

[Cite as *State v. Mitchell*, 2011-Ohio-477.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94917

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ROBERT MITCHELL

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-526685

BEFORE: Celebrezze, P.J., Jones, J., and Cooney, J.

RELEASED AND JOURNALIZED: February 3, 2011

ATTORNEY FOR APPELLANT

David L. Doughten
The Brownhoist Building
4403 St. Clair Avenue
Cleveland, Ohio 44103

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
BY: Louis J. Brodnik
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

FRANK D. CELEBREZZE, JR., P.J.:

{¶ 1} Defendant-appellant, Robert Mitchell, appeals his convictions for drug possession and drug trafficking. Based on our review of the record and apposite case law, we affirm.

{¶ 2} On April 8, 2009, at approximately 10:00 p.m., Officers Ken Kirk and Christopher Allen with the Cleveland Police Department noticed loud music emanating from a vehicle parked in a nearby parking lot.¹ The officers parked their zone car behind the vehicle, and Officer Kirk approached

¹ The vehicle was registered as a rental vehicle. Appellant's mother testified that she rented the car for appellant, but that she never drove it and had not had access to it since the day it was rented.

the driver's window. After the driver, who was later identified as appellant, rolled down the window, Officer Kirk immediately recognized the smell of marijuana. After appellant admitted that he and the passenger had been smoking marijuana, Officer Kirk asked appellant to step out of the vehicle. Officer Allen conducted a pat-down search of appellant for officer safety while Officer Kirk monitored the passenger's actions. This pat-down revealed nothing; appellant was handcuffed and placed in the back of the zone car.

{¶ 3} During the pat-down of appellant, Officer Kirk noticed the passenger reaching for a pocket that was on the sleeve of his jacket. Officer Kirk then noticed a package containing a white substance sticking out of the pocket; Officer Kirk suspected the substance to be cocaine. The two officers asked the passenger to step out of the vehicle and placed him in handcuffs. Once the handcuffs were secure, the passenger began attempting to reach for the pocket on the sleeve of his jacket. The officers attempted to stop him, and a small struggle began. During this struggle, a bag containing crack cocaine fell to the ground. The officers then recovered an additional bag of crack cocaine and one bag of powder cocaine from the passenger's pocket.

{¶ 4} Once the officers secured the passenger and placed him in the back of the zone car, they conducted a search of the vehicle. During this search, Officer Allen removed the cup holders from the center console.²

²These cup holders were able to be easily popped out of place.

Upon doing so, Officer Allen found bags containing drugs. At trial, it was proven that these drugs amounted to 110.92 grams of crack cocaine and 23.20 grams of powder cocaine. Officer Allen also found a burnt marijuana cigarette in the driver's floorboard area.

{¶ 5} Appellant was charged in a five-count indictment with two counts of drug possession, two counts of drug trafficking, and one count of possession of criminal tools. Counts 1 and 2, drug possession and drug trafficking respectively, carried major drug offender specifications. All counts carried forfeiture specifications. At the close of the state's case-in-chief, the court granted appellant's Crim.R. 29 motion with regard to the possessing criminal tools count and the forfeiture specifications. The jury found appellant guilty of the remaining charges, and he was sentenced to an aggregate sentence of ten years in prison. This appeal followed.

Law and Analysis

Motion to Suppress

{¶ 6} In his first assignment of error, appellant argues that “[t]he trial court erred in overruling [his] motion to suppress where the stop of the car was not based upon an articulable suspicion that the occupants of the vehicle were engaged in criminal activity.” In *State v. Lloyd* (1998), 126 Ohio App.3d 95, 100-101, 709 N.E.2d 913, the court stated: “our standard of review with respect to motions to suppress is whether the trial court's findings are

supported by competent, credible evidence. *State v. Winand* (1996), 116 Ohio App.3d 286, 288, 688 N.E.2d 9, 11, citing *Tallmadge v. McCoy* (1994), 96 Ohio App.3d 604, 608, 645 N.E.2d 802, 804-805. Naturally, this is the appropriate standard because “[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. Hopfer* (1996), 112 Ohio App.3d 521, 548, 679 N.E.2d 321, 339, quoting *State v. Venham* (1994), 96 Ohio App.3d 649, 653, 645 N.E.2d 831, 833. However, once we accept those facts as true, we must independently determine, as a matter of law and without deference to the trial court’s conclusion, whether the trial court met the applicable legal standard.”

