[Cite as *State v. Hunter*, 2009-Ohio-4194.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92032

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAVID HUNTER

DEFENDANT-APPELLANT

JUDGMENT:
CONVICTION AFFIRMED; SENTENCE VACATED;
REMANDED FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-503616

BEFORE: Gallagher, P.J., Dyke, J., and Sweeney, J.

RELEASED: August 20, 2009

JOURNALIZED:

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SEAN C. GALLAGHER, P.J.:

{¶ 1} Defendant-appellant, David Hunter, appeals his convictions and sentencing for one count of receiving stolen property, under R.C. 2913.51(A), and one count of forgery, under R.C. 2913.31(A)(2). Both charges were felonies of the fifth degree. Appellant asserts the trial court erred in denying his motion to suppress the evidence and claims he was denied the effective assistance of counsel. Appellant also claims the sentence imposed was unlawful and void. For the reasons outlined below, we affirm the conviction but vacate the sentence and remand for resentencing.

{¶ 2} Appellant went to the Great Northern Mall in North Olmsted, Ohio, on September 27, 2007, with two companions, Michelle Lofton and Terrence Hunter. Lofton is appellant's sister, and Terrence Hunter is appellant's cousin. While at the mall, the group went to a series of stores, including Rogers Jewelers where Terrence Hunter attempted to buy merchandise with checks, but the checks were refused. A representative from Rogers Jewelers called mall security to report what was described as "suspicious activity." Store personnel reportedly told mall security that the group was seen outside the store "exchanging checks and ID's" in an apparent attempt to pass a check at Rogers Jewelers.

{¶ 3} A mall security officer, Chuck Knapp, contacted the North Olmsted police, and Officer Victor Branscrum responded. Officer Branscrum was advised by Knapp of the details of the reported "suspicious activity." By the time Officer

Branscrum arrived, the group was at the Sears store in the mall, opening up two lines of instant credit. One of the individuals, Terrence Hunter, used the instant credit to obtain two Sears gift cards valued at $500 each. During this period, Sears loss prevention officers, along with Knapp, Officer Branscrum, and others, were observing appellant and his two companions from an adjacent location inside the store.

{¶ 4} Officer Branscrum described appellant and his companions as "hurried" during the Sears transaction. He claimed they appeared to be looking for "a way out." At this point, Officer Branscrum, with others, approached all three individuals. Officer Branscrum went directly to appellant and identified himself as a police officer. Officer Branscrum separated appellant from his two companions and, after advising him of why the police had intervened, gave him the *Miranda* warnings. He then asked appellant for identification. Appellant reached into his pockets and began laying items out in front of the officer on a clothing display.[1] One item the officer observed and recovered was a folded check. Officer Branscrum opened the check and discovered it was on an account in the name of Glenerica Mahone and made out to a Nakita Smith in the amount of $5,000. Upon seeing the check, the officer became suspicious because the signature line on the check had Nakita Smith's name on it, which

[1] Michelle Lofton testified that she heard Officer Branscrum order appellant to empty his pockets, but the trial court found this testimony "difficult to believe" since Lofton was at least 15 feet from appellant. Appellant did not testify at the suppression hearing.

signature was crossed out and Glenerica Mahone's name was signed over the top of it. When asked by Officer Branscrum if appellant knew who Smith or Mahone were, appellant indicated he did not know either party. Later that day, after contacting Mahone directly, Officer Branscrum learned that Mahone did not know appellant and appellant did not have her permission or authorization to have the check.

{¶ 5} Appellant was indicted on the charges of receiving stolen property and forgery on November 20, 2007. He entered a plea of not guilty to the charges. Thereafter, he filed a motion to suppress and the trial court held a hearing on April 10, 2008. Following the hearing, the trial court denied appellant's motion, and the case was set for trial.

{¶ 6} On August 11, 2008, appellant entered no contest pleas to both charges and was sentenced to twelve months concurrent on each charge with an additional three-year period of postrelease control. The court further found that appellant was in violation of postrelease control in an earlier case. The court terminated that postrelease control and ordered appellant to serve the remaining time, which was to run consecutive to the current sentence of twelve months. Appellant timely filed this appeal, assigning three errors for our review:

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

{¶ 8} Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside,* 100 Ohio St.3d 152, 797 N.E.2d 71, 2003-Ohio-5372. In considering a motion to suppress, the trial court is in the

best position to decide the facts and to evaluate the credibility of the witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972. Consequently, we must accept the trial court's findings of fact if they are supported by competent and credible evidence. *State v. Curry* (1994), 95 Ohio App.3d 93, 641 N.E.2d 1172. However, without deference to the trial court's conclusion, it must be determined independently whether, as a matter of law, the facts satisfy the applicable legal standard. *Burnside,* supra at 155.

{¶ 9} Appellant claims that there was insufficient justification for the investigatory stop. Appellant also argues that there was insufficient justification for the search. Specifically, appellant argues that there was no probable cause nor reasonable suspicion for the officer to open and look at the check.

