[Cite as *State v. Fykes*, 2009-Ohio-2926.]

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

State of Ohio — Court of Appeals No. WD-07-072

Appellee — Trial Court No. 07 CR 253

v.

Gaory Fykes — **DECISION AND JUDGMENT**

Appellant — Decided: June 19, 2009

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, Gwen Howe-Gebers and Jacqueline M. Kirian, Assistant Prosecuting Attorneys, for appellee.

Wendell R. Jones, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, Gaory Fykes, appeals his conviction for possession of cocaine in the above-captioned case. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} On June 21, 2007, appellant was indicted on a single charge of possession of cocaine in an amount equal to or exceeding 25 grams but less than 100 grams, a third degree felony in violation of R.C. 2925.11(A) and (C)(4)(c). Included in the indictment was a vehicle forfeiture specification.

{¶ 3} At arraignment, Fykes pleaded not guilty. On August 13, 2007, he filed a motion to suppress. The trial court, after conducting a hearing on the matter, denied appellant's motion.

{¶ 4} Trial was held before a jury on September 27, 2007. Evidence adduced at the trial established the following facts. On June 2, 2007, Deputy Robert Myerholtz of the Wood County Sheriff's Office and Sergeant John M. Gazarek of the Perrysburg Township Police Department were conducting directive patrol on Interstate 75 as part of a special response team. While heading southbound on the highway, the officers decided to pace a 1993 Cadillac Seville, driven by appellant. Upon discovering that appellant's car was traveling at 70 m.p.h. in a 65 m.p.h. zone, the officers initiated a traffic stop.

{¶ 5} The officers approached appellant's vehicle. Gazarek, standing next to the driver's side window of the car, asked appellant for his license, registration, and proof of insurance. Appellant asked permission to retrieve his wallet from his back pocket, and Gazarek told him to go ahead. Appellant retrieved the wallet, spilling its contents onto the floor of the vehicle, near his right leg. Appellant asked whether he could pick up the dropped items, and Gazarek told him that he could. According to testimony by Myerholtz, who was standing next to the passenger side of the vehicle -- and, in

Gazarek's opinion, had a better view of what appellant was doing -- appellant appeared to be trying to shove an unknown object down in between the driver's seat and the middle console of the vehicle. From Gazarek's point of view, appellant could only be seen reaching down to the right with both hands; what appellant was doing with his hands was out of Gazarek's line of sight. Due to his uncertainty about the nature of appellant's activity, Gazarek asked appellant to step out of the vehicle.

{¶ 6} When appellant got out of the car, he immediately -- and in the absence of any request by the officers -- put his hands in the air, walked to the rear of the car, and placed his hands on the trunk lid. Gazarek, observing that appellant seemed nervous, asked appellant to turn around and relax. Thereafter, Gazarek asked appellant for consent to search his vehicle. Appellant told him to "go ahead."

{¶ 7} Before Gazarek had a chance to search appellant's vehicle, a K9 unit arrived at the scene. Due to the presence of rain and traffic, the officers placed Fykes in the back of the police cruiser. The canine handler, Perrysburg Township Police Officer Dave Smith, walked the dog around the car. The dog did not alert to the vehicle. Gazarek again asked appellant for consent to search the vehicle, and appellant replied, "Sure." While searching the area where appellant had earlier been seen reaching, Gazarek found a plastic baggy containing a 32.9 grams of a white powder substance, which he believed to be -- and was later confirmed to be -- cocaine. Upon making this discovery, the officers took appellant into custody. Gazarek placed appellant in handcuffs, and Meyerholtz read appellant his *Miranda* rights.

{¶ 8} After hearing all of the evidence, the jury returned with a verdict of guilty to the charge alleged in the indictment. Appellant was sentenced to a term of five years in prison and was ordered to pay a fine in the amount of $5,000. In addition, the trial court ordered the forfeiture of the 1993 Cadillac.

{¶ 9} Appellant timely filed a notice of appeal, raising the following assignments of error:

{¶ 10} I. "THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS WHEN THE INVESTIGATING OFFICERS DID NOT POSSESS A REASONABLE AND ARTICULABLE SUSPICION TO JUSTIFY AS STOP AND DETENTION OF APPELLANT, AND AS IS REQUIRED UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 14 OF THE CONSTITUTION OF THE STATE OF OHIO."

