[Cite as *State v. Dickerson*, 2010-Ohio-5787.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94567

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

JOHNNY DICKERSON

DEFENDANT-APPELLEE

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-524471 and CR-529668

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

RELEASED AND JOURNALIZED: November 24, 2010

ATTORNEYS FOR APPELLANT

William D. Mason
Cuyahoga County Prosecutor
BY: T. Allan Regas
Assistant County Prosecutor
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

ATTORNEY FOR APPELLEE

Paul Mancino, Jr.
75 Public Square
Suite 1016
Cleveland, Ohio 44113-2098

MARY J. BOYLE, J.:

{¶ 1} Plaintiff-appellant, state of Ohio, appeals from a judgment granting the suppression motion of defendant-appellee, Johnny Dickerson. The state raises one issue for our review:

{¶ 2} "The trial court erred in granting the motion to suppress where the evidence in this case indicates that the search of appellee's automobile was based upon probable cause."

{¶ 3} Finding merit to the appeal, we reverse and remand.

Procedural History and Factual Background

{¶ 4} The grand jury indicted Dickerson on four counts: trafficking, in violation of R.C. 2925.03(A)(2); improperly handling of firearms in a motor vehicle, in violation of R.C. 2923.16(B); having weapons while under a disability, in violation of R.C. 2923.13(A)(3); and possessing criminal tools. The trafficking charge also carried firearm and schoolyard specifications, and all counts carried several forfeiture specifications. Dickerson moved to suppress all evidence. The following facts were adduced at the hearing on his motion.

{¶ 5} Officer Lawrence Smith testified that he and his partner were on routine patrol when they passed a convenience store located on the corner of West 38th Street and Denison Avenue. They were very familiar with this area because they had received many complaints from city council members and area residents regarding people loitering in the parking lot, selling drugs, and harassing customers.

{¶ 6} On this particular day, they drove by the store and saw a car parked in the parking lot. They observed two men come out of the store and approach the car. When the officers saw this, they turned around in a laundromat parking lot. The two men left and began walking down the street. The car left the store parking lot, and the officers followed it. Officer Smith said they initially began to follow the car to identify the driver.

But as they followed the vehicle, they observed it make a turn "without indicating with [a] turn signal." They ran the license plate, stopped the car, and approached the driver, later identified to be Dickerson. Upon approaching the car, Officer Smith testified that he immediately smelled raw marijuana in the car.

{¶ 7} Officer Smith ordered Dickerson out of the car and patted him down for officer safety. Dickerson began "fidgeting around," so Officer Smith handcuffed him and placed him in the back of the police car. Officer Smith then searched Dickerson's vehicle. He looked under the seats first and then in the glove box, where he found an open bag containing seven vials of marijuana "in a gum ball capped container with a loaded gun loaded on top of that."

{¶ 8} Officer Smith arrested Dickerson. Dickerson then told Officer Smith that he had more vials of marijuana on him. Officer Smith searched him and found three more vials of marijuana in gumdrop containers.

{¶ 9} On cross-examination, Officer Smith agreed that he did not know who the two males were who approached Dickerson's car in the parking lot of the convenience store, nor did he know who was in the vehicle at that time. He reiterated that he only followed the car initially because of complaints in the area and to identify the driver. Defense counsel asked him if he ran the

license plate. Officer Smith replied, "Once we reached Archwood, I was able to get the plate and I waited until the plate came back. That's why we had to wait until 34th and Archwood to pull him over." He denied that the glove box was locked before he searched it.

{¶ 10} Dickerson testified that the car he was driving was not his. He explained that he was sitting in the convenience store parking lot waiting for the man who came up to the car to give him the keys to the vehicle so he could borrow it to pick up his children. He left the parking lot and drove down Archwood. He saw the dark police car behind him. He then said, "I hit my right blinker to go down Archwood because I was going to hop on the freeway." After he turned, the police pulled him over.

{¶ 11} Dickerson said that Officer Smith asked for his license, went back to the police car, came back, and ordered him out of the car. Dickerson stated that the officers took the keys out of the ignition of the car he was driving to open the glove box. And according to Dickerson, the officers did not find anything in the glove box. Dickerson said that he then saw Officer Smith come back to the police car and open the trunk of the police car.

{¶ 12} On cross-examination, Dickerson agreed that he had several prior drug trafficking and possession convictions, but this time the police set him up and planted the drugs and the gun.

