[Cite as *State v. Wilson*, 2011-Ohio-707.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94691

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ERIC R. WILSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-457755

BEFORE: Jones, J., Kilbane, A.J., and Rocco, J.

RELEASED AND JOURNALIZED: February 17, 2011

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LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Eric R. Wilson ("Wilson"), appeals his convictions for drug trafficking, two counts of drug possession, having a weapon under disability, and possession of criminal tools. Finding no merit to the appeal, we affirm.

{¶ 2} In 2004, Wilson was indicted on the above-mentioned charges. He filed a motion to suppress and, in 2005, the trial court held a partial hearing on the motion before Wilson decided to plead guilty to an amended indictment. Wilson pleaded guilty to drug

possession and having a weapon while under disability. He failed to appear for sentencing and a capias was issued for his arrest.

{¶ 3} In 2007, Wilson was arrested out of state on multiple outstanding warrants. In September 2008, the trial court sentenced Wilson to four and one-half years in prison. Wilson appealed, and we reversed his conviction and vacated his guilty plea because the trial court had failed to advise him of postrelease control. *State v. Wilson*, Cuyahoga App. No. 92149, 2009-Ohio-4879.

{¶ 4} In February 2010, the trial court resumed the hearing on the motion to suppress, indicating that it was incorporating the evidence from the 2005 suppression hearing.

{¶ 5} At the 2005 hearing, Detective Tim Grafton from the Cleveland Police Department testified that his sergeant received information from a confidential reliable informant ("CRI") that the CRI was staying in apartment #203 located at 1192 East 40th Street and that a man by the name of "Solo," later identified as Wilson, was running an escort service and dealing drugs out of that apartment. The sergeant also learned from a "known citizen" that was at the apartment with the CRI that there was drug paraphernalia and plastic bags with white residue strewn about the apartment.

{¶ 6} On October 6, 2004, police began surveilling Wilson's apartment and observed activity associated with drug dealing and prostitution, but did not observe any actual drug transactions. On the second evening of surveillance, the police spotted Wilson driving eastbound on East 40th Street near King Avenue. Detective Grafton and his partner were riding in an undercover vehicle. After the two cars passed each other,

going in opposite directions, Detective Grafton observed Wilson make an illegal u-turn in an intersection. Wilson then sped up, driving left of center, and began to follow the detectives. Wilson accelerated his truck in an attempt to come parallel with the undercover vehicle. Detective Grafton radioed for backup, telling his fellow officers "he's chasing me," and other police units effectuated a traffic stop.

{¶ 7} At the 2010 suppression hearing, Detective Jeffrey Follmer testified that he was involved in the arrest of Wilson. After receiving a call from Detective Grafton for assistance, Detective Follmer responded to the scene. Detective Follmer, in conjunction with eight to ten other police officers, approached Wilson's car with his gun drawn. Officers observed Wilson lean towards the right side of his car, down by the floorboard of the passenger seat. A loaded gun was laying in plain view on the passenger seat floorboard. Officers also recovered three glass pipes, commonly used for smoking drugs, but the pipes were clean.

{¶ 8} A K-9 unit also responded to the scene. The trained police dogs "alerted" to two places on the vehicle, but a search of the car did not result in the discovery of any other contraband.

{¶ 9} The police questioned Wilson, who only stated that he was exercising his right "to shut the f*** up." Detective Follmer testified that a officer took Wilson's keys and used them to open the door to the common area of the apartment building. Another detective, who knew the apartment building owner, called the owner. The owner confirmed that Wilson was the leaseholder for apartment #203. The police knocked on the apartment door and a woman inside the apartment refused to open the door. The police

secured the perimeter of the building while Detective Follmer drafted a search warrant, which was approved and signed by a judge. During the search of the apartment, the police confiscated 60 grams of marijuana, 15 pills, and several items with alleged cocaine residue on them and arrested two women.

{¶ 10} Wilson testified that he was driving southbound on East 40th Street when he saw a white car back out of a driveway and follow him. He stated that he thought the people in the car were visiting him for his birthday so he followed the car and flashed his lights to get their attention. He testified that he made a u-turn in an abandoned parking lot, not an intersection. According to Wilson, he never reached down by the passenger seat floorboard after being stopped by the police. Wilson conceded there was a gun in the car, but testified it was not his and he did not know whose it was.

{¶ 11} The trial court denied the motion to suppress and Wilson pleaded no contest to the indictment. The trial court again sentenced Wilson to four and one-half years in prison, to run consecutive to his other prison sentences.[1]

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

{¶ 13} "I. The trial court erred in denying appellant's motion to suppress."

