[Cite as *State v. Pope*, 2010-Ohio-1749.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92915

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOHNATHAN POPE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-518240

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

RELEASED: April 22, 2010

JOURNALIZED:

[Cite as *State v. Pope*, 2010-Ohio-1749.]

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MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, Johnathan Pope, appeals his drug possession conviction. He raises three assignments of error for our review:

{¶ 2} "[1.] Appellant was denied effective assistance of counsel as guaranteed by Section 10, Article 1, of the Ohio Constitution and the Sixth and Fourteenth Amendments to the United States Constitution when counsel failed to challenge the stop, detention, and arrest by not filing a motion to suppress.

{¶ 3} "[2.] The state failed to present sufficient evidence that appellant committed this crime.

{¶ 4} "[3.] Appellant's conviction is against the manifest weight of the evidence."

{¶ 5} Finding no merit to his appeal, we affirm.

Procedural History and Factual Background

{¶ 6} The grand jury indicted Pope on one count of drug trafficking (crack cocaine), in violation of R.C. 2925.03(A)(2), and one count of drug possession (crack cocaine), in violation of R.C. 2925.11(A). The case proceeded to a jury trial where the following evidence was presented.

{¶ 7} Police officers Matt Prince and Edward Lentz were working routine patrol in early November 2008. Shortly after midnight, they were driving westbound on Clark Avenue when they observed a blue Ford Explorer traveling in the opposite direction, i.e., eastbound on Clark Avenue. Officer Lentz explained that Clark Avenue is a four-lane road. According to Officer Lentz, the occupants in the Ford seemed to notice the officers

and when they did, the Ford made a right turn onto West 44th Street from the center lane without using a turn signal. At that point, the officers initiated a traffic stop.

{¶ 8} Officer Prince approached the driver's side of the vehicle, and Officer Lentz approached the passenger's side. Both officers testified that as they approached the vehicle, the driver and the passenger were making "furtive movements."

{¶ 9} Officer Prince testified that he ordered the driver out of the car and asked him if he had any weapons on him. The driver replied that he did and also volunteered that he had marijuana.

{¶ 10} Officer Lentz said that when he reached the passenger door, he could see that Pope was "cupping something in his right hand," and he was "making furtive movements trying to hide something (indicating), so I would not see what was in his hand." Officer Lentz further explained that Pope was "trying to conceal something or trying to grab something from underneath the seat or next to the seat."

{¶ 11} At that point, Officer Lentz ordered Pope out of the car and ordered Pope to show him what was in his hands. Officer Lentz testified, "I wanted to see his hands. I ordered to see his hands. We are trained to make sure that their hands are clear of any weapons. He continued to make movements. I ordered him out of the car." Pope stepped out of the car and as he did, "he threw from his hand in a concealing fashion" a plastic bag of marijuana to the ground. On cross-examination, Officer Lentz said that Pope was arrested at this point.

{¶ 12} Officer Lentz then had Pope "place his hands on the vehicle" and proceeded

to search him. Officer Lentz found a lottery ticket with loose marijuana inside the ticket in Pope's front, right pocket.

{¶ 13} Officer Lentz said Pope was taken to the police station for booking. At the police station, another officer further searched Pope and discovered two bags of crack cocaine in his sock.

{¶ 14} Pope testified on his own behalf. He stated that the Ford Explorer had tinted back windows. He further said that the driver used his turn signal when he turned onto West 44th Street. According to Pope, Officer Lentz walked up to his side of the car and asked him for identification. He then testified that Officer Lentz told him to "step out of the car [and] [t]here was a bag of marijuana on the seat. I had one in my left pocket and one in the right little pocket." Pope said Officer Lentz patted him down at that point. He denied having cocaine in his socks and denied that the police had him take his socks off at all during the booking procedures.

{¶ 15} The jury found Pope guilty of drug possession, but not guilty of drug trafficking. The trial court sentenced him to 17 months in prison and informed him that he would be subject to three years of postrelease control upon his release.

Ineffective Assistance of Counsel

{¶ 16} In his first assignment of error, Pope claims his trial counsel was ineffective for failing to move to suppress evidence used against him.

{¶ 17} To succeed on a claim of ineffective assistance, a defendant must establish that counsel's performance was deficient and that the defendant was prejudiced by the

deficient performance. *Strickland v. Washington* (1984), 466 U.S. 668, 687; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. Counsel will only be considered deficient if his or her conduct fell below an objective standard of reasonableness. *Strickland* at 688. When reviewing counsel's performance, this court must be highly deferential and "must indulge a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." Id. at 689. To establish resulting prejudice, a defendant must show that the outcome of the proceedings would have been different but for counsel's deficient performance. Id. at 694.

{¶ 18} "'[F]ailure to file a motion to suppress is not per se ineffective assistance of counsel.'" *State v. Madrigal*, 87 Ohio St.3d 378, 389, 2000-Ohio-448, 721 N.E.2d 52, quoting *Kimmelman v. Morrison* (1986), 477 U.S. 365, 384, 106 S.Ct. 2574, 91 L.Ed.2d 305. Failure to file a motion to suppress constitutes ineffective assistance of counsel only if, based upon the record, the motion would have been granted. *State v. Robinson* (1996), 108 Ohio App.3d 428, 433, 670 N.E.2d 1077.

{¶ 19} Thus, we must determine from the record whether a motion to suppress would have been granted if Pope's trial counsel had filed one. If so, Pope's counsel was ineffective for failing to file it.

Fourth Amendment

{¶ 20} Pope contends that his trial counsel should have challenged the "stop, detention, and arrest" because his Fourth Amendment rights were violated.

{¶ 21} The Fourth Amendment 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 such exception to a warrantless search was recognized in *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, which held that "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot," the officer may briefly stop the suspicious person and make "reasonable inquiries" aimed at confirming or dispelling his suspicions. Id. at 30.

{¶ 22} *Terry* further held that "[w]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others," the officer may conduct a pat-down search "to determine whether the person is in fact carrying a weapon." Id. at 24. A pat-down search for weapons requires reasonable grounds to believe that the suspect is armed and dangerous. *State v. Andrews* (1991), 57 Ohio St.3d 86, 89, 565 N.E.2d 1271. Thus, even if an investigatory stop and detention is justified, it does not necessarily follow that a frisk for weapons is also warranted. *State v. Martin*, 2d Dist. No. 20270, 2004-Ohio-2738, ¶14.

A. *Initial Stop*

{¶ 23} It is well established that an officer may stop a motorist upon his or her observation that the vehicle in question violated a traffic law. *Dayton v. Erickson* (1996), 76 Ohio St.3d 3, 11-12, 665 N.E.2d 1091. Moreover, courts have repeatedly held that when a police officer witnesses even a minor traffic violation, he or she is warranted in making a stop to issue a citation. *Village of Waite Hill v. Popovich*, 11th Dist. No.

2001-L-227, 2003-Ohio-1587, ¶14.

{¶ 24} Officer Lentz testified that the driver of the vehicle made an illegal turn without using a turn signal. That testimony, if believed, constituted more than reasonable suspicion — that is the police had probable cause — to make the initial stop of the Ford Explorer.

B. *Further Investigation or Detention Beyond the Initial Stop*

{¶ 25} "An officer may not expand the investigative scope of the detention," however, "beyond that which is reasonably necessary to effectuate the purposes of the initial stop unless any new or expanded investigation is supported by a reasonable, articulable suspicion that some further criminal activity is afoot." *State v. Batchili*, 113 Ohio St.3d 403, 2007-Ohio-2204, 865 N.E.2d 1282, ¶34, citing *State v. Retherford* (1994), 93 Ohio App.3d 586, 600, 639 N.E.2d 498. This is because any further detention is a greater invasion into an individual's liberty interests. *State v. Evans* (1998), 127 Ohio App.3d 56, 62, 711 N.E.2d 761, citing *State v. Yemma* (Aug. 9, 1996), 11th Dist. No. 95-P-0156. In determining whether a detention is reasonable, the court must look at the totality of the circumstances. *State v. Bobo* (1988), 37 Ohio St.3d 177, 178, 524 N.E.2d 489.

{¶ 26} Because it is relevant to the instant case, we further note that once a motor vehicle has been lawfully detained for a traffic violation, police officers may order the driver and any passengers out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures. *Pennsylvania v. Mimms* (1977), 434

U.S. 106, 111, 98 S.Ct. 330, 54 L.Ed.2d 331 (driver), and *Maryland v. Wilson* (1997), 519 U.S. 408, 415, 117 S.Ct. 882, 137 L.E.2d 41 (passengers). Neither *Mimms* nor *Wilson*, however, provide the justification for a subsequent search of the driver or passenger unless the officer has reasonable suspicion to support the frisk as established by *Terry*.

{¶ 27} Here, Officer Lentz testified that he ordered Pope out of the car, which he was justified in doing under *Wilson*, but at the same time he also ordered Pope to show him his hands to make sure his "hands [were] clear of any weapons." This clearly went beyond the scope of the initial stop and amounted to a frisk or search. The question becomes whether Officer's Lentz's demand was warranted by reasonable suspicion that Pope may have been armed and dangerous. Based on the record before us, we find that it was.

{¶ 28} In the instant case, both officers testified that they observed furtive movements from both the driver and the passenger as they approached the vehicle. Officer Lentz further testified that Pope was "trying to conceal something or trying to grab something from underneath the seat or next to the seat. Officer Lentz explained that he wanted to see Pope's hands to make sure that he did not have any weapons. We find that Pope's furtive movements and "cupped" hands were sufficient articulable facts amounting to reasonable suspicion that he may have been armed and dangerous.

{¶ 29} And once Pope responded to Officer Lentz's demand by throwing the marijuana to the ground, everything else the officers did was justified, including searching him at the scene and at the police station. See *State v. Hopper*, 8th Dist. Nos. 91269 and 91327, 2009-Ohio-2711 (once marijuana was lawfully discovered, the officers were

permitted to arrest the occupants based upon the marijuana being transported in a motor vehicle; further, once the occupants were taken into custody, they were permissibly patted down incident to the lawful arrest; and crack cocaine found as a result of the pat-down search was admissible).

{¶ 30} Thus, we find that since Pope's motion to suppress would not have been granted, Pope's trial counsel was not ineffective. Pope's first assignment of error is overruled.

Sufficiency and Manifest Weight of the Evidence

{¶ 31} In his second and third assignments of error, Pope argues that his conviction was not supported by sufficient evidence and was against the manifest weight of the evidence. We disagree.

{¶ 32} An appellate court's function in reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus. If so, the evidence is sufficient.

{¶ 33} "Weight of the evidence concerns 'the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541. When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees with

the factfinder's resolution of the conflicting testimony. Id. at 387, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652.

{¶ 34} After reviewing the record, we find that the state presented sufficient — indeed overwhelming evidence — that Pope possessed crack cocaine. And although Pope testified that he did not have crack cocaine on his person and even denied that officers looked in his socks during booking procedures, the jury chose to believe the officers over Pope. Accordingly, Pope's conviction was supported by sufficient evidence, and the jury clearly did not lose its way in convicting Pope of drug possession.

{¶ 35} Pope's second and third assignments of error are 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

KENNETH A. ROCCO, P.J., and
CHRISTINE T. McMONAGLE, J., CONCUR