

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-08-1052

Appellee

Trial Court No. CR-200603601

v.

Goldy Thompson

DECISION AND JUDGMENT

Appellant

Decided: June 30, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
James E. Vail, Assistant Prosecuting Attorney, for appellee.

Scott J. Hoffman, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals a judgment of conviction for cocaine possession entered on a no contest plea in Lucas County Court of Common Pleas. For the reasons that follow, we affirm.

{¶ 2} On November 17, 2006, on information provided by an informant, Toledo police obtained a search warrant for premises being occupied by appellant, Goldy Thompson. The warrant listed as items of interest: work boots, tennis shoes, two pocket knives and two cellular phones.

{¶ 3} During the search, an officer found a pair of appellant's pants hanging in appellant's closet. One of the searching officers put his hand in the pants pocket, discovering a plastic bag containing crack cocaine. Appellant was arrest and charged with drug possession in violation of R.C. 2925.11(A) and (C)(4)(b).

{¶ 4} Appellant pled not guilty and moved to suppress the evidence found in his pockets. When the trial court denied his motion to suppress, appellant changed his plea to no contest and was found guilty. The trial court sentenced appellant to a term of ten months in prison.

{¶ 5} From this judgment of conviction, appellant now brings this appeal. Appellant sets forth the following two assignments of error:

{¶ 6} "I. The trial court committed reversible error when it denied defendant's motion to suppress.

{¶ 7} "II. The trial court committed reversible error when it denied defendant's motion to withdraw his guilty [sic] plea."

{¶ 8} Appellant, in his first assignment of error, contends that the trial court's denial of appellant's motion to suppress was improper in two respects. First, appellant argues that the issuance of the warrant was improper, and thus the search was in violation

of the Fourth Amendment of the United States Constitution. Second, appellant maintains that, since the search warrant did not specify cocaine as an enumerated item to be searched for, police exceeded the scope of the warrant.

{¶ 9} Appellant failed to challenge the validity of the warrant in the trial court. During the suppression hearing, the court expressly asked appellant whether the basis of his motion to suppress went to the validity of the search warrant. Appellant replied that it was not.

{¶ 10} It is well established that failure to raise an alleged error in the trial court, even an error of constitutional magnitude, results in the waiver of such issue on appeal. *State v. Williams* (1977), 51 Ohio St.2d 112, 117. Therefore, appellant waived any appellate attack on the validity of the warrant.

{¶ 11} Appellant contends that the police search of his pants pocket where the drugs were found exceeded the scope of the warrant. For this reason, appellant insists, the trial court should have granted his motion to suppress.

{¶ 12} Appellate review of a trial court's decision on a motion to suppress evidence presents a mixed question of law and fact. *State v. McNamara* (1997), 124 Ohio App.3d 706, 710. "When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses." *State v. Burnside* , 100 Ohio St.3d 152, 154-155, 2003-Ohio-5372, ¶ 8. The appellate court must then accept the trial court's findings of fact provided that they are supported by competent, credible evidence. *State v. Durnwald*,

163 Ohio App.3d 361, 369, 2005-Ohio-4867, ¶ 28, citing *Burnside*, supra. Next, the appellate court, conducting a de novo review, determines independently whether the facts in the case satisfy the applicable legal standard. *State v. Claytor* (1993), 85 Ohio App.3d 623, 627; *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594.

{¶ 13} A search warrant must describe with particularity the place to be searched and the items to be searched for and seized. Fourth Amendment; Section 14, Article I, Ohio Constitution; Crim.R. 41(C). The scope of the search conducted is circumscribed by the warrant. Nevertheless, if, during the course of a search, an officer discovers immediately apparent contraband in a place he or she may lawfully be searching, the officer is not required to ignore the contraband. *Coolidge v. New Hampshire* (1971), 403 U.S. 443, 465-468. Such a discovery is treated in law as if such an item had been discovered in plain view, *id.*, or by plain feel, *Minnesota v. Dickerson* (1993), 508 U.S. 366, 375-376, during a warrantless search. See 2 LaFare, *Search and Seizure* (4 ed. 2004) 779-783, section 4.11(b).

{¶ 14} In gaining lawful right of access to an object which is in a container, the container must logically be capable of concealing the specific object of the search. *State v. Welch* (1985), 18 Ohio St.3d 88, 92, citing *United States v. Ross* (1982), 456 U.S. 798, 821 ("a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found"). As stated by one court, "the permitted scope of a search is, logically, whatever is necessary to serve the purpose of that particular search, but don't look for an

elephant in a matchbox." *Dotson v. Commonwealth* (2005), 47 Va. App. 237, 243; citing *Wilkerson v. State* (1991), 88 Md. App. 173.

{¶ 15} A pants pocket is a logical place for a cell phone or a pocket knife to be kept. After all what better place to find a pocket knife than in one's pocket? Stated differently, the officer was not searching for an elephant in a matchbox. Moreover, the officer who conducted the search testified that he was a 30 year veteran of the force who had previously found crack cocaine hundreds of times. According to the officer, when he felt the plastic baggie with what felt like rocks inside, he concluded based on his experience that the object was crack cocaine. This is sufficient testimony for the trial court to properly find that the crack was immediately apparent. See *State v. Johnson*, 2d Dist. No. 21361, 2006-Ohio-6311, ¶ 20. Therefore, the search was within the scope of the warrant and the nature of the object found was immediately apparent to the officer conducting the search.

{¶ 16} Consequently, the fact that the cocaine was not listed in the warrant is of no consequence. The entry into the premises was lawfully executed. The items listed in the search warrant could be concealed in a pants pocket, so the officer's search of the pockets was lawful. Last, it was immediately apparent to the officer that what he felt was contraband. Thus, the seizure of the cocaine was proper and the trial court properly denied appellant's motion to suppress. Accordingly, appellant's first claim of error is not well-taken.

{¶ 17} Appellant, in his second assignment of error, contends that the trial court's denial of appellant's postsentencing motion to withdraw his no contest plea was improper.

{¶ 18} Postsentence motions to withdraw pleas are not freely granted and only should be allowed "to correct manifest injustice." Crim.R. 32.1; *State v. Xie* (1992), 62 Ohio St.3d 521, 526; *State v. Smith* (1977), 49 Ohio St.2d 261, 264. The burden of establishing the existence of a manifest injustice is upon the individual seeking vacation of the plea. *Id.*

{¶ 19} An appellate court reviews the trial court's denial of appellant's motion under an abuse-of-discretion standard, i.e., whether the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Xie*, at 527, citing *State v. Adams* (1980), 62 Ohio St.2d 151, 157. The good faith, credibility and weight of the movant's assertions in support of the motion are matters to be resolved by the trial court. *Smith*, 49 Ohio St.2d at 264.

{¶ 20} Appellant's only justification in support of his postsentencing motion to withdraw his plea is that the court should have granted his suppression motion. The trial court found that this failed to establish the existence of a manifest injustice and denied the motion. On review, we cannot say that this decision was arbitrary, unreasonable or unconscionable. Accordingly, appellant's second assignment of error is not well-taken.

{¶ 21} On consideration, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay costs, pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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