[Cite as *State v. Stewart*, 2010-Ohio-6184.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94803

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

KENNETH STEWART

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-529898

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

RELEASED AND JOURNALIZED: December 16, 2010

ATTORNEYS FOR APPELLANT

William D. Mason
Cuyahoga County Prosecutor

BY: Stephanie Heibertshausen
Assistant County Prosecutor
9th Floor, Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

ATTORNEY FOR APPELLEE

Jason Davidoff
55 Erieview Plaza
Suite 324
Cleveland, Ohio 44114

COLLEEN CONWAY COONEY, J.:

{¶ 1} Plaintiff-appellant, the state of Ohio ("the State"), appeals the trial court's judgment granting the motion to suppress filed by defendant-appellee, Kenneth Stewart ("Stewart"). We find no merit to the appeal and affirm.

{¶ 2} In October 2009, Stewart was charged with having a weapon under disability, in violation of R.C. 2923.13. Stewart filed a motion to suppress

evidence. The trial court held a hearing on the motion at which the following evidence was presented:

{¶ 3} On October 7, 2009, Officer Dennis Funari ("Funari") of the Westlake Police Department testified that he stopped Stewart, who was driving a black Lincoln Town Car because the license plates on the car were registered to a different vehicle. Officer Funari wanted to determine whether the Lincoln Town Car was not registered or whether there was an error at the BMV. During his conversation with the occupants of the vehicle, Officer Funari detected the smell of burnt marijuana emanating from inside the car and he observed a marijuana "blunt" in the ashtray of the vehicle. Stewart admitted the license plates belonged to his truck and that he had substituted the plates because the plates to the Lincoln were expired.

{¶ 4} Officer Funari decided to impound the vehicle because it was not properly registered to be driven on the road. He admitted that while some officers have discretion as to whether to impound a vehicle for improper registration, he impounds all vehicles with improper registration pursuant to the Westlake Police Department's impound policy. He also admitted that he intended to search the vehicle for contraband because, after finding a burnt marijuana cigarette in plain view, he suspected there were more drugs inside the car. The State argued that the search was permissible because the vehicle was

going to be impounded and, therefore, would have been subject to an inventory search.

{¶ 5} Officers Funari and Steven Krebs did not find any contraband in the passenger compartment of the vehicle. Officer Krebs began searching the trunk and found a large speaker box and speakers, which were screwed into the speaker box. Officer Krebs unscrewed the speakers to look inside the speaker box. He and another officer removed the large speaker box and discovered a gun. The police conducted a criminal background check and learned that Stewart had a 1991 conviction for possession of a crack pipe. Accordingly, they arrested Stewart for possessing a weapon under disability due to his prior drug conviction.

{¶ 6} At the conclusion of the evidence, the trial court granted Stewart's motion to suppress, holding that the inevitable discovery doctrine was inapplicable and that the police lacked the requisite probable cause to search the trunk without a warrant. The State now appeals, raising one assignment of error.

{¶ 7} In its sole assignment of error, the State argues the trial court erroneously granted Stewart's motion to suppress. The State maintains the gun was discovered pursuant to a valid inventory search because Stewart's vehicle was being impounded. We disagree.

{¶ 8} "Appellate review of a motion to suppress presents a mixed question of law and fact. 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.

{¶ 9} "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."

{¶ 10} *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71. (Internal citations omitted.)

{¶ 11} An inventory search is a well-defined exception to the warrant requirement of the Fourth Amendment. *State v. Mesa*, 87 Ohio St.3d 105, 108, 1999-Ohio-253, 717 N.E.2d 329. Police may conduct an inventory search of a vehicle that is being impounded. *State v. Peagler*, 76 Ohio St.3d 496, 501, 1996-Ohio-73, 668 N.E.2d 489, citing *Colorado v. Bertine* (1987), 479 U.S. 367, 372-373, 107 S.Ct. 738, 93 L.Ed.2d 739. The scope of an inventory search of an automobile may extend to the trunk and glove compartment. *State v. Fryer*, Cuyahoga App. No. 91499, 2008-Ohio-6290, ¶21.

