

[Cite as *State v. Kirkland*, 2015-Ohio-1978.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

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| STATE OF OHIO | : | |
| | : | |
| Plaintiff-Appellee | : | C.A. CASE NO. 26272 |
| | : | |
| v. | : | T.C. NO. 13CR3894 |
| | : | |
| LYSONNIA KIRKLAND | : | (Criminal appeal from |
| | : | Common Pleas Court) |
| Defendant-Appellant | : | |
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OPINION

Rendered on the 22nd day of May, 2015.

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DONOVAN, J.

{¶ 1} Defendant-appellant Lysonnia Kirkland appeals from her conviction and

sentence for one count of illegal conveyance of drugs of abuse onto the grounds of a detention facility, in violation of R.C. 2921.36(A)(2), a felony of the third degree. Kirkland filed a timely notice of appeal with this Court on June 13, 2014.

{¶ 2} The incident which forms the basis for the instant appeal occurred on the night of December 7, 2013, at approximately 11:30 p.m. when Dayton Police Officers Eric Kleinhans and Jennifer Stack were dispatched to a residence located at 1012 Randolph Street in Dayton, Ohio, on a report of a “family disturbance.” When Officer Kleinhans arrived at Randolph Street in his police cruiser, a woman in another vehicle flagged him down before he reached the residence in question. The unidentified woman informed Officer Kleinhans that there was a person in a wheelchair in front of the subject residence yelling for someone to help.

{¶ 3} Officer Kleinhans, with Officer Stack behind him in a separate cruiser, traveled to the subject residence where he immediately observed an elderly female, later identified as Stella Rutledge, seated in a wheelchair in front of the house. Officer Kleinhans testified that it was very cold outside, approximately twenty-five degrees fahrenheit, and the ground was covered in five to six inches of snow. Rutledge, who was seventy-nine years old at the time, was only wearing a light housecoat with a thin blanket in her lap when Officers Kleinhans and Stack found her. Rutledge told the police that she had been convalescing at the home of her niece, Kirkland, after undergoing surgery earlier in the week to have her left leg amputated. Rutledge further stated that she and Kirkland had gotten into an argument, and Kirkland kicked her out of the house. Kirkland also threw all of Rutledge’s belongings outside of the residence. Rutledge told the police that she had been sitting outside in her wheelchair for approximately one hour waiting for

someone to help her. Officer Kleinhans testified that Rutledge was visibly shaking from the cold and her clothes were damp. Rutledge was also found to be sitting on a wet towel. Concerned that Rutledge might begin suffering from hypothermia, Rutledge was placed in the back of Officer Stark's vehicle so that she could get warm.

{¶ 4} After securing Rutledge, Officer Kleinhans walked up to Kirkland's residence. Officer Kleinhans testified that the storm door was closed and locked, but the front door of the house was open so that he could see inside the house. Officer Kleinhans testified that he observed Kirkland walking back and forth in the front room while dialing her phone. Officer Kleinhans made contact with Kirkland and asked her to explain the situation. According to Officer Kleinhans, Kirkland stated that she "couldn't do it anymore." When Officer Kleinhans asked her what she was talking about, Kirkland stated that although she agreed to care for Rutledge after the surgery, she could no longer do so because she "couldn't handle it." Officer Kleinhans testified that he then arrested Kirkland and charged her with violating R.C. 2903.16(A), failure to provide for a functionally impaired person. Upon being searched at the jail subsequent to being booked, Kirkland was found to have hidden a small quantity of marijuana in her pants. Thereafter, Kirkland was also charged with illegal conveyance of drugs of abuse onto the grounds of a detention facility.

{¶ 5} On January 28, 2014, Kirkland was indicted for one count of illegal conveyance of drugs of abuse onto the grounds of a detention facility. At her arraignment on February 11, 2014, Kirkland stood mute, and the trial court entered a plea of not guilty on her behalf. On February 24, 2014, Kirkland filed a motion to suppress alleging that the police did not have probable cause to arrest her for failure to provide for

a functionally impaired person. Absent her arrest, the police would never have discovered the marijuana hidden in her pants. A hearing was held on said motion on April 7, 2014, after which the trial court held that the police officers did, in fact, have probable cause to arrest her for failure to provide for a functionally impaired person. Therefore, the marijuana found in her pants was not subject to the exclusionary rule. The trial court issued its decision overruling Kirkland's motion to suppress on April 9, 2014.

{¶ 6} On April 22, 2014, Kirkland pled no contest to the charged offense and the court sentenced her to a term of community control sanctions not to exceed five years.

{¶ 7} It is from this judgment that Kirkland now appeals.

{¶ 8} Kirkland's sole assignment of error is as follows:

{¶ 9} "THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS."

{¶ 10} In her sole assignment, Kirkland contends that the trial court erred when it overruled her motion to suppress. Specifically, Kirkland argues that the police did not have probable cause to arrest her for failure to provide for a functionally impaired person. Kirkland's argument is premised upon two claims, to wit: 1) that Rutledge was not a "functionally impaired person as defined by R.C. 2903.10(A); and 2) that she was not Rutledge's "caretaker" as defined under R.C. 2903.10(B). Kirkland also asserts that even if there were probable cause to believe that she committed the offense for which she was arrested, the offense [R.C. 2903.16(A)], is a misdemeanor. Thus, she contends the police could not arrest her without a warrant unless the offense was committed in the officers' presence, which she claims it was not. Therefore, Kirkland asserts that the

marijuana later discovered hidden in her pants was subject to the exclusionary rule.

{¶ 11} As this Court has previously noted:

“Appellate courts give great deference to the factual findings of the trier of facts. (Internal citations omitted). At a suppression hearing, the trial court serves as the trier of fact, and must judge the credibility of witnesses and the weight of the evidence. (Internal citations omitted). The trial court is in the best position to resolve questions of fact and evaluate witness credibility. (Internal citations omitted). In reviewing a trial court’s decision on a motion to suppress, an appellate court accepts the trial court’s factual findings, relies on the trial court’s ability to assess the credibility of witnesses, and independently determines whether the trial court applied the proper legal standard to the facts as found. (Internal citations omitted). An appellate court is bound to accept the trial court’s factual findings as long as they are supported by competent, credible evidence.” *State v. Hurt*, Montgomery App. No. 21009, 2006-Ohio-990.

State v. Purser, 2d Dist. Greene No. 2006 CA 14, 2007-Ohio-192, ¶ 11.

{¶ 12} Initially, we note that the only witnesses who testified at the hearing held on Kirkland’s motion to suppress were Officers Kleinhan and Stack. The trial court found the officers’ testimony credible and adopted it as the court’s factual findings.

{¶ 13} Kirkland was initially arrested for failure to provide for a functionally impaired person., in violation of R.C. 2903.16(A)¹ which states in pertinent part:

¹ We note that the record establishes that while the trial court found that the police had probable cause to arrest Kirkland for violating R.C. 2903.16, the court failed to articulate which subsection of the statute, (A) or (B), under which she was arrested. However, in

(A) No caretaker shall knowingly fail to provide a functionally impaired person under the caretaker's care with any treatment, care, goods, or service that is necessary to maintain the health or safety of the functionally impaired person when this failure results in physical harm or serious physical harm to the functionally impaired person.

{¶ 14} R.C. 2903.10(A) defines "functionally impaired person" as "any person who has a physical or mental impairment that prevents him from providing for his own care or protection or whose infirmities caused by aging prevent him from providing for his own care or protection." Pursuant to R.C. 2903.10(B), a "caretaker" is defined as "a person who assumes the duty to provide for the care and protection of a functionally impaired person on a voluntary basis, by contract, through receipt of payment for care and protection, as a result of a family relationship, or by order of a court of competent jurisdiction. ***."

{¶ 15} "Probable cause to arrest exists when a reasonably prudent person would believe that the person to be arrested has committed a crime. * * * ." *State v. Adams*, 2d Dist. Montgomery No. 24184, 2011-Ohio-4008, ¶ 7. "[P]robable cause is a concept that must be based on the totality of the circumstances, because it 'deals with probabilities - the factual and nontechnical considerations of everyday life on which reasonable and prudent men act.' * * * ." *State v. Etherington*, 172 Ohio App.3d 756, 2007-Ohio-4097, 876 N.E.2d 1285, ¶ 20 (2d Dist.). "In the abstract, it means a reasonable basis for a particularized belief of guilt constructed from the totality of the circumstances. * * * A trial

the closing arguments made by counsel at the suppression hearing, it is clear that all of the parties were operating under the assumption that Kirkland was arrested for violating R.C. 2903.16(A), rather than subsection (B).

court will decide whether probable cause exists based principally on the historical facts, and ‘whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause.’ * * * .” *State v. Huber*, 2d Dist. Clark No. 07-CA-88, 2009-Ohio-1636, ¶ 12.

{¶ 16} As did the trial court, we conclude that, based on the totality of the circumstances, Officer Kleinhans possessed probable cause to arrest Kirkland for failure to provide for a functionally impaired person. The evidence adduced at the suppression hearing established that Officers Kleinhans and Stack were dispatched to a residence located at 1012 Randolph Street in Dayton, Ohio, in order to respond to a report of a “family disturbance.” Before reaching the residence, an unidentified woman on Randolph Street informed Officer Kleinhans that there was a person in a wheelchair in front of the subject residence yelling for someone to help. Upon arriving at the residence, Officer Kleinhans immediately observed an elderly female, later identified as Rutledge, seated in a wheelchair in front of the house wearing only a light housecoat with a thin blanket in her lap. Officer Kleinhans testified that it was very cold outside, approximately twenty-five degrees fahrenheit, and the ground was covered in five to six inches of snow. Upon investigation, Officer Kleinhans determined that Rutledge was seventy-nine years old and wheelchair bound because she had recently had her left leg amputated. Rutledge informed Officer Kleinhans that the loss of her leg prevented her from caring for herself in her own home. Rutledge further stated that she had gone to live with Kirkland as the latter had agreed to care for her while she recuperated from her surgery.

