[Cite as *State v. Wotring*, 2010-Ohio-5797.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-L-009**
- vs -	:	
TAMMY WOTRING,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 09 CR 000316.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

John W. Hawkins, Center Plaza North, Suite 441, 35353 Curtis Boulevard, Eastlake, OH 44095 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Tammy Wotring, appeals her conviction of aggravated possession of drugs, a felony of the fifth degree, in violation of R.C. 2925.11, following a no-contest plea. At issue is whether the Lake County Court of Common Pleas erred in denying appellant's motion to suppress. For the following reasons, we affirm the judgment of the trial court.

{¶2} Appellant filed a motion to suppress. A hearing was held wherein Detective Patrick Radigan of the Mentor Police Department testified to the events of

April 23, 2009. Detective Radigan stated that on said date he was working day shift, 7:00 a.m. until 7:00 p.m. At approximately 9:00 a.m., Detective Radigan, based upon his visual observations and the audio radar unit, encountered a vehicle travelling in excess of the posted speed limit, 25 miles per hour. As the vehicle passed Detective Radigan, he effectuated a traffic stop. Prior to his approach of the vehicle, Detective Radigan ran the license plate through the Mobile Data Terminal. He was notified that the license plate on the vehicle was expired by almost two months, and the owner of the vehicle had a suspended license.

{¶3} Detective Radigan approached the vehicle and informed the driver that she was being stopped for a speeding violation. Detective Radigan learned that the driver of the vehicle was also the owner of the vehicle. Detective Radigan called for back-up, as he knew the vehicle was subject to impound per the policy of the Mentor Police Department. Detective Radigan testified that "[a]nytime the vehicle owner is the driver and has a suspended license, [it is Mentor's policy] to tow the vehicle." Detective Radigan further testified that upon removing appellant's expired license plates, the vehicle at issue would be illegally parked, and, pursuant to the policy of the Mentor Police Department, the vehicle was subject to impound.

{¶4} Appellant was removed from the vehicle and placed in the back of the cruiser. At this point, appellant was not searched because Detective Radigan stated he did not expect a physical arrest to take place, as this was her first offense. The officers, however, conducted an inventory search of her vehicle as mandated by the policy of the Mentor Police Department. Upon taking inventory of appellant's vehicle, Detective

Radigan observed 14 white pills on the floor between the front driver and front passenger seats. The pills were identified as Tylenol with Codeine, a Schedule II drug.

{¶5} Appellant sought to have the results of the inventory search suppressed. After a hearing, the trial court denied the motion. Appellant pled no contest to a felony of the fifth degree.

{¶6} Appellant has filed a timely notice of appeal. On appeal, appellant alleges five assignments of error for our review with a separate issue under each assigned error. As each assigned error is the same, we construe appellant's brief to contain one assignment of error with five issues. On appeal, appellant maintains:

{¶7} "The trial court erred to the prejudice of defendant when the court overruled defendant's motion to suppress."

{¶8} "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, at ¶8. The appellate court must accept the trial court's factual findings, provided they are supported by competent, credible evidence. Id., citing *State v. Fanning* (1982), 1 Ohio St.3d 19. Thereafter, the appellate court must independently determine whether those factual findings meet the requisite legal standard. Id., citing *State v. McNamara* (1997), 124 Ohio App.3d 706.

{¶9} Generally, "[f]or a search or seizure to be reasonable under the Fourth Amendment, it must be based upon probable cause and executed pursuant to a warrant." *State v. Moore* (2000), 90 Ohio St.3d 47, 49, citing *Katz v. United States* (1967), 389 U.S. 347, 357, and *State v. Brown* (1992), 63 Ohio St.3d 349, 350. However, as this court has previously noted, "there are several exceptions to the

warrant requirement." *State v. Mitchell*, 11th Dist. No. 2004-L-071, 2005-Ohio-3896, at ¶17. (Citations omitted.)

{¶10} The Supreme Court of the United States recognized the inventory search exception to the warrant requirement of the Fourth Amendment in *South Dakota v. Opperman* (1976), 428 U.S. 364. The United States Supreme Court concluded that a routine inventory search of a lawfully impounded vehicle is not unreasonable within the meaning of the Fourth Amendment of the United States Constitution when performed in accordance with standard procedures in the local police department, and the search is not a pretext concealing an investigatory police motive. Id., at syllabus.

