[Cite as *State v. Jones-Bateman*, 2013-Ohio-4739.]

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

State of Ohio

Appellee

v.

John Jones-Bateman

Appellant

Court of Appeals Nos. WD-11-074
WD-11-075

Trial Court Nos. 2010CR0548
2011CR0143

DECISION AND JUDGMENT

Decided: October 25, 2013

* * * * *

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

Eric Allen Marks, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} These consolidated appeals are before the court from judgments of the Wood County Court of Common Pleas in two cases regarding defendant-appellant, John Jones-Bateman. Following the court's denial of appellant's motion to suppress, appellant entered a plea of no contest to the charge of carrying a concealed weapon in Wood County Common Pleas case No. 2010CR0548. Subsequently, he pled no contest to the charges of aggravated assault, endangering children and domestic violence in Wood

County Common Pleas case No. 2011CR0143. Appellant now challenges the lower court judgments through the following assignments of error:

First Assignment of Error

The trial court erred in denying appellant's motion to suppress

Second Assignment of Error

Appellant's Miranda rights were violated when officers questioned him regarding a weapon after being arrested

Third Assignment of Error

The trial court abused its discretion by a consecutive sentence in violation of the due process clause of the Fourteenth Amendment to the United States Constitution and Sections 1 and 16 of Article I of the Ohio Constitution

{¶ 2} On November 29, 2010, Officer Will Richardson of the Ohio State Highway Patrol was driving toward the Bowling Green post to start his shift when he came upon a vehicle at the intersection of State Routes 582 and 25 in Wood County, Ohio. The vehicle was towing a trailer and Richardson noticed that the license plate on the trailer had an expired sticker. Richardson ran the plate through the LEADS computer in his cruiser and began to follow the vehicle. Shortly thereafter, the computer indicated that there was a warrant in place for the registered owner of the trailer, appellant John Jones-Bateman. After verifying with the dispatcher that the warrant was current, Richardson instituted a stop of the vehicle. He then learned from the LEADS system that the warrant

was out of Wood County and was for domestic violence and aggravated menacing so he called the Wood County Sheriff's Department and asked that the department send a deputy. After verifying that the driver of the vehicle was appellant, Richardson asked him to step out of the car, arrested him, searched him, handcuffed him and placed him in the front seat of his cruiser. Two passengers, however, remained in appellant's car, a teenage boy in the front passenger seat and an approximately three-year-old girl in a car seat in the back.

{¶ 3} On that same day, Deputy Brian Ruchstuhl, of the Wood County Sheriff's Department, was assisting Detective Sergeant Terry James in his attempt to arrest appellant on a felony warrant in an ongoing investigation. That investigation involved appellant's alleged use of a handgun in a crime of domestic violence. Ruchstuhl and James had attempted to serve the warrant at a local hotel but they did not find appellant or the handgun. Ruchstuhl subsequently responded to the call from Richardson because he was nearby and knew that appellant was the suspect they had been searching for earlier. When Ruchstuhl arrived, he asked Richardson if appellant had a weapon on him. Richardson stated that he had not found one. Then, while handing appellant over to Ruchstuhl, Richardson asked appellant where the weapon was. Appellant answered that it was in his vehicle. At that point, the children were still in the car. In addition, Richardson testified at the suppression hearing below that appellant's son appeared to be very agitated because his father was being arrested. The officers then removed the children from the car and, upon searching the car, found an unregistered handgun in a

backpack behind the front seat. The handgun was loaded with a magazine containing eight 9mm rounds. The officers subsequently determined that the vehicle belonged to appellant's wife and that appellant had permission to drive it. When attempts to reach her failed, they locked the car and left it along the side of the road. The children were evidently transported from the scene.

{¶ 4} On December 15, 2010, appellant was indicted in case No. 2010CR0548 on one count of carrying a concealed weapon with a specification that the firearm was loaded, in violation of R.C. 2923.12(A)(2), a fourth degree felony. Subsequently, appellant filed a motion to suppress the evidence seized through the warrantless search of the vehicle as well as any and all statements he made to officers. Appellant asserted that he was not properly advised of his constitutional rights as set forth in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), prior to officers obtaining a statement from him and that the search of his vehicle was not justified under any of the exceptions to the requirement for a warrant.

{¶ 5} That case proceeded to a hearing on the motion to suppress at which the above evidence was presented through the testimony of Officers Richardson and Ruchstuhl. At the conclusion of the hearing, the court denied the motion. The court determined that the officers did not begin the search of the vehicle until Richardson learned from Ruchstuhl that appellant had a gun and then learn from appellant that the gun was in the car. The court held that the officers had probable cause to believe that a weapon was in the vehicle and further that the officers were justified in searching the

vehicle for their own safety given that appellant's son was in the car and that he appeared angry that his father was being arrested. On May 10, 2011, the court filed a judgment entry denying the motion to suppress. In light of that ruling, appellant withdrew his prior not guilty plea and entered a plea of no contest to the charge of carrying a concealed weapon with the specification that it was loaded, a fourth degree felony.

