[Cite as *State v. Robinson*, 2011-Ohio-842.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95160

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

RICHARD ROBINSON

DEFENDANT-APPELLEE

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-532673

BEFORE: Rocco, J., Gallager, P.J., and Keough, J.

RELEASED AND JOURNALIZED: February 24, 2011

ATTORNEYS FOR APPELLANT

William D. Mason
Cuyahoga County Prosecutor

BY: John Hanley
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

ATTORNEY FOR APPELLEE

Jimmie Mack, Jr.
Jimmie Mack, Jr., Co., LPA
526 Superior Avenue, East
Suite 716
Cleveland, Ohio 44114

KENNETH A. ROCCO, J.:

{¶ 1} Plaintiff-appellant the state of Ohio appeals from the trial court's decision to grant the motion to suppress evidence filed by defendant-appellee Richard Robinson.

{¶ 2} The state presents two assignments of error. It argues the trial court incorrectly determined the scope of the search of Robinson's vehicle went beyond permissible

boundaries. The state additionally argues the trial court incorrectly determined Robinson's statements also were inadmissible.

{¶ 3} Upon a review of the record, this court agrees with both of the state's arguments. Consequently, the trial court's order is reversed, and this case is remanded for further proceedings.

{¶ 4} The state provided testimony of only one witness at the hearing on Robinson's motion to suppress evidence. East Cleveland police officer Thomas Telegdy testified as follows.

{¶ 5} On the night of December 29, 2009, Telegdy and his partner Hvizdos were in their zone car patrolling in the area of Hayden and Shaw Avenues; Hvizdos was driving.[1] As the officers traveled on Hayden, they noticed an SUV turn onto the street from Shaw.[2]

{¶ 6} According to Telegdy, his partner noticed that the SUV lacked a front license plate.[3] Telegdy also noticed that the SUV's windows were "too dark."[4] Based upon these

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[1] Hvizdos did not testify at the hearing and neither Telegdy nor the prosecutor provided his full name.

[2]Although the trial court apparently viewed a rendering of the area and the positions of the vehicles during the relevant time period on a "white board," this "map" was not included in the record.

[3]This is a violation of R.C. 4503.21(A).

[4]East Cleveland Codified Ordinances Section 337.28 specifies the degree of tint that may be used to block light from vehicle windows.

violations of the traffic code, the officers decided to conduct a traffic stop. Hvizdos turned the patrol car around, activated his lights, and the driver of the SUV, Robinson, pulled over.

{¶ 7} Since the officers noticed two men inside the vehicle, Telegdy went to the passenger side of the SUV while his partner went to the driver's side. Robinson responded to Hvizdos's request to talk to him. At the same time, his passenger rolled down his window to speak to Telegdy.

{¶ 8} Telegdy heard Robinson explain that the SUV "belonged to his baby's mama," and that "he paid for it." Telegdy further testified that, in response to a question posed by Hvizdos, Robinson stated, "Yes, I have a small bag of weed."

{¶ 9} As he spoke, Robinson lifted up a small clear plastic baggie from the cupholder area of the vehicle's center console, then replaced the item. Telegdy testified he was only three to four feet away from Robinson when this took place.

{¶ 10} The officers removed both Robinson and the passenger from the SUV, patted the men down, and placed them into the rear seat of the police car "so [the officers] could retrieve the contraband from their vehicle." Telegdy testified he performed the search, and discovered "17 bags of marijuana" in the center console. He also found a "loaded .48 caliber Taurus semiautomatic pistol."

{¶ 11} Telegdy returned to the patrol car, opened the rear door, and asked the men inside if they could hear him. When he received acknowledgment, he "read them their Miranda rights."

{¶ 12} Telegdy testified he asked Robinson "what was going on with the stuff in the vehicle." Robinson "replied that he was driving around, selling the bags of marijuana." Robinson further told Telegdy that he "bought [the gun] for $100," but refused to disclose from whom he made the purchase, or to whom he sold the marijuana. Robinson did, however, claim ownership of the drugs and the gun. Robinson's passenger never said a word.

