[Cite as *State v. Nicholson*, 2017-Ohio-2825.]

nicCOURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

DAMARCUS NICHOLSON

Defendant-Appellant

JUDGES:
Hon. Patricia A. Delaney, P. J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case No. 2016 CA 00210

O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 2016 CR 01465(A)
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	May 15, 2017

APPEARANCES:

For Plaintiff-Appellee

JOHN D. FERRERO
PROSECUTING ATTORNEY
KRISTINE W. BEARD
ASSISTANT PROSECUTOR
110 Central Plaza South, Suite 510
Canton, Ohio 44702-1413

For Defendant-Appellant

BERNARD L. HUNT
2395 McGinty Road, NW
North Canton, Ohio 44720

Wise, J.

{¶1} Appellant Damarcus Nicholson appeals his conviction on one count of trafficking in heroin, one count of aggravated trafficking in drugs, one count of possession of heroin and one count of aggravated possession of drugs following a jury trial in the Stark County Common Pleas Court.

{¶2} Appellee is the State of Ohio.

STATEMENT OF THE FACTS

{¶3} Appellant Damarcus Nicholson was indicted by the Stark County Grand Jury on one count of trafficking in heroin; one count of aggravated trafficking in drugs, one count of possession of heroin, and one count of aggravated possession of drugs.

{¶4} On August 22, 2016, Appellant filed a motion to suppress the drugs that had been seized from the rental vehicle, arguing that the seizure was in violation of the Fourth Amendment. Specifically, Appellant argued that he was stopped and cited for driving under a child support suspension, and that the pertinent charging statute did not authorize a search of his vehicle. The state responded that Appellant lacked standing to suppress the drugs because at the time of the seizure he was an unauthorized user of the rental vehicle, citing *State v. Burton,* 5th Dist. Licking No. 00CA0013 in support.

{¶5} On September 6, 2016, a hearing was held on Appellant's motion to suppress. At the suppression hearing, the state presented the testimony of Officer Joseph Bays and admitted three exhibits, the LEADs printout of Appellant's driving status, the LEADs printout for the Jeep Appellant was driving, and the Rental Agreement for the Jeep.

{¶6} Officer Bays is a Canton Police officer working with the special investigation unit. (Supp. T. at 6). Officer Bays testified that the unit had received a tip that Appellant and Kristen Butcher were selling heroin. Based upon this information an investigation was initiated. (Supp. T. at 6). In the beginning of the investigation, Officer Bays learned that Butcher had an active arrest warrant and Appellant's driving privileges were under multiple FRA suspensions. (Supp. T. at 9-10). Officer Bays testified that Appellant has actually never had a valid driver's license. (Supp. T. at 11).

{¶7} Officer Bays testified that he and other officers set up a surveillance of an orange Jeep Renegade they had been advised was being driven by Appellant. (Supp. T. at 8-9). The officers observed Appellant driving the Jeep and ran the license plate number. The plate established that the owner of the vehicle was EAN Holding LLC, a rental car company. (Supp. T. at 12). Officer Bays then pulled Appellant over for driving under an FRA suspension. Officers immediately arrested the passenger, Kristen Butcher, on the outstanding warrants.

{¶8} At the scene, Officer Bays determined that neither Appellant nor Butcher could drive the vehicle away from the place where the vehicle had been stopped. In addition, Officer Bays testified that the vehicle was parked in a rough neighborhood and that under the circumstances, the Canton City Police Department policy required that the vehicle be inventoried and impounded for the safekeeping. (Supp. T. at 14-16).

{¶9} Officer Bays called the Canton PD for impound and inventoried the vehicle. (Supp. T. at 16). During the inventory, Officer Bays found the rental agreement entered into between Enterprise Rental Car Company and Latonia Billings, who is Appellant's mother. Appellant was not an authorized user on the agreement. Furthermore, Latonia

Billings was not authorized to permit anyone else to drive the vehicle. In the center console, Officer Bays found a yellow Crown Royal bag containing a digital scale, small plastic baggies, and an aspirin bottle containing two bags of a grey substance.

{¶10} At trial Jay Spencer from the Stark County crime lab testified that the digital scale tested positive for traces of Fentanyl. Spencer also testified that the baggies contained heroin mixtures in the amounts of 5.99 grams and 13.52 grams.

