[Cite as *State v. Smith*, 2010-Ohio-1891.]

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

State of Ohio — Court of Appeals No. F-09-016

Appellee — Trial Court No. 09CR45

v.

Carl M. Smith — **DECISION AND JUDGMENT**

Appellant — Decided: April 30, 2010

* * * * *

Scott A. Haselman, Fulton County Prosecuting Attorney, and
Paul H. Kennedy, Assistant Prosecuting Attorney, for appellee.

Clayton M. Gerbitz, for appellant.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Fulton County Court of Common Pleas that found appellant guilty of one count of aggravated trafficking in drugs in violation of R.C. 2925.03(A)(1). For the reasons that follow, the judgment of the trial court is reversed.

{¶ 2} Appellant sets forth the following as his sole assignment of error:

{¶ 3} "I. The trial court erred in failing to suppress evidence because law enforcement officers lacked probable cause to arrest appellant."

{¶ 4} On March 14, 2009, appellant was arrested and charged with one count of

{¶ 5} aggravated trafficking in drugs. A search of appellant's car at the time of his arrest resulted in the seizure of eight tablets of Methylenedioxymethamphetamine, a Schedule I controlled substance, commonly referred to as ecstasy. Appellant subsequently was indicted on the aggravated trafficking charge. On June 15, 2009, appellant filed a motion to suppress all evidence obtained pursuant to his arrest and the search of his car. In support of his motion, appellant argued that the police did not have probable cause to justify the stop and seizure and that, therefore, the illegally obtained evidence should be suppressed.

{¶ 6} The motion to suppress was heard on August 24, 2009. In its judgment entry filed August 25, 2009, the trial court denied the motion, finding that the officers had acted within their authority in effecting the stop and search.

{¶ 7} On September 30, 2009, appellant entered a plea of no contest to the sole count of the indictment. The trial court accepted appellant's plea and imposed a six-month sentence. The sentence was ordered stayed pending appeal.

{¶ 8} In his sole assignment of error, appellant again asserts that none of the facts presented by the state at the suppression hearing demonstrated probable cause sufficient to justify his arrest and the search of his car.

{¶ 9} "Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. (Citations omitted.)

{¶ 10} In the case before us, the state does not dispute that appellant was arrested without a warrant, and that no warrant was obtained to search his vehicle.

{¶ 11} We therefore must consider whether the facts and circumstances known to the arresting officer demonstrated the existence of probable cause sufficient to arrest appellant and search his vehicle.

{¶ 12} "An arrest without a warrant is constitutionally invalid unless the arresting officer had probable cause to make it at that time. To have probable cause, the arresting officer must have sufficient information, derived from a reasonably trustworthy source, to warrant a prudent man in believing that a felony has been committed and that it has been committed by the accused." *State v. Timson* (1974), 38 Ohio St.2d 122, 127. Thus, the existence of probable cause is a factual question. *State v. Pavao* (1987), 38 Ohio App.3d 178.

{¶ 13} At the suppression hearing, the state presented the testimony of Wauseon Police Officer Jeremy Langenderfer. The officer testified that on March 14, 2009, a confidential informant with whom he had worked previously contacted him and said he would be able to purchase 10 ecstasy pills from appellant. The informant said he would need $160, which he would give to appellant to buy the pills from a supplier in Toledo. Langenderfer told the informant to set up a meeting with appellant later that day. The officer then gave the informant the money and a tape recorder to record his transaction with appellant. Surveillance was set up, and at 8:30 that evening, Langenderfer observed appellant pull into the informant's driveway. The officer saw the two men talk for "one or two minutes." Appellant pulled out of the driveway and was observed by Wauseon police until he left the city limits.

{¶ 14} Langenderfer further testified that at approximately 10:30 p.m., officers observed appellant drive back into Wauseon. However, appellant did not return to the informant's house. At that time, Langenderfer suspected that appellant had purchased the pills but intended to keep them for himself. The officer then radioed the marked patrol cars to stop appellant and take him into custody. Officers found a plastic baggie in appellant's car containing eight pills. Langenderfer testified that he did not listen to the tape recording of the meeting between the CI and appellant prior to the arrest.

{¶ 15} Based on the testimony summarized above, we find that the following facts were objectively known to Officer Langenderfer at the time of appellant's arrest: (1) appellant pulled into the informant's driveway and the two men had a one or two-minute

conversation; (2) appellant pulled away from the informant's house and drove east toward Toledo; (3) appellant returned to Wauseon approximately two hours later; and (4) the informant was waiting outside his house for appellant, but appellant drove past the informant's street without stopping.

{¶ 16} Upon consideration of the foregoing, we find that appellant's activities as observed by the police officers on the night of March 14, 2009 -- pulling into the informant's driveway and talking for a minute or two, driving away from Wauseon, and driving past the informant's house two hours later -- were not indicative of criminal behavior. Therefore, we are unable to find that the information available to Officer Langenderfer created probable cause to arrest appellant.

{¶ 17} Further, since the officers unlawfully arrested appellant, the search of his vehicle incident to arrest was also unlawful and the fruits of that search must be excluded from evidence. *State v. Nelson* (1991), 72 Ohio App.3d 506, 508.

{¶ 18} Accordingly, we find that the trial court erred by denying appellant's motion to suppress. Appellant's sole assignment of error is well-taken.

{¶ 19} On consideration whereof, the judgment of the Fulton County Court of Common Pleas is reversed. This matter is remanded to the trial court for further proceedings consistent with this decision. Costs of this appeal are assessed to appellee pursuant to App.R. 24.

JUDGMENT REVERSED.

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

Thomas J. Osowik, P.J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE