**[Cite as *State v. Mitchell*, 2010-Ohio-4708.]**

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

State of Ohio — Court of Appeals No. L-10-1047

Appellee — Trial Court No. CR0200601769

v.

Ervin Lamont Mitchell — **DECISION AND JUDGMENT**

Appellant — Decided: September 30, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

Kenneth J. Rexford, for appellant.

* * * * *

OSOWIK, P.J.

**{¶ 1}** This is an appeal from a judgment of the Lucas County Court of Common Pleas, following a no contest plea, in which the trial court found appellant, Ervin L. Mitchell, guilty of one count of possession of crack cocaine in violation of R.C. 2925.03(A)(2) and (C)(4)(f), a first degree felony. As a result of his conviction, appellant

was ultimately sentenced to serve a mandatory five-year prison term. The relevant, undisputed facts are as follows.

**{¶ 2}** On February 14, 2006, Toledo Police Detectives received a tip from a confidential informant that appellant was selling drugs on the 1300 block of Woodland Avenue. Based on the tip, detectives began surveillance of the area, during which time they observed appellant, who appeared to be exchanging items taken from a maroon pickup truck for paper money.

**{¶ 3}** After a few minutes, appellant got into the pickup truck and drove away. Shortly thereafter, his vehicle was stopped by police. When the police captain approached the truck, appellant got out and struggled briefly with the captain before running away. As appellant ran away, he dropped several baggies to the ground which contained an unknown substance. Appellant was eventually apprehended by police officers as he fled from the scene. Money and more baggies containing the same substance were found on appellant's person and in the abandoned truck. The substance was later tested and found to be crack cocaine.

**{¶ 4}** On April 11, 2006, the Lucas County Grand Jury indicted appellant on two counts of possession of crack cocaine, in violation of R.C. 2925.11(A) and (C)(4)(e) and R.C. 2925.03(A)(2) and (C)(4)(f), respectively, both first degree felonies; and one count of assaulting a peace officer, in violation of R.C. 2903.13(A) and (C)(3), a fourth degree felony. On August 8, 2006, appellant filed a motion to suppress evidence obtained by police at the time of his arrest. A suppression hearing was held on October 12, 2006.

**{¶ 5}** At the hearing, Toledo Police Detectives Michael Awls and Robert Marzec testified that appellant was a known drug dealer. They also testified that a Detective Greenwood, who remained at the police station, ran a computer check of appellant's driving status and any possible outstanding warrants. As a result of his computer search, Greenwood learned that appellant's driver's license was suspended, with limited driving privileges. That information was relayed to the surveillance team before appellant was stopped and arrested.

**{¶ 6}** On December 8, 2006, the trial court denied appellant's motion to suppress. That same day, appellant entered a plea of no contest to possession of crack cocaine, as charged in Count 2 of the indictment. Pursuant to a plea agreement, the trial court dismissed Counts 1 and 3. On March 2, 2007, appellant was sentenced to serve five years in prison, and his driver's license was suspended for three years.

**{¶ 7}** Appellant appealed his conviction and sentence, which were affirmed by this court in *State v. Mitchell*, 6th Dist. No. L-07-1092, 2007-Ohio-5316. However, appellant later filed a motion in which he argued that his sentence was void pursuant to *State v. Baker* (2008), 119 Ohio St.3d 197, 2008-Ohio-3330.[1] The trial court granted appellant's motion and, on January 25, 2010, ordered appellant to serve essentially the

[1]The record shows that the trial court's original judgment of conviction did not comply with *State v. Baker*, supra, in which the Ohio Supreme Court held that a judgment of conviction is a final appealable order under R.C. 2505.02 only if "it sets forth (1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court. (Crim.R.32(C), explained.)" Id., syllabus.

same sentence. See *State v. Baker*, supra; *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462; and R.C. 2929.191.

**{¶ 8}** A second notice of appeal was filed in this court on February 12, 2010. The state filed a motion to dismiss appellant's second appeal, which we denied on April 22, 2010.

**{¶ 9}** On appeal, appellant sets forth the following assignment of error:

**{¶ 10}** "I. The trial and appellate courts should have suppressed the evidence of an unlawful search and seizure of Mr. Mitchell, in violation of his rights under the fourth amendment to the United States Constitution."

**{¶ 11}** In support of his sole assignment of error, appellant asserts that the trial court erred by denying his motion to suppress. In support, appellant argues that the police had neither a reasonable suspicion of criminal wrongdoing, nor probable cause to make an arrest because, prior to the stop, detectives Awls and Marzec observed appellant engaging in "financial transactions," which took place during normal business hours. Appellant further argues that the police officers "had no reason to believe he was operating the vehicle outside of his limited [occupational driving] privileges" when they executed the stop.

