[Cite as *State v. Howard*, 2010-Ohio-2817.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-L-158**
- vs -	:	
ORRY D. HOWARD,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 08 CR 000454.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Joshua S. Horacek*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Albert L. Purola, 38298 Ridge Road, Willoughby, OH 44094 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Orry D. Howard, appeals the judgment of the Lake County Court of Common Pleas, denying his motion to suppress evidence. At issue is whether police were authorized to stop appellant when they observed him commit various traffic violations, and, at the same time, they wanted to interview him in connection with an unrelated investigation. For the reasons that follow, we affirm.

{¶2} Appellant was charged by indictment with multiple drug law violations. In count 1, he was charged with trafficking in cocaine, in violation of R.C. 2925.03(A)(2), a

felony of the first degree, with a forfeiture specification under R.C. 2941.1417 and 2981.04, alleging appellant used his Pontiac Grand Prix as an instrumentality to commit the offense, and with a second forfeiture specification under the same sections of the Revised Code, alleging appellant knowingly possessed $439 in drug trafficking proceeds. In court 2, he was charged with possession of cocaine, in violation of R.C. 2925.11, a felony of the first degree, with the same two forfeiture specifications. In count 3, he was charged with trafficking in cocaine, in violation of R.C. 2925.03(A)(2), a felony of the fourth degree, with the same two specifications. In court 4, he was charged with possession of cocaine, in violation of R.C. 2925.11, a felony of the fourth degree, with the same two specifications. In count 5, he was charged with trafficking in heroin, in violation of R.C. 2925.03(A)(2), a felony of the third degree, with the same two specifications. In count six, he was charged with possession of heroin, in violation of R.C. 2925.11, a felony of the third degree, with the same two forfeiture specifications. In count 7, appellant was charged with possessing criminal tools, in violation of R.C. 2923.24, a felony of the fifth degree. In count 8, he was charged with a second count of possessing criminal tools, in violation of R.C. 2923.24, a felony of the fifth degree.

{¶3} Appellant pled not guilty and filed a motion to suppress evidence. The trial court subsequently held a suppression hearing. Officer David Burrington and Officer Michael Fitzgerald of the Willoughby Police Department testified that during the evening of July 9, 2008, they went to appellant's apartment at 35400 Euclid Avenue to talk to him regarding his involvement in an alleged Section 8 housing violation. The officers parked in the parking lot of appellant's apartment in an unmarked police vehicle and put appellant's apartment under surveillance. During this time they saw two occupants in

his apartment. They knew appellant was driving a black Pontiac Grand Prix from a recent encounter with him. While in the parking lot, they ran appellant's license plate number in LEADS and found that his driver's license was suspended. After being in the parking lot for about one hour, the officers went to appellant's apartment to talk to him about the housing violation. They knocked at the door for about one minute, but no one answered. After getting no response, they left the area.

{¶4} Later that night, on July 10, 2008, at about 2:30 a.m., Officer Fitzgerald and Officer Burrington were driving northbound on State Route 91. When they approached the intersection at State Route 84, they noticed that appellant was driving his Grand Prix southbound on Route 91 and passed them. They recognized appellant from their previous encounter with him and because they had seen his BMV photograph. Officer Burrington said, "there he is." At that time the officers knew appellant was driving under suspension. They also saw appellant did not have a license plate on the front of his vehicle, another violation of Ohio law. At that point, Officer Fitzgerald made a U-turn, got behind appellant's vehicle, activated the vehicle's rotating lights in the grill, and stopped appellant.

{¶5} After stopping their cruiser, Officer Fitzgerald approached the driver's side of appellant's car to talk to him, while Officer Burrington walked to the passenger side of the vehicle to talk to a female who was in the front passenger seat. Officer Fitzgerald testified he stopped appellant because he was driving under suspension; he did not have a license plate on the front of his car; and the officers wanted to talk to him regarding his involvement in the alleged housing violation. Officer Fitzgerald asked appellant for consent to search his vehicle and appellant consented to the search.

Officer Fitzgerald asked appellant to stand with Officer Burrington and his female passenger between the two vehicles for their safety, while Officer Fitzgerald searched appellant's car.

{¶6} Officer Fitzgerald reached up under the center console and found a plastic grocery bag containing large amounts of crack cocaine and powder heroin. Officer Fitzgerald then advised Officer Burrington to arrest appellant. He was advised of his Miranda rights and placed in a marked cruiser of a third officer who had arrived on scene to provide assistance. Officer Fitzgerald then asked appellant if there was any other contraband in his car, and he told the officer to check the can of Sprite in the back seat of his car. Inside the can, Officer Fitzgerald found six packets of powder cocaine. The officer also found a digital scale on the floor in the back seat.

