

[Cite as *Cleveland v. Wells*, 2010-Ohio-5014.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94394

CITY OF CLEVELAND

PLAINTIFF-APPELLEE

vs.

JAMES WELLS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED IN PART;
REVERSED AND REMANDED IN PART**

Criminal Appeal from the
Cleveland Municipal Court
Case No. 09 TRD 060751

BEFORE: McMonagle, J., Gallagher, A.J., and Cooney, J.

RELEASED AND JOURNALIZED: October 14, 2010

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CHRISTINE T. McMONAGLE, J.:

{¶ 1} Defendant-appellant, James Wells, appeals from the trial court's judgment denying his motion to suppress and motion to return property seized from him at the time of his arrest. We affirm in part and reverse and remand in part.

I

{¶ 2} Wells was charged with driving without a valid license in violation of R.C. 4510.12 and operating a vehicle without proper directional

equipment in violation of R.C. 4513.261. He pled not guilty and filed a motion to suppress and motion to return seized property.

{¶ 3} At the suppression hearing, Cuyahoga County Sheriff's Detective Tim O'Connor, Jr., testified that on September 17, 2009, at approximately 11:45 a.m., he and a partner were parked in an unmarked police car in the parking lot of a Save-a-Lot store in Cleveland. As they observed the area, they saw a Volvo station wagon enter the parking lot and stop next to a van. Detective O'Connor saw the driver exit the van, go to the driver's side of the Volvo and engage in "what appeared to be a conversation," and then go to the passenger side of the Volvo. Detective O'Connor testified that he then "observed what [he] believed to be a hand-to-hand exchange of money for drugs." The driver of the van then got back in the van, and the Volvo and the van both left the parking lot.

{¶ 4} O'Connor testified that he and his partner followed the Volvo "to see if I could find probable cause to stop him."¹ O'Connor testified that the Volvo failed to signal a turn when it turned right from Cable Avenue onto Adelphia Avenue, so he initiated a traffic stop of the car. Wells was the driver of the vehicle.

¹A tacit admission that the police did not have a reasonable suspicion of criminal drug activity sufficient to permit an investigatory stop of the vehicle. See, e.g., *Maumee v. Weisner*, 87 Ohio St.3d 295, 1999-Ohio-68, 720 N.E.2d 507 (Fourth Amendment permits police stops of motorists in order to investigate a reasonable suspicion of criminal activity).

{¶ 5} Both occupants of the Volvo were asked for identification, and a check of Wells's identification indicated that he was driving without a valid license. Wells was arrested and secured, at which time the detectives found \$2,500 on his person. The detectives then searched the Volvo and found three bags containing what O'Connor suspected to be cocaine and heroin. Wells was then transported to the county jail.

{¶ 6} Wells testified that he knew the police were following him when he pulled out of the Save-a-Lot parking lot and that he was driving with a suspended license, so he signaled for every turn he made, but the police stopped him anyway. He testified that before they searched the car and found the drugs, the police told him they would "give him a break" and ticket him only for driving with a suspended license, but later, at the police station, the police took the first ticket from him and then wrote another ticket that charged him with both improper signaling equipment and driving without a valid license. The ticket cited Wells for illegally operating his car at East 63rd Street and Francis Avenue.

{¶ 7} The trial judge denied Wells's motion to suppress. Wells then pled no contest to the charges; the trial judge found him guilty as charged and ordered him to pay a \$75 fine for driving without a valid license and a \$25 fine on the signaling charge. Wells appeals from the trial court's judgment.

{¶ 8} In his first assignment of error, Wells contends that the trial court erred in denying his motion to suppress.

{¶ 9} Appellate review of a suppression ruling presents a mixed question of law and fact. *State v. Singleton*, 8th Dist. No. 90003, 2008-Ohio-3557, ¶6-7. We must first determine whether the trial court's findings of fact are supported by competent, credible evidence. *State v. Elliott*, 8th Dist. No. 92324, 2010-Ohio-241, ¶9. Then, accepting the properly supported findings as true, an appellate court must determine as a matter of law, without deference to the trial court's conclusion, whether the trial court erred in applying the substantive law to the facts of the case. *Singleton* at ¶25. See, also, *State v. Curry* (1994), 95 Ohio App.3d 93, 96, 641 N.E.2d 1172.

