

[Cite as *State v. Turner*, 2009-Ohio-5524.]

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

STATE OF OHIO

Plaintiff-Appellee

v.

JOHN TURNER, JR.

Defendant-Appellant

Appellate Case No. 23217

Trial Court Case No. 08-CR-434

(Criminal Appeal from
Common Pleas Court)

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OPINION

Rendered on the 16th day of October, 2009.

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WOLFF, J.

{¶ 1} John Turner, Jr. was found guilty by a jury of possession of crack
cocaine in an amount exceeding ten grams. The trial court imposed a prison

sentence of two years, a fine of \$7500, a two year license suspension, and court costs.

{¶ 2} On appeal, Turner has advanced two assignments of error, the first being:

{¶ 3} “THE CONVICTION SHOULD BE REVERSED BECAUSE THE TRIAL COURT ERRED BY NOT SUSTAINING APPELLANT’S SUPPRESSION MOTION, IN VIOLATION OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION.”

{¶ 4} Turner was arrested for possession of crack cocaine inside a residence rented by Kami Clemmons at 23 Wroe Avenue in Dayton. He was arrested after the Dayton Police found the crack cocaine between the cushions of the couch that Turner had been sitting on.

{¶ 5} The trial court ruled from the bench at the close of the evidence presented at the suppression hearing. The court expressly found that Turner lacked standing to attack the police entry into the residence, which the court further found was consented to by Clemmons. The court expressly found that “any evidence to the contrary as (sic) not credible.”

{¶ 6} The court went on to say that there was justification for the police to approach the residence for a “knock and advise,” repeated its determination that Clemmons consented to the police entering her home, and found justification for the police search between the couch cushions.

I

{¶ 7} Dayton Police officer Susan Bengel was the sole witness on behalf of the State. Clemmons and Turner’s father, John Turner, Sr. testified for the defense.

It appears from the record that all conflicts between Bengé's testimony and that of Clemmons and John Turner, Sr. were resolved in favor of the State.

{¶ 8} Officer Bengé testified that she has been a Dayton Police officer for nineteen years. On January 16, 2008, she was in uniform and patrolling in a police cruiser. She went to 23 Wroe Avenue on a complaint of drug sales. At the rear of that residence, she observed two people leave whom she subsequently arrested for drug offenses. She also observed on the average of every five minutes someone make a brief stop at the back door, which she associated with drug dealing.

{¶ 9} Thinking she had enough for a "knock and announce" - wherein the police seek entry into a residence to tell the occupants what they think is occurring, i.e. drug trafficking, and to tell them to cease - she summoned backup support. Officers Heiser, Halburnt, and Gusweiler responded. Gusweiler went to the front of the residence and Heiser, Halburnt, and Bengé were at the rear. Before they knocked, they saw Turner - who was empty handed - run to the back door of 23 Wroe Avenue and enter the house.

{¶ 10} After knocking, Clemmons came to the door. Bengé asked her if she and the other officers could enter to discuss the activity she had observed and Clemmons allowed them to enter, which was into the kitchen. Clemmons was "very cooperative" and told the police she rented the premises. From the kitchen, Bengé observed as follows:

"Q. Did you and the officers engage her at that time about the activities you were observing that evening?

"A. Yes. I told her why we were there.

"Q. At the time that you were in the kitchen, did you - - were you able to

look out into the living room area to see if anybody else was in the house?

“A. Yes.

“Q. At that time did you observe anybody else?

“A. Yes.

“Q. Who did you see?

“A. Mr. Turner was seated on the couch and there were two children in the living room area.

“Q. And what happened when you made these observations?

“A. When I was standing there talking to Ms. Clemmons, I observed Mr. Turner reach his hand up from between the cushions of the couch. He was the only one on the couch. And Officer Halburnt observed, obviously, the same thing I did because he immediately went over to him, patted him down and checked the cushions before he let him sit back down because guns and drugs are very indicative. They go hand-in-hand. And if we’ve already arrested people that have purchased crack from that house tonight, more than likely there’s a gun in there as well.

“Q. When you said you observed Mr. Turner have his hand in the couch, could you describe what you observed?

“A. It was a couch and he had his hand right between where the cushions would be up against each other and he was pulling his hand up from in between the cushions.

“Q. Were you able to observe Officer Halburnt pat down Mr. Turner?

"A. Yes.

"Q. Did you observe him find any contraband on him when he patted him down initially?

"A. No.

"Q. And did you observe Officer Halburnt check the couch cushions as well?

"A. Yes, I did.

"Q. And are you aware of whether or not he found anything when he checked the couch cushions?

"A. Yes. He found crack cocaine in a cellophane wrapper, like maybe a cigarette pack cover wrapper.

"Q. Were you able to observe what area of the couch he recovered drugs from?

"A. Yes. Right from where Mr. Turner had pulled his hand up, right between the couch cushions.

"Q. What happened at that time, ma'am?

"A. Office Halburnt took him into custody and put him in the back of his cruiser."

{¶ 11} After he was arrested, Turner gave his address as 831 Longvale. Clemmons said she knew Turner only as "T" and did not indicate that he lived at 23 Wroe Avenue or had ever spent the night there. Bengé said she suspected weapons were at the premises:

"I had just arrested people that evening that had purchased crack cocaine from there. Nine times out of ten, when somebody's operating a drug house,

they're going to protect those drugs with either a pit bull or handguns.”

{¶ 12} Kami Clemmons testified and related a version of events that differed substantially from Officer Benge's narrative. She said she had known Turner since August of 2007 and denied telling the police she knew Turner as “T”. She said she and Turner had been in a “dating relationship” that had not involved having sex but that Turner had spent the night at her home in the past and was going to spend that night of January 16 at her home. She testified that Turner arrived 15-20 minutes before the police knocked and that he was carrying a box of chicken, and that he was standing in the kitchen when the police knocked. Clemmons said she never saw Turner on the couch until he was arrested. She said the police beat on her door and threatened to break the door down and that she let them in:

“Because, for one, I didn't want my door tore down; or for two, I had kids; and for three, we didn't have nowhere else to go late that night.”

{¶ 13} First she said the police cracked the plexiglass of her screen door; she then stated the cracked plexiglass was on the “solid door.” Clemmons denied observing drug activity at her back door on January 16 or that drug activity occurred at her residence.

{¶ 14} Turner's father, John Turner, Sr. testified that he came to 23 Wroe Avenue on the evening of January 16, observed the police presence, and was told to stay away. After the police left, he entered the premises and observed a broken door window in the kitchen. He conceded that he had no first hand knowledge of how the window was broken.

II.

{¶ 15} Under this assignment of error, Turner first contends that the trial court

erred in holding that he lacked standing to challenge the actions of the police. He points to Clemmons' testimony that he had spent the night at her home in the past and planned to do so on January 16 as establishing that he was a social guest of Clemmons with a legitimate expectation of privacy in her home, citing *Minnesota v. Olsen* (1990), 495 U.S. 91.

{¶ 16} A threshold problem with this contention is that the record does not demonstrate that the trial court credited Clemmons' testimony upon which Turner relies. As alluded to *supra*, the court began its ruling from the bench with the following:

"The Court finds by a preponderance of the evidence as follows: Number one, that the defendant didn't have standing to contest the entry and search of the residence. The Court finds based upon the demeanor of the witnesses and the testimony that the police officers did have consent to enter the premises, were invited in and shown to the living room. The Court finds any evidence to the contrary as not credible."

{¶ 17} A reasonable reading of this passage is that the last sentence refers to both the "standing" issue and the "consent to enter" issue. That being so, there is no credible evidence supporting Turner's claim of standing. The last sentence of this passage clearly relates to the consent to enter issue, and it is reasonable to conclude that if the trial court didn't credit Clemmons' testimony on the consent to enter issue, it likewise didn't credit her testimony on the standing issue.

{¶ 18} That said, we need not decide the standing question here. Assuming the trial court credited Clemmons' testimony as it pertains to standing, and assuming

arguendo - and without deciding - that Turner had standing to challenge the action of the police, we still conclude that the actions of the police were proper.

{¶ 19} Based on the evidence that the trial court found credible, the police were in the kitchen of a house which - based on Officer Bengé's earlier observations - they had every reason to believe was a place where drug trafficking occurred. They observed Turner, whom they had just seen run into the house before they knocked, pulling his hand out from between the cushions of the couch on which he was seated. Officer Bengé testified that guns are often found in drug houses, and the officers' observations certainly support a reasonable suspicion on their part that Turner may have just secreted a weapon.

{¶ 20} After the evidence was in, the State in argument and the court in ruling, referred to the couch cushions as the "lunge area." Turner argues that checking the lunge area is only permissible as to automobiles but this is not so. If a police officer has a reasonable articulable suspicion that a person sitting on a couch in a drug house has just secreted a weapon between the cushions of the couch, the officer is certainly allowed to check between the cushions to dispel or confirm that suspicion. See *State v. Blackwell*, 159 Ohio App.3d 790, 2005-Ohio-922.

{¶ 21} The record does not demonstrate, as Turner suggests, that the trial court rationalized its ruling as a search incident to an arrest.

{¶ 22} Finally, Turner argues that the observations of the police are simply insufficient to support a reasonable articulable suspicion that Turner had secreted a weapon between the couch cushions. For the reasons stated above, we disagree.

{¶ 23} The first assignment is overruled.

{¶ 24} Turner's second assignment of error states:

{¶ 25} “THE MATTER SHOULD BE REMANDED FOR RE-SENTENCING BECAUSE OHIO’S SENTENCING SCHEME, WHERE PURVEYORS OF CRACK COCAINE ARE TREATED MORE PUNITIVELY THAN SELLERS OF THE EQUAL AMOUNT OF POWDERED COCAINE, CANNOT WITHSTAND CONSTITUTIONAL SCRUTINY.”

{¶ 26} Turner did not make this claim in the trial court and we therefore decline to consider this claim on appeal. Furthermore, we recently rejected the contentions that Turner makes under his assignment. *State v. Wilkerson*, Mont. App. 22693, 2008-Ohio-4750.

{¶ 27} The second assignment is overruled.

III.

{¶ 28} The judgment will be affirmed.

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DONOVAN, P.J., and FROELICH, J., concur.

(Hon. William H. Wolff, Jr. retired from the Second District Court of Appeals sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

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