[Cite as *State v. Kay*, 2009-Ohio-4801.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF WAYNE	)	
STATE OF OHIO		C.A. No. 09CA0018
Appellant		
v.		APPEAL FROM JUDGMENT ENTERED IN THE
NOBLE T. KAY, III		COURT OF COMMON PLEAS COUNTY OF WAYNE, OHIO
Appellee		CASE No. 08-CR-0459

DECISION AND JOURNAL ENTRY

Dated: September 14, 2009

BELFANCE, Judge.

{¶1} The State of Ohio appeals the decision of the Wayne County Court of Common Pleas granting Defendant-Appellee Noble Kay's motion to suppress. For reasons set forth below, we affirm.

PROCEDURAL HISTORY

{¶2} Kay was indicted on seven charges stemming from two unrelated incidents. Counts one through four of the indictment, felonious assault, robbery, theft, and assault, relate to an incident that occurred on October 27, 2008, and counts five through seven, possession of cocaine, obstructing official business, and possession of drug paraphernalia, concern a traffic stop that occurred on October 23, 2008. It is unclear to this Court why the unrelated charges were joined.

{¶3} Kay filed a motion to suppress the evidence obtained by the police during the October 23, 2008 traffic stop, which the trial court granted following a hearing on the matter.

The State has timely appealed, raising a sole assignment of error, arguing the trial court erred in granting the motion to suppress.

MOTION TO SUPPRESS

{¶4} An appeal from a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶8. This Court must defer to the trial court's findings of fact as the trial court is in the best position to evaluate the evidence and determine the credibility of the witnesses. *State v. Kurjian*, 9th Dist. No. 06CA0010-M, 2006-Ohio-6669, at ¶10, citing *Ornelas v. United States* (1996), 517 U.S. 690, 699, and quoting *Akron v. Bowen*, 9th Dist. No. 21242, 2003-Ohio-830, at ¶5. A reviewing court accepts the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Metcalf*, 9th Dist. No. 23600, 2007-Ohio-4001, at ¶6. However, this Court will review the trial court's application of the law to the facts *de novo*. *Metcalf* at ¶6.

{¶5} After careful review of the record, we accept the trial court's findings of fact as they are supported by competent, credible evidence. See id. On October 23, 2008, around 8:30 in the evening, Officer Quinn McConnell of the Wooster Police Department followed a vehicle from what he described as a "known drug house." The vehicle's initial proximity to the "known drug house" is not further detailed. The occupants of the vehicle were Arthur Hambree, the driver, and Kay, the front seat passenger. After observing the vehicle make an improper turn, Officer McConnell initiated a traffic stop. Upon illuminating the interior of the vehicle with his spotlight, Officer McConnell noticed that the front seat passenger, Kay, was "moving his upper body around noticeably." Officer McConnell also indicated that Kay denied making such movements. Shortly thereafter, Patrol Sergeant Kristopher Conwill and Lieutenant Fisher arrived on the scene. Officer McConnell returned to his cruiser to check for outstanding

warrants on the occupants, check Hambree's driving status, issue a written warning to Hambree, and to call to request that Officer Brian Waddell bring his K9 partner to the scene for a drug sniff of the vehicle. Officer Waddell arrived while Officer McConnell was in the process of issuing the warning. The K9 walked around the vehicle and alerted at the driver-side door, indicating the presence of illegal drugs. The Officers requested that Hambree and Kay exit the vehicle. Hambree consented to a search of his person, which revealed no contraband. Kay refused to allow the Officers to search him and began to walk past the Officers. Kay was ordered to stop, which he did and proceeded back towards the Officers. Upon reaching the Officers, it appeared to the Officers that Kay was going to continue walking past them. Kay was then handcuffed and informed that he was under "investigative detention" until the completion of the traffic stop. The vehicle was searched and no contraband was found. Officers then informed Kay he would be searched. Kay refused and was held down by Officers as Sergeant Conwill searched him. Sergeant Conwill found a crack pipe in Kay's pocket.

{¶6} Kay argued in his motion to suppress that the evidence seized following the search of his person should be suppressed as the search was conducted without probable cause. Kay did not challenge the validity or duration of the traffic stop. The State argued at the suppression hearing that the Officers had probable cause to search Kay in light of the fact that Kay left a "known drug house," was known to the Officers as a drug offender, and the K9 alerted on the vehicle, but no drugs were found on Hambree or inside the vehicle. The State also argued at the suppression hearing that the search was a valid search incident to arrest.

{¶7} The only issue before us is whether the search of Kay's person was lawful. "The Fourth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, provides, 'The right of the people to be secure in their persons, houses,

papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'" *State v. Moore* (2000), 90 Ohio St.3d 47, 48-49. "Section 14, Article I of the Ohio Constitution, nearly identical to its federal counterpart, likewise prohibits unreasonable searches." Id. at 49. The Supreme Court of Ohio stated in *Moore*, that:

> "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. This requires a two-step analysis. First, there must be probable cause. If probable cause exists, then a search warrant must be obtained unless an exception to the warrant requirement applies. If the state fails to satisfy either step, the evidence seized in the unreasonable search must be suppressed." (Internal citations omitted.) Id.

{¶8} In its merit brief, the State argues that the police had probable cause to search Kay, that the search was incident to arrest, that exigent circumstances negated the warrant requirement, and that the discovery of the crack pipe was inevitable.

Probable Cause

{¶9} Probable cause has been defined as "'a reasonable ground for belief of guilt.'" Id., quoting *Carroll v. United States* (1925), 267 U.S. 132, 161. It means "more than bare suspicion: Probable cause exists where 'the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Brinegar v. United States* (1949), 338 U.S. 160, 175-176, quoting *Carroll*, 267 U.S. at 162. It "must be based upon objective facts that would justify the issuance of a warrant by a magistrate." *Moore*, 90 Ohio St.3d at 49. "A determination of probable cause is made from the totality of the circumstances. Factors to be considered include an officer's observation of some criminal behavior by the defendant, furtive or suspicious behavior, flight,

events escalating reasonable suspicion into probable cause, association with criminals and locations." *State v. White,* 9th Dist. No. 05CA0060, 2006-Ohio-2966, at ¶24, quoting *State v. Shull,* 5th Dist. No. 05-CA-30, 2005-Ohio-5953, at ¶20, citing *State v. Timson* (1974), 38 Ohio St.2d 122, syllabus. "These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. * * * The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." *Brinegar*, 338 U.S. at 176.

{¶10} As the validity and duration of the traffic stop were not challenged in the trial court, we begin our analysis at the point of the drug dog sniff of the vehicle. We note that a drug dog sniff of a vehicle is not a search within the meaning of the Fourth Amendment. *Illinois v. Caballes* (2005), 543 U.S. 405, 408-409; see, also, *United States v. Place* (1983), 462 U.S. 696, 707; *State v. Carlson* (1995), 102 Ohio App.3d 585, 594. Further, we have held that "once a trained drug dog alerts to the odor of drugs from a lawfully detained vehicle, an officer has probable cause to search the vehicle for contraband." *Carlson*, 102 Ohio App.3d at 600.

{¶11} Thus, under the facts of this case, the police had probable cause to search the vehicle following the drug dog's alert on the driver-side door of the vehicle, which was lawfully detained for a traffic stop. Before the police searched the vehicle, they asked Hambree, the driver, if he would consent to be searched. Hambree, although not required to do so, agreed. Officers found no contraband on Hambree's person. Kay refused to be searched, as was his right. The police detained Kay in handcuffs under an "investigatory detention," as they searched

the vehicle. Once again, no contraband was found. The police then held Kay down and searched him, during which time a crack pipe was discovered in Kay's pocket. Kay was not under arrest at the time the police conducted the search.

{¶12} The State urges us to conclude that probable cause existed justifying the search of Kay's person. We are not convinced.

{¶13} The State believes the following facts establish that the officers possessed probable cause to search Kay: the vehicle was seen leaving a "known drug house," Kay was seen moving his upper body noticeably, Kay appeared nervous, Kay was a known by the police for abusing drugs, and the fact that police found no contraband in the vehicle or on Hambree's person.

{¶14} While Officer McConnell did state that he followed the vehicle from a "known drug house," it is unclear exactly what this means. The record does not indicate if the vehicle was seen in the driveway, parked along the street, or just driving in the vicinity of this "known drug house." Moreover, there is no testimony that Kay or Hambree were seen exiting the "known drug house." Thus, the value of this fact is debatable at best. McConnell also testified that Kay was "moving his upper body around noticeably" when the vehicle was stopped. However, McConnell also indicated that Kay denied making such movements. There is also testimony by Sergeant Conwill that Kay appeared nervous and was breathing rapidly, and it is clear from the record that the Officers knew Kay as a drug offender. We do not believe that these facts are compelling either; most people are nervous when stopped by police, regardless of whether they have done anything wrong. Furthermore, the fact that a person has committed a drug-related crime in the past, does not lessen the probable-cause standard or necessitate a conclusion that probable cause existed to search Kay for drugs on the night in question merely

because the police knew Kay possessed drugs in the past. To sanction warrantless searches based almost entirely on past criminal conduct would grant police the authority to search any person with a prior criminal conviction at essentially anytime and would obliterate the protections afforded by the Fourth Amendment.

