[Cite as *State v. Freeman*, 2009-Ohio-5226.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92286

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

BUDDY FREEMAN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-508707

BEFORE: Dyke, J., Kilbane, P.J., and Blackmon, J.

RELEASED: October 1, 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 courts announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

ANN DYKE, J.:

{¶ 1} Defendant-appellant, Buddy Freeman ("appellant"), appeals the trial

court's denial of his motion to suppress. For the reasons set forth below, we affirm.

{¶ 2} On April 9, 2008, the Cuyahoga County Grand Jury indicted appellant on one count of having a weapon while under a disability in violation of R.C. 2923.13(A)(3). The count also included a forfeiture specification for the weapon and ammunition. Initially, appellant pled not guilty to the charge.

{¶ 3} On May 16, 2008, appellant filed a motion to suppress. On July 17, 2008, the trial court conducted a hearing and the state presented the testimony of Gregory Drew, an officer at the time of the incident and now a detective with the Cuyahoga Metropolitan Housing Authority.

{¶ 4} Drew testified that during the evening of March 22, 2008, he observed appellant exit a Dave's Supermarket parking lot located on Community College Boulevard and pull behind the officer in his vehicle. While appellant followed Drew, appellant looked around "frantically," scooting forward in his seat, repeatedly turning his shoulders and looking all around.

{¶ 5} The two stopped at a red light. When the light changed green, Drew proceeded forward while appellant made an abrupt left turn into a gas station, squealing his tires. Drew followed into the gas station via an alternate entrance and witnessed appellant drive his vehicle past a set of gas pumps. He quickly exited the vehicle, leaving the engine still running. Noting the illegality of leaving a vehicle running while unattended, Drew stopped appellant as he walked to the gas station and asked him to return to the vehicle. Appellant complied and

Drew discussed the traffic violation.

{¶ 6} At that time, Drew recognized appellant from prior service calls and asked him whether he had any guns on his person or vehicle for the officer's safety. Drew testified that appellant responded, "No, I don't. You can go ahead and check." As a result, Drew performed a search of the interior of the vehicle. He then retrieved the keys from the ignition and opened the trunk where he observed the handle of a handgun protruding from a tennis shoe. At that same time, appellant offered that there was a gun in the trunk. Drew placed appellant under arrest and informed him of his Miranda rights.

{¶ 7} Thereafter, Drew questioned appellant regarding the firearm. Appellant maintained that the gun belonged to a friend. He then agreed to provide his written statement while he was in the back of the police vehicle. In the statement, appellant wrote, "The police ask me, do I have any weapons on me, or in me car. I tell the police to check my car. When I tell them about the gun."

{¶ 8} Appellant testified on his own behalf. Appellant denied consenting to the search of his vehicle, and rather, maintained that he asked Drew whether he had probable cause to search the vehicle. Additionally, during his testimony, appellant admitted that he provided Drew with a written and signed statement. He, however, maintained he only provided the statement when he was promised that in doing so, he would avoid jail. Also, appellant testified that Drew told him what to write. Finally, appellant stated that he was never informed of his Miranda

rights.

{¶ 9} After considering the foregoing, the trial court denied appellant's motion to suppress on July 24, 2008. As a result, on August 25, 2008, appellant pled no contest and the trial court found him guilty of having a weapon while under disability and the forfeiture specification. The court sentenced appellant to one year of community control sanctions and ordered forfeiture of the weapon.

{¶ 10} Appellant now appeals and presents two assignments of error for our review. Appellant's first assignment of error states:

{¶ 11} "The trial court erred when it denied defendant-appellant's motion to suppress the evidence."

{¶ 12} In his first assigned error, appellant maintains that the trial court erred in denying his motion to suppress because the officers did not have reasonable suspicion to perform the stop of appellant, nor did he consent to the search of his vehicle. For the reasons that follow, we find appellant's arguments without merit.

{¶ 13} 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 if competent, credible evidence exists to support those findings. See *State v. Long* (1998), 127 Ohio App.3d 328, 332, 713 N.E.2d 1. Accepting the facts found by the trial court as true, the appellate court must then independently determine as a matter of law, without deferring to the trial court's

conclusions, whether the facts meet the applicable legal standard. *State v. Kobi* (1997), 122 Ohio App.3d 160, 701 N.E.2d 420.