{¶11} In *State v. Hathman* (1992), 65 Ohio St.3d 403, paragraph one of the syllabus, the Supreme Court of Ohio followed the United States Supreme Court and held:

{¶12} "To satisfy the requirements of the Fourth Amendment to the United States Constitution, an inventory search of a lawfully impounded vehicle must be conducted in good faith and in accordance with reasonable standardized procedure(s) or established routine." (Citations omitted.)

{¶13} "The Supreme Court [in *Colorado v. Bertine* (1987), 479 U.S. 367] noted inventory procedures serve (1) to protect an owner's property while it is in the custody of the police, (2) to ensure against claims of lost, stolen, or vandalized property, and (3) to guard the police from danger." *State v. Peagler* (1996), 76 Ohio St.3d 496, 501.

{¶14} Appellant presents five issues for review. We first address appellant's second, third, fourth, and fifth issues. Appellant argues that the investigatory search conducted of her vehicle did not comply with the Mentor Police Department's written

policy; that the police lacked express authority to impound her vehicle; that an inventory search with an investigative purpose is unconstitutional; and that the seizure of appellant's property without probable cause or an articulable suspicion is unconstitutional.

{¶15} In the case sub judice, we must first determine whether appellant's vehicle was lawfully impounded thereby setting the stage for the officers' subsequent inventory search, or whether the impoundment was merely a pretext for an evidentiary search of the impounded vehicle. If we determine that appellant's vehicle was lawfully impounded, we then determine whether the inventory search of the lawfully impounded vehicle was conducted in good faith and in accordance with reasonable standardized practices or routines.

{¶16} Although the inventory exception and impoundment of a vehicle are often intermingled, they involve different considerations.

{¶17} "In the interests of public safety and as part of what the Court has called 'community caretaking functions,' *** automobiles are frequently taken into police custody. *** Police will also frequently remove and impound automobiles which violate parking ordinances and which thereby jeopardize both the public safety and the efficient movement of vehicular traffic. *** The authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge.

{¶18} "When vehicles are impounded, local police departments generally follow a routine practice of securing and inventorying the automobiles' contents. These procedures developed in response to three distinct needs: the protection of the owner's

property while it remains in police custody ***; the protection of the police against claims or disputes over lost or stolen property ***; and the protection of the police from potential danger ***." (Footnotes and internal citations omitted.) *Opperman*, supra, at 368-369.

{¶19} In *Blue Ash v. Kavanagh*, 113 Ohio St.3d 67, 2007-Ohio-1103, the Supreme Court of Ohio determined that the defendant's motion to suppress was properly overruled. In *Blue Ash*, the defendant was stopped for driving with expired license plates. Id. at ¶2. The defendant also possessed an expired driver's license. Id. The defendant's vehicle was impounded since the tags and driver's license had been expired for more than three months; the vehicle could not be lawfully driven away by the defendant; and the vehicle could not be parked or pushed to a safe location. Id. at ¶3. The policy of the police department regarding impoundment allowed for the officer to exercise his discretion. Id.

{¶20} "The Supreme Court of Ohio [in *Blue Ash*] noted that R.C. 4513.51 allowed police officials to impound automobiles that come into their possession as a result of the performance of an officer's duties or that have been left on public streets or other property open to the public. ***. The court also observed that the Blue Ash Code of Ordinances allowed police to impound vehicles left unattended on a highway where they constitute an obstruction to traffic, and to impound vehicles that are stolen, are abandoned, are not roadworthy, or are parked where parking is prohibited. *** The Supreme Court of Ohio concluded that the police officer was authorized to use his discretion to impound under both the statute and the local ordinance." *State v.*

Robinson, 2d. Dist. No. 23175, 2010-Ohio-4533, at ¶50, citing *Blue Ash*, supra at ¶13-16.

{¶21} The Mentor Police Department's policy, G.O. 62.1.11, entitled "Suspended or Revoked Licenses," was admitted into evidence at the suppression hearing. It provides, "[a]rresting officers are *required* to impound vehicles when the driver is the owner of the vehicle and the driver is charged with a [driving under suspension] offense ***." (Emphasis added.)

{¶22} The Mentor Police Department's policy, G.O. 66.1.9, governing the removal and towing of a vehicle, states:

{¶23} "A. This directive shall establish guidelines regarding the removal and/or towing of vehicles from public streets *** for legitimate governmental purposes such as:

{¶24} "1. Violations of laws regulating stopping, standing, or parking.

{¶25} "2. ***

{¶26} "3. Safeguarding vehicles and property of arrested persons."

{¶27} Section (B) of the tow policy enumerates instances where vehicles may be towed, and includes, in pertinent part:

{¶28} "B. Officers are authorized to remove (and/or impound) or cause to be removed to a place of safety or an impound garage, a vehicle found upon a street or highway under the following circumstances[:]

{¶29} "8. Unattended, unlicensed motor vehicles parked on public right of way or public property.

{¶30} "***

{¶31} "9. When seizure of the vehicle is required by a provision of the Ohio Revised Code or Mentor City Ordinances.

{¶32} "10. When officers are required to seize the vehicle under guidelines in G.O. 62.1.11 ***."

{¶33} Detective Radigan testified that a search of appellant's license plate number revealed that the registration had expired on February 24, 2009, nearly two months prior to this incident. Further, the vehicle owner, later identified as appellant, had failed to reinstate her driver's license. The Bureau of Motor Vehicles requested that appellant's registration and license plates be confiscated. Detective Radigan testified that it was the department's policy to impound a vehicle when the driver of a vehicle is arrested for driving under suspension and the driver is the owner of the vehicle. He further stated that the vehicle could not remain on the road, as the license plates were removed from the vehicle, and, therefore, the vehicle would have been illegally parked. Detective Radigan's testimony and impoundment of appellant's vehicle is consistent with the policies of the Mentor Police Department.

{¶34} There is no evidence to conclude that the impoundment of appellant's vehicle was a pretext for an evidentiary search of the vehicle. In order to substantiate her argument that the impoundment of her vehicle was merely a pretext for an evidentiary search, appellant cites to the testimony of Detective Radigan where he noted appellant's nervous behavior upon initially speaking with her. A review of the record reveals that Detective Radigan testified that upon his approach to her vehicle, appellant indicated she had a suspended license and was late for school. Although Detective Radigan noted appellant's nervous behavior, he later testified that he did not

initiate a pat-down search of appellant prior to her placement in his police cruiser. Detective Radigan stated that she was going to be released at the scene, and he was going to take appellant to school.

{¶35} As the trial court determined, "[i]n this case[,] there was no evidence to suggest that the officers had any type of investigative, other intent. I don't think any evidence – I don't think suggested that there was a pretext, that the police officers used the inventory exception as a pretext to search for evidence in this car. As they even indicated in this particular case they were going to let the Defendant go."

{¶36} Finding the impoundment of appellant's vehicle lawful, we must next determine whether the inventory search was conducted in good faith and in accordance with reasonable standardized practices or routines.

{¶37} Here, Detective Radigan testified to the department's policy, G.O. 66.1.10, entitled "Tow Report." That policy allows the officer to conduct an inventory of the vehicle's contents when the vehicle is towed due to, inter alia, the arrest of the driver, an unlicensed vehicle, and the necessity to protect the vehicle or property in the vehicle. Further, the officer is required to complete a "Vehicle Impoundment and Inventory Record Form." Although the policy allows for an officer to inventory "the contents of the passenger compartment, glove box and trunk," Detective Radigan testified that as he "looked down between the front driver's side, front passenger side seats, that there was as plain as day a handful, or grouped together, several white pills[.]"

{¶38} Appellant argues that Detective Radigan did not list the pills found in her vehicle on the inventory record form; however, we find this argument without merit, as Detective Radigan explained that the pills were taken as evidence. Detective Radigan

explained that they list the items in the vehicle on the inventory sheet that are being left inside the vehicle.

