[Cite as *State v. Howard*, 2004-Ohio-5287.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 20321

vs. : T.C. CASE NO. 03CR2234

SHERWOOD HOWARD : (Criminal Appeal from Common Pleas Court)

Defendant-Appellant :

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O P I N I O N

Rendered on the 24th day of September, 2004.

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GRADY, J.

{¶ 1} Defendant, Sherwood Howard, appeals from his conviction and sentence for possessing crack cocaine in violation of R.C. 2925.11(A), which were entered on Defendant's plea of no contest after the trial court had overruled Defendant's motion to suppress evidence.

{¶ 2} On May 21, 2003, at about 1:50 a.m., Defendant was observed by two Montgomery County Sheriff's Deputies while he was driving a car with a permanent license

plate mounted to the front and a temporary tag mounted to the rear of the vehicle. Believing this to be a violation of the traffic code, they activated the emergency lights on their patrol car in order to stop Defendant's vehicle.

{¶ 3} Defendant's vehicle appeared to speed up and then proceeded South on North Main Street, turned left on to Waverly Avenue, and finally made a hard left turn into a driveway at a house. One of the two deputies, Brian Cavender, emerged from the patrol car and approached Defendant's vehicle.

{¶ 4} After explaining why he had stopped Defendant, Deputy Cavender asked to see his driver's license. Defendant replied he didn't have one. Defendant was then asked to get out of his vehicle and, after being patted down, was placed in the rear seat of the deputies' patrol car while they confirmed his identity and prepared citations for his traffic code violations.

{¶ 5} While Defendant was in the patrol car, a woman came out of the house and identified herself as the vehicle's owner. She asked to be allowed to enter the vehicle to secure it. Deputy Cavender's partner, Deputy Phillips, told her she couldn't do that until they'd concluded their duties.

{¶ 6} Defendant's identity was confirmed and Deputy Cavender told him that he would be released after citations were served. While Defendant was yet in the patrol car, Deputy Cavender asked him if they could search inside Defendant's vehicle for weapons. Defendant consented. The woman who said she was the owner likewise consented.

{¶ 7} Deputy Cavender remained with Defendant while Deputy Phillips searched Defendant's vehicle. Deputy Phillips returned with drugs he said he'd found inside. Defendant was arrested and charged with possessing crack cocaine, and he was subsequently

indicted on that charge.

{¶ 8} Defendant moved to suppress evidence of the drugs seized from his vehicle. At the hearing on the motion, the State offered the testimony of Deputy Cavender concerning Defendant's stop and arrest. Deputy Phillips, who discovered and seized the drugs, didn't testify.

{¶ 9} Deputy Cavender testified on direct examination that Deputy Phillips asked Defendant "if he'd mind if he checked the car for weapons, and . . . Mr. Sherwood said that was fine with him, he could." (T. 12). Deputy Cavender testified that the woman who said she owned the vehicle also gave her consent. *Id*. With respect to why the request was made, Deputy Cavender testified as follows:

{¶ 10} "Q. Okay. Up until this point was there anything that Mr. Howard said or did to lead you to believe he was armed?

{¶ 11} "A. Just the way he was driving right there to, you know, that left hard turn into that driveway, you know, like he was trying to avoid me.

{¶ 12} "Q. And you thought because of that he was armed.

{¶ 13} "A. Maybe not necessarily armed, but I believed that there was – he had something he didn't want us to see.

{¶ 14} "Q. Something he didn't want us to see like what?

{¶ 15} "A. Drugs, guns, I don't know.

{¶ 16} "Q. Did you see him make any type of furtive movements while he was driving?

{¶ 17} "A. No.

{¶ 18} "Q. See him reach under the seat?

{¶ 19} "A. No.

{¶ 20} "Q. Reach anywhere else?

{¶ 21} "A. No.

{¶ 22} "Q. He just drove fast and turned into a driveway.

{¶ 23} "A. Yes. (T. pp. 20-21).

