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CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Sixth District, Wood County.
STATE of Ohio, Appellant,
v.
Daniel LYKINS, Appellee.
No. 93WD076.

June 3, 1994.

Alan R. Mayberry, Pros. Atty., and Gary D. Bishop, Bowling Green, for appellee.

Konrad Kuczak, Dayton, for appellant.

DECISION AND JUDGMENT ENTRY

*1 This case is before the court on appeal from a judgment of the Wood County Court of Common Pleas, in which the court granted the motions to suppress and to dismiss the indictment. Plaintiff-appellant, the state of Ohio, now appeals, raising the following assignments of error:

"I. THE TRIAL COURT ERRED IN SUPPRESSING AS EVIDENCE THE WEAPON DISCOVERED IN THE DEFENDANT'S VEHICLE AFTER THE DEFENDANT TOLD POLICE OFFICERS OF ITS EXISTENCE PURSUANT TO NON-CUSTODIAL QUESTIONING DURING A TRAFFIC STOP.

"II. THE TRIAL COURT ERRED IN DISMISSING THE INDICTMENT AGAINST THE DEFENDANT WHERE THE COURT BELIEVED THAT THE DEFENDANT COULD HAVE BEEN CHARGED WITH A LESS SERIOUS OFFENSE."

On January 7, 1993, the Wood County Grand Jury returned an indictment against Lykins for one count of carrying a concealed weapon in violation of R.C. 2923.12. On January 14, 1993, Lykins filed a motion to dismiss the indictment on the ground that the grand jury which heard the evidence was not the grand jury which issued the indictment. He asserted that the case was originally presented to the grand jury in December 1992, after which no indictment was returned. Thereafter, a new grand jury was impaneled which, Lykins asserted, did not review the evidence in this case, but did return an indictment. Lykins then requested that the court review the grand jury proceedings of January 6, 1993. Thereafter, Lykins filed a supplemental memorandum in support of his motion to dismiss in which he asserted, pursuant to Crim.R. 6(E), a particularized need for the court to review, in camera, the grand jury transcripts of both the December 1992 and the January 1993 proceedings. Appellee asserted that between the December and January sessions of the grand jury, a new grand jury was impaneled. Appellee argued that the court had to review the transcripts to determine if Trooper Ray Martin, who arrested appellee, did in fact testify in January and if so, whether he substantially embellished his prior testimony so as to support an indictment.

On January 28, 1993, the trial court released an entry and order in which the court found a particularized need to review, in camera, the grand jury testimony given by Trooper Martin on December 2, 1992 and January 6, 1993. Thereafter, however, the state responded that it could not comply with the court's order because Trooper Martin, although subpoenaed for the December 2 proceedings, only testified at the January 6 proceedings. Nevertheless, the court reviewed a transcript of the January 6 proceeding and subsequently found a particularized need to release the proceedings to appellee.

Concurrently, appellee filed a motion to suppress any and all evidence obtained from him subsequent to Trooper Martin's questioning him as to the presence of firearms in his vehicle on November 14, 1992. Appellee asserted that the evidence was illegally obtained in that he was in custody and was interrogated without the benefit of Miranda warnings, and that the vehicle was searched without Trooper Martin having any reason to believe that his safety was in danger. On March 1, 1993, the case proceeded to a hearing on the motions to dismiss and suppress at which Trooper Martin and appellee testified. The evidence revealed that on November 14, 1992, at approximately 5:15 p.m., appellee was driving his 1979 Chevrolet Impala eastbound on State Route 6 when Trooper Martin, using a radar device, clocked him going seventy-three miles per hour in a fifty-five mile per hour zone. Trooper Martin then activated his overhead lights and followed appellee until he pulled over. Martin testified that as he was chasing appellee, he noticed appellee making furtive movements and that his passenger, appellee's girlfriend, was occupied with something in her lap. When Martin approached the driver's side of appellee's car, he noticed beer cans in the back seat and detected the odor of alcohol. He further testified that appellee's movements made him suspect that appellee was trying to hide something under the front seat. Martin then asked appellee for his driver's license and asked appellee to step out of the car. Martin then performed a horizontal gaze nystagmus test on appellee, which appellee performed satisfactorily. Martin then patted down appellee and asked him to sit in the back of the patrol car while

Martin wrote out citations for speeding and a seatbelt violation. At the hearing, Martin testified that he told appellee that he could leave the door open; however, appellee testified that Martin placed him in the back seat, which is separated from the front seat by a heavy wire screen, and closed the door.

