[Cite as *State v. Frazier*, 2010-Ohio-3973.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellant -vs- MICHAEL FRAZIER Defendant-Appellee	JUDGES: Hon. Sheila G. Farmer, P. J. Hon. John W. Wise, J. Hon. Patricia A. Delaney, J. Case No. 09 CA 143 O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Municipal Court, Case No. 09 CRB 2197
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	August 23, 2010

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
TRICIA M. MOORE ASSISTANT LAW DIRECTOR 40 West Main Street Newark, Ohio 43055	KAREN HELD PHIPPS Post Office Box 20402 Columbus, Ohio 43220

Wise, J.

{¶1} Appellant State of Ohio appeals the decision of the Licking County Municipal Court, which granted, in part, a motion to suppress evidence filed by Defendant-Appellee Michael Frazier. The relevant facts leading to this appeal are as follows.

{¶2} On August 11, 2009, Licking Sheriff Deputy Allen Thomas went to appellee's residence in Johnstown, Ohio, regarding a tip of a possible marijuana growing operation at that location. Thomas, as a result of an earlier subpoena, had already reviewed electric utility records regarding the residence, and had noticed a recent surge in electricity usage. Thomas arrived at appellee's residence in plain clothes and driving an unmarked GMC sport-utility vehicle, without an interior "cage" or divider. He was accompanied by Detective Romano, who was also in plain clothes and driving an unmarked Ford truck. The officers were working with the Central Ohio Drug Enforcement ("CODE") unit.

{¶3} Thomas spoke with appellee about the purpose of his visit, and asked for permission to search the basement of the house, which appellee shared with his wife and grandmother-in-law. Appellee expressed concern about upsetting his elderly housemate and went to discuss the situation with her. After returning, he further conversed with the officers, who assured him that they were only concerned with the basement area. Appellee then led the officers into the basement, where equipment consistent with marijuana growing was observed. This included fluorescent lights, transformers, a portable heater, an empty fertilizer bag, squirt bottles, and small plant

cups. The officers also discovered "some green vegetation, which was later found to be marijuana." Suppression Tr. at 14.

{¶4} Appellee made a comment that his wife was "going to kick his [appellee's] ass," to which the officers responded that the situation was not "that big of a deal." Rather than stand outside in the heat, Deputy Thomas asked appellee to sit in the air-conditioned unmarked vehicle, which remained unlocked throughout. Appellee agreed to do so, and was not handcuffed. Nonetheless, Thomas read appellee his Miranda rights.[1]

{¶5} Appellee at first claimed the growing equipment was for his grandmother-in-law's tomatoes, but eventually admitted to "dabbling" with marijuana in the past. Thomas offered appellee the opportunity to work with law enforcement as an informant, but appellee did not respond. The officers eventually ended their discussions with appellee and left the premises without making an arrest.

{¶6} On or about October 6, 2009, appellee was charged with one count of possession of criminal tools, R.C. 2923.24, a first-degree misdemeanor. Appellee thereafter appeared for arraignment and entered a not guilty plea.

{¶7} On November 6, 2009, appellee filed a motion to suppress all of the evidence stemming from the search, arrest, and interrogation of appellee on August 11, 2009. A hearing on the suppression issue was conducted on December 9, 2009. The trial court thereupon ruled that the suppression motion be denied as to the items found in the search of his residence; however, the court granted the motion to

[1] We note appellee has denied that he was ever read his Miranda rights during the events at issue. See Suppression Tr. at 36.

suppress the statements made by appellee to the officers while he was seated in the unmarked police vehicle. The court ruled in pertinent part as follows:

{¶8} "As to the Defendant's challenge regarding the statements obtained during the interview in the officer's vehicle after the search, the Court finds that the Defendant was in custody at that time. The Court further finds that Detective Thomas did read the Miranda warnings to the Defendant. However, the Court finds the waiver not to be voluntary as the Defendant's will was overcome by the police actions. Therefore, the Defendant's Motion to Suppress the statements at issue is granted." Judgment Entry at 1.

