[Cite as *State v. Morrison*, 2009-Ohio-4724.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92065

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JERON MORRISON

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-508332

BEFORE: Jones, J., Boyle, P.J., and Sweeney, J.

RELEASED: September 10, 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).

LARRY A. JONES, J.:

{¶ 1} Appellant-defendant, Jeron Morrison ("Morrison"), appeals the judgment of the lower court. Having reviewed the arguments of the parties and the pertinent law, we hereby reverse and remand.

STATEMENT OF THE CASE AND THE FACTS

{¶ 2} On April 3, 2008, the Cuyahoga County Grand Jury returned a seven-count indictment against Morrison, in CR-508332. Counts 1 and 2 charged Morrison with drug trafficking in violation of R.C. 2925.03, felonies of the second degree. Count 3 charged Morrison with possession of drugs in violation of R.C. 2925.11, a felony of the second degree. Count 4 charged Morrison with drug trafficking in violation of R.C. 2925.03, a felony of the first degree. Count 5 charged Morrison with possession of drugs in violation of R.C. 2925.11, a felony of the first degree. Count 6 charged Morrison with possession of drugs in violation of R.C. 2925.11, a felony of the fifth degree. Count 7 charged Morrison with possession of criminal tools in violation of R.C. 2923.24, a felony of the fifth degree.

{¶ 3} On May 12, 2008, defense counsel filed a motion to suppress evidence recovered during a search of the house Morrison was living in located at 2048 West 87th Street in Cleveland, Ohio. On May 14, 2008, defense counsel filed a motion to suppress evidence found on appellant's person following a warrantless search. On June 5, 2008, defense counsel filed a motion to suppress oral statements. On August 11, 2008, a hearing was held on all three motions.

The trial court denied all three motions. That same day, Morrison entered a plea of no contest as to all seven counts of the indictment.

{¶ 4} The trial court found Morrison guilty as to all counts and immediately proceeded to sentencing. Morrison was sentenced to four years on each of Counts 1, 2, 3, 4 and 5. Morrison received a sentence of 6 months on each of Counts 6 and 7. All counts were ordered to run concurrently with each other for a total aggregate sentence of 4 years. Morrison was advised that he would be subject to a period of post-release control upon his release. On September 12, 2008, Morrison filed a timely notice of appeal.

{¶ 5} According to the facts, on February 27, 2008, members of the Cleveland Police First District Vice Unit were conducting buy/bust operations on Cleveland's west side. A confidential reliable informant ("CRI") had provided detectives with information concerning a male selling drugs in the area of West 89th Street and Sauer. Under the supervision of police detectives, the CRI placed a phone call to a man known as "P" for the purpose of purchasing $70 worth of crack. After the initial call, detectives monitored another call to "P" in which the man on the phone told the CRI to meet him at West 89th and Sauer. However, when the CRI and detectives went to that location, the seller never showed up.

{¶ 6} Detectives and the CRI placed another call to the seller who changed the meeting location to a BP gas station near West Boulevard and Lorain Avenue. Detective Fallon was listening in on the conversation and heard the male tell the CRI to meet him there. Based on this new information, Detective Fallon radioed

the other vice detectives and informed them of the new location. Detective Pitts observed a red Lincoln Town Car arrive at the gas station and pull up directly next to the CRI. The passenger of the Lincoln, later learned to be Morrison, motioned for the CRI to follow him from that location. The car in which Morrison was riding in left the gas station and was driven down a one-way alley going in the wrong direction.

{¶ 7} Detective Pitts testified that during the investigation he learned that Morrison was in possession of the cell phone that was used to set up the drug deal. Subsequently, detectives arrested Morrison and found crack cocaine on his person.

{¶ 8} The driver of the Lincoln was a man named Fred Hudy. Hudy resided at the West 89th Street residence. Hudy signed a consent to search form for that residence. Hudy informed detectives that Morrison stayed there on occasion and had stayed there the night before the arrest. Detective Fallon read the consent form to Hudy out loud before Hudy signed it. Detective Fallon testified that he did not promise nor threaten Hudy in conjunction with Hudy signing the form. In Morrison's room, detectives recovered crack cocaine, packing materials, pills, personal papers, and a digital scale. Prior to giving consent to search the home, Hudy told detectives that he was the owner.

{¶ 9} When Morrison was first searched, the police found some crack cocaine. Later, back at the police station, they found an even larger quantity of crack cocaine on Morrison's person. Specifically, the police later found 13.75

grams in Morrison's sock, .92 grams in his waistband, and .18 grams in his right pocket. The police also found more crack cocaine in Morrison's room when they searched the house. The police ultimately found 33.78 grams of crack cocaine.

Assignments of Error

{¶ 10} Morrison assigns two assignments of error on appeal:

{¶ 11} "[1.] The trial court erred when it failed to grant his motion to suppress evidence found on his person.

