[Cite as *State v. Burke*, 2010-Ohio-1433.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93258

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

DAMION BURKE

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-516746

BEFORE: Dyke, P.J., Boyle, J., and Jones, J.

RELEASED: April 1, 1010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

ANN DYKE, P.J.:

{¶ 1} Pursuant to R.C. 2945.67 and Crim.R. 12, the state of Ohio appeals from the order of the trial court that suppressed evidence obtained in connection with the stop of a vehicle driven by defendant Damion Burke. For the reasons set forth below, we affirm.

{¶ 2} On October 15, 2008, defendant was indicted for possession of drugs, two counts of drug trafficking, and possession of criminal tools, all with forfeiture specifications. Defendant pled not guilty and filed a motion to suppress the evidence obtained against him.

{¶ 3} At the March 11, 2009, suppression hearing, the state presented the testimony of Cleveland Police Officer Jeffrey Weaver. Officer Weaver testified that, on September 29, 2008, at approximately 1:40 a.m., he observed defendant driving on East 124th Street. According to Officer Weaver, the driver's side door of the vehicle was open and loud music emanated from the car. Officer Weaver followed defendant for a brief period but defendant then lowered the volume of his music and the officer continued in a different direction. Later, however, the officer heard the loud music again and continued after defendant's vehicle. At this time, Officer Weaver observed defendant's car go left of center.

{¶ 4} The officer stopped defendant's car and saw defendant making movements toward the middle of the interior of the vehicle. Officer Weaver further testified that he detected the strong odor of marijuana. He asked if defendant had marijuana in the car. Defendant reportedly stated that he did not and the police officer asked if he could check. According to Officer Weaver, defendant stated

that he did not mind if the officer checked, but he did not think that the officer had probable cause.

{¶ 5} The officer then had defendant get out of the car and, at this time, a bottle of beer fell out of the car and shattered. Officer Weaver placed defendant under arrest for open container, driving with the driver's side door open, weaving, and loud music. Defendant was handcuffed and placed in the back of the squad car. Officer Weaver then searched the car for marijuana, and recovered two plastic bags containing forty individually wrapped bags of suspected marijuana and one plastic bag containing fifty individually wrapped bags of suspected crack cocaine. On cross-examination, Officer Weaver admitted that defendant stated, in response to the officer's inquiry as to whether he could search the car, that the officer did not have probable cause.

{¶ 6} Defendant offered testimony in support of the motion to suppress and stated that he had not been driving with the door open. The officer asked if he had marijuana and defendant stated that he did not. At this time, the officer took a cigar that defendant had been smoking and broke it apart. It did not contain illicit drugs. The officer then removed him from the car and placed him in the back of the squad car. Defendant denied that a bottle of beer fell from the car. Defendant also denied that he gave the officer permission to search the car, explaining that it was not his car.

{¶ 7} The trial court subsequently granted the motion to suppress, noting:

{¶ 8} "On the basis of U.S Supreme Court case *Arizona v. Gant*, U.S. (Date

of decision 4-21-09) the motion to suppress is granted. Defendant was placed under arrest, handcuffed behind his back, and police could not reasonably expect to find evidence of the basis for arrest in this case (i.e., a traffic violation stop)."

{¶ 9} The state now appeals and assigns a single error for our review.

{¶ 10} The state's assignment of error is as follows:

{¶ 11} "The trial court erred in granting Defendant-Appellee's Damion Burke's motion to suppress as the police had probable cause to believe that marijuana was present in Burke's vehicle. "

{¶ 12} With regard to procedure, we note that "[i]n a hearing on a motion to suppress evidence, the trial court assumes the role of trier of facts and is in the best position to resolve questions of fact and evaluate the credibility of witnesses." *State v. Venham* (1994), 96 Ohio App.3d 649, 653, 645 N.E.2d 831.

{¶ 13} The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." A temporary detention of a person during a traffic stop is a "seizure" under the Fourth Amendment. *Delaware v. Prouse* (1979), 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660. A traffic stop must be reasonable under the circumstances to avoid violating the Fourth Amendment. Id. at 659.

{¶ 14} A traffic stop is generally reasonable under the Fourth Amendment where the police have probable cause to believe that the detainee has committed a traffic violation. *Dayton v. Erickson* (1996), 76 Ohio St.3d 3, 665 N.E.2d 1091.

{¶ 15} As to searches, reasonableness of a warrantless search, with the

basic rule that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions." *Katz v. United States* (1967), 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576. "Among the exceptions to the warrant requirement is a search incident to a lawful arrest [that] derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations." *Arizona v. Gant* (2009), 556 U.S. ___ , 129 S.Ct. 1710, 173 L.Ed.2d 485, quoting *Katz v. United States* (1967), 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576.

{¶ 16} In *Arizona v. Gant,* supra, the Court held that an officer may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest, but if these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

{¶ 17} The *Gant* Court explained:

{¶ 18} "[*New York v.*] *Belton* [(1981), 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768,] does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle. Consistent with the holding in *Thornton v. United States,* 541 U.S. 615, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004), and following the suggestion in Justice

Scalia's opinion concurring in the judgment in that case, id., at 632, 124 S.Ct. 2127, 158 L.Ed.2d 905, we also conclude that circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle."

{¶ 19} In this case the stop was permissible, in light of the fact that the officer observed defendant's vehicle proceeding with the door open and playing music at a high volume. See *State v. McComb,* Montgomery App. No. 21963, 2008-Ohio-425; *State v. Steen,* Summit App. No. 21871, 2004-Ohio-2369.

{¶ 20} We concur with the trial court's decision that the search was impermissible, however, pursuant to *Arizona v. Gant,* supra, as defendant was handcuffed and under arrest at the time of the search and the officer had no reason to believe that the vehicle contained evidence of the offenses of arrest, i.e., open container, driving with the driver's side door open, weaving, and loud music. Cf. *State v. Hopper,* Cuyahoga App. Nos. 91269 and 91327, 2009-Ohio-2711; *State v. Elliott,* Cuyahoga App. No. 92324, 2010-Ohio-241.

{¶ 21} The state further contends that the search was justified by defendant's consent. The state bears the burden of proving that consent to search was, in fact, freely and voluntarily given. *Bumper v. North Carolina* (1968), 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. Id. "[W]hether a consent to search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the

totality of the circumstances." *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 219, 93 S.Ct. 2041, 2044, 36 L.Ed.2d 854

{¶ 22} In this matter, Officer Weaver testified that defendant consented to the search but stated that he did not think that there was probable cause. Defendant testified that he did not consent to the search. From the totality of the circumstances, we cannot say that the state established that consent was freely and voluntarily given, as the state's evidence is more indicative of defendant acquiescing to the officer's authority than freely and voluntarily consenting.

{¶ 23} Finally, we address the issue of whether the search was the result of a proper inventory search of defendant's car. An inventory search of a lawfully impounded vehicle is a well-defined exception to the warrant requirement of the Fourth Amendment to the United States Constitution. *South Dakota v. Opperman* (1976), 428 U.S. 364, 367, 96 S.Ct. 3092, 49 L.Ed.2d 1000. This exception permits police to conduct a warrantless search of a vehicle, prior to the tow, for the purpose of inventorying its contents after the vehicle has been lawfully impounded. Id., *State v. Bridges,* Cuyahoga App. No. 80171, 2002-Ohio-3771. An inventory search may not be conducted for purposes of investigation and must be conducted according to standard police procedures. *Florida v. Wells* (1990), 495 U.S. 1, 5, 110 S.Ct. 1632, 109 L.Ed.2d 1.

{¶ 24} In this matter, Officer Weaver could not articulate the procedures for an inventory search and therefore could not establish that the search was undertaken as an inventory search under standard police procedures.

{¶ 25} In accordance with all of the foregoing, the state's assignment of error is overruled and the judgment of the trial court is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, PRESIDING JUDGE

MARY J. BOYLE, J., and
LARRY A. JONES, J., CONCUR