[Cite as *State v. Huffman*, 2010-Ohio-5116.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93000

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

OREON HUFFMAN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART; REVERSED
IN PART AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-510290

BEFORE: Sweeney, J., Stewart, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: October 21, 2010

FOR APPELLANT

Oreon Huffman, Pro se
Inmate No. 152538
Cuyahoga County Jail
P.O. Box 5600
Cleveland, Ohio 44101

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
BY: Katherine Mullin
Assistant Prosecuting Attorney
1200 Ontario Street
Cleveland, Ohio 44113

JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Oreon Huffman ("defendant"), appeals pro se his various drug related convictions and prison sentence. After reviewing the facts of the case and pertinent law, we affirm in part and reverse and remand for the limited purpose of merging Counts 2 and 3 as allied offenses.

{¶ 2} On May 14, 2008, defendant was charged with two counts of drug trafficking with juvenile specifications, drug possession, endangering children, and possession of criminal tools. After a hearing, the court denied defendant's motion to suppress evidence. On November 5, 2008, defendant pled no contest

to the charges. The court sentenced defendant to 18 months in prison for the trafficking offenses; 12 months in prison for drug possession; and 12 months in prison for possession of criminal tools, to run concurrently. The court also sentenced defendant to six months in prison for the child endangerment offense, to run consecutive to the 18 months, for a total of 24 months in prison.

{¶ 3} Defendant appeals and raises five assignments of error for our review.

{¶ 4} "I. The trial court erred in denying appellant's motion to suppress."

{¶ 5} "Appellate review of a trial court's ruling on a motion to suppress presents mixed questions of law and fact. An appellate court is to accept the trial court's factual findings unless they are clearly erroneous. We are therefore required to accept the factual determinations of a trial court if they are supported by competent and credible evidence. The application of the law to those facts, however, is subject to de novo review." *State v. Polk*, Cuyahoga App. No. 84361, 2005-Ohio-774, ¶2.

{¶ 6} Warrantless searches are presumptively unconstitutional, subject to a limited number of specific exceptions. In *Maumee v. Weisner* (1999), 87 Ohio St.3d 295, 299, 720 N.E.2d 507, the Ohio Supreme Court permitted "police stops of motorists in order to investigate a reasonable suspicion of criminal activity."

{¶ 7} In the instant case, the following testimony was presented at the hearing on defendant's motion to suppress:

{¶ 8} Cleveland Police Officer Jeffrey Yasenchak testified that on April 26, 2008, he observed a red Dodge Charger exit a Wendy's parking lot on Broadway Avenue without using a turn signal. The Charger had Kentucky license plates on it, and when Officer Yasenchak ran the license plate number, the registration information came back for a different vehicle. Police initiated a traffic stop, and as soon as the Charger pulled over, the driver, who was identified in court as defendant, appeared to reach down. As Officer Yasenchak approached the car, defendant opened the window, and Officer Yasenchak immediately smelled marijuana. He also noticed marijuana buds on the floor of the car at defendant's feet.

{¶ 9} Officer Yasenchak ordered defendant out of the vehicle and conducted a pat-down search. Police found a bag of marijuana and a bag of cocaine in defendant's left sock and placed defendant under arrest. Officer Yasenchak then searched the vehicle, still noticing a strong scent of marijuana coming from the car. Police found a large bag of marijuana and seven empty baggies in a black camera bag in the back seat. Police also recovered $1,195 in small bills and four cell phones.

{¶ 10} Defendant testified at the suppression hearing, and parts of his testimony were inconsistent with Officer Yasenchak's. Defendant recalled using a turn signal when he exited the Wendy's parking lot. According to defendant, he specifically remembered this because he saw the police vehicle, and he was

turning into oncoming traffic. He also testified that the police found the camera bag containing marijuana in the trunk of the car, rather than the backseat.

{¶ 11} The passenger of the red Charger testified on behalf of defendant. She stated that defendant used turn signals and obeyed other traffic rules, and she recalled this because defendant told her to put on her seatbelt when he saw the police vehicle. However, neither this eyewitness nor defendant contested that the out-of-state license plate did not match the car defendant was driving, that the car smelled like marijuana, or that there were marijuana buds in plain view on the floor of the car.

{¶ 12} In denying defendant's motion to suppress the evidence, the court acknowledged inconsistent testimony regarding whether defendant used his turn signal. However, the court reasoned that "finding that the plate was registered to a vehicle that did not meet the description of the vehicle that the officer was observing, certainly did give the officer probable cause to stop the vehicle, at that point in time." We find that, under the circumstances of this case, the police made a permissible stop of the vehicle defendant was driving. See *State v. Simmons*, Cuyahoga App. No. 85297, 2005-Ohio-3428, ¶23 (holding that when police "discovered that the license plate was not registered to the vehicle, a violation of R.C. 4549.08(A)(3) * * *, [this] constituted reasonable grounds for an investigative stop").

{¶ 13} We now turn to whether the police had grounds to search defendant. A second exception to the presumption that warrantless searches are

unconstitutional is the stop and frisk investigatory search under *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. Under *Terry*, a police officer may pat down a detained suspect to reasonably search for weapons. Id. A *Terry* frisk is limited in scope and designed to protect law enforcement agents. *State v. Evans* (1993), 67 Ohio St.3d 405, 618 N.E.2d 162.

{¶ 14} The United States Supreme Court expanded *Terry* to include discovery of contraband other than weapons under the "plain feel" doctrine, "[i]f a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent * * *." *Minnesota v. Dickerson* (1993), 508 U.S. 366, 375, 113 S.Ct. 2130, 124 L.E.d2d 334.

{¶ 15} In the instant case, Officer Yasenchak testified that when he was frisking defendant for weapons, he felt a lump in defendant's sock. Officer Yasenchak did not know what the lump was, although he knew it was not a weapon, and he did not believe that defendant was armed and dangerous. Under these facts, any further search of defendant was not authorized under *Terry*. However, we find that the drugs in defendant's sock would have been inevitably discovered because the vehicle search and defendant's arrest were valid.

{¶ 16} The automobile exception to the warrant requirement allows an officer to search a vehicle when there is probable cause to believe it contains contraband. *State v. Moore* (2000), 90 Ohio St.3d 47, 52, 734 N.E.2d 804.

This Court recently held that pursuant to the automobile exception, "when an officer has probable cause to believe that a person has been smoking marijuana based on the odor of marijuana emanating from the vehicle, a warrantless search is permissible." *State v. Burke*, Cuyahoga App. No. 93258, 2010-Ohio-3597.

{¶ 17} During the lawful vehicle stop, Officer Yasenchak smelled marijuana coming from the car and saw it on the floor. Accordingly, the resulting search of the vehicle was valid. This search lead to the discovery of drugs hidden in a camera bag, which provided probable cause to arrest defendant. Police can permissibly conduct a more intrusive search of a person and the area within that person's immediate control, incident to that person's lawful arrest. *State v. Smith*, 124 Ohio St.3d 163, 2009-Ohio-6426, 920 N.E.2d 949, ¶11. See, also, *Arizona v. Gant* (2009), 556 U.S. ____, 129 S.Ct. 1710, 173 L.Ed.2d 485.

{¶ 18} Pursuant to the inevitable-discovery doctrine, "illegally obtained evidence is properly admitted in a trial court proceeding once it is established that the evidence would have been ultimately or inevitably discovered during the course of a lawful investigation." *State v. Perkins* (1985), 18 Ohio St.3d 193, 196, 480 N.E.2d 763. Accordingly, the discovery of drugs in defendant's sock was inevitable, and the court's denial of defendant's motion to suppress was proper. Defendant's first assignment of error is overruled.

{¶ 19} "II. Trial court erred when it abused its discretion sentencing appellant to a consecutive sentence for a misdemeanor after the allowed [time] had expired."

{¶ 20} Although unclear from his multiple appellate briefs, it seems as if defendant's argument under this assignment of error is twofold: First, that the court erred in running his six-month sentence for the child endangerment misdemeanor consecutive to his 18-month sentence for all other offenses. Second, that his right to a speedy trial was violated in conjunction with his misdemeanor conviction.

{¶ 21} We disregard any argument regarding consecutive sentences under the authority of App.R. 12(A)(2) and 16(A), because defendant cites no legal authority to support this allegation.

{¶ 22} As to defendant's speedy trial argument, the Ohio Supreme Court has held that a defendant's "failure to file a motion to dismiss on speedy trial grounds prior to trial and pursuant to R.C. 2945.73(B) prevents him from raising the issue on appeal." *State v. Taylor*, 98 Ohio St.3d 27, 2002-Ohio-7017, 781 N.E.2d 72, ¶37. Defendant did not file a motion to dismiss based on a speedy trial violation or otherwise raise this issue in the trial court; therefore, he is precluded from doing so on appeal.

{¶ 23} Defendant's second assignment of error is overruled.

{¶ 24} "III. The State committed constitutional error by exhibiting outrageous government conduct in disproportionately enhancing the possession of marijuana."

{¶ 25} In essence, defendant argues that it was error for the State to combine the quantity of drugs found in his sock with the quantity of drugs found

in the vehicle he was driving to enhance his marijuana trafficking offense to a fourth degree felony, rather than two misdemeanors. Particular to this assignment of error, defendant was indicted for drug trafficking in violation of R.C. 2925.03(A)(2), involving less than 200 grams of marijuana. In *State ex rel. Stern v. Mascio* (1996), 75 Ohio St.3d 422, 423, 662 N.E.2d 370, the Ohio Supreme Court held that "a plea of no contest * * * is an admission of the truth of the facts alleged in the indictment * * *." A defendant who pleads no contest waives the right to appeal issues other than the constitutionality of the plea itself and pretrial motions, such as a motion to suppress, pursuant to Crim.R. 12(I). See, also, Crim.R. 11. Cf. *Ross v. Common Pleas Court of Auglaize Cty.* (1972), 30 Ohio St.2d 323, 323-324, 285 N.E.2d 25 (holding that "[a] defendant who enters a voluntary plea of guilty while represented by competent counsel waives all nonjurisdictional defects in prior stages of the proceedings") (internal citations omitted).

{¶ 26} Defendant's third assignment of error is overruled.

{¶ 27} "IV. The trial court committed plain, reversible error when it convicted appellant for the allied offenses of similar import of possession of cocaine, trafficking in cocaine, and endangering children."

{¶ 28} R.C. 2941.25(A) states that when "the same conduct by a 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."

{¶ 29} In *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, at paragraph one of the syllabus, the Ohio Supreme Court held: "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar import. (*State v. Rance* (1999), 85 Ohio St.3d 632, 710 N.E.2d 699, clarified.)" The *Cabrales* Court further held that "[i]f the offenses are allied, the court proceeds to the second step and considers whether the offenses were committed separately or with a separate animus." Id. at ¶16.

{¶ 30} R.C. 2919.22(A) states that "[n]o person * * * shall create a substantial risk to the health or safety of [a] child, by violating a duty of care, protection, or support." Defendant was convicted of endangering children because his five-year-old nephew was in the backseat of the car defendant was driving when he was arrested for the drug related offenses.

{¶ 31} To be found guilty of drug trafficking under R.C. 2925.03(A)(2), an offender must "knowingly * * * [p]repare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance * * *." To be found guilty of drug possession under R.C. 2925.11(A), an offender must "knowingly obtain, possess, or use a controlled substance."

{¶ 32} In the instant case, the State conceded that the court should not have sentenced defendant for trafficking cocaine in violation of R.C. 2925.03(A)(2) and possessing cocaine in violation of R.C. 2925.11(A), as they are allied offenses under *Cabrales*. Accordingly, the sentences for these offenses should merge.

{¶ 33} Defendant additionally argues that endangering children is an allied offense of both drug possession and drug trafficking. In comparing the elements of these crimes in the abstract, it is possible to endanger children without committing a drug related offense. Likewise, it is possible to possess or traffic drugs without endangering children. Given this, endangering children is not an allied offense to drug possession or trafficking.

{¶ 34} Defendant's fourth assignment of error is sustained in part. Pursuant to *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, this matter is remanded to the trial court to merge defendant's convictions for drug trafficking (Count 2) and drug possession (Count 3).

{¶ 35} Defendant's fifth and final assignment of error states that:

{¶ 36} "V. Trial counsel was ineffective for failing to object to outrageous government conduct and convictions for allied offenses of similar import."

{¶ 37} To establish ineffective assistance of counsel when a defendant pleads guilty or no contest to charges against him, he must establish that but for his counsel's errors, he would have gone to trial. *Hill v. Lockhart* (1985), 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203. In other words, defendant waived the

right to claim ineffective assistance of counsel, "except to the extent the defects complained of caused the plea to be less than knowing and voluntary." *State v. Barnett* (1991), 73 Ohio App.3d 244, 249, 596 N.E.2d 1101.

{¶ 38} As we held that defendant's third assignment of error was without merit, we conclude that defendant failed to show his counsel's performance regarding this issue was deficient. Additionally, although we sustained defendant's fourth assignment of error in part, defendant fails to show how counsel's failure to object to this court error was prejudicial to him and his decision to plead no contest. Additionally, defendant cites no law to support this assignment of error. We find, under the circumstances of this case and pursuant to App.R. 12(A)(2) and 16(A), that defendant failed to establish a claim for ineffective assistance of counsel, and his final assignment of error is overruled.

Judgment affirmed in part; case remanded for the limited purpose of merging Counts 2 and 3 in light of *Cabrales*.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Case remanded to the trial court for further proceedings.

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

JAMES J. SWEENEY, JUDGE

MELODY J. STEWART, P.J., and
MARY J. BOYLE, J., CONCUR