[Cite as *State v. Caldwell*, 2010-Ohio-1700.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio — Court of Appeals No. WD-08-075

Appellee — Trial Court No. 2008CR0054

v.

Timothy Caldwell — **DECISION AND JUDGMENT**

Appellant — Decided: April 16, 2010

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
Gwen Howe-Gebers, Chief Assistant Prosecuting Attorney, for appellee.

Lawrence A. Gold, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This case is before the court on appeal from a judgment of the Wood County Court of Common Pleas. Appellant, Timothy Caldwell, asks this court to consider the following assignments of error:

{¶ 2} "The trial court erred in denying appellant's motion to dismiss/suppress in violation of appellant's right to due process under the Fourteenth Amendment of [sic] the United States Constitution.

{¶ 3} "The trial court abused its discretion and erred to the prejudice of appellant at sentencing by imposing a prison term in excess of the minimum in violation of appellant's right to due process under the Sixth and Fourteenth Amendments of [sic] the United States Constitution."

{¶ 4} At approximately 4:23 a.m. on the morning of January 12, 2008, Sergeant John Gazarek of the Perrysburg Township Police Department was patrolling in the area of I-75 just north of State Route 20 when a white pickup truck with tinted windows passed by. Gazarek decided to follow the truck and pulled out into the southbound lane of I-75. At the 190 mile marker, he noticed a light blue Dodge Charger ("Charger") with Kentucky license plates travel over the right fog line, then change lanes to pass another motor vehicle and travel over the left fog line. Just south of the 189 mile marker, Sergeant Gazarek decided to initiate a stop of the Charger for a "marked lane violation," that is, driving outside a marked lane. When the officer attempted to initiate the traffic stop, the driver pulled over and stopped at the side of the interstate. He sped away, however, after the sergeant stopped his patrol car, got out, and started walking toward the vehicle.

{¶ 5} The Charger exited I-75 and a lengthy high speed chase ensued until it stopped in the middle of the northbound right hand lane of State Route 25 in Perrysburg

Township. By that time, Sergeant Gazarek had called in to the township police station and stated that he was going to attempt a stop and wait for "backup." Nevertheless, the Charger again sped away on State Route 25. At that point, the sergeant contacted other officers, asking them to put "stop-sticks," that is, spikes, in the road.

{¶ 6} Traveling at a speed of "around 100 miles per hour," the driver operated his vehicle over the stop-sticks and continued into the city of Perrysburg, Ohio, where he crossed over more stop-sticks that were placed there by a Perrysburg police officer. The driver attempted to make a turn toward an area of the city of Perrysburg known as Perrysburg Heights but apparently could not make the turn and ended up in a grassy field where the Charger came to a stop. By this time, there were "six or more" police cars chasing appellant. When the vehicle stopped, appellant, Timothy Caldwell, exited and began running; Sergeant Gazarek pursued him in his patrol car. When appellant tripped and fell, the police car's front tire ended up resting on appellant's leg. After securing appellant, the police officer seized a one gallon plastic bag containing what was later determined to be marijuana on the passenger side floor of the Charger. Officers also discovered seven more gallon plastic bags filled with marijuana near the second set of stop-sticks.

{¶ 7} Subsequently, the Wood County Grand Jury indicted appellant on one count of trafficking in drugs in violation of R.C. 2925.03(A)(2) and (C)(4)(d) and one count of failing to comply with an order of a police officer, a violation of R.C. 2921.331(B) and (C)(5)(a)(ii). Both are felonies of the third degree. Appellant appeared

before the Wood County Court of Common Pleas on February 15, 2008, where he was appointed counsel. Appellant also entered a plea of "not guilty," signed a document waiving his right to a speedy trial, and was ordered to appear for a pretrial conference or a "possible motion to suppress." On March 18, 2008, appellant appeared before the court and was released on bond in the amount of $100,000 with "no ten percent to apply."

{¶ 8} Caldwell filed a motion to dismiss this case alleging that Sergeant Gazarek lacked the authority, i.e., the jurisdiction, to stop appellant's vehicle. He also asked the court to suppress all the evidence seized as a result of the unlawful stop. Appellant argued that unless appellee, the state of Ohio, could establish that a Perrysburg Township police officer had the authority under R.C. 4513.39 to stop and arrest him for a marked lane violation on an interstate highway, Sergeant Gazarek's arrest and search violated appellant's "constitutional rights under the Fourth and Fourteenth Amendments of [sic] the United States Constitution and Article I, Section 14 of the Ohio Constitution." Appellant also filed a supplemental memorandum in support of his motions, and appellee filed a memorandum in opposition.

{¶ 9} On April 22, 2008, the trial court denied appellant's motions, holding, in material part:

{¶ 10} "The question of whether an officer with the Perrysburg Township Police Department is authorized to patrol I-75, and to make a traffic stop thereon based solely upon a marked lane violation need not be resolved here. The Court also notes that no

evidence was seized from the defendant's person or vehicle when he was pulled over for the marked lane violation.

{¶ 11} "This Court determines that a township police officer is authorized to arrest a person who, in failing to comply with an order or signal of the police officer, leads that officer on a dangerous chase, regardless of where in the township that traffic pursuit originated. Accordingly, the court finds that Sergeant Gazarek did not lack the authority to pursue the defendant when the defendant sped away from the original stop. The Court concludes that the defendant's arrest, following the high-speed chase, was not unconstitutional or otherwise unlawful and the evidence that was discovered in plain view in the defendant's vehicle at the end of that pursuit need not be excluded at trial. In light of the foregoing analysis, the Court determines that it does not lack jurisdiction in this matter. The Defendant's motion to suppress is denied as is the motion to dismiss."

{¶ 12} On October 1, 2008, the trial court held a change of plea hearing. At that time, appellant entered no contest pleas to: (1) trafficking in marijuana, a violation of R.C. 2925.03(A)(2) and (C)(3)(c), a felony of the fourth degree; and (2) failure to comply with an order of a police officer in violation of R.C. 2921.331(B) and (C)(5)(a)(ii), a felony of the third degree. The trial judge found appellant guilty of both felonies, ordered a presentence investigation, and set the date for sentencing.

{¶ 13} After holding a hearing, the court below sentenced appellant to 17 months in prison, imposed a fine of $5,000, and suspended his driver's license for a period of four years for the trafficking in marijuana conviction. As to the conviction for appellant's

failure to comply with an order of a law enforcement officer, the court sentenced appellant to three years in prison to be served, by law, consecutively to the 17 months of imprisonment and suspended his driver's license for a period of seven years. This timely appeal followed.

{¶ 14} In his first assignment of error, appellant argues that, under R.C. 4513.39, Sergeant Gazarek lacked the power/jurisdiction to arrest him on an interstate highway outside of a municipality. He therefore reasons that the trial court lacked the jurisdiction to entertain this cause and that any evidence secured as the result of Gazarek's arrest is fruit of the poisonous tree.

{¶ 15} R.C. 4513.39 reads, in pertinent part:

{¶ 16} "(A) The state highway patrol and sheriffs or their deputies shall exercise, to the exclusion of all other peace officers except within municipal corporations and except as specified in division (B) of this section and division (E) of section 2935.03 of the Revised Code, the power to make arrests for violations on all state highways, of sections * * * 4511.33[1] * * *."

{¶ 17} Appellant relies on *State v. Holbert* (1974), 38 Ohio St.2d 113, for the proposition that a "stop" for a traffic offense is equivalent to an arrest and, therefore, Sergeant Gazarek lacked the authority to stop him on I-75, thereby rendering the trial court without jurisdiction to hear this cause. He further argues that due to the lack of

[1]R.C. 4511.33 sets forth the rules for driving in marked lanes.

jurisdiction, any evidence obtained as a result of the unlawful arrest should have been suppressed.

{¶ 18} In *Holbert* at paragraph two of the syllabus, the Ohio Supreme Court held that "[b]y virtue of R.C. 4513.39, a township police officer has no authority to stop a motorist for any of the offenses enumerated in that statute, which have been committed on a state highway outside municipal corporations." The court went on to find that the phrase "power to make arrests" in R.C. 4513.39 included "the right to stop motorists for traffic offenses." Id. at 117. Nevertheless, the outcome of that case turned on the fact that the filing of an affidavit of a police officer charging a traffic offense set forth in R.C. 4513.39 was not an exercise of the officer's "power to make arrests." Id. Therefore, the court held that the prosecution of the defendant in that case was commenced lawfully, found the trial court had jurisdiction over the case, and determined that its judgment was not void. Id.

{¶ 19} In the present case, Sergeant Gazarek never fully effectuated an impermissible stop of appellant's motor vehicle. Cf. *State v. Wendel* (1999), 11th Dist. No. 97-G-2116. Instead, appellant sped away thereby providing the officer with probable cause to chase him. See *State v. Daniels* (1981), 6th Dist. No. WD-80-82 . If, however, we find that Gazarek did, in fact, make that stop on I-75, we would still find that it neither divested the trial court of the jurisdiction to hear this case nor required that court to grant appellant's motion to suppress the evidence.

{¶ 20} Specifically, as did the defendant in *Holbert*, appellant first appeared in the Perrysburg Municipal Court, was advised of his rights, and waived a preliminary hearing. He then appeared before the Wood County Court of Common Pleas, pled not guilty to both charges in the indictment, and requested the appointment of an attorney to represent him. He never alleged that the trial court lacked jurisdiction over his person. Therefore, the Wood County Court of Common Pleas had jurisdiction over this cause. *Holbert* at 118; *State v. Davis (*1978), 3d Dist. No. CA5-78-10.

{¶ 21} Furthermore, and assuming that there was an impermissible stop by Sergeant Gazarek acting outside his territorial jurisdiction, the seizure of appellant "was not unreasonable per se under the Fourth Amendment" because the violation of a statute in this case, R.C. 4513.39, does not rise to the level of a constitutional violation. *State v. Weideman*, 94 Ohio St.2d 501, 2002-Ohio-1484, syllabus. As a result, this statutory violation does not require the suppression of all evidence flowing from the alleged "stop" in this case. Id. For all of the foregoing reasons, appellant's first assignment of error is found not well-taken.

{¶ 22} In his second assignment of error, appellant contends that the trial court erred in imposing a nonminimum sentence in prison for his violation of R.C. 2921.331(B) and (C)(5)(a)(ii), failure to comply with an order or signal of a police officer. In particular, appellant argues that the trial court made impermissible findings of fact in violation of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, in order to impose a three year rather than a one year minimum sentence for a third degree felony.

{¶ 23} After *Foster*, a trial court is no longer required to make any factual findings in imposing a nonminimum sentence. Id. at paragraph seven of the syllabus. Here, our review of the sentencing hearing and the trial court's judgment on sentencing reveals that the trial judge did not make *any* factual findings with regard to the imposition of a nonminimum sentence on appellant for his violation of R.C. 2921.331(B) and (C)(5)(a)(ii). Furthermore, our review of the trial court's judgment on sentencing discloses that the trial court fully complied with all applicable rules and statutes in sentencing appellant, e.g., the sentence imposed is within the statutory range of one to five years for a third degree felony. Therefore, that court's sentence is not clearly and convincingly contrary to law. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 14. Finally, we cannot say that the trial judge's attitude in determining to impose a nonminimum sentence was an abuse of discretion, see id. at ¶ 18-19. That is, the lower court's judgment on sentencing is not unreasonable, arbitrary, or unconscionable, *State v. Adams* (1980), 62 Ohio St.2d 151, 157. Appellant's second assignment of error is found not well-taken.

{¶ 24} The judgment of the Wood County Court of Common pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24(A).

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE