STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 14, 2011
v	No. 297310 Oakland Circuit Court
JASON MATTHEW KLEES, Defendant-Appellant.	LC No. 2009-226901-FH

Before: FORT HOOD, P.J., and DONOFRIO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of possession with intent to deliver 50 to 449 grams of cocaine, MCL 333.7401(2)(a)(iii), and operating a vehicle with a suspended license, second or subsequent offense, MCL 257.904(3). Defendant was sentenced to 7 to 30 years' imprisonment for the possession with intent to deliver cocaine conviction and four days, time served, for the operating a vehicle with a suspended license conviction. Defendant challenges the constitutionality of two separate searches of his vehicle. The first was a consent search at the scene of a traffic stop, and it revealed nothing illegal. The second, which revealed a sizeable amount of cocaine, occurred after defendant was in custody and the vehicle impounded. We affirm.

I. MATERIAL FACTS AND PROCEDURAL HISTORY

Three police officers received a dispatch regarding a complaint of loud music and suspected narcotics activity involving a gray car and a white SUV at a mobile home park. At the scene, one officer observed a white minivan arguably matching the description given by the complainants, and he did not notice any other white vehicles in the vicinity. He observed the vehicle traveling very slowly with its headlights off. The vehicle stopped in front of a mobile home. An individual approached the vehicle and leaned in but quickly returned to his residence when the officer neared. The officer considered this activity evidence that a drug transaction had taken place and followed the vehicle when it pulled away. A second officer was following close behind. The second officer noted that the vehicle was traveling without running taillights but could not see whether the vehicle's headlights were working.

The first officer then initiated a traffic stop and both officers approached the vehicle. When asked why he was in the mobile home park, defendant responded that he was loaning money to someone he met in a bar. When asked for more details, however, defendant did not

know who the person was and kept changing his story. Defendant had a Michigan Identification Card but did not produce a driver's license or vehicle information. When asked, defendant consented to a search of his vehicle. A search of defendant's person revealed a $50 bill in his front pocket, and more money and a tally sheet in his wallet. The tally sheet had names on one side and numbers on the other. Defendant was placed in the back of the squad car, and the two officers searched the vehicle together. The officers performed an extensive search of the vehicle, yet did not discover any drugs. The officers placed defendant under arrest for driving on a suspended license, second offense, which is a one-year misdemeanor, and transported him to the police station. Defendant's vehicle was impounded.

While in custody, defendant expressed extreme concern about his vehicle, asking where it was going to be kept, where it was going to be parked, and when he could get it out. The officer conducting the interview had never had anyone ask so many questions about a vehicle. At some point, a canine officer and drug dog were summoned to the impound lot to search the vehicle a second time. The dog alerted during an exterior sweep of the vehicle, indicating that a narcotic odor was present. When let inside the vehicle, the drug dog alerted to a pair of tennis shoes. The canine officer discovered bags of suspected narcotics beneath the shoes' lining. At no point did the officers obtain a search warrant. A report noting "taillights or headlights off" as the reason for the traffic stop was prepared after the drugs were seized.

Defendant admitted to selling drugs at the mobile home park and driving on a suspended license. Nonetheless, he moved to suppress all of the seized evidence, arguing that the officers did not have reasonable suspicion to support the initial traffic stop and that no exception to the warrant requirement applied to the second warrantless search of the vehicle at the impound lot. The trial court denied defendant's motion and found defendant guilty of both charged offenses.

II. STANDARD OF REVIEW

This Court reviews the trial court's factual findings underlying its ruling on a motion to suppress evidence for clear error. *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001). A factual finding is clearly erroneous where, although there is evidence to support it, a review of the record leaves this Court with a definite and firm conviction that a mistake has been made. *People v Milstead*, 250 Mich App 391, 397; 648 NW2d 648 (2002). The trial court's application of the law to the facts, and its ultimate ruling on a motion to suppress evidence, are reviewed *de novo*. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005).

