[Cite as *State v. Smith*, 2015-Ohio-5265.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102893

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WILLIAM SMITH

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-590453-A

BEFORE: Keough, P.J., McCormack, J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: December 17, 2015

ATTORNEY FOR APPELLANT

Steve W. Canfil
55 Public Square, Suite 2100
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor
By: Melissa Riley
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

KATHLEEN ANN KEOUGH, P.J.:

{¶1} Defendant-appellant, William Smith, appeals the trial court's judgment denying his motion to suppress. For the reasons stated below, we affirm.

I. Background

{¶2} Smith and his girlfriend, Maureen McMullen, were indicted in a multicount indictment as follows:

> Count 1 — drug trafficking (hydrocodone) in violation of R.C. 2925.03(A)(2), with a one-year firearm specification and a forfeiture specification (scales);
>
> Count 2 — drug possession (marijuana) in violation of R.C. 2925.11(A), with a one-year firearm specification and a forfeiture specification;
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> Count 3 — drug trafficking in violation of R.C. 2925.03(A)(2), with a one-year firearm specification and a forfeiture specification;
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> Count 4 — carrying a concealed weapon in violation of R.C. 2923.12(A)(2), with a furthermore clause that it was loaded;
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> Count 5 — improperly handling a firearm in a motor vehicle in violation of R.C. 2923.16(H);
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> Count 6 — receiving stolen property (the gun) in violation of R.C. 2913.51(A);
>
> Count 7 — drug possession (cocaine) in violation of R.C. 2925.11(A), with a forfeiture specification, and
>
> Count 8 — possession of criminal tools in violation of R.C. 2923.24(A), with a furthermore clause that the handgun and scales were used in the commission of a felony and a forfeiture specification.

{¶3} Smith pleaded not guilty to the charges and filed a motion to suppress.

{¶4} At the suppression hearing, Cleveland police officer James Bellomy testified that on October 16, 2014, he and his partner responded to a complaint that a male driving a red Ford Fusion in the area of 12509 Bennington Avenue had pointed a gun at a woman as she drove by. The woman gave the officers the license plate number of the car and told them the car had heavy front-end damage.

{¶5} When the officers arrived at 12509 Bennington Avenue, they observed a car matching the victim's description parked in the driveway. Bellomy and his partner exited their patrol car and approached the car. They observed a male (later identified as Smith) in the driver's seat of the car and a woman (later identified as McMullen) in the front passenger seat. Bellomy testified that when they identified themselves as Cleveland police officers, both the male and female turned around to look at them, and then turned back around and began reaching in the center console area. Bellomy testified that based upon his experience, he presumed that the occupants of the car either had a weapon or were attempting to hide something.

{¶6} The officers drew their guns and told Smith and McMullen to raise their hands. Bellomy approached the driver's side of the car and asked Smith if he had a gun, which Smith denied. As Bellomy began opening the door, he looked through the car window and saw a gun on the floor between Smith's legs. Bellomy got Smith out of the car, handcuffed him, and advised him that he was under arrest for carrying a concealed weapon. The officers secured Smith and McMullen in the back of the patrol car, and then, due to Smith's arrest, Bellomy began processing the car for towing. During his

search of the car, Bellomy found drugs and scales with cocaine residue on them. A check of the handgun found between Smith's legs on the floor indicated the gun was stolen.

{¶7} Bellomy testified that as the police were giving commands, several people came out of the house next door and stood on the porch to watch. Bellomy said he determined "after the fact" that McMullen, the owner of the car, lived next door, but no one approached him as he prepared the car for towing and told him that the car could remain in the driveway instead of being towed.

{¶8} Bellomy identified state's exhibit No. 1 as the Cleveland police department's procedures regarding towing and releasing motor vehicles. He testified that procedure 1.E.6 provides that the police should conduct an inventory of any property in a vehicle prior to its towing in order to protect the public and the police department from false claims. Bellomy also identified state's exhibit No. 2 as Cleveland Cod. Ord. 405.02 regarding impounding vehicles. Bellomy testified that under Cleveland Cod. Ord. 405.02(g), police officers may impound vehicles "when any vehicle is left unattended due to the removal of an ill, injured, or arrested operator." The trial judge then noted that the police are also authorized under Cleveland Cod. Ord. 405.02(e) to tow a vehicle when the vehicle has been used in or is connected with the commission of any felony.

{¶9} Jeffrey Victor testified for the defense. He stated that he lives at 12509 Bennington and McMullen is his next-door neighbor. Victor said that he came out of his house when Smith pulled in his driveway, and had just sat down in the backseat of the

car, with his legs still outside the car and the door open, when the police came up to the car and asked him where the gun was. When he said he did not know, the police patted him down, and then searched Smith, McMullen, and the car. Victor said that the police never asked him if the car could stay in the driveway, which he said would not have been a problem, or if he wanted the car towed.

{¶10} At the conclusion of the hearing, the trial court denied the motion to suppress. The court found that Bellomy only inventoried the car after he arrested Smith. The court further found that Smith was arrested for carrying a concealed weapon in a vehicle, a fourth-degree felony, and that under Cleveland Cod. Ord. 405.02(e), police officers may tow a vehicle "when any vehicle has been used in or connected with the commission of * * * any felony." The trial court further found that police officers are not required to search out someone who wants to "babysit" the car of someone who has been arrested for a felony.

{¶11} Smith changed his plea to no contest, and the trial court found him guilty of all offenses and sentenced him to a four-year prison term. This appeal followed.

II. Analysis

{¶12} In his single assignment of error, Smith contends that the trial court erred in denying his motion to suppress the evidence found during the search of the car.

{¶13} Appellate review of a suppression ruling involves mixed questions of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. When ruling on a motion to suppress, the trial court serves as the trier of fact and is the

primary judge of the credibility of the witnesses and the weight of the evidence. *State v. Fanning*, 1 Ohio St.3d 19, 20, 437 N.E.2d 583 (1982). An appellate court must accept the trial court's findings of fact as true if they are supported by competent and credible evidence. *Burnside* at 154. The appellate court must then determine, without any deference to the trial court, whether the facts satisfy the applicable legal standard. *Id.*

{¶14} The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures. Searches conducted without a warrant are per se unreasonable, subject to a few "jealously and carefully drawn" exceptions. *State v. Smith*, 124 Ohio St.3d 163, 2009-Ohio-6426, 920 N.E.2d, 949, ¶ 10, citing *Jones v. United States*, 357 U.S. 493, 499, 78 S.Ct. 1253, 2 L.Ed.2d 1514 (1958).

{¶15} Inventory searches are a well-defined exception to the warrant requirement of the Fourth Amendment. *State v. Mesa*, 87 Ohio St.3d 105, 108, 717 N.E.2d 329 (1999). Inventory searches involve administrative procedures conducted by law enforcement officials and are intended to protect an individual's property while it is in police custody, protect the police against claims of lost, stolen, or vandalized property, and protect police from dangerous instrumentalities. *Id.* at 109. Because inventory searches are administrative caretaking functions unrelated to criminal investigations, the policies underlying the Fourth Amendment warrant requirement are not implicated. *Id.* Rather, the validity of an inventory search of a lawfully impounded vehicle is judged by the Fourth Amendment's standard of reasonableness. *Id.* "To satisfy the requirements of the Fourth Amendment, an inventory search of a lawfully impounded vehicle must be

conducted in good faith and in accordance with reasonable standardized procedure(s) or established routine." *State v. Hathman*, 65 Ohio St.3d 403, 407, 604 N.E.2d 743 (1992).

{¶16} In this case, there is ample evidence that the decision to conduct the inventory search of the vehicle was made in good faith and in accordance with the city of Cleveland's standardized procedure regarding such searches. Officer Bellomy testified that he followed standard police procedure in deciding to tow the vehicle, as well as in conducting the inventory search. He testified that under Cleveland Cod. Ord. 405.02(g), the police are authorized to tow a vehicle when the vehicle is left unattended due to the arrest of its operator. He testified that he decided to have the vehicle towed only after Smith was arrested. He testified further that he made arrangements to inventory the items in the vehicle consistent with police department procedures regarding towing a car after an arrest, which require the officers to conduct a LEADS check, which he did, and then require the police to inventory and remove any property from the vehicle prior to the tow. Bellomy identified state's exhibit No. 1 as the police department's written procedures for towing and releasing vehicles, and testified that he followed those procedures with respect to towing the vehicle Smith was in when he was arrested. Thus, Smith's argument that Bellomy "did not provide any insight into the Cleveland police department's policy, practice, or procedure when conducting an inventory search" after an arrest is without merit.

