[Cite as *State v. Wolfe*, 2011-Ohio-195.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
STATE OF OHIO	:	Julie A. Edwards, P.J.
	:	William B. Hoffman, J.
Plaintiff-Appellee	:	John W. Wise, J.
	:	
-vs-	:	Case No. 10-CA-28
	:	
	:	
DAVID A. WOLFE	:	O P I N I O N
Defendant-Appellant		

CHARACTER OF PROCEEDING:	Criminal Appeal from Licking County Court of Common Pleas Case No. 09 CR 435
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	January 18, 2011

APPEARANCES:

For Plaintiff-Appellee

KENNETH W. OSWALT
Licking County Prosecutor

BY: TRACY F. VAN WINKLE
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For Defendant-Appellant

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Edwards, P.J.

{¶1} Appellant, David Wolfe, appeals a judgment of the Licking County Common Pleas Court convicting him of possession of crack cocaine (R.C. 2925.11(A)(C)(4)(2)) and possession of drug paraphernalia (R.C. 2925.14(C)(1)) upon a plea of no contest. Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} Patrolman Adam Pfannenschmidt of the Newark Police Department was on duty on August 24, 2009, when he was dispatched to a call regarding a man slumped behind the wheel of a car. Residents of the area became concerned when they noted a man, later identified to be appellant, parked in front of their house slumped over behind the wheel of the vehicle for several hours.

{¶3} When the officer approached the car, he could see a pocket knife laying on the passenger seat. The car door was locked. As officers spoke to each other, appellant woke up and began grabbing and slapping his face, harder than a person would normally slap or rub his face upon waking up. Appellant appeared disoriented.

{¶4} Upon questioning, appellant stated that he had been out partying and decided to stay there instead of driving home. He did not know where he was except that he was in Newark, and did not remember exactly where he had been partying. He was waiting for a friend named "Christy," but did not remember her last name. Appellant's speech was slurred and his eyes were bloodshot, and he appeared to Officer Pfannenschmidt to be under the influence of alcohol or another substance.

{¶5} The officer asked appellant to step out of the car in order to get him away from the knife while continuing to evaluate his condition. Appellant exited the vehicle,

although he was angry. When the officer patted appellant down, he felt a cylinder in appellant's pocket. When he asked appellant if he was hiding "weed" in the canister, appellant replied, "Maybe." The officer shook the canister and heard something rattling inside. Upon opening the canister, the officer found a rock of crack cocaine.

{¶6} Appellant moved to suppress solely on the basis that the officer lacked a reasonable suspicion of criminal activity to justify the stop under *Terry v. Ohio* (1968), 392 U.S.1. Following an evidentiary hearing, the court overruled the motion to suppress. Appellant assigns two errors on appeal:

{¶7} "I. THE TRIAL COURT ERRED IN ITS DETERMINATION THAT AN OFFICER HAS REASONABLE SUSPICION OF PHYSICAL CONTROL TO ORDER AN OCCUPANT TO EXIT A LAWFULLY PARKED VEHICLE WHERE THE OFFICER COULD NOT TESTIFY WHERE THE IGNITION KEYS WERE LOCATED.

{¶8} "II. THE TRIAL COURT ERRED IN ITS DETERMINATION THAT LAW ENFORCEMENT HAS PROBABLE CAUSE TO OPEN A CLOSED CONTAINER WHEN THE OWNER INDICATES THAT THE CONTAINER 'MAYBE' CONTAINS CONTRABAND."

I

{¶9} An appellate court's review of a ruling on a motion to suppress evidence presents a mixed question of law and fact. *State v. Long* (1998), 127 Ohio App.3d 328, 332, 713 N.E.2d 1. During a suppression hearing, the trial court assumes the role of the trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972; *State v. Hopfer* (1996), 112 Ohio App.3d 521, 679 N.E.2d 321. As a result, an

appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594, 621 N.E.2d 726. An appellate court must then independently determine without deference to the trial court's legal conclusions whether, as a matter of law, evidence should be suppressed. *State v. Russell* (1998), 127 Ohio App.3d 414, 416, 713 N.E.2d 56; *State v. Klein* (1991), 73 Ohio App.3d 486, 488, 597 N.E.2d 1141.

{¶10} An investigatory stop is permissible if a law enforcement officer has a reasonable suspicion, based on specific and articulable facts, that the individual to be stopped may be involved in criminal activity. *Terry v. Ohio* (1968), 392 U.S. 1, 21-22, 88 S.Ct. 1868. When determining whether or not an investigative traffic stop is supported by a reasonable, articulable suspicion of criminal activity, the stop must be viewed in light of the totality of circumstances surrounding the stop. *State v. Bobo* (1988), 37 Ohio St.3d 177, 524 N.E.2d 489, paragraph one of the syllabus, cert. denied (1988), 488 U.S. 910, 109 S.Ct. 264. In determining whether an officer has a reasonable suspicion of criminal activity to justify a stop, the facts are viewed from the standpoint of an objectively reasonable police officer. *Ornelas v. United States* (1996), 517 U.S. 690, 696, 116 S.Ct. 1657, 1661-1662, 134 L.Ed.2d 911, 919.

{¶11} Appellant specifically argues that the officer’s testimony did not support the court’s finding that he had a reasonable suspicion of criminal activity to justify removing appellant from his vehicle.

