

[Cite as *State v. Phillips*, 2009-Ohio-3519.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 22918
Plaintiff-Appellee	:	
	:	Trial Court Case No. 08-CRB-00122
v.	:	
	:	(Criminal Appeal from Kettering
KEVIN MICHAEL PHILLIPS	:	Municipal Court)
	:	
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 17th day of July, 2009.

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BROGAN, J.

{¶ 1} Kevin Michael Phillips appeals from his conviction and sentence following a no-contest plea to misdemeanor charges of improperly handling a firearm in a motor vehicle and improperly displaying a license plate. In his sole assignment of error, he contends the trial court erred in partially overruling his motion to suppress the evidence

against him.

{¶ 2} The charges against Phillips stemmed from the discovery of a loaded handgun in his car during a traffic stop for having an obstructed license plate. Following an evidentiary hearing, the trial court sustained in part and overruled in part Phillips' suppression motion. He then entered no-contest pleas to the charges set forth above. The trial court found him guilty and sentenced him accordingly.

{¶ 3} Suppression-hearing testimony reflects that Montgomery County Sheriff's Deputy Joseph Caito observed Phillips' vehicle traveling in Washington Township at approximately 10:00 p.m. on January 20, 2008. Caito began following the vehicle and could not read its temporary license plate despite approaching to within no more than three car lengths. Caito noticed a tinted cover over the plate as well as dirt and salt on the cover. He made a traffic stop for an obstructed plate.

{¶ 4} When Caito reached the back of Phillips' vehicle on foot, he was able to read the plate. He informed the dispatcher of the plate number and proceeded to make contact with Phillips. While advising Phillips about the obstructed plate, Caito learned from the dispatcher that the owner of the vehicle had a permit to carry a concealed weapon. Phillips confirmed that he was the owner but told Caito he was not carrying his weapon. As they spoke, Caito detected a slight odor of burnt marijuana in the car. He took Phillips' driver's license back to his cruiser and called for a canine unit. Caito still was completing an obstructed-plate citation when a drug dog arrived with its handler, Randall Hawley.

{¶ 5} Before the dog performed a drug sniff, Caito removed Phillips from the vehicle, patted him down, and placed him in a police cruiser. Hawley then walked the

dog around Phillips' car. The dog alerted near the driver's door and again on the center console after being placed in the vehicle. Caito looked inside the console and found a loaded handgun. No drugs were discovered in the vehicle. Based on the discovery of the loaded handgun, however, Caito placed Phillips under arrest. Without giving any *Miranda* warnings, Caito then asked Phillips about the weapon. Phillips responded that he didn't know it was in the vehicle.

{¶ 6} In its July 9, 2008 suppression ruling, the trial court held that the traffic stop was lawful based on an apparent violation of R.C. 4503.21, which requires license plates to be displayed in plain view and unobstructed. The trial court further held that Phillips was not unreasonably detained prior to the drug dog's arrival and that the dog's alert gave Caito probable cause to search the console. The trial court also determined that Caito's lawful discovery of the loaded weapon justified Phillips' arrest. The trial court sustained Phillips' suppression motion, however, as it pertained to his un-*Mirandized* post-arrest statement.

{¶ 7} Phillips' sole argument on appeal is that Caito lacked reasonable, articulable suspicion to justify stopping and detaining him. Phillips contends Caito was required to turn him loose immediately upon approaching his car and reading the license plate number. Phillips reasons that once Caito read his plate there was no legitimate basis for continuing the stop. In support of his argument, he relies largely on *State v. Chatton* (1984), 11 Ohio St.3d 59. There the Ohio Supreme Court held that "where a police officer stops a motor vehicle which displays neither front nor rear license plates, but upon approaching the stopped vehicle observes a temporary tag which is visible through the rear windshield, the driver of the vehicle may not be detained further to

determine the validity of his driver's license absent some specific and articulable facts that the detention was reasonable." *Id.* at 63. The *Chatton* majority opined that "because the police officer no longer maintained a reasonable suspicion that appellee's vehicle was not properly licensed or registered, to further detain appellee and demand that he produce his driver's license is akin to [a] random detention[.]" *Id.*

{¶ 8} Upon review, we are unpersuaded by Phillips' argument. A trial court's suppression decision presents a mixed question of fact and law. *State v. McNamara* (1997), 124 Ohio App.3d 706, 710. We accept the trial court's view of the facts, provided they are supported by competent, credible evidence, because "[w]hen 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." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. But we determine independently whether the evidence satisfies the applicable legal standard. *State v. Mackey*, Montgomery App. No. 22244, 2008-Ohio-3621, ¶9.

{¶ 9} In the present case, suppression-hearing testimony supports a factual finding that Phillips' temporary license plate was obstructed by a tinted cover coated with dirt and road salt. As a result, Caito could not read the license plate when following Phillips' vehicle as closely as safety would permit. These facts at least gave Caito articulable suspicion to make a traffic stop for a violation of R.C. 4503.21, which provides: "No person to whom a temporary license placard * * * has been issued for the use of a motor vehicle * * *, and no operator of that motor vehicle, shall fail to display the temporary license placard in plain view from the rear of the vehicle either in the rear window or on an external rear surface of the motor vehicle * * *. No temporary license

placard * * * shall be covered by any material that obstructs its visibility.”

{¶ 10} Although Phillips’ temporary license plate was displayed on the rear of his vehicle, its visibility was obstructed by a tinted cover, dirt, and road salt. Caito could not read it when viewed from no more than three car lengths away in his patrol car; therefore, he had reasonable, articulable suspicion that Phillips was violating R.C. 4503.21. This suspicion did not abate simply because Caito then approached Phillips’ vehicle on foot and ascertained the plate number. Caito testified that he was able to read the plate only when he reached the “driver’s side rear corner of the vehicle.” Caito properly concluded that the plate was obstructed from view, within the meaning of the statute, when he had to approach within a few feet away to read it. Cf. *State v. Rose* (June 14, 1993), Clark App. No. 2960 (finding that a license plate was obstructed where it was so dirty that an officer could not read it until after making a traffic stop for the violation). Thus, Caito’s ultimate ability to read the plate does not mean no violation of R.C. 4503.21 occurred. To the contrary, the record supports a finding that Phillips violated the statute by driving with a plate obstructed by a tinted cover, dirt, and road salt. As a result, Caito was not required to turn Phillips loose upon reading the plate.

{¶ 11} In reaching the foregoing conclusion, we find *Chatton*, supra, to be distinguishable. In that case, a police officer stopped the defendant because no license plates were visible on his vehicle. After approaching the car on foot, the officer saw a temporary plate lying on the rear deck under the rear window. At that time, R.C. 4503.21 did not require temporary plates to be displayed in any particular way or even to be “visibly displayed at all.” *Chatton*, supra, at 60. Accordingly, the *Chatton* majority concluded that the officer lacked reasonable suspicion of any legal violation once he

determined that a temporary plate existed.

{¶ 12} Following *Chatton*, the General Assembly amended R.C. 4503.21 to require a temporary plate to be displayed in plain view from the rear of a vehicle and to have its visibility unobstructed. See, e.g., *State v. Brown* (Jan. 9, 1991), Clark App. No. 2817 (distinguishing *Chatton* based on the amendments to R.C. 4503.21). Because Phillips' temporary plate was obstructed by a tinted cover, dirt, and road salt, Caito continued to have reasonable suspicion of a statutory violation after he approached Phillips' car. Unlike *Chatton*, the legal justification for Caito's stop continued when he made contact with Phillips and detected the odor of burnt marijuana. Accordingly, we find no merit in Phillips' argument that Caito was obligated to let him go upon approaching his car and ascertaining his plate number.