III. REASONABLE SUSPICION TO EFFECTUATE THE TRAFFIC STOP

"[T]o effectuate a valid traffic stop, a police officer must have an articulable and reasonable suspicion that a vehicle or one of its occupants is subject to seizure for a violation of the law." *People v Williams*, 236 Mich App 610, 612; 601 NW2d 138 (1999). Reasonable suspicion exists if an officer observes a traffic violation or civil infraction or has probable cause to believe a traffic violation has occurred. *People v Davis*, 250 Mich App 357, 363; 649 NW2d 94 (2002); *Williams*, 236 Mich App at 612. Defendant does not dispute that driving on a highway at night with his headlights off is a civil infraction, see MCL 257.684(a) and MCL 257.683(6), but argues that there was insufficient evidence that his headlights actually were off. We disagree.

In this case, there was simply a conflict of testimony: defendant testified that his headlights were on, one officer could not observe defendant's headlights, and another officer testified that defendant's headlights were off. Witness credibility determinations are to be decided initially by the trial court, and we give great deference to the trial court's resolution. *People v Geno*, 261 Mich App 624, 629; 683 NW2d 687 (2004). Deference is appropriate given the special opportunity of the trial court to observe the witnesses' demeanor and judge their trustworthiness. MCR 2.613(C). The trial court found all of the testimony somewhat suspect, given that defendant admitted that he lied to the police officers and the squad cars suspiciously lacked video recordings. The trial court concluded that, in part on the demeanor of the witnesses, the headlights had been off. We are not in a position to find clear error in the trial court's determination.[1]

IV. CONSENT TO THE SECOND WARRANTLESS SEARCH

Defendant next argues that the trial court properly held that defendant's initial consent to search his vehicle at the scene of the traffic stop did not extend to the second warrantless search of the vehicle at the impound lot. The prosecution does not contest this holding on appeal, and it does not change the outcome in this matter, but we briefly note that we agree.

Warrantless searches are per se unreasonable, and evidence obtained from a warrantless search cannot be admitted in the face of a motion to suppress unless a specific exception to the warrant requirement applies. *People v Beydoun*, 283 Mich App 314, 323; 770 NW2d 54 (2009); *People v Martinez*, 192 Mich App 57, 61-62; 480 NW2d 302 (1991). A defendant's voluntary consent to search provides one such exception. *People v Dagwan*, 269 Mich App 338; 342; 711 NW2d 386 (2005). But the scope and duration of consent may be restricted to what an objective, reasonable person would have understood the consenting party to have granted. *People v Frohriep*, 247 Mich App 692, 703; 637 NW2d 562 (2001). "When consent is given to search an area, it does not mean the constitutional protection against unreasonable searches and seizures has been waived forever." *People v Chism*, 32 Mich App 610, 630-632; 189 NW2d 435 (1971), aff'd 390 Mich 104 (1973).

In *Chism*, the defendant consented to a search of his home, and on a subsequent day, the officers returned to the home, entered it, and took a notebook and checkbook that they had seen during the previous search. *Chism*, 32 Mich App at 630-632. This Court distinguished the defendant's consent in *Chism* from the consent given in *People v Nawrocki*, 6 Mich App 46, 56-57; 150 NW2d 516 (1967), where a second search of the defendant's automobile in the afternoon, after it had been searched in the morning, was found permissible based on the fact that defendant told police that they could search his car "at any time." *Chism*, 32 Mich App at 631. Defendant's consent here did not give the officers broad authority to search at any time; we find that an objective, reasonable person would have believed that defendant's consent in this case extended only to a search "right then and there." The search was unambiguously terminated, and

[1] It is clear from the record, and from the officers' own admissions, that the officers *also* stopped defendant for suspected drug activity. This is irrelevant, because one valid ground to effectuate a traffic stop is sufficient.

thereafter no subsequent search could be pursuant to defendant's initial consent. The trial court properly held that the subsequent search was without defendant's consent.