{¶ 14} First, we find the stop of appellant within the confines of the law. "[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." *Dayton v. Erickson* (1996), 76 Ohio St.3d 3, 1996-Ohio-431, 665 N.E.2d 1091, syllabus.

{¶ 15} In the case at bar, Detective Drew clearly had probable cause to stop appellant as Drew witnessed, and appellant admitted, that he violated R.C. 4511.661 and Cleveland Codified Ordinance 451.06. These rules provide that a person driving a motor vehicle shall not permit it to stand unattended without first stopping the engine. Thus, the stop of appellant was constitutionally valid.

{¶ 16} As to the subsequent search, we further note that a recognized exception to the Fourth Amendment's warrant requirement is a search conducted based on consent. *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854. The state must prove that the consent was freely and voluntarily given, as demonstrated by a totality of the circumstances. Id. The essential question is whether the consent was voluntary or the product of express or implied duress or coercion, as determined from the totality of the circumstances. Id. at 227.

{¶ 17} The standard for measuring the scope of consent under the Fourth Amendment is objective reasonableness, i.e., what a typical reasonable person would have understood by the exchange between the officer and the suspect. *Florida v. Jimeno* (1991), 500 U.S. 248, 251, 111 S.Ct. 1801, 114 L.Ed.2d 297. "Police officers act in full accord with the law when they ask citizens for consent." *United States v. Drayton* (2002), 536 U.S. 194, 207, 122 S.Ct. 2105, 153 L.Ed.2d 242.

{¶ 18} In this matter, the evidence demonstrated that appellant consented to the search of his vehicle. When Drew asked whether appellant had any weapons on his person or in the vehicle, appellant responded, "No, I don't. You can go ahead and check." Drew proceeded to search the interior and trunk of the vehicle based upon this unlimited consent. The search yielded a firearm and appellant was informed of his Miranda rights and arrested. Subsequently, appellant signed a written statement in which he admitted to the foregoing sequence of events and to consenting to the search.

{¶ 19} While appellant maintained at the suppression hearing that he did not consent to the search in contradiction to Drew's testimony and appellant's prior written statement, we find the trial court was in a better position to evaluate the credibility of the evidence. Appellant failed to present any other evidence besides his own self-serving statement indicating that the state's evidence was anything less than competent and credible. From the foregoing, we conclude that competent credible evidence supported the trial court's determinations that

the evidence was discovered following a stop for a valid traffic violation and consensual search. Appellant's first assignment of error is without merit.

{¶ 20} Appellant's second assignment of error provides:

{¶ 21} "The trial court erred when it denied defendant-appellant's motion to suppress statements as they were obtained contrary to law."

{¶ 22} In his second assignment of error, appellant maintains that the trial court erred in failing to suppress his written statement because appellant did not knowingly, intelligently or voluntarily waive his right to self-incrimination. We decline to address the merits of this argument, finding that appellant waived this argument prior to appeal.

{¶ 23} A motion to suppress is the proper avenue for invoking challenges to exclude evidence that is the product of police conduct that results in a constitutional violation. *State v. French* (1995), 72 Ohio St.3d 446, 650 N.E.2d 887, 1995-Ohio-32. Crim.R. 12(C)(3) mandates that a defendant file a motion to suppress evidence with the trial court prior to trial and the failure to do so "shall constitute waiver of the defenses or objections" for purposes of trial. Crim.R. 12(H); see, also, *State v. Wade* (1973), 53 Ohio St.2d 182, 373 N.E.2d 1244; *State v. Montgomery*, Licking App. No. 2007 CA 95, 2008-Ohio-6077.

{¶ 24} Here, Smith did not file a motion to suppress, nor make an argument during the suppression hearing that the written statement was not entered voluntarily, knowingly or intelligently. Accordingly, because this evidence was not the subject of a timely motion to suppress, we find appellant waived his right

to assert constitutional objections to the admission of this evidence. Appellant's second assignment of error is overruled.

Judgment affirmed.

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 common pleas court to carry this judgment into execution. 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.

ANN DYKE, JUDGE

MARY EILEEN KILBANE, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR