[Cite as *State v. Torres*, 2008-Ohio-2090.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-07-1306

Appellee — Trial Court No. CR-0200701706

v.

Heriberto Torres — **DECISION AND JUDGMENT ENTRY**

Appellant — Decided: May 2, 2008

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Jerome Phillips, for appellant.

* * * * *

SKOW, J.

{¶ 1} Appellant, Heriberto Torres, appeals from his conviction in the Lucas County Court of Common Pleas for possession of marijuana. For the reasons that follow, we reverse the judgment of the trial court.

{¶ 2} On April 3, 2007, appellant was indicted on charges of possession of marijuana, a felony of the third degree, and trafficking in marijuana, also a felony of the third degree. Appellant pled not guilty to the charges and filed a motion to suppress.

{¶ 3} On May 24, 2007, a hearing on the motion to suppress was held, and evidence of the following was adduced. On December 13, 2006, five or six Toledo police officers, with guns drawn, entered a carry-out owned and operated by appellant, to execute a search warrant for that location. Upon entering the carry-out, Detective Michael Awls presented defendant with a copy of the search warrant. When defendant asked the purpose of the search warrant, Detective Awls informed defendant that it was for "marijuana, narcotics."

{¶ 4} Awls patted appellant down and removed keys and money from appellant's pocket. Awls then placed these items on a counter.

{¶ 5} Sergeant Robert Marzec read appellant his *Miranda* warnings in English, and provided him with a card on which the *Miranda* warnings were written in both English and Spanish. After being read his rights, appellant acknowledged that he understood.

{¶ 6} As the search was underway, Awls asked appellant if he would consent to a search of his residence. Appellant responded by saying, "I don't have anything here, you can search my house, you can search my car." Without any further discussion, Awls took from the counter the keys that he had earlier removed from appellant's pocket, and used them to open a pickup truck that was parked on the street outside the carry-out. On the driver's side floor of the truck officers found two plastic bags, inside of which were a total of 12 one-pound bags of marijuana.

{¶ 7} Following the discovery of the marijuana, appellant was handcuffed and placed under arrest. The search of both the carry-out and the truck took less than fifteen minutes.

{¶ 8} Following the evidentiary hearing, the trial court concluded that appellant knowingly and voluntarily gave the police consent to search his vehicle, and on that basis the trial court denied appellant's motion to suppress.

{¶ 9} On August 8, 2007, appellant withdrew his guilty plea and entered a no contest plea to the lesser included charge of possession of marijuana, a felony of the fourth degree. He was sentenced to four years of community control, including a six-month period of commitment in the Corrections Center of Northwest Ohio ("CCNO").

{¶ 10} On September 17, 2007, a notice of appeal was timely filed. Appellant's six-month commitment to CCNO was stayed pending the outcome of this appeal.

{¶ 11} In this appeal, appellant raises the following assignment of error:

{¶ 12} "THE TRIAL COURT ERRED WHEN IT DENIED THE APPELLANT'S MOTION TO SUPPRESS, HOLDING THAT HIS CONSENT WAS FREELY AND VOLUNTARILY GIVEN."

{¶ 13} Appellate review of a trial court's decision on a motion to suppress presents a mixed question of law and fact. *State v. Richardson*, 3d Dist. No. 13-06-21, 2007-Ohio-115, ¶ 13. When reviewing a decision on a motion to suppress, an appellate court must uphold the trial court's findings of fact if they are supported by competent, credible evidence. Id. After accepting the trial court's properly supported findings of fact, the

appellate court must conduct its own, independent review, to determine whether the trial court applied the correct legal standard. Id.

{¶ 14} In order for a defendant to prevail on a motion to suppress evidence as the fruit of a Fourth Amendment violation, he must first establish that the search or seizure was illegal. *United States v. Holmes* (C.A.D.C.2007), 505 F.3d 1289, 1292. Specifically at issue in the instant case is whether the police officers exceeded the scope of a protective frisk authorized by *Terry v. Ohio* (1968), 392 U.S. 1, when they seized appellant's keys from inside his pocket.

{¶ 15} The law is clear that police seizure of items that are neither weapons nor apparent contraband during a *Terry* pat down exceeds the doctrine's limited exception to the Fourth Amendment's prohibition on warrantless searches and seizures. *Holmes*, supra, at 1292.

{¶ 16} In this case, the keys were neither weapons nor contraband. Although there was some general testimony by Detective Awls that "keys can be used as a weapon," Awls never stated that he considered appellant's keys to be a weapon. Neither was there any evidence or assertion to suggest that the keys constituted contraband. Because the keys were neither weapons nor contraband, we find that the officers had no right to remove them from appellant's pocket during the pat down.

{¶ 17} Having established a Fourth Amendment violation, appellant must next make a prima facie showing of a causal nexus between that violation and the evidence he seeks to suppress. *Holmes*, supra, at 1292; see, also, *United States v. Kornegay* (C.A.1,

2005), 410 F.3d 89, 93-94; *Alderman v. United States* (1969), 394 U.S. 165, 183. In the instant case, appellant has met his burden of showing that but for the illegal seizure of his keys, the police likely would not have discovered the marijuana in his car. That is, if the police had not removed appellant's keys during the pat down, they would not have been able to view them to determine whether appellant possessed a car key. Also, even if they had somehow been able to determine that appellant had a car key, they would have to have done something more than simply take the key from the counter in order to get into appellant's car. Upon hearing appellant say, "I don't have anything here, you can search my house, you can search my car," they would have had to obtain, if not a search warrant for appellant's vehicle, at least the cooperation of appellant in handing over the keys.

{¶ 18} Because appellant has met his burden in showing a prima facie causal nexus between the illegal seizure and the challenged evidence, the evidence must be suppressed unless the state proves by a preponderance of the evidence: (1) that the evidence would have been discovered inevitably; (2) that the evidence was discovered through independent means; or (3) the discovery of the evidence was so attenuated from the illegal search or seizure that the taint of the unlawful government conduct was dissipated. See *Holmes*, supra, at 1293.

{¶ 19} In the instant case, only the third option is even arguably applicable, with the state devoting much of its argument to the proposition that appellant -- in telling the officers, "I don't have anything here, you can search my house, you can search my car" -- consented to the search of his vehicle.

{¶ 20} Even if we assume, *arguendo*, that appellant's statement is properly construed as a consent, we note that when a defendant's consent is obtained after illegal police activity, "[t]he consent will be held voluntary only if there is proof of an unequivocal break in the chain of illegality sufficient to dissipate the taint of the prior illegal action." *State v. Retherford*, 93 Ohio App.3d 586, 602, citing *Florida v. Royer*, 460 U.S. 491, 501. "Factors to consider in determining whether the consent is sufficiently removed from the taint of the illegal [seizure] include the length of time between the illegal seizure and the subsequent search, the presence of intervening circumstances, and the purpose and flagrancy of the misconduct." *United States v. Richardson* (C.A.6, 1991), 949 F.2d 851, 858; see, also, *Brown v. Illinois* (1975), 422 U.S. 590, 603-604; *State v. Retherford*, supra.

{¶ 21} In the instant case, appellant's "consent" was obtained within 15 minutes of the illegal seizure of appellant's keys. Thus, there was no significant time lapse between the seizure and the request to search. As indicated by the court in *Holmes*, a short temporal gap between an unlawful seizure and a defendant's consent weighs heavily against a finding that the consent was an act of free will sufficient to purge the taint of the earlier police conduct. See *Holmes*, supra, at 1295, citing *United States v. Washington* (C.A.9, 2004), 387 F.3d 1060, 1073 (holding that 15 minutes was insufficient); *United States v. Maez* (C.A.10, 1989), 872 F.2d 1444, 1456 (holding that 45 minutes was insufficient).

{¶ 22} Further, there was no intervening circumstance that might have served to attenuate the connection between the illegal seizure and the ultimate discovery of the marijuana. Here, the entire incident occurred during the execution of a search warrant at appellant's business premises. After appellant was patted down and the keys were unlawfully removed from his pocket, he was asked if he would consent to a search of his residence. When appellant responded, "I don't have anything here, you can search my house, you can search my car," Detective Awls immediately grabbed the keys from the counter and used them to open the pickup truck that was parked on the street outside the carry-out. A lack of intervening circumstances, like a lack of a substantial temporal gap, between a seizure and subsequent consent weighs heavily against a finding that a defendant's consent was sufficient to purge the taint of the unlawful seizure. See *Holmes*, supra, at 1295 (where the defendant faced a coercive situation at the time he gave consent because his only hope of avoiding arrest was to consent to a search and hope that the officers would not discover his hidden contraband, the absence of intervening circumstances strongly weighed against a finding that defendant's consent was sufficient to purge the taint of the unlawful seizure).

{¶ 23} Although there may have been a lack of flagrant police misconduct, this lack was not sufficient to show that appellant's consent amounted to an intervening act of free will that broke the causal link between the unlawful seizure of appellant's keys and discovery of the marijuana in his car. Cf., *Holmes*, supra, (holding that where there was virtually no temporal gap between the seizure and consent and no meaningful intervening

circumstances, the lack of flagrant police misconduct was not sufficient to compensate for the strongly coercive circumstances otherwise surrounding defendant's grant of consent to search).

{¶ 24} Because the state failed to meet its burden of proof to show that the illegality of the seizure of appellant's keys was cured by his subsequent "consent" to the search of his vehicle, we are constrained to find that the trial court erred in denying appellant's motion to suppress evidence.

{¶ 25} For all of the foregoing reasons, the judgment of the Lucas County Court of Common Pleas is reversed. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Lucas County.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Arlene Singer, J. _____
JUDGE

William J. Skow, J.
CONCUR. _____
JUDGE

Thomas J. Osowik, J.,
DISSENTS and writes separately.

OSOWIK, J., dissents.

{¶ 26} I respectfully dissent from the majority's conclusion that the trial court erred in denying appellant's motion to suppress, for the following reasons.

{¶ 27} As stated by the majority, the threshold issue is whether the removal of appellant's keys impermissibly exceeded the scope of a protective frisk, as authorized by *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. To be constitutional, a patdown frisk must be "limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby * * *." *Terry*, supra, 392 U.S. at 26. Accordingly, "police seizure of items that are neither weapons nor apparent contraband during a *Terry* patdown exceeds that doctrine's limited exception to the Fourth Amendment's prohibition on warrantless searches and seizures." *United States v. Holmes* (C.A.D.C., 2007), 505 F.3d 1289, 1292.

{¶ 28} I agree with the majority that Detective Awls testimony that keys "can be used as a weapon" is insufficient to establish that he actually considered them to be a weapon. Also, there is no evidence to show that the keys or the money removed from appellant's pockets was contraband. Therefore, applying the law to the facts of this case, I concur that the keys were seized in violation of appellant's Fourth Amendment rights. However, once it is established that a constitutional violation has occurred, a defendant must also make "a prima facie showing of a causal nexus between the Fourth Amendment violation and the evidence he seeks to suppress." *Holmes*, supra. Using the reasoning employed in *Holmes,* the majority concludes that such a nexus exists in this case. I disagree.

{¶ 29} In *Holmes*, police officers removed a set of car keys, cigarette rolling papers, and a wallet from Rondell Holmes' pocket during a patdown search. Upon checking for outstanding warrants, they found out that Holmes had a prior drug conviction, and was out on parole. The officers then pressed Holmes as to whether he had a car, and threatened him with arrest for possession of drug paraphernalia if he did not cooperate. After Holmes eventually revealed that his vehicle was parked around the corner, the officers used the keys to open the vehicle. The ensuing search yielded a gun and ammunition, concealed under the driver's seat. Holmes was arrested and charged with a parole violation.

{¶ 30} Holmes filed a motion to suppress the gun and ammunition as the fruits of an illegal search. The trial court denied the motion, based on its conclusion that Holmes consented to the search. On appeal, the Court of Appeals for the District of Columbia, Circuit Court, reversed the trial court, after finding that the illegal discovery of the car keys led directly to the discovery of the gun and ammunition in Holmes' vehicle. Accordingly, the appellate court concluded there was a "causal nexus" between the two events, which compelled suppression of the evidence against Holmes. *Holmes*, supra.

{¶ 31} In this case, unlike the scenario in *Holmes*, police entered appellant's place of business to execute a search warrant. When appellant asked the purpose of the search, he was told the officers were looking for marijuana and other narcotics. Appellant's keys were simply removed during a patdown search that was incident to execution of the warrant, and were placed on the counter. No evidence was presented that appellant was asked whether he had a vehicle parked outside based upon discovery of the car keys in

his pocket. In fact, no particular significance was apparently attached to their discovery at all, until after police searched appellant's business for approximately 15 minutes. At that point, appellant was asked to consent to a search of his residence, and he responded by inviting the officers to search his house and his vehicle.[1] Detective Awls then picked up the keys and went outside to search appellant's truck, which was parked at the curb. Accordingly, based on a review of the record in this case, I would find that appellant has not established a causal nexus between the seizure of his keys and the search of his truck that justifies suppression of the evidence against him.[2]

{¶ 32} In addition, I would also find that appellant voluntarily consented to the search of the truck. It is well-established that consent given after an illegal seizure is tainted by the prior illegality, unless the giving of consent is sufficiently attenuated from the illegal seizure that the taint had been dissipated. *United States v. Richardson* (C.A.6, 1991), 949 F.2d 851, 858. In other words, the "primary taint" is purged if the consent is the "'product of an intervening act of free will.'" Id., quoting *United States v. Grant* (C.A.6, 1990), 920 F.2d 376, 388. In considering whether the consent is sufficiently removed from the taint of illegal police action, courts may consider "the length of time between the illegal seizure and the subsequent search, the presence of intervening

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[1]Awls testified at the hearing that appellant stated: "I don't have any drugs here, * * * you can search my house, you can search my car -- he [appellant] said truck."

[2]Since the relevant inquiry here is whether there is a "causal nexus" between the illegal seizure of appellant's keys and the ultimate discovery of marijuana in his truck, I consider speculation as to how the detectives would have entered the truck without having easy access to the keys to be unhelpful.

circumstances, and the purpose and flagrancy of the misconduct." Id., citing *United States v. Brown* (1975), 422 U.S. 590, 603, 95 S.Ct. 2254, 451 L.Ed.2d 416.

{¶ 33} As indicated above, any taint resulting from the seizure of the keys was minimal, since there is no direct connection between the discovery of the keys and Detective Awl's use of those keys to open appellant's truck. In addition, before the search commenced, appellant was advised of his *Miranda* rights, and was told that the purpose of the search was to look for marijuana and other narcotics. Although appellant's native language is Spanish, he appeared to understand the officers' statements, given his specific invitation to the police to search his house and his truck. Appellant was not free to leave the store during that time; however, he was not handcuffed and placed under arrest until after marijuana was found in the truck. Finally, the officers did not ask appellant for permission to search his home until after they had been searching the convenience store for 15 minutes. In response, appellant stated they could not only search his home, they could search his vehicle as well. All of these factors support the conclusion that appellant's consent to the search of the truck was voluntarily given. For these reasons, I would affirm the trial court's decision and deny the motion to suppress.