{¶11} On cross-examination, Officer Bays admitted that the traffic citation served on Appellant after the traffic stop incorrectly stated that Appellant was pulled over for driving under a suspension for non-payment of child support. Bays testified that although the citation was incorrect, the stop had been based on Appellant driving under multiple FRA suspensions.

{¶12} Appellant argued that because the traffic stop was based on non-support, the officers went outside the scope of their authority under R.C. §4510.111 when they searched the vehicle.

{¶13} By Judgment Entry filed September 9, 2016, the trial court denied Appellant's motion to suppress. The trial court based its decision on *State v. Burton*, 5th Dist. Licking No. 00CA0013, wherein this Court held that suppression of evidence obtained in violation of the Fourth Amendment can be urged only by those whose rights were violated by the search itself. The trial court found *Burton* to be directly in point in holding that a defendant who does not own a vehicle, who is not authorized by the rental agreement to operate the vehicle, and was not in lawful possession of the vehicle, lacks the standing necessary to challenge an inventory search of the vehicle. As such, the trial

court held that Appellant lacked standing to move to suppress the evidence seized from the rental vehicle.

{¶14} At the conclusion of the trial, the jury found Appellant guilty as charged in the indictment, and the trial court sentenced him as follows: on Count One, trafficking in heroin, Appellant was sentenced to serve 8 years. For the purposes of sentencing only, the remaining counts were merged into Count One for a total aggregate sentence of 8 years.

{¶15} It is from this conviction and sentence Appellant now appeals, raising the following single error for review:

ASSIGNMENT OF ERROR

{¶16} "I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT OVERRULED THE DEFENDANT'S MOTION TO SUPPRESS."

I.

{¶17} In his sole Assignment of Error, Appellant claims the trial court erred in denying his motion to suppress and finding that he did not have standing to challenge the warrantless search of his vehicle. We disagree.

{¶18} 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 findings of fact. In reviewing a challenge of this nature, an appellate court must determine whether said findings of fact are against the manifest weight of the evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19; *State v. Klein* (1991), 73 Ohio App.3d 485; *State v. Guysinger* (1993), 86 Ohio App.3d 592. Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can

reverse the trial court for committing an error of law. *State v. Williams* (1993), 86 Ohio App.3d 37. Finally, assuming the trial court's findings of fact are not against the manifest weight of the evidence and it has properly identified the law to be applied, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this 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 any given case. *State v. Curry* (1994), 95 Ohio App.3d 93; *State v. Claytor* (1993), 85 Ohio App.3d 623; *Guysinger*. As the United States Supreme Court held in *Ornelas v. U.S.* (1996), 116 S.Ct. 1657, 1663, "…as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal."

{¶19} The Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution provide for "[t]he right of the people to be secure * * * against unreasonable searches and seizures * * *." Searches and seizures conducted without a prior finding of probable cause by a judge or magistrate "are per se unreasonable under the Fourth Amendment, subject to only a few specifically established and well-delineated exceptions." *California v. Acevedo,* 500 U.S. 565, 111 S.Ct., 1982 (1991); *State v. Tincher,* 47 Ohio App.3d 188, 548 N.E.2d 251 (1988).

{¶20} If the government obtains evidence through actions that violate an accused's Fourth Amendment rights, that evidence must be excluded at trial. *State v. LeMaster,* 4th Dist. No. 11 CA3236, 2012–Ohio–971, 2012 WL 762542, ¶ 8. " 'Standing is defined as a party's right to make a legal claim or seek a judicial enforcement of a duty or right.' " *Coleman v. Davis,* 4th Dist. No. 10CA5, 2011–Ohio–506, 2011 WL 345772, ¶

16, citing *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery Cty. Bd. of Commrs.,* 124 Ohio St.3d 390, 922 N.E.2d 945, 2010–Ohio–169, at ¶ 19, quoting *Ohio Pyro, Inc. v. Ohio Dept. of Commerce,* 115 Ohio St.3d 375, 875 N.E.2d 550, 2007–Ohio–5024, at ¶ 27 (other internal quotation omitted). " 'Whether established facts confer standing to assert a claim is a matter of law.' " *Cuyahoga Cty. Bd. of Commrs. v. State,* 112 Ohio St.3d 59, 858 N.E.2d 330, 2006–Ohio–6499, at ¶ 23, quoting *Portage Cty. Bd. of Commrs. v. Akron,* 109 Ohio St.3d 106, 846 N.E.2d 478, 2006–Ohio–954, at ¶ 90. " 'We review questions of law de novo.' " *State v. Elkins,* 4th Dist. No. 07CA1, 2008–Ohio–674, at ¶ 12, quoting *Cuyahoga Cty. Bd. of Commrs.* at ¶ 23; *see, also, Bridge v. Midas Auto Experts # 322,* 8th Dist. No. 94115, 2010–Ohio–4681, at ¶ 6 ("The question of standing is an issue of law, which we review de novo.") (citation omitted).

{¶21} Modern understandings of the Fourth Amendment recognize that it serves to protect an individual's subjective expectation of privacy if that expectation is reasonable and justifiable. *Rakas v. Illinois,* 439 U.S. 128, 143, 99 S.Ct. 421 (1978); *Katz v. United States,* 389 U.S. 347, 381, 88 S.Ct. 507 (1967) (Harlan, J., concurring); *State v. Buzzard,* 112 Ohio St.3d 451, 860 N.E.2d 1006 (2007).

{¶22} Moreover, an individual must have standing to challenge the legality of a search or seizure. *Rakas v. Illinois,* 439 U.S. 128, 99 S.Ct. 421 (1978); *State v. Coleman,* 45 Ohio St.3d 298, 544 N.E.2d 622 (1989). The person challenging the search bears the burden of proving standing. *State v. Williams,* 73 Ohio St.3d 153, 652 N.E.2d 721 (1995). That burden is met by establishing that the person has an expectation of privacy in the place searched that society is prepared to recognize as reasonable. *Id; Rakas v. Illinois, supra*.

{¶23} The Supreme Court of Ohio has held that an individual who is in lawful possession of a vehicle, although not the titled owner, does possess a legitimate expectation of privacy in the vehicle searched, if he or she can demonstrate that the owner gave them permission to use the vehicle. *State v. Carter,* 69 Ohio St.3d 57, 63, 630 N.E.2d 355 (1994). *See also, State v. Hines,* 92 Ohio App.3d 163, 166, 634 N.E.2d 654 (10th Dist.1993); *State v. Middleton,* 8th Dist. No. 88327, 2007 Ohio 2227, 2007 WL 1366430, ¶ 25.

{¶24} In the instant case, the trial court found that Appellant lacked standing to challenge the inventory search of the vehicle:

> Defendant does not have legal standing to object to a search of his vehicle. The Jeep Renegade is owned by Clerac, LLC (dba Enterprise) and an agreement was made between Enterprise and Defendant's mother to rent the vehicle. Defendant is not listed as an authorized driver of the vehicle, nor could he have been because he does not have a valid driver's license; to allow him to operate this vehicle was clearly a breach of the rental agreement. As Defendant is not the owner, nor even an authorized operator of the vehicle, he lacked the standing to challenge the search. This is directly on point with the Fifth District Court of Appeals' decision in *State v. Burton,* 5th Dist. Licking No. 00CA0013, 2000 WL 987274 (July 14, 2000), in which the Court stated that suppression of evidence obtained in violation of the Fourth Amendment can be urged only by those whose rights were violated by the search itself. " (9/9/16 Judgment Entry).

{¶25} Upon review, we agree with the trial court that Appellant lacked standing to challenge the search.

{¶26} As a general rule, a person operating a motor vehicle without the permission of the owner has no standing to challenge the validity of the search of that vehicle. *State v. Crickon* (1988), 43 Ohio App.3d 171. Standing is not achieved solely by a person's status as a defendant or by introduction of damaging evidence. *Alderman v. United States* (1969), 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176. Consequently, before a court may review the reasonableness of police behavior, the defendant must be able to demonstrate that his Fourth Amendment right to privacy was violated.

{¶27} Here, Appellant did not own the vehicle, and he was not authorized by the rental agreement to operate the vehicle. Further, the rental agreement did not give Ms. Billings authority to give Appellant permission to operate the vehicle. Indeed, Appellant has never even possessed a valid driver’s license. Appellant was therefore not in lawful possession of the vehicle. In light of these facts, the Court finds that there is no evidence to conclude that Appellant had any legitimate expectation of privacy in the rental vehicle, and therefore he lacks standing to challenge the search of that vehicle under the Fourth Amendment of the United States Constitution or Article One of the Ohio Constitution, as urged in his motion.

{¶28} Accordingly, Appellant's sole Assignment of Error is overruled.

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

By: Wise, J.

Delaney, P. J., and

Hoffman, J., concur.

JWW/d 0508