[Cite as *State v. Tell*, 2010-Ohio-2217.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93280

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

LYNELL TELL

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-518847

BEFORE: Sweeney, J., Gallagher, A.J., and Dyke, J.

RELEASED: May 20, 2010

JOURNALIZED:

ATTORNEYS FOR APPELLANT

William D. Mason
Cuyahoga County Prosecutor
BY: Mary Court Weston
Assistant Prosecuting Attorney
1200 Ontario Street
Cleveland, Ohio 44113

ATTORNEY FOR APPELLEE

Michael P. Maloney
24441 Detroit Road
Suite 300
Westlake, Ohio 44145

JAMES J. SWEENEY, J.:

{¶ 1} Plaintiff-appellant, the State of Ohio, appeals the portion of the trial court's judgment that partially granted defendant-appellee, Lynell Tell's ("defendant") motion to suppress evidence. For the reasons that follow, we affirm.

{¶ 2} The State specifically appeals from the portion of the order that suppressed evidence seized from a 1988 Oldsmobile, pursuant to a consent to search form because the court found that the "consent was not a knowing and voluntary consent." The trial court denied defendant's motion to suppress in all other respects, which is not at issue in this appeal. Accordingly, we limit our focus to the facts relevant to the search of the subject automobile.

{¶ 3} Police arrested defendant after reportedly observing his participation in a controlled drug buy and transported him to the Second District police station.

{¶ 4} Det. Rivera testified that she observed defendant sign a consent to search form for his residence while he was in custody at the station. Defendant was handcuffed. Det. Rivera then went to the residence with Det. Fairchild and was met by a female at the door. Det. Rivera said defendant had informed them this female would be present. She had also inquired of defendant whether any dogs would be present for safety reasons. They explained to the female resident that defendant was under arrest and asked for her consent to search the home, which she gave in writing. Det. Rivera said that she was "there" when defendant executed a second consent to search form for a vehicle but she "didn't witness

the form." On cross-examination, Det. Rivera said the second consent form was signed at the house. She did not bring defendant to the house and said "I believe he was brought to the house, yes. I don't know by who." Again later, Det. Rivera said she "believed" defendant may have been in a vehicle parked in front of the house, "maybe a police car." Unlike the other consent to search forms, the form pertaining to the Oldsmobile does not indicate the time it was signed.

{¶ 5} Det. Rinkus testified that he was present when defendant was arrested after the controlled drug buy. He advised defendant of his *Miranda* rights and defendant was then taken to the Second District in handcuffs. Det. Rinkus prepared a consent to search form for defendant's residence, which he read aloud and then defendant signed. After arriving at defendant's residence, Det. Rinkus prepared a second consent to search form, which defendant's live-in girlfriend signed. Det. Rinkus prepared a third consent to search form for the Oldsmobile vehicle. Det. Rinkus said he read this form to defendant, who then signed it.

{¶ 6} Although Det. Rinkus stated that defendant signed the consent to search his residence at the Second District, and that his girlfriend signed another one later at the house, both forms indicate the exact same time of signing, 1500 hours. He said this was because "1500 was in my head." According to Det. Rinkus, defendant was taken to the residence for the search but not by him.

{¶ 7} Det. Rinkus confirmed that police opened a safe found inside the residence by breaking it open. On two separate occasions Det. Rinkus testified they had to force it open because defendant could not remember the combination.

{¶ 8} The defense presented two witnesses: Darla (the female resident present at the residence for the search), and defendant.

{¶ 9} Darla signed a consent to search the residence she shared with defendant and others. However, she maintained that she signed it after the police had already executed the search. According to her, defendant was not there.

{¶ 10} Defendant testified that Det. Rinkus discussed with him a consent to search his house while he was in custody at the Second District in handcuffs. Defendant said that when he signed the consent to search form nothing was filled out on it. He claimed he signed it because he felt threatened and alleged police were putting tasers to his face. Defendant said he did not accompany police to the residence for the search. He remained at the Second District. He said he signed the consent to search forms at the Second District, but had no idea about a search of a vehicle at the house. Defendant maintained that police only asked for his consent to search the residence. He believed both consent to search forms related to searching the residence. Defendant learned that his Oldsmobile was searched and impounded only after he was released from jail days later. He retrieved this vehicle from the impound lot in February 2009.

{¶ 11} The court granted the motion to suppress the evidence obtained from the Oldsmobile based on its finding that although defendant voluntarily signed the consent to search form, he did not knowingly consent to the search of the Oldsmobile. The court found the testimony concerning defendant's presence at the residence was conflicting and cited specific points in this regard, including Det. Rivera's inability to state where defendant was located at the scene and Darla and defendant's denials of his presence at the residence.

{¶ 12} The State now appeals, raising the following assignment of error for our review:

{¶ 13} "I. The trial court erred when it granted, in part, the defendant-appellee's motion to dismiss when the plaintiff-appellant proved by clear and convincing evidence that the defendant's consent to search was validly given."

{¶ 14} The facts set forth above will only be repeated here to the extent necessary for ease of discussion.

{¶ 15} Appellate courts should give great deference to the judgment of the trier of fact. *Ornelas v. United States* (1996), 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911; *State v. George* (1989), 45 Ohio St.3d 325, 544 N.E.2d 640. Accordingly, we are bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Armstrong* (1995), 103 Ohio App.3d 416, 420, 659 N.E.2d 844; *State v. Williams* (1993), 86 Ohio App.3d 37, 41, 619 N.E.2d 1141. However, the reviewing court must independently

determine as a matter of law, without deference to the trial court's conclusion, whether the trial court's decision meets the appropriate legal standard. *State v. Claytor* (1993), 85 Ohio App.3d 623, 627, 620 N.E.2d 906.

{¶ 16} In a suppression hearing, the trial court assumes the role of trier of fact and, as such, is in the best position to evaluate the credibility of witnesses and resolve questions of fact. *State v. Klein* (1991), 73 Ohio App.3d 486, 597 N.E.2d 1141.

{¶ 17} The Fourth Amendment to the United States Constitution prohibits warrantless searches and seizures, rendering them, per se, unreasonable unless an exception applies. *Katz v. United States* (1967), 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576. One exception is a consensual search. *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854.

{¶ 18} In *State v. Freeman,* Cuyahoga App. No. 92286, 2009-Ohio-5226, ¶16-17, this Court stated that when relying on the consent exception, "[t]he State must prove that the consent was freely and voluntarily given, as demonstrated by a totality of the circumstances. [*Bustamonte*, supra.] 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.

{¶ 19} "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."

{¶ 20} Here, the trial court found that while defendant voluntarily signed the consent forms, the State did not prove defendant knowingly consented to the search of the vehicle. The State maintains that it presented clear and convincing evidence otherwise. However, the applicable standard requires our acceptance of the trial court's factual finding if it is supported by competent, credible evidence, which it is. Although the officers maintained that the subject consent form was completed at the scene, their testimony was not strong concerning defendant's presence there. Specifically, Det. Rivera would only go so far as to say she "believed" he was there. Both Darla and defendant adamantly maintained he was not there. And, no one testified as to who or how defendant, who had previously been placed under arrest, was transported to the residence. Both Det. Rivera and Det. Rinkus said they did not bring him to the residence. Det. Rivera was unable to articulate where defendant was located during the search. Further, defendant stated he signed both consent forms while in custody at the Second District but they were both blank. The trial court was in the best position to weigh the evidence and determined that it did not prove defendant knowingly consented to the search of the Oldsmobile.

{¶ 21} The State's sole assignment of error is without merit and is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant his 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 Court of Common Pleas 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.

JAMES J. SWEENEY, JUDGE

SEAN C. GALLAGHER, A.J., and
ANN DYKE, J., CONCUR