{¶ 12} "[2.] The trial court erred when it failed to grant his motion to suppress evidence found in his bedroom."

LEGAL ANALYSIS

Motion to Suppress

{¶ 13} Our review of the trial court's decision to deny the motion to suppress is de novo. The Supreme Court of Ohio held in *State v. Burnside*, 100 Ohio St.3d 152, 154, 2003-Ohio-5372, 797 N.E.2d 71, as follows:

> "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. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. 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." (Internal citations omitted.)

{¶ 14} Appellate review of a trial court's ruling on a motion to suppress presents mixed questions of law and fact. See *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 then subject to de novo review. Id.

{¶ 15} The Fourth Amendment to the United States Constitution provides in part: "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *."

{¶ 16} During a suppression hearing regarding evidence found in a warrantless search of a premises, the state must prove that one of the few exceptions to the search warrant requirement applies to the facts of the case at hand. *Coolidge v. New Hampshire* (1971), 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564.

Search of Morrison

{¶ 17} Morrison argues in his first assignment of error that the search of his person was unconstitutional. We find merit in Morrison's argument that the search of his person was unconstitutional. Accordingly, the search of Morrison's room that followed the search of his person must also be suppressed.

{¶ 18} An investigatory stop of a vehicle is permissible if a police officer has reasonable, articulable suspicion that the individual stopped may be involved in criminal activity. See *Terry v. Ohio* (1968), 392 U.S. 1, 20, 88 S.Ct. 1868, 20 L.Ed.2d 889. When determining whether an investigative traffic stop is supported by a reasonable, articulable suspicion of criminal activity, the stop must be viewed in light of the totality of circumstances surrounding the stop. *State v. Bobo* (1988), 37 Ohio St.3d 177, 524 N.E.2d 489, paragraph one of the syllabus, certiorari denied (1988), 488 U.S. 910, 109 S.Ct. 264, 102 L.Ed.2d 252. An officer's inchoate hunch or suspicion will not justify an investigatory stop. See *Terry*, supra. Rather, justification for a particular seizure must be based upon specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant that intrusion. Id.

{¶ 19} We find that, under the circumstances, the detectives did not have the requisite reasonable suspicion to search Morrison. Morrison was merely a passenger in a car driven by another individual, Mr. Hudy, who was stopped for a traffic violation. A review of the record demonstrates that the police pulled Hudy over for driving the wrong way on a one-way street. Although driving the wrong way on a one-way street may constitute enough reasonable suspicion to justify the stop of the driver, it is not enough to justify searching Morrison in this case.

{¶ 20} Although the police may have recognized some behavior that was suspicious, there is a lack of specific articulable factors to justify the stop and search of Morrison. The police observed the red Lincoln Town Car drive the

wrong way down a one-way street and pull up next to another car. However, the police did not observe any drugs, money, criminal tools, or drug paraphernalia exchanged between the men in the vehicle. Accordingly, no specific articulable drug-related activity was observed prior to the arrest and subsequent search of Morrison.

{¶ 21} A review of the record demonstrates that Detective Matt Putman and Detective John Pitts both testified that they did not hear any of the actual conversation between the confidential informant and Morrison. Moreover, both detectives further testified that they did not witness any drug activity prior to the stop and search of Morrison. Specifically, Detective Putman testified on cross-examination by defense counsel as follows:

> Q: "But you had no contact with the intended seller?"
>
> A: "No."
>
> Q: "You had no contact with either one of the these individuals in the car before you took them down."
>
> A: "No, sir."
>
> * * *
>
> Q: "You never had any conversations with the individuals?"
>
> A: "That is correct."
>
> Q: "Nor did a drug transaction take place, am I correct?"
>
> A: "I had no knowledge of that, no."

Q: "So you had no knowledge of the drug transaction.

Am I correct?"

A: "That's correct."

Q: "You had no personal knowledge - - you did not hear a conversation between either one of the individuals in the car and anybody else; am I correct?"

A: "Not personally, no."

* * *

Q: "If I may, you never had contact with the CRI [confidential reliable informant] - -

A: "That is correct."[1]

Detective Pitts also testified that he had no contact with the intended seller, driver of the red car, CRI, or Morrison before the arrest and subsequent searches.

Q: "So you have no - - you have no idea what was said between this confidential informant and anyone else, is that correct?"

A: "Not firsthand, no,

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[1]See Oct. 20, 2008 transcript, pp. 12, 13, 15.

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”

Q: “And you weren’t privy to that phone conversatic

A: “By privy do you mean did I hear it?”

Q: “Yes.”

A: “No, I did not.”

Q: “So what happened here essentially is, if I’m not mistaken, is that this vehicle was stopped for going the wrong way down a one-way street; am I correct?”

A: “Yes, among other things, yes.”

Q: “Well, no drug transaction ever took place did it?”

A: “No, sir.”

Q: “So they certainly weren’t stopped because a drug transaction had taken place, am I correct?”

A: “The drug transaction never took place that’s correct.”

Q: “And they were stopped because there were going down a wrong way on a one-way street, am I correct?”

MR. HANLEY: “Objection, asked and answered.”

THE COURT: “Overruled.”

A: "That is partially right. They were stopped because of the impending drug transaction."

Q: "But it never took place and you were not privy to the setup and the drug transaction, were you?"

A: "It never took place. No, I was not privy to that."[2]

{¶ 22} In addition to Officers Putman and Pitts, Officer Fallon, the officer in charge, also testified that he never observed any drug transaction between the suspects. Defense counsel asked Officer Fallon, "And no drug transaction ever took place, did it?" To which, Officer Fallon responded, "Not at that time, no."[3] Further review of the record demonstrates that Officer Fallon never did observe any drug transaction involving Morrison and the other suspects.

{¶ 23} Officer Fallon testified that his reasons for the investigation and arrest of Morrison were based on the confidential informant's phone conversation with Morrison. However, when Officer Fallon first heard the confidential informant's phone conversation with Morrison, he had never heard Morrison's voice before. Officer Fallon admitted as much when defense counsel questioned him about his reasons for the investigation.

Q: "You said you heard Mr. Morrison's voice?"

A: "Yes."

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[2]See Oct. 20, 2008 transcript, pp. 24, 25.

[3]Tr. 43.

Q: “You didn’t know it was Mr. Morrison’s voice, did you? You never heard him speak before, did you?”

A: “Afterwards, afterwards I talked with Mr. Morrison, several minutes later, yes.”

Q: “Beforehand?”

A: “No.”

Q: “Before this all went down, you said you heard Mr. Morrison’s voice.”

A: “I knew him when I was on listening afterwards, yes.”

Q: “But my point is, before the arrest went down, you said you listened to the telephone conversation.”

A: “That is correct.”

Q: “You had no idea that was Morrison at that time, did you?”

A: “Not at that time, no.”

Q: “It could have been anybody.”

A: “It could have been anybody, yes.”

{¶ 24} The Supreme Court of Ohio has held that “[t]he reputation of an area for criminal activity is an articulable fact upon which a police officer may legitimately rely in determining whether an investigative stop is warranted.” *Bobo* at 179. However, that fact alone is insufficient for a *Terry* stop. The totality of the facts and circumstances before the officers must reasonably suggest that some specific criminal activity is afoot. Id.

{¶ 25} Here, the detectives did not observe any activity within the red Lincoln Town Car, and they did not observe any evidence of drugs. They only

had the cell phone conversation on which to base their search of Morrison. However, the police never heard Morrison's voice before this phone conversation and were therefore unable to confirm that the voice on the phone was that of Morrison before they searched him. This court has previously found a lack of reasonable suspicion in similar cases where the officers fail to observe any drugs or exchanges between motorists. See *State v. Stewart*, Cuyahoga App. No. 88239, 2007-Ohio-1597; *State v. Delagraza* (2001), 144 Ohio App.3d 474, 760 N.E.2d 860; see, also, *State v. Wagner-Nitzsche*, Summit App. No. 23944, 2008-Ohio-3953.

{¶ 26} The circumstance of the case sub judice are similar to *State v. Alexander*, Cuyahoga App. No. 90065, 2008-Ohio-2665. In *Alexander*, the State relied on testimony attempting to link Alexander to a cell phone number *after* the police had stopped and arrested him. Specifically, Detective Jones testified that after the search warrant was obtained, and during the search of the Glenville Avenue house, the police found some bills, including a cell phone bill, that had Alexander's name on them. That the after-the-fact attempt to link Alexander to the cell phone number, together with the fact that Detective Jones could not state that it was actually Alexander with whom the CI spoke, was not enough to support the stop and subsequent search.

{¶ 27} Consequently, the court in *Alexander* held that the police officers lacked reasonable suspicion that defendant was involved in drug activity and, thus, were not justified in making an investigatory stop, and the state failed to

show any good faith on the part of the detective in obtaining a warrant to search the residence for drug evidence, and thus the good-faith exception to the exclusionary rule was inapplicable.

{¶ 28} Considering the totality of the circumstances, we find the trial court erred in determining that the police had reasonable suspicion to search Morrison. We find the search of Morrison's person to be improper.

{¶ 29} Accordingly, Morrison's first assignment of error is sustained.

{¶ 30} The search of Morrison's person was improper, therefore the subsequent search of Morrison's room was also improper.

> "The exclusionary rule of the Fourth Amendment was extended to the states through the Fourteenth Amendment in *Mapp v. Ohio*, (1961), 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081. The exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, but also evidence later discovered and found to be derivative of an illegality, or 'fruit of the poisonous tree.' See *Nardone v. United States* (1939), 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307."

State v. Smith, 163 Ohio App.3d 567, 2005-Ohio-5204, 839 N.E.2d 451.

{¶ 31} Because the search warrant was based on evidence discovered through an illegal seizure, the later-discovered evidence found at the West 87th Street residence is fruit of the poisonous tree and is now also excluded.

{¶ 32} Assuming for the sake of argument that the search of Morrison's person happened to be valid, the search of his room would still be improper. Although Hudy consented to the search, the consent was not his to give.

Search of Morrison's Residence

{¶ 33} Here, Morrison argues that the police violated his constitutional rights when they entered and searched his residence without a search warrant or exigent circumstances. Morrison argues that *State v. Chuey* (Apr. 26, 2000), Medina App. No. 2937-M, applies. We agree. Although, Hudy indicated that he was the owner of the premises and signed the consent to search form to search the entire house, he did not have the authority to offer consent to the search of Morrison's room. This situation is similar to the search of a boarding house addressed in *Chuey*.

{¶ 34} In *Chuey*, the court held that "the facts available to the deputies who performed the search were not sufficient to warrant a reasonable belief that Ms. Yergin had authority to consent to a search of Defendant's room." Id. at ¶5. "The facts available to the deputies at the time of the search indicated that defendant had a significant privacy interest in the place to be searched: he was a boarder in the home, he was an adult, the place to be searched was his personal bedroom, the room contained belongings, the room was separated from the rest of the home, and there was no evidence that Ms. Yergin used or had mutual access to the room." The court further held that "[t]he deputies' belief that Ms. Yergin had authority to consent was based on an erroneous view of the law," and, as a result, their view that Yergin had apparent authority to consent to the search was not reasonable under the circumstances. Id. at ¶6.

{¶ 35} In the case at bar, Morrison had a significant privacy interest in the place to be searched, he was a boarder in the home, he was an adult, the place

to be searched was his personal bedroom, the room contained his belongings, and the room was separated from the rest of the home. Moreover, there was no reason why the police could not have obtained a search warrant prior to entering Morrison's room.

{¶ 36} Even if the search of Morrison's person had been valid, Hudy did not have the legal right to give consent to the police to search Morrison's room. A review of the record demonstrates Morrison was a boarder in this case. The direct examination of Hudy illustrates Morrison's status as a boarder.

Q: "Mr. Hudy, prior to February 27th of 2008, did you have renters?"

A: "Yes, I had."

Q: "Commonly referred to as boarders?"

A: "Yes."

Q: "What would they do? Rent a room from you?"

A: "Rent a room."

Q: "Would they pay you?"

A: "Correct."

Q: "When these boarders would rent a room from you, was their bedroom private?"

A: "Yes, it is."

Q: "Did you have any access to that room?"

A: "No, I did not."

Q: "Was your access to that room restricted?"

A: "Yes."

* * *

Q: "Now did you have authority to let anybody into Mr. Morrison's room?"

A: "Not really, no."

Q: "No? I mean, did you have authority to let any other renters in Mr. Morrison's room."

A: "No."

Q: "Did you have authority to let any workmen or anybody else in Mr. Morrison's room?"

A: "No."

Q: "This was his private abode, am I correct?"

A: "Correct."[4]

{¶ 37} Hudy did not have the authority to give consent to the police to search Morrison's room. The police still had to obtain a search warrant prior to searching Morrison's room. Accordingly, the items seized from Morrison's room should have been suppressed by the trial court.

{¶ 38} Exigent circumstances will permit a deviation from the Fourth Amendment warrant requirement in the presence of probable cause to arrest or to search. *City of North Royalton v. James Bramante* (April 29, 1999), Cuyahoga

[4]Tr. 50 - 54.

App. No. 74019. Those circumstances that have been determined to be exigent and therefore justify a warrantless search and seizure are: the hot pursuit of a fleeing felon, imminent destruction of evidence, preventing a suspect's escape, and protecting the life of a police officer or others. See *Welsh v. Wisconsin* (1984), 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732; *Minnesota v. Olson* (1990), 495 U.S. 91, 100, 110 S.Ct. 1684, 109 L.Ed.2d 85.

{¶ 39} In this present appeal, there are no facts that would support the presence of exigent circumstances. The police were not in hot pursuit, there was no evidence presented that there was an imminent threat of the destruction of any evidence, the suspect was in custody, and there was no threat to the life of the police involved in the search of Morrison's room.

{¶ 40} Accordingly, the items seized from Morrison's room should have been suppressed by the trial court.

{¶ 41} Accordingly, Morrison's second assignment of error is sustained.

{¶ 42} Judgment of the lower court is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover of appellee 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.

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

LARRY A. JONES, JUDGE

MARY JANE BOYLE, P.J., and
JAMES J. SWEENEY, J., CONCUR