[Cite as *State v. Jackson*, 2005-Ohio-5688.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 85639

STATE OF OHIO	:	
	:	JOURNAL ENTRY
Plaintiff-Appellant	:	
	:	AND
vs.	:	
	:	OPINION
ALBERT JACKSON	:	
	:	
Defendant-Appellee	:	
	:	
	:	
DATE OF ANNOUNCEMENT	:	
OF DECISION	:	October 27, 2005
	:	
CHARACTER OF PROCEEDINGS	:	Criminal appeal from
	:	Common Pleas Court
	:	Case No. CR-450583
	:	
JUDGMENT	:	AFFIRMED.
	:	
DATE OF JOURNALIZATION	:	

APPEARANCES:

For plaintiff-appellant

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By: CHIPPER XAVIER, ESQ.
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For defendant-appellee

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Assistant Public Defender
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Cleveland, Ohio 44113

SEAN C. GALLAGHER, J.:

{¶ 1} Plaintiff-appellant state of Ohio ("State") appeals the decision of the Cuyahoga County Court of Common Pleas that granted a motion to suppress in favor of defendant-appellee Albert Jackson ("Jackson"). Finding no error with the proceedings below, we affirm.

{¶ 2} The following facts give rise to this appeal. Officers Goines and Anderson of the Cleveland Police Department observed Jackson's vehicle parked by a no-parking sign; the vehicle was impeding the flow of traffic, and the engine was still running while Jackson went into the store. The officers parked their vehicle and entered the store to speak with Jackson. He was escorted from the store, patted down and searched, and then placed in the zone car. While Officer Anderson wrote the traffic citations for impeding the flow of traffic, in violation of section 433.04 of the Cleveland Codified Ordinances, and leaving a vehicle running while unattended, in violation of section 451.06 of the Cleveland Codified Ordinances, Officer Goines went into Jackson's car to turn the engine off and discovered a bag of crack cocaine in a plastic baggie "sticking out of the ceiling where the roof and the windshield meets [sic]." Jackson was arrested for possession of drugs.

{¶ 3} Following a hearing on Jackson's motion to suppress, the trial court stated:

> "The police were certainly justified under the circumstances in approaching the defendant inside the store.
>
> "They had, in fact, witnessed Mr. Jackson committing violations of the city ordinances of impeding traffic and leaving the key in the ignition.
>
> "It has been noted that these are not arrestable offenses. However, under the circumstances, they were justified in approaching the defendant and in escorting him from the store.

> "Under those circumstances, I believe they also were justified in conducting a pat-down for their safety. And this is where I believe the matter gets somewhat sticky.
>
> "Having determined that the defendant, at most had committed a non-arrestable traffic violation or two non-arrestable traffic violations, the appropriate act would have been either to make the determination of whether to ticket him or not while he was outside or, given the fact that this was mid winter, to allow him to go into his vehicle and wait there until they made that determination, either issue a ticket or to not.
>
> "* * * I don't believe he [Officer Goines] was justified in entering the defendant's car without a warrant, without the defendant's permission, without the defendant having been arrested or even being considered to be charged with any arrestable offense."

{¶ 4} The court granted the motion to suppress, finding that the search was not justified. The State appeals, advancing one assignment of error for our review, which states:

{¶ 5} "The trial court abused its discretion when it suppressed the evidence found in plain view in defendant's automobile."

{¶ 6} At a hearing on a motion to suppress, the trial court functions as the trier of fact, inasmuch as the trial court is in the best position to weigh the evidence by resolving factual questions and evaluating the credibility of the witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357. On review, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Harris* (1994), 98 Ohio App.3d 543, 546. After accepting such factual findings, the reviewing court must independently determine as a matter of law whether the applicable legal standard has been satisfied. *State v. Lloyd* (1998), 126 Ohio App.3d 95.

{¶ 7} The concurring opinion notes that our task under App.R. 12(A)(1)(b) is to determine the appeal on its merits on the assignment(s) of error as set forth in the brief. Here, the State argues that Officer Goines did not perform a search of the vehicle because his intent was to turn off the

engine, not to look for contraband. The State further contends that the drugs were in plain view and therefore rightfully seized.

{¶ 8} In considering the State's claim, we again note that the trial court stated "* * * I don't believe he [Officer Goines] was justified in entering the defendant's car without a warrant, without the defendant's permission, *without the defendant having been arrested* or even being considered to be charged with any arrestable offense." (Emphasis added.)

{¶ 9} We respectfully disagree with the trial court's finding that Jackson was not under arrest at the time the drugs were discovered. In our view, Jackson was unlawfully placed under arrest prior to the discovery of the drugs and, as such, that discovery is fruit of the poisonous tree.

{¶ 10} An investigative stop is more intrusive than a consensual encounter, but less intrusive than a custodial arrest. *State v. Williams*, Cuyahoga App. No. 81364, 2003-Ohio-2647. The investigative detention is limited in duration and purpose and can last only as long as it takes a police officer to confirm or dispel suspicions. See *State v. Polk* (Dec. 6, 2001), Cuyahoga App. No. 79170.

{¶ 11} In this case, Jackson was approached in the store and escorted outside because his vehicle was parked illegally and left running unattended. When Jackson was outside, the officers patted him down, searched his pockets (pulling everything out), and then placed him in the back of the zone car.

{¶ 12} A person is seized during an investigatory detention when, in consideration of all the circumstances surrounding the encounter, by means of physical force or show of authority a reasonable person would have believed he was not free to leave or was compelled to respond to questions. *Williams*, supra, citing *United States v. Mendenhall*, 446 U.S. 544.

{¶ 13} The encounter in this case involved a seizure that was equivalent to an arrest. Further, the officers testified that both citations issued were minor misdemeanors. R.C. 2935.26 prohibits police officers from arresting individuals for a minor misdemeanor unless one of the four exceptions apply. None of the exceptions apply in this case.

{¶ 14} The exclusionary rule is a judicially created remedy applied to exclude evidence from the government's case in chief when it has been obtained by police through an illegal search or seizure in violation of the Fourth Amendment. *Mapp v. Ohio* (1961), 367 U.S. 643. Although in *Atwater v. Lago Vista* (2001), 532 U.S. 318, the United States Supreme Court held that the Fourth Amendment does not forbid warrantless arrests for minor criminal offenses, the Supreme Court of Ohio has held that Section 14, Article I of the Ohio Constitution provides greater protection than the Fourth Amendment to the United States Constitution against warrantless arrests for minor misdemeanors. See *State v. Brown* (2003), 99 Ohio St.3d 323, 327. Consequently, Jackson's arrest and the seizure of evidence was unlawful.

{¶ 15} Had the officers entered the vehicle for a "caretaking" function, as in *State v. Cunningham*, Montgomery App. No. 20059, 2004-Ohio-3088, the State's argument would have merit. Here, Jackson was, for all intents and purposes, arrested prior to the officers attending to the vehicle. Hence, the arrest and subsequent search was unlawful.

{¶ 16} The State's sole assignment of error is overruled.

Judgment affirmed.

[Cite as *State v. Jackson*, 2005-Ohio-5688.]

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal. It is ordered that a special mandate issue out of this court directing the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, J., CONCURS;

COLLEEN CONWAY COONEY, P.J., CONCURS IN JUDGMENT ONLY (SEE ATTACHED CONCURRING OPINION).

SEAN C. GALLAGHER
JUDGE

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COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 85639

STATE OF OHIO	:	
	:	
Plaintiff-Appellant	:	C O N C U R R I N G
	:	
vs.	:	O P I N I O N
	:	
ALBERT JACKSON	:	
	:	
Defendant-Appellee	:	

DATE: October 27, 2005

COLLEEN CONWAY COONEY, P.J., CONCURRING IN JUDGMENT ONLY:

{¶ 17} I concur in judgment only because the majority has gone beyond our task set forth in App.R. 12(A)(1)(b) to determine the within appeal on its merits based on the assignments of error set forth in the briefs, the record, and oral argument. The State's sole assignment of error charges that "the court abused its discretion when it suppressed the evidence found in plain view in defendant's automobile."

{¶ 18} The majority notes that the State argues that the officer did not perform a search of the vehicle, and further that the drugs were in plain view and "rightfully seized." The majority then addresses an alternative argument raised by the appellee that the evidence resulted from his unlawful arrest. I would decide this appeal solely on the State's arguments and affirm the trial court's

suppression. I would analyze the facts presented solely under the plain view exception which the State argues and not find that Jackson was under an unlawful arrest, as the majority states.

{¶ 19} I disagree with the majority's decision to overturn the trial court's factual finding that Jackson was not under arrest at the time the drugs were discovered. I would not disturb the trial court's finding which is supported by competent, credible evidence.

{¶ 20} In the instant case, both parties agree the plain view doctrine is the exception at issue. A warrantless search or seizure by a law enforcement officer of an object in plain view does not violate the Fourth Amendment if: (1) the officer did not violate the Fourth Amendment in arriving at the place from which the object could be plainly viewed; (2) the officer has a lawful right of access to the object; and (3) the incriminating nature of the object is immediately apparent. *State v. Steward*, Cuyahoga App. No. 80993, 2003-Ohio-1337, citing, *Horton v. California* (1990), 496 U.S. 128, 136-137, 110 L. Ed. 2d 112, 110 S. Ct. 2301; *State v. Wilmoth* (1982), 1 Ohio St.3d 118, 438 N.E.2d 105; *State v. Williams* (1978), 55 Ohio St.2d 82, 377 N.E.2d 1013.

{¶ 21} In determining whether the intrusion was lawful, we must examine whether the police activity that led to the discovery of the evidence falls within the proper scope permissible under the "plain view" exception to the warrant requirement. The search was not incident to an arrest. There was no testimony that Officer Goines entered the car out of a concern for weapons or that any exigent circumstances existed that would warrant the intrusion. The officers testified that they placed Jackson under arrest only after Goines located the suspected drugs in the car. Both officers testified that initially they were not sure they were even going to cite Jackson for a traffic offense. Neither officer testified that Jackson gave consent to search the vehicle and there was no evidence that Goines found the drugs while conducting an inventory search.

{¶ 22} A review of the record does not show that Goines saw the drugs in plain view before opening the car door. If he had seen the drugs prior to getting into the car he would have had the necessary probable cause to enter the car and seize the drugs. *State v. Lang* (1996), 117 Ohio App.3d 29, 36, citing *State v. Harris* (1994), 98 Ohio App.3d 543, 546. The discrepancies in Goines' testimony make it unclear whether he saw the drugs as he opened the car door, as he shined his flashlight in the car, as he sat in the driver's seat, or as he leaned to turn off the engine.

{¶ 23} The trial court found that the officer did not use turning off the car as a ruse to justify a search. Even if the officer had good intentions, he must still respect the privacy rights of the detained individual. The State argues that it is police policy to turn off running engines in cars during the detention of suspected criminals. The State, however, failed to provide any proof of an official policy, nor was Jackson a "suspected criminal." Goines could have asked Jackson's permission to go into the car to turn off the ignition or allowed Jackson to do it himself. Finding that the intrusion does not fall within an exception to the warrant requirement, I would find that the search was not lawful. Since the State's argument fails to satisfy the first prong of the "plain view" test, I would proceed no further with an evaluation of whether the illegal nature of the plastic bag was immediately apparent.

{¶ 24} Therefore, I would find that the trial court did not abuse its discretion in suppressing the drugs found in Jackson's car and agree to affirm the judgment.