[Cite as *State v. McCorvey*, 2011-Ohio-3627.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellant,	:	
		CASE NO. 2010-A-0038
- vs -	:	
BEVERLY MCCORVEY,	:	
Defendant-Appellee.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2010 CR 118.

Judgment: Affirmed.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellant).

Jane Timonere, Timonere Law Offices, L.L.C., 4 Lawyers Row, Jefferson, OH 44047-1099 (For Defendant-Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, the state of Ohio, appeals the judgment of the Ashtabula County Court of Common Pleas granting the motion to suppress evidence filed by appellee, Beverly McCorvey. At issue is whether police had probable cause to search her person following a traffic stop. For the reasons that follow, we affirm.

{¶2} Appellee was charged in a three-count indictment with trafficking in cocaine, a felony of the third degree, in violation of R.C. 2925.03(A)(2)(C)(4)(d);

possession of cocaine, a felony of the third degree, in violation of R.C. 2925.11; and possession of hydrocodone, a felony of the fifth degree, in violation of R.C. 2925.11(A).

{¶3} Appellee pled not guilty and filed a motion to suppress evidence. The trial court held a hearing on the motion. Robert Wolford, police officer with the city of Ashtabula, testified that on February 25, 2010, at 10:45 p.m., he was driving northbound on West Avenue in Ashtabula when he saw a maroon four-door Chevrolet Impala driving southbound on West Avenue toward him. The Impala was driving left of center. As the officer was turning his cruiser around, he saw the Impala make a left-hand turn onto W. 37th Street without signaling. Officer Wolford stopped the vehicle for these traffic violations.

{¶4} At that time, Officer Hollis arrived to provide backup. Officer Wolford advised dispatch of the stop and provided the Impala's license plate. As he approached the vehicle, dispatch advised him that this vehicle matched the description of a car the officers had discussed earlier that day at a briefing, namely, a maroon four-door Impala that was trafficking drugs in the area. Officer Wolford learned there were three occupants in the Impala: appellee, who was the driver-owner, and two passengers, one in the front seat and the other in the back.

{¶5} Sergeant Joe Cellitti testified he arrived to provide additional backup. He said that upon learning the driver's identity, he realized he knew her from being involved in drug sales more than ten years earlier. Sergeant Cellitti asked dispatch to send a canine unit, and about five minutes later, Sergeant Rodney Blaney arrived with his narcotic detection dog. While the three occupants were still in their car, Sergeant Blaney walked the dog around the Impala, and the dog alerted to the presence of

narcotics in the rear passenger area of the car. Sergeant Blaney then notified the other officers of the dog's alert.

{¶6} Officer Wolford and Officer Hollis then took the occupants out of the Impala one at a time and patted down each of them for weapons, but none were found. The officers then searched the interior of the car, while the three occupants were standing outside their car, with negative results.

{¶7} At that time, dispatch advised Sergeant Cellitti that an anonymous informant had advised that appellee may have concealed illegal narcotics in her bra. He then shared this information with Officer Wolford. At Sergeant Cellitti's instruction, Officer Wolford had appellee remove her jacket, and he handed it to the sergeant. Further, following Sergeant Celliti's instruction, Officer Wolford had appellee lift the underwire of her bra and shake it to determine if anything was concealed in it. She did so, but nothing was found.

{¶8} Sergeant Cellitti then searched appellee's jacket and found a small packet wrapped in paper that contained two vicadin. He said he searched the jacket based on the tip regarding the bra, appellee's past history, the canine alert on appellee's vehicle, and the negative results of the search of her car. Sergeant Cellitti told Officer Wolford not to arrest appellee, but rather to give her a summons for the traffic violations and the possession of vicadin.

{¶9} Dispatch then advised Sergeant Cellitti that they had received another tip from an anonymous informant (the sergeant did not know if it was the same informant), who advised that appellee may have concealed the narcotics in her crotch area. Based

on this tip, the sergeant decided to arrest appellee for possession of vicadin and to bring her to the station to be searched by a female officer.

