[Cite as *State v. Williams*, 2009-Ohio-6955.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. GREGORY R. WILLIAMS Appellant	C. A. No. 24731 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 08 05 1475(B)

DECISION AND JOURNAL ENTRY

Dated: December 31, 2009

DICKINSON, Judge.

INTRODUCTION

{¶1} When Officer Roy Cunningham ran the temporary tag of a sport-utility vehicle that was exiting the highway in front of him, it came back to a different vehicle. He stopped the vehicle and ran its vehicle identification number, which came back as registered to Gregory Williams, a passenger in it. Mr. Williams told the officer that he had recently transferred the vehicle to his girlfriend. As Officer Cunningham was talking to Mr. Williams, he saw some cigar wrappers with tobacco in them in the vehicle. Suspecting that the cigars had been hollowed out and filled with marijuana, he asked if he could search the vehicle. The driver deferred to Mr. Williams, who, initially, said no. After the officer told Mr. Williams that he would not be arrested if there was only a small amount of marijuana or an open container of beer in the vehicle, Mr. Williams consented to the search. The officer found a bag of cocaine on the driver's side of the vehicle, in the headliner near where it meets the windshield. Mr. Williams

moved to suppress the cocaine, but the trial court denied his motion. A jury found him guilty of possession of cocaine, open container, and use of unauthorized plates. This Court affirms in part because the trial court correctly denied Mr. Williams's motion to suppress, and his possession of cocaine conviction is supported by sufficient evidence and is not against the manifest weight of the evidence. This Court reverses his conviction for use of unauthorized plates.

FACTS

{¶2} As Officer Cunningham was exiting Interstate 271 onto State Route 8, he ran the temporary tag of a Chevrolet Tahoe sport-utility vehicle that was in front of him. When the tag came back to a Saturn sedan, he initiated a traffic stop. He approached the vehicle and asked the driver, Nemon Hobbs, for his license and the vehicle's registration. Mr. Williams was in the passenger seat.

{¶3} According to Officer Cunningham, while he was looking into the vehicle, he saw cellophane cigar wrappers that had a lot of tobacco in them, more than would usually be left behind when the cigar was removed. He said it was an indicator that the cigars had been hollowed out and the tobacco replaced with marijuana. He, therefore, suspected that there was marijuana in the vehicle.

{¶4} Mr. Hobbs and Mr. Williams were unable to produce the vehicle's registration, so Officer Cunningham ran its vehicle identification number instead. He learned that the vehicle was registered to Mr. Williams and that a permanent license plate existed for the vehicle. The permanent license plate was not on the vehicle at the time of the stop, only the temporary tag. According to Officer Cunningham, Mr. Williams told him that he had "transferred the vehicle to his girlfriend because his license was suspended, and that's why the temporary tag was on the vehicle." Officer Cunningham had Mr. Williams sit in his patrol car while he tried to determine

whether the temporary tag was fictitious or whether the Bureau of Motor Vehicles had made a mistake.

{¶5} After about thirty minutes, the officer was unable to resolve the inconsistency. He let Mr. Williams exit his patrol car, but asked him and Mr. Hobbs if he could search their vehicle. Mr. Hobbs deferred to Mr. Williams, who said no. Officer Cunningham explained that he expected to find marijuana and that he would only issue a ticket if the quantity was small. Mr. Williams then volunteered that there was an open container of beer in the vehicle. After Officer Cunningham explained that the open container would also be "just a ticket," Mr. Williams said he could search the vehicle. As Officer Cunningham searched it, he found the open container of beer. He also "found a loose spot above the driver's seat directly above the steering wheel in the headliner where the windshield meets the inside roof . . . ." Inside the headliner, he found a plastic bag containing an off-white substance that appeared to be crack cocaine.

{¶6} The Grand Jury indicted Mr. Williams for possession of cocaine, open container, and use of unauthorized plates. Mr. Williams moved to suppress the evidence found during the search of the vehicle, arguing that Officer Cunningham did not have any reason to detain him after he was unable to resolve the temporary tag issue. The trial court denied his motion, concluding that, because Officer Cunningham had probable cause to arrest Mr. Williams and Mr. Hobbs for operating a vehicle with a fictitious plate, "he had ab fortiori grounds to detain [them] for the brief period required to ask for their consent to search . . . ." A jury convicted him on all three counts, and he has appealed, assigning three errors.

MOTION TO SUPPRESS

{¶7} Mr. Williams's first assignment of error is that the trial court incorrectly denied his motion to suppress. A motion to suppress evidence presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St. 3d 152, 2003-Ohio-5372, at ¶8. A reviewing court "must accept the trial court's findings of fact if they are supported by competent, credible evidence." *Id*. But see *State v. Metcalf*, 9th Dist. No. 23600, 2007-Ohio-4001, at ¶14 (Dickinson, J., concurring). The reviewing court "must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *Burnside*, 2003-Ohio-5372, at ¶8.

{¶8} Before a defendant can challenge the search of a vehicle as unconstitutional, he must establish that he had a reasonable expectation of privacy in the areas searched. *Rakas v. Illinois*, 439 U.S. 128, 148-49 (1978). In *Rakas*, the United States Supreme Court held that the passenger of an automobile, who does not assert a property or possessory interest in the vehicle, does not have a reasonable expectation of privacy in its glove box or the area under his seat. *Id*. at 148. Officer Cunningham testified that, when he ran the vehicle's identification number, it came back as registered to Mr. Williams. Mr. Williams, therefore, would appear to have a reasonable expectation of privacy in the vehicle. According to Mr. Williams, however, he was merely "a passenger in his girlfriend's automobile, which was being driven by his friend." Appellant's Brief at 2. He told Officer Cunningham the same thing at the time of the stop.

{¶9} It is not necessary to resolve whether Mr. Williams forfeited his right to claim a reasonable expectation of privacy in the vehicle's headliner because the Ohio Supreme Court has determined that, even if a passenger does not have a reasonable expectation of privacy in a vehicle, he may challenge the legality of a traffic stop "because when the vehicle is stopped, [he

is] equally seized, and [his] freedom of movement is equally affected." *State v. Carter*, 69 Ohio St. 3d 57, 63 (1994). If a traffic stop is unlawful under the Fourth Amendment, a passenger may move to suppress any evidence that is found in the vehicle that is the fruit of the stop. *Id*.

{¶10} Mr. Williams, however, has conceded that the initial stop of the vehicle was lawful. His argument is that, after Officer Cunningham finished investigating the temporary tag issue, he should have let him and Mr. Hobbs go. According to Mr. Williams, Officer Cunningham did not have reasonable suspicion of other criminal activity to justify further detaining them.

{¶11} "[I]f circumstances attending an otherwise proper stop should give rise to a reasonable suspicion of some other illegal activity, different from the suspected illegal activity that triggered the stop, then the vehicle and the driver may be detained for as long as that new articulable and reasonable suspicion continues, even if the officer is satisfied that the suspicion that justified the stop initially has dissipated." *State v. Myers*, 63 Ohio App. 3d 765, 771 (1990). If, however, the "police officer's objective justification to continue detention of a person stopped for a traffic violation for the purpose of searching the person's vehicle is not related to the purpose of the original stop, and . . . that continued detention is not based on any articulable facts giving rise to a suspicion of some illegal activity justifying an extension of the detention, the continued detention to conduct a search constitutes an illegal seizure." *State v. Robinette*, 80 Ohio St. 3d 234, paragraph one of the syllabus (1997).

{¶12} Officer Cunningham testified that, as he was talking to Mr. Hobbs and Mr. Williams at the vehicle, he saw some miniature cigar wrappers on the seat and floor. He said that "there was a lot of tobacco left in the wrappers, more than that would normally [be] left behind just by removing the cigar." According to Officer Cunningham, the quantity of tobacco

in the wrappers was "an indicator that the cigars have been hollowed and replaced with marijuana." He also said that it had been his "experience in the past many times when I have seen that I found marijuana in the vehicle."

{¶13} Ohio case law contains many references to "blunts," cigars from which the tobacco has been removed and replaced with marijuana. See, e.g., *State v. Brown*, 100 Ohio St. 3d 51, 2003-Ohio-5059, at ¶2 (noting that the defendants had "smoked marijuana in 'blunts,' which are cigars that have been cut open, emptied of tobacco, and filled with marijuana."); *State v. Williams*, 9th Dist. No. 23176, 2007-Ohio-622, at ¶5 ("[O]fficers discovered what they believed to be a marijuana 'blunt'–a hollowed-out cigar containing marijuana."). This Court concludes that, in light of Officer Cunningham's observation of an atypical amount of tobacco in the cigar wrappers, his knowledge that cigars are sometimes hollowed out to hold marijuana, and his experience of having found illegal drugs inside vehicles under similar circumstances, he had reasonable suspicion to continue his investigation of the vehicle after he was unable to resolve the temporary tag issue.

{¶14} The United States Supreme Court has held that "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Florida v. Royer*, 460 U.S. 491, 500 (1983). Officer Cunningham said that, after he let Mr. Williams out of his patrol car, he asked Mr. Hobbs if he could search the vehicle. Mr. Hobbs said he did not care, but he deferred to Mr. Williams, who refused consent. Officer Cunningham explained to them that he expected to find marijuana in the car and that, if it was only a small amount, it would be just a ticket and then they could be on their way. At that point, Mr. Williams said there was an

open container of beer in the vehicle. Officer Cunningham told Mr. Williams that the open container would also be just a ticket. The officer suggested that, if that was all Mr. Williams was worried about, then Mr. Williams would not mind if he looked around. Mr. Williams then consented to the search of the vehicle. This Court concludes that the brief exchange Officer Cunningham had with Mr. Williams before Mr. Williams consented to a search of the vehicle was "sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." *Id*.

{¶15} Mr. Williams has also argued that his consent was not voluntary. Although "evidence obtained in a warrantless search is generally inadmissible . . . 'one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.'" *State v. Posey*, 40 Ohio St. 3d 420, 427 (1988) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973)). "[T]he state must show by 'clear and positive' evidence that the consent was 'freely and voluntarily' given." *Id*. (quoting *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968)). "[W]hether consent to a search was voluntary or the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances." *State v. Roberts*, 110 Ohio St. 3d 71, 2006-Ohio-3665, at ¶99. "Among the circumstances to be considered are the length of the detention, the repeated and prolonged nature of the questioning, and the use of physical punishment." *State v. Dettling*, 130 Ohio App. 3d 812, 815-16 (1998).

{¶16} Mr. Williams has argued that this case is similar to *State v. Robinette*, 80 Ohio St. 3d 234 (1997). In *Robinette*, the Ohio Supreme Court held that, if "an individual has been unlawfully detained by law enforcement, for his or her consent to be considered an independent act of free will, the totality of the circumstances must clearly demonstrate that a reasonable

person would believe that he or she had the freedom to refuse to answer further questions and could in fact leave." *Id*. at paragraph three of the syllabus. *Robinette* is distinguishable because the defendant in that case was unlawfully detained at the time he gave permission to search his car. *Id*. at 241. In this case, because Officer Cunningham had reasonable suspicion that there was marijuana in the vehicle, his detention of Mr. Hobbs and Mr. Williams beyond the initial traffic stop was lawful.

{¶17} Having reviewed the totality of the circumstances, this Court concludes that Mr. Williams's consent was voluntary. The facts establish that Mr. Williams knew he could refuse consent. There is no evidence that Officer Cunningham misled or deceived Mr. Williams when he told Mr. Williams what he thought he would find in the vehicle and what the consequences would be. There is also no evidence that Officer Cunningham did or said anything to expressly or impliedly coerce Mr. Williams. The trial court, therefore, correctly denied Mr. Williams's motion to suppress. Mr. Williams's first assignment of error is overruled.

POSSESSION OF COCAINE

{¶18} Mr. Williams's second assignment of error is that there was insufficient evidence to support his conviction for possession of cocaine, and that his conviction is against the manifest weight of the evidence. Whether a conviction is supported by sufficient evidence is a question of law that this Court reviews de novo. *State v. Thompkins*, 78 Ohio St. 3d 380, 386 (1997); *State v. West*, 9th Dist. No. 04CA008554, 2005-Ohio-990, at ¶33. This Court must determine whether, viewing the evidence in a light most favorable to the prosecution, it could have convinced the average finder of fact of Mr. Williams's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St. 3d 259, paragraph two of the syllabus (1991). When a defendant argues that his conviction is against the manifest weight of the evidence, however, this Court "must review

the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Otten*, 33 Ohio App. 3d 339, 340 (1986). "Inasmuch as a court cannot weigh the evidence unless there is evidence to weigh," this Court will consider his sufficiency argument first. *Whitaker v. M.T. Automotive Inc.*, 9th Dist. No. 21836, 2007-Ohio-7057, at ¶13.

{¶19} Mr. Williams was convicted of violating Section 2925.11 of the Ohio Revised Code. Section 2925.11(A) provides that "[n]o person shall knowingly obtain, possess, or use a controlled substance." Section 2925.01(K) defines "possession" as "having control over a thing or substance . . . ." It may be individual or joint. *State v. Gibson*, 9th Dist. No. 18540, 1998 WL 225037 at *2 (May 6, 1998). It may be actual or constructive. *State v. McShan*, 77 Ohio App. 3d 781, 783 (1991). Constructive possession is demonstrated if drugs are in a defendant's dominion or control. *State v. Wolery*, 46 Ohio St. 2d 316, 329 (1976); *McShan*, 77 Ohio App. 3d at 783. The State may prove dominion and control through circumstantial evidence. See *State v. Jenks*, 61 Ohio St. 3d 259, 272 (1991). Possession, however, "may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found." R.C. 2925.01(K).

{¶20} Officer Cunningham said that, when he ran the vehicle's identification number, it came back as registered to Mr. Williams. Even if Mr. Williams did transfer the vehicle to his girlfriend, because he recently owned it, it would be reasonable to infer that he knew about the loose spot in the headliner. At the time of the traffic stop, he was sitting in the front passenger seat, in close proximity to where the cocaine was found. Although the bag was immediately

above where Mr. Hobbs was sitting, there was circumstantial evidence from which the jury could have found that they had joint constructive possession of it. Accordingly, to the extent Mr. Williams has argued that his possession of cocaine conviction is not supported by sufficient evidence, it is overruled.

{¶21} Regarding whether his conviction is against the manifest weight of the evidence, Mr. Williams has argued that, since he did not own the vehicle, someone else could have placed the cocaine in the headliner. Officer Cunningham also testified that, when he booked Mr. Hobbs, he discovered two pieces of a clear plastic bag in one of his socks. On one of the pieces there was a white powdery residue that tested positive for cocaine, suggesting that Mr. Hobbs had handled the bag of cocaine.

{¶22} The jury was entitled to reject what Mr. Williams told Officer Cunningham about who owned the vehicle. In addition, just because Mr. Hobbs had pieces of a plastic bag in his sock, does not mean that he and Mr. Williams did not have joint possession of the bag of cocaine. Having reviewed and weighed all the evidence that was before the trial court, this Court cannot say that the jury lost its way and created a manifest miscarriage of justice when it found that Mr. Williams knowingly possessed the cocaine that was found inside the vehicle that was registered to him. To the extent Mr. Williams's assignment of error is that his conviction is against the manifest weight of the evidence, it is overruled.

INVALID LICENSE PLATE

{¶23} Mr. Williams's third assignment of error is that the trial court incorrectly denied his motion for acquittal on the fictitious plate charge. The State has conceded that his conviction under Section 4549.08 of the Ohio Revised Code "is improper and will consent to a discharge on that offense." Mr. Williams's third assignment of error is sustained.

CONCLUSION

{¶24} The trial court correctly denied Mr. Williams's motion to suppress. His conviction of possession of cocaine is supported by sufficient evidence and is not against the manifest weight of the evidence. His conviction of operating a motor vehicle bearing an invalid license plate is vacated. The judgment of the Summit County Common Pleas Court is affirmed in part and reversed in part, and this matter is remanded for further proceedings consistent with this opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

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 Summit, 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 both parties equally.

CLAIR E. DICKINSON
FOR THE COURT

MOORE, P. J.
CONCURS, SAYING:

{¶25} I agree with the judgment of the majority. However, I write separately to express my concern about the manner in which the officer obtained consent to search.

{¶26} As the majority notes, the State bore the burden to prove that the consent in this case was voluntarily given. This question is a finding of fact for the trial court to determine based upon the totality of the circumstances. *Roberts*, 110 Ohio St.3d at ¶99. I recognize that due to our standard of review, we are limited to determining that the trial court's findings of fact are supported by some competent, credible evidence. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶8. I agree with the majority that a review of the record reveals that the trial court's finding that the State satisfied its burden to prove that the consent was voluntarily given was supported by competent, credible evidence. Officer Cunningham testified that when asked if he could search the car, Williams consented. My concern, however, stems from the tactics used by police to gain consent after Williams had denied consent to search.

{¶27} When the State premises a warrantless search on consent, the State must show that the consent was voluntarily given and not the result of, among other things, coercion, express or implied. *Bustamonte*, 412 U.S. at 248. In the instant case, Williams initially denied Officer Cunningham consent to search his vehicle. It was only after Officer Cunningham's repeated questions regarding the potential results of the search that Williams consented. Notably, Officer Cunningham testified that he

> "told him that I was just trying to get him on their way, that if he was worried, I expect to find marijuana in the vehicle, and I said that if all there was a personal amount of marijuana, it was just a traffic ticket. At that point Mr. Williams informed me that there was an open container of beer in the vehicle, and I asked him if that's all he was worried about, and he said yes. I asked him again if he

> would consent to a search then if that's all he was worried about, and at that point he consented to the search."

{¶28} He explained that he informed Williams that an open-container violation was a minor misdemeanor and was just a ticket. I would agree with the majority that this testimony does not reach the level of coercion, but I feel compelled to caution that an unauthorized promise of leniency can be viewed, under the totality of the circumstances to be implied coercion, and therefore, consent given because of certain promises would not be voluntary. *State v. Kovacs* (Oct. 15, 1992), 8th Dist. No. 61079. Likewise, repeated requests for consent after an individual has refused consent, could, in certain circumstances, be construed as a coercive tactic, therefore vitiating consent. However, because I conclude that the trial court's finding that the consent in this case was voluntary is supported by some competent, credible evidence, I concur with the majority opinion.

CARR, J.
CONCURS, BUT WRITES SEPARATELY, SAYING:

{¶29} I concur in the judgment but I write separately to emphasize that I join in the concerns expressed by Judge Moore in her separate concurrence.

APPEARANCES:

LAURA A. GROZA, attorney at law, for appellant.

SHERRI BEVAN WALSH, prosecuting attorney, and RICHARD S. KASAY, assistant prosecuting attorney, for appellee.