[Cite as *State v. Lett,* 2009-Ohio-2796.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-T-0116**
- vs -	:	
MARK S. LETT ll,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 08 CR 153

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos,* Assistant Prosecutor*,* Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481 (For Plaintiff-Appellee).

James E. Lanzo, 4126 Youngstown-Poland Road, Youngstown, OH 44514 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.,

{¶1} Appellant, Mark S. Lett II, appeals the judgment of the Trumbull County Court of Common Pleas, denying his motion to suppress evidence. For the reasons that follow, we affirm.

{¶2} On November 18, 2007, at approximately 10:20 a.m., Officer Craig Callow of the Hubbard Township Police Department was on routine patrol traveling east on U.S. Route 62 in the township when he observed appellant's vehicle traveling west on

Route 62. The officer noticed appellant's vehicle did not have a front license plate. Officer Callow was uncertain whether appellant was in violation of Ohio law since he had not yet determined whether the vehicle was licensed in Ohio or nearby Pennsylvania, which does not require drivers to display a license plate on the front of their vehicles.

{¶3} At that time, using his moving Doppler radar, Officer Callow clocked appellant's vehicle traveling 69 miles per hour in a 55 miles per hour zone. Officer Callow made a u-turn and approached appellant's vehicle from the rear, with the intention to stop him for a speeding violation. Officer Callow testified that he stopped appellant's vehicle due to appellant's speeding violation and his violation of Ohio law, which requires both front and rear license plates to be displayed on vehicles at all times.

{¶4} Officer Callow then approached appellant's vehicle from the driver's side. He noticed that appellant was acting "jittery," perspiring on his face, acting nervous, and clutching his steering wheel rigidly. In addition, appellant had a serious look on his face and was staring straight ahead. Officer Callow testified that, based on his 16 years' experience as a police officer, appellant was acting unusual for a random traffic stop. Officer Callow asked appellant for his driver's license and he complied.

{¶5} Officer Callow testified that, based on appellant's unusual behavior, he asked appellant to exit his vehicle to ensure "everyone's safety." As appellant did so, the officer asked him if he had a weapon on his person or anything that he should be concerned about. Appellant said, "no, you can pat me down." At that point Officer Callow patted appellant down and found nothing on his person. Officer Callow then asked appellant if he could search the interior of his car and appellant said, "sure, no

problem." Officer Callow asked appellant if there was anything in his vehicle that he needed to be concerned about that might injure him and appellant said there was nothing.

{¶6} Officer Callow then escorted appellant to the rear of appellant's vehicle and appellant stood there while Officer Callow looked inside appellant's car. The officer opened the center console of appellant's vehicle and saw a dark-colored pistol that was loaded. In order to determine whether appellant had a legitimate reason for having the firearm in his vehicle, Officer Callow asked him why he had this gun. The officer testified that at that point appellant was not under arrest. He was not handcuffed or secured in any manner. Further, the officer had not indicated to appellant that he was not free to leave the scene. Appellant responded that a family member had recently been shot at in a drive-by shooting in his neighborhood, and he had bought the gun for his own protection.

{¶7} At that point Officer Callow patted appellant down again and called for backup, which arrived in two to four minutes. After the second officer arrived, appellant was handcuffed and advised of his *Miranda* rights. The gun in appellant's possession was an Iberia .40 caliber semi-automatic pistol, which was later determined to have been stolen in Akron, Ohio.

{¶8} Appellant was charged in the Girard Municipal Court with the traffic violation. He was subsequently indicted for carrying a concealed weapon, in violation of R.C. 2923.12(A)(2) and former (G)(1); improperly handling firearms in a motor vehicle, in violation of R.C. 2923.16(B) and (I)(2); and receiving stolen property, in violation of R.C. 2913.51(A) and (C), all being felonies of the fourth degree.

{¶9} Appellant pleaded not guilty at his arraignment, and subsequently filed a motion to suppress evidence. The trial court conducted a suppression hearing, at which Officer Callow was the sole witness. Following the hearing, the trial court denied appellant's motion to suppress on July 25, 2008. The trial court found that Officer Callow obtained appellant's consent to search his vehicle "within the period of time required to process the speeding violation and license plate violation," and that the search of the vehicle took place while the violation was being processed. The court also found appellant's consent to search his vehicle was obtained during his lawful detention for a traffic violation. Further, the court found that appellant voluntarily consented to the search of his vehicle so that his Fourth Amendment rights were not violated. On July 28, 2008, appellant entered a plea of no contest to the indictment. The trial court found appellant guilty and sentenced him to five years community control sanctions.

{¶10} Appellant now appeals the trial court's judgment denying his motion to suppress, asserting the following as his sole assignment of error:

{¶11} "THE TRIAL COURT ERRED BY OVERRULING APPELLANT'S MOTION TO SUPPRESS, AS APPELLANT'S CONTINUED DETENTION WAS ILLEGAL AND UNLAWFUL. "

{¶12} Appellant does not challenge the propriety of the initial stop. Instead, he argues that at the time Officer Callow frisked him, the officer was not in possession of sufficient articulable facts to justify the frisk or the search of his vehicle. Appellant also contends that the state failed in its burden to show that appellant's consent for the officer to conduct the pat down and search of his vehicle was valid.

{¶13} Appellate review of a trial court's ruling on a motion to suppress evidence presents a mixed question of law and fact. *State v. Burnside,* 100 Ohio St.3d 152, 154, 2003-Ohio-5372. During a hearing on a motion to suppress evidence, the trial judge acts as the trier of fact and, as such, is in the best position to resolve factual questions and assess the credibility of witnesses. Id. at 154-155; *State v. Mills* (1992), 62 Ohio St.3d 357, 366. An appellate court reviewing a motion to suppress is bound to accept the trial court's findings of fact where they are supported by some competent, credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594. Accepting these facts as true, the appellate court independently reviews the trial court's legal determinations de novo. *State v. Djisheff*, 11th Dist. No. 2005-T-0001, 2006-Ohio-6201, at ¶19.

{¶14} A stop is constitutional if it is supported by probable cause or a reasonable suspicion. *City of Ravenna* v. *Nethken*, 11th Dist. No. 2001-P-0040, 2002-Ohio-3129, at ¶30-31; *Terry v. Ohio* (1968), 392 U.S. 1, 21-27. The concept of an investigatory stop allows a police officer to stop an individual for a short period of time if the officer has a reasonable suspicion that criminal activity has occurred or is about to occur. *State v. McDonald (*Aug. 27, 1993), 11th Dist. No. 91-T-4640, 1993 Ohio App. LEXIS 4152, *10. To justify the stop, the officer must be able to point to specific and articulable facts that w1ould warrant a man of reasonable caution in the belief that the action taken was appropriate. Id., citing *State v*. *Klein* (1991), 73 Ohio App.3d 486, 488. The stop and inquiry must be reasonably related in scope to the justification for their initiation. *United States v. Brignoni-Ponce* (1975), 422 U.S. 873, 881, citing *Terry,* supra, at 29. "Typically, this means that the officer may ask the detainee a moderate number of

questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions." *Berkemer v. McCarty* (1984), 468 U.S. 420, 439.

{¶15} The Ohio Supreme Court has held that the propriety of an investigatory stop must be viewed in light of the totality of the surrounding circumstances. *State v. Bobo* (1988), 37 Ohio St.3d 177, at paragraph one of the syllabus.

{¶16} Further, if a police officer observes any traffic law violation, sufficient grounds exist for the officer to stop the vehicle. *State v. Wojtaszek*, 11th Dist. No. 2002-L-016, 2003-Ohio-2105, at ¶16, citing *State v. Brownlie* (Mar. 31, 2000), 11th Dist. Nos. 99-P-0005 and 99-P-0006, 2000 Ohio App. LEXIS 1450, *6. Where a police officer witnesses a minor traffic violation, the officer is justified in making a limited stop for the purpose of issuing a citation. *Brownlie,* supra, citing *State v. Jennings* (Mar. 3, 2000), 11th Dist. No. 98-T-0196, 2000 Ohio App. LEXIS 800, *8.

{¶17} ["'*** Once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures.'"] *Wojtaszek*, supra, at ¶17, quoting *Pennsylvania v. Mimms* (1977), 434 U.S. 106, 111.

{¶18} This court has held that it is proper for an officer to order a driver to exit a lawfully stopped vehicle, even if there was no reasonable suspicion of criminal activity. *Jennings,* supra*,* at *13.

{¶19} The order to leave one's vehicle sanctioned by the United States Supreme Court in *Mimms* has been held to be subject to a lesser standard than that articulated by

the United States Supreme Court in *Terry*, supra. In *State v. Evans,* 67 Ohio St.3d 405, 1993-Ohio-186, the Ohio Supreme Court held as follows:

{¶20} "*** [T]he order to step out of the vehicle is not a stop separate and distinct from the original traffic stop. It is so minimal and insignificant an intrusion that the *Mimms* court refused to apply the requirements for an investigatory stop. Unlike an investigatory stop, where the police officer involved 'must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion,' *Terry* [, supra, at] 21, a *Mimms* order does not have to be justified by any constitutional quantum of suspicion." *Evans,* supra, at 408.

{¶21} In the case sub judice, as noted supra, appellant does not challenge the propriety of Officer Callow's initial stop. We note the officer stopped appellant for a traffic violation and the stop was therefore justified. *Wojtaszek*, supra. Further, because appellant was lawfully detained for a traffic violation, Officer Callow was authorized to order him out of his vehicle while he was being detained for the traffic violation. *Jennings*, supra.

{¶22} Next, we observe that appellant gave Officer Callow his consent for the officer to pat him down and then to search the interior of his vehicle.

{¶23} In addressing the consent exception to the warrant and probable-cause requirements under the Fourth Amendment, the United States Supreme Court has held:

{¶24} "It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is '*per se* unreasonable [***] subject only to a few specifically established and well-delineated exceptions.' *Katz v. United States*, 389 U.S. 347, 357; *Coolidge v. New Hampshire*, 403

U.S. 443, 454-455; *Chambers v. Maroney*, 399 U.S. 42, 51. It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent. *Davis v. United States*, 328 U.S. 582, 593-594; *Zap v. United States*, 328 U.S. 624, 630." *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 219.

{¶25} Further, a defendant's consent to search a vehicle stopped for a traffic violation is valid if obtained within the period of time required to process the traffic violation, even if the officer suspects no other criminal activity. *State v. Loffer*, 2d Dist. No. 19594, 2003-Ohio-4980, at ¶22; accord *State v. Riggins*, 1st Dist. No. C-030626, 2004-Ohio-4247, at ¶19; *State v. Lattimore*, 10th Dist. No. 03AP-467, 2003-Ohio-6829, at ¶12. "Because Loffer's consent to search was obtained within the period of time required to process the traffic warnings, the search of the truck was not required to be supported by a reasonable articulable suspicion of criminal behavior other than the traffic infractions." *Loffer*, supra. In contrast, once a traffic citation is issued and the purpose of the stop is completed, the lawful basis for the detention ceases. A consent to search obtained during an unlawful detention is invalid. *State v. Retherford* (1994), 93 Ohio App.3d 586.

{¶26} However, the Supreme Court of Ohio has held that voluntary consent, determined under the totality of the circumstances, may validate an otherwise illegal detention and search. *State v. Robinette,* 80 Ohio St.3d 234, 241, 1997-Ohio-343, citing *Davis v. United States* (1946), 328 U.S. 582, 593-594. The Supreme Court in *Robinette* held:

{¶27} "Once an individual has been unlawfully detained by law enforcement, for his or her consent to be considered an independent act of free will, the totality of the circumstances must clearly demonstrate that a reasonable person would believe that he or she had the freedom to refuse to answer further questions and could in fact leave." Id. at paragraph three of the syllabus.

{¶28} In the case sub judice, there was competent, credible evidence to support the trial court's finding that Officer Callow obtained appellant's consent to search the interior of his vehicle within the period of time required to process the traffic violation.

{¶29} We therefore hold the trial court did not err in finding appellant's consent to search his vehicle took place during his lawful detention and was therefore valid.

{¶30} Further, there was competent, credible evidence to support the trial court's finding that appellant's consent was an independent act of free will pursuant to *Robinette*, supra. There is nothing in the record suggesting a prolonged detention. Officer Callow testified he waited no more than two to four minutes for backup to arrive. The frisk and search of appellant's vehicle were conducted on a public road in broad daylight. There was only one officer present. There is no evidence in the record of any threats, promises, or coercive police procedures. Appellant was not arrested or told he was not free to leave. He was not handcuffed or otherwise secured, and he was not placed in a police cruiser. He agreed to wait at the rear of his vehicle while it was being searched. There is no evidence of any words or conduct of appellant to suggest he was threatened or coerced in any way to give his consent. Appellant was highly cooperative with Officer Callow. In fact, appellant offered to be frisked, and when asked for consent to search his vehicle, appellant said, "sure, no problem." Finally, Officer Callow testified

that appellant was business-like, cooperative, and so “clean cut, [he] could have been an off duty policeman.” In short, appellant appeared to be educated and intelligent and not easily subject to coercion. For this additional reason, the trial court did not err in finding appellant’s consent to search his vehicle to be valid.

{¶31} Next, appellant argues his consent was not voluntary, but rather represented a mere submission to a claim of lawful authority. We do not agree.

{¶32} To establish the consent exception to the probable-cause and warrant requirements of the Federal and Ohio Constitutions, the state has the burden of establishing by "clear and positive" evidence that consent was freely and voluntarily given. *Bumper v. North Carolina* (1968), 391 U.S. 543, 548; *State v. Posey* (1988), 40 Ohio St.3d 420, 427. Whether a consent to search was voluntary or was the product of duress or coercion, either express or implied, is a question of fact to be determined from the totality of the circumstances. See Schneckloth, supra, at 248-249; *State v. Chapman* (1994), 97 Ohio App.3d 687, 691.

{¶33} Relevant factors for the trial court to consider in determining whether a consent was voluntary include the following: (1) the suspect's custodial status and the length of the initial detention; (2) whether the consent was given in public or at a police station; (3) the presence of threats, promises, or coercive police procedures; (4) the words and conduct of the suspect; (5) the extent and level of the suspect's cooperation with the police; (6) the suspect's awareness of his right to refuse to consent and his status as a "newcomer to the law"; and (7) the suspect's education and intelligence. *Riggins,* supra, at ¶15, citing Schneckloth.

{¶34} There was competent, credible evidence to support the trial court's finding that appellant's consent to search his vehicle was freely and voluntarily given. We therefore hold the trial court did not err in finding appellant voluntarily consented to the search.

{¶35} For the reasons stated in the Opinion of this court, the assignment of error is not well taken. It is the judgment and order of this court that the judgment of the Trumbull County Court of Common Pleas is affirmed.

MARY JANE TRAPP, P.J.,

DIANE V. GRENDELL, J.,

concur.