[Cite as *State v. Hopper*, 2009-Ohio-2711.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91269 and 91327

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

THOMAS HOPPER, ET AL.

DEFENDANTS-APPELLANTS

[**Inconsistent spellings of Hopper's last name appear in the record. At times, his last name is spelled "Hooper."]**

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-501921

BEFORE: Kilbane, P.J., McMonagle, J., and Stewart, J.

RELEASED: June 11, 2009

JOURNALIZED:

ATTORNEYS FOR APPELLANTS

For Thomas Hopper:

Brian R. McGraw
1280 West Third Street - 3rd Floor
Cleveland, Ohio 44113

For Decharles Stephens:

Timothy F. Sweeney
Law Office - Timothy Farrell Sweeney
The 820 Building - Suite 430
820 West Superior Avenue
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
Michael Graham
Assistant Prosecuting Attorney
The Justice Center - 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

MARY EILEEN KILBANE, P.J.:

{¶ 1} Appellants, Decharles Stephens and Thomas Hopper[1] (collectively appellants), appeal from the decision of the Cuyahoga County Court of Common Pleas that denied their motions to suppress.[2] For the reasons that follow, we affirm.

{¶ 2} On October 10, 2007, a grand jury indicted Stephens and Hopper on seven counts. Count One charged Stephens with drug trafficking, to wit: crack cocaine, under R.C. 2925.03(A), a fourth degree felony. Count Two charged Hopper with drug trafficking, to wit: crack cocaine, under R.C. 2925.03(A)(2), a third degree felony. Count Three charged Stephens with possession of drugs, to wit: crack cocaine, under R.C. 2925.11(A), a fourth degree felony. Count Four charged Hopper with possession of drugs, to wit: crack cocaine, under R.C. 2925.11(A), a third degree felony.

{¶ 3} Count Five charged Stephens and Hopper with possession of criminal tools, to wit: money and/or scales and/or cell phone, under R.C. 2923.24(A), a fifth degree felony. Count Six charged Hopper with illegal conveyance of prohibited items onto the grounds of a detention facility, under R.C. 2921.36(A)(2), a third

---

[1]Despite the fact that the indictment identifies appellant as "Thomas Hooper," the parties agreed at the April 2, 2008 suppression hearing that the correct spelling of his last name is "Hopper."

[2]Stephens and Hopper filed separate appeals. However, because they each assert an assignment of error supported by the same arguments and facts, we sua sponte consolidated the appeals for disposition. Accordingly, we shall address the appeals within one opinion.

degree felony. Finally, Count Seven charged Hopper with drug possession, to wit: cocaine, under R.C. 2925.11(A), a fifth degree felony.

{¶ 4} On March 21 and March 28, 2008, Stephens and Hopper each filed a motion to suppress, respectively. On April 2, 2008, the trial court held a joint hearing on the motions and denied them. On that same date, Stephens and Hopper pleaded no contest, and were found guilty on all counts. On April 3, 2008,[3] the trial court sentenced Hopper to two years in prison. On April 4, 2008, the trial court sentenced Stephens to one year in prison.

{¶ 5} The following facts give rise to this appeal.

{¶ 6} Cleveland Police Officers Lawrence Smith and William Mazur testified to the following. On the afternoon of October 2, 2007, as they traveled on East 40th Street, Officer Smith noticed a car turn without using its turn signal; therefore, the officers decided to make a traffic stop. As Officer Smith approached the stopped car, he noticed Hopper exit the back seat. Officer Smith informed Hopper that he needed to remain inside the car. Hopper returned to his seat, but left the passenger door open.

{¶ 7} As Officer Smith approached the open rear door, he noticed the smell of marijuana. The officers asked all of the car's occupants to exit the vehicle and, for officer safety, handcuffed them as they conducted a search of the car.

---

[3]Also on April 3, 2008, Hopper moved for a Crim.R. 29 motion for acquittal on Count Six, which the trial court granted. Accordingly, the trial court vacated the finding of guilt on Count Six.

{¶ 8} Officers Taylor and Yasenchack[4] had been patrolling in a different car and stopped to assist the officers who were already on the scene. Officer Mazur found two blunts, one on the driver's seat and one on the front passenger side floorboard where Stephens had been sitting. Officer Yasenchack found two baggies containing marijuana and a scale in the back seat where Hopper had been sitting.

{¶ 9} The officers advised the car's three occupants, which included the driver and passengers Stephens and Hopper, that they were under arrest for transporting marijuana in a motor vehicle pursuant to Cleveland Codified Ordinance 619.23(C), a first degree misdemeanor. Officer Taylor searched Stephens and found several pieces of crack cocaine in his boot. When a guard at the police station searched Hopper, he found pieces of crack cocaine on him.

{¶ 10} Hopper and Stephens appeal, each asserting one assignment of error for our review. The assignments of error are substantially similar, therefore, we address them together.

{¶ 11} ASSIGNMENT OF ERROR NUMBER ONE (STEPHENS)

"THE TRIAL COURT ERRED IN OVERRULING THE MOTION TO SUPPRESS."

{¶ 12} ASSIGNMENT OF ERROR NUMBER ONE (HOPPER)

"THE POLICE IMMEDIATELY ARRESTED THE APPELLANT WITHOUT PROBABLE CAUSE AND AS A RESULT, THE MOTION

[4]The record does not indicate the officers' first names.

TO SUPPRESS SHOULD HAVE BEEN GRANTED."

{¶ 13} Appellants argue that the trial court erred when it denied their motions to suppress. Specifically, they argue that the crack cocaine police found on them is inadmissable because they were improperly arrested before the search of the car revealed evidence of marijuana. For the foregoing reasons, we disagree.

> **"Appellate review of a trial court's ruling on a motion to suppress presents mixed questions of law and fact. *State v. McNamara* (1997), 124 Ohio App.3d 706, 710, 707 N.E.2d 539. An appellate court is to accept the trial court's factual findings unless they are clearly erroneous. *State v. Long* (1998), 127 Ohio App.3d 328, 332, 713 N.E.2d 1. We are therefore required to accept the factual determinations of a trial court if they are supported by competent and credible evidence. *State v. Harris* (1994), 98 Ohio App.3d 543, 546, 649 N.E.2d 7. The application of the law to those facts, however, is subject to de novo review. Id." *State v. Polk,* Cuyahoga App. No. 84361, 2005-Ohio-774, at ¶2.**

{¶ 14} The Fourth Amendment to the United States Constitution states that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Ordinarily, the police must obtain a warrant based on probable cause before they can arrest or conduct a search; however, one exception to this rule is the motor vehicle exception as stated in *Chambers v. Maroney* (1970), 399 U.S. 42, 90 S.Ct. 1975:

{¶ 15} "An investigative stop does not violate the Fourth Amendment to the United States Constitution if the police have reasonable suspicion that 'the person stopped is, or is about to be, engaged in criminal activity.'" *State v. Harrell*,

Cuyahoga App. No. 89015, 2007-Ohio-5322, ¶8, quoting *United States v. Cortez* (1981), 449 U.S. 411, 417, 101 S.Ct. 690.

{¶ 16} The United State Supreme Court has held: "[I]n determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868. In other words, "the propriety of an investigative stop by a police officer must be viewed in light of the totality of the surrounding circumstances." *State v. Bobo* (1988), 37 Ohio St.3d 177, 178, 524 N.E.2d 489, paragraph one of the syllabus.

{¶ 17} A review of the record demonstrates that appellants' Fourth Amendment rights were not violated at any point during the course of the officers' actions. For reasons more fully explained below, the officers were permitted to stop the car based on a traffic violation; to conduct an investigative search based upon the smell of marijuana in the car; and, upon discovering marijuana and arresting the occupants on that charge, to conduct patdowns, which led to the discovery of the cocaine.

Traffic Stop

{¶ 18} As long as an "officer has probable cause to believe that a traffic violation has occurred or was occurring, the resulting stop is not unlawful and does not violate the Fourth Amendment." *Dayton v. Erickson* (1996), 76 Ohio St.3d 3, 9, 665 N.E.2d 1091. Therefore, the officers had a right to stop the vehicle for failure to

use a turn signal.

Investigative Search

{¶ 19} Upon conducting a permissible routine traffic stop, Officer Smith smelled marijuana emanating from the vehicle. After handcuffing the car's occupants, the officers searched the car and found marijuana blunts on the front passenger side floorboard and front seat, and marijuana in the back seat. Based upon finding the evidence, the officers arrested the car's occupants for transporting marijuana in a motor vehicle.

{¶ 20} Clearly, the smell of marijuana gives rise to a reasonable suspicion that the person stopped is engaged in criminal activity. See *State v. Moore*, 90 Ohio St.3d 47, 53, 2000-Ohio-10, holding that "the smell of marijuana, alone, by a person qualified to recognize the odor, is sufficient to establish probable cause to search a motor vehicle, ***." Therefore, because Officer Smith had a reasonable suspicion that criminal activity was occurring, he had the right to detain the car's occupants and search the car.

Arrest

{¶ 21} The crux of appellants' argument is that the officers were not allowed to handcuff them immediately after removing them from the vehicle because this constituted an arrest. Specifically, appellants rely on *United States v. Myers* (C.A.3, 2002), 308 F.3d 251, 263, citing *Henry v. United States* (1953), 361 U.S. 98, 103, which states that "[a]n arrest is not justified by what the subsequent search discloses." However, we find that the detention was appropriate, even though the

officers handcuffed Stephens and Hopper, and the detention did not constitute an arrest.

{¶ 22} In *State v. Hubbard,* Cuyahoga App. No. 83385, 2004-Ohio-4498, ¶17, this court held that "[h]andcuffing and other means of detention are reasonable as long as the restraint was temporary, lasted no longer than was necessary to effectuate the purpose of the stop, and the methods employed were the least intrusive means reasonably available to verify the officers' suspicions in a short period of time. Handcuffing and other means of detention may also be used to prevent flight. *State v. Pickett* (Aug. 3, 2000), Cuyahoga App. No. 76295, citing *United States v. Glenna*, 878 F.2d at 972."

{¶ 23} A review of the facts demonstrates that the officers' decision to handcuff the car's occupants merely constituted a reasonable measure to ensure officer safety. First, Hopper tried to exit the vehicle when the officers conducted the traffic stop, which indicates that he might have attempted to flee or harm the officers. Also, the officers were investigating a suspected drug offense, and "Ohio courts have long recognized that persons who engage in illegal drug activities are often armed with a weapon." *State v. Martin,* Montgomery App.

{¶ 24} No. 20270, 2004-Ohio-2738, at ¶17. Finally, there were three suspects in the vehicle, which elevates the concern for officer safety. Accordingly, we find that the act of handcuffing appellants did not convert the investigative stop into an arrest.

{¶ 25} Although appellants characterize the stop in this case in light of *Terry*, supra, we find it is more properly considered under the line of cases that analyze

automobile searches. See, e.g., *Maroney*, supra; *Moore*, supra; *State v. Farris*, 109 Ohio St.3d 519, 529-530, 2006-Ohio-3255; *State v. Crenshaw,* Cuyahoga App. No. 90635, 2008-Ohio-4859, ¶18.

{¶ 26} Briefly, we note that Stephens argues that, despite the argument that handcuffing appellants was not an arrest under *State v. Rampey,* Stark App. No. 2004 CA 00102, 2006-Ohio-1383, at ¶14, "a seizure becomes an arrest rather than a *Terry* detention if a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest." However, in *Rampey,* the defendant was "handcuffed, placed into the rear of a police cruiser, and taken to the police station." Id. at ¶15. We find *Rampey* easily distinguishable from this case because appellants were not put into a police car or taken to the police station before the officers discovered the marijuana.

{¶ 27} Appellants also rely on *State v. Williams,* Montgomery App. No. 22601, 2008-Ohio-5511, ¶20, in which the court found that, "the officers' use of restraints was not reasonably necessary as part of a brief, investigative stop, and that officers therefore converted the *Terry* stop into an arrest by handcuffing Williams." The court based its decision on the fact that there were four officers present, Williams did not make any threatening gestures or appear to be armed, and Williams had complied with the officers' requests. Id. at ¶19.

