

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 09AP-818
	:	(C.P.C. No. 09CR-01-462)
Timothy J. Cox,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 25, 2010

Ron O'Brien, Prosecuting Attorney, and *Sarah W. Creedon*,
for appellee.

Dennis C. Belli, for appellant.

APPEAL from the Franklin County Court of Common Pleas

TYACK, P.J.

{¶1} Timothy J. Cox is appealing from his convictions and sentences for carrying a concealed weapon, improper handling of a firearm in a motor vehicle, and having a weapon while under disability. He assigns two errors for our consideration:

[I.] The court of common pleas committed reversible error when it denied Defendant-Appellant's motion to suppress physical evidence and statements that were obtained by the police in violation of his rights under the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 14 of the Ohio Constitution.

[II.] Overreaching by the prosecutor and the introduction of irrelevant, inflammatory, and unsupported allegations denied Defendant-Appellant a fair sentencing hearing in violation of

his rights under the Ohio Felony Sentencing Act, the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 16 of the Ohio Constitution.

{¶2} Addressing the first assignment of error, Cox was subjected to a warrantless search. Searches where no warrant has been obtained are per se unreasonable under the Fourth Amendment, subject to a few specifically established and well-delineative exceptions. See *Katz v. United States* (1967), 389 U.S. 347, 88 S.Ct. 507. The burden rests upon the prosecution to demonstrate and prove the existence of an exception to the warrant requirement for a warrantless search or arrest found to be legal.

{¶3} The exception to the warrant requirement which was argued below was the automobile exception, initially set forth in *Carroll v. United States* (1925), 267 U.S. 132, 45 S.Ct. 280. Under the so-called *Carroll* exception, police officers can search an automobile if they have probable cause to believe the motor vehicle contains contraband.

{¶4} The evidence presented at a hearing on the motion to suppress filed on behalf of Cox included the following testimony. Cox and his girlfriend, Lakrisha Haithcock, were in a recently purchased Lexus at about 10:15 p.m. on January 16, 2009. Haithcock was driving. Cox was in the front passenger seat.

{¶5} Two Columbus police officers saw the vehicle and its dealer plates on Wilson Road on the westside of Columbus. The officers turned their police cruiser around and fell in behind the Lexus. By the time the cruiser arrived directly behind the Lexus, the Lexus was stopped at a traffic light at the intersection of Wilson Road and West Broad Street. The officers had viewed no illegal activity up to that point.

{¶6} The Lexus made a left turn onto westbound West Broad Street and proceeded until it made another turn onto Viotis Drive where the couple lived. The officers then activated the police cruiser lights and pulled the Lexus over.

{¶7} At the hearing on the motion to suppress, Haithcock testified that her turn onto West Broad Street was completely legal. The officers testified that she made the turn too sharply, proceeding partially in the eastbound lanes briefly before the Lexus went fully right-of-center. The officers testified that they pulled the vehicle over later because of the illegal left turn at Wilson and Broad. The trial court judge believed this testimony.

{¶8} After the Lexus had been stopped, the officers approached the Lexus, one on the driver's side and one on the passenger's side. Each officer claimed that he smelled marijuana as he approached the Lexus. The one officer, Randall Mayhew, called the odor "quite a smell of marijuana." The other officer, Douglas Wilkinson, testified that he had smelled the heavy odor of fresh burnt marijuana coming from the car.

{¶9} The officer obtained identification from both Haithcock and Cox. Haithcock had a valid Ohio driver's license. Neither Haithcock nor Cox had any pending warrants for their arrest, facts which were verified by the officers.

{¶10} Officers Mayhew and Wilkinson summoned a police canine unit to investigate the Lexus. After a lapse of time, the canine unit, consisting of Officer Brian Carter and his dog Rosta arrived. Rosta alerted at the passenger side of the trunk of the Lexus. A later search of the vehicle revealed no contraband in the trunk.

{¶11} After Rosta alerted on the Lexus, the officers handcuffed both Haithcock and Cox and placed them in the back of their police cruiser. The officers then searched the Lexus and found a firearm in the glove box in front of the passenger seat.