{¶ 11} II. "EVIDENCE OBTAINED FROM THE WARRANTLESS SEARCH OF APPELLANT'S VEHICLE SHOULD HAVE BEEN SUPPRESSED FOR FAILURE TO GAIN HIS CONSENT FOR THE SEARCH, AGAIN IN VIOLATION OF HIS RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 14 OF THE CONSTITUTION OF THE STATE OF OHIO."

{¶ 12} III. "APPELLANT FAILED TO RECEIVE PROPER AND TIMELY MIRANDA WARNINGS."

{¶ 13} IV. "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY DENYING HIS MOTIONS FOR ACQUITTAL, AS THE EVIDENCE PRESENTED BY THE STATE WAS INSUFFICIENT TO SUSTAIN A CONVICTION FOR THE OFFENSE OF POSSESSION OF COCAINE."

{¶ 14} V. "THE JURY ERRED BY FINDING APPELLANT GUILTY OF POSSESSION OF COCAINE WHEN THE EVIDENCE PRESENTED WAS INSUFFICIENT TO SUPPORT SAID FINDING."

{¶ 15} VI. "THE JURY ERRED BY FINDING APPELLANT GUILTY OF POSSESSION OF COCAINE WHEN SAID FINDING WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 16} Appellant argues in his first assignment of error that the trial court erred in denying his motion to suppress, because the investigating officers did not possess a reasonable and articulable suspicion to justify a stop and detention of appellant.

{¶ 17} A police officer's observation of a speeding violation provides probable cause to institute a traffic stop. See *State v. Robinette*, 80 Ohio St.3d 234, 239 (holding that officer's act of stopping defendant was justified because defendant was speeding). "Where a police officer stops a vehicle based on probable cause that a traffic violation has occurred or was occurring, the stop is not unreasonable under the Fourth Amendment to the United States Constitution even if the officer had some ulterior motive for making the stop, such as a suspicion that the violator was engaging in more nefarious criminal

activity." *Dayton v. Erickson*, 76 Ohio St.3d 3, 1996-Ohio-431, syllabus; see also, *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539, ¶ 22.

{¶ 18} In the instant case, Gazarek testified at the suppression hearing that when he came upon the 1993 Cadillac, he noticed and "thought to be strange" that, despite a light rain, all of the windows in the vehicle had been rolled down. Specifically, Gazarek thought that appellant may have been smoking marijuana. According to Gazarek "There is no other reason in my opinion to have your windows down when it is raining." After pacing the vehicle for about two miles at approximately 70 m.p.h. in a 65 m.p.h. zone, the officers initiated a traffic stop.

{¶ 19} On the basis of the foregoing, we conclude that the officers had probable cause to initiate a traffic stop based upon their observation of the traffic violation. That Gazarek suspected that appellant had been smoking marijuana does nothing to alter our conclusion in this case. See *Erickson*, supra. Accordingly, we find that the stop of appellant's vehicle was permissible under the Fourth Amendment.

{¶ 20} Next, we determine whether the scope and detention of the stop in this case complied with Fourth Amendment principles. In *State v. Kuhl*, 6th Dist. No. OT-07-032, 2008-Ohio-1641, ¶ 15, this court explained:

{¶ 21} "Generally, the scope and duration of an investigative traffic stop must last no longer than is necessary to effectuate the purpose for which the initial stop was made. * * * However, if circumstances attending an otherwise proper stop should give rise to a reasonable suspicion of some other illegal activity, different from that which triggered the

stop, then the individual may be detained for as long as that new articulable and reasonable suspicion continues, even if the officer is satisfied that the suspicion that justified the initial stop has dissipated. * * * Whether or not the detention was reasonable depends upon the totality of the circumstances and the facts of each case. * * *" Id. (citations omitted).

{¶ 22} Here, the circumstances attending the otherwise proper stop gave rise to a reasonable suspicion of other criminal activity, allowing the officers to detain appellant for a longer period of time than was necessary to resolve the speeding violation. Specifically, those circumstances include appellant's having reached down with both hands after spilling the contents of his wallet onto the floor in between his seat and the vehicle's center console. When Gazarek asked appellant to exit the car, appellant immediately threw his hands up in the air and would not lower them when told to relax. At the rear of the car, appellant voluntarily placed both of his hands on the trunk and then put his hands up once again when he was once more instructed to relax and to speak with the officers. When Gazarek asked appellant why he was acting so nervous, appellant told him that he had just been released from prison for "running guns." Gazarek asked appellant if he had any guns in the vehicle, and he responded that he did not. Gazarek then conducted a pat-down search for weapons, but found no weapons or contraband.

