[Cite as *State v. Petty*, 2010-Ohio-4107.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93234

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LAMAR PETTY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART;
REVERSED AND REMANDED IN PART

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-509389

BEFORE: McMonagle, P.J., Dyke, J., and Jones, J.

RELEASED AND JOURNALIZED: September 2, 2010

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CHRISTINE T. McMONAGLE, P.J.:

{¶ 1} Defendant-appellant, Lamar Petty, appeals the trial court's judgment denying his motion to suppress. We affirm the finding of guilt, but reverse the order of forfeiture as it relates to the money, reverse the sentence, and remand for resentencing.

I.

{¶ 2} Petty was indicted in April 2008, on one count each of drug possession, drug trafficking, and possession of criminal tools. All the counts contained a forfeiture specification. He filed a motion to suppress, a hearing was held on the motion, and the trial court denied the motion. Petty pleaded no contest to the charges in the indictment and the trial court found him guilty of the charges. He was sentenced to a five-year-prison term on each count, to be served concurrently, and ordered to forfeit $525 and a 2008 Chevrolet.

II.

{¶ 3} At the suppression hearing, the police testified that they learned from a source that a drug transaction was scheduled to occur at a Chester Avenue gas station. The source revealed that a black Chevrolet HHR would arrive at the location and its occupants would be involved in the transaction. Based on this information, the police set up surveillance of the area.

{¶ 4} A black Chevrolet HHR arrived at the gas station and pulled up to one of the pumps. Detectives Clinton Ovalle and Thomas Azzano, who were attired in plain clothes and in an unmarked car, pulled their car up behind the

Chevrolet, leaving a distance of approximately 50 feet, and approached the HHR vehicle on foot. The driver, Petty, and the passenger, co-defendant Antwane Moore, were still in the vehicle. Both detectives testified that the windows were rolled down, and as they approached the vehicle, they saw drugs in "plain view" in the car. Detective Ovalle testified that the drugs were on the floor; Detective Azzano testified that they were in the center console.

{¶ 5} After seeing the drugs, the detectives ordered Petty and Moore out of the vehicle. The defendants did not comply, however, and instead, Petty drove the car in reverse. The detectives then drew their guns and the other law enforcement officials who were involved in the surveillance assisted in apprehending Petty and Moore.

{¶ 6} Petty and Moore were arrested and the drugs were recovered from the floor. According to Detective Azzano, when Petty drove the car in reverse, the drugs apparently fell from the center console to the floor. Azzano testified that if the drugs had been on the floor when he and Ovalle first approached the vehicle, they would not have been able to see them.

{¶ 7} Co-defendant Moore testified that he and Petty were at the gas station to get gas before driving to the westside of Cleveland. According to Moore, upon arriving at the station and pulling up to a pump, two or three people came "running" toward the car. Because he and Petty did not know

what was going on, Petty backed up. According to Moore, he and Petty did not know that the people who were running toward their car were law enforcement officials until after they pulled their guns and he and Petty saw their badges. Moore also testified that the detectives could not have initially seen in the inside of the HHR because Petty backed up before the detectives got close enough to have been able to see inside.

III.

{¶ 8} Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶8. In deciding a motion to suppress, the trial court assumes the role of trier of fact. Id. A reviewing court is bound to accept those findings of fact if they are supported by competent, credible evidence. Id. But with respect to the trial court's conclusion of law, we apply a de novo standard of review and decide whether the facts satisfy the applicable legal standard. Id., citing *State v. McNamara* (1977), 124 Ohio App.3d 706, 707 N.E.2d 539.

IV.

{¶ 9} In his first and second assignments of error, Petty challenges the trial court's denial of his suppression motion on the basis of the source of the information supplied to the police. Petty contends that the testimony was

conflicting as to whether the source was "anonymous" or from an "informant," and that a stop based on either source on the facts here was unconstitutional. In his third assignment of error, he contends that the drugs were not in plain view.

{¶ 10} A review of the transcript reveals that the source relied on by the police was not anonymous. The confusion about whether the tip was anonymous began with the assistant prosecuting attorney in opening statement stating that "[a]lthough that [the tip coming from an anonymous source] maybe [sic] true, the initial approach of the vehicle * * * didn't violate any constitutional rights[.] " (Tr. 6.)

{¶ 11} On direct examination, Detective Ovalle referred to the source simply as a "tip." On cross-examination, he was questioned on that point as follows:

{¶ 12} "Q. Now, I understand that you had received an anonymous tip; is that it?

{¶ 13} "A. Correct.

{¶ 14} "Q. That means that somebody called you up and talked to you personally and told you about some events that were going to take place?

{¶ 15} "A. That's correct." (Tr. 23-24.)

{¶ 16} The detective further testified on cross-examination as follows:

{¶ 17} "Q. But your purpose in walking to the car was to further investigate: is that right?

{¶ 18} "A. To examine, yes. To determine if my source of information was correct.

{¶ 19} "Q. And the source, you didn't know who it was; is that right?

{¶ 20} "* * *.

{¶ 21} "A. Yes, I do.

{¶ 22} "Q. [By the court] You are aware of who the source of the information was, but reluctant to reveal the identity of the person"

{¶ 23} "A. Correct." (Tr. 41-42.)

{¶ 24} Another law enforcement official who was involved in the incident, Sergeant Paul Styles, testified that "anonymous" and "informant" are sometimes used synonymously:

{¶ 25} "Q. In other words when the prosecutor said it was anonymous and when Mr. Ovalle said it was anonymous and you hadn't heard anything contrary to that before you came to court, you believed the informant was anonymous, didn't you?

{¶ 26} "A. Not in our dealings, no. * * * An anonymous person could also be an informant.

{¶ 27} "Q. Often times they are.

{¶ 28} "A. Yes, they are.

{¶ 29} "* * *

{¶ 30} "Q. Why do you or why does your police department use the word[ ] [anonymous] when they're describing an informant, or why would they?

{¶ 31} "A. The same reason as the term informant is used, because we don't want to disclose that information. The identity of that person could be later oh, you know - - could be retaliation later on." (Tr. 56.)

{¶ 32} Further, Detective Azzano testified that the source of the information was a "confidential informant" and that he knew the informant. (See Tr. 75, 86.)

{¶ 33} Thus, although the word "anonymous" was used to describe the source of the information, both Detectives Ovalle and Azzano testified that they knew the informant. Detective Ovalle testified that he was reluctant to reveal the identity of the informant because of fear of retaliation on the informant and Sergeant Styles testified that "anonymous" and "informant" are sometimes used synonymously. On this record, therefore, we find that this was not a true "anonymous" tip case and overrule the first assignment of error.

{¶ 34} In his second assignment of error, Petty contends that the information supplied by the informant did not give rise to adequate reasonable suspicion and, therefore, there was no legal basis for the police to stop him. Petty argues that the police approached his vehicle to conduct an investigatory

stop without the required reasonable suspicion under *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. He cites testimony of Detective Ovalle that, after seeing Petty's car pull into the parking lot, he and Detective Azzano "approached it and conducted our investigation." Petty also cites testimony of Detective Azzano that the police approached Petty's car "[t]o investigate the complaint."

{¶ 35} The state, on the other hand, contends that the police attempted to have a consensual encounter with the occupants of the car, but upon approaching the vehicle, saw the drugs in plain view, which gave them probable cause for an arrest.

{¶ 36} There are generally three classifications of interactions between police and private citizens: consensual encounters, investigatory stops, and arrests. See *State v. Gove*, Cuyahoga App. No. 91972, 2009-Ohio-3463, ¶18. Consensual encounters include many long-standing, routine police practices, including approaching a person in a public place, engaging the person in conversation, requesting information from the person, examining the person's identification, and asking the person to search his or her belongings. *Florida v. Rodriguez* (1984), 469 U.S. 1, 105 S.Ct. 308, 83 L.Ed.2d 165. Consensual encounters are those that involve no coercion or restraint on liberty. *State v. Morris* (1988), 48 Ohio App.3d 137, 138, 548 N.E.2d 969.

{¶ 37} In determining whether an encounter was consensual, courts consider whether the police have restrained the person's liberty, by physical force or display of authority, in such a way that a reasonable person would not feel free to walk away. *United States v. Mendenhall* (1980), 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497. It is well settled that the Fourth Amendment is not implicated in the case of a consensual encounter. *United States v. Mendenhall* (1980), 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497.

{¶ 38} Generally, the police are free to observe whatever may be seen from a place where they are entitled to be. *Florida v. Riley* (1989), 488 U.S. 445, 449, 109 S.Ct. 693, 102 L.Ed.2d 835. "This understanding of the Fourth Amendment is expressed in the plain-view, or open-view, doctrine. The doctrine embodies the understanding that privacy must be protected by the individual, and if a police officer is lawfully on a person's property and observes objects in plain or open view, no warrant is required to look at them." *Horton v. California* (1990), 496 U.S. 128, 134-137, 140-142, 110 S.Ct. 2301, 110 L.Ed.2d 112.

{¶ 39} Some competent, credible evidence supports the position that this was an attempt at a consensual encounter, during which drugs were seen in plain view. Although the detectives used the words "investigation" and "investigate," Detective Ovalle testified that his intent on approaching the car was to see if its occupants would have a "conversation" with him, but before he

could even say anything to them, he saw the drugs. (See Tr. 27.) Other facts support the position that the police intended to have a consensual encounter with the defendants — namely, the police did not block Petty's car in, and even by co-defendant Moore's admission, they did not initially approach with their guns drawn.

{¶ 40} We are not persuaded by Petty's contention that the detective's conflicting testimonies as to who was the first to approach Petty's car and where the drugs were observed "is fatal to the state's position" of plain view. The fact remains that both detectives testified that they saw the drugs in plain view. And the trial court considered the conflicts in the testimonies: "Whether Detective Ovalle was the first to the vehicle or whether Detective Azzano was the first to the vehicle, each testified that they looked inside the vehicle and saw in plain view a large amount of crack cocaine * * *." (Tr. 127.) "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 a witness." *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972.

{¶ 41} In light of the above, the second and third assignments of error are overruled.

{¶ 42} In his final assignment of error, Petty contends that his motion to suppress should have been granted because the law enforcement officials did

not have the authority to arrest him. The involved officials were police from the Cuyahoga Metropolitan Housing Authority (CMHA), but the incident did not take on CMHA property. The detectives testified, however, that they were duly appointed Cuyahoga County deputy sheriffs and Detective Ovalle testified that they were so appointed in February 2008, well before the April 2008 offense here. "The sheriff is the chief law enforcement officer in the county, with jurisdiction coextensive with the county, including all municipalities and townships." *In re Sulzmann* (1932), 125 Ohio St. 594, 597, 183 N.E. 531. Because the detectives were also duly appointed sheriff's deputies, they had the authority to arrest Petty.

{¶ 43} Accordingly, the fourth assignment of error is overruled.

{¶ 44} Although not raised by Petty, we address his sentence. R.C. 2941.25(A) provides that "[w]here the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one." The Ohio Supreme Court has held that the statutes under which Petty was indicted, R.C. 2925.11(A) (drug possession) and R.C. 2925.03(A)(2) (drug trafficking), are allied offenses. *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, paragraph two of the syllabus; see, also, *State v. Moore*, Cuyahoga App. No. 92829, 2010-Ohio-3305, ¶48-49.

{¶ 45} As this court stated in *Moore*, "[e]ven though the trial court sentenced appellant to concurrent terms for each conviction, 'a defendant is prejudiced by having more convictions than are authorized by law.' *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶31. Further, a no contest plea does not relieve this court of its obligation to ensure that appellant's sentence is authorized by law. Id. at ¶26. Therefore, this case must be remanded to the trial court for resentencing where the state shall decide on which charge appellant should be convicted and sentenced. *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937, paragraph three of the syllabus." *Moore* at ¶49. Accordingly, this case is remanded for resentencing in light of the above.

{¶ 46} Finally, we note that the trial court improperly ordered forfeiture[1] of $525 against Petty. Petty and his co-defendant Moore were charged in a joint indictment. The forfeiture specifications relative to the money listed only Moore as being the owner or possessor of the money. Thus, the orders against Petty for forfeiture of the money shall be vacated upon remand.

Conviction affirmed; case reversed and remanded in part for further proceedings consistent with this opinion.

It is ordered that appellee and appellant share the costs herein taxed.

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[1]See trial docket nos. 23 and 36.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. McMONAGLE, PRESIDING JUDGE

LARRY A. JONES, J., CONCURS
ANN DYKE, J., CONCURS IN JUDGMENT ONLY