{¶ 10} We note that the appellant conceded below that the officer had reasonable suspicion to perform an investigatory stop. Accordingly, this issue is waived. Issues cannot be raised for the first time on appeal. *State v. Foust*, 105 Ohio St.3d 137, 823 N.E.2d 836, 2004-Ohio-7006; Crim.R. 12(C)(3).

{¶ 11} The Fourth Amendment to the United States Constitution prohibits warrantless searches and seizures, rendering them per se unreasonable unless an exception applies. *Katz v. United States* (1967), 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576. One exception was announced by the United States Supreme Court in *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. In *Terry*, the Court held that a brief investigative stop of a person does not violate

the Fourth Amendment if the police have reasonable suspicion that the person stopped is, or is about to be, engaged in criminal activity. Id.

{¶ 12} A warrantless search or seizure by a law enforcement officer of an object in plain view does not violate the Fourth Amendment if (1) the officer did not violate the Fourth Amendment in arriving at the place from which the object could be plainly viewed; (2) the officer has a lawful right of access to the object; and (3) the incriminating nature of the object is immediately apparent. *State v. Steward*, Cuyahoga App. No. 80993, 2003-Ohio-1337, citing *Horton v. California* (1990), 496 U.S. 128, 136-137, 110 S.Ct. 2301, 110 L.Ed.2d 112; *State v. Wilmoth* (1982), 1 Ohio St.3d 118, 438 N.E.2d 105; *State v. Williams* (1978), 55 Ohio St.2d 82, 377 N.E.2d 1013.

{¶ 13} In *State v. Halczyszak* (1986), 25 Ohio St.3d 301, 496 N.E.2d 925, the Ohio Supreme Court held that "the 'immediately apparent' requirement of the 'plain view doctrine' is satisfied when police have probable cause to associate an object with criminal activity. In ascertaining the required probable cause to satisfy the 'immediately apparent' requirement, police officers may rely on their specialized knowledge, training, and experience."

{¶ 14} Here, Officer Branscrum conducted an investigative stop of appellant after being called to the Great Northern Mall on a report of "suspicious activity." Officer Branscrum was a 20-year veteran of the North Olmsted Police Department, who spent two years investigating financial crimes. Upon arriving, Officer Branscrum learned from mall security that a merchant reported to security

that three individuals were seen entering and leaving a series of stores where one individual was attempting to pass checks later deemed to be on accounts with insufficient funds. The report included a claim that these individuals were passing or exchanging between them what appeared to be "checks and ID's" outside Rogers Jewelers. Officer Branscrum added that, upon personally observing the three individuals opening lines of instant credit at Sears, he observed that they were in a "hurry" and appeared to be looking for "a way out."

{¶ 15} Upon approaching appellant, Officer Branscrum advised appellant of the reason for the stop, gave him the *Miranda* warnings, and asked for his identification. Appellant voluntarily emptied his pockets, which revealed the folded check that was later deemed to have been stolen and forged.

{¶ 16} The trial court found that "an item such as a check, even folded in half, is readily identifiable as a check in that type of state; and therefore, he was justified in taking a closer look at the check, even by unfolding it. Once he did that and saw two female names on the check, none of which were David Hunter, he was justified in performing good detective work in determining whether the check was indeed stolen, or not."

{¶ 17} We find that the trial court did not err when it denied appellant's motion to suppress. As conceded by the appellant below, the officer had reasonable articulable suspicion to do an investigatory stop, appellant voluntarily emptied out his pockets in front of the officer, and the incriminating nature of the

check was immediately apparent. Accordingly, appellant's first assignment of error is overruled.

{¶ 18} "II. Appellant was denied the effective assistance of counsel."

{¶ 19} Appellant argues that his trial counsel was ineffective because she waived any argument about the constitutionality of the initial stop.

{¶ 20} In order to substantiate a claim of ineffective assistance of counsel, the appellant is required to demonstrate that (1) the performance of defense counsel was seriously flawed and deficient, and (2) the result of the appellant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407. "Judicial scrutiny of counsel's performance is to be highly deferential, and reviewing courts must refrain from second-guessing the strategic decisions of trial counsel." *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965, 1995-Ohio-104. Further, "trial counsel is entitled to a strong presumption that all decisions fell within the wide range of reasonable, professional assistance." *State v. Sallie,* 81 Ohio St.3d 673, 675, 693 N.E.2d 267, 1998-Ohio-343, citing *State v. Thompson* (1987), 33 Ohio St.3d 1, 10, 514 N.E.2d 407; *State v. Mondie,* Cuyahoga App. No. 91668, 2009-Ohio-3070.

{¶ 21} "Failing to file a motion to suppress does not constitute ineffective assistance of counsel per se. To establish ineffective assistance of counsel for failure to file a motion to suppress, a defendant must prove that there was a basis

to suppress the evidence in question." (Internal citations omitted.) *State v. Brown*, 115 Ohio St.3d 55, 68, 69, 873 N.E.2d 858, 2007-Ohio-4837.