{¶7} Appellant was then transported to the police station and his vehicle was taken to the impound lot where it was inventoried. At the station, appellant was again advised of his Miranda rights and interviewed. He was very calm and cooperative. Appellant gave the officers verbal and written consent to search his apartment. During the earlier search of his vehicle, Officer Fitzgerald had found a garage door opener. A few days after his arrest, Officer Fitzgerald asked appellant what garage the garage door opener was for. Appellant said that it was for a garage he rents in Euclid, and that he keeps a second car in that garage. He said he switches his vehicles because he was "paranoid about getting caught" by police. Appellant also said there was more than $4,000 in the trunk of that car inside a sock. Appellant gave Officer Fitzgerald verbal and written consent to search the garage he was renting and the vehicle located inside.

{¶8} Officers Fitzgerald and Burrington then went to the house where this garage was located. When no one answered the door, the officers called their supervisor, who, in the circumstances presented, advised them to search appellant's car. They found $4,500 and a couple packets of powder cocaine in the trunk.

{¶9} Appellant testified in his defense. He admitted he was home when the officers knocked on his apartment door during the evening of July 9. He said he never opened the door and stayed in his room until the officers left. He also admitted his driver's license was suspended. He admitted that after he arrived at the police station, he gave the officers consent to search his apartment. He also admitted he gave them consent to search his garage and his second car.

{¶10} At the conclusion of the evidence, appellant argued the officers did not have probable cause to arrest him because their reason for stopping him was pretextual. He argued that the officers wanted to talk to him in connection with the housing violation and used his license suspension as an excuse. The state argued the stop was valid because it was based on probable cause in that appellant was driving with a suspended driver's license and the vehicle did not have a front license plate. The state argued it was irrelevant that the officers also wanted to talk to him about the housing violation since they had probable cause based on appellant's traffic violations. The trial court denied appellant's motion, finding that because the officers had probable cause that appellant was driving his vehicle while under suspension and without a license plate on the front of the vehicle, the officer's stop of the vehicle was not unreasonable, and the fact that the officers wanted to talk to him about the housing violation was irrelevant.

{¶11} Pursuant to a plea bargain, appellant subsequently pled no contest to amended count 1, trafficking in crack cocaine, a felony of the second degree, with the two forfeiture specifications as alleged in the indictment, and count 6, possession of heroin, a felony of the third degree, with the same two specifications. The court sentenced appellant to two years in prison on count 1 and one year in prison on count 6, the two terms to be served consecutively to each other, for a total term of imprisonment of three years. The court ordered that the vehicle appellant was operating on July 10, 2008, be forfeited to the state and, with appellant's agreement and waiver of hearing, that his second vehicle, also be forfeited. The court ordered that $439 be forfeited to the state and, with appellant's agreement and waiver of hearing, that the additional amount of $4,480 also be forfeited to the state. In exchange for his plea, the remaining six counts were nolled.

{¶12} Appellant appeals the trial court's ruling on his motion to suppress, asserting the following as his sole assignment of error:

{¶13} "The trial court erred in overruling the Motion to Suppress Evidence because the police search was unreasonable and violated clearly established law."

{¶14} It is well-settled that a motion to suppress presents a mixed question of law and fact. At a hearing on a motion to suppress, the trial court functions as the trier of fact. Accordingly, the trial court is in the best position to weigh the evidence by resolving factual questions and evaluating the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366; *State v. Smith* (1991), 61 Ohio St.3d 284, 288. The trier of fact is best able to view witnesses and observe their demeanor, gestures, and voice inflections, using these observations in weighing the credibility of the witnesses.

Seasons Coal Company, Inc. v. City of Cleveland (1984), 10 Ohio St.3d 77, 80. As the trier of fact, the trial court is free to believe all, part, or none of the testimony of each witness. *State v. Dierkes*, 11th Dist. No. 2008-P-0085, 2009-Ohio-2530, at ¶16; *State v. Long* (1998), 127 Ohio App.3d 328, 335.

{¶15} On review, an appellate court must accept the trial court's findings of fact if they are supported by some competent and credible evidence. *State v. Retherford* (1994), 93 Ohio App.3d 586, 592. After accepting the factual findings as true, the reviewing court must then independently determine, as a matter of law, whether the applicable legal standard has been met. Id. See, also, *State v. Swank*, 11th Dist. No. 2001-L-054, 2002-Ohio-1337, at ¶11.

{¶16} The only issue assigned as error by appellant is whether his initial stop by police was justified. He does not challenge the validity of any of the consent searches that yielded the evidence in this case. Appellant argues the real reason the officers stopped him was because they wanted to talk to him about the housing violation, and that their stated reason, i.e., that he was driving with a suspended driver's license and without a front license plate, was "bogus" and therefore did not justify the stop. Appellant does not dispute that, at the time he was stopped, he was committing these traffic violations.

