion. Considering the totality of the circumstances, we agree with the trial court's determination that Fouch's consent to search the vehicle was unconditional and voluntary.

{¶30} Fouch's first Assignment of Error is overruled.

II. Inevitable Discovery

{¶31} The State argued in its response to Fouch's motion to suppress that even if Fouch's consent to search was not valid, the evidence in the vehicle would have been inevitably discovered. In 1985, the Ohio Supreme Court adopted the inevitable discovery exception to the exclusionary rule. *State v. Camp*, 2014-Ohio-329, 24 N.E.2d 601, ¶ 27 citing *State v. Perkins*, 18 Ohio St.3d 193, 480 N.E.2d 763 (1985). The Supreme Court held:

> that illegally obtained evidence is properly admitted in a trial court proceeding once it is established that the evidence would have been ultimately or inevitably discovered during the course of a lawful investigation. The prosecution will have the burden to show within a reasonable probability that police officials would have discovered the derivative evidence apart from the unlawful conduct.

Id. quoting *State v. Perkins*, 18 Ohio St.3d at 196.

{¶32} Our analysis under the first Assignment of Error determined the trial court's decision to find that Fouch gave her voluntary and unconditional consent to search her vehicle was supported by the evidence. As such, the second Assignment of Error is moot.

{¶33} Fouch's second Assignment of Error is overruled.

CONCLUSION

{¶34} The judgment of the Licking County Court of Common Pleas is affirmed.

By: Delaney, J.,

Wise, P.J. and

Baldwin, J., concur.