{¶ 22} In this case, counsel for appellant filed a motion to suppress; however, she failed to challenge the initial stop. Appellant's counsel focused on the unfolding of the check, claiming that it constituted a search without probable cause.

{¶ 23} Under *Terry*, the state must be able to point to specific and articulable facts that reasonably suggest criminal activity. *Terry*, supra. Inarticulable hunches, general suspicion, or no evidence to support the stop is insufficient as a matter of law. *State v. Smith*, Cuyahoga App. No. 89432, 2008-Ohio-2361. The propriety of an investigative stop by a police officer must be viewed in light of the totality of the surrounding circumstances. *State v. Bobo* (1988), 37 Ohio St.3d 177, 524 N.E.2d 489, paragraph one of the syllabus; *State v. Hodges,* Cuyahoga App. No. 92014, 2009-Ohio-3378.

{¶ 24} Appellant argues that no one saw him or his companions do anything illegal that would warrant police to conduct an investigative stop. He asserts that it was Terrence Hunter who was attempting to use the checks and that the only reason they were refused was because of insufficient funds in the account.

{¶ 25} Appellant's argument ignores the fact that an employee from Rogers Jewelers observed appellant with his two companions exchanging what appeared to be checks and identification cards outside the store after Terrence Hunter's check was rejected. Further, Terrence Hunter came in and out of the jewelry

store more than once trying to use different checks, while the appellant and his sister waited outside for him. This information was relayed to mall security and then to the North Olmsted Police Department. Further Officer Branscrum testified that, he personally observed the three individuals at Sears opening lines of instant credit, he noted that they were in a "hurry" and appeared to be looking for "a way out."

{¶ 26} The record reveals that although appellant conceded the stop was reasonable, his attorney questioned the officer and security guard extensively regarding the reasons to stop appellant. We find that the record supports the conclusion that the officer had reasonable articulable suspicion that criminal activity was afoot. Appellant has failed to prove that there was a basis to suppress the evidence in question. As a result, we conclude that appellant's trial counsel was not ineffective for conceding the stop was legal.

{¶ 27} Appellant also claims counsel was ineffective at the sentencing hearing for conceding appellant was not amenable to community control sanctions and for not correcting errors in his criminal record. We find no merit in these claims. Even if appellant's counsel had not conceded that appellant was not amenable to community control sanctions, we find that the sentence would not have been different because of appellant's criminal record and history of probation violations. Further, appellant had just been released from prison and was on postrelease control when he was charged in the instant case. Finally,

there is no evidence in the record that appellant's criminal record was incorrect. For these reasons, appellant's second assigned error is overruled.

{¶ 28} "III. The trial court's sentence is unlawful and void."

{¶ 29} Appellant argues the sentence is unlawful and void in four ways. First, appellant argues the trial court usurped the authority of the Adult Parole Authority ("APA"), which should have been the entity to determine whether appellant would be subject to postrelease control for the instant case pursuant to R.C. 2967.28. We agree with appellant. The trial court should not have imposed a term of postrelease control and should have left that determination to the APA. Pursuant to R.C. 2953.08(G)(2), we vacate the court's order imposing three years of postrelease control and leave that determination to the discretion of the APA.

{¶ 30} Second, appellant argues that the sentencing entry does not properly reflect what is stated in the transcript regarding postrelease control. Although we do not see an inconsistency between the transcript and the journal entry, this argument is moot as we have already determined the imposition of postrelease control by the trial court was improper.

{¶ 31} Next, appellant claims the trial court did not have the authority to terminate the previously imposed postrelease control from appellant's earlier cases. We reject this claim. R.C. 2929.141(B) specifically authorizes the trial court to terminate the term of postrelease control and impose an additional sentence as outlined under R.C. 2929.141(B)(1).

{¶ 32} Finally, appellant argues the imposition of the original postrelease control term from the prior case was improper. In the transcript the court indicates it is imposing the balance of the postrelease control term not served, which is not set forth in the record, and the journal entry reflects a term of twelve months. R.C. 2929.141(B) provides, in relevant part, that "[t]he maximum prison term for the violation shall be the greater of twelve months or the period of post-release control for the earlier felony minus any time the person has spent under post-release control for the earlier felony."

{¶ 33} The record is unclear how much time the appellant must serve for violating postrelease control. Because of the inconsistency in the trial court's sentence, we vacate the sentence and remand the case for resentencing.

{¶ 34} For these reasons, appellant's third assignment of error is sustained in part.

Conviction affirmed; sentence vacated; remanded for resentencing.

It is ordered that appellant and appellee share 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 common pleas court to carry this judgment into execution.

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

SEAN C. GALLAGHER, PRESIDING JUDGE

ANN DYKE, J., and
JAMES J. SWEENEY, J., CONCUR