{¶ 13} The other cases Phillips cites do not alter our conclusion. In *State v. Cromes*, Shelby App. No. 17-06-07, 2006-Ohio-6924, the Third District held that an officer was justified in making a traffic stop under R.C. 4503.21 based on his inability to read the defendant's rear license plate while following the vehicle. The officer testified at trial, however, that he was able to read the plate after he stopped the vehicle and came within ten feet of it. Significantly, the officer conceded that there was no dirt, mud, or improper paint on the plate, that it was in its correct location, and that there was nothing at all obstructing it. In light of these admissions, the Third District found that the officer had no reasonable suspicion of a violation of R.C. 4503.21 to justify further detaining the defendant and demanding his driver's license. Unlike *Cromes*, however, officer Caito testified that he could not read Phillips' temporary plate until he actually reached the stopped vehicle on foot. Caito further testified that the plate was obstructed by a tinted

cover that was dirty and salty. Therefore, Caito did have reasonable suspicion to believe R.C. 4503.21 had been violated.

{¶ 14} In *State v. Brooks*, Lake App. No. 2005-L-200, 2007-Ohio-344, an officer testified that he stopped the defendant's vehicle because the rear license plate was partially obstructed by a frame. The trial court found that less than one-quarter of the plate was obstructed and that the stickers on the bottom of the plate were only partially covered. It held that the officer lacked reasonable suspicion of a violation of R.C. 4503.21 to justify a traffic stop. Upon review, the Eleventh District affirmed in a two-to-one ruling. The majority declined to read the statute strictly as prohibiting *any* obstruction. It noted the officer's admitted ability to read the characters on the license plate, and it distinguished cases finding a traffic stop permissible where the characters were unreadable. In the present case, of course, the characters on Phillips' temporary plate were unreadable until officer Caito actually walked right up to the rear of the stopped car. Therefore, even if we were to agree with the *Brooks* majority's reading of the statute, its ruling does not conflict with our conclusion here.

{¶ 15} Finally, in *State v. Molek*, Portage App. No. 2001-P-0147, 2002-Ohio-7159, an officer stopped a car because its license plate was partially covered with snow. The Eleventh District concluded that the stop was unlawful because the snow did not prevent the officer from reading any of the characters on the plate. The Eleventh District reasoned as follows:

{¶ 16} "The officer correctly identified six of the seven characters of appellee's license plate. The only character incorrectly identified was an 'F,' which was incorrectly identified as an 'E.' Although there may have been snow on appellee's license plate, it

was not obstructing any of the identifying characters. The officer saw the top of the F and, in fact, also saw the entire bottom half of the letter. He guessed that the snow was covering the bottom line of an E, however, the snow was not covering anything other than the lower border of the license plate. Thus, this is not a case where snow obstructed the identification of a motor vehicle's license plate; instead it is situation where the officer added something to a license plate that simply was not there. Under these circumstances, we cannot conclude that the license plate was obstructed. As such, the stop was not supported by probable cause or a reasonable suspicion." *Id.* at ¶30.

{¶ 17} Unlike *Molek*, the testimony of officer Caito supports a finding that Phillips' license plate was obstructed by a tinted cover that was dirty and salty. Therefore, Caito had reasonable suspicion to believe R.C. 4503.21 had been violated. As a result, he was entitled to continue the traffic stop and to approach Phillips about the violation. Upon doing so, he smelled burnt marijuana in the car. On appeal, Phillips does not dispute the officer's right to continue the detention after smelling the marijuana for purposes of having a drug dog sniff the car. Nor does he challenge the duration of the detention from the time Caito smelled marijuana until the drug dog alerted. Phillips also does not dispute Caito's right to retrieve the loaded handgun from the console after the dog alerted or any other aspect of the stop. Accordingly, we overrule his sole assignment of error and affirm the judgment of the Kettering Municipal Court.

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FAIN and FROELICH, JJ., concur.

Copies mailed to:

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