{¶15} The State places great weight on the following set of circumstances: (1) the dog alerted on the vehicle, (2) the search of the driver revealed no contraband, and (3) the search of the vehicle revealed no contraband. Taken together, the State argues that this chain of events logically leads to the conclusion that if the drugs were not found in the vehicle or on Hambree's person, they must be on Kay, and thus, the police had probable cause to search Kay. We find no merit to this process-of-elimination argument. If we were to agree with the State's reasoning, we would in effect eviscerate the protections afforded by the Fourth Amendment. "The overriding function of the Fourth Amendment is to 'protect personal privacy and dignity against unwarranted intrusion by the State.'" *Moore*, 90 Ohio St.3d at 51, quoting *Schmerber v. California* (1966), 384 U.S. 757, 767. The Supreme Court of the United States has held both that "probable cause to search a car did not justify a body search of a passenger [and that] * * * a search warrant for a tavern and its bartender did not permit body searches of all the bar's patrons." *Wyoming v. Houghton* (1999), 526 U.S. 295, 303, citing *United States v. Di Re* (1948), 332 U.S. 581 and *Ybarra v. Illinois* (1979), 444 U.S. 85. "Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be." *Yabarra*, 444 U.S. at 91.

{¶16} Under the totality of the circumstances we cannot conclude that the police had probable cause to believe that Kay was guilty of a drug-related offense. The police did not possess probable cause to believe Kay had drugs, they possessed probable cause to believe drugs would be found in the vehicle. A negative search of the vehicle does not necessitate the conclusion the drugs must therefore be with one of the occupants of the vehicle. The equally valid and possible conclusion is that the drug dog alerted to the residual odor of narcotics from past occupants of the vehicle or to drug particles too small to humanly detect. Thus, without something more than mere suspicion based largely on the police's familiarity with Kay, the police lacked probable cause to search Kay.

{¶17} We also disagree with the State's contention that our decision in *White* is controlling. We find the facts of *White* easily distinguishable from the facts of the instant appeal. In concluding the police had probable cause to search the defendant in *White* we stated:

> "In the present case, Appellant was first hesitant and deceptive with Officer Conwill about his identification. Then, upon realizing that the officers intended to conduct a dog sniff of the car, Appellant watched for an opportunity when Officer Waddell's back was turned and then made a furtive movement-reaching into his pocket in direct disregard of Officer Waddell's request that he keep his hands on the seat, in plain sight. Based on Appellant's conduct in response to police questioning and the impending dog sniff, Officer Conwill could reasonably suspect some criminality in regard to whatever Appellant was concealing in, or retrieving from, this particular pocket." (Internal citations omitted.) *White* at ¶25.

In the instant appeal, no argument has been made that either Hambree or Kay were deceptive or attempted to mislead the police as to their identities. And while Kay was seen by Officer McConnell making movements with his upper body upon being pulled over, Officer McConnell admits that Kay denied making such movements. Moreover, no one saw Kay put anything in, or remove anything from, his pockets. The record indicates that the vehicle occupants gave officers no trouble during the canine sniff of the vehicle. While Kay did walk away from the scene at one point, he stopped and walked back when instructed to do so by the Officers. When Kay

walked past the Officers in the other direction, the Officers did not tell Kay to stop, they simply grabbed him and handcuffed him. At the point in time that Kay was searched, the police had no more than a suspicion that Kay might have committed a drug-related offense. "In the name of investigating a person who is no more than suspected of criminal activity, the police may not carry out a full search of the person or of his automobile or other effects." *Florida v. Royer* (1983), 460 U.S. 491, 499.

Search Incident to Arrest

{¶18} The State next contends that the search of Kay's person was lawful as a valid search incident to arrest. "The right of the police to search incident to arrest is a well-established exception to the warrant requirement of the Fourth Amendment." *State v. Oliver*, 9th Dist. No. 24500, 2009-Ohio-2680, at ¶10. "Officers have probable cause to justify an arrest if 'from the information known to the arresting officers based on reasonably trustworthy information, a reasonably prudent person would be warranted in believing that the arrestee had committed or was committing an offense.'" Id., quoting *State v. Scott*, 9th Dist. No. 08CA009446, 2009-Ohio-672, at ¶ 11.

{¶19} Initially, we note that Kay was not under arrest at the time of the search. However, this does not necessarily foreclose the State's argument: "Where the formal arrest follow[s] quickly on the heels of the challenged search of [the] person, * * * it [is not] particularly important that the search preceded the arrest rather than vice versa." *Rawlings v. Kentucky* (1980), 448 U.S. 98, 111.

{¶20} The State makes two arguments that the search of Kay was a search incident to lawful arrest. First, the State argues that this Court should follow the precedent of the Tenth Circuit, and hold that when a drug dog alerts on a vehicle, it provides probable cause not only to

search the vehicle, but probable cause to arrest the occupants. See *United States v. Anchondo*, (C.A.10, 1998), 156 F.3d 1043, 1045-1046. We decline to do so. Further, given our analysis above, concluding that the police did not have probable cause to believe that Kay had committed a drug-related offense, we cannot conclude that the same set of facts would provide probable cause to arrest Kay for a drug-related offense.