{¶ 23} We conclude that, based on the officers' observations of appellant's attempt to reach under the center console, his excessively nervous conduct upon exiting the vehicle, and his admission of having recently been released from prison for an offense

involving weapons, the officers lawfully detained him for a brief period to investigate their suspicions.

{¶ 24} Because both the stop and the detention were lawful in this case, appellant's first assignment of error is found not well-taken.

{¶ 25} Appellant argues in his second assignment of error that evidence obtained from the search of his vehicle should have been suppressed for failure to gain his consent for the search.

{¶ 26} The law provides that "[p]olice do not need a warrant, probable cause, or even a reasonable, articulable suspicion to conduct a search when a suspect voluntarily consents to the search." *Bainbridge v. Kaseda*, 11th Dist. No. 2007-G-2797, 2008-Ohio-2136, ¶ 28, citing *Schneckloth v. Bustamante* (1973), 412 U.S. 218, 219. To establish proper consent, the state must prove, by clear and convincing evidence, that the consent was free and voluntary. *Bainbridge* at ¶ 28.

{¶ 27} Gazarek testified that when he had asked appellant for consent to search the vehicle, appellant said to "go ahead." After receiving consent to search, K9 patrolman Smith, who had arrived at the scene after learning of the traffic stop, pulled up behind the police car and asked Gazarek and Myerholtz if they wanted the dog to walk around appellant's car. Gazarek told him to go ahead. Gazarek asked appellant to sit in the back seat of the police cruiser and expressly told him that he was not under arrest. After the walk-around, Gazarek asked appellant if it was still okay for him to search the vehicle. Appellant stated, "Sure."

{¶ 28} Although appellant testified at the suppression hearing that neither officer had asked for his consent to search the vehicle, the law is clear that the trial court at a suppression hearing "assumes the role of the trier of fact and is in the best position to resolve issues regarding credibility of witnesses and the weight of the evidence." *State v. Wilcox*, 2d Dist. No. 22308, 2008-Ohio-3856, ¶ 8. An appellate court will not reverse a trial court's decision on a motion to suppress where it is supported by competent, credible evidence. Id.

{¶ 29} Here, we conclude that the trial court's determination that appellant gave verbal consent to the search was supported by competent, credible evidence. We additionally conclude that the evidence in the record clearly and convincingly demonstrates that appellant's consent was free and voluntary. Appellant's second assignment of error is, therefore, found not well-taken.

{¶ 30} Appellant argues in his third assignment of error that he did not receive proper and timely *Miranda* warnings. Specifically, appellant argues that he was in custody and should have been read *Miranda* warnings at the time he was placed in the back seat of the police cruiser, rather than later, after Gazarek discovered the baggie of cocaine.

{¶ 31} We note in this case that, regardless of when appellant was taken into custody, there is no evidence or allegation to suggest that once appellant was inside the cruiser, there was any interrogation whatsoever. Not only did the officers not ask appellant any questions, appellant made no incriminating statements.

{¶ 32} The requirements set forth in *Miranda v.* Arizona (1966), 384 U.S. 436, are implicated only in cases of custodial interrogation. *State v. Waibel* (1993), 89 Ohio App.3d 522, 524. Where there is no interrogation, no *Miranda* warning is required. *City of Euclid v. Meyers* (Mar. 15, 2001), 8th Dist. No. 77932. In the instant case, the absence of an interrogation precludes the application of *Miranda*. Accordingly, appellant's third assignment of error is found not well-taken.

{¶ 33} Appellant argues in both his fourth and fifth assignments of error that the evidence was insufficient to sustain a conviction for the offense of possession of cocaine. In his fourth assignment of error, he complains that the alleged insufficiency should have prevented the case from going to the jury; and in his fifth assignment of error, he complains that the alleged insufficiency should have prevented the jury from reaching a verdict of guilty.

{¶ 34} Crim.R. 29(A) provides that a judgment of acquittal shall be entered "if the evidence is insufficient to sustain a conviction of such offense or offenses." In reviewing a record for sufficiency, a court must determine whether the evidence submitted is legally sufficient to support all of the elements of the offense charged. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386-387. Specifically, the court must determine whether the state has presented evidence which, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Nicholson*, 6th Dist. Nos. L-08-1136. L-08-1137, 2009-Ohio-518, ¶ 45.