{¶10} After appellee was handcuffed, she told Sergeant Cellitti she wanted to talk to him. She was then placed in the front passenger seat of his cruiser. Sergeant Cellitti gave her the Miranda warnings. She asked him to remove her handcuffs so she could show him the money. He said what money, and she said $6,000.

{¶11} Upon arrival at the police station, Sergeant Cellitti removed appellee's handcuffs. She then reached down into the crotch area of her pants and removed two bundles of money totaling $6,000. He said she better keep digging, and she then removed another package from her crotch area containing 60 grams of cocaine.

{¶12} The trial court granted appellee's motion to suppress. In its seven-page judgment entry, the court set forth detailed findings of facts, which closely tracked the officers' testimony. The court found that appellee's traffic violations authorized the initial stop. The court also found that the officers had probable cause to search the car based on the dog's alert. However, the court found that the officers did not have probable cause to search appellee's jacket because the information about the bra provided by the informant had no indicia of reliability. The court also found the tip about appellee's crotch was not reliable.

{¶13} The state appeals the trial court's ruling on the motion to suppress, asserting the following for its sole assignment of error:

{¶14} "The trial court erred in granting appellee's motion to suppress."

{¶15} The state argues the trial court erred in granting appellee's motion to suppress evidence because, it maintains, the officers had probable cause to search appellee's jacket. We do not agree.

{¶16} "Appellate review of a motion to suppress presents a mixed question of law and fact." *State v. Burnside*, 100 Ohio St.3d 152, 154, 2003-Ohio-5372. The appellate court must accept the trial court's factual findings, provided they are supported by competent, credible evidence. Id. at 155, citing *State v. Fanning* (1982), 1 Ohio St.3d 19. Thereafter, the appellate court must determine, without deference to the trial court, whether the applicable legal standard has been met. *Bainbridge v. Kaseda*, 11th Dist. No. 2007-G-2797, 2008-Ohio-2136, at ¶20. Thus, we review the trial court's application of the law to the facts de novo. *State v. McNamara* (1997), 124 Ohio App.3d 706, 710.

{¶17} Generally, "[f]or a search or seizure to be reasonable under the Fourth Amendment, it must be based on probable cause and executed pursuant to a warrant." *State v. Moore*, 90 Ohio St.3d 47, 49, 2000-Ohio-10, citing *Katz v. United States* (1967), 389 U.S. 347, 357. "'This requires a two-step analysis. First, there must be probable cause. If probable cause exists, then a search warrant must be obtained unless an exception to the warrant requirement applies. If the state fails to satisfy either step, the evidence seized in the unreasonable search must be suppressed.'" (Internal citations omitted.) *Moore*, supra.

{¶18} To detain a suspect and conduct a search requires probable cause, which has been defined as "'a reasonable ground for belief of guilt.'" *Moore*, supra, quoting *Carroll v. United States* (1925), 267 U.S. 132, 161. "In dealing with probable cause, ***

as the very name implies, we deal with probabilities." *Brinegar v. United States* (1949), 338 U.S. 160, 175. Probable cause means "more than bare suspicion: Probable cause exists where 'the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." Id. at 175-176, quoting *Carroll*, supra, at 162. "Probable cause must be based upon objective facts that would justify the issuance of a warrant by a magistrate." *State v. Welch* (1985), 18 Ohio St.3d 88, 92. Probable cause can only be measured by objective facts known to a police officer *prior to* a warrantless search. *Byars v. United States* (1927), 273 U.S. 28, 29. A determination of probable cause is made from the totality of the circumstances. *State v. Hynde*, 11th Dist. No. 2004-P-0030, 2005-Ohio-1416, at ¶10.

{¶19} The state argues that three factors in this case resulted in probable cause to search appellee's jacket. We note that the state does not address Sergeant Cellitti's later seizure of the cash and cocaine from appellee at the police station.