{¶ 12} Inventory searches are excluded from the warrant requirement because they are an administrative, rather than investigatory, function of the police that protect an owner's property while it is in the custody of the police, insure against claims of lost, stolen, or vandalized property, and guard the police from danger. *Mesa* at 109.

{¶ 13} An inventory search is reasonable when it is performed in good faith pursuant to standard police policy, and "when the evidence does not demonstrate that the procedure involved is merely a pretext for an evidentiary search of the impounded vehicle." *State v. Robinson* (1979), 58 Ohio St.2d 478, 480, 391 N.E.2d 317. "Inventory searches 'must not be a ruse for a general rummaging in order to discover incriminating evidence.'" *State v. Burton* (Apr. 14, 1994), Cuyahoga App. No. 64710, quoting *Florida v. Wells* (1990), 495 U.S. 1, 4, 110 S.Ct. 1632, 109 L.Ed.2d 1. "A search which is conducted with an investigatory intent, and which is not conducted in the manner of an inventory search, does not constitute an 'inventory search.'" *State v. Caponi* (1984), 12 Ohio St.3d 302, 303, 466 N.E.2d 551.

{¶ 14} In the instant case, both Officers Funari and Krebs admitted that they searched Stewart's car because they suspected they would find additional contraband. Specifically, Officer Funari stated:

{¶ 15} "Q: Why were you planning on searching the vehicle?

{¶ 16} "A: For the marijuana that I saw and the odor.

{¶ 17} "* * *

{¶ 18} "Q: Any why were you planning on searching because of the odor and the marijuana?

{¶ 19} "A: To see if there was any more marijuana within the vehicle or any other criminal items."

{¶ 20} Officer Krebs similarly testified:

{¶ 21} "Q: Okay. You recall removing seats from the automobile?

{¶ 22} "A: At one point in time, yes.

{¶ 23} "Q: You were searching for contraband, correct, drugs?

{¶ 24} "A: Correct."

{¶ 25} Because the officers searched Stewart's vehicle with the investigatory intent of searching for drugs, they did not conduct the search in good faith.

{¶ 26} Furthermore, even if the search was performed in good faith, they failed to follow standardized police procedure and policy. Officer Funari testified that Westlake Police Department policies and procedures permit police to search "locked compartments," which include the trunks of vehicles. However, Funari admitted that there are no police procedures that allow fixtures to be removed during an inventory search. Specifically, Officer Funari testified:

{¶ 27} "Q: There is nothing in the procedure that indicates that speakers should be unscrewed and looked through or behind or anything like that, correct?

{¶ 28} "A: Not on an inventory, no."

{¶ 29} In a closely analogous case, this court affirmed the trial court's granting a motion to suppress the evidence found when police pulled back the carpet to search a vehicle's wheel well. *State v. Wells,* Cuyahoga App. No. 93433, 2010-Ohio-4000. An inventory search does not allow pulling back carpet

to search the wheel well when the police department policy does not include searching the wheel well. Id. at ¶11.

{¶ 30} In *State v. Hathman* (1992), 65 Ohio St.3d 403, 407, 604 N.E.2d 743, the Ohio Supreme Court explained that "[i]f, during a valid inventory search of a lawfully impounded vehicle, a law-enforcement official discovers a closed container, the container may only be opened as part of the inventory process if there is in existence a standardized policy or practice specifically governing the opening of such containers." Although the Westlake Police Department had a standardized policy allowing the search of a trunk, there was no evidence that the procedures allowed the removal of fixtures during an inventory search. Indeed the testimony suggested otherwise. Absent evidence of a relevant inventory procedure as mandated by *Hathman*, the removal of the speakers and speaker box from the trunk was not a valid part of the inventory search.

{¶ 31} Accordingly, the sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of 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.

COLLEEN CONWAY COONEY, JUDGE

MARY EILEEN KILBANE, P.J., and
JAMES J. SWEENEY, J., CONCUR