{¶ 7} Officer Kirk was the only officer to testify at the suppression hearing. His version of events, however, did not differ in any significant fashion from his trial testimony or from the trial testimony of Officer Allen. Appellant now argues that the officers lacked a reasonable suspicion that appellant and the passenger were engaged in criminal activity and, therefore, they had no authority to stop the vehicle. This argument lacks merit.

{¶ 8} Officer Kirk unequivocally testified that he and his partner decided to approach appellant’s vehicle because they heard loud music coming from the vehicle and such loud music was a violation of the city’s ordinances. Officers are permitted to stop a vehicle for a traffic violation. *State v. Lanier*,

Cuyahoga App. No. 93983, 2010-Ohio-5765, ¶13. Appellant seems to argue that the stop in this case was invalid because the officers were using the alleged loud music violation as a pretext to investigate what they suspected to be criminal activity. In *Dayton v. Erickson*, 76 Ohio St.3d 3, 11-12, 1996-Ohio-431, 665 N.E.2d 1091, however, the Ohio Supreme Court held that “where an officer has an articulable reasonable suspicion or probable cause to stop a motorist for any criminal violation, including a minor traffic violation, the stop is constitutionally valid regardless of the officer’s underlying subjective intent or motivation for stopping the vehicle in question.” See, also, *Lanier*, supra; *State v. Gillenwater*, Cuyahoga App. No. 93845, 2010-Ohio-5476. Based on the holding in *Erickson*, the officers had authority to stop appellant based on the loud music violation regardless of whether they were using that violation as a pretext to investigate further.

{¶ 9} Upon approaching appellant’s vehicle, Officer Kirk recognized the strong scent of marijuana, and appellant admitted smoking marijuana. Based on this odor of marijuana, the officers were permitted to conduct a warrantless search of the vehicle pursuant to the “plain smell” doctrine. *State v. Moore*, 90 Ohio St.3d 47, 2000-Ohio-10, 734 N.E.2d 804, at the syllabus (“The smell of marijuana, alone, by a person qualified to recognize the odor, is sufficient to establish probable cause to conduct a search.”); *State v. Williams*, Cuyahoga App. Nos. 92009 and 92010, 2009-Ohio-5553, ¶26 (“the

strong smell of marijuana emanating from the vehicle justified a search of the vehicle without a warrant based upon the ‘plain smell doctrine’). Appellant’s first assignment of error is overruled.

Discrimination in Jury Selection

{¶ 10} In his second assignment of error, appellant argues that “[t]he trial court erred by overruling the defense motion challenging the state’s exercising of peremptory challenges [to exclude] African American jurors.” Appellant specifically argues that the prosecutor violated *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, when he used two peremptory challenges to exclude African American jurors.

{¶ 11} In *Batson*, the United States Supreme Court established a two-part test to establish a prima facie case of purposeful discrimination. The defendant must first establish that the state used its peremptory challenges to exclude members of a recognized racial group. Then, the defendant must show that the facts and circumstances give rise to an inference that those jurors were excluded based on their race. *Batson* at 96. Once the prima facie case of discrimination has been made, the state must provide a racially neutral explanation for the exclusion of those jurors. *Id.* at 95. The trial court must then determine, based on all the facts and circumstances, whether the defendant has proven purposeful race discrimination. *State v. Hunt*, Cuyahoga App. No. 93080, 2010-Ohio-5839,

¶15, citing *State v. Herring*, 94 Ohio St.3d 246, 256, 2002-Ohio-796, 762 N.E.2d 940. As an appellate court, we will not disturb the trial court's determination unless we find it to be clearly erroneous. *Hunt* at ¶11.

{¶ 12} The first African American juror the state excluded was Juror No. 5, who admitted that his son was arrested for what the juror believed to be a drug case. When asked why he excluded this juror, the prosecutor said, "I asked to excuse [him] because of a number of reasons actually, but his son was arrested for a drug offense and jailed. I just also noticed a lot about his demeanor. He didn't raise his hand when he came in yesterday * * *, did a lot of things that just didn't indicate to me that he was paying attention."

{¶ 13} The second African American juror who was excused, Juror No. 17, told the court she had been laid off by her employer of 21 years. The prosecutor expressed concern that the juror might be lying, and she was questioned further. During this further questioning, the juror told the court that she was the only employee from her department that was laid off and that she was laid off after she received a negative evaluation from her supervisor. When questioned about why he was excluding this juror, the prosecutor said, "her excusal from [her employer], the firm that she had been with for 21 years just seems like it had other reasons. I'm asking her to be excused because I have some suspicious [sic] about why she was released from her previous employment.