V. APPLICATION OF THE AUTOMOBILE EXCEPTION TO THE SECOND WARRANTLESS SEARCH

Defendant next argues that the trial court erred in holding the second warrantless search was constitutional under the automobile exception, for two reasons. We disagree.

Under the automobile exception, police officers never need a warrant to search a car if they have probable cause to believe contraband is inside, irrespective of whether the police would have the time and opportunity to obtain a warrant. *United States v Ross*, 456 US 798; 102 S Ct 2157; 72 L Ed 2d 572 (1982); *People v Clark*, 220 Mich App 240, 242; 559 NW2d 78 (1996). To have probable cause, there must be a fair probability that the search of a particular place will uncover contraband or evidence of a crime. *People v Garvin*, 235 Mich App 90, 102; 597 NW2d 194 (1999). "The basis for this rule is the lessened expectation of privacy in an automobile." *Clark*, 220 Mich App at 242. Whether probable cause exists in a given case is determined "in a commonsense manner in light of the totality of the circumstances." *Garvin*, 235 Mich App at 102.

A drug dog sniff of a legally detained car is not a "search" within the meaning of the Fourth Amendment because the dog only alerts to an illegal drug, and, therefore, no legitimate privacy interest is compromised. *Illinois v Caballes*, 543 US 405, 409; 125 S Ct 834; 160 L Ed 2d 842 (2005). While a person might have a personal expectation of privacy in one's vehicle in a general sense, society is not prepared to consider reasonable a specific expectation that illegality will not come to the attention of law enforcement. *Id*, 408-410. The United States Supreme Court emphasized, however, that a canine sniff is not a "search" only if the dog is well-trained, because the *only* thing detected thereby is the presence or absence of contraband. *Id*. Therefore, no legally recognized reasonable privacy interest is compromised: anything else a person might have in his or her car that he or she would prefer to remain private will remain undetected. *Id*. The record clearly indicates that the dog in this case was properly trained and certified.

Unlike the drug dog in *Caballes*, *supra*, the dog sniff in this case did not take place at the scene of the traffic stop; it took place at a private impound lot. We find no relevance to this. If a drug dog sniff is not a search, then neither a warrant nor probable cause was required.

The existence of probable cause, however, even in dog-alert cases, depends on the facts known to the officers at the time and the totality of the circumstances. *Garvin*, 234 Mich App at 101-102. The Sixth Circuit has held that a "positive indication by a properly trained dog is sufficient to establish probable cause for the presence of a controlled substance." *US v Diaz*, 25 F 3d 392, 393-394 (CA 6, 1994). Even if a drug dog alert is insufficient per se, additional evidence here included defendant's suspiciously high level of concern about his vehicle, the apparent drug transaction just before the traffic stop, the report of drug activity involving a vehicle matching the description of defendant's vehicle, and the cash and tally sheet. Indeed, after the initial search, and despite its thoroughness, one of the officers continued to believe that the vehicle contained narcotics.

Under the totality of these circumstances, we believe that the officers had probable cause to search defendant's vehicle at the impound lot. Therefore, they were permitted to search it without a warrant, even though it had been impounded and was immobilized in police custody. *People v Carter*, 250 Mich App 510, 514-518; 655 NW2d 236 (2002); *People v Wade*, 157 Mich App 481, 486; 403 NW2d 578 (1987); *Michigan v Thomas*, 458 US 259, 261-262; 102 S Ct 3079; 73 L Ed 2d 750 (1982). The trial court did not err in finding the warrantless search constitutional under the automobile exception.

VI. CONCLUSION

The trial court did not clearly err when it found that defendant was driving with his headlights off, so it properly found that officers had reasonable suspicion to effectuate the traffic stop. The trial court properly held that the second warrantless search of defendant's vehicle was constitutional under the automobile exception to the warrant requirement. Accordingly, given the constitutionality of the traffic stop and subsequent search of defendant's vehicle, the trial court properly denied defendant's motion to suppress the evidence later recovered.

Affirmed.

/s/ Karen Fort Hood
/s/ Pat M. Donofrio
/s/ Amy Ronayne Krause