{¶21} The State also contends that the police had probable cause to arrest Kay for either obstruction of official business in violation of R.C. 2921.31, for which Kay was later charged, or failure to comply with an order or signal of a police officer in violation of R.C. 2921.331. However, we need not determine whether probable cause existed to arrest Kay for either offense, as the record is devoid of evidence indicating when in time the arrest occurred following the search. The record is devoid of evidence providing a timeframe for Kay's arrest and the testimony of the witnesses at the suppression hearing does not even indicate that Kay was arrested. *Rawlings* indicates that a search preceding a warrantless arrest is justifiable if the arrest occurs close in time to the search. *Rawlings*, 448 U.S. at 111. Even before *Rawlings* was decided, the Sixth Circuit declared that "a search without a warrant may precede an arrest as long as it is substantially contemporaneous with the same and the arrest is based on probable cause and not on the results of the search." *United States v. Lucas* (C.A.6, 1966), 360 F.2d 937, 938. "Generally, at a suppression hearing, the state bears the burden of proving that a warrantless search or seizure meets Fourth Amendment standards of reasonableness." *Maumee v. Weisner* (1999), 87 Ohio St.3d 295, 297. As the State offered no evidence that Kay was arrested and that the police's search of Kay's person occurred contemporaneously with his arrest, we cannot conclude that the search was reasonable.

Exigent Circumstances & Inevitable Discovery

{¶22} The State next alleges that the search of Kay's person was justified based upon exigent circumstances and upon the fact that *if* police had decided to lawfully conduct a *Terry* search of Kay, the discovery of the crack pipe would have been inevitable under the "plain feel" doctrine. However, we do not reach the merits of the State's arguments as the State did not raise these arguments in the trial court. See *State v. Standen*, 9th Dist. No. 07CA009123, 2007-Ohio-5477, at ¶16 ("Because the state failed to raise this argument below, we decline to consider it.").

JURISDICTION UPON FILING OF A NOTICE OF APPEAL

{¶23} Finally we note that as we reviewed the record of this case, it became immediately apparent that the trial court continued to adjudicate the case after the State filed its notice of appeal, despite the fact that the charges were made under a single indictment, there was no motion or request to sever, and the trial court did not expressly sever the matter on appeal from the remaining charges. "An appeal is perfected upon the filing of a written notice of appeal. R.C. 2505.04. Once a case has been appealed, the trial court loses jurisdiction except to take action in aid of the appeal." *In re S.J.*, 106 Ohio St.3d 11, 2005-Ohio-3215, at ¶9. An adjudication conducted by a court without jurisdiction is void. Id. at ¶15. Thus, the trial court was without jurisdiction to proceed with the action once the State filed its appeal, and as such its actions following perfection of the appeal, including the trial court's judgment of conviction, are void. Id. at ¶¶9,15.

CONCLUSION

{¶24} In light of the foregoing, we affirm the judgment of the Wayne County Court of Common Pleas granting Kay's motion to suppress. Additionally, the trial court's judgment of conviction is a nullity as it is void.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

EVE V. BELFANCE
FOR THE COURT

MOORE, P. J.
CONCURS

CARR, J.
CONCURS, IN PART, AND DISSENTS, IN PART, SAYING:

{¶25} I agree under the circumstances here that the evidence should have been suppressed. Dog alerting on a vehicle, by itself, was not sufficient to establish the probable cause required to conduct a search of Kay's person. However, dog alerting on a vehicle, coupled with other factors, may be sufficient to establish probable cause to conduct a search on a person depending on the circumstances. Furthermore, police may have placed Kay under arrest for obstruction of official business and then conducted a lawful search incident to arrest. Here, however, police searched Kay based on the dog alert and not incident to arrest.

{¶26} I respectfully dissent in regard to the majority's holding that the trial court was without jurisdiction to dispose of the remaining charges against Kay which were unrelated to the motion to suppress. Under Crim.R. 14, trial courts possess the inherent authority to "order an election or separate trial of counts, grant a severance of defendants, or provide such relief as justice requires." The trial court's decision to resolve the remaining counts in the indictment amounted to an implicit severance of the counts in the indictment. The four counts which were disposed of by the trial court stemmed from the October 27, 2008 incident and were unrelated to the subject matter of the State's appeal to this Court. Neither party objected to the trial court proceeding in this manner. Therefore, I disagree with the majority's holding that Kay's assault conviction is void for want of jurisdiction.

APPEARANCES:

MARTIN FRANTZ, Prosecuting Attorney, and LATECIA E. WILES, Assistant Prosecuting Attorney, for Appellant.

CLARKE W. OWENS, Attorney at Law, for Appellee.