{¶ 35} To establish the offense of possession of cocaine, the state was required to prove, beyond a reasonable doubt, that appellant had knowingly obtained, possessed, or used cocaine, in an amount that equaled or exceeded 25 grams but was less than 100 grams. R.C. 2925.11(A) and (C)(4)(c). The term "knowingly" is defined as the awareness that one's conduct "will probably cause a certain result or will probably be of a certain nature." R.C. 2901.22(B). "A person has knowledge of circumstances when he is aware that such circumstances probably exist." Id. "'Possess' or 'possession' means 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." R.C. 2925.01(K). A court must look at all of the attendant facts and circumstances in order to determine if a defendant knowingly possessed a controlled substance. *State v. Pippen*, 8th Dist. No. 81630, 2003-Ohio-1736, ¶ 8.

{¶ 36} Possession may be actual or constructive. *State v. Kingsland,* 177 Ohio App.3d 655, 2008-Ohio-4148, ¶ 13. Actual possession occurs when the defendant "had the items within his immediate physical control." *State v. Jones*, 10th Dist. Nos. 07AP-977, 07AP-978, 2008-Ohio-3765, ¶ 13. Constructive possession occurs when the defendant is able to exercise dominion control over an item, even if the individual does not have the item within his immediate physical possession. *Kingsland*, supra. In order for constructive possession to exist, there must be evidence demonstrating that the defendant was conscious of the presence of the object. Id. Although a defendant's mere

proximity to an item is in itself insufficient to establish constructive possession, proximity to the item may constitute some evidence of constructive possession. Id. "Thus, presence in the vicinity of contraband, coupled with another factor or factors probative of dominion or control over the contraband, may establish constructive possession." Id.

{¶ 37} Initially, appellant argues that we cannot consider whether the evidence supports a finding that he constructively possessed the cocaine, because the trial court never specifically instructed the jury on the concept or definition of constructive possession.

{¶ 38} The trial court, in its jury instructions, defined the term "possess" to mean "having control over a thing or substance;" in addition, the trial court cautioned that possession "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." As indicated above, constructive possession is present when an individual exercises dominion or control over an item. *Kingsland*, supra, at ¶ 13. The trial court sufficiently informed the jury that it could find appellant guilty even if he did not have actual possession of the cocaine, so long as it found that he had exercised control over them. See id., at ¶ 14.

{¶ 39} In the instant case, the record contains sufficient evidence to show that appellant was either in actual or constructive possession of the cocaine. When appellant was sitting inside the car, the baggy of cocaine was within his immediate physical

control. The evidence also suggests that appellant knowingly exercised dominion and control over the cocaine. Both Gazarek and Myerholtz testified that appellant had spilled the contents of his wallet onto the floor and then used both hands in an apparent attempt either to gather the items or to shove and object further down between the driver's seat and the center console. Gazarek further testified that, when searching the area where appellant had been reaching, he immediately found the baggy of cocaine. Testimony by both officers that appellant exhibited unusually nervous behavior constituted additional evidence that appellant knowingly possessed the cocaine.

{¶ 40} Under the circumstances of this case, we conclude that any rational trier of fact could have found the essential elements of the crime charged proven beyond a reasonable doubt. Accordingly, we find that the trial court acted properly in denying appellant's motion for judgment of acquittal and the jury acted properly in finding that appellant had possession over the baggy of cocaine. For the foregoing reasons, appellant's fourth and fifth assignments of error are found not well-taken.

{¶ 41} Appellant argues in his sixth, and final, assignment of error that the guilty verdict was against the manifest weight of the evidence. An appellate court considering the manifest weight of the evidence acts as a "thirteenth juror" to determine whether the trier of fact lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered. *Thompkins*, supra, at 387. Here, appellant presented only the testimony of K9 handler Smith. Smith related the facts of the canine sniff of appellant's vehicle, but these facts in no way detracted from the

credibility of the state's witnesses. There was no conflicting testimony for the jury to resolve, and the cross-examinations of the state's witnesses did not undermine the witnesses' direct examination testimony. The jury simply assessed the credibility of the state's witnesses and concluded that appellant committed the offense. We find nothing in the record to suggest that the trier of fact lost its way, or that such a manifest miscarriage of justice occurred that a new trial should be ordered. For the foregoing reasons, appellant's sixth assignment of error is found not well-taken.

{¶ 42} For all of the foregoing reasons, the judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

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

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE

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