{¶12} Cox received his warnings under *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, and chose to talk to the officers. He told them that the gun was his and that he had placed it in the glove box as the officers were pulling over the Lexus. He acknowledged smoking marijuana earlier in the day of the arrest and stated that he sprayed air freshener in the car to remove some of the odor once the car was being pulled over. Cox claimed Haithcock, who was in her ninth month of pregnancy with his child, knew nothing about the firearm.

{¶13} The trial court's key findings were that the officers had a legal basis for pulling the Lexus over based upon their observation of an illegal turn and that the officers had probable cause to search the car based upon their sensing of the odor of marijuana emanating from the interior of the vehicle. If the trial court's key factual findings—that the Lexus went left-of-center on West Broad Street during the turn from Wilson Road and that the officers perceived the distinctive odor of marijuana emanating from the interior of the Lexus as they approached it—are supported by competent, credible evidence, then we are bound by those findings in assessing the merits of this assignment of error.

{¶14} The evidence presented at the hearing on the motion to suppress did constitute competent, credible evidence on both key issues. The officers were in position to observe the turn and were clear in their testimony about what occurred during the turn. The fact they delayed in pulling the car over to run a check on the temporary license plates or for other reasons does not mean that they lacked probable cause to believe they had witnessed a traffic violation for which the driver of the Lexus could be cited.

{¶15} The arresting officers were both clear as to the fact that they smelled the odor of marijuana coming from the interior of the car. They were in a position to sense

the odor. Officer Wilkinson's testimony was more clear, both as to his qualifications to identify the smell of burnt marijuana and to the uniqueness of the odor. His clarity, in and of itself, constitutes competent, credible evidence that the smell of marijuana smoke was emanating from the car. Parenthetically, Cox's later statement that he sprayed air freshener in an attempt to mask or reduce the odor, supported the claims of the officers as to what they smelled.

{¶16} As a result of the trial court's factual findings, we find that the police had a legal basis for pulling the Lexus over and probable cause to search the interior of the vehicle. Because they had probable cause to search, the automobile exception to the warrant requirement applies and the search was legal for purposes of the Fourth Amendment to the United States Constitution.

{¶17} Because the testimony at the hearing on the motion to suppress indicated that Cox was not arrested until after the gun was legally found, his statements to police were not the product of an illegal search or arrest. Therefore, his statements were admissible as evidence.

{¶18} The first assignment of error is overruled.

{¶19} The second assignment of error attacks the fairness of the sentencing hearing which ended with Cox receiving a term of incarceration of four and one-half years. Cox was sentenced to three years of incarceration for having a weapon under disability, consecutive to an 18 month sentence on the carrying a concealed weapon and improper transportation of a firearm in a motor vehicle charge (concurrent sentences).

{¶20} The trial court judge went into great detail in explaining to Cox why she gave him the sentence she did. Cox had had a juvenile conviction for murder which

resulted in an extended stay in the Ohio Department of Youth Services. After Cox became an adult, he committed a number of drug-related offenses, which resulted in another term of incarceration of over seven years. He smoked numerous joints of marijuana on a daily basis after his release from prison and continued that habit up until shortly before he was sentenced on the current charges. The trial court made no reference to the information presented at the sentencing hearing which is now alleged to be inflammatory and which could be viewed as being inflammatory. There is no basis in the record before us for finding that the trial court judge was influenced by anything the assistant prosecutor said, inflammatory or not, except for the acknowledgment that the carrying a concealed weapon charge should be served concurrently with the improper transportation of a firearm in a motor vehicle charge.

{¶21} Further, the trial court gave less than the maximum sentence on the having a weapon under disability charge. The resulting sentence allows for judicial release if the trial court views that as being proper at a later date.

{¶22} The sentencing hearing has not been shown to be unfair. The second assignment of error is overruled.

{¶23} Both assignments of error having been overruled, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

SADLER and McGRATH, JJ., concur.
