[Cite as *State v. Dell*, 2009-Ohio-4897.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	JUDGES:
Plaintiff-Appellee	Hon. Sheila G. Farmer, P. J. Hon. John W. Wise, J. Hon. Julie A. Edwards, J.
-vs-	Case No. 07 CA 97
ERIC A. DELL	
Defendant-Appellant	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 06 CR 43
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 16, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
BRIAN T. WALTZ ASSISTANT PROSECUTOR 20 South Second Street, Fourth Floor Newark, Ohio 43055	ERIC BREHM BREHM & ASSOCIATES 604 East Rich Street, Suite 2100 Columbus, Ohio 43215

Wise, J.

{¶1} Appellant Eric A. Dell appeals his conviction, in the Licking County Court of Common Pleas, for possession of crack cocaine. The relevant facts leading to this appeal are as follows.

{¶2} Shortly after midnight on January 26, 2006, Officer Todd Green of the Newark Police Department was monitoring a suspected drug house, located on Railroad Street, from an alley off Harrison Street. Green, who was in uniform and in a marked cruiser, began following a gray Mercury after two persons from the area of the house got into the vehicle and departed. Green ultimately observed a turn signal violation on the Route 16 off-ramp at Hudson Avenue, and he effectuated a traffic stop. The driver of the Mercury was Richard Mickens; the passenger was appellant. Green asked for identification from both men, although the officer recognized them from previous incidents.

{¶3} According to the record of the suppression hearing, Mickens exited the Mercury at Green's request and consented to a *Terry* search. Green patted Mickens down and found no weapons or contraband on his person. Mickens, however, would not consent to a vehicle search. Green then directed Mickens to stand with another officer, David Arndt, who had arrived as back-up.

{¶4} Green approached the passenger side of the Mercury and asked appellant to exit. Appellant, who was wearing a hooded sweatshirt, complied with the officer's request, but kept his hands in the sweatshirt's lower front pockets. Green asked appellant to keep his hands out of the pockets, so appellant removed them, but "quickly" turned his body away from the officer, toward the car. Tr., Suppression Hearing, at 18.

At that point, concerned for his safety, Green pinned appellant against the Mercury, resulting in a plastic baggie falling to the ground. When Green saw the baggie, containing what appeared to be rocks of cocaine, he placed appellant under arrest. The officers also found a knife in appellant's pocket.

{¶5} On February 3, 2006, appellant was indicted by the Licking County Grand Jury on one count of possession of crack cocaine, R.C. 2925.11(A)(C)(4)(e), a felony of the first degree. Appellant pled not guilty, and on March 24, 2006, filed a motion to suppress evidence. After a hearing, the trial court denied the motion to suppress on May 1, 2006.

{¶6} The matter proceeded to a jury trial on May 2, 2006. The jury found appellant guilty of possession of crack cocaine. The trial court thereupon sentenced appellant to five years in prison, with 539 days of jail-time credit.

{¶7} Appellant originally appealed in July 2007, but said appeal was dismissed for want of prosecution. This Court subsequently reopened his appeal under App.R. 26(B). Appellant herein raises the following three Assignments of Error:

{¶8} "I. THE TRIAL COURT DID ERR BY FAILING TO GRANT DEFENDANT'S MOTION TO SUPPRESS.

{¶9} "II. THE ACTIONS OF THE PROSECUTION AND THE TRIAL COURT VIOLATED THE OHIO CONSTITUTION.

{¶10} "III. THE TRIAL COURT DID ERR WHEN IT ENTERED JUDGMENT AGAINST THE DEFENDANT WHEN THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION AND WAS NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE."

I.

{¶11} In his First Assignment of Error, appellant maintains the trial court erred in denying his motion to suppress evidence. We disagree.

Standard of Review

{¶12} There are three methods of challenging on appeal a trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's finding of fact. Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. Finally, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this third type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in the given case. *State v. Curry* (1994), 95 Ohio App.3d 93, 96, 641 N.E.2d 1172; *State v. Claytor* (1993), 85 Ohio App.3d 623, 627, 620 N.E.2d 906; *State v. Guysinger* (1993), 86 Ohio App.3d 592, 621 N.E.2d 726. As the United States Supreme Court held in *Ornelas v. U.S.* (1996), 517 U.S. 690, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911, "... as a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal."

{¶13} Appellant herein does not challenge the propriety of the initial traffic stop. Appellant further does not dispute that the United States Supreme Court has held that an officer making a traffic stop may order passengers to get out of the vehicle pending completion of the stop. See *Maryland v. Wilson* (1997), 519 U.S. 408, 415. However, the gist of appellant's argument in the case sub judice is his insistence that Officer Green had completed his stop of Micken's vehicle when he approached appellant in the

passenger seat, and that Green's continued actions resulted in an unconstitutional expansion of the encounter.

{¶14} Upon review, we find the record does not support appellant's position. Despite appellant's claim that Officer Green was "done" with Mickens before approaching appellant, Green clearly testified that although Micken's LEADS check was satisfactory, he had not yet even "had a chance" to write Micken's turn signal violation ticket. Tr., Suppression Hearing, at 21, 35.[1] After appellant exited, his sudden move back toward the Mercury after complying with the officer's request to remove his hands from his pockets then created a need for the officer to take reasonable actions to protect his safety, i.e., physically pinning appellant against the car, which led to the baggie falling to the ground.

{¶15} We therefore hold the motion to suppress was thus properly denied under these facts and circumstances. Appellant's First Assignment of Error is overruled.

II.

{¶16} In his Second Assignment of Error, appellant contends the trial court's delegation to the prosecutor the task of submitting proposed findings of fact and conclusions of law on the suppression ruling was a violation of appellant's constitutional rights. We disagree.

{¶17} Generally, "[a]n appellate court is guided by a presumption of regularity in the proceedings before a trial court." *Huffer v. Chafin,* Licking App.No. 01 CA 74, 2002-Ohio-356. In *Adkins v. Adkins* (1988), 43 Ohio App.3d 95, 539 N.E.2d 686, the court

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[1] Officer Green recalled waiting about five to six minutes for the LEADS report to come back from the dispatcher, although he was not sure of the time frame. Tr., Suppression Hearing, at 34.

indicated that a trial court may adopt a party's proposed findings verbatim, but that before adopting proposed findings, the trial judge has a duty to read the document thoroughly, and ensure that it is completely accurate in fact. See id. at 98, 539 N.E.2d 686, citing *Paxton v. McGranahan* (Oct. 31, 1985), Cuyahoga App. No. 49645; *State v. Rose,* 4th Dist. No. 06 CA 5, 2006-Ohio-5292, ¶ 45. Findings from the verbatim adoption of proposed findings may be reversed on appeal only if they are clearly erroneous. See *State v. Elmore*, Licking App.No. 2005-CA-32, 2005-Ohio-5940, ¶ 30.

{¶18} Upon review of the record, we hold appellant has not overcome the presumption of regularity and has failed to demonstrate that the court's findings of fact and conclusions of law were "clearly erroneous." Appellant's Second Assignment of Error is therefore overruled.

III.

{¶19} In his Third Assignment of Error, appellant maintains his conviction was against the sufficiency and manifest weight of the evidence. We disagree.

{¶20} In reviewing a claim of insufficient evidence, "[t]he 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 492, paragraph two of the syllabus.

{¶21} Appellant herein was convicted of possession of drugs (crack cocaine). R.C. 2925.11(A) states, "No person shall knowingly obtain, possess, or use a controlled substance." R.C. 2925.01(K) defines possession as "having control over a thing or substance * * *."

{¶22} Appellant points out that at trial, Officer Green was uncertain as to exactly what part of appellant's body the bag of crack fell from, and that Officer Arndt did not see the bag fall to ground as he observed the physical struggle between Green and appellant. See Trial Tr. at 82, 158-159. He further notes that no fingerprints were taken from the bag.[2] Finally, Mickens, a defense witness, testified that he himself had "shooed" the bag of crack under the Mercury after dropping it from his pants leg, and that the wind carried it toward appellant.

{¶23} However, the State may show constructive possession of drugs by circumstantial evidence alone. *State v. Townsend,* Cuyahoga App.No. 88065, 2007-Ohio-2370, ¶ 6. Green testified that he saw a bag fall from appellant's person at the very moment appellant removed his hands from the sweatshirt pockets and turned away. In Green's words: "His hands come up against the car. I'm backing away, and I see this baggie of something fall out from the front of Mr. Dell." Trial Tr. at 82. This incident further occurred after both officers had checked the roadside area around the passenger side of the Mercury to make sure no contraband had already been thrown on the ground. See Trial Tr. at 79, 146.

{¶24} Viewing the evidence in a light most favorable to the prosecution, we hold reasonable triers of fact could have found, beyond a reasonable doubt, that appellant committed the crime of possession of crack cocaine.

{¶25} Appellant also raises a "manifest weight" challenge to his conviction. Although the focus of the argument in his brief is on the sufficiency of the evidence, in the interest of justice we have reviewed the record under the standard of *State v. Martin*

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[2] The identity of the bag's contents as crack cocaine is not herein challenged.

(1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717, and we find the jury did not clearly lose its way and create a manifest miscarriage of justice requiring that appellant's conviction be reversed and a new trial ordered.

{¶26} Appellant's Third Assignment of Error is therefore overruled.

{¶27} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Licking County, Ohio, is hereby affirmed.

By: Wise, J.

Farmer, P. J., and

Edwards, J., concur.

/S/ JOHN W. WISE_____________________

/S/ SHEILA G. FARMER________________

/S/ JULIE A. EDWARDS________________

JUDGES

JWW/d 825

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
ERIC A. DELL	:	
	:	
Defendant-Appellant	:	Case No. 07 CA 97

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Licking County, Ohio, is affirmed.

Costs assessed to appellant.

/S/ JOHN W. WISE____________________

/S/ SHEILA G. FARMER________________

/S/ JULIE A. EDWARDS________________

JUDGES