{¶ 6} Meanwhile, on March 17, 2011, appellant was indicted in case No. 2011CR0143 on two counts of felonious assault in violation of R.C. 2903.11(A)(1), both second degree felonies, one count of domestic violence in violation of R.C. 2919.25(A), with a specification that appellant knew that the victim was pregnant, a fifth degree felony, and one count of rape in violation of R.C. 2907.02(A)(2), a first degree felony. Appellant entered pleas of not guilty to all of the offenses. Subsequently, he withdrew his not guilty pleas and entered pleas of no contest to the amended charges of aggravated assault in violation of R.C. 2903.12(A)(1), a fourth degree felony, child endangering in violation of R.C. 2929.22(A), a first degree misdemeanor, and domestic violence in violation of R.C. 2919.25(A), a fifth degree felony. In exchange for appellant's change in plea, the state agreed to request a dismissal of the rape charge.

{¶ 7} On November 17, 2011, the lower court proceeded to sentence appellant in both cases. The court heard from appellant's counsel and the victim in case No. 2011CR0143, and reviewed the presentence investigation report. After dismissing the rape count, the court sentenced appellant in case No. 2010CR0548 to 12 months incarceration. Then, in case No. 2011CR0143, the court sentenced appellant to 16

months on the aggravated felonious assault count and 180 days on the child endangering count, with both of those terms to be served concurrently with the sentence in case No. 2011CR0143. Finally, the court sentenced appellant to 11 months incarceration on the domestic violence count, with that term to be served consecutively to the sentences on the other counts. The court also gave appellant credit for time served which was subsequently calculated to be 243 days as of the date of sentencing. The judgment entries of sentence were journalized on November 22, 2011, from which appellant now appeals.

{¶ 8} Appellant's first and second assignments of error challenge the trial court's denial of his motion to suppress.

{¶ 9} Appellate review of a trial court's decision on a motion to suppress presents a mixed question of law and fact. *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, ¶ 100. "When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8, citing *State v. Mills*, 62 Ohio St.3d 357, 366, 582 N.E.2d 972 (1992). The appellate court must then accept the trial court's findings of fact provided that they are supported by competent, credible evidence. *State v. Durnwald*, 163 Ohio App.3d 361, 2005-Ohio-4867, 837 N.E.2d 1234, ¶ 28 (6th Dist.), citing *Burnside, supra.* The appellate court, however, conducting a de novo review, determines independently whether the facts in the case satisfy the applicable legal standard. *State v. Claytor*, 85 Ohio App.3d 623, 627, 620 N.E.2d 906 (4th Dist.1993).

{¶ 10} Under his second assignment of error, appellant asserts that because Trooper Richardson questioned him about the location of the weapon prior to advising him of his *Miranda* rights, the lower court erred in using his response against him in justifying the officer's search of the vehicle.

{¶ 11} It is well-settled that a person who is taken into custody or otherwise significantly deprived of his freedom and subjected to interrogation by law enforcement officials must be informed of certain constitutional rights "and make a knowing and intelligent waiver of those rights before statements obtained during the interrogation will be admissible" as evidence against him. *State v. Treesh*, 90 Ohio St.3d 460, 470, 739 N.E.2d 749 (2001); *Miranda, supra*. That is, once a person has been restrained by police officers, the officers are not authorized to initiate questioning absent an explanation of the detainee's constitutional rights. An "interrogation" is defined as "a statement, question or remark by a police officer [that] is reasonably likely to elicit an incriminating response from a suspect[.]" *State v. Knuckles*, 65 Ohio St.3d 494, 605 N.E.2d 54 (1992), paragraph two of the syllabus.

{¶ 12} It is undisputed that appellant was under arrest when the officers asked him the location of the gun. We further find that their question was reasonably likely to elicit an incriminating response. The lower court, therefore, erred in using that statement as support for its conclusion that the officers had probable cause to believe that the gun was in the vehicle. The second assignment of error is well-taken.

{¶ 13} We must further determine, however, if the seizure of the gun was valid absent the officers' reliance on appellant's statement. The Fourth Amendment to the United States Constitution protects 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. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Initially, the burden is on the party challenging the legality of the search or seizure to establish that such was conducted without a warrant. *Xenia v. Wallace*, 37 Ohio St.3d 216, 218, 524 N.E.2d 889 (1988). Once a warrantless search or seizure is established, however, the burden shifts to the state to put forth evidence proving the validity of the search or seizure. *Id.* at paragraph two of the syllabus.

{¶ 14} One exception to the warrant requirement is the search incident to a lawful arrest as recognized in *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). "The exception derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations." *Id.* at 338, citing *United States v. Robinson*, 414 U.S. 218, 230-234, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973); *Chimel v. California*, 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). Under *Gant*, a search incident to a lawful arrest is permitted "when an arrestee is within reaching distance of the vehicle or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Id.* at 346. Reasonableness "is measured in objective terms by examining the totality of the circumstances." *Ohio v. Robinette*, 519 U.S. 33, 39, 117

S.Ct. 417, 136 L.Ed.2d 347 (1996). "When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies." *Gant* at 351.

