[Cite as *State v. Jones*, 2009-Ohio-5701.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92820

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JERMAINE JONES

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-509841

BEFORE: Boyle, J., McMonagle, P.J., and Blackmon, J.

RELEASED: October 29, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, Jermaine Jones, appeals from the trial court's denial of his motion to suppress. Finding no merit to the appeal, we affirm.

{¶ 2} Jones was charged with one count of possession of drugs, in violation of R.C. 2925.11(A), and one count of trafficking, in violation of R.C. 2925.03(A)(2). Jones pled not guilty to the charges and moved to suppress evidence, arguing that it was illegally obtained.

{¶ 3} The following evidence was presented at the suppression hearing.

{¶ 4} Officer Larry McDonald testified that he had been an officer for the city of East Cleveland for approximately one year and two months. In April 2008, around 9:30 a.m., he observed a vehicle parked on the street at 1733 Carlyon Road, East Cleveland. Officer McDonald was in his police cruiser and in full uniform. Carlyon is a two-lane road that runs north and south between Superior and Euclid avenues, and was open for traffic that day; Officer McDonald was heading toward Superior and the vehicle was parked toward Euclid. The vehicle would have been parked legally, except that the rear driver-side door of the vehicle was "wide open" into the lane of oncoming traffic, which he said was a violation of an East Cleveland ordinance.

{¶ 5} Officer McDonald explained that he saw someone's "legs hanging out" of the rear driver-side door. He pulled next to the vehicle (but did not get out at first) to "make sure the person was either okay or, *** to talk to him about the violation." Officer McDonald identified Jones as the person whose legs were

hanging out of the vehicle. When Officer McDonald pulled up next to the vehicle, he said, "[Jones] came out of the rear and stated that he was looking for, I think it was a pen or something, in the rear of the vehicle." Officer McDonald then testified, "while [Jones] was speaking with me, he dropped an object, a white object, out of his hand." It looked like a "yellow rock," and Officer McDonald immediately suspected that it was crack cocaine. When Officer McDonald saw Jones drop the object, he got out of his police cruiser, placed Jones up against the police cruiser, and patted him down for officer safety. He then secured Jones in the back of the police car.

{¶ 6} Officer McDonald then obtained the yellow rock off the ground and confirmed that it was cocaine. Officer McDonald got back into his police car and asked Jones what the rock was. Jones replied, "you know what it is." Officer McDonald denied that he did, and Jones stated, "man, it's some crack." Officer McDonald then asked Jones if he had anything else in his vehicle, and Jones told him, "there's some work in the vehicle." Officer McDonald asked Jones what that meant and Jones replied, "you know what it means." He then asked Jones where it was and Jones told him that it was in the "driver's panel." Officer McDonald called for backup; when other officers arrived, he recovered two bags of suspected crack cocaine from the vehicle.

{¶ 7} Officer McDonald further testified that after he confirmed that the "yellow rock" was crack cocaine, he planned to arrest Jones for violating state

drug laws. Pursuant to police policy, Officer McDonald explained that Jones's vehicle would have been inventoried upon impound.

{¶ 8} On cross-examination, Officer McDonald testified that each bag of crack cocaine weighed 6.5 grams. He explained that when he found the bags, one bag was open, and one was tied in a knot. Officer McDonald said that he placed the single rock of cocaine that Jones had dropped in one of two bags, but he did not know which bag. Officer McDonald agreed that he could not identify the single rock inside either bag. He further agreed that when looking at both bags, he could not tell if the single rock was in either one. But he stated that the evidence looked the same as when he found it. Officer McDonald also said that the conversation with Jones only lasted a couple of seconds before he saw Jones drop the rock.

{¶ 9} Jones then testified on his own behalf. He said that he has been convicted of a "fair number" of past drug offenses. Jones said he parked on the street because he had been on the phone with his girlfriend to get an address, and he needed a pen to write the address down. According to Jones, Officer McDonald pulled up to the driver's side of his car, and said, "what are you doing?" Jones said that he told him he was getting a pen. Jones testified that at that point, Officer McDonald said to him, "let me see your ID. I'll run your name, make sure you got a driver's license, and you ain't got warrants." Jones went into his car to retrieve his driver's license. Jones said that Officer McDonald then "told [him] he was going to put [him] in cuffs for his safety and run [his] name

through." Then, Jones explained, Officer McDonald got out of his police car and said, "Oh, I'll see what you got in this car, or something like that." Jones testified that he never dropped anything prior to being handcuffed. Jones further testified that because of his prior drug offense history, he knew not to tell Officer McDonald where the drugs were located, and he denied telling Officer McDonald where the drugs were located.

{¶ 10} Jones stated that after Officer McDonald handcuffed him, he searched Jones's vehicle, but did not find anything. According to Jones, Officer McDonald asked him, "where was the drugs at?" Jones explained that he did not respond, and Officer McDonald searched his car again and found the drugs.

{¶ 11} Jones further testified that he had placed 6.5 grams of crack cocaine in each bag because he was going to sell someone a half ounce. Jones testified that he was purposefully "shortening them by a half a gram." Jones said that he had "tied up" both bags of cocaine in a knot.

{¶ 12} On cross-examination, Jones agreed that he had his door open onto the street when Officer McDonald stopped beside his car and Jones further stated, "my feet was out, and I was looking underneath the seat." Jones also agreed that his door was open on the street where traffic was "coming up and down that street." Jones said that Officer McDonald did not use lights or sirens, did not pull his gun, and did not say, "stop right there." Jones also stated that when Officer McDonald pulled his police cruiser up, he asked Jones, "what's going on?"

{¶ 13} At the conclusion of the suppression hearing, the trial court denied Jones's motion, finding:

{¶ 14} "In this matter, the court heard testimony from two witnesses, also had a chance to observe the evidence that was sought to be suppressed.

{¶ 15} "The testimony of the two witnesses is consistent with respect to the assertion that the defendant was in his car with his legs hanging out when the officer drove up. They did have some brief words.

{¶ 16} "The court accepts as true the testimony of Officer McDonald, that he observed Mr. Jones drop what he thought might be crack.

{¶ 17} "Officer McDonald had only been on the job a few months at that point.

{¶ 18} "He tried to ascertain the identity of the defendant, placed him in the back of the zone car, came back, investigated the drugs on the ground, determined that this did appear, in fact, to be crack cocaine. Therefore, he placed the defendant under arrest for violations of State Drug Law.

{¶ 19} "Consistent with the East Cleveland Police policy, an inventory search ensued, during which time the two bags of additional crack were found, or would have been found regardless, in the door of the car.

{¶ 20} "So the motion to suppress is denied."

{¶ 21} After the trial court denied his motion to suppress, Jones pled guilty to possession, in violation of R.C. 2925.11(A), and trafficking, in violation of R.C. 2925.03(A)(2). The trial court sentenced him to three years on each count, to be

served concurrently. The trial court also informed Jones that he would be subject to three years of postrelease control upon his release from prison.

{¶ 22} It is from this judgment that Jones appeals, and raises three assignments of error for our review:

{¶ 23} "[1.] The 'inventory search' of appellant's vehicle was unreasonable and therefore violated appellant's constitutional rights when no evidence was presented as to the specific standard policy of the East Cleveland police department for conducting inventory searches of vehicles.

{¶ 24} "[2.] The trial court erred in denying appellant's motion to suppress evidence because appellant's detention was illegal, since it was based upon neither a reasonable suspicion of criminal activity nor probable cause to arrest.

{¶ 25} "[3.] The trial court erred in failing to suppress appellant's oral statement because the record reflects he was not provided with warnings regarding his Fifth Amendment right against self-incrimination prior to police questioning."

Standard of Review

{¶ 26} A motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. "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 witnesses. *** Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence.

*** Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." (Internal citations omitted.) Id.

{¶ 27} We will address Jones's assignments of error in the order the events occurred, i.e., the initial encounter (second assignment), the oral statements (third assignment), and search of the vehicle (first assignment).

Initial Encounter

{¶ 28} Jones argues that Officer McDonald unlawfully detained him since he "was displaying no 'suspicious criminal conduct,' and provided no justification for McDonald to investigate further." Specifically, he maintains that because Officer McDonald did not observe a criminal violation, but instead only observed a parking violation, that Officer McDonald did not have the right to detain him.

{¶ 29} 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. An investigative stop, as set forth in *Terry v. Ohio* (1968), 392 U.S. 1, is a common exception to the Fourth Amendment warrant requirement. Under *Terry*, both the stop and seizure must be supported by a reasonable suspicion of criminal activity. The state must be able to point to specific and articulable facts that reasonably suggest criminal activity "may be afoot." *Terry* at 9. Inarticulable hunches, general suspicion, or no evidence to support the stop is insufficient as a matter of law. *State v. Smith*, 8th Dist. No. 89432, 2008-Ohio-2361, ¶8.

{¶ 30} Here, Officer McDonald explained that he pulled up to Jones's vehicle because Jones had his door "wide open" into the lane of traffic, in violation of an East Cleveland ordinance.[1] Officer McDonald further explained that Jones's legs were hanging out of the car. Jones admitted as much, stating that his "feet [were] out" because he was searching for a pen under his driver's seat. This was a clear violation of ECO 351.06. The ordinance does not require that traffic be coming down the street when the car door is open. It only requires that the door be open "on the side available to moving traffic." And Jones could not have known that "it was reasonably safe" to open his door into traffic since he could not see if traffic was coming down the street at that moment because he was searching for a pen under his driver's seat.

{¶ 31} It is well established that "[w]here a police officer stops a vehicle based on probable cause that a traffic violation has occurred or was occurring, the stop is not unreasonable under the Fourth Amendment to the United States Constitution even if the officer had some ulterior motive for making the stop, such as a suspicion that the violator was engaged in more nefarious criminal activity." *Dayton v. Erickson* (1996), 76 Ohio St.3d 3, syllabus. "[A]ny traffic violation, even a de minimis violation, would form a sufficient basis upon which to stop a

[1]ECO 351.06, "Opening Vehicle Door on Traffic Side," provides, "No person shall open the door of the vehicle on the side available to moving traffic unless and until it is reasonably safe to do so, and can be done without interfering with movement of other traffic, nor shall any person leave a door open on the side of a vehicle available to moving traffic for a period of a time longer than necessary to load or unload passengers."

vehicle." *State v. McCormick* (Feb. 2, 2001), 5th Dist. No. 2000CA00204. "The severity of the violation is not the determining factor as to whether probable cause existed for the stop." *State v. Weimaster* (Dec. 21, 1999), 5th Dist. No. 99CA36. Thus, when probable cause exists, reasonable suspicion of criminal activity is not necessary. See *Erickson*, supra.

{¶ 32} Officer Jones therefore had probable cause to approach Jones because he observed Jones violating an East Cleveland parking ordinance. The fact that it was a parking violation, and not a traffic violation, is a distinction without a difference. See *State v. Nevins* (May 9, 1997), 2d Dist. No. 15968 (police officer observed a parking violation and thus, had probable cause to stop a vehicle).

{¶ 33} Moreover, even if Jones had not committed the parking violation, Officer McDonald did not violate the Fourth Amendment by simply asking Jones what he was doing, a fact Jones himself admitted. See *United States v. Mendenhall* (1980), 446 U.S. 544, 554 (an encounter is not a seizure where the police approach a person in a public place, engage the person in conversation, request information, and the person is free not to answer and to walk away). An encounter rises to the level of a Fourth Amendment "seizure," by contrast, when, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Id. Circumstances that might indicate that a seizure has occurred, even where the person did not attempt to leave, include the threatening presence of several officers, the display of a

weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. Id.

{¶ 34} Although Officer McDonald was in his police car and dressed in full uniform, there is nothing in the record to indicate that the initial encounter was a stop within the meaning of *Terry*. Jones had his feet hanging out into the street, with his car door wide open, and Officer McDonald simply asked him what he was doing. Then, within a couple of seconds, Officer McDonald observed Jones drop something that looked like a yellow rock. And once Jones dropped what Officer McDonald suspected to be crack cocaine, Officer McDonald had reasonable suspicion that criminal activity was afoot, justifying further investigation, including detaining Jones and searching his vehicle.

{¶ 35} While Jones testified that he did not drop anything, the trial court, as the factfinder, explicitly found Officer McDonald's testimony to be more credible than Jones's. The trial court stated that it believed Officer McDonald that he saw Jones drop the single rock of crack cocaine.

{¶ 36} Jones's second assignment of error is overruled.

Miranda Warning

{¶ 37} Jones further argues that Officer McDonald never advised him of his *Miranda* rights, violating his Fifth Amendment right against self-incrimination. See *Miranda v. Arizona* (1966), 384 U.S. 436. The record reveals, however, that Jones failed to raise this issue with the trial court either in his written motion or

orally at the hearing. Jones only sought to suppress the contraband evidence, arguing that Officer McDonald did not have a reasonable suspicion of criminal activity (specifically because he only observed a parking violation) to justify an investigatory stop of him within *Terry*'s purview.

{¶ 38} Crim.R. 12(B) requires a defendant to raise any objection to the admissibility of unconstitutionally obtained evidence in a pretrial motion to suppress. *State v. Moody* (1978), 55 Ohio St.2d 64, 65-66.

{¶ 39} In *Xenia v. Wallace* (1988), 37 Ohio St.3d 216, paragraph one of the syllabus, the Ohio Supreme Court held:

{¶ 40} "To suppress evidence obtained pursuant to a warrantless search or seizure, the defendant must (1) demonstrate the lack of a warrant, and (2) raise the grounds upon which the validity of the search or seizure is challenged in such a manner as to give the prosecutor notice of the basis for the challenge."

{¶ 41} The Supreme Court explained:

{¶ 42} "[T]he prosecutor cannot be expected to anticipate the specific legal and factual grounds upon which the defendant challenges the legality of a warrantless search.

{¶ 43} "The prosecutor must know the grounds of the challenge in order to prepare his case, and the court must know the grounds of the challenge in order to rule on evidentiary issues at the hearing and properly dispose of the merits. *** Therefore, the defendant must make clear the grounds upon which he challenges the submission of evidence pursuant to a warrantless search or

seizure. *** Failure on the part of the defendant to adequately raise the basis of his challenge constitutes a waiver of that issue on appeal." (Citations omitted.) *Xenia* at 218.

{¶ 44} But if a defendant fails to raise a suppression issue in his or her written motion, he or she can raise it orally at the suppression hearing where the issues stem from common facts. *State v. Wells* (1983), 11 Ohio App.3d 217, 219-220.

{¶ 45} Here, at the suppression hearing, the prosecutor established that Officer McDonald's initial encounter with Jones and subsequent search of his vehicle was legal, specifically responding to Jones's written motion to suppress. The prosecutor further responded to arguments that Jones made orally at the hearing (regarding an inventory search discussed infra). The trial court likewise addressed arguments that Jones made in his written motion and orally at the hearing. The trial court then set forth its findings of fact, concluding that Officer McDonald acted reasonably with respect to those issues.

{¶ 46} Jones now argues on appeal, for the first time, that the trial court erred in overruling his motion to suppress because he was not advised of his rights under *Miranda*, 384 U.S. 436. Because Jones failed to raise this issue below, the prosecutor and trial court had notice only of his claim that the initial stop was unreasonable. We find that Jones's failure to raise the custodial interrogation-*Miranda* issue, either in his motion to suppress or at the suppression hearing, constituted a waiver of that issue.

{¶ 47} Jones's third assignment of error is overruled.

Inventory Search

{¶ 48} Finally, Jones maintains that the inventory search conducted by Officer McDonald was invalid because the state did not present "testimony as to a specific policy, practice, or procedure." We first note that Jones did not raise this issue in his suppression motion either, but he did raise it during cross-examination of Officer McDonald and during closing arguments. Thus, this court will consider it.

{¶ 49} Jones's argument, however, is without merit. Despite what Jones (and the state for that matter) claim here, the record reveals that Officer McDonald did not conduct an inventory search. The prosecutor asked Officer McDonald, "and *what would have happened* to the vehicle that the person was found in?" Officer McDonald replied, "[t]he vehicle *would have been inventoried* and then taken to ***, which is the impound." (Emphasis added in both quotes.) Thus, the prosecutor asked Officer McDonald a *hypothetical* question, "what would have happened" to the vehicle, not what actually did happen to the vehicle upon impound. Indeed there was no evidence presented about the vehicle actually being impounded or the contents of the vehicle inventoried. The prosecutor only asked Officer McDonald those hypothetical questions to establish that the two bags of cocaine would have inevitably been discovered upon impound. During closing arguments, the prosecutor then argued, "I would

submit to the court that the discovery of this evidence was going to be inevitable given that the vehicle was towed."

{¶ 50} After the prosecutor posed the hypothetical questions to Officer McDonald, Officer McDonald did agree that "subsequent to the arrest of this person, [he] did search the vehicle." But it was not an inventory search. As he previously testified, he searched Jones's vehicle after he confirmed that the "yellow rock" was suspected crack cocaine, and in response to Jones telling him that there was "work" in the car and telling him where the "work" was.

{¶ 51} In his *statement of facts* (not within his assignments of error and without citation to the record), Jones claims that the single rock of crack cocaine was not admitted into evidence — alluding that this should somehow affect the trial court's factual findings. This, however, was not established at the hearing. Officer McDonald testified that he put the single rock of crack cocaine in one of the two bags of cocaine found in Jones's car. On cross-examination, Officer McDonald agreed that when looking at the two bags of crack cocaine, he could not identify the single rock in the bag from the others in the bag. But that does not mean that it was not in there. The trial court heard Officer McDonald's explanation that he placed the single rock in one of the bags and believed him.

{¶ 52} Essentially, once Officer McDonald saw Jones drop the single rock of suspected crack cocaine, a fact the trial court believed, Officer McDonald had reasonable suspicion that criminal activity was afoot, justifying the search of the

vehicle — with or without Jones's oral statements admitting the single rock was crack cocaine and telling him where the other "work" was in his car.

{¶ 53} Jones's first assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant 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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

MARY J. BOYLE, JUDGE

PATRICIA ANN BLACKMON, J., CONCURS;
CHRISTINE T. McMONAGLE, P.J., CONCURS IN JUDGMENT ONLY