

[Cite as *State v. Smith*, 2009-Ohio-5692.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92320

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

DONNELL SMITH

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART; REVERSED IN PART AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-500569-A

BEFORE: Kilbane, P.J., Boyle, J., and Celebrezze, J.

RELEASED: October 29, 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).

MARY EILEEN KILBANE, P.J.:

{¶ 1} Appellant, Donnell Smith (“Smith”), appeals the trial court’s denial of his motion to suppress, failure to explain his constitutional right to compulsory process, failure to merge two counts for sentencing, and the denial of his motion to withdraw his no contest plea. After a review of the record and pertinent law, we affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

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

{¶ 3} On August 16, 2007, the Lakewood Police Department received an anonymous tip that two black males in a tan-colored SUV were using drugs in the parking lot of the Silver Coast Apartments, located at 16300 Hilliard Road, in Lakewood, Ohio. (Tr. 8-9.) Officer Joseph Eikens (“Officer Eikens”) responded to the tip at 8:45 a.m. and went to the provided address, where he discovered a tan Chevrolet Trailblazer SUV with Smith in the driver’s seat. Another black male was sitting on the outdoor steps with his young daughter, approximately ten feet from the parked SUV. (Tr. 11.) A second patrol car arrived shortly thereafter.

{¶ 4} Officer Eikens approached the driver’s side of the SUV and informed Smith of the tip he had received. Smith denied any drug usage. (Tr. 12.) Officer Eikens then asked Smith for permission to search both Smith and his SUV. Officer Eikens maintained that Smith consented to the search. Smith stepped out of the SUV to be searched, at which time Officer

Eikens discovered a loaded pistol in Smith's right rear pants pocket. Officer Eikens then placed Smith under arrest. (Tr. 13-15.)

{¶ 5} Smith arrived at the Lakewood Police Department, where corrections officer, Ron Bunner ("Bunner") searched Smith's clothing as part of the booking process. Bunner discovered a plastic bag containing cocaine residue in Smith's right front pants pocket. (Tr. 24-25.)

{¶ 6} Smith was then interviewed by Detective Patrick Foye ("Detective Foye"). Detective Foye testified that Smith admitted he gave Officer Eikens consent to search both his person and his vehicle; however, he stated that he would not have done so had he remembered he had cocaine in his pocket. Smith further stated to Detective Foye that he had found the pistol that morning in the mulch near a convenience store, which was directly across the street from the Silver Coast Apartments. (Tr. 30-33, 54.)

{¶ 7} Smith was subsequently indicted on four counts. Counts 1 and 2 charged Smith with having a weapon while under disability, in violation of R.C. 2923.13(A)(2) and R.C. 2923.13(A)(3), felonies of the third degree. Count 3 charged Smith with carrying a concealed weapon, in violation of R.C. 2923.12(A)(1), a felony of the fourth degree. Count 4 charged Smith with possession of drugs, to-wit: crack cocaine, in violation of R.C. 2925.11(A), a felony of the fifth degree. All counts contained forfeiture specifications, and Count 4 contained a firearm specification.

{¶ 8} On March 14, 2008, Smith filed a motion to suppress the loaded pistol and the cocaine found in his possession. Smith argued that the anonymous tip that led Officer Eikens to investigate Smith was unreliable and that he did not provide consent to be searched as Officer Eikens maintained.

{¶ 9} On March 31, 2008, the State filed its response to Smith's motion to suppress. The State argued that the anonymous tip justified the investigation and subsequent patdown of Smith. The State also contends that the search of Smith's vehicle was performed for officer safety and that, consequently, the seized evidence should be admissible. On April 1, 2008, Smith filed a reply brief. On May 9, 2008, the trial court held a hearing on Smith's motion to suppress, and ultimately denied the motion concluding that the seized evidence was, in fact, admissible.

{¶ 10} On May 14, 2008, Smith entered a plea of no contest to all four counts of the indictment. On September 29, 2008, Smith appeared before the trial court for sentencing. Prior to being sentenced, Smith made an oral motion to withdraw his previously entered plea. After Smith had the opportunity to address his concerns, the trial court denied his request. (Tr. 86-88.)

{¶ 11} On Counts 1 and 2, the trial court sentenced Smith to one year of incarceration. On Counts 3 and 4, Smith received six months of incarceration. These sentences were to run concurrent to one another.

Smith was further sentenced to one year of incarceration on the firearm specification, which was to be served prior to the other sentences, for an aggregate sentence of two years of incarceration.

{¶ 12} Smith appealed, asserting four assignments of error for our review.

{¶ 13} ASSIGNMENT OF ERROR NUMBER ONE

“THE TRIAL COURT ERRED IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 14 OF THE OHIO CONSTITUTION WHEN IT DENIED MR. SMITH’S MOTION TO SUPPRESS BECAUSE THERE WAS NO REASONABLE SUSPICION TO BELIEVE THAT MR. SMITH WAS ENGAGED IN ILLEGAL ACTIVITY AT THE TIME HE WAS DETAINED BY THE POLICE.”

{¶ 14} Smith argues that the trial court erred when it denied his motion to suppress evidence. He maintained that he was illegally detained on the basis of an anonymous, unreliable tip; therefore, the evidence seized by police is inadmissible. We disagree.

{¶ 15} A motion to suppress presents mixed issues of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71. However, in considering the motion to suppress, it must be noted that the trial court was in the best position to judge the credibility of the witnesses and make factual determinations. *State v. Hodges*, Cuyahoga App. No. 92014, 2009-Ohio-3378, at ¶9, citing *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972.

The decision of the trial court regarding a motion to suppress must be upheld if it is supported by competent, credible evidence. *Tallmadge v. McCoy* (1994), 96 Ohio App.3d 604, 645 N.E.2d 802, citing *State v. Self* (1990), 56 Ohio St.3d 73, 80, 564 N.E.2d 446, 453.

{¶ 16} We will first address the issue of the anonymous tip. This court has previously held that an anonymous tip rarely demonstrates the informant's knowledge or his credibility, therefore, an anonymous tip almost never justifies an investigatory stop. *State v. Whitsette*, Cuyahoga App. No. 92566, 2009-Ohio-4373, at ¶10, citing *Alabama v. White* (1990), 496 U.S. 325, 329, 110 S.Ct. 2412, 110 L.Ed.2d 301. An anonymous informant can provide sufficient information to justify an investigative stop if the informant provides information with which to judge their credibility. *Whitesette* at ¶11; *Alabama* at 331.

{¶ 17} In the instant case, the anonymous caller stated that two black males were using drugs in a tan SUV parked behind the Silver Coast Apartments. Although the apartment parking lot was small, and the description provided adequate detail to locate the individuals, the anonymous informant provided no information with which to judge his own credibility. Therefore, Smith could not have been searched based upon the anonymous tip alone. However, the search may still be upheld on the ground that Smith provided consent.

{¶ 18} A review of the testimony adduced at the suppression hearing reveals that the encounter between Smith and Officer Eikens was consensual.

The protections of the Fourth Amendment are not implicated in consensual encounters, therefore, any voluntary statements made by the defendant in such encounters are admissible against him. *State v. Taylor* (1995), 106 Ohio App.3d 741, 749, 667 N.E.2d 60, citing *United States v. Mendenhall* (1980), 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497.

{¶ 19} In *Mendenhall*, the United States Supreme Court listed factors to consider when determining whether an individual is engaged in a consensual encounter as opposed to an investigatory detention by the police. The factors included, “the threatening presence of several officers, the display of a weapon by the officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.” *Mendenhall* at 554. The court must look to the totality of the circumstances to determine whether a reasonable person would feel free to leave during the encounter. *Id.* at 555.

{¶ 20} At the evidentiary hearing, Smith’s testimony conflicted with that of Officer Eikens and Detective Foye. Smith testified that two patrol cars arrived at the scene and that one of the patrol cars parked behind him and blocked his car so that he was unable to leave. Smith stated that Officer Eikens did not have his weapon drawn, nor was he making any motion to

indicate that he was going to take his weapon out. (Tr. 55-56.) Smith further testified that Officer Eikens did not ask him for consent to search his person, but rather that he ordered Smith out of the car and searched him without consent. (Tr. 53-54.)

{¶ 21} Officer Eikens testified that he arrived on scene several minutes before the second patrol car arrived. Officer Eikens stated that he parked next to Smith and did not block his car. According to Eikens, he approached Smith's vehicle and informed Smith of the complaint. Upon Smith's denial that he was using drugs, Officer Eikens asked for and obtained consent from Smith to search his person. During the search, Officer Eikens discovered a loaded pistol in Smith's pants pocket and placed him under arrest. Bunner then testified that, upon booking Smith into jail, he discovered a bag containing cocaine residue in Smith's pants pocket.

{¶ 22} Detective Foye testified that he informed Smith of his rights and Smith signed a written waiver of his right to remain silent. Detective Foye stated that during the interview Smith was cooperative and admitted that he had given Officer Eikens consent to search him. Smith told Detective Foye that if he had remembered he was in possession of cocaine, he would not have consented to the search. (Tr. 29-31.)

{¶ 23} The individual sitting on the steps at the apartment complex when Smith was searched, Edward Hendrix, Jr. ("Hendrix"), testified on behalf of

Smith. Hendrix stated he was standing approximately fifteen feet away, playing with his daughter, when police arrived. Hendrix testified that the first police car pulled into a parking space next to Smith's vehicle, and the second police car pulled directly behind Smith's vehicle, blocking it. He stated he was unable to hear the conversation between Smith and Officer Eikens prior to Smith getting out of the vehicle; therefore, Hendrix could not confirm or contradict whether Smith had consented to the search.

{¶ 24} Application of the factors enumerated by the *Mendenhall* court to the instant case illustrates that the encounter was consensual. Although there were multiple police officers present, Smith admitted that the officers did not have their weapons drawn. Further, while Smith claimed that the officer ordered him out of the vehicle, it was not unreasonable for the factfinder to conclude that the testimony of Officer Eikens, corroborated by Detective Foye, was more credible.

{¶ 25} In a factually similar case, *State v. McDaniel* (1993), 91 Ohio App.3d 189, 631 N.E.2d 1140, three detectives were assigned to investigate drug activity inside a hallway of an apartment building. The three detectives noticed the defendant standing in the hallway and questioned him as to whether he was involved in drug activity. The defendant responded that he had no involvement or knowledge of any drug activity. One of the detectives

then asked the defendant for permission to search him. The defendant consented, and the search yielded a crack pipe.

{¶ 26} The trial court denied the defendant's motion to suppress, and this court affirmed. This court reasoned that no reasonable suspicion was required to simply ask the defendant a few questions. *Id.* at 1142. Further, this court determined that a reasonable person in the defendant's position would have felt that he was free to leave. Consequently, the decision of the trial court was affirmed. The instant case is clearly factually similar, and therefore, warrants the same result reached by this court in *McDaniel*.

{¶ 27} This assignment of error is overruled.

{¶ 28} ASSIGNMENT OF ERROR NUMBER TWO

“THE TRIAL COURT ERRED WHEN IT DID NOT ADVISE DONNELL SMITH HE WAS WAIVING CERTAIN CONSTITUTIONALLY GUARANTEED TRIAL RIGHTS BY PLEADING GUILTY IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I SECTION 10 OF THE OHIO CONSTITUTION AND OHIO CRIM. R. 11.”

{¶ 29} Smith argues that his no contest pleas must be vacated because the trial court did not properly inform him of the right to compulsory process that would allow him to subpoena witnesses on his behalf pursuant to Crim.R.

11. The State concedes this issue and agrees that the trial court's explanation of compulsory process was insufficient. After a review of the applicable law and the transcript, we agree.

{¶ 30} This court reviews a trial court's compliance with Crim.R. 11 de novo. *State v. Senich*, Cuyahoga App. No. 82581, 2003-Ohio-5082, at ¶18, citing *State v. Jones*, Cuyahoga App. No. 79811, 2002-Ohio-1271. When this court reviews a matter de novo, it does not defer to the determination of the trial court, but rather, it revisits the matter as if it were the trial court. *Brewer v. Cleveland Bd. of Edn.* (1997), 122 Ohio App.3d 378, 383, 701 N.E.2d 1023, citing *Dupler v. Mansfield Journal Co.* (1980), 64 Ohio St.2d 116, 413 N.E.2d 1187.

{¶ 31} When the trial court accepts a plea, it must ensure that the defendant has entered into the plea knowingly, intelligently, and voluntarily waived his constitutional rights. *State v. Younger* (1975), 46 Ohio App.2d 269, 271-272, 349 N.E.2d 322. The requirements of Crim.R. 11 remedy the inherent problems that previously required trial courts to make a subjective determination as to whether the defendant was knowingly and intelligently waiving his rights. *Id.* at 272, citing *State v. Stone* (1975), 43 Ohio St.2d 163, 331 N.E.2d 411.

{¶ 32} Prior to accepting a no contest plea, the trial court must determine that the defendant: (1) is voluntarily entering into the plea with an

understanding of the charges and the maximum penalties, (2) understands the effect of the plea and that the trial court may immediately proceed with sentencing, and (3) has adequately been informed of the constitutional rights he is waiving by entering into a plea. Crim.R. 11(C)(2).

{¶ 33} One of the constitutional rights a defendant must specifically be informed of, which is at issue here, is a defendant's right to compulsory process for obtaining witnesses on his behalf. In the instant case, the trial court informed Smith of the compulsory process by stating, "and do you understand that you have the right to compulsory process? That means you have the right to bring in people who could testify for yourself? Do you understand?" (Tr. 76-77.)

{¶ 34} The right of a defendant to utilize the compulsory process to obtain witnesses to testify on his behalf is a constitutional right under both the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution. *Senich* at ¶31, citing *State v. Denis* (1997), 117 Ohio App.3d 442, 690 N.E.2d 955. This court reviews the trial court's compliance regarding constitutional rights for strict compliance. *Senich*, citing *State v. Nero* (1990), 56 Ohio St.3d 106, 564 N.E.2d 474.

{¶ 35} In *State v. Wilson*, Cuyahoga App. No. 83759, 2004-Ohio-4470, this court held that "a trial court need not specifically tell a defendant that he has the right to compulsory process, it must nonetheless inform a defendant

that he has the power to force, compel, subpoena or otherwise cause a witness to appear and testify on the defendant's behalf." In this case, although the trial court did tell Smith that he had the right to bring in witnesses who could testify on his behalf, the trial court failed to explain to Smith that he could use the subpoena power of the court to compel those individuals to appear and that he did not have to secure witnesses on his own.

{¶ 36} Consequently, we find that Smith's right to compulsory process was not adequately explained, and we therefore sustain his second assignment of error. The third and fourth assignments of error are moot.

{¶ 37} Judgment affirmed in part, reversed in part, plea vacated, and case remanded for further proceedings.

It is ordered that appellee and appellant share the 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.

MARY EILEEN KILBANE, PRESIDING JUDGE

MARY J. BOYLE, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR

