[Cite as *State v. Starks*, 2015-Ohio-2137.]

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

STATE OF OHIO Appellee v. DERRICK J. STARKS Appellant	C.A. No. 27347 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 13 12 3394

DECISION AND JOURNAL ENTRY

Dated: June 3, 2015

CARR, Judge.

{¶1} Appellant, Derrick Starks, appeals the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} This matter arises out of a traffic stop on June 23, 2013. The Summit County Grand Jury indicted Starks on one count of possession of a controlled substance. After pleading not guilty to the charge at arraignment, Starks filed a motion to suppress. The trial court held a hearing on the matter and subsequently permitted Starks to file a supplemental memorandum in support of his motion. The State responded with a memorandum in opposition. On March 18, 2014, the trial court issued a journal entry denying the motion. Starks then withdrew his plea of not guilty and pleaded no contest to the charge. The trial court found Starks guilty and imposed a 12-month term of community control.

{¶3} On appeal, Starks raises one assignment of error.

II.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED AS A MATTER OF LAW IN DENYING APPELLANT'S MOTION TO SUPPRESS.

{¶4} In his assignment of error, Starks argues that there was no basis for the trial court to conclude that he consented to the search. This Court disagrees.

{¶5} A motion to suppress evidence presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. "When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses." *Id*., citing *State v. Mills*, 62 Ohio St.3d 357, 366 (1992). Thus, a reviewing court "must accept the trial court's findings of fact if they are supported by competent, credible evidence." *Burnside* at ¶ 8. "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." *Id*., citing *State v. McNamara*, 124 Ohio App.3d 706 (4th Dist.1997).

{¶6} In support of his assignment of error, Starks contends that he was unlawfully detained during the stop and that the officers had no basis to search him when he was removed from the vehicle. Starks further asserts that he never consented to the search, and that even if he did give consent, it was due to an unlawful show of authority by police. Starks also contends that the trial court incorrectly applied a preponderance of the evidence standard of review in determining whether Starks consented to the search.

{¶7} The Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution enunciate the right of persons to be free from unreasonable searches and seizures. These constitutional protections prohibit unreasonable searches and seizures, not

every search and seizure. "[A] search conducted without a warrant issued upon probable cause is 'per se unreasonable * * * subject only to a few specifically established and well-delineated exceptions.'" *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973), quoting *Katz v. United States*, 389 U.S. 347, 357 (1967). The State bears the burden of establishing that a warrantless search fell within one of the established exceptions to the warrant requirement. *Akron v. Gardner*, 9th Dist. Summit No. 22062, 2004-Ohio-7165, ¶ 15, citing *State v. Kessler*, 53 Ohio St.2d 204, 207 (1978). "It is * * * well settled that 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." *Schneckloth*, 412 U.S. at 219, citing *Davis v. United States*, 328 U.S. 582, 593-594 (1946).

{¶8} In order to rely on the consent exception of the warrant requirement, the State must demonstrate that the consent was "freely and voluntarily given." *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968); *State v. Posey*, 40 Ohio St.3d 420, 427 (1988); *State v. Beougher*, 9th Dist. Summit No. 21378, 2003-Ohio-3591, ¶ 10. "[T]he government bears the burden of showing that consent was 'freely and voluntarily' given by 'clear and positive' evidence." *State v. Feeney*, 9th Dist. Summit No. 25727, 2011-Ohio-5474, ¶ 12, quoting *State v. Cummings*, 9th Dist. Summit No. 20609, 2002 WL 57979 (Jan. 16, 2002), citing *State v. Robinette*, 80 Ohio St.3d 234, 243 (1997). However, "[o]nce 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." *Robinette*, 80 Ohio St.3d at paragraph three of the syllabus. The Ohio Constitution does not require a police officer to inform an individual stopped for a traffic violation that he or she is

free to go before the officer may attempt to engage in a consensual interrogation. *Robinette*, 80 Ohio St.3d at 245. "Whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined by the totality of the circumstances." *Beougher* at ¶ 10, quoting *Schneckloth*, 412 U.S. at 227. "Voluntary consent, determined under the totality of the circumstances, may validate an otherwise illegal detention and search." *Robinette*, 80 Ohio St.3d at 241, citing *Davis,* 328 U.S. at 593-594.

{¶9} Officers Robert Frisina and Brad Whitacre of the Stow Police Department testified on behalf of the State at the suppression hearing. Starks also testified in his own defense. During the early evening on June 23, 2013, Officer Frisina was on patrol on Graham Road when he conducted a random license plate check on a white Oldsmobile Aurora traveling in an adjacent lane. When the computer revealed that the license plates were registered for a silver Ford, Officer Frisina initiated a traffic stop of the white Oldsmobile. The driver of the vehicle, Carmesha Neil, provided a state identification card. The only other passenger, Starks, did not have formal identification but provided the officer with his name, date of birth, and social security number. As Officer Frisina returned to his cruiser to verify the identification of the Oldsmobile's occupants, Officer Whitacre arrived on the scene to provide backup. At that time, Officer Frisina learned that neither occupant of the vehicle had a valid driver's license and that the Kent Police Department had an outstanding warrant for Neil's arrest. Neil was removed from the vehicle, placed under arrest, and put in the back of the cruiser so that the Kent police could take her into custody.

{¶10} Because Starks did not have a valid driver's license, the officers determined it was necessary to have the Oldsmobile towed. Prior to conducting an inventory search, Officer Frisina asked Starks to step out of the vehicle. When Starks exited the vehicle, Officer Frisina

asked him if he had anything illegal on his person. Starks responded in the negative. Officer Frisina then asked if he could search the inside of Starks' pockets. Starks responded, "Yeah, go ahead." Officer Whitacre also testified that Officer Frisina obtained consent from Starks prior to searching his pockets. Officer Whitacre added that Officer Frisina "wasn't threatening in any way," that he spoke to Starks in a casual tone, and that it was Officer Frisina's standard practice to request consent to search under the circumstances. Officer Frisina explained that even if he had not obtained consent, he would have conducted a *Terry* pat-down for officer safety reasons because the officers would have had their backs to Starks while they inventoried the vehicle. Having obtained consent, however, Officer Frisina searched Starks' pockets and found three packets that were labeled, "geeked up." Though Officer Frisina believed that the packets contained synthetic marijuana known as "spice," the officer did not have a field test kit for synthetic marijuana. Starks was permitted to leave the scene. After the packets were sent to BCI for testing, it was confirmed that Starks was, in fact, carrying synthetic marijuana on his person.

{¶11} With respect to whether he consented to the search of his pockets, Starks offered a different version of the story during his testimony. Starks testified that he "vaguely" remembered the night of June 23, 2013. Starks recalled that after giving his name, date of birth, and social security number, the officers placed Neil in the back of the police cruiser. The officers then returned to the passenger side of the vehicle. Starks asserted that Officer Frisina immediately removed him from the vehicle, patted him down, and then asked Starks what he had in his pockets. After Starks indicated that he had nothing more than a cell phone and cigarettes, Officer Frisina then asked, "Do you mind if I search you?" Starks testified that he responded, "Yes, I mind." Starks testified that despite the fact that he did not give the officers consent, Officer Frisina proceeded to search the inside of his pockets where he located the drugs.

{¶12} Given the evidence presented at the suppression hearing, Starks cannot prevail on his arguments that he was unlawfully detained and that the police did not lawfully obtain consent prior to the search. The temporary seizure of a driver and passenger continues and remains reasonable for the duration of the stop, which ends when the police have no further need to control the scene. *State v. Caulfield*, 2d Dist. Montgomery No. 25573, 2013-Ohio-3029, ¶ 19, citing *Arizona v. Johnson*, 555 U.S. 323, 333 (2009). Though Starks argues that he should have been free to leave while the officers were processing the arrest of the driver, the continued detention of a passenger is not unreasonable when it is contemporaneous with the arrest of the driver. *Caulfield* at ¶ 19. Because it was necessary to tow the vehicle in this case, police had to continue to control the scene in order to conduct an inventory search of the vehicle, and Starks' brief detention allowed police to conduct the search while reasonably accounting for officer safety. Moreover, both officers testified that Officer Frisina obtained consent from Starks prior to searching his pockets. Both officers further testified that Officer Frisina asked for consent in a conversational manner and that neither officer had drawn their weapons or made any unlawful show of authority prior to Officer Frisina asking for consent. While Starks' testimony directly contradicted portions of the officers' testimony, the trial court assumes the role of trier of fact in ruling on a motion to suppress and is in the best position to resolve factual questions and evaluate the credibility of witnesses. *Burnside*, 2003-Ohio-5372, at ¶ 8. In its judgment entry denying the motion to suppress, the trial court acknowledged the contradictory testimony and specifically stated that it found "the testimony of both Officer Frisina and Officer Whitacre to be more credible than that of the Defendant and find therefore the Defendant did consent to the search of his person[.]" Thus, while Starks suggests that the trial court's findings demonstrate that the trial court incorrectly applied a "preponderance of the evidence standard" in ruling on

whether he gave consent, we read the trial court's statement merely as a resolution of a factual dispute that arose from the testimony at the hearing. Two officers testified that Starks consented to the search of his pockets and the trial court found that testimony to be credible. Under these circumstances, Starks cannot prevail on his argument that Officer Frisina did not lawfully obtain consent prior to searching Starks' pockets.

{¶13} The assignment of error is overruled.

III.

{¶14} Starks' assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

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 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(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 Appellant.

DONNA J. CARR
FOR THE COURT

HENSAL, P. J.
MOORE, J.
CONCUR.

APPEARANCES:

DAVID G. LOMBARDI, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN DIMARTINO, Assistant Prosecuting Attorney, for Appellee.