**[Cite as *State v. Young*, 2012-Ohio-3131.]**

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

| | | |
|---|---|---|
| STATE OF OHIO, | : | |
| Plaintiff-Appellee, | : | CASE NO. CA2011-06-066 |
| | : | O P I N I O N |
| - vs - | | 7/9/2012 |
| | : | |
| KEVIN L. YOUNG, | : | |
| Defendant-Appellant. | : | |

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 10 CR 27083

David P. Fornshell, Warren County Prosecuting Attorney, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Ryan L. DeBra, 4914 Ridge Avenue, Cincinnati, Ohio 45209, for defendant-appellant

**PIPER, J.**

**{¶ 1}** Defendant-appellant, Kevin Young, appeals a decision of the Warren County Court of Common Pleas denying his motion to suppress.

**{¶ 2}** On January 18, 2011, appellant was indicted for carrying a concealed weapon in violation of R.C. 2923.12(A)(2), a fourth-degree felony. Appellant was charged because of items found in his backpack during the search of a vehicle in which he was a passenger. Prior to trial, appellant moved to suppress the evidence. Following a suppression hearing,

the trial court overruled appellant's motion.

**{¶ 3}** On December 2, 2010, several officers with the Warren County Sheriff's Office were patrolling an area known for drug trafficking between State Route 122 and Interstate 75 in Middletown, Ohio. At approximately 9 p.m., an undercover officer named Detective Wetzel advised over the police radio that he observed a male suspect, now known as appellant, sitting inside a green Volvo with Illinois license plates in a Kroger parking lot. Detective Wetzel's attention was drawn to the vehicle because appellant had parked far away from Kroger and made no attempt to enter the store. A short time later, Detective Wetzel saw appellant exit the Volvo carrying a black backpack, at which time he was picked up by a male and female in a white minivan. Detective Wetzel radioed this information to the other police units, and several undercover officers began following the minivan.

**{¶ 4}** Detective Wetzel subsequently contacted Deputy Brian Lewis, a certified narcotics canine handler, to bring his drug detection dog to conduct a preliminary detection for illegal controlled substances. The canine immediately alerted to the presence of narcotics on the both driver and passenger sides of the Volvo. The officers relayed this information to the units following the minivan, including Detective Dan Schweitzer.

**{¶ 5}** At the suppression hearing, Detective Schweitzer testified that he had worked for the Warren County Drug Task Force since 2001, and had advanced training in narcotics detection and interdiction. Detective Schweitzer explained that after the minivan left Kroger, it went into a Wendy's drive-through. The van then drove toward a nearby Meijer, where the driver looped around the parking lot and finally parked in a distant lot. When the three occupants exited the minivan, they looked around suspiciously in a manner that, based on Detective Schweitzer's experience, was indicative of an attempt to determine the existence of police surveillance. As the subjects walked toward Meijer, Detective Schweitzer recognized the other male passenger as Brian Robbins, a known drug dealer who was under indictment

for a drug-related offense in Warren County. Detective Schweitzer notified the other police units that he had identified Robbins, and continued to wait outside Meijer for the individuals to exit the store.

**{¶ 6}** A few minutes later, the subjects got back into the minivan and began to exit the parking lot. Detective Schweitzer advised all units that the driver had signaled a right turn, but that she suddenly flipped on her left turn signal and made an erratic turn to the left. At this time, Detective Schweitzer radioed for a police cruiser to make a traffic stop.

**{¶ 7}** During the stop, the officers observed Robbins making furtive gestures in the front seat of the minivan, as if trying to conceal something in his jacket, which was located in the back seat. The officers removed Robbins from the vehicle and patted him down for weapons, but found nothing. When asked why he was reaching for his jacket, Robbins indicated that he had stashed marijuana in the jacket pocket. After finding the marijuana, the officers received consent from the driver to search the rest of the minivan. At some point after receiving the driver's consent, the officers removed appellant from the vehicle and placed him in a police car.

**{¶ 8}** In conducting the search, the officers came across appellant's backpack, and opened it, finding a digital scale, a small bag of marijuana, a pistol, and some ammunition. Appellant admitted that the backpack, digital scale, and marijuana belonged to him, but denied owning the pistol and the ammunition.

**{¶ 9}** After reviewing the evidence, the trial court denied appellant's motion to suppress. First, the court found that the canine alert on the Volvo gave the police probable cause not only to search the Volvo, but also to search and arrest appellant for possession of illegal drugs. The court also found that the police were authorized to search the minivan and all of its contents, based upon the driver's consent and various additional factors. In so holding, the court stated:

> The Court is persuaded that [the driver's] consent extends to all of the contents of the vehicle since as the operator she had the authority to consent to such a search. However, this holding is not limited to her consent but is also based * * * on the probable cause to arrest [appellant] as well as the probable cause to search the contents of the minivan once marihuana was discovered on the front seat passenger, Robbins.

Sic.

**{¶ 10}** The court also found that the automobile exception to the warrant requirement applied, due to the exigency of the situation.

**{¶ 11}** Following the denial of his motion to suppress, appellant pled no contest to the concealed weapon charge, and was sentenced to three years of community control.

**{¶ 12}** Appellant timely appeals, raising one assignment of error for review:

**{¶ 13}** THE ARREST, SEARCH, AND SEIZURE OF APPELLANT WAS IN VIOLATION OF APPELLANT'S FOURTH AMENDMENT RIGHT TO BE SECURE AGAINST UNREASONABLE AND WARRANTLESS SEARCHES AND SEIZURES.

**{¶ 14}** In his sole assignment of error, appellant argues that the trial court erroneously denied his motion to suppress, where the officers violated his constitutional rights under the Fourth Amendment.

**{¶ 15}** "Appellate review of a motion to suppress presents a mixed question of law and fact." *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, ¶ 100. "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.*, quoting *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. "Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *Id.*

**{¶ 16}** The Fourth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, provides, "[t]he right of the people to be secure in

their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Section 14, Article I of the Ohio Constitution, nearly identical to its federal counterpart, likewise prohibits unreasonable searches and seizures. *See State v. Kinney*, 83 Ohio St.3d 85, 87 (1998).

**{¶ 17}** For a search or seizure to be reasonable under the Fourth Amendment, it must be based upon probable cause and executed pursuant to a warrant. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507 (1967). This requires a two-step analysis. First, there must be probable cause. If probable cause exists, then a search warrant must be obtained unless an exception to the warrant requirement applies. If the state fails to satisfy either step, the evidence seized in the unreasonable search must be suppressed. *See Mapp v. Ohio*, 367 U.S. 643, 654, 81 S.Ct. 1684 (1961); *Maumee v. Weisner*, 87 Ohio St.3d 295, 297 (1999).

**{¶ 18}** It is undisputed that the officers herein acted without a warrant. Thus, we must determine whether one of the delineated exceptions to the warrant requirement applies.

**Probable Cause to Arrest**

**{¶ 19}** Here, the trial court first found that the canine alert created probable cause to search the Volvo. Ohio courts have consistently upheld this finding, and appellant does not challenge this decision. *See, e.g., State v. Grenoble*, 12th Dist. No. CA2010-09-011, 2011-Ohio-2343, ¶ 30, *appeal not accepted*, 129 Ohio St.3d 1505, 2011-Ohio-5358.

**{¶ 20}** However, the trial court also found that the canine alert, standing alone, gave the officers probable cause to search and arrest appellant. Appellant apparently disagrees, as he argues that the police lacked probable cause to arrest him prior to the traffic stop.

**{¶ 21}** To make a warrantless arrest, there must be probable cause. "The probable-cause standard is incapable of precise definition or quantification into percentages because it

deals with probabilities and depends on the totality of the circumstances." *Maryland v. Pringle*, 540 U.S. 366, 371, 124 S.Ct. 795 (2003). However, "[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt, * * * and that the belief of guilt must be particularized with respect to the person to be searched or seized * * *." *Id.*, citing *Ybarra v. Illinois*, 444 U.S. 85, 91,100 S.Ct. 338 (1979). "To determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause." *Pringle* at 371, quoting *Ornelas v. United States*, 517 U.S. 690, 696, 116 S.Ct. 1657 (1996). *See also Dayton v. Erickson*, 76 Ohio St.3d 3, 10 (1996).

**{¶ 22}** Initially, we recognize that there is a dispute among courts as to whether a canine alert, standing alone, gives rise to probable cause to arrest a suspect. *See United States v. Anchondo*, 156 F.3d 1043, 1045 (10th Cir.1998) (a positive canine alert provides probable cause to arrest the driver of the vehicle); *United States v. Beltran-Palafox*, 731 F.Supp.2d 1126, 1166 (D.Kan.2010). *But see State v. Kay*, 9th Dist. No. 09CA0018, 2009-Ohio-4801 (canine alert alone does not provide probable cause to arrest); *State v. McCorvey*, 11th Dist. No. 2010-A-0038, 2011-Ohio-3627 (canine's alert and fruitless search of vehicle were mere factors in probable cause inquiry); *State v. Gibson*, 141 Idaho 277, 285 (2005) ("dog's detection of the odor of drugs did not automatically justify probable cause to arrest [defendant] unless there were additional factors to connect that odor with him"); *Whitehead v. Virginia*, 278 Va. 300, 305 (2009) (canine alert, "without something more," did not create probable cause to search defendant's person).

**{¶ 23}** Here, however, the police did not simply rely on the canine alert. Instead, they were aware of additional facts particularized to appellant, which established probable cause to arrest him prior to the traffic stop. The additional facts are: (1) appellant was spotted alone

in an area known for high drug activity; (2) appellant drove a Volvo with Illinois license plates; (3) officers knew that drug traffickers used the I-75 corridor between Illinois and Ohio to transport drugs; (4) appellant transported a backpack containing unknown items into the minivan; (5) after appellant entered the minivan with his backpack, the minivan was driven in a route and manner as if trying to avoid being followed; (6) appellant exited the minivan suspiciously, as if looking for police surveillance; and (7) appellant was with a known drug dealer under indictment in Warren County.

**{¶ 24}** Appellant claims there is nothing suspicious about carrying his backpack from the Volvo to the minivan. He argues that the probable cause to search the Volvo – and his backpack – stemming from the canine alert did not follow the backpack once he took it outside of the Volvo. We disagree. Here, the officers continually observed appellant for the 15 minutes between his exit from the Volvo and the search of his backpack, and there is no evidence that he lost possession or control of the backpack at any time. Given these specific facts, we find that probable cause as to the criminal contents of the backpack was not attenuated during the short transit from one vehicle to another.

**{¶ 25}** Moreover, the backpack was simply one of many factors giving rise to probable cause to believe appellant was engaged in criminal activity prior to the traffic stop. Ohio courts have consistently held that a majority of these factors are pertinent to determining probable cause. *See, e.g., State v. Christopher*, 12th Dist. No. CA2009-08-041, 2010-Ohio-1816, ¶ 26 (nervous, evasive behavior); *State v. Bobo*, 37 Ohio St.3d 177, 179 (1988) (high crime area); *State v. Freeman*, 64 Ohio St.2d 291, 295 (1980) (defendant sat alone in vehicle for 20 minutes without entering nearby motel); *State v. Moore*, 90 Ohio St.3d 47, 51 (2000) (officers' training and experience); *State v. Johnson*, 5th Dist. No. 10-CA-35, 2010-Ohio-5698, ¶ 10 (association with known criminals). *See also United States v. Perez*, 440 F.3d 363, 374 (6th Cir.2006) (transfer of bags between vehicles contributed to reasonable

suspicion).

**{¶ 26}** We find that under the totality of the circumstances, these facts established probable cause to arrest appellant without a warrant prior to initiating the traffic stop. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 230-232, 103 S.Ct. 2317 (1983). However, we need not focus on this issue, where probable cause to arrest is not the deciding factor governing the admissibility of the evidence against appellant. Instead, the evidence was admissible independent of whether probable cause for appellant's arrest existed prior to the stop, as we discuss next.

**Traffic Stop**

**{¶ 27}** Even if the above facts did not establish probable cause to arrest prior to the stop, we are certain that they were sufficient to create a reasonable suspicion in the minds of the officers to warrant an investigative stop of the minivan pursuant to *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968).

**{¶ 28}** Under *Terry*, an officer is permitted to "stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause." *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581 (1989), quoting *Terry* at 30. Likewise, a moving vehicle may be stopped to investigate an officer's reasonable and articulable suspicion that its occupants had engaged, were engaging, or were about to engage in criminal activity. *United States v. Hensley*, 469 U.S. 221, 226-227, 105 S.Ct. 675 (1985). "Courts must determine from the totality of the circumstances whether law enforcement had an objective and particularized basis for suspecting criminal wrongdoing." *Perez*, 440 F.3d at 371, citing *United States v. Arvizu*, 534 U.S. 266, 272-277, 122 S.Ct. 744 (2002).

**{¶ 29}** Here, along with the above facts, the officers witnessed activities particularized not only to appellant, but also to the minivan and the other two occupants. Specifically, after

appellant entered the minivan, an officer saw the vehicle make a "loop" around three Meijer entrances before parking in a distant lot. Also, the minivan drove "erratically" when leaving Meijer.

**{¶ 30}** Viewing these facts in the aggregate, and giving due weight to the reasonable inferences drawn by the police based on their experience, we are satisfied that the totality of the circumstances provided an objective basis to suspect that the occupants of the minivan were engaged in a drug transaction. Accordingly, at the very least, there was reasonable suspicion that the minivan contained evidence of contraband to support an investigative stop of the vehicle.

**{¶ 31}** We further find that the scope and duration of the stop were "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 20. Generally, "an investigative detention must be temporary 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 (1983). The investigative means used should also be the "least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Id. See also State v. Waldroup*, 100 Ohio App.3d 508, 513 (12th Dist.1995).

**{¶ 32}** Here, immediately after the officers initiated the stop, they saw Robbins furtively trying to reach his jacket in the back seat of the minivan. The officers promptly removed Robbins from the vehicle and patted him down for weapons. *See Knowles v. Iowa*, 525 U.S. 113, 117, 119 S.Ct. 484 (1998) (officers may order occupants to exit the vehicle during a traffic stop). When asked about his attempt to reach his jacket, Robbins admitted that he had concealed marijuana in the jacket, which was still in the back seat of the minivan.

**{¶ 33}** At that point, there is no doubt that the officers had probable cause to believe the minivan contained evidence of contraband. *See, e.g., State v. Tompkins*, 12th Dist. No. CA2000-08-044, 2001 WL 1154554 (Oct. 1, 2001) (voluntary production of drugs from center

console gave probable cause to search vehicle).

**{¶ 34}** "Once a law enforcement officer has probable cause to believe that a vehicle contains contraband, he or she may search a validly stopped motor vehicle based upon the well-established automobile exception to the warrant requirement." *Moore*, 90 Ohio St.3d at 51, citing *Maryland v. Dyson*, 527 U.S. 465, 466, 119 S.Ct. 2013 (1999); *United States v. Ross*, 456 U.S. 798, 804, 102 S.Ct. 2157 (1982). Under the automobile exception, the police may search a vehicle if they have probable cause to believe it contains evidence and there are exigent circumstances justifying a warrantless search. *See Moore* at 51; *Ross* at 804. We have already found that the officers had probable cause to conduct a reasonable search of the minivan. Thus, whether the warrantless search was valid now turns on the presence of exigent circumstances.

**{¶ 35}** Ohio courts have consistently recognized the "inherent mobility" of automobiles, such that exigent circumstances typically exist if the vehicle was readily mobile at the time of the stop. *See Dyson*, 527 U.S. at 467; *Moore*, 90 Ohio St.3d at 52 ("[t]he inherent mobility of the automobile created a danger that the contraband would be removed before a warrant could be issued"). Here, we have no trouble finding that the inherent mobility of the minivan created the exigent circumstances necessary to justify the warrantless search thereof.

**{¶ 36}** We therefore find that the search of the minivan and its contents, including appellant's backpack, were exempt from the warrant requirement of the Fourth Amendment on the basis of probable cause and the automobile exception. *See Ross*, 456 U.S. at 825 ("[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search"); *Wyoming v. Houghton*, 526 U.S. 295, 302-303, 119 S.Ct. 1297 (1999) (the scope of the search extends to passengers' belongings found in the vehicle that are capable of concealing the object of the search).

**{¶ 37}** Based on the foregoing, the trial court did not err in denying appellant's motion to suppress. However, we recognize that our reason for upholding the denial of the suppression motion differs somewhat from the trial court's, in that the trial court also held that the driver's consent to search the minivan justified the search of appellant's backpack. We will briefly explain why we disagree with this reasoning.

**{¶ 38}** This court has previously held that a warrantless search is valid "when based on the consent of a third party whom the police reasonably believe to possess authority over the property, but who in fact does not." *State v. Denune*, 82 Ohio App.3d 497, 509 (12th Dist.1992). Here, however, the police lacked any reasonable belief that the driver had authority over appellant's backpack. It was law enforcement's precise knowledge of appellant's ownership that aided the police in attaching probable cause to the backpack.

**{¶ 39}** Accordingly, we overrule the trial court's conclusion that the scope of the consent from the vehicle's operator included an item that the police knew belonged to another person, such as appellant's backpack. Even so, it is well-settled that a reviewing court is not authorized to reverse a correct judgment simply because the trial court stated an erroneous basis for that judgment. *See State v. Payton*, 124 Ohio App.3d 552, 557 (12th Dist.1997).

**{¶ 40}** In the present case, even though the trial court issued an erroneous finding in its decision, we find that the denial of appellant's motion to suppress was the proper result for the reasons previously discussed.

**{¶ 41}** Judgment affirmed.

POWELL, P.J., and HENDRICKSON, J., concur.