{¶ 28} This case is easily distinguishable from *Williams.* In *Williams,* the only justification for handcuffing the defendant was that he had been interacting with a

"known crack addict" in a high drug area. Id. at ¶3. Here, the officers smelled marijuana before handcuffing the car's occupants; Hopper had attempted to exit the vehicle; and there were a total of three suspects, as opposed to only one in *Williams*.

{¶ 29} Furthermore, even if we accept appellants' arguments the investigative stop was transformed into an arrest when they were handcuffed, their argument still fails.

{¶ 30} Probable cause to arrest is a requirement of the Fourth Amendment to the United States Constitution binding upon the individual states through the Fourteenth Amendment. *Giordenello v. United States* (1958), 357 U.S. 480, 78 S.Ct. 1245. Probable cause exists where the facts and circumstances within the arresting officer's knowledge, and of which he had reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Carroll v. United States* (1925), 267 U.S. 132, 45 S.Ct. 280; *Henry v. United States* (1959), 361 U.S. 98, 80 S.Ct. 168; *Ker v. California* (1963), 374 U.S. 23, 83 S.Ct. 1623; *Beck v. Ohio* (1964), 379 U.S. 89, 85 S.Ct. 223; *State v. Fultz* (1968), 13 Ohio St.2d 79, 234 N.E.2d 593.

{¶ 31} In this case "the facts available at the moment of the arrest" included the smell of marijuana emanating from the car contemporaneously with the officers' approach. This would "'warrant a man of reasonable caution in the belief' that an offense has been committed." *Beck*, supra, at 96, quoting *Carroll*, supra, at 162.

Search Incident to Arrest

{¶ 32} Thus, even aside from concerns for officer safety, the officers in this case had every reason to make a valid arrest once armed with the knowledge that an offense was being committed. In such an instance, the subsequent search of the automobile was justified under the automobile exception found in *Maroney*, supra.

{¶ 33} Such a search could also be justified by the holding in a recent United States Supreme Court case, *Arizona v. Gant* (2009), 556 U.S. ___, 129 S.Ct. 1710, wherein the court held that a law enforcement officer who arrests a vehicle occupant may search the vehicle if the arrestee was in reaching distance of a weapon or contraband at the time of the search, or if the officer has reason to believe the vehicle contains evidence of the crime of arrest. Id.

{¶ 34} In this case, based upon the probable cause generated by the smell of marijuana emanating from the car, the officers placed the occupants of the car under arrest for allegedly transporting marijuana in a motor vehicle. A search of the vehicle incident to that arrest was entirely justified under *Gant*, because the officers had reason to believe that the vehicle contained evidence of the offense of arrest, to wit: marijuana.

{¶ 35} After the arrests, the officers conducted a search incident to arrest on each suspect, which is a well-established exception to a warrant requirement. In *Chimel v. California* (1969), 395 U.S. 752, 89 S.Ct. 2034, the United States Supreme Court held that the Fourth Amendment is not violated by an officer's valid search incident to an arrest. See, also, *United States v. Robinson* (1973), 414 U.S. 218, 235, 94 S.Ct. 467, holding that “[t]he authority to search the person incident to a

lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification."

{¶ 36} Accordingly, any evidence discovered incident to a lawful arrest is admissible against a defendant.

{¶ 37} For the following reasons, we find that the trial court did not err in denying appellants' motion to suppress: the officers lawfully stopped the car for a traffic violation and smelled marijuana. Under the plain smell doctrine, the officers had the right to detain the occupants of the vehicle, and then had the right to search the vehicle based upon a reasonable suspicion that criminal activity was taking place. After their suspicions were confirmed, the officers were permitted to arrest the occupants based upon the marijuana found in the car. Further, once the occupants were taken into custody, they were permissibly patted down incident to the lawful arrest for transporting marijuana in a motor vehicle. The crack cocaine found as a result of the patdown was admissible. Accordingly, appellants' assignments of error are overruled.

Judgment affirmed.

It is ordered that appellee recover from appellants 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 common pleas court to carry this judgment into execution. The defendants' convictions having been affirmed, any bail pending appeal is terminated.

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

MARY EILEEN KILBANE, PRESIDING JUDGE

CHRISTINE T. McMONAGLE, J., CONCURS IN JUDGMENT ONLY
MELODY J. STEWART, J., CONCURS