[Cite as *State v. Dunn*, 2009-Ohio-3737.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92030

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANTHONY DUNN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-501515

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

RELEASED: July 30, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, Anthony Dunn, appeals from his conviction for improperly handling a firearm in a motor vehicle. The police discovered the firearm in Dunn's car after stopping him for driving at night without headlights. Dunn argues that the court should have suppressed evidence of the gun because the traffic stop was a pretense for an illegal search and seizure.

{¶ 2} In *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, the supreme court stated:

{¶ 3} "Appellate review of a motion to suppress presents a mixed question of law and fact. 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. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Fanning* (1982), 1 Ohio St. 3d 19, [20], 1 Ohio B. 57, 437 N.E.2d 583. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. *State v. McNamara* (1997), 124 Ohio App.3d 706, 707 N.E.2d 539." Id. at ¶8.

{¶ 4} A police officer testified during the suppression hearing that he had been on undercover patrol at 11:30 p.m. in an unmarked car. He saw a car

carrying Dunn and a passenger and requested "a random verification check on the plate." The car was registered to a 73-year-old female. Even though the car had not been reported stolen, the officer knew that the particular make of car being driven by Dunn was often reported stolen, so he thought it suspicious that it was being driven by Dunn, accompanied by another male, when the car was registered to an elderly woman. He followed the car and watched it turn into a residential driveway and turn off its headlights. Between five and ten seconds later, the car backed out of the driveway and continued in the opposite direction, with the headlights still turned off. The car passed four to six houses before its headlights were turned on. The officer decided to stop the car for driving without headlights and requested backup to make the stop because he was in an unmarked car. Once stopped, the occupants exited the car and informed the police that there was a gun in the car. The police did not cite Dunn for driving without headlights.

{¶ 5} The police stop of Dunn's car for driving at 11:30 p.m. without headlights was lawful. R.C. 4513.03(A) states that every vehicle "upon a street * * * during the time from sunset to sunrise * * * shall display lighted lights and illuminating devices * * *." In *State v. Jones*, 121 Ohio St.3d 103, 2009-Ohio-316, the supreme court stated at ¶19:

{¶ 6} "[T]he majority of the appellate court did not sufficiently appreciate the importance of the fact that [the sergeant] personally observed [defendant]

driving without headlights in the dark in clear contravention of several Ohio statutes. This conduct constituted a traffic violation, thereby giving [the sergeant] probable cause to initiate the stop because he had personally observed the violation. *Dayton v. Erickson* (1996), 76 Ohio St.3d 3, 11-12, 1996-Ohio-431, 665 N.E.2d 1091 ('where an officer has * * * probable cause to stop a motorist for any criminal violation, including a minor traffic violation, the stop is constitutionally valid')." (Footnotes omitted.)

{¶ 7} We also reject Dunn's argument that the traffic infraction for driving without headlights was meritless because he had illuminated his headlights by the time of the traffic stop. Regardless of whether he traveled for only a short distance before illuminating his headlights, the fact remains that the officer did see Dunn operating his car on the street without headlights. Dunn's argument would be akin to claiming that a speeding ticket should not be issued to a speeder because he slowed down after passing the radar gun. It may be that the officer used the traffic violation as a pretext for a stop, but "[w]here 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." *Erickson*, 76 Ohio St.3d at syllabus. The court did not err by denying the motion to suppress.

Judgment affirmed.

It is ordered that appellee recover of appellant its 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 Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

MELODY J. STEWART, JUDGE

CHRISTINE T. McMONAGLE, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR