

[Cite as *State v. Fowler*, 2011-Ohio-3156.]

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 10AP-658 (C.P.C. No. 09CR09-5594)
	:	
Timothy L. Fowler,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on June 28, 2011

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*Ron O'Brien*, Prosecuting Attorney, and *Kimberly M. Bond*, for appellee.

*Yeura R. Venters*, Public Defender, and *David L. Strait*, for appellant.

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APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, Timothy L. Fowler, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas. For the following reasons, we affirm that decision.

**Factual and Procedural History**

{¶2} In the early morning hours of September 8, 2009, Columbus Police Officer Kareem Kashmiry pulled a car over for failing to use a turn signal. Officer Kashmiry approached the car and noticed a strong odor of alcohol coming from the car. Officer

Kashmiry asked the driver, Fowler, to step out of the car. Once Fowler was out of the car, Officer Kashmiry no longer noticed the smell of alcohol and concluded that it was coming from Fowler's passenger, Joseph Bateman. Officer Kashmiry's partner, Patrick Daugherty, approached the passenger side of the car and removed Bateman from the car. Bateman appeared to be intoxicated; he was slurring his speech and having trouble walking.

{¶3} At this point, Officer Kashmiry realized that Fowler was not intoxicated. However, Officer Kashmiry asked Fowler if he had anything illegal in the car. Fowler responded that he did not. Before issuing Fowler a traffic citation, Officer Kashmiry asked Fowler for consent to search his car. Fowler consented to the search. Officer Daugherty searched the car and found a gun in the center console. The officers arrested Fowler for carrying a concealed weapon.

{¶4} As a result of these events, a Franklin County grand jury indicted Fowler with one count of carrying concealed weapons, a violation of R.C. 2923.12, and one count of improperly handling firearms in a motor vehicle, a violation of R.C. 2923.16.

{¶5} Fowler filed a motion to suppress the gun found by the officers during the search of the car. At a hearing on the motion to suppress, Officers Kashmiry and Daugherty testified to the above version of events. Both officers testified that Fowler consented to the search.

{¶6} Fowler and Bateman testified to a very different version of the encounter. Fowler testified that he was staying at Bateman's home on the morning of the incident. Bateman called him for a ride home from a bar that morning because Bateman could not drive. Fowler testified that after the officers pulled him over, Officer Kashmiry pulled him

from the vehicle and immediately started to roughly pat him down and ask him about a gun. Fowler claimed that Officer Kashmiry then placed him in the back of the police car and closed the doors. Soon after being put in the police car, the officers told him they found a gun in his car. Fowler claimed that neither of the officers asked him for consent to search his car and that he never gave them consent to search his car. Bateman also testified that he never heard either officer request permission to search the car and that he did not hear Fowler consent to such a search.

{¶7} The trial court denied Fowler's motion to suppress, concluding that Fowler lawfully consented to the search of his car. The trial court found that Officer Kashmiry's description of the stop was more credible than Fowler's description. The trial court noted that Officer Daugherty also testified that he heard Officer Kashmiry ask Fowler for consent to search the car and that Fowler consented to the search. The trial court noted that the only support for Fowler's testimony was Bateman, who had been drinking that night.

{¶8} After the trial court's decision, Fowler withdrew his not guilty plea and entered a plea of no contest to both counts of the indictment. The trial court accepted Fowler's plea, found him guilty, and sentenced him accordingly.

{¶9} Fowler appeals and asserts the following assignment of error:

The trial court erred in overruling Defendant-Appellant's motion to suppress.

### **Assignment of Error - Denial of Motion to Suppress**

{¶10} " 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 is therefore in the best position to resolve factual questions and evaluate

the credibility of witnesses. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. 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. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, ¶100 (quoting *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8) (citations omitted).

{¶11} The Fourth Amendment to the United States Constitution prohibits the government from conducting warrantless searches and seizures. *State v. Jones*, 188 Ohio App.3d 628, 2010-Ohio-2854, ¶11. "Searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment" unless an exception applies. *Katz v. United States* (1967), 389 U.S. 347, 357.

{¶12} Here, the officers did not have a warrant to search Fowler's car. However, the trial court found that the officers searched his car after Fowler consented to the search. " '[O]ne 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. Wilcox*, 10th Dist. No. 05AP-972, 2006-Ohio-6777, ¶48 (quoting *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 219, 93 S.Ct. 2041, 2044). Although Fowler argued in the trial court that he did not consent to the search, he does not dispute that he consented to the search of his car in this appeal. Instead, he argues that his consent was not voluntary. We disagree.

{¶13} Fowler first argues that under *State v. Robinette*, 80 Ohio St.3d. 234, 1997-Ohio-343, his consent was not a voluntary act of free will. However, his reliance on

*Robinette* is misplaced, as that case is factually distinguishable from the facts of this case.