{¶ 13} A couple weeks later, with all parties present, the trial court orally denied the motion to suppress. Before the trial court issued its judgment entry, Dickerson filed a motion for findings pursuant to Crim.R. 12(F). Two months later, the trial court issued a judgment entry, with findings, granting Dickerson's motion to suppress. It is from this judgment that the state appeals.

Standard of Review

{¶ 14} A motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶8. "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.) Id.

Exceptions to the Warrant Requirement

{¶ 15} Dickerson states in his brief to this court, "[o]verlooked by the [state] in its statement of facts was that defendant testified in these

proceedings." He argues that his testimony created a "credibility issue which [can]not be overturned on appeal." But our review of the trial court's judgment entry shows that the trial court found Officer Smith's testimony to be true, but still granted Dickerson's motion based upon the fact that the search was not conducted "incident to arrest" or after "an inventory search."

{¶ 16} Because we find the trial court did not properly apply the law to the facts, we reverse and remand.

{¶ 17} Initially, we note that an investigative stop of a vehicle is permissible if a police officer has a reasonable and articulable suspicion that the person 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. In this case, the stop of the vehicle was permissible due to the fact that Dickerson did not properly use a turn signal. See *State v. McComb*, 2d Dist. No. 21963, 2008-Ohio-425; *State v. Steen*, 9th Dist. No. 21871, 2004-Ohio-2369. The question presented in this case is whether the search of the vehicle following the stop was properly conducted.

{¶ 18} The Fourth Amendment to the United States Constitution provides protection against unreasonable searches and seizures. Searches conducted without a warrant are per se unreasonable, subject to a few "jealously and carefully drawn" exceptions. *State v. Smith*, 124 Ohio St.3d

163, 2009-Ohio-6426, 920 N.E.2d 949, ¶10, citing *Jones v. United States* (1958), 357 U.S. 493, 499, 78 S.Ct. 1253, 2 L.Ed.2d 1514, and *Coolidge v. New Hampshire* (1971), 403 U.S. 443, 454-455, 91 S.Ct. 2022, 29 L.Ed.2d 564.

{¶ 19} One of the exceptions to the warrant requirement is a search incident to a lawful arrest, "which allows officers to conduct a search that includes an arrestee's person and the area within the arrestee's immediate control." *Smith* at ¶11, citing *Chimel v. California* (1969), 395 U.S. 752, 762-763, 89 S.Ct. 2034, 23 L.Ed.2d 685. "The exception 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, 1716, 173 L.Ed.2d 485. But in *Arizona v. Gant*, the United States Supreme Court held that an officer may search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search or when it is reasonable to believe that the vehicle contains evidence relevant to the offense of arrest. Id.

{¶ 20} In this case, the trial court was correct that a search of the vehicle incident to arrest was impermissible because Dickerson had not yet been arrested. And the trial court properly concluded that an

inventory-search exception did not apply, since one was not conducted. Nonetheless, alternative grounds existed upon which a warrantless search could be conducted.

{¶ 21} A warrantless search of a vehicle may be justified when an officer has probable cause to believe that the vehicle contains contraband based upon the well-established automobile exception to the warrant requirement. *State v. Moore* (2000), 90 Ohio St.3d 47, 52, 734 N.E.2d 804. "[T]he search of an auto on probable cause proceeds on a theory wholly different from that justifying the search incident to an arrest." *Chambers v. Maroney* (1970), 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419, citing *Carroll v. United States* (1925), 267 U.S. 132, 158-159, 45 S.Ct. 280, 69 L.Ed. 543.

{¶ 22} In *Moore*, the Ohio Supreme Court held that based upon the automobile exception, the detection of the odor of marijuana, alone, by an experienced law enforcement officer, is sufficient to establish probable cause to conduct a reasonable search. And this court recently held, in an en banc decision, that *Arizona v. Gant* did not abrogate the holding in *Moore*. See *State v. Burke*, 8th Dist. No. 93258, 2010-Ohio-3597.

{¶ 23} In this case, Officer Smith testified that he smelled raw marijuana immediately upon reaching Dickerson's car. This alone provided him with probable cause to search the passenger compartment of the vehicle

without a warrant. Accordingly, we find that a lawful search of the vehicle was conducted in this case.

{¶ 24} The state's sole assignment of error is sustained.

Judgment reversed and case 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.

MARY J. BOYLE, JUDGE

MARY EILEEN KILBANE, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR