[Cite as *State v. Chojnowski*, 2015-Ohio-1405.]

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

STATE OF OHIO Appellee v. TARYN L. CHOJNOWSKI Appellant	C.A. No. 14AP0018 APPEAL FROM JUDGMENT ENTERED IN THE WAYNE COUNTY MUNICIPAL COURT COUNTY OF WAYNE, OHIO CASE No. 2014-CRB-0262

DECISION AND JOURNAL ENTRY

Dated: April 13, 2015

CARR, Judge.

{¶1} Appellant Taryn Chojnowski appeals the judgment of the Wayne County Municipal Court that denied her motion to suppress. This Court reverses and remands.

I.

{¶2} Chojnowski was charged with one count of possessing drug abuse instruments, a misdemeanor of the second degree. She filed a motion to suppress, and the trial court held a hearing, after which it denied her motion. Chojnowski thereafter pleaded no contest to the charge, and the trial court sentenced her accordingly. Chojnowski filed a timely appeal, raising one assignment of error for review.

II.

ASSIGNMENT OF ERROR

> THE TRIAL COURT ERRED BY DENYING [] CHOJNOWSKI'S MOTION TO SUPPRESS, AS THE ILLEGAL SEARCH OF [] CHOJNOWSKI'S PERSONAL BAGS AND SUBSEQUENT INTERROGATION OF HER VIOLATED HER RIGHTS UNDER THE FOURTH AND FIFTH

> AMENDMENTS TO THE U.S. CONSTITUTION, AND ARTICLE I, SECTIONS 10 AND 14 OF THE OHIO CONSTITUTION.

{¶3} Chojnowski argues that the trial court erred by denying her motion to suppress. This Court agrees.

{¶4} The Ohio Supreme Court has held:

> Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and it therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Mills*, 62 Ohio St.3d 357, 366 (1992). Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Fanning*, 1 Ohio St.3d 19 (1982). Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. *State v. McNamara*, 124 Ohio App.3d 706 (4th Dist.1997).

State v. Burnside, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. *Accord State v. Hobbs*, 133 Ohio St.3d 43, 2012-Ohio-3886, ¶ 6 (*Burnside* applied). Accordingly, this Court reviews the trial court's factual findings for competent, credible evidence and considers the court's legal conclusions de novo. *State v. Conley*, 9th Dist. Lorain No. 08CA009454, 2009-Ohio-910, ¶ 6, citing *Burnside* at ¶ 8.

{¶5} The Fourth Amendment to the United States Constitution, made applicable to the states via the Fourteenth Amendment, protects individuals from unreasonable searches and seizures. "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." *State v. Moore*, 90 Ohio St.3d 47, 49 (2000). "Searches conducted without a warrant are presumptively unreasonable, unless an exception to the warrant requirement applies." *State v. Jones*, 9th Dist. Lorain No. 12CA010270, 2013-Ohio-2375, ¶ 8, citing *Payton v. New York*, 445 U.S. 573, 586 (1980). The Ohio Supreme Court explicitly recognizes seven exceptions to the warrant requirement, including consent to the

search, which signifies a waiver of constitutional rights. *State v. Price*, 134 Ohio App.3d 464, 467 (9th Dist.1999), citing *State v. Akron Airport Post No. 8975*, 19 Ohio St.3d 49, 51 (1985).

{¶6} At the suppression hearing, the State presented the testimony of one witness. Deputy Kirk Shelly of the Wayne County Sheriff's Department testified that he was dispatched to a business parking lot around 10:20 p.m. regarding a suspicious vehicle. Believing the occupants of the vehicle to be engaging in sexual relations and suspecting prostitution, he asked the vehicle owner to exit the car. After determining that the pair were not engaged in sexual relations for money, the deputy asked the vehicle owner for permission to search the vehicle. After obtaining the owner's consent, Deputy Shelly asked the passenger, Chojnowski, to exit the vehicle. Another deputy arrived on the scene, and monitored the vehicle occupants. Deputy Shelly testified that he saw that Chojnowski had a black bag on her lap while sitting in the vehicle and that she left the bag in the vehicle when she exited. The deputy testified that he understood the bag to belong to Chojnowski, but he did not seek her permission to search the bag. The bag was partially open, and another sealed black bag was inside. The deputy removed the sealed smaller bag from the larger bag, held it up, and asked Chojnowski what it was. Chojnowski replied that it was her "illegal stuff." Deputy Shelly then arrested Chojnowski and transported her to the station where he opened the small black bag. At that time, he saw a pipe, needles, and what he described as "instruments used for drug abuse."

{¶7} On cross-examination, Deputy Shelly expressly testified that he had no probable cause for the search, and that he conducted the search solely on the basis of the vehicle owner's consent to search the car. He admitted that he knew that the black bag he searched belonged to Chojnowski and that he never sought her consent to search it. In addition, the deputy reiterated that the black bag containing the drug use instruments was completely sealed and inside a larger

black canvas bag. Accordingly, the contents of the smaller bag were not in plain view. Furthermore, Deputy Shelly admitted that he did not read Chojnowski her *Miranda* warnings before asking her what was in her small bag. Finally, although the deputy did not convey his subjective intent to Chojnowski, he admitted that he would not have allowed her to leave the area before he had determined to his satisfaction what was going on at the scene.

{¶8} In denying Chojnowski's motion to suppress, the trial court based its conclusion on case law authorizing the search of containers within a vehicle pursuant to the automobile exception to the warrant requirement. The automobile exception allows a law enforcement officer to conduct a warrantless search of an automobile when "the officer has probable cause to believe that it contains contraband and exigent circumstances necessitate a search." *State v. Laird*, 9th Dist. Medina No. 3213-M, 2002 WL 121218, *2 (Jan. 30, 2002), citing *State v. Mills*, 62 Ohio St.3d 357, 367 (1992). If such probable cause and exigent circumstances exist, the officer may search every part of the vehicle, including any containers therein, which may conceal the object of the search. *Laird* at *2, citing *U.S. v. Ross*, 456 U.S. 798, 825 (1982). Moreover, this Court has recognized that "[t]he scope of the search [pursuant to the automobile exception] extends to a passenger's belongings in the vehicle, such as a purse." *Laird*, citing *Wyoming v. Houghton*, 526 U.S. 295, 302 (1999). The automobile exception, however, is not applicable to these circumstances.

{¶9} The only evidence adduced at the hearing was that the deputy searched the vehicle pursuant to the owner's consent. Moreover, the deputy was clear that he had no probable cause to support a search. His initial suspicions were that the vehicle occupants were engaged in sexual relations for money, but he clarified that he learned that no money had been exchanged by the time he requested the vehicle owner's consent to search the car. As he had no probable cause

to support the search for suspected contraband, neither could he articulate any exigent circumstances in support of the search. Accordingly, the evidence did not support the conclusion that the deputy conducted the search pursuant to the automobile exception to the warrant requirement. Rather, the search was premised solely on the vehicle owner's consent.

{¶10} Whether a vehicle owner's consent to search the vehicle grants the authority to law enforcement to search containers like bags and purses belonging to a passenger is an issue of first impression for this Court. The Second District Court of Appeals has addressed the issue, however, and we find that court's reasoning persuasive. In *State v. Caulfield*, 2d Dist. Montgomery No. 25573, 2013-Ohio-3029, deputies obtained a vehicle owner's consent to search his vehicle. Caulfield was a passenger in the vehicle. During the search, the deputies searched Caulfield's purse that was left in the car after she was asked to exit the vehicle. She did not consent to a search of her purse. After the deputies found drug paraphernalia in the purse, Caulfield was arrested. She was subsequently indicted on four drug charges. She filed a motion to suppress the evidence found during the search of her purse, and the trial court granted the motion. The State appealed. The *Caulfield* court affirmed the suppression of the evidence after concluding that the vehicle owner had no authority to consent to a search of the passenger's belongings. *Id.* at ¶ 23.

{¶11} The Second District wrote:

> Proper consent can be given by a third party, but the third-party must possess "common authority over the area sought to be searched." *State v. Miller*, 117 Ohio App.3d 750, 759 (11th Dist.1997), citing *United States v. Matlock*, 415 U.S. 164, 172 (1974). (Other citation omitted.) "Common authority rests 'on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.'" *State v. Pugh*, 2d Dist. Montgomery No. 25223, 2013-Ohio-1238, ¶ 9, citing *Matlock* at 172, fn. 7. "[T]he United States Supreme Court has applied a

> 'reasonable belief' standard for determining whether a police officer's reliance upon the consent of a third party was proper under particular circumstances." *Miller* at 759. "That is, before a trial court can conclude that a warrantless search was valid on the basis of a third-party consent, it must find that the facts of the case supported a reasonable belief on the part of the police officer that the third party had the authority to consent to the search." *Id.* at 759-760.

Caulfield at ¶ 23.

{¶12} As in *Caulfield*, there was nothing in the record to demonstrate that the vehicle owner had mutual use or joint access to Chojnowski's bag. Moreover, the State presented no evidence to establish that Deputy Shelly had a reasonable belief that the vehicle owner had authority to consent to a search of Chojnowski's bag. Accordingly, as "there was no common authority over the [bag], [] the [vehicle owner's] consent to search the vehicle [did] not extend to [Chojnowski's bag]." *See Caulfield* at ¶ 24. Under these circumstances, the vehicle owner's consent to search the vehicle did not validate the warrantless search of Chojnowski's bag. *See id*.

{¶13} Chojnowski next argues that the trial court erred by failing to suppress her statement, after the deputy's questioning, that the sealed bag contained her "illegal stuff." She argues that suppression was proper as her statement constituted fruit of the illegal search. This Court has recognized that "'[i]n the typical "fruit of the poisonous tree" case * * * the challenged evidence was acquired by the police *after* some initial Fourth Amendment violation[.]'" *State v. Hobbs*, 9th Dist. Summit No. 25379, 2011-Ohio-3192, ¶ 18, quoting *United States v. Crews*, 445 U.S. 463, 471 (1980). As we have already determined that the deputy's search of Chojnowski's bag was improper, her statement in response to the deputy's question about what was in the inner bag he removed from the larger bag was subject to exclusion as fruit of the illegal search.

{¶14} For the reasons enunciated above, Chojnowski's assignment of error is sustained.

III.

{¶15} Chojnowski's sole assignment of error is sustained. The judgment of the Wayne County Municipal Court is reversed and the cause remanded for further proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Wayne County Municipal Court, 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(C). 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 Appellee.

DONNA J. CARR
FOR THE COURT

HENSAL, P. J.
CONCURS.

WHITMORE, J.
DISSENTING.

{¶16} The majority reverses the trial court's denial of Chojnowski's motion to suppress. I respectfully dissent.

{¶17} The majority relies on *State v. Caulfield*, 2d Dist. Montgomery No. 25573, 2013-Ohio-3029. The facts of *Caulfield*, however, are distinguishable from the case at hand. In *Caulfield*, the passenger attempted to take her purse with her as she exited the vehicle, but was ordered by the sheriff's deputy to leave it in the vehicle. *Id.* at ¶ 6. The deputy then conducted a search of the vehicle and the purse. By contrast, in the present case, Chojnowski voluntarily left her bag in the car.

{¶18} The ability to search a container within a vehicle may be based on a general consent to search the car. *Florida v. Jimeno*, 500 U.S. 248, 251 (1991) (noting standard of objective reasonableness); *see also State v. Morgan*, 9th Dist. Medina No. 07CA0130-M, 2008-Ohio-4948, ¶ 2, 13 (authorized driver of rental vehicle consented to search of vehicle during which marijuana belonging to other occupant in car was discovered in a bag). "Passengers, no less than drivers, possess a reduced expectation of privacy with regard to the property that they transport in cars." *Wyoming v. Houghton*, 526 U.S. 295, 303 (1999). The operative question is "not merely whether the defendant had a possessory interest in the items seized, but whether [she] had an expectation of privacy in the area searched." *State v. Johnson*, 63 Ohio App.3d 345, 347 (9th Dist.1989), quoting *United States v. Salvucci*, 448 U.S. 83, 93 (1980). "Whether a person 'took normal precautions to maintain [her] privacy' in a given space helps determine whether [her] interest is one protected by the Fourth Amendment." *Id.* at 348, quoting *Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980).

{¶19} Chojnowski's actions demonstrate that she did not retain an expectation of privacy in the bags she left in the car that was about to be searched. After Deputy Shelly obtained the driver's consent to search the vehicle, and after he asked Chojnowski to exit the vehicle, Chojnowski set the black, canvas bag on the passenger seat of the vehicle and proceeded to the rear of the vehicle. Chojnowski could have taken the bag with her, but chose not to do so. There is no evidence that Chojnowski, who was physically present during the search, ever objected to or sought to limit the scope of the search. *See State v. Roberts*, 9th Dist. Medina No. 13CA0065-M, 2014-Ohio-4126, ¶ 11-12 (upholding search of cigar box in closet based on third-party's consent to search closet). In addition, although the officer's suspicions regarding prostitution may have been dispelled at the time of the search, he observed blood on a piece of paper outside the passenger door and "a pool of blood on the [back] seat" of the car. Therefore, it was reasonable for the officer to continue his investigation of the scene.

{¶20} I would affirm the decision of the Wayne County Municipal Court. Accordingly, I respectfully dissent.

APPEARANCES:

PATRICK L. BROWN, Attorney at Law, for Appellant.

DANIEL R. LUTZ, Prosecuting Attorney, and NATHAN R. SHAKER, Assistant Prosecuting Attorney, for Appellee.