[Cite as *State v. Williams*, 2011-Ohio-108.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94860

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

DONIQUE WILLIAMS

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-526993

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

RELEASED AND JOURNALIZED: January 13, 2011

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MELODY J. STEWART, P.J.:

{¶ 1} Plaintiff-appellant, the state of Ohio, appeals from a judgment of the Common Pleas Court granting defendant-appellant, Donique Williams's, motion to suppress. For the reasons that follow, we affirm.

{¶ 2} At the suppression hearing, the state presented the testimony of Cleveland police officer William Fein. Fein testified that on July 24, 2009 he and officer Jack Steele were on patrol. They observed Williams riding a small scooter without a helmet or eye-gear and weaving in and out of traffic.

The officers decided to "issue Mr. Williams some citations." Steele activated the overhead lights to effectuate a traffic stop. Steele asked Williams for an operator's license and insurance, which he could not produce. Steele asked Williams to come back to the patrol car.

{¶ 3} At the patrol car, Fein placed Williams in handcuffs and asked him for identification. After Williams gave two different names, Fein "patted him down for officer safety, and advised him that we were going to detain him until identification was given as to who he was and place him in the rear of our zone car." During the pat-down, Fein felt "what apparently had been some keys, a long like pen-like instrument and just like some bulgy material in his pants." He asked Williams if he had anything that would "poke me, gouge me, hurt me on his person that we should be aware of." Williams said he did not. Fein went into Williams's pockets and pulled out "keys, cell phone charger, a pen, some change, cash and a tissue, like a wad of tissue." Fein saw a "little plastic baggie wrapper sticking out of the wad of tissue." He opened up the wad of tissue and found a small plastic bag with suspected crack cocaine.

{¶ 4} Williams was indicted for drug possession, in violation of R.C. 2925.11(A), drug trafficking, in violation of R.C. 2925.03(A)(2), and falsification, in violation of R.C. 2921.13(A)(3). Williams moved to suppress any evidence obtained as a result of the search, arguing that the police had no

reasonable basis to believe that he was armed and dangerous, and therefore the pat-down for weapons was unnecessary. He further argued that even if a pat-down for officer safety was permissible under the circumstances, the police exceeded the scope of the pat-down search and conducted a full exploratory and warrantless search without probable cause.

{¶ 5} Following the suppression hearing, the court granted Williams's motion. The trial court found the pat-down for weapons was reasonable under the circumstances, noting that "[w]hen you put someone in the back of a car, you have to do a pat down." The court held however that the officer exceeded the permissible scope of the search. The court concluded:

{¶ 6} "What's troublesome to me is that he went deep in the pocket, found a tissue or napkin, and by his own testimony said it was balled up, and then he opened it up. That's where I think the problem comes in. There is no reasonable expectation that a balled-up napkin or tissue is going to harm an officer."

{¶ 7} The state appeals from the suppression of the state's evidence, raising as its single assignment of error: "The trial court erred by granting appellee's motion to suppress because the search that resulted in the seizure of crack cocaine was a search incident to arrest."

{¶ 8} The standard of review regarding motions to suppress is set forth by the Ohio Supreme Court as follows:

{¶ 9} "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 ." (Internal citations omitted.) *State v. Burnside*, 100 Ohio St.3d 152, 155, 2003-Ohio-5372, 797 N.E.2d 71.

{¶ 10} The state argues that the court should not have suppressed the evidence because the drugs were lawfully seized as a result of a "search incident to arrest." The state argues that at the time of the search, Williams was under arrest for driving without a license and insurance. Williams counters that the facts show he was not under arrest and that the search was unlawful.

{¶ 11} It is well-settled law that warrantless searches are presumptively unreasonable under the Fourth Amendment to the United States Constitution, subject to certain exceptions. *State v. Burks*, 8th Dist. No. 92736, 2010-Ohio-658, citing *Coolidge v. New Hampshire* (1971), 403 U.S. 443, 454-455, 91 S.Ct. 2022, 29 L.Ed.2d 564. A search of a person incident to

a lawful arrest is one exception that is reasonable under the Fourth Amendment. *Chimel v. California* (1969), 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685. Searches incident to arrest are broad in scope, and the police may fully search an arrestee for weapons and contraband. *State v. Ferman* (1979), 58 Ohio St.2d 216, 389 N.E.2d 843.

{¶ 12} The state argues that Williams was under arrest at the time of the pat-down. We disagree. "An arrest occurs when the following four requisite elements are involved: (1) An intent to arrest, (2) under a real or pretended authority, (3) accompanied by an actual or constructive seizure or detention of the person, and (4) which is so understood by the person arrested." *State v. Darrah* (1980), 64 Ohio St.2d 22, 412 N.E.2d 1328, quoting *State v. Barker* (1978), 53 Ohio St.2d 135, 139, 372 N.E.2d 1324.

{¶ 13} Fein testified that driving without a license and insurance is an "arrestable offense" and that he "was going to" place Williams under arrest prior to finding the wadded tissue. Fein further testified that when arresting a person, "We place him in handcuffs, pat him down for officer safety, inventory his property * * * place him in the rear of the police car, and advise him of why he's being placed under arrest." There is no evidence in the record, however, to show that Fein actually placed Williams under arrest or that Williams understood himself to be under arrest at the time of the search. Fein testified that before putting Williams in the patrol car he

"patted him down for officer safety" and "*advised him that we were going to detain him until identification was given*." Fein did not testify that he advised Williams that he was being arrested for operating a motor scooter without a license and insurance. Therefore, the evidence supports a finding that Williams was detained for purposes of verifying identity, not that he was under arrest.

{¶ 14} The trial court is in the best position to resolve factual questions. While the state argued that the search was a "search incident to arrest," the trial court did not agree. The court considered the facts and circumstances and found the search to be a pat-down for weapons following a traffic stop as authorized by *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. Applying the facts of the case to the legal standard set forth in *Terry*, the trial court found the officer's search exceeded the permissible scope of a pat-down search. Upon review of the record, we find no error.

Judgment affirmed.

It is ordered that appellee recover of appellant his 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 Cuyahoga County Court of Common Pleas 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.

MELODY J. STEWART, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
LARRY A. JONES, J., CONCUR