{¶17} A stop is constitutional if it is supported by either a reasonable suspicion or probable cause. *Ravenna v. Nethken*, 11th Dist. No. 2001-P-0040, 2002-Ohio-3129, at ¶30-31. An officer's observation of any traffic law violation constitutes sufficient grounds to stop the vehicle observed violating the law. *Dayton v. Erickson* (1996), 76 Ohio St.3d 3, 11-12. In *Erickson*, the Supreme Court of Ohio held:

{¶18} "We agree with the Sixth Circuit's cogent analysis of the issue [in *United States v. Ferguson* (C.A. 6, 1993), 8 F.3d 385]. Specifically, we are in complete agreement with the Sixth Circuit that a traffic stop based upon probable cause is not unreasonable, and that an officer who makes a traffic stop based on probable cause acts in an objectively reasonable manner. Accordingly, we *** hold that where a police officer stops a vehicle based on probable cause that a traffic violation has occurred or was occurring, the stop is not unreasonable under the Fourth Amendment to the United States Constitution even if the officer had some ulterior motive for making the stop, such as a suspicion that the violator was engaging in more nefarious criminal activity." *Erickson* at 11, citing *Ferguson*, at 391-393.

{¶19} In *Ferguson*, the Sixth Circuit affirmed the district court's decision denying the defendant's motion to suppress. The Sixth Circuit found that the traffic stop was not violative of the Fourth Amendment because the police officer had probable cause to stop Ferguson on the minor traffic violation of driving without a visible license plate. The Sixth Circuit in *Ferguson* held:

{¶20} "We address today only the issue of whether a traffic stop, which is supported by probable case but motivated -- at least in part -- by suspicions inadequate to support a stop, may be held to be unconstitutional because it is pretextual. ***

{¶21} "We hold that so long as the officer has probable cause to believe that a traffic violation has occurred or was occurring, the resulting stop is not unlawful and does not violate the Fourth Amendment. *** We focus *** on whether this particular officer in fact had probable cause to believe that a traffic offense had occurred, regardless of whether this was the only basis or merely one basis for the stop. The stop

is reasonable if there was probable cause, and it is irrelevant what else the officer knew or suspected about the traffic violator at the time of the stop. ***" (Internal citation omitted.) *Ferguson*, supra, at 391-392.

{¶22} Further, in *Whren v. United States* (1996), 517 U.S. 806, the United States Supreme Court held:

{¶23} "*** Not only have we never held, outside the context of inventory search or administrative inspection ***, that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary. In *United States v. Villamonte-Marquez*, 462 U.S. 579, 584, n. 3 (1983), we held that an otherwise valid warrantless boarding of a vessel by customs officials was not rendered invalid 'because the customs officers were *** following an informant's tip that a vessel in the ship channel was thought to be carrying marihuana.' We flatly dismissed the idea that an ulterior motive might serve to strip the agents of their legal justification. In *United States v. Robinson*, 414 U.S. 218, (1973), we held that a traffic-violation arrest (of the sort here) would not be rendered invalid by the fact that it was 'a mere pretext for a narcotics search,' id., at 221, n. 1; and that a lawful postarrest search of the person would not be rendered invalid by the fact that it was not motivated by the officer-safety concern that justifies such searches, see id., at 236. See also *Gustafson v. Florida*, 414 U.S. 260, 266 (1973). And in *Scott v. United States*, 436 U.S. 128, 138 (1978), *** we said that 'subjective intent alone *** does not make otherwise lawful conduct illegal or unconstitutional.' We described *Robinson* as having established that 'the fact that the officer does not have the state of mind which is hypothecated [sic] by the reasons which provide the legal justification for the officer's action does not

invalidate the action taken as long as the circumstances, viewed objectively, justify that action.' 436 U.S. at 136, 138.

{¶24} "We think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved. *** *Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.*" (Emphasis added.) *Whren*, supra, at 812-813.

{¶25} In the instant case, both officers testified that at the time they stopped appellant, they were aware he was driving under suspension, in violation of R.C. 4510.11(A), and that he did not have a license attached to the front of his vehicle, in violation of R.C. 4503.21(A). Officer Fitzgerald testified that he stopped appellant for three reasons: (1) appellant was driving under a suspended driver's license; (2) his vehicle did not have a front license plate; and (3) he wanted to talk to him about the housing violation. There was thus competent, credible evidence for the trial court's finding that "the officers were aware that [appellant's] license was under suspension and noticed that he did not have a front license plate."

{¶26} Although appellant correctly argues that in general R.C. 2935.26 requires the issuance of a citation rather than an arrest for a minor misdemeanor, this court has held that "[w]here a police officer witnesses a minor traffic violation, the officer is justified in making a limited stop for the purpose of issuing a citation." *State v. Lett*, 11th Dist. No. 2008-T-0116, 2009-Ohio-2796, at ¶16. In any event, driving under suspension is not a minor misdemeanor; it is a misdemeanor of the first degree for which appellant could lawfully be arrested. R.C. 4510.11(C)(1)(a).

{¶27} In addressing whether an officer had probable cause to stop the defendant for driving with a suspended driver's license, this court in *State v. Freeman* (March 15, 2002), 11th Dist. No. 2001-T-0008, 2002-Ohio-1176, 2002 Ohio App. LEXIS 1205, held:

{¶28} "In the case sub judice, Officer Massucci had probable cause to stop appellant. Officer Massucci testified that he recognized appellant driving and checked on the status of his driver's license. A check of a person's Bureau of Motor Vehicles records does not implicate Fourth Amendment rights, as it does not involve any intrusion or interruption of travel, or any attempt to restrain or detain him. *State v. Begovic* (Dec. 5, 1997), Lake App. No. 97-L-041, unreported, 1997 Ohio App. LEXIS 5452, *9, citing *State v. Ow*ens (1991), 75 Ohio App.3d 523, 525.

{¶29} "When Officer Massucci had determined, through the L.E.A.D.S. report, that appellant's driving privileges had been suspended, he had reasonably trustworthy information that appellant was in the process of committing the offense of driving with a suspended license. At this time, Officer Massucci had probable cause to stop appellant and arrest him for that offense." (Emphasis removed.) *Freeman* at *6-*7.

{¶30} Thus, both of appellant's traffic violations provided probable cause to stop him. As a result, pursuant to *Erickson*, even if the officers had an ulterior motive to stop appellant, namely, to investigate the housing violation, such ulterior motive would have been irrelevant and would not vitiate the existence of probable cause to stop appellant. We find it noteworthy that, while the trial court cited *Erickson* in support of its decision and the state relies on *Erickson* on appeal, appellant does not attempt to distinguish or even mention this case in either his merit or his reply brief.

{¶31} Appellant further argues that Officer Fitzgerald's police report supports his argument because, he claims, the report does not mention appellant was stopped for driving under suspension. We note, however, that, while appellant made an issue of Officer Fitzgerald's police report, he failed to submit the officer's report as an exhibit at the hearing. In determining the existence of error, an appellate court is limited to a review of the record. *State v. Dudas*, 11th Dist. Nos. 2008-L-109 and 2008-L-110, 2009-Ohio-1001, at ¶34; *State v. Sheldon* (Dec. 31, 1986), 11th Dist. No. 3695, 1986 Ohio App. LEXIS 9608, *2; *Schick v. Cincinnati* (1927), 116 Ohio St. 16, at paragraph three of the syllabus. Without evidence presented at the hearing in support of appellant's argument, there is nothing for us to consider. *Dudas*, supra. "On appeal it is the appellant's responsibility to support his argument by evidence that supports his assigned errors." Id., citing *Columbus v. Hodge* (1987), 37 Ohio App.3d 68, at paragraph two of the syllabus. Because appellant failed to offer the police report as evidence during the suppression hearing, there is nothing for us to consider. In any event, Officer Fitzgerald testified that in his police report he stated, "[appellant] was also known to police officers to be currently driving under suspension." Thus, contrary to appellant's argument, Officer Fitzgerald's report supported his testimony that one of the reasons for which appellant was stopped was that he was driving under suspension.

{¶32} Appellant also argues that the testimony of the two officers was contradictory, and that the trial court could not simply accept the testimony of one officer and ignore that of the other. Initially, we note that the officers' testimony was not necessarily contradictory. Although Officer Burrington testified on cross examination that appellant was stopped to discuss the housing violation, he never testified this was

the sole reason. In fact, he also testified that at the time of his stop, the officers knew appellant was driving his vehicle under suspension and without a front license plate.

{¶33} However, even if the testimony of the two officers was inconsistent, as discussed above, it is the province of the trial court to determine the credibility of the witnesses. Further, the trial court as the finder of fact is entitled to believe all, part, or none of the testimony of each officer. *Dierkes*, supra. As a result, even if the testimony of the officers was inconsistent on this point, the trial court was entitled to resolve any conflicts in the officers' testimony. In light of the trial court's ruling, the court obviously chose to believe the testimony of Officer Fitzgerald, as it was entitled to do.

{¶34} For the reasons stated in the Opinion of this court, the assignment of error is not well taken. It is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

TIMOTHY P. CANNON, J.,

concur.