[Cite as *State v. Prude*, 2010-Ohio-4892.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94052

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

SEAN PRUDE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED; REMANDED FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-520509

BEFORE: Kilbane, P.J., Celebrezze, J., and Sweeney, J.

RELEASED AND JOURNALIZED: October 7, 2010

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MARY EILEEN KILBANE, P.J.:

{¶ 1} Appellant, Sean Prude ("Prude"), appeals the trial court's denial of his motion to suppress. We find no merit to his appeal and affirm. However, since he was convicted of crimes that are allied offenses of similar import, we are constrained to vacate Prude's sentence and remand the case to the trial court for resentencing under R.C. 2941.25.

Statement of Facts and Procedural History

{¶ 2} On January 10, 2009, Prude was stopped by Cleveland Police Officers William Mazur ("Officer Mazur") and Jeffrey Yasenchak ("Officer Yasenchak") after running a red light while traveling eastbound on Kinsman

Avenue at East 73rd Street at 3:15 p.m. Upon approaching Prude's vehicle, Officer Mazur observed Prude, who was the only person in the 2008 Lincoln MKX, "shoving something down his waist like he was trying to hide something." (Tr. 15.) Officer Yasenchak, who was standing beside the passenger's side door scanning the car for weapons or anything else that may be a danger to him or his partner, also observed Prude "shoving something down the front of his pants." (Tr. 75.)

{¶ 3} After seeing Prude's movements, Officer Mazur asked Prude to first keep his hands still, and then asked him to produce his driver's license. (Tr. 16.) Officer Mazur advised Prude that he was being stopped for running the red light. Based upon Prude's furtive movements and nervous actions when the officers approached him, Officer Mazur eventually asked Prude to step out of the car and then asked him whether he put anything down his pants. Prude denied this.

{¶ 4} Both Officers Mazur and Yasenchak conducted patdown searches of Prude for officer safety. (Tr. 21, 59.) While questioning Prude beside his vehicle, Officer Mazur observed the corner of a clear plastic bag protruding one inch out of his waistband. (Tr. 17, 20, 23.) Officer Mazur suspected that the bag contained contraband, based upon Prude's behavior during the encounter, his experience in making drug arrests and conducting traffic stops, and also because Prude continued to deny he had hidden anything in his

waistband, even though Officer Mazur could plainly see the plastic bag. (Tr. 19, 20.)

{¶ 5} Officer Yasenchak could also plainly see the plastic bag in Prude's waistband. During the encounter, he pulled the bag from Prude's waistband and discovered it contained suspected crack and powder cocaine. (Tr. 20.) The officers did not have to reach into Prude's pants pockets or manipulate his clothing in any way to seize the bag. (Tr. 21, 81.) As Officer Mazur stated: "Like I said, there was something right there at the waistband, and all you had to do was just pull it out." (Tr. 20-21.) Prude was then Mirandized and placed under arrest. (Tr. 23.) The sandwich bag contained over 10 grams of crack cocaine.

{¶ 6} During the suppression hearing, Prude testified that the light he crossed was yellow, not red, as the officers stated. While he admitted to possessing the cocaine, Prude stated that the officers only found the cocaine after they conducted several intrusive patdown searches and that he placed the sandwich bag of cocaine through his unzipped pants, and not in his waistband. He further testified that Officer Mazur immediately handcuffed him when he exited his car, and the patdown searches began after that.

{¶ 7} During the suppression hearing, the police officers admitted that they run vehicle history reports during traffic stops "95 percent" of the time, and that they often check on the registered owner's criminal history as well

before stopping a vehicle. (Tr. 74.) However, the officers did not have a specific recollection of doing so in this case. (Tr. 74.)

{¶ 8} On February 2, 2010, a Cuyahoga County Grand Jury charged Prude in a five-count indictment. Count 1 charged possession of crack cocaine in an amount between 10 to 25 grams, a second degree felony, in violation of R.C. 2925.11(A). Count 2 charged drug trafficking, to wit: crack cocaine, in an amount between 10 and 25 grams, a second degree felony, in violation of R.C. 2925.03(A)(2). Count 3 charged possession of cocaine in an amount between 5 to 25 grams, a fourth degree felony, in violation of R.C. 2925.11(A). Count 4 charged drug trafficking, to wit: cocaine, in an amount between 10 and 100 grams, a third degree felony, in violation of R.C. 2925.03(A)(2). Count 5 charged possession of criminal tools, a fifth degree felony, in violation of R.C. 2923.24(A). All counts included forfeiture specifications under R.C. 2941.1417(A).

