[Cite as *State v. Holder*, 2015-Ohio-1837.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101848

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

JAMES HOLDER III

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-586029-A

BEFORE: Celebrezze, A.J., Keough, J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: May 14, 2015

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

{¶1} Appellant, the state of Ohio, appeals the suppression of a loaded firearm discovered in the possession of appellee, James Holder, III, during a pat- down search. On appeal, the state asserts that the trial court erred in suppressing the evidence. After a thorough review of the record and law, this court affirms.

I. Factual and Procedural History

{¶2} From the hearing that resulted from Holder's motion to suppress, the following facts were adduced. On June 1, 2014, Holder was a passenger in a car driven by a person that was suspected of being intoxicated. Officer Ricky Crumbley of the Valley View Police Department initiated a traffic stop of the vehicle just before 1:00 a.m. after observing the vehicle traveling at 60 miles per hour in a 35 mile per hour zone. The driver of the car could not provide the officer with a driver's license or proof of insurance. He did produce an expired document for driving privileges from the Parma Municipal Court. When speaking with the driver, Officer Crumbley observed indicia of intoxication. The driver failed a field sobriety test and was arrested. After the driver was placed in the back of a police cruiser, Officer Crumbley turned his attention to Holder, the passenger.

{¶3} Officer Crumbley asked Holder for identification, which he was unable to produce. Instead, Holder supplied a social security number. While another officer was verifying that information, Officer Crumbley explained to Holder that the driver had been arrested and the vehicle was going to be impounded. Officer Crumbley asked Holder if

he could call someone to come pick him up. Holder stated that his girlfriend would. Officer Crumbley testified that he informed Holder he was going to have Holder sit in the back of a patrol car while officers inventoried the contents of the impounded vehicle. Holder then exited the impounded car and Officer Crumbley walked him to the patrol car. Officer Crumbley told Holder he was going to pat him down for weapons before placing him in the back of the patrol car. Holder turned and faced the car. Officer Crumbley discovered a firearm tucked into Holder's right front pocket. Holder was handcuffed and a .38 caliber revolver was removed from his pocket.

{¶4} Officer Crumbley testified that before he places anyone in the back of a patrol car, he conducts a pat-down search for weapons for officer safety. Officer Crumbley also testified that prior to the pat-down, he had no indication that Holder posed a danger. There were no furtive movements, signs of nervousness, or indication that Holder was carrying a firearm. He also testified that Holder was at all times cooperative, consented to the pat-down search, and that Holder was free to leave prior to the pat-down.

{¶5} On cross-examination, Officer Crumbley confirmed that there was no written policy that officers search individuals before placing them in the back of a patrol car. Holder was never specifically told he was free to leave. He also testified Holder could not wait at the side of the road at the scene.

{¶6} Officer Jack Pietraszkiewicz of the Valley View Police Department also testified at the suppression hearing. He stated that he searches any individual that he places in the back of a patrol car for officer safety, but that there is no official written

policy or rule. He also testified that he was in the process of verifying the information Holder had given when Officer Crumbley shouted that he had found a gun.

{¶7} The trial court granted Holder's motion to suppress. The state then filed the instant appeal raising one assignment of error for review: "The trial court erred in suppressing Appellee's gun."

II. Law and Analysis

{¶8} The state argues that the trial court erred in suppressing the evidence obtained from the search of Holder.

{¶9} The standard applicable in the review of suppression decisions requires appellate courts to accept the trial court's findings of fact as true if they are supported by competent and credible evidence and to determine, without any deference to the trial court, whether the facts satisfy the applicable legal standard. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71.

{¶10} Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject to only a few well-recognized exceptions. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). The Fourth Amendment protects individuals from unreasonable searches and seizures. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Unlike *Terry*, this case does not involve an investigatory search pursuant to a reasonable suspicion of criminal activity or that an individual is armed and dangerous. The search was conducted, as stated by Officer

Crumbley, for officer safety, which he does as a matter of course prior to placing anyone into the back of a patrol car. Therefore, the analysis is outside the scope of *Terry*.