{¶39} We decline to address the reasonableness of G.O. 62.1.11, the police department's policy that provides arresting officers are *required* to impound vehicles when the driver is the owner of the vehicle and the driver is charged with a driving under suspension offense. Based on the facts and circumstances of this case, it is clear the vehicle did not have valid license plates, and, even if a licensed driver was readily available to drive the car from the scene, it would have been illegal to do so.

{¶40} Appellant's second, third, fourth, and fifth issues are without merit.

{¶41} Under her first issue, appellant claims that the inventory search exception was overruled by the Supreme Court of the United States in *Arizona v. Gant*, 129 S.Ct. 1710. In *Gant*, the Court revisited its holding in *New York v. Belton* (1981), 453 U.S. 454. In *Gant*, five police officers went to a residence on a tip that it was being used to sell drugs. The officers arrested and handcuffed two persons found at the residence and then placed them in separate cruisers. When Gant arrived at the house in his vehicle shortly thereafter, the officers arrested him for driving with a suspended license. Gant was handcuffed and locked in the back of another patrol car. Even though the car was parked in a private driveway, apparently with the permission of the property owner, the officers then searched his car and discovered cocaine in the pocket of a jacket on the backseat. Gant was charged with possession of narcotics and moved to suppress the evidence. Id. at 1712.

{¶42} In *Gant*, the Supreme Court held:

{¶43} "In *Chimel*, we held that a search incident to arrest may only include 'the arrestee's person and the area "within his immediate control" -- construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.' Ibid. That limitation, which continues to define the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy. ***. If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply. ***

{¶44} "***

{¶45} "*** [In *Belton*] we held that when an officer lawfully arrests 'the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile' and any containers therein. *Belton*, 453 U.S., at 460 (footnote omitted). That holding was based in large part on our assumption 'that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within "the area into which an arrestee might reach."' *Ibid*.

{¶46} "***

{¶47} "*** [O]ur opinion [in *Belton*] has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search. ***

{¶48} "***

{¶49} "Under this broad reading of *Belton*, a vehicle search would be authorized incident to every arrest of a recent occupant notwithstanding that in most cases the vehicle's passenger compartment will not be within the arrestee's reach at the time of the search. To read *Belton* as authorizing a vehicle search incident to every recent occupant's arrest would thus untether the rule from the justifications underlying the *Chimel* exception -- a result clearly incompatible with our statement in *Belton* that it 'in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests.' 453 U.S., at 460, [f]n 3. Accordingly, we reject this reading of *Belton* and hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search. ***

{¶50} "***

{¶51} "Neither the possibility of access nor the likelihood of discovering offense-related evidence authorized the search in this case. Unlike in *Belton*, which involved a single officer confronted with four unsecured arrestees, the five officers in this case outnumbered the three arrestees, all of whom had been handcuffed and secured in separate patrol cars before the officers searched Gant's car. Under those circumstances, Gant clearly was not within reaching distance of his car at the time of the search. An evidentiary basis for the search was also lacking in this case. Whereas Belton *** [was] arrested for drug offenses, Gant was arrested for driving with a suspended license – an offense for which police could not expect to find evidence in the passenger compartment of Gant's car. ***. Because police could not reasonably have

believed either that Gant could have accessed his car at the time of the search or that evidence of the offense for which he was arrested might have been found therein, the search in this case was unreasonable." (Footnote and internal citations omitted.) *Gant*, supra, at 1716-1719.

{¶52} Appellant's application of *Gant*, supra, is misplaced. Gant involved a search of his vehicle incident to a lawful arrest for driving with a suspended license. Here, the exception to the warrant requirement the state is relying upon is an inventory search. As we have previously noted, the police department was justified in its impoundment of appellant's vehicle. According to police procedures, the vehicle was subject to impound, as the driver of the vehicle, who was also the owner, possessed a suspended license. Moreover, the vehicle, which displayed expired license plates, could not legally remain parked on the road. As the vehicle was properly impounded, the police were required to conduct an inventory search of the vehicle, as mandated by police policy. The inventory search was properly conducted, and, as a result, Detective Radigan observed white pills lying on the floor of the vehicle.

{¶53} Appellant's first issue is without merit.

{¶54} We find no error on appeal. Based on the opinion of this court, the judgment of the Lake County Court of Common Pleas is hereby affirmed.

MARY JANE TRAPP, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.