Motion to Suppress

[1]Wilson was convicted for involuntary manslaughter and is currently serving a 35-year sentence in prison for that case and a 20-year sentence for rape in another case. See *State v. Wilson*, 182 Ohio App.3d 171, 2009-Ohio-1681, 912 N.E.2d 133 and *State v. Wilson*, Cuyahoga App. No. 92148, 2010-Ohio-550. Wilson was also recently sentenced to life in prison after being convicted of rape in yet another case; we affirmed his convictions but remanded the case for resentencing. *State v. Wilson*, Cuyahoga App. No. 93772.

{¶ 14} "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. 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." (Citations omitted.) *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶8.

Traffic Stop

{¶ 15} Wilson first challenges the traffic stop that led to the discovery of the gun, claiming that the police did not have any reason to pull him over. The state contends that the detective's testimony that he saw Wilson commit an illegal u-turn in an intersection and drive left of center was sufficient to justify the traffic stop.

{¶ 16} It is well-settled that "[w]here 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 * * *." *Dayton v. Erickson* (1996), 76 Ohio St.3d 3, 11, 665 N.E.2d 1091. The police observed Wilson make at least two traffic violations before he was pulled over. They then observed him make a furtive movement towards the location of where they saw his loaded gun in plain view. Although Wilson testified that the u-turn he made was in an abandoned parking lot and not in an intersection and he never "chased" the police, we defer to the trial court's judgment on witness

credibility. The warrantless seizure of items in plain view does not violate the Fourth Amendment if it is shown that "(1) the initial intrusion which afforded the authorities the plain view was lawful; (2) the discovery of the evidence was inadvertent; and (3) the incriminating nature of the evidence was immediately apparent to the seizing authorities." *State v. Williams* (1978), 55 Ohio St.2d 82, 377 N.E.2d 1013, paragraph one of the syllabus. Based on the stop for traffic violations and the detective's testimony that officers saw the gun in plain view on the passenger floorboard, the trial court properly concluded that the traffic stop was justified and the search of the vehicle and seizure of the gun were proper.

Sufficiency of the Affidavit

{¶ 17} Next, Wilson argues that the trial court should have granted his motion to suppress because the underlying affidavit failed to demonstrate probable cause to support the warrant.

{¶ 18} Before a search warrant may be issued, probable cause must be established. Crim.R. 41(C); the Fourth Amendment to the United States Constitution; Section 14, Article I, Ohio Constitution. When "determining the sufficiency of probable cause in an affidavit submitted in support of a search warrant, '[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *State v. George* (1989), 45

Ohio St.3d 325, 544 N.E.2d 640, paragraph one of the syllabus, quoting *Illinois v. Gates* (1983), 462 U.S. 213, 238-239, 103 S.Ct. 2317, 76 L.E.2d 527.

{¶ 19} In deciding whether a search warrant was adequately supported by probable cause, "the duty of a reviewing court is simply to ensure that the [issuing judge] had a substantial basis for concluding that probable cause existed." *George* at paragraph two of the syllabus. This standard of review affords a great deal of deference to the issuing judge and prohibits us from conducting a de novo review and substituting our judgment for that of the issuing judge. Id.

{¶ 20} To establish probable cause for issuance of a search warrant, an affidavit must contain sufficient information to allow a magistrate to draw the conclusion that evidence is likely to be found at the place to be searched. *State v. Cabrales*, Hamilton App. No. C-050682, 2007-Ohio-857, ¶22, citing *United States v. Ventresca* (1965), 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684. Indeed, a search warrant based on a police officer's affidavit is legally sufficient if the totality of the circumstances establishes a "fair probability that contraband or evidence of a crime will be found in a particular place." *Gates* at 238.

{¶ 21} We further note that when a defendant's motion to suppress attacks the validity of a search conducted under a warrant, the defendant bears the burden of proof. *State v. Wild,* Franklin App. No. 2009 CA 83, 2010-Ohio-4751; *State v. Barnes* (Mar. 16, 2000), Franklin App. No. 99AP-572.

{¶ 22} To support the search warrant, Detective Follmer averred that 1) he was a trained and experienced detective; 2) his sergeant received information from a CRI and

"known citizen" with regard to drug activity in apartment #203 and Eric Wilson, also known as "Solo"; 3) the CPD vice unit pulled Wilson over during routine surveillance and confiscated a gun they saw in plain view in Wilson's car; 4) the police also confiscated three glass tubes commonly used for smoking crack cocaine; 5)Wilson denied living at 1192 East 40th Street; 6) police used Wilson's keys to open the front door of the main entrance to the building and a detective found out from the building owner that Wilson rented apartment #203; 7) a K-9 police dog alerted to two places on Wilson's car; 8) Wilson had prior arrests for drug crimes and carrying a concealed weapon; and 9) activity observed during the surveillance of Wilson's apartment was indicative of drug trafficking.

{¶ 23} Wilson argues that there was insufficient evidence to show that the CRI was reliable, the information police gathered was stale, the "known citizen" should be classified as an anonymous informant, there was insufficient detail as to the surveillance the police conducted on the apartment, and no known nexus existed between the gun found in Wilson's car and the drugs seized at the apartment.

{¶ 24} We first address Wilson's claim regarding the CRI and "known citizen."

{¶ 25} The veracity, reliability, and basis of knowledge of CRI's and other informants are all highly relevant in determining probable cause, so "[t]here must be some basis in the affidavit to indicate the informant's credibility, honesty or reliability." *State v. Harry*, Butler App. No. CA2008-01-013, 2008-Ohio-6380. Nonetheless, a deficiency in one of these principles does not negate probable cause if there is a strong showing on another or if there is some other indicia of reliability. *Illinois v. Gates*, supra. Thus, an identified informant who provides corroborated information may establish probable cause.

See *State v. Martin*, Cuyahoga App. No. 89030, 2007-Ohio-6062; *State v. Banna*, Cuyahoga App. Nos. 84901 and 84902, 2005-Ohio-2614.

{¶ 26} Here, the detectives testified that the CRI lived with Wilson and took part in his escort service. The "known citizen" was known to police because the citizen was a local defense attorney who observed criminal activity in the apartment. Although it is unclear from the testimony exactly what the defense attorney was doing in Wilson's apartment with the CRI and there was no independent corroboration of the CRI's and the citizen's information, we do note that the search warrant was not based on that information alone. In fact, Detective Follmer testified that they were performing surveillance based on the information given to them by the CRI and citizen and did not seek a search warrant until after the traffic stop because they did not think they had sufficient information just based on the CRI and the citizen's observations to pursue the warrant.

{¶ 27} Wilson also argues that the use of his keys constitutes an illegal trespass on his property. But the police did not use his keys to gain entry to his specific unit and the landlord independently verified that Wilson lived in unit #203. Moreover, the police did not enter Wilson's apartment until after they got a search warrant. Even if the initial entry into the building was unlawful, whether the initial entry was illegal or not is irrelevant to the admissibility of the challenged evidence because there was an independent source for the warrant under which that evidence was seized. See *Segura v. United States* (1984), 468 U.S. 796, 814, 104 S.Ct. 3380, 82 L.Ed.2d 599.

{¶ 28} As to Wilson's claim that the information was stale, the affidavit specifically states when the police met with the CRI and "known citizen," and when the police conducted surveillance on the apartment.

{¶ 29} Wilson also argues that recovering contraband from a car does not entitle the police to obtain a search warrant. To support his proposition, Wilson cites *State v. Cole*, Montgomery App. No. 23058, 2009-Ohio-6131, in which the court held that drugs found in a car being driven by someone who lived with the defendant, without more, is insufficient to establish probable cause to believe that evidence of criminal activity might be found within the defendant's apartment, when the defendant was not in the car at the time the drugs were seized. *Cole* is distinguishable because in this case there was additional evidence other than the gun in Wilson's car and Wilson was in the car at the time of the seizure of the gun and glass pipes. Moreover, we note that the *Cole* court actually affirmed the defendant's conviction, finding that the good faith exception doctrine applied.

{¶ 30} We do agree with Wilson in so far as if we were to consider Detective Follmer's averments in the search warrant independently from each other, there may not be sufficient evidence to establish probable cause. We recognize the fact that the affidavit does not include the dates when the CRI and "known citizen" observed the drugs and drug trafficking in Wilson's apartment. When the averments in the affidavit are read together, however, we find that the affidavit contains sufficient information to allow the issuing judge to draw the conclusion that evidence of drug trafficking was likely to be found at Wilson's apartment. We also note the difficulty witnesses had in remembering

details of the incident since the second half of the suppression hearing occurred five years after the first half. The fault in that lies solely with Wilson, who absconded shortly before sentencing was to occur in this case. The burden in this case was Wilson's, and we find he failed to show that the affidavit did not support probable cause to issue the search warrant.

{¶ 31} Based on the foregoing, we conclude that the trial court did not err in denying Wilson's motion to suppress.

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

Judgment is 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. The defendant's conviction 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.

LARRY A. JONES, JUDGE

MARY EILEEN KILBANE, A.J., and
KENNETH A. ROCCO, J., CONCUR