{¶ 14} “* * *

{¶ 15} “Nevertheless, Judge, that was my reason. It has nothing to do with the race. It’s just the fact that she didn’t appear to me to be, you know, a responsible employee.”

{¶ 16} We give great deference to a trial court’s *Batson* determinations, and those decisions will not be reversed unless error is clearly demonstrated. *Hunt* at ¶20. Here, the prosecutor provided racially neutral reasons for excluding both jurors. The prosecutor was worried that Juror No. 5 would be biased by his son’s prior drug conviction and feared he was not paying attention, and he suspected that Juror No. 17 was lying about the circumstances surrounding her alleged layoff. Once these racially neutral explanations were provided, it was within the trial court’s discretion to determine whether appellant had proven purposeful race discrimination. We cannot find the trial court’s decision finding no race discrimination to be clearly erroneous. Appellant’s second assignment of error is overruled.

Sufficiency of the Evidence

{¶ 17} In his third and final assignment of error, appellant argues that inadequate evidence existed to support his convictions. The Ohio Supreme Court has recognized that “[i]n determining whether the evidence is legally sufficient to support the jury verdict as a matter of law, ‘[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the

prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” *State v. Robinson*, 124 Ohio St.3d 76, 2009- Ohio-5937, 919 N.E.2d 190, ¶34, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 18} Appellant was convicted of possessing and trafficking crack cocaine in an amount that was equal to or exceeded 100 grams in violation of R.C. 2925.03(A)(2) and 2929.11(A). He was also convicted of the major drug offender specifications that accompanied those convictions. Appellant was also convicted of possessing and trafficking cocaine in amount that was equal to or exceeded five grams but was less than 25 grams.

{¶ 19} Officer Allen testified that he found the drugs at issue in a compartment that he discovered only after removing the vehicle’s removable cup holders. The parties stipulated to the lab report, which indicated that the drugs were tested and found to be 110.92 grams of crack cocaine and 23.20 grams of powder cocaine. Appellant now argues that because the vehicle was a rental car and the drugs were not on his person, the state failed to prove that he possessed them, and his convictions were based on insufficient evidence. We disagree.

{¶ 20} Possession can be actual or constructive, and the state may show constructive possession based on circumstantial evidence alone. *State v. Bowling*, Cuyahoga App. No. 93052, 2010-Ohio-3595, ¶52, citing *State v.*

Trembly (2000), 137 Ohio App.3d 134, 141, 738 N.E.2d 93. “Dominion and control over premises sufficient to allow an inference of possession can be shown not only by ownership of the premises, but by occupancy.” *Id.* at ¶53.

{¶ 21} In this case, appellant was driving a rental car that was provided to him by his mother. His mother testified that, although she paid for the rental car, appellant was the only individual who drove it. Officer Allen testified that he found the drugs in a compartment that was hidden underneath the vehicle’s removable cup holders — a location that was likely known only to an individual who was familiar with the vehicle. This evidence was sufficient to find that appellant constructively possessed the drugs. Finally, the drugs found were in an amount that exceeded that which a person would possess for personal consumption, thus supporting the inference that appellant was engaged in drug trafficking. Viewing this evidence in a light most favorable to the state, as we must, appellant’s convictions were supported by sufficient evidence. Appellant’s third assignment of error is overruled.

Conclusion

{¶ 22} Officers Kirk and Allen had authority to stop appellant’s vehicle because they had a reasonable suspicion that he had violated a local ordinance related to loud music. Upon approaching the vehicle, Officer Kirk recognized the odor of marijuana, and appellant admitted smoking a

marijuana cigarette, thus justifying a search of the vehicle under the plain smell exception to the warrant requirement. The state provided a racially neutral reason for excluding two African American jurors, and the trial court's finding that there was no purposeful discrimination was not clearly erroneous. Finally, viewing the evidence in a light most favorable to the state, there was sufficient evidence to support appellant's convictions.

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. The defendant's convictions having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

FRANK D. CELEBREZZE, JR., PRESIDING JUDGE

LARRY A. JONES, J., and
COLLEEN CONWAY COONEY, J., CONCUR