{¶14} In *Robinette*, a police officer stopped Robinette for speeding. After the officer issued Robinette a verbal warning and gave him back his driver's license, the officer asked Robinette if he could search his car for any drugs or weapons. Robinette consented to the search but later contested the legality of the search. The Supreme Court of Ohio concluded that the officer unlawfully detained Robinette to ask for permission to search his car because the purpose of the stop (issuing a traffic citation) was completed before the officer asked for consent to search Robinette's car. *Id.* at 241. The court went on to conclude that for consent to be an independent act of free will once a person had been unlawfully detained, the totality of the circumstance would have to clearly demonstrate that a reasonable person would believe that he or she had the freedom to refuse to answer further questions and could leave. *Id.* at 245.

{¶15} In this case, unlike *Robinette*, Fowler was lawfully detained at the time the officer asked him to search his car because the officer had not completed the purpose of the stop. Therefore, *Robinette* does not aid Fowler in this case. *State v. Riggins*, 1st Dist. No. C-030626, 2004-Ohio-4247, ¶21 (noting that where a suspect is lawfully detained when consent is sought, the suspect is not free to leave and the proscriptions of *Robinette* do not apply); *State v. Chiodo*, 10th Dist. No. 01AP-1064, 2002-Ohio-1573 (distinguishing *Robinette* in the same manner).

{¶16} Instead, "[w]hen a person is lawfully detained by police and consents to a search, the state must show by clear and convincing evidence that the consent was freely and voluntarily given." *State v. Lattimore*, 10th Dist. No. 03AP-467, 2003-Ohio-6829, ¶14.

Important factors in determining the voluntariness of consent are: (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse to consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found. *Id.*; *In re Parks*, 10th Dist. No. 04AP-355, 2004-Ohio-6449, ¶22.

{¶17} Applying the above factors, we note that although Fowler obviously did not agree to be stopped by the police, the officers lawfully detained Fowler to issue a citation for failing to use his turn signal. *Parks* at ¶23. Additionally, the surrounding environment did not produce coercive police conditions. Officer Kashmiry and Fowler were standing on a public street when consent was asked for and given within the period of time necessary to process the citation. Fowler was not arrested until after Officer Daugherty found the gun. Moreover, there was only one police cruiser and two officers present throughout the entire process, and the second officer was dealing with Bateman and did not interact with Fowler at all. *Lattimore* at ¶16 (no coercive police conduct where one officer dealt with defendant while other officer dealt with passenger). There is also no evidence that the citation-issuing procedure was prolonged in a way that added an impermissible coercive effect to an otherwise lawful detention. *Riggins* at ¶19.

{¶18} Additionally, Fowler cooperated with the police. He got out of the car when he was asked to and answered questions posed to him by the officer. There is no evidence in the record of Fowler's intelligence or education or his belief that no incriminating evidence would be found. Finally, while there is no evidence that Fowler was aware of his right to refuse consent, such knowledge is not the "sine qua non of an

effective consent to search." *Lattimore* at ¶17 (citing *Schneckloth*, 412 U.S. at 234, 93 S.Ct. at 2051). Viewing the totality of the circumstances, we find that there was clear and convincing evidence that Fowler voluntarily consented to the search.

{¶19} Fowler also argues that the search of his car exceeded the scope of the parameters warranted by the initial traffic stop and amounted to an impermissible "fishing expedition" when the officers sought his consent to search his car. We disagree.

{¶20} A police officer may stop a vehicle based on probable cause that a traffic violation has occurred without violating the Fourth Amendment of the United States Constitution. *Dayton v. Erickson*, 76 Ohio St.3d 3, 11, 1996-Ohio-431. It is not disputed that the officers lawfully stopped Fowler's car for failing to use a turn signal.

{¶21} Fowler is correct that the lawfulness of an initial stop will not support a "fishing expedition" for evidence of other crimes. *Lattimore* at ¶12 (citing *State v. Bevan* (1992), 80 Ohio App.3d 126, 130). However, when consent to search is obtained within the time required to process a traffic citation, there is no requirement that the search be supported by a "reasonable articulable suspicion of criminal behavior other than the traffic infraction." *Id.* (citing cases).

{¶22} Here, Officer Kashmiry validly stopped Fowler because of his failure to use a turn signal. Officer Kashmiry was still in the process of issuing that citation when he asked for and received Fowler's consent to search the car, and he did not unnecessarily prolong Fowler's detainment in order to gain such consent. *Id.* at ¶13. Thus, the officer's request for consent and Fowler's consent to search occurred during a lawful stop and did not go beyond the period necessary to effectuate the stop and issue a citation for failing

to use a turn signal. There is no evidence that Officer Kashmiry obtained Fowler's consent to search the car by coercion.

{¶23} Because there is clear and convincing evidence that Fowler voluntarily consented to the search of his car, the trial court properly denied Fowler's motion to suppress. Accordingly, we overrule Fowler's assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

TYACK and CONNOR, JJ., concur.

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