[Cite as *State v. Carson*, 2020-Ohio-3669.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 108876
v.	:	
SHANTIL CARSON,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED AND VACATED
RELEASED AND JOURNALIZED: July 9, 2020

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-18-634728-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Brandon A. Piteo, Assistant Prosecuting Attorney, *for appellee.*

Kevin M. Cafferkey, *for appellant.*

ANITA LASTER MAYS, P.J.:

{¶ 1} Defendant-appellant Shantil Carson ("Carson") appeals his convictions and ask this court to either vacate his convictions or remand to the trial court for a hearing on his motion to withdraw his plea. After a review of the record,

we reverse the trial court's decision to deny Carson's motion to suppress and vacate Carson's convictions.

{¶ 2} Carson pleaded no contest and was found guilty by the trial court of having weapons while under disability, a third-degree felony, in violation of R.C. 2923.13(A)(2); carrying a concealed weapon, a fourth-degree felony, in violation of R.C. 2923.12(A)(2); and trafficking with a firearm specification, a third-degree felony, in violation of R.C. 2925.03(A)(2). Carson was sentenced to one-year imprisonment for the firearm specification and 18 months' imprisonment for each count, to be served concurrently to each other, but consecutively to the firearm specification sentence, for an aggregate of 30 months' imprisonment.

I. Facts and Procedural History

{¶ 3} On August 28, 2018, in the late evening, Carson was sitting in the passenger seat of a vehicle that was located in the parking lot of an apartment complex. Officers Thomas Forester ("Officer Forester") and Gary Bartell ("Officer Bartell") approached the vehicle, and upon their approach, Officers Forester and Bartell turned on their body cameras. The audio and video reveal the officers approaching Carson as he sat in the vehicle looking down at his cell phone and smoking a cigarette.

{¶ 4} At the suppression hearing, Officer Forester testified that he and Officer Bartell, along with another officer-in-training, were patrolling the parking lot of an apartment complex when they observed several young men engaged in what

they thought was illegal gambling. As they approached the young men, they observed a young man on a bicycle next to a vehicle. Officer Forester testified that it appeared that the young man on the bicycle said something to Carson, who was sitting on the passenger side of the vehicle. Officer Forester testified that Carson appeared to be slumped over in the vehicle. (Tr. 42.)

{¶ 5} Officer Forester continued his testimony stating that when he locked eyes with Carson, it appeared that Carson was placing something on the floor. Officer Forester testified that he shined his flashlight inside of the vehicle and observed a glass vial wrapped in a plastic bag at Carson's feet. (Tr. 46.) Officer Forester stated that based upon his experience as a police officer, he knew this vial to contain PCP. After alerting the other officers of what he saw, Officer Forester testified that Officer Bartell took over with Carson, and Officer Forester went to speak with the man on the bicycle.

{¶ 6} Officer Bartell approached the passenger side of the vehicle where Carson was seated. Officer Bartell testified that he opened the passenger side door, retrieved the plastic bag from the floor, placed it on top of the vehicle, while speaking with Carson. Officer Bartell asked Carson to get out of the vehicle. Officer Bartell then placed Carson in handcuffs and searched the rest of the vehicle. (Tr. 84.) At this time, Officer Forester searched Carson and found a gun in his back, right pocket. *Id*. Carson was arrested that evening.

{¶ 7} After Carson's not guilty plea, Carson subsequently filed a motion to suppress the drug and gun evidence. After a hearing, the trial court denied Carson's motion and set the matter for trial. After several plea offers from the state, Carson agreed to plead no contest to the indictment. The court accepted Carson's plea, found Carson guilty, and sentenced him to prison. After sentencing, Carson filed a pro se motion to withdraw his plea. The trial court did not hold a hearing on Carson's pro se motion nor did the trial court issue a ruling on the motion.[1] A month after sentencing and filing the motion to withdraw the plea, Carson appealed the trial court's decision, and assigned two errors for our review:

> I. The trial court erred in denying appellant's motion to suppress; and
>
> II. The trial court erred and abused its discretion in denying appellant's motion to withdraw and/or vacate his plea without holding a hearing.

{¶ 8} We determine that assignment of error one is dispositive of the case, so we need not address assignment of error two. App.R. 12(C).

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[1] *See, e.g., State v. Wyley*, 8th Dist. Cuyahoga No. 102889, 2016-Ohio-1118, ¶ 9 ("when a criminal defendant is represented by counsel, a trial court may not entertain a pro se motion filed by the defendant").

II. Motion to Suppress

A. Standard of Review

{¶ 9} We review a trial court's ruling on a motion to suppress under a mixed standard of review.

> "In a motion to suppress, the trial court assumes the role of trier of fact and is in the best position to resolve questions of fact and evaluate witness credibility." *State v. Curry*, 95 Ohio App.3d 93, 96, 641 N.E.2d 1172 (8th Dist.1994). The reviewing court must accept the trial court's findings of fact in ruling on a motion to suppress if the findings are supported by competent, credible evidence. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. With respect to the trial court's conclusion of law, the reviewing court applies a de novo standard of review and decides whether the facts satisfy the applicable legal standard. *Id.*, citing *State v. McNamara*, 124 Ohio App.3d 706, 707 N.E.2d 539 (4th Dist.1997).

State v. Miller, 8th Dist. Cuyahoga No. 106946, 2018-Ohio-4898, ¶ 22.

B. Whether the Trial Court Erred in Denying Appellant's Motion to Suppress

{¶ 10} In Carson's first assignment of error, he argues that the trial court erred by denying his motion to suppress because the officers lacked probable cause to search his vehicle and person. "The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures. Ohio Constitution, Article I, Section 14, is nearly identical to its federal counterpart." *State v. Mathis*, 8th Dist. Cuyahoga No. 107986, 2019-Ohio-4887, ¶ 36, citing *State v. Kinney*, 83 Ohio St.3d 85, 87, 698 N.E.2d 49 (1998). "For a search or seizure to be reasonable under the Fourth Amendment, it must be based upon probable cause and executed pursuant to a warrant. *See Katz v. United States*, 389 U.S. 347,

88 S.Ct. 507, 19 L.Ed.2d 576 (1967)." *State v. Blevins*, 2016-Ohio-2937, 65 N.E.3d 146, ¶ 19 (8th Dist.).

{¶ 11} "Warrantless searches based on probable cause are per se unreasonable, unless they fall within one of the well-established exceptions." *State v. Jackson*, 8th Dist. Cuyahoga No. 105541, 2018-Ohio-2131, ¶ 13, citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). "Evidence obtained from an unreasonable search or seizure must be suppressed." *State v. Thompson*, 8th Dist. Cuyahoga No. 107999, 2020-Ohio-486, ¶ 10, citing *Mapp v. Ohio*, 367 U.S. 643, 651, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

> Generally, there must be "compelling reasons" or "exceptional circumstances" to justify an intrusion without a warrant. *McDonald v. United States*, 335 U.S. 451, 454, 69 S.Ct. 191, 193, 93 L.Ed. 153, 158 (1948). For example, the concept of exigency underlies the automobile exception to the warrant requirement. The inherent mobility of the automobile created a danger that the contraband would be removed before a warrant could be issued. *South Dakota v. Opperman*, 428 U.S. 364, 367, 96 S.Ct. 3092, 3096, 49 L.Ed.2d 1000, 1004. A warrantless search is also justified if there is imminent danger that evidence will be lost or destroyed if a search is not immediately conducted. *Cupp v. Murphy*, 412 U.S. 291, 294-296, 93 S.Ct. 2000, 2003-2004, 36 L.Ed.2d 900, 905-906.

State v. Moore, 90 Ohio St.3d 47, 52, 734 N.E.2d 804 (2000).

{¶ 12} "One well-known exception to the Fourth Amendment's warrant requirement is an investigative stop." *Thompson* at ¶ 11. An officer is permitted to conduct an investigative stop if the officer "has a reasonable suspicion, supported by specific and articulable facts and rational inferences from those facts, that the individual is engaged in criminal activity." *Id.* "Reasonable suspicion * * * requires

something more than an 'inchoate and unparticularized suspicion or hunch.'" *Cleveland v. Maxwell*, 8th Dist. Cuyahoga No. 104964, 2017-Ohio-4442, ¶ 19, citing *Terry v. Ohio*, 392 U.S. 1, 27, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Reviewing whether Officer Forester and Officer Bartell had a reasonable suspicion that Carson was engaged in criminal activity requires us to "consider the totality of the circumstances 'as viewed through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold.'" *Id.*, quoting *State v. Andrews*, 57 Ohio St.3d 86, 87-88, 565 N.E.2d 1271 (1991).

{¶ 13} In this case, after a review of the testimony and the body camera footage we find there was no reasonable suspicion that Carson was involved in illegal activity. At the suppression hearing, Officer Forester testified that initially the officers thought the men hanging out in the parking lot were involved in gambling. Then an officer "ride-along"[2] stated that there was something happening by a car. (Tr. 41.) They then observed a man on a bicycle on the passenger side of a vehicle. Officer Forester stated that the person in the vehicle "was very much so leaned back" and was not moving much. (Tr. 42.) That was the reason for their stop. Officer Forester clarified his statement by saying that Carson was, "[s]o, yeah, you could say slumped back, slumped forward, however it was, he was not moving, we were not sure what the instance or what the occasion the two had." (Tr. 43.) However, the video clearly shows Carson smoking a cigarette and viewing his cell phone. In fact,

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[2] A person just out of the academy on probation.

before the officers shined their flashlight on Carson, his actions can be clearly observed because of the light coming from the cell phone. Other than the men potentially gambling and Carson in the front seat of his vehicle, we find the officers did not articulate any reasonable suspicion they had that Carson was involved in illegal activity. Neither smoking a cigarette or looking at a cell phone can be deemed illegal or suspicious.

{¶ 14} Furthermore, on cross-examination Officer Forester testified as follows:

> Counsel: Let's go back to the video a bit more. So you're walking up. You're walking up to the car, what criminal activity is afoot at this point? What crime do you think is taking place?
>
> Forester: None.
>
> Counsel: So why are you approaching the car?
>
> Forester: To have a conversation with Mr. Carson.
>
> Counsel: Is this a traffic stop?
>
> Forester: No.
>
> Counsel: Because the car is not moving, correct?
>
> Forester: Correct.
>
> Counsel: It's parked?
>
> Forester: Yes.
>
> Counsel: Okay. So you're walking up. So it's a little blurry, but can you make out what's going on right there?

Forester: Mr. Carson sitting in his car.

Counsel: So what criminal activity is taking place at this point?

Forester: None.

(Tr. 61-62.)

{¶ 15} A review of Officer Forester's camera reveals the young man on the bicycle in front of the vehicle. The video clearly shows Carson in the passenger side of the vehicle. Carson is not slumped or still. Instead, Carson appears to be smoking a cigarette. Officer Forester turns around and when the camera focuses on Carson again, Carson is looking at his cell phone and smoking a cigarette. Carson is seated in the vehicle, with his knees very close to the glove compartment. The video shows the middle console and does not show the floor.

{¶ 16} At this point, there is no evidence that Carson has been involved in any criminal activity. There is no evidence that Carson was gambling, as the officers stated, and Carson is not slumped over or even unresponsive. *See, e.g., State v. Lanier*, 8th Dist. Cuyahoga No. 93375, 2011-Ohio-66, ¶ 12 ("The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search.").

{¶ 17} The state argues that the encounter between Carson and Officer Forester was consensual rather than an investigative stop or detention. "A consensual encounter occurs when the police approach a person in a public place, engage the person in conversation, and the person remains free to not answer or

walk away." (Internal citations omitted.) *State v. Haynesworth*, 8th Dist. Cuyahoga No. 107231, 2019-Ohio-1986, ¶ 19. "An officer may approach an individual in a street or other public place for the purpose of a consensual encounter." *State v. Blevins*, 2016-Ohio-2937, 65 N.E.3d 146, ¶ 25 (8th Dist.). Under this rule, a seizure has not occurred when an officer approaches a vehicle and questions its occupants. *Id.*, citing *State v. Boys*, 128 Ohio App.3d 640, 642, 716 N.E.2d 273 (1st Dist.1998), and *State v. Johnston*, 85 Ohio App.3d 475, 620 N.E.2d 128 (4th Dist.1993).

{¶ 18} Additionally, if the encounter is a consensual encounter, "'the individual must be free to terminate the consensual encounter or decline the officer's request.'" *Id.*, quoting *Florida v. Bostick*, 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991). Additionally,

> "[e]ncounters between the police and a citizen are consensual where the police merely approach an individual in a public place, engage the person in conversation, and request information. *U.S. v. Mendenhall*, 446 U.S. 544, 553, 100 S.Ct. 1870, 64 L.Ed.2d 497. There need be no objective justification for such an encounter. As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy and the protections of the Fourth Amendment are not implicated. *Id.* at 554." *State v. Brock*, 8th Dist. Cuyahoga No. 75168, 1999 Ohio App. LEXIS 5890.

State v. Johnson, 8th Dist. Cuyahoga No. 92540, 2009-Ohio-5377, ¶ 13.

{¶ 19} Officer Forester testified at different stages that his purpose in approaching Carson was to check on his well-being.

{¶ 20} However, according to the video, when Officer Forester approached Carson's vehicle, he immediately illuminated several compartments of the car with

his flashlight by looking through the window. Officer Forester did not initially engage in conversation with Carson. While keeping the light illuminated, Officer Forester walked to the driver side of the vehicle after seeing Carson lean forward and back. There is no evidence in the record that Officer Forester inquired of Carson's well-being while he was on the driver or passenger side of the vehicle. There is no evidence that Officer Forester engaged in any conversation with Carson.

{¶ 21} The evidence shows that Officer Bartell instructs Carson to put the cigarette and cell phone down. Carson throws the cigarette out of the window and places his hands on his lap. The video reveals that Officer Bartell did not inquire as to Carson's well-being. Officer Bartell reaches in the open window and unlocks the passenger side door. It is at this point that Officer Bartell uses the flashlight to search the floor of the vehicle while Carson is still seated. Officer Forester walks over to Officer Bartell, and Officer Bartell shows Officer Forester the bag and says, "PCP." Officer Bartell grabs the bag and places it on top of the vehicle. Officer Bartell instructs Carson to step out of the vehicle after asking Carson if he "has anything else illegal" on him, to which Carson replies, "no." Carson steps out of the vehicle, is handcuffed, and a gun is taken out of Carson's back pocket.

{¶ 22} As previously stated, Officer Forester testified that his encounter with Carson was a consensual encounter to check on Carson's well-being. (Tr. 62, 69.) During the trial court's analysis, it stated, "[s]o here the police officer testified that he approached the vehicle for a wellness check of the passenger, the passenger being

Mr. Carson." (Tr. 109.) Officer Forester thereafter went to the driver's side window, flashed his light into the vehicle and saw from his angle what he believed to be PCP. The trial court went on to state,

> There was never any indication or any contradiction through the testimony and evidence that this was anything but a consensual encounter. The defendant was not asked to step out. He was not asked to raise his hands. He was never detained. The police officers never had their flashing lights on. They never had a weapon against the defendant.

Id. The court then stated that the PCP was in plain view. (Tr. 110.)

{¶ 23} However, we find that the trial court's determination is not supported by the facts. After a review of the record, we find that this was not a consensual encounter. When Officer Forester approached Carson, he made eye contact as well as observed particular movement. The officers did not engage Carson in conversation or request information. Furthermore, Officer Forester testified that his was checking on Carson's well-being but never asks if Carson was okay or needed any help.

{¶ 24} Additionally, "the Fourth Amendment does not permit officers to stop, seize, or search any person without corroborating information that the person in question is presently involved in criminal activity." *Haynesworth*, 8th Dist. Cuyahoga No. 107231, 2019-Ohio-1986, at ¶ 43. *See also State v. McCord*, 8th Dist. Cuyahoga No. 93127, 2010-Ohio-1979, ¶ 12 ("where it is not a consensual encounter, the Fourth Amendment requires that the officers possess a reasonable and articulable suspicion that criminal activity is occurring."). There was no evidence

that Carson was engaged or involved in criminal activity before the officers conducted their search. Based upon our independent review of the record and the aforementioned body camera video recordings, we find that at the time the officers observed Carson in his vehicle, the officers did not possess a reasonable and articulable suspicion of criminal activity before initiating a search of the vehicle. At every instance of Officer Forester's testimony, he insisted that he was checking on Carson's well-being.

{¶ 25} Although we must accept the trial court's findings of fact in ruling on a motion to suppress, we must only do so if the findings are supported by competent, credible evidence. We find that the record does not support the trial court's findings of fact that the officers engaged Carson in a consensual encounter.

{¶ 26} As a result, we find that the trial court erred in denying Carson's motion to suppress. "Evidence is generally deemed inadmissible when law enforcement obtains the evidence in violation of the Fourth Amendment's prohibition against warrantless searches." (Internal citations omitted.) *State v. Mickey*, 8th Dist. Cuyahoga No. 82844, 2003-Ohio-6878, ¶ 12.

> "'[T]he exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search * * * but also evidence later discovered and found to be derivative of an illegality or 'fruit of the poisonous tree' * * * It 'extends as well to the indirect as [it does to] the direct products' of unconstitutional conduct.'"

State v. Harris, 8th Dist. Cuyahoga No. 84591, 2005-Ohio-399, ¶ 36, quoting *Segura v. United States*, 468 U.S. 796, 804, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984).

{¶ 27} Accordingly, the first assignment of error is sustained and dispositive of the case. Pursuant to App.R. 12(C), we will not address assignment of error two.

{¶ 28} Judgment is reversed and conviction vacated.

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.

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

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ANITA LASTER MAYS, PRESIDING JUDGE

LARRY A. JONES, SR., J., CONCURS;
MICHELLE J. SHEEHAN, J., CONCURS IN JUDGMENT ONLY