

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

State of Ohio

Court of Appeals No. L-09-1186

Appellee

Trial Court No. CR0200802635

v.

Charles Washington

DECISION AND JUDGMENT

Appellant

Decided: June 4, 2010

* * * * *

Deborah Kovac Rump, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Charles Washington, appeals from the judgment of the Lucas County Court of Common Pleas finding him guilty of one count of attempted trafficking in cocaine. For the reasons set forth below, we reverse.

{¶ 2} On April 3, 2008, appellant was indicted for two counts of trafficking in cocaine and one count of possession of cocaine, both first degree felonies. On

February 6, 2009, appellant filed a motion to suppress. A suppression hearing commenced on March 5, 2009.

{¶ 3} Detective Michael J. Awls of the Toledo Police Department testified that on the evening of April 3, 2008, an informant had arranged to sell cocaine to James Hill. Hill and the informant had agreed, over the course of several weeks, to make a transaction whereupon the informant would provide Hill with one kilogram of cocaine in exchange for \$24,000. Unbeknownst to Hill, the transaction was arranged as a "reverse buy." That is to say, the Toledo Police Department received written permission from the prosecutor to set up a sale of narcotics obtained from the police's evidence room. After the transaction was arranged, the police obtained a warrant to search Hill's residence.

{¶ 4} On the evening of April 3, 2008, Sergeant Robert Marczec was parked approximately 50 yards from the home and in constant surveillance of the scene over the duration of the evening. Sergeant Marczec testified that shortly after the informant entered the home at 10:05 p.m., a red Pontiac Grand Prix pulled into the driveway and parked. Two unidentified males exited the vehicle and entered the home. At one point, one male came back out and retrieved an unidentified brown object from the trunk. He then re-entered the home. Shortly thereafter, Sergeant Marczec witnessed the informant exit the home, enter his car and leave. Several minutes later, the two unidentified males exited the home. The driver walked to the back of the car and placed the brown object in the trunk while the passenger stood by.

{¶ 5} At that point, Sergeant Marczec ordered the entry team to engage on the home. When the two males witnessed the oncoming entry team, they fled on foot towards the back of the home. The driver was not apprehended; however the passenger was apprehended while attempting to throw approximately \$5,000 in cash over the privacy fence onto a neighbor's yard. The passenger then identified the escaped driver as appellant. Having had one suspect escape on foot, Sergeant Marczec determined it was urgent to search the vehicle's trunk to determine if the cocaine was located therein. After using a crowbar to open the vehicle's trunk, Sergeant Marczec found the cocaine concealed in the armhole of a brown Carhart jacket. The next day, upon learning of the warrant for his arrest, appellant voluntarily turned himself into the authorities.

{¶ 6} On March 5, 2009, the trial court denied appellant's motion to suppress. Appellant then entered a no contest plea and was sentenced to six years in prison for attempted trafficking of cocaine. Appellant now appeals setting forth the following assignment of error:

{¶ 7} "The trial court erred by not granting Washington's motion to suppress the warrantless search of a vehicle he was driving."

{¶ 8} Review of a ruling on a motion to suppress involves a mixed question of law and fact. *State v. Davis* (1999), 133 Ohio App.3d 114, 117. The trial court acts as the trier of fact; therefore, that court alone weighs the evidence and determines the credibility of the witnesses. The reviewing court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Brooks* (1996), 75

Ohio St.3d 148, 154. Having accepted the facts as true, the appellate court must independently determine as a matter of law, without deference to the trial court's conclusion, whether the facts met the appropriate legal standard. *State v. Anderson* (1995), 100 Ohio App.3d 688, 691.

{¶ 9} Appellant contends that his motor vehicle does not fall within the purview of the search warrant because it was not included in the language of the warrant. He further contends the vehicle was not mobile and thereby created no immediate emergency that would permit the Toledo Police Department to lawfully search the car. In sum, appellant contends no exigent circumstance existed to allow a warrantless search of his automobile.

{¶ 10} The Fourth Amendment to the United States Constitution and Article 1, Section 14 of the Ohio Constitution protect citizens from unreasonable searches and seizures. Searches and seizures conducted outside of the judicial process, without a warrant based on probable cause, are per se unreasonable, subject to several specific established exceptions. *Schneckloth v. Bustamonte* (1973), 412 U.S. 218. However, certain exigent circumstances allow warrantless searches. For instance, a warrantless search may be permitted by the court when there is imminent danger evidence will be lost or destroyed if a search is not imminently conducted. *Cupp v. Murphy* (1973), 412 U.S. 291, 294-296. In the case of the automobile, a warrantless search may be permitted because of the inherent mobility of the vehicle if there is a risk the evidence would be lost or destroyed without an immediate search. *South Dakota v. Opperman* (1976), 428 U.S.

364, 367. In addition, a warrantless search may be permitted if necessary to protect or preserve life in the face of an immediate emergency. *State v. Price* (1999), 134 Ohio App.3d 464, 468. Finally, a warrantless search may be permitted if the contraband is in clear view of the officer. *Thompson v. Louisiana* (1984), 469 U.S. 17.

{¶ 11} Here, the search warrant contained no mention of appellant's automobile. Thus, absent a showing of an exigent circumstance the search and seizure of the cocaine from appellant's trunk would be a violation of his Fourth Amendment rights. Upon arrival at the scene, appellant and his passenger fled the oncoming police, exiting towards the backyard. Having fled the scene and leaving only a parked car, there was no reason for the officer to believe an ongoing emergency was present that would necessitate an immediate search of the vehicle. Furthermore, the car was no longer mobile; it was locked and its driver had escaped. Under these circumstances, there does not appear to be any reason for the officer to believe any evidence would be destroyed or lost without an immediate search of the automobile. While it is true the officer was unsure of the cocaine's whereabouts (whether it was in the trunk or still with appellant), there is no immediate threat that would prevent the officer from waiting to obtain a warrant. Having arranged and observed the transaction, there certainly was probable cause that the cocaine was located in the locked car's trunk. That being said, in order for a search to be reasonable under the Fourth Amendment, it must be based upon probable cause and executed pursuant to a warrant; a failure to do so without showing an exception causes the evidence seized in the unreasonable search to be suppressed. *State v. Moore* (2000),

90 Ohio St.3d 47. Here, absent a warrant, no exception applies and it is the opinion of this court that the trial court erred in denying the motion to suppress. Appellant's sole assignment of error is found well-taken.

{¶ 12} On consideration whereof, we find substantial justice has not been done the party complaining and 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 REVERSED.

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

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Keila D. Cosme, J.

CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