{¶ 15} In *Gant*, the defendant was arrested for driving on a suspended license, was handcuffed and locked in a patrol car before officers searched his vehicle. The United States Supreme Court found that the warrantless search of Gant's vehicle was unreasonable and did not fall within the search-incident-to-arrest exception because Gant was not within reaching distance of the passenger compartment at the time of the search and it was not reasonable for the officers to believe that Gant's vehicle would contain evidence regarding the offense of driving on a suspended license.

{¶ 16} Appellant asserts that pursuant to *Gant*, the search in question was not justified because appellant and the children had been removed from the car, thereby removing any concerns for officer safety. The court in *Gant*, however, recognized that

> Other established exceptions to the warrant requirement authorize a vehicle search under additional circumstances when safety or evidentiary concerns demand. For instance, *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), permits an officer to search a vehicle's passenger compartment when he has reasonable suspicion that an individual, whether or not the arrestee, is "dangerous" and might access the vehicle to "gain immediate control of weapons." *Id.*, at 1049, 103 S.Ct. 3460 (citing *Terry v. Ohio*, 392 U.S. 1, 21 S.Ct. 1868, 20 L.Ed.2d 889

(1968)). If there is probable cause to believe a vehicle contains evidence of criminal activity, *United States v. Ross*, 456 U.S. 798, 820-821, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), authorizes a search of any area of the vehicle in which the evidence might be found. * * * *Ross* allows searches for evidence relevant to offenses other than the offense of arrest, and the scope of the search authorized is broader. Finally, there may be still other circumstances in which safety or evidentiary interests would justify a search. *Id*. at 346-347.

{¶ 17} The controlling question is "'whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.'" *Long* at 1050, quoting *Terry* at 27.

{¶ 18} In the present case, appellant was originally pulled over by Trooper Richardson for an expired license tag. Richardson quickly learned, however, that there was an active warrant for appellant's arrest. Accordingly, appellant was not arrested for the license tag violation. He was arrested on the outstanding warrant from Wood County, for aggravated menacing and domestic violence. When Officer Ruchstuhl arrived, he informed Richardson that appellant possessed a handgun that he had allegedly used in the commission of domestic violence. When Richardson did not find the weapon during his search of appellant's person, the officers had a reasonable suspicion that the weapon was still in the vehicle with appellant's teenage son. Richardson described the boy as seemingly angry that his father was being arrested. Both officers testified that they were

concerned about their safety because they had just arrested the boy's father and there was likely a gun in the car.

{¶ 19} Under these circumstances, we find that the search of the vehicle and the seizure of the handgun were permissible under the automobile exception set forth in *Long*, *supra.* While appellant's son was removed from the car, he had not been arrested. Accordingly, he still posed a danger to police. In *Long*, at 1047, the court recognized that "investigative detentions involving suspects in vehicles are especially fraught with danger to police officers." In further explaining those dangers, the court noted the increased risk to officer safety where a suspect has not been arrested and could re-enter the vehicle, thereby gaining access to weapons inside. *Id.* at 1052. In the present case, although appellant was under arrest, the officers had reasonable cause to believe that appellant's son could be a threat to their safety and thus were justified in searching the vehicle. The lower court did not err in denying the motion to suppress and the first assignment of error is not well-taken.

{¶ 20} In his third assignment of error, appellant contends that the lower court abused its discretion in imposing a consecutive sentence of 11 months on appellant's conviction for domestic violence.

{¶ 21} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, the Supreme Court of Ohio set forth a two-step analysis to be employed in reviewing felony sentences on appeal. First, appellate courts are required to "examine the sentencing court's compliance with all applicable rules and statutes in imposing the

sentence to determine whether the sentence is clearly and convincingly contrary to law." *Id.* at ¶ 26. Second, if the first prong is satisfied, the appellate court reviews the decision imposing sentence under an abuse of discretion standard. *Id.*

{¶ 22} On September 30, 2011, 2011 Am.Sub.H.B. No 86 took effect and reinstated the requirement of judicial fact-finding before a court imposes consecutive sentences in a felony case. R.C. 2929.14(C)(4). Appellant was sentenced in this case on November 22, 2011, and hence the trial court was required to comply with that version of the sentencing statute in imposing sentence. The applicable version of R.C. 2929.14(C)(4) reads:

> If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶ 23} The record reveals, and the state concedes, that the lower court did not comply with this statute. Indeed, the court made no findings on any of the factors listed in the statute in ordering that the 11-month sentence for the domestic violence offense be served consecutively to the terms imposed on the other charges. The third assignment of error is well-taken.

{¶ 24} On consideration whereof, the judgments of the Wood County Court of Common Pleas are affirmed as to appellant's convictions. The sentence in case No. 2011CR0143 is reversed as to that portion that imposed a consecutive term of imprisonment, and that case is remanded for resentencing on the domestic violence

conviction. Appellant and appellee are each ordered to pay one-half of the costs of this appeal pursuant to App.R. 24.

Judgments affirmed, in part,
and reversed, in part.

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

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE