[Cite as *State v. Rox*, 2010-Ohio-5238.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94051

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DIANE ROX

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-512335

BEFORE: McMonagle, J., Gallagher, A.J., and Sweeney, J.

RELEASED AND JOURNALIZED: October 28, 2010

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CHRISTINE T. McMONAGLE, J.:

{¶ 1} Defendant-appellant, Diane Rox, appeals the denial of her motion to suppress and her conviction for carrying a concealed weapon. We affirm.

I

{¶ 2} Rox was indicted in June 2008 for carrying a concealed weapon, with a forfeiture specification. She was evaluated three times for competency to stand trial. The first report, completed by Dr. Barach in October 2008, found her competent; the second report, completed by Dr. Karpawich in February 2009, found her incompetent; and the final report,

completed by Dr. Cerny in April 2009, found her competent. After a hearing on the issue in June 2009, the court found Rox competent.

{¶ 3} Rox filed a motion to suppress, and after a hearing, the trial court denied the motion. In August 2009, Rox entered a plea of no contest to the sole count, and the trial court found her guilty. The court sentenced her to 24 months of community control with conditions and ordered forfeiture of the weapon.

II

{¶ 4} The following facts were elicited at the suppression hearing. The East Cleveland police responded to an apartment building on a call of a female with a gun. Upon arriving at the scene, Detective Mark Allen found two women in a car who said that they had been threatened by Rox with a weapon that she took out of her purse. According to the women, Rox went into the apartment building after she threatened them.

{¶ 5} As Allen was talking to the women, Rox exited the apartment building and the women identified her as the female who had threatened them. The detective testified that Rox was "agitated" while he was trying to talk with her. Rox was placed under arrest for aggravated menacing. By that time, two other officers — Officers Perez and Malone — had arrived. Allen testified that Rox was not handcuffed.

{¶ 6} The detective testified that Rox told the police that she did not have a gun. He asked her if the police could search her vehicle and residence and she said “yes.” Perez and Malone escorted Rox to her apartment to conduct the search. Perez testified that once in the apartment, Rox asked if she could go to the bathroom. After the bathroom was checked for weapons, she was permitted to go in. The officer testified that he did not believe Rox was handcuffed. According to Perez, Rox was “nice,” “completely cooperative,” and never objected to the search or asked that the police stop.

{¶ 7} During the search, Officer Perez found a cigarette lighter that resembled a pistol and told Officer Malone maybe that was what the women had seen and mistaken for a real gun. Rox heard the conversation and agreed that the lighter must have been what the women had seen. Not having found anything else of significance, Malone and Perez did a “once-over” before leaving, during which Perez looked in a hallway closet and saw a purse. He picked it up and “could immediately feel added weight in it,” so he opened it up and found a gun matching the description given by the two women. Rox was then “secured.”

{¶ 8} Rox testified that as she and a friend were pulling into the parking lot at the apartment building, two women got out of their car, yelled at Rox and her friend, and threatened to “blow [them] away.” Rox’s friend left the scene because she was on probation and did not want to get involved;

Rox went into her apartment and called the police. Once she saw that the police had arrived, Rox went back outside and approached them. According to Rox, the police "grabbed" and handcuffed her. She also testified that Detective Allen told the other officers to "go get the gun." The officers "snatched" her apartment keys from her hand and "escorted [her] up [to her apartment] against [her] wishes."

{¶ 9} Rox testified that she was handcuffed during the entirety of the search and never went to the bathroom. According to Rox, Officer Perez asked her if he could use her restroom, and she consented to that. Rox denied that she had a purse or a gun with her when she encountered the two women. She testified that she had the cigarette lighter, which she uses in her car, and that was "probably what [the two women] saw."

III

{¶ 10} It was established at the competency hearing that Rox had a history of mental illness and substance abuse. She had been prescribed medications to treat her illnesses; sometimes she was compliant in taking the medications, other times she was not. At times Rox was able to answer the questions posed by her evaluators, (Drs. Barach and Cerny), and they were of the opinion that she was able to understand the nature of the charge and

assist in her defense, but at another time, her evaluator, (Dr. Karpawich), opined that her "sporadic moods" rendered her incompetent.

IV

{¶ 11} In her first assignment of error, Rox contends that the trial court did not comply with Crim.R. 11 in accepting her plea because it did not resolve her "confusion about the legal proceedings, the nature of the charges and the potential ramifications of her plea." Rox implicitly challenges the trial court's finding that she was competent in this assigned error.

{¶ 12} R.C. 2945.37(B) recognizes the right of a criminal defendant not to be tried or convicted of a crime while incompetent. It provides:

{¶ 13} "In a criminal action in a court of common pleas or a municipal court, the court, prosecutor, or defense may raise the issue of the defendant's competence to stand trial. If the issue is raised before trial, the court shall hold a hearing on the issue as provided in this section. * * *."

{¶ 14} "A defendant is presumed to be competent to stand trial. If, after a hearing, the court finds by a preponderance of the evidence that, because of the defendant's present mental condition, the defendant is incapable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense, the court shall find the defendant incompetent to stand trial and shall enter an order authorized by section 2945.38 of the Revised Code." R.C. 2945.37(G).

{¶ 15} Under constitutional due process principles, the standard for determining competency to stand trial is the same as the standard for determining competency to enter a guilty plea or plea of no contest. *State v. Bolin* (1998), 128 Ohio App.3d 58, 61-62, 713 N.E.2d 1092. A defendant must present evidence to rebut the presumption of competency. *State v. Williams* (1986), 23 Ohio St.3d 16, 19, 490 N.E.2d 906.

