[Cite as *State v. Newsome*, 2010-Ohio-2891.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93328

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

KENNETH NEWSOME

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-517745

BEFORE: Dyke, J., Rocco, P.J., and McMonagle, J.

RELEASED: June 24, 2010

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), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

ANN DYKE, J.:

{¶ 1} Defendant Kenneth Newsome appeals from his convictions for drug possession, drug trafficking, and possession of criminal tools. For the reasons set forth below, we affirm.

{¶ 2} On December 2, 2008, defendant, and co-defendants Victoria Dickerson and Curtiss Beard, were indicted pursuant to a three-count indictment. In Count 1, the defendants were charged with possession of more than one, but less than five grams of crack cocaine, in violation of R.C. 2925.11. In Count 2, the defendants were charged with trafficking in more than one, but less than five grams of crack cocaine, in violation of R.C. 2925.03(A)(2). In Count 3, the defendants were charged with possession of criminal tools, to-wit: an automobile. All three charges also contained a forfeiture specification under which the state alleged that the defendants used a 2001 Ford automobile to transport drugs.

{¶ 3} Defendant moved to suppress the evidence against him, asserting that the police lacked a lawful basis for stopping and searching his vehicle. The trial court held an evidentiary hearing on the motion on March 12, 2009. The evidence demonstrated that Cleveland Police Officer Dan Lentz and his partner were traveling southbound on East 54th Street toward Fleet Avenue. They observed defendant's vehicle make two left turns without signaling. They further observed that the license plate of the vehicle was not illuminated. The car circled around the block, and a man put his hand up as if to signal defendant's car, but walked away when he saw the

officers.

{¶ 4} The officers stopped the car. At this time, they observed furtive movements inside the car. The officers approached the car and the man who had previously attempted to flag down the officers came up to defendant's car and claimed that he had been robbed. The man, later identified as Curtiss Beard, became agitated and claimed that he was a victim and needed the officer's help. The officers explained that they were in the middle of a stop. Beard became very agitated and the officers placed Beard into their zone car.

{¶ 5} Passenger Victoria Dickerson made a motion with her eyes as if to signal the officers. The officers then removed her from the car. At this time, Officer Lentz leaned inside and did a "safety search." He observed a plastic bag containing individual smaller bags of rocks in the cup holder of the rear portion of the center console of the car. The police cited defendant for the unsignaled turn and improper license plate illumination, seized the suspected bags of narcotics, and placed defendant under arrest for the drugs.

{¶ 6} The trial court denied the motion to suppress, and the matter proceeded to a jury trial. Co-defendant Victoria Dickerson entered into a plea agreement with the state, whereby she would plead guilty to the possession charge and the other charges would be dismissed in exchange for her testimony against defendant. She testified that defendant called her

and asked if he could pick her up. She went out to the street, and when defendant's vehicle approached, co-defendant Beard was in the front passenger seat. They then went to defendant's home and Beard used defendant's vehicle. Defendant subsequently called Beard to return the vehicle. Beard brought the vehicle back and defendant and Dickerson then left defendant's home.

{¶ 7} According to Dickerson, defendant received a telephone call from someone who asked for a ride to Newburgh Heights to make a drug sale. They then drove this person to East 52nd Street where he made a drug sale from the vehicle. They then drove this individual to an apartment building, and the man went inside, then returned to the vehicle.

{¶ 8} Defendant and Dickerson later returned to defendant's home. At this time, Beard came out and got into the rear seat of the vehicle. Beard asked for a ride to East 54th Street and Fleet Avenue. Defendant agreed to return a short time later after Beard completed a drug sale. After Beard exited the car, defendant informed Dickerson that the police were behind them. They subsequently stopped the car. Beard approached and told the officers that he had just been robbed. The officers put the men into the police cruiser. They then spoke to Dickerson and asked her about drugs that were in the car. Dickerson was also arrested. She became upset and explained that she only wanted a ride home and did not want to get involved with the drugs.

{¶ 9} Officer Lentz outlined the circumstances of the stop and search for the jury. He testified that, when Beard approached, he recognized Beard as the man who had attempted to flag down defendant's car, and did not believe that Beard had just been robbed.

{¶ 10} The state also established that the plastic bag contained thirteen smaller bags of rocks which tested positive for cocaine, and had a total weight of 2.48 grams.

{¶ 11} Defendant elected to present testimony. He offered the testimony of Curtiss Beard and also testified on his own behalf. Beard testified that the drugs found in the car were his, and that he had left them inside the cup holder while the defendant was giving him a ride. He further testified that he pled guilty to the possession and trafficking charges against him. Beard denied telling the police that he had been robbed and stated that the police approached him immediately after stopping defendant's car.

{¶ 12} Defendant testified that he is 53 years old, and served in the military. On the night he was arrested, Dickerson and Beard had been at his home and he agreed to drive Beard home. Dickerson got into the front passenger seat and Beard sat in the back. Beard got out at East 54th Street and the police stopped him a few moments later. He and Beard were subsequently placed in the zone car and Beard told defendant that he left his stuff inside the car. Defendant testified that the drugs were not his, that he had no knowledge that they were in his car, and that he had not been

involved in any drug sales.

{¶ 13} Defendant was subsequently convicted of all charges and specifications and was sentenced to a total of one year imprisonment. He now appeals and assigns one error for our review.

{¶ 14} In his assignment of error, defendant contends that the trial court erred in denying his motion to suppress because he was secured and away from the vehicle at the time police searched his vehicle and found drugs.

{¶ 15} With regard to procedure, we note that 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. If competent, credible evidence exists to support the trial court's findings, an appellate court must accept the trial court's factual 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 ascertain as a matter of law, without deferring to the trial court's conclusions, whether the facts comport with the applicable legal standard. *State v. Kobi* (1997), 122 Ohio App.3d 160, 168, 701 N.E.2d 420. Moreover, "[i]n a hearing on a motion to suppress evidence, the trial court assumes the role of trier of facts and is in the best position to resolve questions of fact and evaluate the credibility of witnesses." *State v. Venham* (1994), 96 Ohio App.3d 649, 653, 645 N.E.2d 831.

{¶ 16} The Fourth Amendment guarantees "[t]he right of the people to

be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." A temporary detention of a person during a traffic stop is a "seizure" under the Fourth Amendment, *Delaware v. Prouse* (1979), 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660, so a traffic stop must be reasonable under the Fourth Amendment. Id. at 659.

{¶ 17} A traffic stop is generally reasonable under the Fourth Amendment where the police have probable cause to believe that the detainee has committed a traffic violation. *Dayton v. Erickson* (1996), 76 Ohio St.3d 3, 665 N.E.2d 1091.

{¶ 18} As to searches, reasonableness of a warrantless search, the basic rule is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions." *Katz v. United States* (1967), 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576. "Among the exceptions to the warrant requirement is a search incident to a lawful arrest [which] derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations." *Arizona v. Gant* (2009), 556 U.S. ___ , 129 S.Ct. 1710, 173 L.Ed.2d 485, quoting *Katz v. United States* (1967), 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576.

{¶ 19} With regard to warrantless searches of automobiles, the Supreme Court of the United States has determined that a warrantless

search of an automobile is permissible where the search is based upon probable cause that the vehicle contains contraband. *Maryland v. Dyson* (1999), 527 U.S. 465, 466-467, 119 S.Ct. 2013, 144 L.Ed.2d 442; *State v. Moore,* 90 Ohio St.3d 47, 49, 2000-Ohio-10, 734 N.E.2d 804. Probable cause is a particularized and objective basis for suspecting the person stopped of criminal activity, that is established where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found. *Ornelas v. United States* (1996), 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911.

{¶ 20} A warrantless search of an automobile may also, in some instances, be undertaken incident to an arrest, as set forth in *Arizona v. Gant,* supra. In *Gant,* the Court held that an officer may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search, or it is reasonable to believe the vehicle contains evidence of the offense of arrest, but if these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

{¶ 21} The *Gant* Court explained:

{¶ 22} "[*New York v.*] *Belton* [(1981), 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768,] does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the

interior of the vehicle. Consistent with the holding in *Thornton v. United States,* 541 U.S. 615, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004), and following the suggestion in Justice Scalia's opinion concurring in the judgment in that case, id., at 632, 124 S.Ct. 2127, 158 L.Ed.2d 905, we also conclude that circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle."

{¶ 23} Another exception to the warrant requirement includes evidence found in plain view. "[T]o justify the warrantless seizure of an item under the plain view doctrine: (1) the seizing officer must be lawfully present at the place from which he can plainly view the evidence; (2) the officer has a lawful right of access to the object itself; and (3) it is immediately apparent that the item seized is incriminating on its face." *Horton v. California* (1990), 496 U.S. 128, 136-37, 110 S.Ct. 2301, 110 L.Ed .2d 112; *State v. Waddy* (1992), 63 Ohio St.3d 424, 442, 588 N.E.2d 819; *State v. Davis,* Cuyahoga App. No. 87964, 2007-Ohio-408.

{¶ 24} In this case, defendant's vehicle was stopped because the officer observed defendant's vehicle turn twice without signaling, and the license plate of the vehicle was not properly illuminated. Cleveland Codified Ordinance 431.14 requires that motorists signal turns and the failure to do so has been deemed to constitute probable cause to stop the vehicle. Cf. *State v. Kirby* (Nov. 22, 2004), Clermont App. No. CA2003-10-089 (applying

R.C.4511.39); *State v. Beacham,* Washington App. No. 03CA36, 2003-Ohio-6211; *State v. Sneed,* Lawrence App. No. 06CA18, 2007-Ohio-853 (applying R.C.4511.39); *Rocky River v. Burke,* Cuyahoga App. No. 78578, 2002-Ohio-1651 (applying R.C.4511.39). The officers also observed that the rear license plate was not properly illuminated. This has also been deemed to constitute probable cause to stop a vehicle. *State v. Maddux,* Woods App. No. WD–08-065, 2010-Ohio-941; *State v. Dierkes,* Portage App. No. 2008-P-0085, 2009-Ohio-2530.

{¶ 25} Immediately after the stop, co-defendant, Curtiss Beard, the man who had been at defendant's vehicle earlier, suddenly approached. Beard stated that he had been robbed and asked the officers to leave defendant's vehicle so that they could assist him. At this point, the officers recalled that this was the man seen at defendant's vehicle earlier. Co-defendant Curtiss Beard was placed into the zone car and was not within reaching distance of the passenger compartment but the known facts and circumstances were sufficient to warrant a man of reasonable prudence in the belief that the man was attempting to divert the officers' attention and that individuals in the car were engaged in criminal activity. The officers therefore had probable cause that the vehicle contained contraband, and search of the vehicle was proper. Just after defendant and co-defendant Victoria Dickerson were removed from the car, the officers could reasonably believe that the vehicle contained evidence of the offense of arrest. Moreover, the officers, from their lawful

vantage point, plainly viewed the bag of drugs, the incriminating nature of which was immediately apparent.

{¶ 26} In accordance with all of the foregoing, we concur with the trial court's determination that the search and seizure undertaken in this matter did not violate the Fourth Amendment. The assignment of error is without merit.

{¶ 27} 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.

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

ANN DYKE, JUDGE

KENNETH A. ROCCO, P.J., CONCURS. (SEE ATTACHED CONCURRING OPINION)

CHRISTINE T. MCMONAGLE, J., DISSENTS. (SEE ATTACHED DISSENTING OPINION)

KENNETH A. ROCCO, P.J., CONCURRING:

{¶ 28} I agree that the judgment should be affirmed, but on a different basis than the writing judge.

{¶ 29} "The United States and Ohio Supreme Courts have recognized a limited exception to the warrant requirement when, while conducting a lawful stop of a vehicle, an officer has a reasonable suspicion of danger, supported by articulable facts. When such a suspicion exists, the officer may conduct a weapons search of the vehicle, limited in scope by this protective purpose. The search must be confined to the area in which the suspect's suspicious conduct was directed." *State v. Huth*, 163 Ohio App.3d 102, 2005-Ohio-4303, 836 N.E.2d 623, ¶13 (citations omitted).

{¶ 30} When the officers pulled over the appellant's vehicle at approximately 2:20 a.m. for a traffic violation, they saw him turn around in his seat and reach for something. His movements caused the vehicle to rock. In my opinion, this behavior gave the officers a reasonable suspicion of danger, such that they could properly remove the appellant and his passenger from the vehicle, pat them down for weapons, and conduct a limited search of the vehicle to protect their safety. The officer's visual search of the area "within arm's reach of where the [appellant] was sitting" was properly confined. For this reason, I agree that the trial court properly denied appellant's motion to suppress.

CHRISTINE T. McMONAGLE, J., DISSENTING:

{¶ 31} Respectfully, I dissent. I agree with the majority's conclusion that the police had a right to stop the defendant's vehicle for failure to signal a left turn and for failure to have a properly illuminated license plate. But I disagree with the majority's conclusion that the approach by a pedestrian[1] during that traffic stop complaining of having been robbed, and the conclusion drawn by the police that this was a diversion meant to channel their attention away from the stopped vehicle, constituted probable cause to believe "that the individuals in the car were engaged in criminal activity."

{¶ 32} Neither do I concur with the majority that since there was probable cause to believe the individuals in the car were engaged in criminal activity, "[t]he officers had probable cause [sic] that the vehicle contained contraband." I see no logical nexus between a pedestrian trying to divert an officer's attention from a traffic stop and the conclusion that the individuals involved in the traffic stop were involved in criminal activity. Nor do I see any logical nexus that would permit a conclusion that since there was probable cause to believe there was criminal activity afoot, there was probable cause to believe the automobile contained contraband.

{¶ 33} Finally, I disagree with the majority's conclusion summarily

[1]Allegedly seen earlier in the day as a passenger in the automobile in question.

finding that the drugs in question were in plain view. Officer Lentz testified that after removing the female passenger from the car, he leaned inside and did a "safety search" (see the majority opinion at page 2); it was only then that the officer observed a plastic bag containing small individual bags of crack cocaine in the cup holder of the rear portion of the center console of the car. This was not plain view; it was a search.

{¶ 34} Accordingly, I would find that the failure to grant appellant's motion to suppress was error, and I would reverse and remand the matter to the trial court.