[Cite as *State v. Sellers*, 2012-Ohio-5440.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-T-0118**
- vs -	:	
LIONEL B. SELLERS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 10 CR 529.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos,* Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Michael A. Partlow, 112 South Water Street, Suite C, Kent, OH 44240 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Lionel B. Sellers, appeals from the judgment of the Trumbull County Court of Common Pleas denying his motion to suppress evidence and the judgment of the same court convicting him on one count of possession of heroin. For the reasons that follow, we affirm.

{¶2} On July 7, 2010, Officers Robert Trimble and Brian Martinek were patrolling the streets of Warren, Ohio pursuant to the police department's Weed and

Seed Program. The program is designed to eliminate criminal activity in Warren's higher crime areas and involving the community in the subsequent clean up and rebuilding of neighborhoods. During routine patrol, the officers noticed appellant driving a light blue Mercedes in the opposite direction. The vehicle did not have a front license plate as required by Ohio law. The officers turned the cruiser around and followed appellant. Officer Martinek had encountered appellant before and ran a LEADS report to determine his driving status. Although he had no warrants, the report stated appellant's license was suspended.

{¶3} Appellant turned the vehicle into the driveway of a home in which a known drug dealer resided. The officers activated their overhead lights and pulled the cruiser behind the Mercedes. Appellant exited the car and began walking across the home's lawn. Officer Trimble advised appellant to stop, but the suspect continued walking at a brisk pace. Officer Trimble began to follow appellant, and Officer Martinek went the opposite way in the event the suspect circled the home. While chasing appellant, Officer Trimble noticed appellant discard what appeared to be a small piece of paper. After a brief chase, the officer apprehended appellant who was then arrested.

{¶4} After being placed in the officers' cruiser, they returned to the vicinity where appellant tossed the item. Officer Martinek soon discovered an object he described as a "bindle," i.e., a small, folded paper often used to conceal or transport drugs. The bindle had a powdery substance on it and was therefore secured and taken to the Warren Police Department for field testing. The powder field tested positive for heroin. The suspected contraband was later sent to BCI where further testing revealed the powder within the bindle was a trace amount of heroin.

{¶5} Appellant was indicted for possession of heroin, in violation of R.C. 2925.11, a felony of the fifth degree. He entered a plea of not guilty and filed a motion to suppress evidence. In his motion, appellant challenged the constitutionality of (1) the stop, (2) the search, and (3) his arrest. A hearing was held at which both officers testified and, after receiving evidence, the trial court denied appellant's motion. The matter proceeded to jury trial and appellant was later found guilty as charged. Appellant was sentenced to 12 months imprisonment. This appeal follows.

{¶6} Appellant assigns three errors for our review. His first assignment of error provides:

{¶7} "The trial court erred as a matter of law by denying the appel[l]ant's motion to suppress evidence."

{¶8} 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, 2003-Ohio-5372, ¶8. 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. *State v. Mills*, 62 Ohio St.3d 357, 366 (1992). An appellate court reviewing a motion to suppress is bound to accept the trial court's findings of fact where they are supported by competent, credible evidence. *State v. Guysinger*, 86 Ohio App.3d 592, 594 (4th Dist.1993). 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, ¶19.

{¶9} Appellant contends the trial court erred in denying his motion to suppress because it misidentified and therefore failed to decide the ultimate issue raised in the motion. Appellant maintains, given the challenges contained in his motion, the trial

court, by denying defense counsel the opportunity to inquire into the appearance of the bindle, had insufficient information to determine whether the item was facially incriminating. In appellant's view, if the item was not facially incriminating, the officer lacked any basis to seize the item. In support, appellant cites *State v. Nimely*, 5th Dist. No. 01COA01428, 2002 Ohio App. LEXIS 649 (Feb. 13, 2002).

{¶10} In *Nimely*, the defendant, a front seat passenger in a stopped vehicle, had his right hand concealed between his right thigh and the passenger door when the officer approached the vehicle from the passenger side. When the officer handed the defendant a clipboard for the driver to sign the traffic citation, he noticed the defendant's hand was clenched in a fist. Because the defendant was incapable of handling the clipboard well with his left hand, the trooper asked the defendant what was in his right hand. The defendant responded, "nothing." The defendant kept his right hand out of sight and the officer became concerned for his safety. Based upon this concern, the officer then opened the passenger side door and observed the defendant toss a small packet into the vehicle's door compartment. The officer retrieved the item, believing it to contain crack cocaine. The defendant was later charged with possession of cocaine, and filed a motion to suppress evidence based upon the officer's alleged lack of probable cause to stop the vehicle and the alleged illegality of the detention and search of the vehicle. The trial court denied the motion.

{¶11} On appeal, the defendant argued the trial court incorrectly decided the issues raised in the motion to suppress. In particular, the defendant claimed the officer did not have a constitutional basis for opening the passenger side door and lacked a legal foundation for seizing the crack. The Fifth District held that the officer's concern for safety was sufficient to open the door to determine whether a weapon was present.

