[Cite as *State v. Grabe*, 2021-Ohio-4666.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellant,

v.

KYREE GRABE,

Defendant-Appellee.

OPINION AND JUDGMENT ENTRY
Case No. 21 MA 0006

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2020 CR 520

BEFORE:
Cheryl L. Waite, Carol Ann Robb, David A. D'Apolito, Judges.

JUDGMENT:
Reversed and Remanded.

Atty. Paul J. Gains, Mahoning County Prosecutor and *Atty. Ralph M. Rivera*, Assistant Chief Prosecuting Attorney, Criminal Division, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellant

Atty. Rachel Cerni, Cerni Law, L.L.C., 3685 Stutz Dr., Suite 100, Canfield, Ohio 44406, for Defendant-Appellee.

Dated: December 22, 2021

WAITE, J.

{¶1} Appellant State of Ohio appeals a January 19, 2021 Mahoning County Court of Common Pleas judgment entry which granted Appellee Kyree Grabe's motion to suppress evidence. The state argues that the officers had probable cause to believe a criminal offense had occurred when, in plain sight, they observed part of a firearm protruding from underneath Appellee's seat. For the reasons provided, the state's argument has merit and the judgment of the trial court is reversed and remanded for further proceedings.

Factual and Procedural History

{¶2} Officers Christopher Stanley, Josh Rivers, and Joseph Burnich are members of the Youngstown Police Department Vice Unit. On the date of the incident, the officers were patrolling an area near the intersection of Mahoning Avenue and S. Lakeview to conduct compliance checks on local bars in accordance with Governor DeWine's COVID orders. The officers observed a grey Buick Regal car approach the area and illegally park on the sidewalk. The officers approached Appellee, who was the driver and sole occupant of the vehicle, and informed him that he would receive a parking ticket. Appellee asked the officers if he needed to sign the ticket, the officers responded that he did not. Appellee then walked away and approached the All City Sports Bar.

{¶3} Apparently, at least two of the officers knew of Appellee from previous encounters. Officer Stanley testified at the suppression hearing that he thought he had encountered Appellee during a prior traffic stop but that was the only time he had seen him. (12/29/20 Suppression Hrg. Tr., p. 27.) Officer Rivers also testified to a prior

interaction with Appellee but did not provide any information regarding that interaction. (12/29/20 Suppression Hrg. Tr., p. 7.) Neither officer appeared to have prior experiences or associated Appellee with either drugs or alcohol. Officer Stanley testified that he did not know at the time if Appellee was under a weapons disability. The officers both testified that the incident occurred in a high-crime area. Specifically, Officer Rivers testified that "[t]hroughout the summer we definitely received a number of complaints from residents for fights, illegally parked vehicles, as well as gun fire." (12/29/20 Suppression Hrg. Tr., p. 12.)

{¶4} After Appellee walked away from his vehicle, Officer Stanley noticed that the back passenger window was rolled down. Officer Stanley shined his flashlight into the vehicle for the stated of purpose of checking to see whether valuable items could be at risk of being stolen. (12/29/20 Suppression Hrg. Tr., p. 31.) Officer Stanley wrote in his report that he "could observe in plain view a silver and black semiautomatic handgun underneath the front passenger seat." (Complaint, Exh. A, Police Report.) At the suppression hearing, Officer Stanley clarified that he observed "the slide of the gun sticking out and the barrel." (12/29/20 Suppression Hrg. Tr., p. 32.) He explained that the "slide" is the part of the barrel that "works to eject the spent shell casing and reload another round from the magazine into the barrel." (12/29/20 Suppression Hrg. Tr., p. 46.) While the gun had a magazine, both officers testified that it was impossible for them to know if it was loaded by merely looking at it. Both officers testified that based on seeing this gun they believed a crime had been committed even though nothing else in the vehicle or about the situation in general indicated that a crime had occurred.

{¶5} After the gun was discovered, Officer C. Kelly waited with the vehicle while Officer Stanley located Appellee near the bar, placed him under arrest, and then transported him back to the vehicle. Both officers testified that they arrested Appellee because of the gun. Officer Rivers testified that he did not know at that time whether the gun was loaded and could not tell without further investigation whether a criminal offense had occurred. (12/29/20 Suppression Hrg. Tr., p. 21.) Officer Stanley similarly testified that he believes a gun must be loaded to constitute a criminal offense but he had no way of knowing whether the gun was loaded at the time it was discovered. (12/29/20 Suppression Hrg. Tr., p. 47.)

{¶6} Following Appellee's arrest, Officer Rivers conducted a search of his person that revealed: one small baggie containing crack cocaine (front right pants pocket), a large sum of money (front right pants pocket), large sum of money (front left pants pocket), one baggie of marijuana (front left pants pocket). The officers then attempted an inventory search of his vehicle. Officer Rivers testified that "[n]ormally, we, you know, conduct our vehicle inventory at the scene, but due to the fact that we had a large crowd of individuals leaving the liquor establishment beginning to surround officers and we were clearly outnumbered, that we had to tow the vehicle from Mahoning and Lakeview to B&O Station to conduct a thorough investigation." (12/29/20 Suppression Hrg. Tr., p. 10.) In addition to the gun, the search of the vehicle resulted in the seizure of drugs.

{¶7} Appellee received a citation for the parking violation, however, it appears that offense was resolved separately in Youngstown Municipal Court. On September 10, 2020, Appellee was indicted on: one count of possession of cocaine, a felony of the second degree in violation of R.C. 2925.11(A), (C)(4)(d), with a specification for forfeiture

of money in a drug case; one count of having weapons while under disability, a felony of the third degree in violation of R.C. 2923.13(B); one count of improperly handling firearms in a motor vehicle, a felony of the fourth degree in violation of R.C. 2923.16(B), (I); one count of possession of heroin, a felony of the fourth degree in violation of R.C. 2925.11(A),(C)(6)(b), with a specification for forfeiture of money in a drug case; and one count of illegal use or possession of drug paraphernalia, a misdemeanor of the fourth degree in violation of R.C. 2925.14(C)(1), (F)(1), with a specification for forfeiture of money in a drug case. The record is not entirely clear, but it appears that Appellee's arrest resulted in a probation violation associated with prior case number 18 CR 1208.

{¶8} On November 24, 2020, Appellee filed a motion to suppress. The state filed a response one week later. On December 29, 2020, the trial court held a hearing where Officers Stanley and Rivers testified. On January 19, 2021, the trial court granted the motion to suppress. In the court's judgment entry, it explained that both officers testified they could not determine that a crime had been committed by the mere presence of the gun. The court determined that further investigation was required in accordance with *State v. Warnock,* 12th Dist. Butler No. CA2018-01-016, 2018-Ohio-4481. As such, the court concluded that Appellee had been arrested and searched without probable cause that he committed a criminal offense. (1/19/21 J.E.) It is from this entry that the state timely appeals.

Law

{¶9} A motion to suppress presents mixed issues of law and fact. *State v. Lake*, 151 Ohio App.3d 378, 2003-Ohio-332, 784 N.E.2d 162, ¶ 12 (7th Dist.), citing *State v. Jedd*, 146 Ohio App.3d 167, 171, 765 N.E.2d 880 (4th Dist.2001.). If a trial court's findings

of fact are supported by competent credible evidence, an appellate court must accept them. *Id*. The court must then determine whether the trial court's decision met the applicable legal standard. *Id*.

ASSIGNMENT OF ERROR

> THE TRIAL COURT'S DECISION TO GRANT DEFENDANT'S MOTION TO SUPPRESS WAS IMPROPER, BECAUSE THE OBSERVATION OF A FIREARM IN A MOTOR VEHICLE ESTABLISHES PROBABLE CAUSE TO ARREST FOR IMPROPERLY HANDLING A FIREARM IN A MOTOR VEHICLE.

{¶10} According to the state, the record demonstrates that Officers Rivers and Stanley had probable cause to arrest Appellee and conduct a search of his person and vehicle as a search incident to a lawful arrest. Both officers testified that the bar is located in a high crime area and the Youngstown Police Department frequently receives complaints of drug and gun activity in the area. The state further explains that the two officers observed Appellee illegally park his vehicle near the bar. After issuing him a parking ticket, the officers noticed that his rear passenger window was rolled down. They shined a flashlight inside and observed part of a gun protruding from underneath the passenger seat. The state argues that these facts taken together gave the officers probable cause to believe that Appellee committed the offense of improper handling of a firearm in a motor vehicle.

{¶11} In the alternative, the state argues that even if probable cause did not exist based on those facts, an uncharged subsection of the statute provides that a gun, whether

loaded or not, must be stored in a specific manner. Here, the facts clearly demonstrate that the gun was not stored in accordance with that law. Thus, even if the officers did not realize this, the facts and circumstances demonstrated the existence of a criminal offense.

{¶12} In response, Appellee argues that the crux of this case is the admitted failure of the officers to conduct any investigation before arresting him and searching his person. Appellee urges that at the time the officers observed the weapon, they did not know if it was loaded, thus did not have knowledge that a crime had been committed based on their testimony. Appellee argues that the incriminating nature of an object must be readily apparent to officers at the time they view it. Here, Appellee argues that the mere presence of part of the gun did not reveal its incriminating nature. Appellee distinguishes the instant matter from the cases cited by the state, as those cases each involved a situation where police were actively investigating offenses involving firearms and drugs. Here, the officers were merely checking local bars for compliance with COVID orders.

{¶13} The parties do not appear to dispute that the officers were authorized to stand on the street and shine the flashlight into the window. Instead, the narrow issue before us is whether the officers had probable cause to believe Appellee committed a criminal offense based on their visual observation of the gun protruding from underneath the seat, alone.

{¶14} "The Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution secure an individual's right to be free from unreasonable searches and seizures and require warrants to be particular and supported by probable cause." *State v. Telshaw*, 195 Ohio App.3d 596, 2011-Ohio-3373, 961 N.E.2d 223 (7th

Dist.), ¶ 12. In order for a search or seizure to be lawful, probable cause must exist and the search or seizure must be executed pursuant to a warrant, unless an exception to the warrant requirement exists. *State v. Ward*, 7th Dist. Columbiana No. 10 CO 28, 2011-Ohio-3183, ¶ 33.

{¶15} There is no question that Appellee was arrested and searched without a warrant. "An arrest without a warrant violates the Fourth Amendment unless the arresting officer has probable cause to make the arrest." *State v. Leffler*, 7th Dist. Columbiana No. 18 CO 0032, 2019-Ohio-3964, ¶ 17. "The test for probable cause to justify an arrest is 'whether at that moment the facts and circumstances within [the officer's] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [arrestee] had committed or was committing an offense.' " *Id.* at ¶ 17, citing *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223 (1964). Thus, the standard views the facts and circumstances from an objective rather than subjective standpoint.

{¶16} Appellee was indicted on a violation of R.C. 2923.16(B) which addresses storage of a loaded gun in a vehicle. Although the state solely relied on this subsection during the trial court proceedings, there is a separate subsection that addresses storage of an unloaded gun. R.C. 2923.16(C) provides that :

> (C) No person shall knowingly transport or have a firearm in a motor vehicle, unless the person may lawfully possess that firearm under applicable law of this state or the United States, the firearm is unloaded, and the firearm is carried in one of the following ways:
>
> (1) In a closed package, box, or case;

(2) In a compartment that can be reached only by leaving the vehicle;

(3) In plain sight and secured in a rack or holder made for the purpose;

(4) If the firearm is at least twenty-four inches in overall length as measured from the muzzle to the part of the stock furthest from the muzzle and if the barrel is at least eighteen inches in length, either in plain sight with the action open or the weapon stripped, or, if the firearm is of a type on which the action will not stay open or which cannot easily be stripped, in plain sight.

{¶17} As previously stated, the issue is not whether the officers themselves clearly understood that a crime had been committed. Rather, the established law asks whether the facts that existed at the time were "sufficient to warrant a prudent man in believing that the [arrestee] had committed or was committing an offense." *Leffler* at ¶ 17. Thus, the issue before us can be narrowed further to whether a reasonable person who saw part of a gun protruding from underneath a seat would believe that a criminal offense had occurred. In other words, did the officers have probable cause to believe a crime was committed even though they held a subjective mistaken belief that the gun must have been loaded to constitute a criminal offense?

{¶18} Although the cases are not perfectly aligned, a case from the Twelfth District provides some guidance, here. See *State v. Braxton,* 2020-Ohio-424, 151 N.E.3d 963 (12th Dist.). In *Braxton,* an officer detected an odor of marijuana during a traffic stop and subsequently searched the car. During the search, the officer located contraband in the center console of the vehicle. Then, although the officer testified that he did not have any reason to search the trunk, he did so. *Id.* at ¶ 19.

{¶19} In determining that the officer had probable cause to search the trunk, the *Braxton* court relied on two factors. First, the court explained that, "even if Trooper Parsons had not subjectively believed that additional contraband would be found in the trunk, based on the discovery of contraband in the center console, the search of the trunk was objectively reasonable under the circumstances and therefore lawful pursuant to the automobile exception to the warrant requirement." *Id.* at ¶ 19.