{¶9} On December 16, 2009, the State filed a notice of appeal. It herein raises the following sole Assignment of Error:

{¶10} "I. THE TRIAL COURT DID ERR IN GRANTING THE DEFENDANT'S MOTION TO SUPPRESS STATEMENTS OF THE DEFENDANT BY FINDING THAT DESPITE BEING READ HIS MIRANDA WARNINGS, THE DEFENDANT'S WILL WAS OVERCOME BY THE ACTIONS OF THE POLICE AND THEREFORE HIS WAIVER OF HIS RIGHTS WAS INVOLUNTARY."

I.

{¶11} In its sole Assignment of Error, the State argues the trial court erred in granting appellee's motion to suppress. We agree.

{¶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.

{¶13} In the case sub judice, the trial court concluded that appellee's statements to the officers, made while he was seated in Deputy Thomas's unmarked vehicle, were involuntary on the basis that appellee's will had been overcome. Judgment Entry at 1, supra.

{¶14} In *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S .Ct. 1602, 16 L.Ed. 694, the United States Supreme Court held that the Fifth Amendment to the United States Constitution prevents the admission at trial of statements made by a defendant during custodial interrogation when the defendant has not been advised of certain rights. "A suspect's decision to waive his Fifth Amendment privilege is made voluntarily absent evidence that his will was overborne and his capacity for self-determination was critically impaired because of coercive police conduct." *State v. Collins*, Richland App.No. 2003-CA-0073, 2005-Ohio-1642, ¶ 141, citing *Colorado v. Spring* (1987), 479 U.S. 564, 574, 107 S.Ct. 851. "Thus, coercive police activity is a necessary predicate to finding that a confession is not voluntary within the Fifth Amendment, on which *Miranda* was based." Id., citing *Colorado v. Connelly* (1986), 479 U.S. 157, 170, 107 S.Ct. 515, 523-24, 93 L.Ed.2d 473. See, also, *United States v. Huynh* (C.A. 9, 1995), 60 F.3d

1386, 1387-1388. A "totality of the circumstances test" is applied to this question. See, e.g., *State v. Petitjean* (2000), 140 Ohio App.3d 517, 523, 748 N.E.2d 133

{¶15} The question of a "coerced waiver" of Miranda rights has essentially evolved into a two-part question: "Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *State v. Bumgardner*, Trumbull App.No. 2007-T-0106, 2008-Ohio-1778, ¶ 31, quoting *Moran v. Burbine* (1986), 475 U.S. 412, 421.

{¶16} The record in the case sub judice reveals that Officers Thomas and Romano repeatedly assured appellee that he was not being arrested that day. Appellee was also permitted to speak with his grandmother-in-law about the situation shortly after the officers arrived. Even after appellee allowed the plainclothes officers to see the marijuana growing arrangements in the basement, they did not make a show of force, utilize any weapons, or put handcuffs on appellee. Although Deputy Thomas, in the exercise of caution, went ahead and read the Miranda warnings, appellee thereupon sat inside an unmarked SUV with the doors unlocked and the air-conditioning running. In addition, appellee was asked if he wanted to work as an informant for law enforcement, which he declined to do. It stands to reason that appellee's conduct in turning down the officers' request in this regard is at least suggestive that actual coercive police conduct was not occurring. Furthermore, appellee's own testimony at the suppression hearing reveals his basic understanding of search warrant requirements and the Miranda rule, as well as suggesting prior contacts with law enforcement officers concerning drug matters. Appellee indeed was

of the understanding that the officers, in seeking if he would be willing to work as an informant, were asking him, as he put it, “to roll on somebody or something.” Tr. at 36.

{¶17} Upon review, we find the facts presented support the conclusion, contrary to that of the trial court, that appellee was not coerced into waiving his Miranda rights and that he properly comprehended such waiver. Accordingly, we hold the trial court erred in concluding a Fifth Amendment violation had occurred and in granting the motion to suppress appellee’s statements under the facts and circumstances of this case. The State's sole Assignment of Error is therefore sustained.

{¶18} For the foregoing reasons, the judgment of the Municipal Court of Licking County, Ohio, is hereby reversed and remanded.

By: Wise, J.

Farmer, P. J., and

Delaney, J., concur.

_____

_____

_____

JUDGES

JWW/d 0803

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

STATE OF OHIO	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
MICHAEL FRAZIER	:	
Defendant-Appellee	:	Case No. 09 CA 143

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Municipal Court of Licking County, Ohio, is reversed and remanded for further proceedings consistent with this opinion.

Costs assessed to appellee.

_____

_____

_____

JUDGES