Id. at *6. And, upon opening the door, the court ruled the officer's seizure of the packet was constitutional because the "incriminating nature" of the object was apparent to the officer, given his testimony and experience. *Id.* at *6- *7.

{¶12} *Nimely* is distinguishable from this case. The primary issue in *Nimely* was whether the arresting officer "had the right to ask appellant, a passenger, to exit the vehicle." *Id.* at *2. After answering this in the affirmative, the secondary issue was whether the officer's seizure of the crack was constitutional. Given the officer's testimony regarding the item's appearance, the court found the seizure permissible. In *Nimely*, neither side disputed whether the defendant's Fourth Amendment rights were implicated; by virtue of the officer's traffic stop, the Fourth Amendment analysis was automatically triggered. In this case, however, appellant was being *pursued* when he discarded the bindle. As a result, he was not seized as contemplated by the Fourth Amendment until he was *actually* apprehended by Officer Trimble. The leading case in this area of law is *California v. Hodari D.*, 499 U.S. 621 (1991).

{¶13} In *Hodari D.,* a group of youths ran away from an unmarked police car. An officer gave chase and witnessed one of the individuals toss a small rock. The officer tackled the individual and later discovered the rock was crack cocaine. The Supreme Court determined the test established by *United States v. Mendenhall*, 446 U.S. 544 (1980), that a person is seized only if a reasonable person would believe that he or she was not free to leave, sets forth a necessary, but not a sufficient condition for a seizure effected through a show of authority. The court concluded that even if the officer's pursuit constituted a show of authority enjoining the individual to stop, there is no constitutional seizure unless the individual complies with the injunction or he is physically restrained by the officer. *Hodari D.* at 629.

{¶14} In this case, even if Officer Trimble's order that appellant "stop" and his subsequent chase was a show of authority, appellant did not actually comply. Pursuant to *Hodari D.*, unless a party submits to a show of authority, there is no "seizure" and hence no Fourth Amendment issue. A command to "stop," when not complied with, is not a seizure under the constitution; and flight from an officer is clearly not a submission to that officer's authority. *See State v. Alston*, 11th Dist. No. 94-L-064, 1994 Ohio App. LEXIS 5094, *5 (Nov. 10, 1994); *see also State v. Bailey*, 2d Dist. No. 22760, 2009-Ohio-2317, ¶25, (holding that "[u]ntil a police officer's attempt to effect the investigatory stop succeeds, no seizure has taken place and therefore no Fourth Amendment review of the reasonableness of the officer's decision to intrude on the suspect's privacy is warranted."); *State v. Stafford*, 2d Dist. No. 20230, 2004-Ohio-2200, ¶16.

{¶15} We therefore hold that appellant was not seized until Officer Trimble caught him. Because the Fourth Amendment is not implicated, there is no need to discuss whether the "incriminating nature" of the bindle was readily apparent when it was discarded or retrieved. The bindle was admissible irrespective of its appearance and, thus, the evidential value of the bindle was a matter for the fact finder to adjudicate at trial.

{¶16} The record demonstrates the officers had probable cause to stop appellant due to the lack of a front license plate and the appellant's status as a suspended driver. Based upon the revelation that appellant was actually driving the vehicle under suspension, the officers had probable cause to arrest appellant for that offense. And, given our analysis above, the officers' retrieval of the bindle did not implicate appellant's Fourth Amendment rights. Given these circumstances, we

therefore conclude the trial court did not err in denying appellant's motion to suppress evidence.

{¶17} Appellant's first assignment of error is without merit.

{¶18} We shall next address appellant's third assignment of error. It provides:

{¶19} "The trial court erred, and abused its discretion, by sustaining the State's objections to questions posed to Officer Trimble concerning the fact that Keith Stambolia was a well-known drug dealer and actually at the scene of the crime."

{¶20} Appellant argues the trial court erred when it limited his attempt to cross-examine Officer Trimble regarding a bystander's status as a known drug dealer. Appellant contends the trial court abused its discretion in ruling the testimony was not relevant.

{¶21} The Confrontation Clause entitles a defendant to engage in an effective cross-examination of his or her accusers. *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985). It does not, however, guarantee a "cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.* A trial court may reasonably restrict the scope of cross-examination based upon concerns for prejudice, harassment, confusion of the issues, or general relevancy. *State v. Melton*, 11th Dist. No. 2009-L-078, 2010-Ohio-1278, ¶35. Unless otherwise prohibited, evidence is relevant and admissible if it has any tendency to make a consequential fact more or less probable. Evid. 401 and Evid.R. 402.

{¶22} During the suppression hearing, Officer Trimble stated the residence into which appellant pulled his vehicle was the residence of a known drug dealer. And that drug dealer was sitting outside the home when appellant pulled into the home's driveway. At trial, during cross-examination, Officer Trimble testified a white male was

sitting in the yard of the home into which appellant pulled his vehicle. The officer further testified he was familiar with the individual, whose name was Keith Stambolia. When defense counsel attempted to establish Stambolia's purported status as a known drug dealer, however, the state objected. The court sustained the objection, concluding the inquiry was irrelevant to the case. Defense counsel subsequently proffered Officer Trimble's previous testimony regarding Stambolia's status as a known drug dealer.

{¶23} By trying to get the testimony before the jury, defense counsel was attempting to suggest that the bindle the officers retrieved was not appellant's, but may have been left by Stambolia, a known drug dealer. While this testimony is relevant to appellant's defense that the bindle retrieved was never in his possession, it is also somewhat cumulative of other evidence previously admitted. Namely, that the Weed and Seed program, pursuant to which the officers were patrolling on the date of the incident, is focused upon eliminating criminal activity from high-drug and high-crime areas. To the extent the area in question was a high-drug location, the suggestion still remains that the bindle retrieved was cast off by an unknown individual. Even though the evidence may have been relevant to appellant's defense, the trial court did not act unreasonably in limiting the scope of potentially cumulative evidence. *See e.g.* Evid.R. 403(B) (affording a court the discretion to exclude relevant evidence "if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.")

{¶24} Even assuming, however, the trial court should have allowed defense counsel to explore Stambolia's criminal history in aid of appellant's defense, any error is harmless. Crim.R. 52(a) provides that harmless error is "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." Officer

Trimble testified he specifically witnessed appellant tossing a small object from his person in the area the heroin bindle was found. There was no testimony that the area had additional clutter, papers, or debris in the vicinity where appellant was seen discarding the object. There was consequently no evidence that appellant simply discarded a benign piece of paper and therefore no indication the officers mistakenly attributed the bindle to appellant. Because the evidence adduced at trial overwhelmingly supported appellant's conviction for possession of heroin, any arguable error in limiting the scope of cross-examination was harmless as a matter of law.

{¶25} Appellant's third assignment of error lacks merit.

{¶26} Appellant's second assignment of error provides:

{¶27} "The appellant's conviction for the possession of heroin is against the manifest weight of the evidence."

{¶28} A manifest weight challenge concerns:

{¶29} "'[T]he inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible* evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief*.'" (Emphasis sic.) *State v. Thompkins*, 78 Ohio St.3d 380, 387, (1997), citing Black's Law Dictionary (6th Ed. 1990).

{¶30} A manifest weight inquiry analyzes whether the state met its burden of persuasion at trial beyond a reasonable doubt. *Id.* at 390. In weighing the evidence submitted at a criminal trial, an appellate court must defer to the factual findings of the

jury regarding the weight to be given the evidence and credibility of the witnesses. *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus.

{¶31} Although our analysis of the previous assignment of error foreshadows our disposition of the instant assignment of error, we shall nonetheless specifically consider appellant's challenge. In arguing the conviction is against the weight of the evidence, appellant argues the only evidence connecting him to the bindle was Officer Trimble's assertion that he saw appellant discard a "piece of paper" prior to being arrested. Although the officers eventually found the bindle, appellant asserts there was no specific testimony that the bindle was the "piece of paper" he purportedly discarded. Appellant points out that because he was arrested in a high crime area, "[t]he entire area of the yard in question, as well as neighboring yards, were quite likely littered with small pieces of paper containing trace substances of one sort or another."

{¶32} As discussed above, even though the testimony indicated the location of appellant's arrest was a high drug or high crime area, there was no specific evidence that the area in which the bindle was found was cluttered with refuse or other pieces of paper. Officer Trimble testified he witnessed appellant toss what appeared to be a piece of paper in the vicinity of where Officer Martinek recovered the bindle. The jury was aware that Officer Trimble was not able to immediately identify the item but, given the proximity of where the bindle was found to where Officer Trimble saw appellant discard the paper, the jury was free to draw the conclusion that the paper Officer Trimble saw was the bindle recovered by Officer Martinek. The evidence produced by the state does not weigh heavily against a conviction and therefore we hold the state met its burden of persuasion.

{¶33} As a final note, appellant suggests that the chain of evidence failed to establish that the bindle presented during trial was the item recovered by the officers at the scene. Appellant, however, neither argues the chain of custody was broken, nor does he assert the bindle was substituted or tampered with. Notwithstanding appellant's open-ended challenge to the bindle's genuineness, Officer Trimble testified that the bindle produced in court looked like the package appellant discarded. While Officer Trimble testified on cross-examination he could not remember the color of the bindle, he consistently maintained it looked like a piece of paper or a gum wrapper. As there is no affirmative evidence to suggest the bindle produced at trial was not the bindle recovered by Officer Martinek, appellant's "chain of evidence" allegation is without merit.

{¶34} Appellant's second assignment of error is overruled.

{¶35} For the reasons discussed in this opinion, appellant's three assignments of error are overruled. The judgment of the Trumbull County Court of Common Pleas is therefore affirmed.

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDELL, J.,

concur.