[Cite as *State v. Wells*, 2010-Ohio-2603.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93433

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

PERCY R. WELLS

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-521754

BEFORE: McMonagle, J., Gallagher, A.J., and Celebrezze, J.
RELEASED: June 10, 2010

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).

CHRISTINE T. McMONAGLE, J.:

{¶ 1} Plaintiff-appellant, the state of Ohio, appeals from the trial court's judgment granting in part the motion to suppress of defendant-appellant, Percy R. Wells. We affirm.

I

{¶ 2} Wells was charged with drug possession, drug trafficking, tampering with evidence, and possession of criminal tools. The charges arose from his stop and arrest on December 30, 2008, when Cleveland police officers stopped his car for allegedly weaving over the center line. Wells subsequently filed a motion to suppress in which he argued that the police lacked probable cause to stop and arrest him, and that the warrantless search of his car did not constitute a valid inventory search.

{¶ 3} At the suppression hearing, Officer Jeffrey Yasenchack testified that as he and his partner walked up to the car for the traffic stop, he observed Wells and the front-seat passenger leaning to the middle of the car and "pitching" something into the backseat. Officer Yasenchack shined his flashlight in the car and saw three baggies containing what appeared to be equal amounts of marijuana on the floorboard of the backseat. Officer Yasenchack told both occupants to exit the car and handcuffed them. After the officers recovered the marijuana, they arrested Wells and his passenger

for violating Cleveland Codified Ordinances 619.23(C), using a motor vehicle to solicit drug sales.

{¶ 4} According to Officer Yasenchack, because there were no other licensed drivers to take control of the car, he then performed an inventory search of the car before it was towed. He found $4,316 in the front center console, which, coupled with the baggies, indicated to him that the occupants of the car were probably involved in drug sales. He looked in the trunk of the car and found several letters to Wells from various lawyers. He then pulled away the carpet from the right rear well, because he knew it to be a place where contraband is often stored, and discovered three bags that contained large chunks of crack cocaine.

{¶ 5} The trial court overruled Wells's motion to suppress regarding the stop and the drugs found on the backseat floorboard, but granted the motion with respect to the drugs found in the wheel well. It ruled that pulling back the carpeting "went beyond the scope of [the] proper purpose of an inventory search" and demonstrated that the search was conducted with an investigatory intent, and not merely as an inventory search. The State appeals this part of the ruling.

II

{¶ 6} The State contends that the trial court erred in suppressing the drugs found in the wheel well because (1) the search was a proper inventory

search incident to a tow, and (2) the police had probable cause for a warrantless search of the car under the "automobile exception."

{¶ 7} Appellate review of a suppression ruling presents a mixed question of law and fact. *State v. Locklear*, 8th Dist. No. 90429, 2008-Ohio-4247, ¶24. The trial judge is the finder of fact on a motion to suppress and therefore in the best position to resolve factual questions and evaluate witness credibility. *State v. Beavers*, 8th Dist. No. 88513, 2007-Ohio-2915, ¶6. A reviewing court must accept the trial court's findings of fact if they are supported by competent, credible evidence. Id. Then the court must determine as a matter of law and without deference to the trial court's conclusion whether the trial court erred in applying the substantive law to the facts of the case. *State v. Singleton*, 8th Dist. No. 90003, 2008-Ohio-3557, ¶6-7.

{¶ 8} "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. 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. The scope of an automobile search may properly extend to the trunk and glove compartment." (Internal citations omitted.) *State v. Fryer*, 8th Dist. No. 91497, 2008-Ohio-6290, ¶21.

{¶ 9} Inventory searches are excluded from the warrant requirement because they are an administrative, rather than investigatory, function of the police that protect an owner's property while it is in the custody of the police, insure against claims of lost, stolen, or vandalized property, and guard the police from danger. *State v. Mesa*, 87 Ohio St.3d 105, 109, 1999-Ohio-253, 717 N.E.2d 329.

{¶ 10} An inventory search is reasonable when it is performed in good faith and pursuant to standard police policy, and "when the evidence does not demonstrate that the procedure involved is merely a pretext for an evidentiary search of the impounded vehicle." *State v. Robinson* (1979), 58 Ohio St.2d 478, 480, 391 N.E.2d 317. "Inventory searches 'must not be a ruse for a general rummaging in order to discover incriminating evidence.'" *State v. Burton* (Apr. 14, 1994), 8th Dist. No. 64710, quoting *Florida v. Wells* (1990), 495 U.S. 1, 4, 110 S.Ct. 1632, 109 L.Ed.2d 1. "A search which is conducted with an investigatory intent, and which is not conducted in the manner of an inventory search, does not constitute an 'inventory search.'" *State v. Caponi* (1984), 12 Ohio St.3d 302, 303, 466 N.E.2d 551.

{¶ 11} The search at issue in this case was conducted with an investigatory intent. The Cleveland General Police Order regarding vehicle tows, pursuant to which Officer Yasenchack performed his search, provides that property found in unlocked closed containers in a vehicle shall be

inventoried, and property such as jewelry, cameras, radios, and other valuables should be inventoried and removed from the car prior to tow. It says nothing about searching wheel wells as part of an inventory search. Thus, Officer Yasenchack's search of the wheel well was not pursuant to standard police policy.

{¶ 12} Furthermore, Officer Yasenchack admitted that the inventory search was actually a pretext for an investigatory search for more drugs. On direct examination, Officer Yasenchack testified that after Wells was arrested, "we did an inventory search of the vehicle." But he testified that he looked in the wheel well because it is a "common area to hide contraband, weapons, drugs" and because he suspected that Wells and his passenger were involved in the sale of drugs. When challenged on cross-examination as to the purpose of his search of the wheel well, he admitted that he was performing a "dual purpose search" and "also searching for more drugs" and, with that intention, he "pulled the fabric [back from around the wheel well] to reveal the cavity inside."

{¶ 13} An inventory search conducted with an investigatory intent and not in the manner of an inventory search does not constitute an inventory search. *State v. Seals*, 8th Dist. No. 90561, 2008-Ohio-5117, ¶28, citing *Caponi*, supra. It is apparent that Officer Yasenchack used the inventory search as a "pretext" for searching for more evidence. If he suspected

evidence was in the wheel well, he should have obtained a search warrant to inspect it. The vehicle was not at risk of being driven away because, as Officer Yasenchack testified, it was to be towed to a secured police parking lot.

{¶ 14} We do not find the State's argument that the "automobile exception" to the warrant requirement allowed Officer Yasenchack to search the wheel well persuasive. The officer specifically stated that he performed an inventory search of the vehicle. Further, the State did not raise the automobile exception argument below, but argued to the trial court that this was a "standard search of an automobile lawfully towed." Because the State did not raise the argument below, it has waived it on appeal.

{¶ 15} The trial court did not err in granting Wells's motion to suppress the drugs found in the wheel well and, therefore, the State's assignment of error is overruled.

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.

CHRISTINE T. McMONAGLE, JUDGE

FRANK D. CELEBREZZE, JR., J., CONCURS;
SEAN C. GALLAGHER, A.J., CONCURS IN JUDGMENT ONLY