{¶20} First, the state argues that, in determining whether the officers had probable cause to search appellee's jacket, the trial court should have considered two informant tips. It argues that the "first" tip advised that a vehicle matching the description of appellee's vehicle was involved in drug trafficking in the area. The "second" tip concerned appellee possibly concealing drugs in her bra. However, there is no evidence in the record that the information about a vehicle matching the description of appellee's vehicle came from an informant. The record simply reveals that a vehicle of this description was discussed at a recent police briefing.

Consequently, there is nothing in the record to support the state's argument that "[a]n accurate tip provided by dispatch advised the officers that appellee would be driving the exact same vehicle in which she was stopped in the area where she was stopped and that she was involved in drug trafficking." Thus, the only tip that was provided to police *prior* to the search of appellee's jacket was the tip about the bra. Because the later tip about the drugs possibly being in appellee's crotch area was received *after* the search of appellee's jacket, that tip is irrelevant to the analysis.

{¶21} It is noteworthy that the state does not address the reliability of the tip regarding the bra. It simply argues that because the informant's tip was passed on to Sergeant Cellitti through dispatch, the state was not required to prove the factual basis of the tip. Appellant's reliance on this court's holding in *State v. Cooper* (1997), 120 Ohio App.3d 416 in support of such argument is misplaced because in other cases, this court has held that the state must prove the factual basis for a dispatch when it is later challenged in court. See *State v. Halahan* (1995), 108 Ohio App.3d 33, 37. Moreover, this court criticized and essentially overruled *Cooper* in *State v. Evans* (1998), 127 Ohio App.3d 56, 62.

{¶22} Further, in an effort to validate the informant's tip about the bra, the state argues Sergeant Cellitti testified that, in his experience, he has found anonymous tips are accurate 90 percent of the time. However, this does not satisfy the legal standard for determining when an informant is reliable.

{¶23} An informant's tip can establish probable cause, depending on the totality of the circumstances. *Illinois v. Gates* (1983), 462 U.S. 213, 241-244. "[C]ourts have generally identified three classes of informants: the anonymous informant, the known

informant (someone from the criminal world who has provided previous reliable tips), and the identified citizen informant." *Maumee v. Weisner*, 87 Ohio St.3d 295, 300, 1999-Ohio-68. "While the United States Supreme Court discourages conclusory analysis based solely upon these categories, insisting instead upon a totality of the circumstances review, it has acknowledged their relevance to an informant's reliability." Id. For instance, an anonymous informant is "comparatively unreliable and his tip, therefore, will generally require independent police corroboration." Id., citing *Alabama v. White* (1990), 496 U.S. 325, 329. Independent corroboration by police of significant aspects of an informant's predictions about a suspect's behavior, particularly where such facts would not ordinarily be easily predicted, can impart some degree of reliability to the criminal activities alleged by an informant. Id. at 331-332. Where an anonymous informant accurately informed police that a woman would be leaving a particular address at a particular time and in a particular car, and that she would drive to a particular destination, the United States Supreme Court found that, although it was a "close case," the informant's capacity to predict the suspect's future behavior, particularly the route the suspect took, was sufficient to assess the informant as sufficiently honest and well-informed. Id.

{¶24} In the landmark case of *Draper v. United States* (1959), 358 U.S. 307, an informant reported that Draper would arrive in Denver on a train from Chicago on one of two days, and that he would be carrying a quantity of heroin. The informant also supplied a detailed physical description of Draper, and predicted that he would be wearing a light colored raincoat, brown slacks, and black shoes, and would be walking "real fast." On one of the stated dates, police observed a man matching this description

exit a train arriving from Chicago; his attire and luggage matched the informant's report and he was walking rapidly. The Supreme Court explained that, by this point in his investigation, the arresting officer "had personally verified every facet of the information given him by [the informant] except whether petitioner had accomplished his mission and had the *** heroin on his person or in his bag. And surely, with every other bit of *** information being thus personally verified, [the officer] had 'reasonable grounds' to believe that the remaining unverified bit of *** information -- that Draper would have the heroin with him -- was likewise true." Id. at 313.

{¶25} Applying these principles to the instant case, it is obvious that the tip about appellee's bra came from an anonymous informant. Such information must therefore be considered relatively unreliable without independent police corroboration of significant aspects of the informant's predictions about appellee's behavior. However, the informant provided virtually no predictions about appellee's activities that night. He did not state, for example, that appellee would be leaving a particular address at a particular time and in a particular car, or that she would drive to a particular destination. In fact, the only information the informant provided was appellee's name and the information that she may be concealing drugs in her bra. While the informant was correct about the driver's name, there was no independent police corroboration about appellee's alleged concealment of drugs in her bra *before the search*.

{¶26} Moreover, the informant did not state that appellee "would be" or "probably would be" concealing drugs in her bra; rather, he said she "may be" doing so. Therefore, the tip did not indicate a crime had been or would be committed or otherwise rise to the level of probability, as required to establish probable cause. *Brinegar*, supra.

{¶27} In summary, no predictions were provided by the informant concerning appellee's conduct, and there was no independent police corroboration of the limited, tentative information provided. We therefore hold the trial court did not err in finding that the anonymous information regarding appellee's possible use of her bra, without any other corroborating factor, was unreliable and could not be considered in determining whether the officers had probable cause to search her jacket.

{¶28} Second, the state argues that the canine's alert to the presence of narcotics in appellee's vehicle coupled with the negative search of her vehicle independently resulted in probable cause to search her person. We note that a "sniff" by a police dog of the exterior of a motor vehicle does not constitute a search for constitutional purposes. *State v. Flowers*, 11th Dist. No. 2009-L-103, 2010-Ohio-2952, at ¶25. Further, when such dog alerts to the presence of narcotics in a vehicle, the officers have probable cause to search the vehicle. *Blue Ash v. Kavanagh*, 113 Ohio St.3d 67, 71, 2007-Ohio-1103.

{¶29} The state's reliance on *State v. Hillman*, 9th Dist. Nos. 07CA0048 & 07CA0049, 2008-Ohio-3204 in support of this argument is misplaced because, although the state fails to bring it to our attention, the Ninth District later essentially overruled *Hillman* in *State v. Kay*, 9th Dist. No. 09CA0018, 2009-Ohio-4801.

{¶30} In *Kay*, the police officer followed a vehicle as it left a known drug house. After the vehicle made an improper turn, the officer initiated a traffic stop and requested a canine unit. The dog subsequently alerted to the vehicle. The car and its driver were searched with negative results. The passenger was then searched and the officer found a crack pipe in his pocket. The trial court granted the passenger's motion to

suppress. On appeal, the state argued that this chain of events logically led to the conclusion that if the drugs were not found in the vehicle or on the driver's person, they must be on the passenger, and thus, the police had probable cause to search him. The Ninth District rejected this "process-of-elimination argument," holding that the officers did not have probable cause to search the driver or his passenger. Id. at ¶11. The Ninth District noted that "[i]f we were to agree with the State's reasoning, we would in effect eviscerate the protections afforded by the Fourth Amendment." Id. at ¶15. In affirming the trial court's judgment granting the passenger's motion to suppress, the Ninth District stated in *Kay*:

{¶31} "*** 'Where the standard is probable cause, a search or seizure of a person must be supported by probable cause *particularized with respect to that person*. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be.' *Ybarra* [*v. Illinois* (1979)], 444 U.S. [85,] 91.

{¶32} "Under the totality of the circumstances we cannot conclude that the police had probable cause to believe that Kay [the passenger] was guilty of a drug-related offense. The police did not possess probable cause to believe Kay had drugs, they possessed probable cause to believe drugs would be found in the vehicle. *A negative search of the vehicle does not necessitate the conclusion the drugs must therefore be with one of the occupants of the vehicle*. The equally valid and possible conclusion is that the drug dog alerted to the residual odor of narcotics from past occupants of the vehicle or to drug particles too small to humanly detect. *Thus, without something more*

than mere suspicion based largely on the police's familiarity with Kay, the police lacked probable cause to search Kay." (Emphasis added.) *Kay*, supra, at ¶15-16.

{¶33} In arriving at its decision, the Ninth District declined to follow the contrary ruling of the Tenth Circuit in *United States v. Anchondo* (C.A.10, 1998), 156 F.3d 1043, also cited by the state, in which the court held that an alert given by a dog to a suspect's car and a negative search of the vehicle result in probable cause to search the driver. We note that several of our sister jurisdictions have declined to adopt a similar holding when presented with similar facts. See *State v. Anderson* (2006), 281 Kan. 896, 908 (drug dog's alert provided probable cause to search a vehicle, but not to arrest its driver); *State v. Gibson* (2005), 141 Idaho 277, 286 ("To the extent [*Anchondo*] endorses a rule in which a dog's alert on a car, and the subsequent failure of a search of that car to disclose drugs, establishes probable cause to arrest an occupant, we disagree a similar rule should govern the use of drug detection dogs during routine traffic stops in Idaho."); *State v. Wallace* (2002), 372 Md. 137, 155-157 (drug dog alerted on car containing defendant-passenger and others; defendant removed from car and searched; cocaine found; arrest followed; court holds dog's alert on car did not give officers probable cause to search passengers); *People v. Fondia* (2000), 317 Ill. App.3d 966, 969 (drug dog alerted on car containing defendants; officer removed defendant from car, searched him, found drug paraphernalia; arrested him; court holds canine's alert on car's exterior does not, without more, provide probable cause to search car's occupants); *Whitehead v. Virginia* (2009), 278 Va. 300, 314 (dog alerted to car; negative search of vehicle, driver, and two occupants; heroin found on third passenger; court

holds "without something more, the positive alert did not provide probable cause sufficiently particularized as to Whitehead to allow the search of his person").

{¶34} Likewise, in *State v. Kelly*, 11th Dist. No. 2000-P-0113, 2001-Ohio-8770, 2001 Ohio App. LEXIS 5444, this court held that, while police have probable cause to search the interior of a car once a drug detection dog alerts his handler to the presence of drugs, without an indication by the dog that a passenger of the vehicle had drugs on his person, there was no probable cause to search the passenger. Id. at *8.

{¶35} We therefore hold the canine's alert to appellee's car and its subsequent negative search were merely pertinent factors in the probable-cause inquiry. They did not independently provide probable cause to search appellee's jacket.

{¶36} Third, the state argues that Sergeant Cellitti's familiarity with appellee from her involvement in drug sales more than ten years earlier was an additional factor in establishing probable cause to search her jacket. We note the state has failed to cite any authority in support of this argument, in violation of App.R. 16(A)(7). For this reason alone, the argument fails. Moreover, our independent research does not support the state's position.

{¶37} In *Kelly*, supra, decided by this court, in addition to the canine alert, the state attempted to justify the search of the passenger based on the officer's previous encounter with him in which the officer found a crack pipe in a vehicle in which he had been sitting. Despite this additional fact, the search was not authorized. Id. at *11.

{¶38} Likewise, in *Kay*, supra, the state argued the fact that the defendant was known to the officers as a drug offender was pertinent to the probable-cause determination. The Ninth District stated:

{¶39} "*** [T]he fact that a person has committed a drug-related crime in the past, does not lessen the probable-cause standard or necessitate a conclusion that probable cause existed to search Kay for drugs on the night in question merely because the police knew Kay possessed drugs in the past. To sanction warrantless searches based almost entirely on past criminal conduct would grant police the authority to search any person with a prior criminal conviction at essentially anytime and would obliterate the protections afforded by the Fourth Amendment."

{¶40} We therefore hold the trial court did not err in finding that Sergeant Cellitti lacked probable cause to search appellee's jacket and that the vicadin seized from it should be suppressed. We further hold that, because the seizure of the cash and cocaine from appellee at the police station resulted from the unconstitutional search of appellee's jacket, the trial court did not err in also suppressing those items.

{¶41} For the reasons stated in the opinion of this court, the state's assignment of error is overruled. It is the judgment and order of this court that the judgment of the Ashtabula County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

THOMAS R. WRIGHT, J.,

concur.