{¶ 17} Rutledge then informed Officer Kleinhans that she and Kirkland had gotten

into an argument, and Kirkland kicked her out of the house. Kirkland also threw all of Rutledge's belongings outside of the residence. Rutledge told the police that she had been sitting outside in her wheelchair for approximately one hour waiting for someone to help her. Officer Kleinhans testified that Rutledge was visibly shaking from the cold and her clothes were damp. Rutledge was also found to be sitting on a wet towel. Concerned that Rutledge might begin suffering from hypothermia, Rutledge was placed in the back of Officer Stark's vehicle so that she could get warm. In our view, the evidence supports the trial court's finding that the officers had probable cause to conclude that Rutledge was a functionally impaired person pursuant to R.C. 2903.10(A).

{¶ 18} When Officer Kleinhans spoke with Kirkland, she admitted that she "couldn't do it anymore." When Officer Kleinhans asked her what she was talking about, Kirkland stated that although she agreed to care for Rutledge after the amputation, she could no longer do so because she "couldn't handle it." Thus, the evidence supports the trial court's finding that the officers had probable cause to conclude Kirkland was Rutledge's "caretaker" as defined by R.C. 2903.10(B). Thus, we find that Officer Kleinhans had the requisite probable cause to arrest Kirkland for a violation of R.C. 2903.16(A).

{¶ 19} Lastly, Kirkland argues that even if the police had probable cause to arrest her for failure to provide for a functionally impaired person in violation of R.C. 2903.16(A), the offense was only a misdemeanor. Thus, she asserts that because the misdemeanor offense was not committed in the officers' presence, they did not have authority to arrest her and take her into custody.

{¶ 20} A police officer is permitted to make an arrest without a warrant for a misdemeanor committed in his presence. *United States v. Watson*, 423 U.S. 411, 418, 96

S.Ct. 820, 46 L.Ed.2d 598 (1976). The basic rule is that, to be lawful, a warrantless misdemeanor arrest must be committed in the presence of the officer. *State v. Lewis*, 50 Ohio St. 179, 33 N.E. 405 (1893); *State v. Henderson*, 51 Ohio St.3d 54, 56, 554 N.E.2d 104 (1990); see, also, *State v. Mason*, 2d Dist. Montgomery No. 20243, 2004-Ohio-5777, ¶13. This is codified in R.C. 2935.03(A)(1), which permits a police officer to arrest and detain, until a warrant can be obtained, a person “found violating” a state law or municipal ordinance, which would include trespass. *State v. McLemore*, 2d Dist. Montgomery No. 24211, 2011-Ohio-243, ¶ 17.

{¶ 21} The word “found” in R.C. 2935.03(A) means that the officer must actually see the offense being committed or, from surrounding circumstances, including admissions from the defendant, be able to reasonably conclude that an offense has been committed. *Oregon v. Szakovits*, 32 Ohio St.2d 271, 291 N.E.2d 742 (1972). “What is required for a valid warrantless arrest is not that the officer have absolute knowledge that a misdemeanor is being committed in the sense of possessing evidence sufficient to support a conviction after trial, but, rather, that he be in a position to form a reasonable belief that a misdemeanor is being committed, based upon evidence perceived through his own senses. In other words, if, based upon circumstances perceivable by his own senses, a reasonable person would be justified in concluding that a misdemeanor is being committed in his presence, then, the warrantless arrest is valid.” *McLemore*, at ¶ 18, citing *Columbus v. Leneer*, 16 Ohio App.3d 466, 468, 476 N.E.2d 1085 (10th Dist.1984).

{¶ 22} On this record, we find that the officers reasonably concluded that the offense of failure to provide for a functionally impaired person under R.C. 2903.16(A) was

committed in their presence. Officers Kleinhans and Stack, when they arrived at the Kirkland's residence, immediately observed Rutledge sitting outside in the cold in her wheelchair as she yelled for help. At the time, Kirkland was inside her residence, actively ignoring her aunt's pleas for help. The conduct for which the officers had probable cause to arrest was ongoing when they arrived. Accordingly, the totality of the circumstances permitted the officers to conclude that the misdemeanor offense was committed in their presence.

{¶ 23} As a final matter, we note in our previous holdings that the exclusionary rule need not be applied to statutory violations falling short of constitutional violations, such as R.C. 2935.03(A)(1)'s prohibition of arrest for a misdemeanor that did not occur in the officer's presence. *State v. Mason*, 2d Dist. Montgomery No. 20243, 2004-Ohio-5777, ¶21, citing *State v. Neal*, 2d Dist. Montgomery App. No. 7426, 1982 WL 4855 (Jan. 28, 1982). Thus, even if Kirkland's offense had not been observed by the officers and his warrantless arrest had been contrary to R.C. 2935.03(A)(1), there was no constitutional violation that required suppression of the evidence against him. *McLemore*, at ¶ 29. Therefore, the trial court did not err when it overruled Kirkland's motion to suppress.

{¶ 24} Kirkland's sole assignment of error is overruled.

{¶ 25} Kirkland's sole assignment of error having been overruled, the judgment of the trial court is affirmed.

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FAIN, J. and HALL, J., concur.

Copies mailed to:

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