**{¶ 12}** Initially, we note that "[a]ppellate review of a motion to suppress presents a mixed question of law and fact." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. In ruling on 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." Id, citing *State v. Mills* (1992), 62 Ohio St.3d 357, 366. On appeal, we "must accept the trial court's findings of fact if they are supported by competent, credible evidence." Id.; *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594. Accepting these facts as true, we must then "independently determine as a matter of law, without deference to the trial court's conclusion, whether they meet the applicable legal standard." *State v. Luckett*, 4th Dist. Nos. 09CA3108, 09CA3109, 2010-Ohio-1444, ¶ 8, citing *State v. Klein* (1991), 73 Ohio App.3d 486, 488.

**{¶ 13}** It is well-settled that a traffic stop is reasonable if the police officer making the stop has probable cause to believe that a traffic offense has been committed. *Dayton v. Erickson* (1996), 76 Ohio St.3d 3, 11-12. Probable cause is defined as "facts and circumstances within [an officer's] knowledge * * * sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." *Beck v. Ohio* (1964), 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142.

**{¶ 14}** Absent probable cause, an officer may still stop a vehicle and briefly detain its occupants if he or she "observes facts which give rise to a reasonable suspicion of criminal activity." *State v. Luckett*, supra, at ¶ 10, citing *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. In order to justify reasonable suspicion, an officer cannot rely on mere intuition, but must be able to "articulate specific facts that would indicate to a person of reasonable caution that the person being stopped has committed, or is in the process of committing, a crime." *Luckett*, supra, at ¶ 10; *Terry*, supra, at

21-22; *State v. Boggs*, 4th Dist. No. 04CA2803, 04CA2804, 2005-Ohio-2758, at ¶ 15, citing *Terry*, supra.

**{¶ 15}** The Eleventh District Court of Appeals recently held that evidence of a suspended driver's license is sufficient to support probable cause for a traffic stop. *State v. Howard*, 11th Dist. No. 2009-L-158, 2010-Ohio-2817, ¶ 29, citing *State v. Freeman*, 11th Dist. No. 2001-T-0008, 2002-Ohio-1176. In addition, the Fourth District Court of Appeals has held that reliable evidence that the driver/owner of a vehicle lacks a valid operator's license "'may create reasonable suspicion of criminal activity to support a traffic stop.'" *State v. Luckett*, supra, at ¶ 13, quoting *State v. Yeager* (Sept. 24, 1999), 4th Dist. No. 99CA2492. In both cases, the assertion that an accused had occupational driving privileges is an affirmative defense, and the burden is on the accused to demonstrate that he was driving within the scope of those privileges at the time of the stop. *State v. Bonn* (1995), 101 Ohio App.3d 69, 72; *Chagrin Falls v. Somers* (May 6, 1993), 8th Dist. No. 91-TRD-05572B. See, also, R.C. 2901.05(A).[2]

**{¶ 16}** At the suppression hearing, Detective Awls testified that he knew appellant's driver's license was suspended before appellant's truck was stopped by police, and that a check of appellant's driving record "came back as limited privileges." Awls stated that he was not informed as to the nature and extent of the limited privileges.

[2]R.C. 2901.05 (A) states: "Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused."

Similarly, Detective Marzec testified that he knew appellant's driver's license was suspended. However, Marzec further testified that, at the time of his arrest, appellant did not present any evidence that he had occupational driving privileges. As set forth above, both detectives testified that, when the stop was made, appellant exited the vehicle, struggled with the arresting officer, and then ran from the scene, during which time appellant dropped several baggies containing what later proved to be crack cocaine. In addition, both officers presented unrebutted testimony that appellant is a known drug dealer who, immediately before he was stopped by police, was engaging in behaviors consistent with selling drugs from his truck in an area known for drug trafficking.

**{¶ 17}** On consideration of the foregoing, we find that the record contains competent, credible evidence to support the trial court's finding that the officers had probable cause to stop appellant's vehicle. The record also shows that appellant failed to establish that, at the time of the stop, he had limited driving privileges and that he was driving within the scope of those privileges. Accordingly, the trial court did not err or otherwise violate appellant's Fourth Amendment rights by refusing to suppress the evidence found as a result of the stop. Appellant's sole assignment of error is, therefore, not well-taken.

**{¶ 18}** The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

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