{¶ 9} On March 11, 2009, Prude's counsel filed a motion to suppress, which came for hearing on July 2, 2009, and was denied on July 6, 2009.

{¶ 10} On August 7, 2009, Prude pled no contest to all charges as indicted, and the court found him guilty on all five counts.

{¶ 11} On September 11, 2009, the trial court sentenced Prude to three years of incarceration on Count 1, three years of incarceration on Count 2, 14 months of incarceration on Count 3, and two years of incarceration on Count

4. On Count 5, the court sentenced Prude to 9 months of incarceration. The court then ordered all counts to be served concurrently, for a total of three years of incarceration. Prude now appeals, asserting the following assignment of error:

> **"The trial court erred in denying appellant's motion to suppress where the contraband seized was not seized pursuant to a warrant or an exception to the warrant requirement."**

Standard of Review

{¶ 12} 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* (1997), 124 Ohio App.3d 706, 707 N.E.2d 539.

{¶ 13} The Fourth Amendment allows a police officer to stop and detain an individual if the officer possesses a reasonable suspicion, based upon specific and articulable facts, that criminal activity "may be afoot." *Terry v. Ohio* (1968), 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889. In deciding

whether reasonable suspicion exists, courts must examine the "'totality of the circumstances' of each case to determine whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." *United States v. Arvizu* (2002), 534 U.S. 266, 122 S.Ct. 744, 151 L.Ed.2d 740, quoting *United States v. Cortez* (1981), 449 U.S. 411, 417-418, 101 S.Ct. 690, 66 L.Ed.2d 621; *State v. Bobo* (1988), 37 Ohio St.3d 177, 524 N.E.2d 489, paragraph one of the syllabus, citing *State v. Freeman* (1980), 64 Ohio St.2d 291, 414 N.E.2d 1044.

{¶ 14} In support of his argument, Prude argues that while Officer Mazur testified about his experience as a police officer as it relates to his reasonable suspicion of Prude and the subsequent patdown search, Officer Yasenchak did not. He further argues that the officers exceeded the scope of their authority under *Terry* by conducting multiple warrantless searches of him. *Terry.*

{¶ 15} Specifically, he complains that Officer Yasenchak was not permitted to conduct an additional patdown search since only Officer Mazur testified to his experience with traffic stops and drug arrests, and as such, the plastic bag that was allegedly retrieved as a part of that patdown must be suppressed. We disagree.

{¶ 16} Prude's argument that Officer Yasenchak never testified that he had experience with drug arrests or traffic stops is irrelevant; such knowledge

was established by Officer Mazur during his testimony. The officers' repeated references to one another throughout the hearing and to the collective pronoun "we" assumes their collective knowledge and experience in drug arrests and traffic stops.

{¶ 17} Further, Officer Yasenchak was not required to testify to his independent knowledge of the contents of the bag. No one could have known the exact contents of the bag until it was pulled from Prude's waistband. At the time of the encounter, all of Prude's actions and the placement of the object in his waistband gave rise to the immediate, logical inference that its contents were criminal in nature.

{¶ 18} Prude cites a litany of cases under the plain feel doctrine, first articulated in *Minnesota v. Dickerson* (1993), 508 U.S. 366, 133 S.Ct. 2130, 124 L.Ed.2d 334, supporting the proposition that where the incriminating character of the evidence is not immediately apparent to a searching officer, the evidence garnered as a result of the seizure must be suppressed. While Prude analogizes the holding of *Dickerson* and its Ohio progeny to the facts in the instant case, the record is clear that the top of the plastic bag at issue was in plain view of the officers and was not discovered as the result of a patdown search. The plain feel doctrine is therefore not applicable.

Plain View Exception to the Warrant Requirement

{¶ 19} "If an article is already in plain view, neither its observation nor its seizure would involve any invasion of privacy." *Horton v. California* (1990), 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed. 112. (Internal citations omitted.) See, also, *State v. Petty,* 8th Dist. No. 93234, 2010-Ohio-4107; *State v.Courtney*, 8th Dist. No. 92830, 2010-Ohio-774. This doctrine, first articulated by the United States Supreme Court in *Coolidge v. New Hampshire* (1971), 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564, was later refined in *Horton* as follows:

> **"It is, of course, an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at a place from which the evidence could be plainly viewed. There are, moreover, two additional conditions that must be satisfied to justify the warrantless seizure. First, not only must the item be in plain view; its incriminating nature must also be 'immediately apparent.'" *Horton* at 2308. (Internal citations omitted.)**

{¶ 20} From the record, it is clear that all three of the *Horton* conditions are met. First, the officers were conducting a valid traffic stop, which Prude expressly does not challenge. While we agree that ordinarily *Terry* patdowns are not permissible during ordinary traffic stops, Prude's actions in attempting to hide the plastic bag in his waistband and his denial that he did so raised the officers' suspicions to a level that permitted such a patdown.

{¶ 21} Second, the plastic bag was in the officers' plain view, or at least Officer Mazur's view, during much of the encounter with Prude. It was not,

as Prude argues, discovered by Officer Yasenchak during an additional unauthorized search. In fact, the record shows the bag was not discovered during the patdown at all, but during the initial encounter with Officer Mazur as Prude stepped from the car. (Tr. 17.) After Prude exited the car, the bag became plainly visible to Officer Mazur, so Prude's privacy concerns as they relate to a *Terry* patdown are not implicated.

{¶ 22} Third, the officers, based upon their training and experience, were immediately aware of the incriminating nature of the plastic bag as possibly containing contraband, not only because of its physical characteristics, but also because Prude was attempting to hide it from them and then denied it was there even though the officers plainly saw it.[1] As the trial court aptly summarized in its ruling on the motion to suppress:

> **"[B]ased on the totality of the circumstances in this case, those being the fact that the officers observed the vehicle going through a red light; observed that he was trying to stuff something into his waistband; and when queried about it, he denied that he did so to the officers; additionally, the corner of the baggie sticking out of Mr. Prude's belt; all of those events, I believe, justify the officers to have reasonable suspicion and conduct the search they did in fact conduct.**
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> **Particularly, the fact that I do believe the officers' testimony to be more credible that in fact the light was**

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[1] Whether the officers discovered the bag inadvertently or not is of no consequence. See *Horton* at syllabus.

red, which precipitated this whole series of events." (Tr. 141-143.)

{¶ 23} Further, we are not persuaded by Prude's contention that his version of events is more credible than the officers. The fact remains that both officers testified that they saw the drugs in plain view, and the trial court found such testimony persuasive. "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. Here, the trial courts findings of fact are supported by competent, credible evidence, and we are bound accept them. *Burnside*.

{¶ 24} The contraband was not discovered by the officers during the *Terry* patdown or by plain feel, as Prude intimates through the case law he cites. Rather, the officers were operating under the plain view exception to the warrant requirement during their encounter with Prude, since the bag was clearly visible to them during their conversation with him. Prude's arguments that the officers exceed the scope of their authority under *Terry* and that no exception to the warrant requirement applies to the seizure of contraband from his person therefore fails. Prude's assignment of error is overruled. The trial court did not err in denying his motion to suppress.

{¶ 25} Sua sponte, we note that the trial court failed to merge Prude's convictions for the allied offenses of drug possession and drug trafficking at sentencing. The Ohio Supreme Court has held that failure to merge allied offenses constitutes plain error. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶31-32. In Ohio, offenses are allied and should be merged for sentencing when the two crimes correspond to such a degree that commission of one crime will necessarily result in the commission of the other. *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, ¶14. The *Cabrales* court specifically determined that drug trafficking and drug possession were allied offenses.

{¶ 26} Moreover, 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 can be convicted of only one."

{¶ 27} In Counts 1 and 2, appellant was convicted and sentenced for drug possession and drug trafficking related to the crack cocaine found during the traffic stop. Because these offenses are allied, and the record shows that these offenses were based on the same controlled substance, these counts should have merged for sentencing. *Cabrales* at ¶30. The same analysis applies to appellant's convictions for drug possession and trafficking related

to Counts 3 and 4. As such, we remand this case for resentencing, where the State may elect under which offenses it wishes to proceed. See *Underwood.*

{¶ 28} Accordingly, we affirm the trial court's denial of Prude's motion to suppress, but vacate his sentence and remand to the trial court for application of R.C. 2941.25.

It is ordered that appellee recover from 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 denial of his motion to suppress 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.

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MARY EILEEN KILBANE, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
JAMES J. SWEENEY, J., CONCUR