{¶ 10} The Fourth Amendment guarantees “[t]he right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures.” A temporary detention of a person during a traffic stop is a “seizure” under the Fourth Amendment, so a traffic stop must be reasonable under the Fourth Amendment. *Delaware v. Prouse* (1979), 440 U.S. 648, 653 and 659, 99 S.Ct. 1391, 59 L.Ed.2d 660. A traffic stop is generally reasonable under the Fourth Amendment where the police have probable cause to believe that the detainee has committed a traffic violation. *Dayton v. Erickson* (1996), 76 Ohio St.3d 3, 665 N.E.2d 1091.

{¶ 11} Wells argues that the traffic stop was illegal because it was merely a pretext to search his car for drugs. But “the Ohio Supreme Court has determined that stops based upon even minor traffic violations do not run afoul of the Fourth Amendment even if the stopping officer harbors an ‘ulterior motive of making the stop, such as suspicion that the violator was engaged in more nefarious criminal activity.’” *State v. Hoskins*, 8th Dist. No. 80384, 2002-Ohio-3451, ¶13, quoting *Erickson*, supra at the syllabus. See, also, *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539, 894 N.E.2d 1204. Thus, when the detectives saw the Volvo fail to signal a right turn, in violation of the Revised Code, they had probable cause to stop it.

{¶ 12} But Wells contends that he used his turn signal when turning and that Detective O’Connor’s testimony to the contrary was simply not credible. He points to the discrepancy between O’Connor’s testimony about where the illegal turn allegedly occurred (Cable and Adelphia Avenues) to what was stated on the ticket (East 63rd Street and Francis Avenue) as evidence that O’Connor was less than truthful about what actually happened.

He also points to his testimony that the detectives changed his ticket at the police station to include a citation for improper signaling. He contends that the police did this only after they found the drugs in his car because they realized they needed to justify the stop and subsequent search of the car.

{¶ 13} In a motion to suppress, the trial court assumes the position of trier of fact and is in the best position to resolve questions of fact and evaluate witness credibility. *Curry*, supra at 95. A reviewing court is bound to accept those findings of fact if supported by competent, credible evidence. Here, the trial judge chose to believe Detective O'Connor's testimony that he saw the Volvo fail to signal a right turn, rather than Wells's testimony that he properly signaled all turns. Despite an inconsistency between O'Connor's testimony about where the offense occurred and what is stated on the ticket, we do not find the detective's testimony so incredible to be unworthy of belief.

Because the trial judge was in the best position to evaluate witness credibility and resolve factual questions, we accept the trial judge's determination that Detective O'Connor observed Wells fail to properly signal a right turn.² Whether we would have resolved this differently is of no consequence.

{¶ 14} Accordingly, having observed a traffic violation, the detectives had probable cause to stop the Volvo and, subsequently, after determining

²Detective O'Connor testified that he saw Wells fail to signal a right turn, which would be a violation of R.C. 4511.39, which requires the use of directional signals for stopping, turning, etc. But O'Connor ticketed Wells for violating R.C. 4513.261, which states that "[n]o person shall operate any motor vehicle * * * unless the vehicle is equipped with electrical or mechanical directional signals." There was no evidence that the Volvo was not equipped with directional signals; the testimony related only to whether Wells used his right turn signal. But Wells does not challenge this discrepancy on appeal. Further, his no contest plea waived any error about this discrepancy because a no contest plea is an admission of the facts contained in the indictment, information, or complaint. Crim.R. 11(B)(2).

that Wells was driving under a suspended license, to arrest him. As the stop was not illegal, the trial court did not err in denying Wells's motion to suppress.

{¶ 15} Appellant's first assignment of error is therefore overruled.

III

{¶ 16} In his second assignment of error, Wells argues that the trial court erred in denying his motion for return of property seized from him at the time of his arrest.³ His motion to the trial court asserted that the Sheriff was retaining the Volvo and \$2,500 found on his person at the time of his arrest. On appeal, Wells argues only about the money and accordingly has abandoned any argument about the Volvo.

