[Cite as *State v. May*, 2015-Ohio-1334.]

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

State of Ohio — Court of Appeals No. L-14-1212

Appellee — Trial Court No. CR0201401703

v.

Logan May — **DECISION AND JUDGMENT**

Appellant — Decided: April 3, 2015

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Matthew D. Simko, Assistant Prosecuting Attorney, for appellee.

Jerome Phillips, for appellant.

* * * * *

YARBROUGH, P.J.

I. Introduction

{¶ 1} Appellant, Logan May, appeals the judgment of the Lucas County Court of Common Pleas, imposing a two-year term of community control following its acceptance of appellant's plea of no contest to one count of carrying a concealed weapon. We affirm.

A. Facts and Procedural Background

{¶ 2} The facts relevant to this appeal are not in dispute. At around 10:00 p.m. on March 31, 2014, appellant was riding his bicycle in the middle of Wyman Street, which is located in a "high-crime" and "high-gang activity" area in Lucas County, when he was approached by a Toledo police officer, Jason Picking. Picking informed appellant that he was illegally operating his bicycle at night without lights.

{¶ 3} At the outset of the stop, Picking noticed that appellant appeared to be nervous, despite the fact that the conversation between the two individuals was "calm, just normal conversation." In an effort to ensure his safety, Picking asked appellant if he could pat him down to make sure he was not carrying any weapons. Appellant then consented to the search and began to dismount. As appellant was getting off the bicycle, however, his shirt lifted up, revealing a concealed firearm tucked in his waistline. Upon noticing the weapon, Picking forced appellant to the ground and held him while he secured backup. Once the backup arrived, appellant was arrested and placed into the back of a police cruiser. While being placed in the cruiser, appellant exclaimed, "I should have just open carried."

{¶ 4} As a result of the foregoing, appellant was indicted on one count of carrying a concealed weapon in violation of R.C. 2923.12(A)(2), a felony of the fourth degree. Subsequently, on May 22, 2014, appellant filed a motion to suppress, arguing that the "stop, search and arrest of [appellant] were not conducted under the authority of a warrant and was not authorized by any exception to the warrant clause of either the

Federal or State Constitution." A hearing on the motion to suppress was held on June 17, 2014, during which both Picking and appellant testified. Following the hearing, the trial court issued a written decision denying the motion to suppress.

{¶ 5} Thereafter, appellant entered a plea of no contest to carrying a concealed weapon. Upon accepting the plea, the trial court found appellant guilty and ordered him to serve a two-year term of community control. Appellant's timely appeal followed.

B. Assignments of Error

{¶ 6} On appeal, appellant assigns the following error for our review:

> The Trial Court erred in denying Appellant's motion to suppress.

II. Analysis

{¶ 7} In his sole assignment of error, appellant argues that the evidence derived from his street-side encounter with Picking should have been suppressed as the fruits of an unconstitutional search and seizure.

{¶ 8} Appellate review of a decision on a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. "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." *Id.*, citing *State v. Mills*, 62 Ohio St.3d 357, 366, 582 N.E.2d 972 (1992). "[A]n appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence." *Id.*, citing *State v. Fanning*, 1 Ohio St.3d 19, 437 N.E.2d 583 (1982). "[T]he appellate court must then independently

determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *Id.*, citing *State v. McNamara*, 124 Ohio App.3d 706, 707 N.E.2d 539 (4th Dist.1997).

{¶ 9} Initially, we note that appellant does not contest that he was illegally operating his bicycle without lights when he was stopped by Picking. Thus, the initial stop was constitutional. *See Dayton v. Erickson*, 76 Ohio St.3d 3, 11-12, 665 N.E.2d 1091 (1996) ("[W]here an officer has an articulable reasonable suspicion or probable cause to stop a motorist for any criminal violation, including a minor traffic violation, the stop is constitutionally valid regardless of the officer's underlying subjective intent or motivation for stopping the vehicle in question."). Nonetheless, appellant argues that the stop was impermissible insofar as it exceeded the duration necessary to effectuate the purpose of the stop, especially since Picking "testified that he had no belief that Appellant was armed or even part of a gang."

{¶ 10} The Fourth Amendment generally prohibits unreasonable searches and seizures with limited exceptions. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Warrantless searches conducted outside these exceptions are per se unreasonable. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

{¶ 11} One exception to the Fourth Amendment's warrant requirement pertains to investigative stops. Under this exception, "a police officer may stop and investigate unusual behavior, even without probable cause to arrest, when he reasonably concludes that the individual is engaged in criminal activity." *State v. Andrews*, 57 Ohio St.3d 86,

87, 565 N.E.2d 1271 (1991). The propriety of an investigative stop must be viewed in light of the totality of the circumstances. *State v. Bobo*, 37 Ohio St.3d 177, 524 N.E.2d 489 (1988), paragraph two of the syllabus. Moreover, the scope and duration of a traffic stop must "be carefully tailored to its underlying justification * * * and last no longer than is necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). "The permissible time to detain a motorist during a traffic stop is that amount of time sufficient to investigate the suspicion for which the vehicle was initially stopped and includes the time necessary to run a computer check on the driver's license, registration and vehicle plates." *State v. Brazil*, 6th Dist. Wood No. WD-13-040, 2014-Ohio-995, ¶ 16, citing *State v. Brown*, 183 Ohio App.3d 337, 2009-Ohio-3804, 916 N.E.2d 1138, ¶ 22 (6th Dist.).

{¶ 12} Here, appellant contends that Picking "prolonged the stop by requesting permission to search [his] person for weapons." Despite his assertion, the record contains no evidence that Picking's questioning extended the duration of the traffic stop. Rather, the evidence adduced at the suppression hearing demonstrates that Picking made his request to search appellant very early in the stop. Indeed, Picking testified that he stopped appellant, informed appellant of the basis for the stop, and then sought appellant's consent to search his person for weapons. On this record, we find that Picking's questions were tailored to the underlying purpose of the traffic stop and did not extend the stop beyond its permissible time.

{¶ 13} Additionally, appellant asserts that the evidence should have been suppressed because his consent was given involuntarily as he did not feel free to leave at the time of the search. We find no merit to appellant's argument.

{¶ 14} Whether consent is voluntary or the product of duress or coercion, either express or implied, is a question of fact to be determined from the totality of the facts and circumstances. *Ohio v. Robinette*, 519 U.S. 33, 40, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996), citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-249, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). The burden is on the state to demonstrate voluntariness of consent, and that burden "is not satisfied by showing a mere submission to a false claim of lawful authority." *State v. Whitfield*, 3d Dist. No. 1-04-80, 2005-Ohio-2255, ¶ 17, citing *Florida v. Royer*, 460 U.S. 491, 497, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983).

{¶ 15} In determining whether a consent was voluntary, we utilize the following factors: (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse to consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found. *State v. Oke*, 6th Dist. Wood Nos. WD-04-082, WD-04-083, 2005-Ohio-6525, ¶ 44, citing *State v. Lattimore*, 10th Dist. Franklin No. 03AP-467, 2003-Ohio-6829.

{¶ 16} Here, appellant testified that he did not feel free to leave. However, there is no evidence that coercive police procedures were used in this stop. Further, the brief

interaction that took place between Picking and appellant prior to the discovery of the firearm was described by both individuals as "calm." There is also no evidence of appellant's lack of intelligence or education. Additionally, appellant testified that his consent was motivated by a belief that Picking would not search him if he consented and, thus, that the firearm would not be found. Further, the surrounding environment did not produce coercive conditions. Indeed, the parties were standing on a public street and appellant was not physically restrained at the time of the consent. Viewing the totality of the circumstances, we find that the record contains clear and convincing evidence that appellant's consent was given voluntarily.

{¶ 17} Accordingly, appellant's sole assignment of error is not well-taken.

III. Conclusion

{¶ 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.

Stephen A. Yarbrough, P.J. _____
JUDGE

James D. Jensen, J.
CONCUR. _____
JUDGE

Arlene Singer, J. _____
CONCURS AND WRITES SEPARATELY. JUDGE

SINGER, J.

{¶ 19} I concur in the majority's decision to overrule appellant's sole assignment of error based on the specific facts in this case.

{¶ 20} Even though the officer testified that he had no reason to believe that appellant had a gun or drugs before he asked appellant about illegal contraband, *very* little time elapsed between the admittedly valid misdemeanor stop and the appearance of a weapon. I write separately to express my concern that our holding could be used to justify unlawful detentions or so called "fishing expeditions" based on nothing more than a mere bicycle infraction.