{¶ 13} Robinson was arrested and subsequently charged on six counts. He was charged with drug trafficking, drug possession, having a weapon while under disability, carrying a concealed weapon, possession of criminal tools, and improper handling of a firearm in a motor vehicle. Most of the counts carried several forfeiture specifications, and count one carried a firearm specification.

{¶ 14} Robinson filed motions to suppress both the physical evidence and the statements he made. After listening to Telegdy's testimony, the trial court granted Robinson's motions, stating in relevant part:

{¶ 15} "I don't have any problem with the stop. The stop is fine. The citation for the stop is fine. Had he been cited for the stop [sic] and the marijuana, it would have been fine. But this clearly goes outside the bounds of an appropriate search.

{¶ 16} "Whether or not he had probable cause as an officer at that point regarding the weed to search further is up to a judge to decide. That information should have been presented to a judicial officer to determine whether or not the statements by the defendant at that point constituted probable cause under the legal standard to search the car.

{¶ 17} "There's absolutely no evidence before this Court that that [sic] search was warranted under any circumstances without a warrant.

{¶ 18} "The car could have been impounded and a warrant obtained. * * * .

{¶ 19} "The defendant was in the back of the police car. He was not free to leave. He was being asked questions. He wasn't Mirandized until later.

{¶ 20} " * * * [I]n this case, the Court does not believe that the law was followed."

{¶ 21} The state filed a notice of appeal pursuant to Crim.R. 12(K). It presents two assignments of error.

{¶ 22} "I. The court erred in granting defendant-appellee's motion to suppress when the search of the automobile fell within the automobile exception to the warrant requirement.

{¶ 23} "II. The court erred in granting defendant-appellee's motion to suppress when defendant-appellee's statements were made after being Mirandized."

{¶ 24} The state argues the trial court improperly determined that neither the police search of Robinson's SUV nor the police questions put to him complied with Fourth Amendment protections.

{¶ 25} The trial court assumes the role of trier of fact when presented with a motion to suppress evidence. *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972. The trial court, therefore, is in the best position to resolve questions of fact and evaluate witness credibility. *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, 833 N.E.2d 1216, ¶41; see, also, *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶8.

{¶ 26} In reviewing the trial court's decision, the appellate court is required to accept the court's factual findings if they are supported by the evidence in the record. This court must then independently determine whether, as a matter of law and without deference to the trial court's conclusion, the facts meet the applicable legal standard. *Mayl*; *In re: D.W.*, 184 Ohio App.3d 627, 2009-Ohio-5406, 921 N.E.2d 1114. Thus, the trial court's conclusions of law are reviewed de novo. *State v. Williams*, Cuyahoga App. No. 92822, 2010-Ohio-901, ¶ 7.

{¶ 27} A law enforcement officer may stop an individual when he has reasonable suspicion that criminal activity is afoot. *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. Reasonable suspicion exists in traffic stops where a police officer has observed a traffic violation. *Columbus v. Dials*, Franklin App. No. 04AP-1099, 2005-Ohio-6305, ¶21. Consequently, traffic stops based on a police officer's observation of a traffic violation are constitutionally permissible. Thus, in *Dayton v. Erickson*, 76 Ohio St.3d 3, 11-12, 1996-Ohio-431, 665 N.E.2d 1091, the Ohio Supreme Court held that the stop is constitutionally valid if an officer has either an articulable reasonable suspicion or probable cause to stop a motorist for any criminal violation.

{¶ 28} In this case, the trial court correctly determined, based upon Telegdy's testimony that he observed two traffic violations, the stop was "fine." However, the trial court found fault with the subsequent search, in spite of Telegdy's testimony that Robinson showed the officers a "bag of weed." This constituted error.

{¶ 29} In *Arizona v. Gant* (2009), 556 U.S.__, 129 S.Ct. 1710, 173 L.Ed.2d 485, the United States Supreme Court held:

{¶ 30} "Police 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*. When 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.* (Emphasis added.)"

{¶ 31} The United States Supreme Court noted in *Gant*, therefore, that the decision in *United States v. Ross* (1982), 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572, remained a valid exception to the warrant requirement in cases involving automobiles. The *Ross* decision stated in pertinent part:

{¶ 32} " * * * [S]ince its earliest days Congress had recognized the impracticability of securing a warrant in cases involving *the transportation of contraband goods*. [Footnote 8 omitted.] It is this impracticability, viewed in historical perspective, that provided the basis for the *Carroll* [*v. United States* (1925), 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543] decision. Given the nature of an automobile in transit, the Court recognized that an *immediate intrusion is necessary if police officers are to secure the illicit substance*. In this class of cases, the Court held that a warrantless search of an automobile is *not unreasonable*. (Emphasis added.)" Attached to the foregoing statement, footnote 9 of the *Ross* opinion observed that:

{¶ 33} " * * * The Court, [in *Chambers v. Maroney*, 399 U.S. 42, 62-64, 90 S.Ct. 1975, 26 L.Ed.2d 419] held that if police officers have *probable cause to justify a warrantless seizure of an automobile* on a public roadway, they may conduct an *immediate search* of the

contents of that vehicle. 'For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. *Given probable cause to search, either course is reasonable under the Fourth Amendment.*' Id., at 52, 90 S.Ct., at 1981. [United States Supreme Court] decisions are based on the practicalities of the situations presented and a realistic appraisal of the relatively minor protection that a contrary rule would provide for privacy interests. Given the scope of the initial intrusion caused by a seizure of an automobile—which often could leave the occupants stranded on the highway—the Court *rejected an inflexible rule that would force police officers in every case either to post guard at the vehicle while a warrant is obtained or to tow the vehicle itself to the station.* Similarly, if an immediate search on the scene could be conducted, but not one at the station if the vehicle is impounded, police often simply would search the vehicle on the street—[sic] at no advantage to the occupants, yet possibly at certain cost to the police. The rules as applied in particular cases may appear unsatisfactory. They reflect, however, a reasoned application of the more general rule that *if an individual gives the police probable cause to believe a vehicle is transporting contraband, he loses the right to proceed on his way* without official interference. Id. at 129, S.Ct. at 1723-24. (Emphasis added.)"

{¶ 34} In this case, Telegdy testified that Robinson not only admitted he carried contraband in his vehicle, but he held the contraband up for illustration. Under these circumstances, since Robinson provided the officers "probable cause" to believe they would find evidence in his vehicle "of an offense of arrest," Telegdy's further search of Robinson's SUV prior to making the arrest met Fourth Amendment requirements of reasonableness. *State v. Dickerson*, Cuyahoga App. No. 94567, 2010-Ohio-5787.

{¶ 35} Accordingly, the state's first assignment of error is sustained.

{¶ 36} The state further argues the trial court wrongly decided Robinson's statements were inadmissible. This argument also has merit.

{¶ 37} Telegdy specifically stated that, after he found the additional contraband in Robinson's vehicle, he placed Robinson under arrest and informed him of his constitutional rights. Robinson at that point proceeded to answer Telegdy's question as to "what was going on with the stuff in the vehicle." *State v. Belle*, Cuyahoga App. No. 90102, 2008-Ohio-3043. Robinson's companion, on the other hand, invoked his right to remain silent.

{¶ 38} The record demonstrates Robinson received the necessary warnings before he provided the statements; consequently, the state's second assignment of error also is sustained.

{¶ 39} The trial court's order is reversed, and this case is remanded for further proceedings.

It is ordered that appellant recover from 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. Case remanded to the trial court for further proceedings.

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

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KENNETH A. ROCCO, JUDGE

SEAN C. GALLAGHER, P.J., and
KATHLEEN ANN KEOUGH, J., CONCUR