{¶ 24} Deputy Cavender later testified: "I'm not going to be releasing anybody back to their vehicle if I think there's a – might be a weapon or something in there." (T. 27-28), When asked why he suspected Defendant might have a weapon, he conceded that his sole basis for that was that Defendant had pulled his car into the driveway quickly when the deputies stopped him. *Id.*

{¶ 25} Deputy Cavender conceded that he had no direct knowledge concerning where in the vehicle Deputy Phillips found the drugs he seized, and that the only information he had was what Deputy Phillips told him. (T. 23). He testified that Deputy Phillips said he'd "found them, I believe, somewhere around the driver's seat. . . I can't remember exactly where he said." (T. 23). Deputy Cavender acknowledged that he was unaware whether the drugs were contained or packaged, or if they were, whether the appearance of the container or package suggested that a weapon might be inside. *Id.*

{¶ 26} The trial court denied Defendant's motions to suppress. He filed a timely notice of appeal after he was convicted and sentenced on his change of plea. Defendant presents four assignments of error for review. All concern his arrest.

{¶ 27} <u>FIRST ASSIGNMENT OF ERROR</u>

{¶ 28} "THE TRIAL COURT ERRED IN OVERRULING DEFENDANT-APPELLANT'S MOTION TO SUPPRESS EVIDENCE WHERE THE STATE FAILS TO

MEET ITS BURDEN OF PROOF THAT THE SEARCH OF THE CAR WAS CONDUCTED WITHIN THE SCOPE OF THE ALLEGED CONSENT GRANTED AFTER DEFENDANT-APPELLANT RAISED THIS ISSUE IN HIS PRETRIAL MOTION TO SUPPRESS AND AT THE HEARING, AND THE STATE FAILS TO PRESENT ANY TESTIMONY OR EVIDENCE TO ADDRESS THE ISSUE OR INTRODUCE THE TESTIMONY OF THE OFFICER WHO CONDUCTED THE SEARCH."

{¶ 29} The Fourth Amendment protects against unreasonable searches and seizures. Warrantless searches are per se unreasonable, and therefore illegal, unless the state successfully demonstrates one or more of the several recognized exceptions to the Fourth Amendment warrant requirement. *Katz v. United States* (1967), 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576.

{¶ 30} Traffic stops are seizures for purposes of the Fourth Amendment, even when a resulting detention is temporary and non-custodial, lasting only until a citation is served and the motorist is free to leave. In the interest of protecting the safety of officers, the driver and passengers may be ordered out of the vehicle while the citation is being prepared. *Pennsylvania v. Mimms* (1997), 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331. Also, if there is a legitimate reason for the officer to require those persons to sit in the police vehicle while the citations are being prepared, a weapons pat-down in that connection is permissible for related reasons of officer safety. *State v. Evans* (1993), 67 Ohio St.3d 405; *State v. Lozada*, 92 S.Ct. 3d 74, 2001-Ohio-149. However any other reason to perform the pat down must satisfy the requirements of *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889.

{¶ 31} *Terry* holds that searches of detainees for suspected contraband are prohibited, but a cursory search of a detainee's outer clothing for weapons is permitted if

the officer possesses, and the facts and circumstances portray, a reasonable and articulable suspicion that the person is armed and may be a danger to the officer or others around them. A like standard applies to the officer's search of a detained driver's motor vehicle before he is allowed to return to it, whether or not the driver was patted down. The officer may search the vehicle if facts and circumstances develop which give rise to a reasonable and articulable suspicion that the motorist is a danger to the officer and may gain access to a weapon inside the vehicle when allowed to return to it. *Michigan v. Long* (1983), 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201; *State v. Erwin* (July 22, 1994), Montgomery App. No. 14135; *State v. Henderson* (Nov. 7, 1997), Montgomery App. No. 16016.

{¶ 32} The State, relying on *Michigan v. Long* argues that, irrespective of the consent they procured from Defendant and the woman who said she owned the vehicle, the deputies were authorized to perform the search of its interior that yielded the drugs. We do not agree.

{¶ 33} Defendant was stopped for a license tag violation. Nothing about the conduct that offense involves implies a particular risk to the deputies, much less a reasonable suspicion that Defendant might be armed and dangerous or have a weapon inside his vehicle. Deputy Cavender's equivocal assertion that the way in which Defendant pulled his vehicle into the driveway raised that concern in his mind portrays no reasonable basis for the required suspicion. More likely, the deputy acted out of the general concern he expressed: that allowing persons to return to their vehicle poses an inherent risk when they have a gun or other weapon inside. Prudent as that concern is, it does not operate to create reasonable suspicion that the person has a gun or other weapon in the vehicle.

{¶ 34} The State also argues that the search was justified by the pat down, or was in

some way a reasonable extension of it. That is mere bootstrapping. The justification for the pat down is the risk of danger to which an officer is exposed when a detainee is seated behind him in his cruiser. *State v. Evans; State v. Lozada*. That particular danger ceases when the detainee is released. The issue then, in a situation of this kind, is whether a reasonable and articulable suspicion exists that the vehicle contains a weapon. On this record, that is not shown.

{¶ 35} The remaining basis for the search that yielded the drugs, and the one on which the State might logically rely, flows from the consent Defendant gave.

{¶ 36} Consent is not an exception to the warrant requirement, but is instead a decision by a citizen to waive his Fourth Amendment rights. At issue when consent is asserted are: (1) the voluntariness of the consent that was given, (2) whether the individual consenting may place limitations on the search, and (3) who is authorized to consent. Katz, Ohio Arrest, Search and Seizure, Section 18.1.

{¶ 37} It is undisputed that Defendant was authorized to consent to a search of his vehicle. Defendant's detention had not concluded when his consent was asked and given, and so voluntariness is not an issue. *State v. Retherford* (1999), 93 Ohio St.3d 586. The only issue is whether the scope of the search was beyond the consent Defendant gave to search the interior of his vehicle for weapons, which is his claim.

{¶ 38} The scope of a search that rests on consent is limited to the extent of that consent. A person consenting can set limits on the time, duration, area and intensity of the search, as well as the conditions governing the search. *State v. Perry* (1985), Jackson App. Nos. 479, 480. An intrusion beyond those limitations would not be based on an intentional relinquishment of the right. However, a defendant's general consent to search his car has

been held to include a consent to search closed containers found inside, *Florida v. Gagman* (1991), 500 U.S. 248, 111 S.Ct. 1801, 114 L.Ed.2d 297, as well as underneath the front seat and into all compartments. *State v. Patterson* (1993), 95 Ohio App.3d 255.

{¶ 39} Defendant argues, as he did in the trial court, that the consent he gave was limited to a search for weapons, and that Deputy Phillips exceeded the limits of that consent when he seized the drugs that he found. That is disingenuous, at least to the extent that it suggests that the waiver of rights involved would prevent officers from seizing contraband discovered in the course of the resulting search. Law enforcement officers have the inherent authority to seize contraband they find in "plain view" so long as two conditions are satisfied. The intrusion affording the plain view must be lawful. *State v. Robinson* (1995), 103 Ohio App.3d 490. And, the incriminating nature of the evidence must be immediately apparent to the seizing authority. *Coolidge v. New Hampshire* (1971), 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564.

{¶ 40} Here, the consent Defendant gave to search his vehicle for weapons made Deputy Phillips' intrusion lawful. He reported that the drugs were "found around the driver's seat," which indicates where they were discovered. What the evidence wholly fails to portray, however, is that the incriminating nature of the drugs as contraband was immediately apparent to Deputy Phillips when he saw it.

{¶ 41} Unlike a gun or a knife, the fact that an article is contraband isn't necessarily revealed by its appearance. Here, the contraband was crack cocaine, which does have a distinctive appearance. However, we do not know how the contraband appeared to Deputy Phillips when he saw it, whether it was unwrapped, which is unlikely, or instead was concealed inside a wrapping or container, and, if it was, whether the particular appearance

of the container or wrapping suggested that a weapon or contraband might be inside. Those facts could have been explored had Deputy Phillips testified, but he didn't. And, Deputy Cavender, who did testify, had no direct knowledge or even an understanding derived from what Deputy Phillips had told him that might explain those matters and resolve the issues they present.

{¶ 42} It is, as we said, the State's burden to present or point to evidence portraying the exception to the warrant requirement that justifies both a search and the seizure that was a product of it. Here, there is no evidence that justifies the seizure, notwithstanding the apparent validity of the search that derives from the consent Defendant gave. Therefore, the trial court erred when it denied Defendant's motion to suppress evidence.

{¶ 43} The first assignment of error is sustained. That holding renders the remaining assignments of error moot. Therefore, we need not decide them. App.R. 12(A)(1)(c).

{¶ 44} Having sustained the first assignment of error, we will reverse and vacate the judgment from which the appeal was taken and remand the case for further proceedings consistent with this opinion.

FAIN, P.J. and WOLFF, J., concur.

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