{¶12} Appellant first argues that the officer did not have a reasonable suspicion that he was under the influence of alcohol. The officer testified that the police department received a call that appellant had been slumped over the wheel of the

vehicle for several hours. Upon awakening, appellant began slapping his face. Appellant admitted to partying the night before. He was unaware of where he was or where he had been partying the night before, and knew that he was to meet a person named "Christy," but could not remember her last name. The officer noted that appellant's speech was slurred and his eyes were bloodshot, and he appeared to Officer Pfannenschmidt to be under the influence of alcohol or another substance. The officer clearly had a reasonable suspicion that appellant was under the influence based on his observations, appellant's disorientation and behavior and appellant's admission to partying.

{¶13} Appellant also argues that the officer did not have reasonable suspicion to believe that appellant was in physical control of the car because the officer did not recall where the keys were at the time he asked appellant to exit the vehicle. R.C. 4511.194 provides:

{¶14} "(A)(2) "Physical control" means being in the driver's position of the front seat of a vehicle or in the driver's position of a streetcar or trackless trolley and having possession of the vehicle's, streetcar's, or trackless trolley's ignition key or other ignition device.

{¶15} "(B) No person shall be in physical control of a vehicle, streetcar, or trackless trolley if, at the time of the physical control, any of the following apply:

{¶16} "The person is under the influence of alcohol, a drug of abuse, or a combination of them."

{¶17} The trial court found that the officer had a reasonable suspicion that appellant was in physical control of the vehicle at the time he asked appellant to exit.

Although the officer did not know where the keys were located at the time of the stop, appellant admitted to officers that he had been out partying the night before and while driving home, decided to stop where the officers located his car instead of driving the rest of the way home. Tr. 11. From this admission that he had driven the car that far and decided to stop before continuing home, the officer had a reasonable suspicion that the keys were in appellant's possession.

{¶18} Further, the officer testified throughout the hearing that his primary concern was to remove appellant from his proximity to the pocket knife for purposes of ensuring officer safety, while continuing to inquire about appellant's well-being. The officer testified that when appellant got out of the vehicle, he asked why they asked him to step out of the vehicle, and officers explained that neighbors had reported seeing appellant slumped over the steering wheel and the officers were concerned with his welfare. Tr. 13. The officer further testified that he did not consider appellant to be under arrest at the time he stepped out of the vehicle. The officer testified that once appellant was out of the vehicle and away from the weapon, his main concern was finding out why appellant was slumped over the steering wheel. Tr. 17. The officer testified that first in his mind was officer safety, and he wanted to distance appellant from the knife because police were unable to get to the knife to remove it. Tr. 13. Second, the officer intended to check appellant's wallet to find out if he had medical issues, or if he was under the influence of drugs or alcohol. Id. In the past, this Court has held that an officer has a duty to public welfare to approach a citizen who could be in need of aid. *City of Massillon v. Anthony* (August 21, 1995), Stark App. No. 95CA31, unreported; *State v. Meek* (October 17, 1988), Tuscarawas App. No. 88AP050037,

unreported; *State v. Sipes* (December 22, 1995), Ashland App. No. 95-COA-01117, unreported. While the officer possessed facts which gave him a reasonable, articulable suspicion of criminal activity to justify asking appellant to step from the vehicle, it is clear that subjectively the officer viewed the encounter to this point as one of public welfare, and only asked appellant to step out of the vehicle to remove him from his proximity to the knife on the seat rather than to effectuate an arrest. Given appellant's erratic behavior, the decision to remove appellant from his reach of the knife while continuing to investigate appellant's welfare and well-being was reasonable under the circumstances for the safety of both the officers and appellant.

{¶19} The first assignment of error is overruled.

II

{¶20} In his second assignment of error, appellant argues that the officer did not have probable cause to open the closed film canister found in appellant's pocket.

{¶21} Appellant failed to raise this claim in his motion to suppress and did not argue at the hearing that the officer lacked probable cause to open the canister.

{¶22} When a defendant files a motion to suppress evidence, the prosecutor must know the grounds of the challenge in order to prepare his case, and the court must know the grounds of the challenge in order to rule on evidentiary issues at the hearing and properly dispose of the merits. *State v. Peagler* (1996), 76 Ohio St.3d 496, 500, 668 N.E.2d 489. Therefore, the defendant must make clear the grounds upon which he challenges the submission of evidence pursuant to a warrantless search or seizure. Id. Failure on the part of the defendant to adequately raise the basis of his challenge constitutes a waiver of that issue on appeal. Id.

{¶23} Although some evidence was adduced at the suppression hearing concerning removal and opening of the closed film canister, the only issue before the court was whether there was a reasonable suspicion of criminal activity to justify asking appellant to step out of his vehicle. While the trial court determined that the removal of the film canister which the officers recognized was likely to contain illegal substances was "reasonable," the trial court did not make a finding of probable cause to open the closed container. The issue of probable cause to open the container was not argued or briefed by the parties, and because appellant did not raise this claim in his motion, the state was not placed on notice that it would be required to present evidence on this issue at the hearing. Appellant has therefore waived this issue on appeal.

{¶24} The second assignment of error is overruled.

{¶25} The judgment of the Licking County Common Pleas Court is affirmed.

By: Edwards, P.J.

Hoffman, J. and

Wise, J. concur

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JUDGES

JAE/r0929

[Cite as *State v. Wolfe*, 2011-Ohio-195.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
DAVID A. WOLFE	:	
Defendant-Appellant	:	CASE NO. 10-CA-28

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Court of Common Pleas is affirmed. Costs assessed to appellant.

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JUDGES