*2 While writing out the citations, Martin, still suspicious of appellee's earlier furtive movements and having not read appellee his Miranda rights, asked appellee if he had a weapon in the vehicle. Appellee answered that yes he did have a gun on the floorboard of the passenger's side of the car. After determining from appellee that appellee's girlfriend did not pose a threat, Martin locked appellee in his cruiser and retrieved from appellee's car a loaded nine millimeter semiautomatic handgun.

Martin further testified that in December 1992 he was subpoenaed to appear before the grand jury relative to this case but he did not appear at that time. He was, however, again subpoenaed to appear before the grand jury on January 6, 1993. On that date, he did appear but at a later time than that requested on the subpoena.

On July 27, 1993, the trial court filed its judgment entry granting both the motion to dismiss and the motion to suppress. Regarding the motion to suppress, the court held that because the elements of custody and interrogation existed at the time appellee stated there was a gun in the vehicle, the Miranda rule requiring that he be advised of his rights was applicable. Because appellee had not been advised of his Miranda rights, the court held that appellee's statement and the evidence obtained therefrom were inadmissible. Regarding the motion to dismiss the indictment, the court concluded that because the prosecutor had not given the grand jurors a truthful and accurate presentation of the law, particularly in light of their specific request for such, a dismissal of the indictment was necessary to sustain the judicial integrity of the court and the grand jury process. The court thus granted the motion to dismiss. Appellant now appeals that judgment.

Under its first assignment of error, the state argues that the lower court erred in granting appellee's motion to suppress. In particular, appellant asserts that because appellee was lawfully detained but was not in custody when he told Trooper Martin of the weapon's existence, appellee was not entitled to Miranda warnings prior to the trooper's questioning of him.

In examining a trial court's ruling on a motion to suppress, a reviewing court must keep in mind that weighing the evidence and determining the credibility of the witnesses are functions of the trier of facts. State v. Depew (1988), 38 Ohio St.3d 275, certiorari denied (1989), 489 U.S. 1042. Where the factual findings of the trial court are clearly supported by the evidence, its ruling will not be disturbed on appeal, absent an error of law. Id. Pursuant to Miranda v. Arizona (1966), 384 U.S. 436, an individual must be informed of certain constitutional rights when taken into custody or otherwise significantly deprived of his freedom and subjected to interrogation by law enforcement officials. Id. at 478-479. Custody requires "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest. Oregon v. Mathiason (1977), 429 U.S. 492, 495. Interrogation requires "express questioning or its functional equivalent" which the police should know is "reasonably likely to elicit an incriminating response * * *." Rhode Island v. Innis (1980), 446 U.S. 291, 300-301.

*3 There is no question but that Trooper Martin's questioning of appellee was likely to elicit an incriminating response from appellee. The issue before this court, however, is whether appellee was in custody when the interrogation occurred. The United States Supreme Court has held that although an individual is not free to leave the scene of an ordinary traffic stop, the type of questioning which occurs at a traffic stop does not involve custodial interrogation or the coercive interrogation pressures which would prevent the individual from freely exercising his Fifth Amendment rights. Berkemer v. McCarty (1984), 468 U.S. 420, 442.

In the present case, Trooper Martin placed appellee in the back of the patrol car while he was writing out the citations because there was equipment on the front seat. This court previously concluded that placing a detainee in a patrol car while an accident report was being prepared did not involve the exercise of coercive pressures that would prevent a detainee from knowing that he could freely exercise his Fifth Amendment privileges. State v. Skotynsky (Nov. 27, 1992), Lucas App. No. L-91-229, unreported. While we do not suggest that in every situation a detainee's placement into a patrol car for questioning will not rise to a custodial situation, under the facts of this case, we must find as a matter of law that Trooper Martin's questioning of appellee did not constitute a custodial interrogation for purposes of Miranda.

Accordingly, the trial court erred in granting appellee's motion to suppress, and the first assignment of error is well-taken.

Under its second assignment of error, appellant challenges the trial court's dismissal of the indictment. The trial court determined that prosecutorial misconduct had undermined the grand jury's ability to make an informed and objective evaluation of the evidence presented to it and, therefore, dismissed the case. Appellant argues that because the grand jury made an informed and objective finding of probable cause to indict appellee for a violation of R.C. 2923.12, carrying a concealed weapon, the court had no authority to dismiss the indictment. Under this assignment of error, appellant further challenges the trial court's finding of a particularized need to review the transcripts of the grand jury proceedings.

Crim.R. 6(E) provides in pertinent part:

"Deliberations of the grand jury and the vote of any grand juror shall not be disclosed. Disclosure of other matters occurring before the grand jury may be made to the prosecuting attorney for use in the performance of his duties. A grand juror, prosecuting attorney, interpreter, stenographer, operator of a recording device, or typist who transcribes recorded testimony, may disclose matters occurring before the grand jury, other than the deliberations of a grand jury or the vote of a grand juror, but may disclose such matters only when so directed by the court preliminary to or in connection with a judicial proceeding, or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." (Emphasis added.)

*4 Under this rule, a defendant must demonstrate a "particularized need" for disclosure of grand jury testimony, i.e., the defendant must show on the basis of all the surrounding circumstances it is probable that failure to disclose the requested witness's testimony will deprive the defendant of a fair adjudication of the allegations put into issue by the witness's trial testimony. State v. Greer (1981), 66 Ohio St.2d 139, paragraph three of the syllabus; State v. Roberts (1976), 50 Ohio App.2d 237. The release of such testimony for use prior to or during trial is within the discretion of the trial court. Greer, supra, at paragraph one of the syllabus.

Appellee originally asserted that the trial court needed to review the transcripts of the grand jury proceedings to determine if the grand jury that indicted him was the same grand jury that heard the evidence against him and if Trooper Martin substantially embellished his testimony at the second proceeding. Appellee's concern was based on the following. Trooper Martin was originally subpoenaed to testify before the grand jury on December 2, 1992. No indictment was issued after that meeting of the grand jury. Martin was again subpoenaed to testify before the grand jury on January 6, 1993. Appellee's girlfriend, who was in appellee's car when he was pulled over, was also subpoenaed to testify before the grand jury on January 6, 1993. Appellee's counsel was at that time also representing appellee's girlfriend and accompanied her to the grand jury proceedings, although remained in the hall during the testimony. Appellee's counsel, however, never saw Trooper Martin enter or exit the grand jury room. Nevertheless, appellee was indicted on January 7, 1993. Under this set of facts, we conclude that the lower court did not abuse its discretion in ordering the transcripts for an in camera review and thereby finding that appellee established a particularized need for the review.

Upon review of the grand jury transcript, however, the lower court became aware of a different problem with the proceedings. The transcript revealed that the prosecutor who presented the evidence to the grand jury misinformed the grand jury as to the law applicable to the facts of this case. During the grand jury proceedings, the prosecutor provided the jurors with the elements of a charge of carrying a concealed weapon. Thereafter, the transcript of those proceedings reads as follows:

"FIRST JUROR: It can't be downgraded to a misdemeanor? Just asking.

"MR. BISHOP: I guess it could if we wanted to--

"FIRST JUROR: I'm talking about if the grand jury felt it wasn't a criminal, but the conditions, he ought to get his hands cracked somehow, but going into jail a year, a year and a half for carrying a weapon, under these conditions. I'm just saying suppose.

