[Cite as *State v. Gillenwater*, 2010-Ohio-5476.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93845

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TION GILLENWATER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-508157-A

BEFORE: McMonagle, J., Gallagher, A.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: November 10, 2010

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CHRISTINE T. McMONAGLE, J.:

{¶ 1} Defendant-appellant, Tion Gillenwater, appeals from the trial court's denial of his motion to suppress evidence. We affirm.

{¶ 2} Gillenwater was charged in March 2008 with the following: Count 1, drug trafficking, with a one-year firearm specification and five forfeiture specifications; Count 2, possession of drugs, with a one-year firearm specification and five forfeiture specifications; Count 3, carrying a concealed weapon, with a forfeiture specification; and Count 4, having a weapon while

under disability, with a forfeiture specification. Gillenwater filed two motions to suppress, and after a hearing, the trial court denied the motions.[1] Gillenwater pleaded no contest to the charges and specifications and the court found him guilty. The trial court sentenced him to a four-year prison term.

{¶ 3} The following testimony was adduced at the suppression hearing. Detective Thomas Klamert of the Cleveland Police Department was investigating a house at 8800 Meridian for suspected drug activity. In particular, the detective had information that a suspected drug dealer, codefendant Steve Moree, resided in the upstairs portion of the house. Moree had the reputation of "best cook" of crack cocaine in Cleveland. Drug dealers would bring their powder cocaine to Moree and he would "cook" it into crack cocaine; in exchange, the drug dealers would let him have some of the drugs. The detective was informed that the process took about 30 minutes and most of the activity occurred in the afternoon. Moree had been the subject of police investigation since 2006.

{¶ 4} On January 24, 2008, Detective Klamert obtained a search warrant for the house, and at 3:00 p.m., he began surveilling it. At approximately 5:00 p.m., the detective saw two cars — a Buick and a Chevrolet — arrive at the house. One person was in the Buick, and

[1] The first motion sought suppression of any and all statements made by Gillenwater, and the second sought suppression of any and all evidence seized by the Cleveland Police Department.

Gillenwater and another codefendant, Keith Lanier, were in the Chevrolet. The three men exited the vehicles and went in a door that the detective knew only led to the upstairs portion of the house.

{¶ 5} Approximately 20 to 30 minutes later, the men exited the house. The driver of the Buick got back in that car, and Gillenwater and Lanier got back in the Chevrolet, with Gillenwater in the driver's seat and Lanier in the front passenger seat. Both cars drove away, and Detective Klamert immediately radioed for a zone car to stop the vehicles. Klamert testified that the order to stop the vehicles was based, in part, on his uncertainty as to whether Moree was one of the three men who had left the residence and, in part, on the "activity" he had witnessed, i.e., the men going to the upstairs of the house for 20 to 30 minutes.

{¶ 6} Officer Christopher Ereg responded to the dispatch to stop the vehicles and pursued the car driven by Gillenwater. While pursuing the car, Ereg saw Gillenwater commit a traffic violation. He testified that he stopped the vehicle both because of Detective Klamert's order and the traffic violation. The officer testified that upon pulling up behind the vehicle, he saw the passenger, codefendant Lanier, make "furtive movements" like he was "putting something under the seat or dashboard."[2] Ereg and his partner

[2] Gillenwater contends in his brief that it was "later revealed" that the "automobile's windows were so tinted that it was inconceivable that the office[r] could have made such an observation." Trial counsel attempted to establish this at the

ordered Gillenwater and Lanier out of the vehicle. Ereg's partner searched under the dashboard and recovered a gun and drugs. The defendants were then arrested and advised of their *Miranda* rights. In a written statement, Gillenwater said the gun was his.

{¶ 7} In his sole assignment of error, Gillenwater challenges the seizure of the drugs and gun; he does not challenge his written statement, and therefore we do not address it.

{¶ 8} A motion to suppress evidence challenges the arrest, search, or seizure at issue as somehow being in violation of the Fourth Amendment of the United States Constitution. *State v. Williams*, Cuyahoga App. No. 81364, 2003-Ohio-2647, ¶7. The principle remedy for such a violation is the exclusion of evidence from the criminal trial of the individual whose rights have been violated. Id. Exclusion is mandatory when such evidence is obtained as a result of an illegal arrest, search, or seizure. Id., citing *Mapp v. Ohio* (1961), 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081.

{¶ 9} Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside,* 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶8. In deciding a motion to suppress, the

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hearing, but Officer Ereg did not waver from his testimony that he was able to see Lanier make "furtive movements," and further testified that the pictures the defense relied on for its proposition were taken hours after the incident, when it was dark outside.

trial court assumes the role of trier of fact. Id. A reviewing court is bound to accept those findings of fact if they are supported by competent, credible evidence. Id. But with respect to the trial court's conclusion of law, we apply a de novo standard of review and decide whether the facts satisfy the applicable legal standard. Id., citing *State v. McNamara* (1977), 124 Ohio App.3d 706, 707 N.E.2d 539.

{¶ 10} Gillenwater first contends that the stop was improper. We disagree. Officer Ereg testified that he stopped the Chevrolet, in part, because Gillenwater committed a traffic violation. Stops based on even minor traffic violations do not violate the Fourth Amendment "even if the stopping officer harbors an 'ulterior motive of making the stop, such as suspicion that the violator was engaged in more nefarious criminal activity.'" *State v. Hoskins*, Cuyahoga App. No. 80384, 2002-Ohio-3451, ¶13, quoting *Dayton v. Erickson* (1996), 76 Ohio St.3d 3, 665 N.E.2d 1091, syllabus. See, also, *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539, 894 N.E.2d 1204. Thus, when Officer Ereg saw the Chevrolet fail to signal a turn, in violation of the Revised Code, he had probable cause to stop it.

{¶ 11} Gillenwater next contends that the police did not have probable cause to search the vehicle. The police may search the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, if an officer possesses a reasonable belief that an

individual is dangerous and may gain immediate control of weapons located in the vehicle upon returning to it. *Michigan v. Long* (1983), 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201, paragraph two of the syllabus.

{¶ 12} To justify the search of a passenger compartment, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio* (1968), 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889. "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." Id. at 27; *State v. Smith* (1978), 56 Ohio St.2d 405, 407, 384 N.E.2d 280. The totality of the circumstances must be "viewed through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold." *State v. Andrews* (1991), 57 Ohio St.3d 86, 87-88, 565 N.E.2d 1271.

{¶ 13} Officer Ereg testified that upon pulling up behind the vehicle, he saw the passenger, codefendant Lanier, make "furtive movements," like he was "putting something under the seat or dashboard." Further, the officer was aware, prior to stopping the vehicle, that the occupants were suspected of engaging in drug activity, and Detective Klamert had informed him that they were "possibly armed." Officer Ereg testified that based on the information

he had from Klamert and the "furtive movements" by Lanier, he and his partner were "concerned there was a weapon," and therefore ordered Gillenwater and Lanier out of the vehicle[3] and searched it.

{¶ 14} On these facts, under the totality of the circumstances, the officers had a reasonable basis to believe that a weapon may have been hidden in the area where Lanier had been sitting. The officers, therefore, were entitled to conduct a protective search for weapons for their safety.

{¶ 15} Gillenwater contends that this case is analogous to *Arizona v. Gant* (2009), 556 U.S.___, 129 S.Ct.1710, 173 L.Ed.2d 485. There, the United States Supreme Court addressed whether the search-incident-to arrest exception to the Fourth Amendment's warrant requirement — set forth in *Chimel v. California* (1969), 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685, and applied to automobile searches in *New York v. Belton* (1981), 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 — permitted the search of a vehicle *after* a motorist was arrested and placed in a police car. The Court held that it did not, stating, "*Belton* 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." *Gant*, 129 S.Ct. at 1714.

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[3]Once a lawful stop has been made, the police may require the driver and any passengers to exit the vehicle pending completion of the traffic stop. *Pennsylvania v. Mimms* (1977), 434 U.S. 106, 111, 98 S.Ct. 330, 54 L.Ed.2d 331; *State v. Evans* (1993), 67 Ohio St.3d 405, 408, 618 N.E.2d 162.

{¶ 16} In limiting and clarifying *Belton*, the Supreme Court recognized that other established exceptions to the warrant requirement authorize the search of an automobile when safety or evidentiary concerns are implicated. *Gant*, 129 S.Ct. at 1721. The Court specifically cited to the exception set forth in *Long*, among others, stating that *Long* "permits an officer to search a vehicle's passenger compartment when he has reasonable suspicion that an individual, whether or not the arrestee, is 'dangerous' and might access the vehicle to 'gain immediate control of weapons.'" *Gant* at id., quoting *Long*.

{¶ 17} Neither Gillenwater nor Lanier were under arrest when the car was searched. Rather, the search was conducted for officer safety based on Ereg's belief that Lanier may have concealed a weapon inside the vehicle. On these facts, that belief was reasonable.

{¶ 18} Gillenwater also relies on *State v. Lewis* (1990), 69 Ohio App.3d 318, 590 N.E.2d 805, wherein the Eleventh Appellate District found that the search of the defendant's vehicle was improper. The defendant was stopped for a traffic violation, during which the police detected the odor of alcohol coming from him and noticed that his eyes were bloodshot. The police asked the defendant if he had been drinking, and he admitted to drinking two beers. The police ordered him out of his vehicle and asked him to submit to field sobriety tests. While the tests were being administered, the police searched the defendant's vehicle and found a firearm in the glove compartment. The

defendant filed a motion to suppress the gun. The trial court overruled the motion finding, in part, that there was probable cause for the search, the search did not take place until after the defendant was arrested, and the search was for the purpose of taking inventory of the vehicle's contents.

{¶ 19} The Eleventh District reversed the trial court's judgment, stating: "Upon review * * *, we find that appellant was not charged with driving while intoxicated or for any other traffic violation; that the search of the subject vehicle was not done for the safety of any police officer; that such search was not based on any contraband that was in plain view of the police officers; that the search of appellant's vehicle by the police officers was done during the tests administered by other police officers to determine whether appellant was intoxicated and before appellant's arrest for driving while intoxicated and, therefore, such search was not an inventory search." *Lewis* at 321.

{¶ 20} This case is distinguishable from *Lewis*. In *Lewis*, there was no evidence whatsoever that the police feared for their safety. In contrast, here, Officer Ereg was aware, prior to stopping the vehicle, that the occupants were suspected of engaging in drug activity, and Detective Klamert had informed him that they were "possibly armed." Further, the officer saw the passenger, Lanier, make "furtive movements," like he was "putting something under the seat of dashboard." The officer testified that based on the information he

had from Klamert and the "furtive movements," he and his partner were "concerned there was a weapon."

{¶ 21} In light of the above, the trial court properly denied Gillenwater's motion to suppress and the sole 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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

CHRISTINE T. McMONAGLE, JUDGE

SEAN C. GALLAGHER, A.J., and
FRANK D. CELEBREZZE, J., CONCUR