{¶20} Second, the fact that there " 'wasn't anything that made [him] think there's going to be something in the trunk' after finding the additional contraband in the center console is not material, as probable cause is viewed under an objective standard. * * * Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that [an] offense has been committed." *Id.* at ¶ 19, citing *State v. Arrasmith*, 12th Dist. Madison No. CA2013-09-031, 2014-Ohio-4173, ¶ 18.

{¶21} In the instant case, both officers testified they held a mistaken belief of the law. At the hearing, Officer Rivers testified that he has experience arresting individuals for both concealed carry and improper handling violations. (12/29/20 Suppression Hrg. Tr., p. 11.) Despite this experience, Officer Rivers exhibited a misunderstanding of the law in his testimony.

> **Q** Was the fact that there was a weapon in the car at the time that you couldn't tell was loaded, was that in and of itself a criminal offense?
>
> **A** Being that we couldn't tell whether or not the weapon was loaded --
>
> **Q** Right. Without further investigation, where the weapon was lying, with the information you had, was it a criminal offense?

A Due to the fact that we didn't know if it was loaded at the time --

Q You didn't know, that's the point. So unless you did further investigation, could you tell as it laid there whether or not there was a criminal offense?

A No, sir.

(12/29/20 Suppression Hrg. Tr., p. 21.)

{¶22} On redirect, the state did not address the misstatement of law, and instead questioned the officer as to whether Appellee's car was parked out in the open. Then, the following exchange occurred between defense counsel and Officer Stanley:

Q When you saw what you described as the barrel and the slide of the weapon and could not make a determination that the weapon was loaded, without any further investigation were you able to make a determination at that point whether or not there was a crime?

A I believe there was a crime.

Q I know you believe it, but what was it that caused you to believe it at the time? Because wouldn't the weapon have to be loaded for it to be a criminal offense at that point?

A Yes.

* * *

Q So at the time that you investigated, at the time that you entered that vehicle, at the time that you arrested [Appellee], what you had, the information before you, was a weapon in a vehicle, which in and of itself is not a criminal act, we agree?

A Yes.

Q And no knowledge as to any other criminal activity.

A Correct.

* * *

THE WITNESS: The weapon and the ammunition need to be separated either by a locked case or in different – different areas of the vehicle. Or the weapon, if loaded, must be in the vehicle where you would have to exit the vehicle in order to obtain that weapon.

(12/29/20 Suppression Hrg. Tr., pp. 47-49.)

{¶23} The trial court asked Officer Stanley to explain the correct way to lawfully handle a firearm in a vehicle. He responded that, if loaded, the gun must be stored in an area inaccessible to the driver. If unloaded, the gun must be stored separate from the ammunition. The court asked several questions to clarify the law and Officer Stanley reiterated the law of subsection (B), but did not mention the law as stated in subsection (C). The state did not attempt to correct any of these misstatements.

{¶24} Officer Stanley's testimony as to an unloaded gun is partially correct. It appears he believes the only requirement as to an unloaded gun is that it must be stored separate from the ammunition. However, R.C. 2923.16(C) requires an unloaded gun to be stored in a locked compartment, in an area inaccessible to the driver, or in a storage rack if in plain view. There is no question that a gun cannot simply be tossed underneath the seat of a vehicle, whether it is loaded or unloaded. Because the gun was laying on the floor underneath the front seat and was not properly stored, Appellee violated R.C. 2923.16(C) regardless of whether the gun was loaded. Thus, a reasonable officer in that situation would have believed that probable cause for arrest existed pursuant to R.C. 2923.16(C).

{¶25} While it is true that the state and its witnesses never raised this aspect of the statute, this issue presents a question of law, not a question of fact. While the state should have taken some effort to clarify the law after both of its own witnesses misstated it, it is ultimately the trial court's responsibility to resolve and apply questions of law.

{¶26} As such, the state's sole assignment of error has merit and is sustained.

Conclusion

{¶27} The state argues that the officers had probable cause to believe a criminal offense had occurred when, in plain sight, they observed part of a firearm protruding from underneath Appellee's seat. For the reasons provided, the state's argument has merit and the judgment of the trial court is reversed and remanded for further proceedings.

Robb, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is sustained and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning 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.