"THIRD JUROR: Yeah. What he's asking is, what are our options--

"FIRST JUROR: Options.

"THIRD JUROR: --as far as the next--

*5 "FIRST JUROR: Lesser.

"THIRD JUROR: --lesser charge.

"FIRST JUROR: Lesser.

"MR. BISHOP: Well, there is a misdemeanor version of carrying a concealed weapon.

"FIRST JUROR: I thought there was.

"MR. BISHOP: But that requires it to not be a firearm or not be loaded.

"SECOND JUROR: Oh, Okay.

"FIRST JUROR: Not be a firearm?

"MR. BISHOP: Yeah.

"SECOND JUROR: So you're talking about something like a knife or something like that.

"MR. BISHOP: Knife--

"FIRST JUROR: All right.

"SECOND JUROR: Okay.

"MR. BISHOP: --something like that. Okay?

"SECOND JUROR: Okay."

Trooper Martin then testified and the grand jurors returned an indictment charging appellee with carrying a concealed weapon.

Carrying a concealed weapon is proscribed under R.C. 2923.12, which reads in pertinent part:

"(A) No person shall knowingly carry or have, concealed on his person or concealed ready at hand, any deadly weapon or dangerous ordnance."

If the weapon is loaded, the offense is a felony of the third degree. That statute, however, is not the only crime for which appellee could have been charged under the facts of this case. R.C. 2923.16 sets forth the offense of improperly handling a firearm in a motor vehicle. That statute provides in pertinent part:

"(B) No person shall knowingly transport or have a loaded firearm in a motor vehicle, in such manner that the firearm is accessible to the operator or any passenger without leaving the vehicle.

"(C) No person shall knowingly transport or have a firearm in a motor vehicle, unless it is unloaded, and is carried in one of the following ways:

"(1) In a closed package, box, or case;

"(2) In a compartment which can be reached only by leaving the vehicle;

"(3) In plain sight and secured in a rack or holder made for the purpose;

"(4) In plain sight with the action open or the weapon stripped, or, if the firearm is of a type on which the action will not stay open or which cannot easily be stripped, in plain sight."

A violation of division (B) of the statute is a first degree misdemeanor and a violation of division (C) of the statute is a fourth degree misdemeanor. Accordingly, and despite the grand jurors requests for such, there was a less serious offense with which appellee could have been charged.

It is well-established that:

"A trial court has the 'inherent power to regulate the practice before it and protect the integrity of its proceedings,' which includes the ' "authority and duty to see to the ethical conduct of attorneys in proceedings." ' " Maple Hts. v. Redi Car Wash (1988), 51 Ohio App.3d 60, 61, quoting Royal Indemnity Co. v. J.C. Penney Co. (1986), 27 Ohio St.3d 31, 33-34.

In this light, the dismissal of an indictment has been held to be justified to prevent prosecutorial impairment of a grand jury's independent role. United States v. Hogan (1983), 712 F.2d 757. Upon review of the record before us, we conclude that the trial court did not err in dismissing the indictment. Appellant's assertion that the court dismissed the indictment because it believed appellee could be charged with a less serious offense is incorrect. The court dismissed the indictment because the prosecutor misinformed the grand jury. This prosecutorial misconduct, the court determined, undermined the grand jury's ability to make an informed, objective and unbiased evaluation of the evidence presented to it. The grand jury process can only work if the grand jury is fully informed of all potentially applicable criminal statutes. Then, in reviewing the evidence before it, the grand jury, not the prosecutor, must determine the crime with which the accused should be charged.

*6 Accordingly, the second assignment of error is not well-taken.

Upon consideration whereof, the court finds that the judgment of the Wood County Court of Common Pleas is reversed as to the motion to suppress and affirmed as to the motion to dismiss. Costs of this appeal to appellee.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 7/1/92.

GLASSER and MELVIN L. RESNICK, JJ., concur.

SHERCK, J., dissents, in part, and concurs, in part.

SHERCK, Judge.

I dissent as to the majority's treatment of appellant's first assignment of error.

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