[Cite as *State v. McCall*, 2010-Ohio-4283.]

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

STATE OF OHIO Appellee v. KOAL B. MCCALL Appellant	C.A. No. 09CA009729 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 06CR072079

DECISION AND JOURNAL ENTRY

Dated: September 13, 2010

BELFANCE, Presiding Judge.

{¶1} Defendant-Appellant Koal B. McCall appeals the ruling of the Lorain County Court of Common Pleas which denied his motion to suppress. For the reasons set forth below, we affirm.

BACKGROUND

{¶2} On the evening of October 8, 2006, Officer Cory[1] Earl of the Lorain Police Department was near Shak's Corner gas station, parked in an unmarked car, performing surveillance in the area due to numerous complaints of open drug trafficking. Officer Earl observed a man pull into Shak's Corner, park on the side of the building and get out of the vehicle. The man proceeded to unzip his pants and urinate. According to Officer Earl, the man's penis was exposed to people in the parking lot and oncoming traffic. Officer Earl recognized the man as McCall, as Officer Earl had previously arrested McCall for drug offenses.

{¶3} Officer Earl pulled into the parking lot, walked up behind McCall, and proceeded to arrest him for public indecency. During a search incident to arrest, Officer Earl discovered a plastic baggie containing what was determined to be crack cocaine.

{¶4} McCall was indicted on one count of possession of cocaine in violation of R.C. 2925.11(A), a fifth-degree felony, one count of possession of drug paraphernalia in violation of R.C. 2925.14(C)(1), a fourth-degree misdemeanor, and one count of public indecency in violation of R.C. 2907.09(A)(1), a fourth-degree misdemeanor. Subsequently, a supplemental indictment was issued, adding a charge of possession of cocaine in violation of R.C. 2925.11(A), a felony of the second degree.

{¶5} McCall filed a motion to suppress asserting that the police did not have probable cause or reasonable suspicion to detain him. The State responded and thereafter McCall filed an amended motion to suppress. Before a hearing was held on McCall's motion, he entered a guilty plea. Prior to sentencing, however, McCall filed a motion to withdraw his plea which the trial court granted.

{¶6} The trial court held a hearing on McCall's motion to suppress. The trial court denied the motion, concluding that Officer Earl "had a reasonable belief that a violation of R.C. 2907.09(A)(1), a fourth degree misdemeanor, was being committed. Thus, the arrest was supported by probable cause and was therefore lawful."

{¶7} Thereafter, McCall entered a plea of no contest and was sentenced to an aggregate term of two years in prison. The trial court found the two possession charges to be allied offenses and thus sentenced McCall on only one of them. McCall has appealed, raising one assignment of error for our review.

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[1] Officer Earl's first name is spelled both "Cory" and "Corey" throughout the record. For

MOTION TO SUPPRESS

{¶8} McCall argues in his sole assignment of error that the trial court erred in denying his motion to suppress. He contends that he was unlawfully arrested and thus the subsequent search of his person was unlawful as well. McCall asserts that at best, Officer Earl observed a minor misdemeanor, and therefore could not legally arrest McCall. Specifically, McCall maintains that what Officer Earl observed, urinating in public, did not amount to public indecency.

{¶9} 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. Id. That is to say that this Court will determine whether "the facts [found by the trial court] meet the appropriate legal standard." (Internal quotations and citations omitted.) *State v. McCoy*, 9th Dist. No. 08CA009329, 2008-Ohio-4947, at ¶4.

{¶10} In general, "[i]n order to effectuate an arrest, the arresting officer must have probable cause to believe that the person to be arrested is engaging in criminal activity." *State v.*

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simplicity, we will use the spelling "Cory."

McGinty, 9th Dist. No. 08CA0039-M, 2009-Ohio-994, at ¶11. With respect to misdemeanor offenses, the Supreme Court of Ohio has stated that:

> "[p]olice officers in Ohio, under R.C. 2935.03, have authority to arrest and detain persons found violating the laws of this state, or ordinances of municipal corporations, until a warrant can be obtained. This language, 'found violating,' has been interpreted to authorize a warrantless arrest for misdemeanor only where the offense has been committed in the officer's presence." *State v. Matthews* (1976), 46 Ohio St.2d 72, 75-76, quoting R.C. 2935.03(A)(1); but, see, *State v. Reymann* (1989), 55 Ohio App.3d 222, 224 (concluding "an exception exists where, from the surrounding circumstances, including admissions by the defendant, the officer is able to reasonably conclude that an offense has been committed.").

Furthermore, with respect to minor misdemeanors, unless certain enumerated circumstances exist, police cannot arrest an individual for committing a minor misdemeanor. See R.C. 2935.26(A).

{¶11} "Probable cause exists where the facts and circumstances known to the officer at the time were 'sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.'" *State v. Waterhouse* (Feb. 22, 1995), 9th Dist. No. 16903, at *1, quoting *Beck v. Ohio* (1964), 379 U.S. 89, 91. Such a determination is based upon the totality of the circumstances. *Waterhouse*, at *1.

> "What is required for a valid warrantless arrest is not that the officer have absolute knowledge that a misdemeanor is being committed in the sense of possessing evidence sufficient to support a conviction after trial, but, rather, that he be in a position to form a reasonable belief that a misdemeanor is being committed, based upon evidence perceived through his own senses." (Internal quotations and citations omitted.) *Reymann*, 55 Ohio App.3d at 224.

{¶12} In the instant case, McCall asserts that what Officer Earl observed was only a minor misdemeanor, namely disorderly conduct, see R.C. 2917.11(E)(2), and did not amount to public indecency, which is a misdemeanor of the fourth degree, see R.C. 2907.09(C)(2); therefore, Officer Earl lacked probable cause to arrest McCall. If McCall is correct in his

argument, any evidence discovered during the search incident to arrest should have been excluded. See *Mapp v. Ohio* (1961), 367 U.S. 643, 655-656.

{¶13} The trial court summarized the facts of the case in its statement of the case as follows:

> "On October 8, 2006 Officer Cor[]y Earl of the Lorain Police Department was on surveillance near the parking lot of Shak's Corner at 2209 W. 21st Street in Lorain. Officer Earl observed [McCall] arrive in his vehicle, exit the vehicle, and begin to urinate in the parking lot. Officer Earl recognized [McCall] as he had previously arrested [McCall] for drug possession. Officer Earl observed [McCall] to be urinating near the front of his vehicle which was parked on the west side of the building, but viewable from the street. Officer Earl testified that [McCall] turned towards the officer while still urinating and exposed his penis to the officer and to people in the parking lot and oncoming traffic. Based on this, Officer Earl arrested [McCall] for public indecency[.]"

These findings are supported by the record. Specifically, Officer Earl testified at the suppression hearing that McCall parked on the side of the building, got out, and walked to the front of the vehicle. McCall then stopped and proceeded to the left side of the car which "exposed him." "[McCall] then unzipped his pants and pulled out his penis and began urinating." When Officer Earl was asked to explain what "exposed him" meant, Officer Earl clarified that McCall exposed himself to "the people in the parking lot and oncoming traffic." After Officer Earl recognized McCall, he "pulled into the parking lot[]" and observed McCall "walk[] north towards * * * the driver's side tire and continue[] to urinate." Officer Earl approached McCall and upon seeing the officer, McCall "stopped urinating, put his penis back into his pants and zipped up the zipper." Officer Earl stated that McCall made no effort to conceal his penis.

{¶14} Officer Earl described the traffic as "medium." He noted that "[t]here were people getting gas and people coming in and out[]" and "there was traffic up and down West 21st Street." Officer Earl noted that where McCall had parked was not very well lit, but "you

could see him exposed. You could see him very well." Officer Earl further stated that McCall could have gone around the back of the building instead of standing in front of his car.

{¶15} We note that in addition to Officer Earl, McCall also testified at the suppression hearing. He contradicted Officer Earl's version of events and testified that he was not urinating in front of the car; he stated that he went to the side of the car, that he was not facing traffic, and that he urinated in the grass. However, on appeal, McCall does not contest the trial court's factual findings. See *Metcalf* at ¶6. In addition, the trial court was in the best position to make credibility determinations and was free to choose which person to believe concerning the visibility of McCall while urinating. See *Kurjian* at ¶10.

{¶16} McCall further explained his actions and why he found it necessary to urinate in the parking lot, thereby exposing himself to passersby. However, there is no indication in the record that the motivation or urgency behind McCall's behavior was known to Officer Earl at the time Officer Earl determined that probable cause existed to arrest McCall for public indecency. As noted above, a probable cause determination must be made based upon "the facts and circumstances known to the officer at the time[.]" *Waterhouse*, at *1. Therefore, we do not consider McCall's reasons for his actions when examining whether probable cause existed to arrest McCall.

{¶17} McCall was arrested for violating R.C. 2907.09(A)(1), which at the time of McCall's arrest stated that "[n]o person shall recklessly * * * , under circumstances in which the person's conduct is likely to be viewed by and affront others who are in the person's physical proximity and who are not members of the person's household: [][e]xpose his or her private parts[.]" Recklessly is defined as

> "when, with heedless indifference to the consequences, [a person] perversely disregards a known risk that his conduct is likely to cause a certain result or is

> likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist." R.C. 2901.22(C).

{¶18} McCall's main argument centers on the 1973 Legislative Service Commission note. It provides:

> "The gist of this section is to prohibit sexual exposures or actual or simulated sexual displays, when done under circumstances in which such exposures or displays are likely to be seen by and offend persons not members of the offender's household.
>
> "Nudist camps would not be prohibited under this section if the inmates take reasonable precautions to insure their privacy, since their lack of clothing is not likely to offend each other. Answering an urgent call of nature alfresco would not be an offense if the actor takes reasonable precautions against discovery, although if he or she is imprudent in choosing a site the act might constitute disorderly conduct under new section 2917.11(A)(5)."

{¶19} McCall further relies upon *Cleveland v. Pugh* (1996), 110 Ohio App.3d 472, 474, an Eighth District case in which the court found that the Legislative Service Commission note created an exception to the statute. In that case, Pugh challenged his conviction for public indecency. Id. at 473. Pugh, who had prior surgery which led to urinary and bladder control problems, stopped his car near a sidewalk and an open field and proceeded to urinate. Id. Pugh was charged with violating a Cleveland ordinance which was identical to the public indecency statute. Id. Pugh was convicted following a bench trial and asserted on appeal that it was error to convict him of public indecency. Id. at 474.

{¶20} The court of appeals proceeded to analyze the statute and the Legislative Service Commission note. The court reversed the judgment of the trial court, concluding that:

> "[t]he comment to R.C. 2907.09 creates an exception to public indecency for a person who exposes his or her private parts when done for the purpose of answering an urgent call of nature. However, it states, if a person is imprudent in choosing a site, at most, the act might constitute disorderly conduct. The offense of public indecency was clearly enacted to punish sexual exposures, not to punish a person for answering an urgent call of nature. Construing the offense of public indecency strictly against the city and liberally in favor of Pugh, we find as a

> matter of law that merely answering an urgent call of nature alfresco by urinating in public does not constitute public indecency and is not a violation of Cleveland Codified Ordinances 619.07." (Internal citations and quotations omitted.) Id. at 474-475; but, see, *Columbus v. Breer*, 152 Ohio App.3d 701, 2003-Ohio-2479, at ¶14.

{¶21} We begin by noting that the Supreme Court of Ohio has stated that courts are "bound by the language of criminal provisions, not unofficial Legislative Service Commission Notes." *State v. Merriweather* (1980), 64 Ohio St.2d 57, 59. In addition, assuming without deciding that we are persuaded by the *Pugh* court's analysis, we conclude that *Pugh* is distinguishable from the case at bar in that Pugh asserted that the evidence was insufficient to support a conviction. *Pugh,* 110 Ohio App.3d at 473-474. Pugh did not challenge his arrest due to the absence of probable cause. McCall, on the other hand, asserts that Officer Earl did not even possess probable cause to arrest. "'Probable cause[,] [however,] does not require the same type of specific evidence as would be needed to support a conviction.'" *Waterhouse*, at *1, quoting *Beck*, 379 U.S. at 91. A probable cause determination is based upon "the facts and circumstances known to the officer at the time[.]" *Waterhouse*, at *1.

{¶22} At the time Officer Earl encountered McCall, Officer Earl witnessed McCall unzip his pants, remove his penis, and urinate in a manner that exposed his private parts to Officer Earl, people at the gas station, and to oncoming traffic, which according to Officer Earl was "medium[.]" As noted above, although there was conflicting evidence, the trial court believed Officer Earl's version of events. Under the plain language of the statute, it is reasonable to conclude that those observations would give Officer Earl the reasonable belief that R.C. 2907.09(A)(1) was being violated, thereby giving Officer Earl probable cause to arrest McCall. See *Reymann*, 55 Ohio App.3d at 224. Although Officer Earl may not have believed that McCall's conduct was sexual in nature, the plain language of the statute requires only reckless

exposure of one's private parts under circumstances where the conduct is likely to be viewed as an affront by others. See R.C. 2907.09(A)(1). Officer Earl did not know McCall's intentions and reasons for urinating in the parking lot and exposing himself to passersby at the time Officer Earl arrested McCall; thus, assuming without deciding that an exception to the statute exists, Officer Earl would have no reason to suspect that McCall's conduct fit within any exception. We acknowledge that the public indecency offense is located in that section of the Ohio Revised Code that delineates sex offenses. In addition, given the Legislative Service Commission note which discusses the purpose of the statute, the plain language of the code conflicts with the note with respect to a person who is simply "[a]nswering an urgent call of nature alfresco[.]" However, it seems this problem begs a legislative solution. Moreover, the Supreme Court of Ohio has not specifically addressed the weight to be given to the Legislative Service Commission note accompanying R.C. 2907.09 despite the conflict present among the districts on the issue. Compare *Pugh*, 110 Ohio App.3d at 474-475 and *Breer* at ¶14. Accordingly, we are disinclined to require officers to be familiar with not only the black letter law, but also the Legislative Service Commission notes in order to determine whether probable cause exists to arrest a person for a violation of R.C. 2907.09(A)(1). We therefore overrule McCall's sole assignment of error.

CONCLUSION

{¶23} In light of the foregoing, we affirm the judgment of the Lorain County Court of Common Pleas.

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 Lorain, 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, J.
WHITMORE, J.
CONCUR

APPEARANCES:

JACK W. BRADLEY and BRIAN J. DARLING, Attorneys at Law, for Appellant.

DENNIS P. WILL, Prosecuting Attorney, and MARY R. SLANCZKA, Assistant Prosecuting Attorney, for Appellee.