{¶11} The Ohio Supreme Court has confronted a similar situation involving the search and placement of an individual in the back of a patrol car during the issuance of a traffic citation. *State v. Lozada*, 92 Ohio St.3d 74, 748 N.E.2d 520 (2001). There, it reiterated that "'even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.'" *Id.* at 79, quoting *Terry* at 24-28. The court went on to state that this personal intrusion must be balanced against the public interest and the legitimate needs for officer safety.[1] *Id.* at 79-80.

{¶12} In *Lozada*, the court was tasked with determining whether a pat-down search of a person being placed in the back of a police car during a routine traffic stop was a reasonable intrusion. The court set forth,

> [d]uring a routine traffic stop, it is reasonable for an officer to search a driver for weapons before placing the driver in a patrol car, if placing the driver in the patrol car during the investigation prevents officers or the driver from being subjected to a dangerous condition and placing the driver in the patrol car is the least intrusive means to avoid the dangerous condition.

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[1]The *Lozada* court, when analyzing prior case law, set forth that a search conducted for officer safety before placing an individual in a patrol car is legitimate in certain circumstances. The court recognized that "'it is reasonable that the officer, who has a legitimate reason to so detain that person [in a patrol car], is interested in guarding against an ambush from the rear.'" *Lozada* at 78, quoting *State v. Evans*, 67 Ohio St.3d 405, 410, 618 N.E.2d 162 (1993).

Id. at paragraph one of the syllabus. The court also held that if the reason for placing the individual in the police cruiser is solely for officer convenience, then a search for weapons is unreasonable. *Id.* at paragraph two of the syllabus. The ultimate question becomes, "'[a]lthough a police officer may reasonably pat down a person before he places him in the back of a police vehicle, the legitimacy of that procedure depends on the legitimacy of placing him in the police car in the first place."' *Id*. at 76, quoting *People v. Kinsella*, 139 A.D.2d 909, 911, 527 N.Y.S.2d 899 (1988).

{¶13} The state argues that Holder was placed in the back of the patrol car for officer safety and for his own safety. The *Lozada* court rejected an argument similar to the present situation. There, the state argued that placing passengers in a vehicle that was subject to a traffic stop in a patrol car would reduce the risk of being ambushed. This is precisely the case here. The traffic stop in this case represented the "multiple occupants" situation addressed in *Lozada*. The court rejected the state's arguments that placement of the passengers or driver in a patrol car was a reasonable intrusion without suspicions by the officer that one or more of the subjects was armed or posed a threat that constituted a dangerous condition. *Id*. at 80. The court held that, "[t]he mere fact that a car contains multiple passengers is, by itself, an insufficient basis to justify a search." *Id*. at 81.

{¶14} In *State v. Baber*, 8th Dist. Cuyahoga No. 97973, 2012-Ohio-3467, a person was stopped for walking in a roadway. This court applied *Lozada* and rejected the state's argument that the pat-down search was justified where placement of the

individual in the back of a patrol car was necessary for the safety of the officer and the individual. *Id*. at ¶ 24. The *Baber* court found that the stop occurred on a well-lit street with no traffic and there was no dangerous condition that necessitated placement of the individual in the patrol car. *Id*. *See also State v. Arnold*, 8th Dist. Cuyahoga No. 91476, 2009-Ohio-2255.

{¶15} The state attempts to distinguish the present case by citing to the fact that the area where the traffic stop occurred was on a busy road in an area that was not well-lit. However, the stop occurred at close to 1:00 a.m. when Officer Crumbley indicated traffic was light. While the back seat of a patrol car was probably the safest and best place to wait for a ride, the fact that the area was lightly traveled and not well-lit is not the kind of danger the Ohio Supreme Court contemplated in *Lozada*. The placement of Holder in the back of a patrol car was done for officer convenience and for the benefit of Holder. Officer Crumbley testified that if Holder refused to be placed in the back of the car, he would have been instructed to leave. This demonstrates there were other, less intrusive options available. Officer Crumbley also testified that there were businesses in the area. These presumably had parking lots where Holder could wait where he would not be exposed to the dangers of vehicular traffic. This is the least intrusive means to avoid the dangerous condition.

{¶16} The trial court made a factual determination that there was no dangerous condition that necessitated the placement of Holder in the back of the patrol car. The stop occurred in the very early morning hours on a four-lane road in a business district.

The area was classified by Officer Crumbley as dimly lit and lightly traveled with no sidewalks. But that does not evidence that the trial court's determination is unsupported in the record.

{¶17} The state argues this case is similar to *State v. Clancy*, 8th Dist. Cuyahoga No. 66902, 1996 Ohio App. LEXIS 393 (Feb. 8, 1996), but it is distinguishable. There, a valid traffic stop resulted in the tow of a vehicle from an interstate highway. The passenger in the vehicle was required to be transported off the highway by officers. A pat-down search was conducted before the individual was placed in the police car. In that case, a necessity existed for placement in the back of a patrol car to transport the individual from a place where he could not remain and could not walk away from. Further, the *Clancy* court found sufficient indicia of criminal activity existed for a valid search. *Id.* at *19-20.

{¶18} The state is left to argue that this was a consensual encounter and Holder consented to the search prior to being placed in the patrol car.

{¶19} A consensual encounter is

> where the police approach a person in a public place, engage the person in conversation, request information, and the person is free not to answer and to walk away. *United States v. Mendenhall* (1980), 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497. An encounter rises to the level of a Fourth Amendment "seizure," by contrast, when, "in view of all of the circumstances surrounding the incident, a reasonable person would have

> believed that he was not free to leave." *Id*. Circumstances that might indicate that a seizure has occurred, even where the person did not attempt to leave, include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. *Id*.

State v. Arnold, 8th Dist. Cuyahoga No. 91476, 2009-Ohio-2255, ¶ 12.

{¶20} Officer Crumbley classified placement of Holder in the patrol car as a consideration offered to Holder so he could sit and wait for his girlfriend to pick him up. The trial court recognized that whether Holder was given a choice to sit in the back of the patrol car was a factual determination. The court implicitly found, based on the testimony, that Holder was not given a choice. Officer Crumbley never informed Holder that he was free to leave. Once Holder told the officer that his girlfriend was going to come pick him up, Officer Crumbley informed Holder that he was going to have him sit in the back of a patrol car while officers inventoried the impounded vehicle. The language used by Officer Crumbley was not discretionary.

{¶21} It must also be remembered that this takes place during a traffic stop where Holder is not free to leave from the outset. Officer Crumbley testified that Holder was free to leave at the time of the pat-down search, but there is conflicting evidence as to Holder's ability to walk away. Officer Pietraszkiewicz testified that he needed to verify Holder's identity because he could not present any form of identification. Officer

Pietraszkiewicz further testified he was running the social security number given by Holder through the computer when he heard Officer Crumbley shout "gun." He testified that he did not verify Holder's identification prior to Officer Crumbley finding the weapon.

{¶22} The trial court made a factual determination that, based on the surrounding facts and circumstances, Holder was not free to leave. That decision is supported in the record. Therefore, the pat-down search of Holder cannot be classified as consensual. Officer Crumbley told Holder that he was going to be placed in the back of the patrol car until his ride got there. He was not given options and the language used by the officer was not conditional or discretionary. The state argues that Holder was free to leave based on the fact that Holder was allowed to call his girlfriend and get a ride to leave the scene of the stop. However, Holder's identity was not yet verified and Officer Pietraszkiewicz testified they needed to verify his identity because neither the driver nor Holder could produce valid identification. The trial court's factual determination is supported in the record.

III. Conclusion

{¶23} The trial court did not err in granting Holder's suppression motion where a pat-down search was conducted prior to placing Holder in the back seat of a patrol car because that was not the least intrusive means of accomplishing the stated goals the officers used to justify the search. The record also contains evidence to support the trial court's factual determination that the search was not consensual.

{¶24} 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.

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

FRANK D. CELEBREZZE, JR., ADMINISTRATIVE JUDGE

KATHLEEN ANN KEOUGH, J., and
EILEEN T. GALLAGHER, J., CONCUR