{¶17} Likewise, Smith's argument that the search was not reasonable because Bellomy admitted that he did not follow the procedure for towing vehicles from private

property is without merit. Under Cleveland Cod. Ord. 405.02(b), the police may impound a vehicle "[u]pon complaint of any person adversely affected, when any motor vehicle * * * has been left on private residential or agricultural property * * * for more than four hours without the permission of the person having the right to the possession of the property." Similarly, under 1.F.1 of the Cleveland police department's policy for vehicle towing, police officers may tow vehicles from private property "when the owner, manager or lessee of the private residential or private agricultural property complains that the vehicle has been parked on the premises of a minimum of four hours."

{¶18} That was not the situation here, however. Smith, the operator of the car, had been arrested. Pursuant to Cleveland Cod. Ord. 405.02(g), the police may tow a car after its operator has been arrested, and the police department's policy for such tows requires that the contents of the vehicle be inventoried and removed from the car prior to its tow. There is no requirement that the police must wait for a complaint from the private property owner before the police may lawfully impound a vehicle whose operator has been arrested.

{¶19} Nevertheless, Smith contends that the trial court erred in finding that the search was reasonable because it failed to consider that (1) Victor testified that the car could have remained in his driveway, and (2) leaving the car there would have been "much less trouble" for the police than ordering a tow and conducting an inventory search of the car. Whether it was "trouble" for the police to arrange for a tow after Smith's arrest is irrelevant to whether the inventory search was reasonable. Moreover, Cleveland

police department tow policy does not allow for anyone other than the owner of the car to take possession or move the vehicle, and McMullen, the owner of the car, was arrested with Smith. Thus, she was unable to take possession of the car or move it. Furthermore, even if someone else could have taken possession of the vehicle, the evidence demonstrated that no one, including Victor, approached Bellomy as he was preparing the car for tow to inform him that the car could remain in the driveway. We agree with the trial court that the police are not required to search out someone to take possession of an unattended vehicle after the operator of the vehicle has been arrested.

{¶20} Finally, Smith contends that the trial court erred in denying his motion to suppress because Bellomy's search of the vehicle did not meet the "automobile exception" to the Fourth Amendment's warrant requirement. Smith cites *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), as support for his argument.

{¶21} In *Gant*, the United States Supreme Court held than an officer may search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search or when it is reasonable to believe that the vehicle contains evidence relevant to the offense of arrest. *Id.* at 338. Smith contends that he was secured in the back of the zone car at the time of the search, and Bellomy had already taken possession of the gun related to his arrest for carrying a concealed weapon, so the search of the vehicle was unlawful under *Gant*.

{¶22} The holding in *Gant* is inapplicable to the facts of this case, however. *Gant* addressed a search incident to a lawful arrest, not the automobile exception to the Fourth Amendment's warrant requirement. Moreover, as the United States Supreme Court specifically recognized in *Gant*, "other established exceptions to the warrant requirement authorize a vehicle search under additional circumstances when safety or evidentiary concerns demand." *Id*. at 346. One such exception is an inventory search of a lawfully impounded vehicle, which is what occurred in this case.[1]

{¶23} Despite Smith's assertions otherwise, the evidence at the suppression hearing demonstrated that the search was done in good faith and the police complied with standard police procedure in searching the vehicle prior to its tow. Thus, the trial court did not err in denying the motion to suppress. The assignment of error is overruled, and the judgment is affirmed.

{¶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. The defendant's conviction having

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[1]The automobile exception referred to by Smith allows the warrantless search of an automobile where the search is based upon probable cause that the vehicle contains contraband, and exigent circumstances necessitate a search or seizure. *State v. Mills*, 62 Ohio St.3d 357, 367, 582 N.E.2d 972 (1992), citing *Chambers v. Maroney*, 399 U.S. 42, 51, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970). Because the police conducted a lawful inventory search, we need not address whether Smith and McMullen's movements toward the center console area of the vehicle after they saw the police approaching gave the police probable cause to search the car.

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.

KATHLEEN ANN KEOUGH, PRESIDING JUDGE

TIM McCORMACK, J., and
SEAN C. GALLAGHER, J., CONCUR