[Cite as *State v. Davis*, 2020-Ohio-4821.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

STATE OF OHIO,

Plaintiff-Appellant,

v.

KEYLAN T. DAVIS,

Defendant-Appellee.

OPINION AND JUDGMENT ENTRY
Case No. 19 CO 0033

Criminal Appeal from the
East Liverpool Municipal Court of Columbiana County, Ohio
Case Nos. 2019 TRD 00258; 2019 CRB 00259

BEFORE:
Cheryl L. Waite, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Reversed and Remanded.

Atty. Katelyn Dickey, Assistant Law Director, City of East Liverpool, 126 W. 6th Street , East Liverpool, Ohio 43920, for Plaintiff-Appellant

Atty. Charles C. Amato, Amato Law Office, L.P.A., 420 Broadway Avenue, Wellsville; Ohio 43968, for Defendant-Appellee.

Dated: September 25, 2020

WAITE, P.J.

{¶1} Appellant State of Ohio appeals three decisions of the East Liverpool Municipal Court, all entered September 16, 2019. The first granted Appellee Keylan T. Davis' motion to suppress evidence obtained from a warrantless search of his vehicle. The second and third entries *sua sponte* dismissed the possession of marijuana and drug paraphernalia charges filed against Appellee, with prejudice. The state argues that the trial court's decision on the motion to suppress is erroneous because the officers had probable cause to search the vehicle. The state urges that the trial court created a new rule requiring any officer who issues a misdemeanor citation must testify at a suppression hearing. The state also argues that a trial court is not authorized to immediately dismiss criminal charges against a defendant after a motion to suppress has been granted, but is required to first afford the state an opportunity to file an appeal. For the reasons provided, the state's arguments have merit and the matter is remanded to the trial court for a trial on the possession of marijuana and drug paraphernalia charges.

Factual and Procedural History

{¶2} On February 12, 2019, a drug taskforce, presumably the Columbiana County Drug Taskforce, conducted surveillance at a residence located on the corner of Dresden and Grant Avenue. At some point, the targeted subjects left the residence in a black Impala. The taskforce members radioed to law enforcement information about the departure of the targets, and described their vehicle as a black Impala with tinted windows. (9/11/19 Suppression Hrg., p. 6.)

{¶3} Shortly after the call, Patrolman John Headley and Patrolman Christopher Green observed a vehicle matching this description driving south on Dresden Ave. According to Patrolman Headley, the window tint was so dark he could not see the driver. The cruiser, which had been driving north on Dresden, turned around and followed directly behind the Impala. The Impala travelled in the right lane, which is a turning lane, and stopped at a red light. Another vehicle was stopped in the left lane, which continues south on Dresden Ave. When the traffic light changed to green, the driver of the Impala did not turn right but continued south on Dresden, cutting off the vehicle in the left lane. The cruiser pulled around the other vehicle, which was now between the Impala and the cruiser, and initiated a traffic stop of the Impala.

{¶4} Patrolmen Headley and Green approached the vehicle and ordered the passengers to roll down the windows for safety purposes, as the window tint was too dark for the officers to see inside the vehicle. As soon as the windows were rolled down, Officer Headley could detect a strong odor of marijuana. (9/11/19 Suppression Hrg., p. 17.) The officers asked Appellee and his passenger if there was anything illegal in the vehicle and they responded "no." The officers informed Appellee that they had pulled him over because the window tint appeared to be above the legal limit. At some point, Patrolman Green brought his K9 dog, Nero, out of the car and walked him around the Impala. Patrolman Green informed Patrolman Headley that Nero had alerted twice at the vehicle.

{¶5} Both people were ordered out of the car. As soon as Appellee exited the car, a plastic bag containing an unknown brown powder was seen emerging above his front right pocket. Officer Headley asked him about the powder substance and he replied

that it was "nothing" and that the patrolman could remove it if he desired. Officer Green took the baggie from Appellant's pocket. Officer Headley then observed a pair of silver digital scales and "paper folds," consistent with drug packaging, emerging from the front pocket of Appellee's hooded sweatshirt. The officers then patted down both Appellee and his passenger for safety purposes.

{¶6} According to the incident report, Captain Wright arrived at the scene and alerted the officers that Appellee had thrown suspected drugs on the ground. The officers located plastic bags containing an unknown white powder on the ground.

{¶7} Officer Headley conducted a test of the window tint. His test revealed that the window tint had seventeen percent light transmission, well below the legal limit of fifty percent.

{¶8} Appellee and his passenger were arrested. Appellee was charged with one count of possession of marijuana, a minor misdemeanor in violation of R.C. 2925.11(C)(3), and possession of drug paraphernalia, a misdemeanor of the fourth degree in violation of R.C 2925.14. Appellee was also cited for the window tint violation. It is unknown whether his passenger was charged with any offenses.

{¶9} On June 13, 2019, Appellee filed a motion to suppress the evidence, arguing that the officers lacked probable cause to initiate the traffic stop. On September 11, 2019, the trial court held a suppression hearing. The state presented the testimony of Patrolman Headley but did not call Patrolman Green as a witness.

{¶10} At the conclusion of the hearing, the trial court granted the motion to suppress based on the failure of the state to call Patrolman Green to testify. The court indicated that both the possession of marijuana and drug paraphernalia charges would

be dismissed if the matter proceeded to trial. However, the trial court then issued a judgment entry the same day dismissing the charges with prejudice. Appellee pleaded no contest to the window tint citation and paid the applicable fine. The window tint citation has been resolved and is not relevant to this appeal. The state's timely appeal followed.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED BY FINDING PROBABLE CAUSE DID NOT EXIST TO SEARCH THE VEHICLE.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED BY INSTITUTING A NEW RULE REQUIRING THE OFFICER WHO SIGNS A MINOR MISDEMEANOR CITATION TO TESTIFY AT A SUPPRESSION HEARING.

{¶11} The state argues that the trial court created a new rule requiring that the officer who issues a misdemeanor citation must testify at a suppression hearing. In so doing, the state urges that the court ignored substantial evidence that gave the officers probable cause to search the vehicle without a warrant. The state cites to Patrolman Headley's testimony that he personally detected an odor of marijuana when Appellee rolled down the windows. In addition, although Patrolman Headley did not assist in the K9 sniff, he testified Patrolman Green informed him that Nero had alerted twice at the vehicle. The state contends that this is sufficient to constitute probable cause.

{¶12} In response, Appellee argues that the officers lacked probable cause to search the vehicle. Although Appellee concedes that the odor of marijuana is sufficient to constitute probable cause, he argues that the record is devoid of any evidence

establishing that Patrolman Headley was trained and experienced in the detection of marijuana odor.

{¶13} In order to be valid, a search must be supported by a warrant or be based on a recognized exception to the warrant requirement. *State v. Ambrosini*, 7th Dist. Mahoning Nos. 14 MA 155, 14 MA 156, 2015-Ohio-4150, ¶ 8, citing *Katz v. U.S.*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). In Ohio, there are seven recognized exceptions to the warrant requirement: (1) a search incident to a lawful arrest, (2) consent, (3) the stop-and-frisk doctrine, (4) hot pursuit, (5) probable cause plus the presence of exigent circumstances, (6) the plain view doctrine, and (7) administrative searches. *State v. McGee*, 7th Dist. Mahoning No. 12 MA 123, 2013-Ohio-4165, 996 N.E.2d 1048 ¶ 17, citing *State v. Akron Airport Post No. 8975*, 19 Ohio St.3d 49, 51, 482 N.E.2d 606 (1985).

{¶14} The Ohio Supreme Court has held that "the smell of marijuana, alone, by a person qualified to recognize the odor, is sufficient to establish probable cause to search a motor vehicle, pursuant to the automobile exception to the warrant requirement. There need be no other tangible evidence to justify a warrantless search of a vehicle." *State v. Moore*, 90 Ohio St.3d 47, 48, 734 N.E.2d 804 (2000).

{¶15} Patrolman Headley testified at the suppression hearing that he detected a strong odor of marijuana emitting from the vehicle when Appellee and his passenger rolled down the windows. While Appellee now argues that Patrolman Headley did not establish his qualifications to recognize the odor, he did not object to Patrolman Headley's testimony, elicited during his cross-examination. When defense counsel asked Patrolman Headley whether there must be a significant amount of marijuana present to

be able to detect the odor, Patrolman Headley responded that "it was a small bud but it smelled like a pound of marijuana. It's potent." (9/11/19 Suppression Hrg., p. 27.)

{¶16} Although not much detail is presented, Patrolman Headley's response can be interpreted to indicate that he has experience detecting the odor. Although there is no bright line rule on this issue, it is reasonable that a trained police officer who testified as to the potency of marijuana and was able to distinguish the scents between a "bud" and a "pound" is qualified to detect the odor.

{¶17} In addition, "[d]uring a valid traffic stop, officers may order the occupants of a vehicle out of the vehicle pending completion of the stop without violating the Fourth Amendment." *State v. Chapman*, 2019-Ohio-3339, 131 N.E.3d 1036, ¶ 37 (7th Dist.), citing, *Maryland v. Wilson*, 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997). Here, Appellee and his passenger were ordered out of the vehicle. Once Appellee exited the vehicle, Patrolman Headley observed a plastic baggie containing an unknown brown powder substance sticking out of his pocket. Patrolman Headley also observed a set of digital scales and drug packaging emerging from Appellee's hooded sweatshirt pocket.

{¶18} While Appellee argues that the K9 unreasonably extended the traffic stop, such claim is contrary to the record. Nero was inside the patrol car at the time of the traffic stop and the sniff occurred immediately as Patrolman Headley approached the vehicle and talked with Appellee. Appellee was ordered out of the vehicle moments after his vehicle was stopped.

{¶19} As Patrolman Headley's detection of the odor of marijuana, alone, is sufficient to establish probable cause, no other evidence is needed to support the search. However, the record in this matter also contains evidence that drug paraphernalia was

readily observable when Patrolman Headley lawfully ordered the passengers out of the vehicle.

{¶20} Pursuant to *Moore* and the plain view doctrine, the officers had probable cause to search the vehicle. Any issues raised by Appellee regarding the K9 sniff are irrelevant.

{¶21} Despite the trial court's statement that the officer who signs a misdemeanor citation must testify at a motion to suppress hearing, Ohio law contains no such rule. Even so, the only offense cited on the ticket was possession of marijuana. The drug paraphernalia offense was charged through a complaint, which was signed by Patrolman Headley. Regardless of who signed the citation, Patrolman Headley also wrote and signed the incident report at issue.

{¶22} Accordingly, the state's first and second assignments of error have merit and are sustained.

ASSIGNMENT OF ERROR NO. 3

THE TRIAL COURT ERRED BY SUBSEQUENTLY SUA SPONTE DISMISSING THE CHARGES BEFORE THE STATE WAS ABLE TO PERFECT AN APPEAL ON EVIDENTIARY ISSUES.

{¶23} The state argues that the trial court improperly dismissed the possession of marijuana and drug paraphernalia charges *sua sponte* before giving the state an opportunity to file an appeal. The state argues that it must be given fourteen days to file an appeal pursuant to Crim.R. 12(J).

{¶24} In response, Appellee argues that the court did not dismiss the charges. Assuming arguendo that the charges were dismissed, Appellee argues that the state did not object to the dismissal at the suppression hearing, thus cannot raise it on appeal.

{¶25} Based on the resolution of the state's first two assignments of error, this assignment is moot. We note, however, that Crim.R. 12(K) affords the state seven days to file an appeal after a trial court grants a motion to suppress.

{¶26} Appellee does not dispute that the state must be given seven days to file an appeal after a motion to suppress is granted. Instead, Appellee argues that the trial court did not actually dismiss the charges and, in the alternative, argues that the state did not object to dismissal at the suppression hearing.

{¶27} Contrary to Appellee's claim, in the trial court's September 16, 2019 judgment entries the court clearly dismissed the charges with prejudice. Although Appellee asserts that the state should have objected to the dismissal at the suppression hearing, while the trial court indicated at the hearing that it would dismiss the charges if the matter were to proceed to trial, the actual dismissal did not occur at the hearing, but later in the day when the court issued judgment entries. Because the trial court did not indicate dismissal would be immmediate, there was no need for an objection at the hearing.

{¶28} The state's third assignment of error is moot.

Conclusion

{¶29} The state argues that the trial court improperly granted the motion to suppress, as probable cause existed allowing law enforcement to search the vehicle without a warrant. The state urges that the trial court created a new rule requiring the

officer who issued a misdemeanor citation must testify at a suppression hearing. The state also argues that a trial court is not authorized to dismiss charges after a motion to suppress has been granted until the state has been afforded the opportunity to file an appeal. For the reasons provided, the state's arguments have merit and the matter is remanded for trial.

Donofrio, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, Appellant's first and second assignments of error are sustained and its third assignment is moot. It is the final judgment and order of this Court that the judgment of the East Liverpool Municipal Court of Columbiana County, Ohio, is reversed. We hereby remand this matter to the trial court for further proceedings according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellee.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.