{¶ 17} The City concedes that the \$2,500 was not returned to Wells, but contends that the money was never under the jurisdiction of the municipal court because the Sheriff's Department turned the money over to the Cuyahoga County Common Pleas Court as part of a pending felony case there. The City contends that Wells should petition the common pleas court for the return of his money. The City refers us to *State ex rel. Chandler v. Butler* (1991), 61 Ohio St.3d 592, 575 N.E.2d 833, as support for its contention that Wells should seek the return of his money from the common pleas court.

³The trial court did not rule on the motion; hence, we presume it was denied. *Temple v. Fence One, Inc.*, 8th Dist. No. 85703, 2005-Ohio-6628, ¶27.

In that case, the defendant filed a writ of mandamus to compel the city of Cincinnati to return money seized from him upon his arrest by the Cincinnati Police Department. The Ohio Supreme Court held that the “undisputed facts” demonstrated that the monies in question had been forfeited under federal law. *Id.* at 834. Specifically, the Court referenced a Cincinnati police sergeant’s affidavit, which stated that the money “was turned over to the United States Drug Enforcement Agency, which caused it to be forfeited administratively.” Therefore, the Supreme Court held that the defendant’s claim, if any, was against the federal government.

{¶ 18} But here, there is nothing in the record to support the City’s assertion that the Sheriff’s Department turned Wells’s money over to the common pleas court. The City proffered no evidence to the municipal court to support its bald assertion about the whereabouts of Wells’s money. The record contains no information whatsoever regarding any pending case against Wells in common pleas court, much less any information about the whereabouts of Wells’s money. Further, there is no evidence that Wells’s money was forfeited through the statutory forfeiture procedure. See R.C. 2981.01 et seq.

{¶ 19} The State may not deprive an individual of his property without due process of law. *State v. Lillock* (1982), 70 Ohio St.2d 23, 28, 434 N.E.2d 723; *Cleveland v. Fulton*, 178 Ohio App.3d 451, 2008-Ohio-4702, 898 N.E.2d

983, ¶47. Insofar as the Sheriff took the money pursuant to this arrest, but provided the trial court with no evidence that the money was legally being held elsewhere, we hold that the municipal court erred in denying Wells's motion for return of the money seized from him when he was arrested.

{¶ 20} Appellant's second assignment of error is sustained.

III

{¶ 21} In his third assignment of error, Wells contends that the evidence was not sufficient to sustain his convictions because Officer O'Connor's testimony about the reason for the stop was not credible.

{¶ 22} The test for sufficiency requires a determination of whether prosecution met its burden of production at trial. *State v. Bowden*, 8th Dist. No. 92266, 2009-Ohio-3598, ¶12. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 942, paragraph two of the syllabus.

{¶ 23} We have already determined that the trial court did not err in finding Detective O'Connor's testimony to be credible. Further, a no contest plea is an admission of the facts contained in the complaint. Those facts stated that Wells drove under a suspended license and operated a vehicle

without proper directional signals. Thus, we find no merit to Wells's argument; his third assignment of error is overruled.

{¶ 24} Affirmed in part; reversed and remanded in part, with instructions to the municipal court to order the Sheriff to return Wells's money to him.

It is ordered that the parties share equally the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the municipal court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. McMONAGLE, JUDGE

SEAN C. GALLAGHER, A.J., CONCURS;
COLLEEN CONWAY COONEY, J., CONCURS IN PART AND
DISSENTS IN PART WITH SEPARATE OPINION.

COLLEEN CONWAY COONEY, J., CONCURRING IN PART,
DISSENTING IN PART:

{¶ 25} I concur with the majority's resolution of the first and third assignments of error. I respectfully dissent, however, regarding the return of Wells's property in the second assignment of error. I would affirm the trial court's denial of Wells's motion for return of his property.

{¶ 26} The record reflects that the County Sheriff's officers seized the property, not the city of Cleveland or its law enforcement officers. Since the traffic conviction on appeal involves the City, not the County, the municipal court did not have any jurisdiction over the seized property. As the majority acknowledges, the Sheriff took the money. The City could proffer no evidence on the whereabouts of Wells's money because the City never had the money.

{¶ 27} Wells has an adequate remedy by way of replevin under R.C. 2737.03 to assert his right to immediate possession of his property. This court has found replevin lies even when alleged contraband has been seized. See *Bernard v. Lakewood* (2000), 140 Ohio App.3d 350, 747 N.E.2d 838.

{¶ 28} Therefore, I would affirm the trial court in toto.