{¶ 16} The court held a hearing on Rox's competency. Drs. Cerny and Karpawich testified. The gist of their combined testimonies was that Rox had mental illnesses and her level of functioning with those illnesses fluctuated, at least in part, depending on whether she was compliant with taking her prescribed medications. Because Rox was competent at times, we examine the plea proceeding to determine whether she was competent then.

{¶ 17} Crim.R. 11(C)(2) mandates that a trial court shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

{¶ 18} "(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

{¶ 19} "(b) Informing the defendant of and determining that the defendant understands the effect of the plea of * * * no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

{¶ 20} "(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself."

{¶ 21} Ohio courts have divided Crim.R. 11 requirements into two categories: constitutional (Crim.R. 11(C)(2)(c)) and nonconstitutional rights (Crim.R. 11(C)(2)(a) & (b)). See *State v. Parks*, Cuyahoga App. No. 86312, 2006-Ohio-1352, ¶6-7, citing *State v. Higgs* (1997), 123 Ohio App.3d 400, 402, 704 N.E.2d 308; *State v. Gibson* (1986), 34 Ohio App.3d 146, 147, 517 N.E.2d 990. A trial court must strictly comply with Crim.R. 11 in informing a defendant of her constitutional rights. *Parks* at id. Substantial compliance is needed for informing a defendant of her nonconstitutional rights. Id.

{¶ 22} We first review for the trial court's compliance with advisement to Rox of her constitutional rights. The trial court strictly complied, advising Rox as follows: "You have the right to go to trial in this case. You have the right to have your case tried to a Judge or a jury. You have the right to have

[defense counsel] confront the witnesses who come in to testify against you and cross-examine them.

{¶ 23} "You can subpoena witnesses for you and you can be a witness if you want to tell your story. But, nobody can force you to do that. And, nobody can comment to a jury on the fact that you chose not to do it.

{¶ 24} "You, most importantly, have the right at trial to require the State of Ohio [to] prove you guilty beyond a reasonable doubt.

{¶ 25} "Do you understand that when you plead no contest, you are giving up your right to trial?" Rox responded, "[y]es."

{¶ 26} We next review for the trial court's determination that Rox voluntarily entered the plea, with an understanding of the nature of the charges, maximum penalty, and effect of the plea. Rox contends that "the record clearly demonstrates [she] was unable to comprehend the nature of the charges, potential consequences of her plea, and the ramifications of her plea[,]" and cites to her repeated references during the plea hearing that the case was going to be appealed. We disagree with her contention.

{¶ 27} Our review of the record demonstrates that Rox understood the nature of the proceedings. She wanted to make certain, however, that the trial court's denial of her suppression motion would be preserved for appellate review, which can be done with a no contest plea. See Crim.R. 12(I); *Columbus v. Sullivan* (1982), 4 Ohio App.3d 7, 9, 446 N.E.2d 485.

{¶ 28} Further, the court took into consideration Rox's mental health issues and medications, engaging in the following colloquy:

{¶ 29} "[Judge]: * * * What I really want to know is whether you had any alcohol or drugs today that might be confusing you this morning about what you're doing?

{¶ 30} "[Rox]: Other than pain medication, I didn't have alcohol at all today.

{¶ 31} "[Judge]: You're not confused this morning because of your pain medication?

{¶ 32} "[Rox]: No.

{¶ 33} "[Judge]: You're thinking clearly?

{¶ 34} "[Rox]: Yes."

{¶ 35} Rox was also advised of the possible penalties and postrelease control, and stated that she understood.[1] At the conclusion of the hearing, Rox stated that her attorney "explained [everything] to me very carefully[,]" and she was "happy" with his work "[a]s long as I get to appeal."

{¶ 36} On this record, we find that Rox understood the nature of the charges and the consequences of her plea and, therefore, that the trial court

[1] She asked the court, "[b]ut I won't go to jail today, will I?" The court responded, "[n]o, definitely not. I won't let that happen[,]" and Rox said "okay." She further asked if her sentence would be "active or inactive," and responded "[a]ll right" when the court told her that would be up to the sentencing judge (a visiting judge took the plea).

complied with Crim.R. 11 in accepting her plea. The first assignment of error is overruled.

V

{¶ 37} In her second assignment of error, Rox contends that the trial court erred by denying her motion to suppress.

{¶ 38} 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* (1977), 124 Ohio App.3d 706, 707 N.E.2d 539.

{¶ 39} Rox contends that after she was arrested, the police "forced" her into her apartment and conducted a search of the apartment without a warrant or her consent.

{¶ 40} The Fourth Amendment of the United States Constitution protects against unreasonable searches and seizures. Ordinarily, the police must have a warrant in order to conduct a search pursuant to the Fourth Amendment. However, consent to search is an exception to the warrant

requirement. *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 223, 93 S.Ct. 2041, 36 L.Ed.2d 854; *State v. Posey* (1988), 40 Ohio St.3d 420, 427, 534 N.E.2d 61.

{¶ 41} Whether consent to search is voluntarily given is a question of fact to be determined from all of the circumstances surrounding the search. *Ohio v. Robinette* (1996), 519 U.S. 33, 40, 117 S.Ct. 417, 136 L.Ed.2d 347. The state has the burden of proving that a defendant's consent to search was given freely and voluntarily. *Florida v. Royer* (1983), 460 U.S. 491, 497, 103 S.Ct. 1319, 75 L.Ed.2d 229. "[W]hether consent to search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined by the totality of the circumstances." *Schneckloth* at 227.

{¶ 42} The state contends that Rox voluntarily consented to a search of her apartment and relies on the testimony of Detective Allen and Officer Perez. Allen testified that Rox stated at the scene of the incident that she did not have a gun, and that he asked her if the police could search her vehicle and apartment and she said "yes." Although the record is not completely clear as to whether Perez was on the scene when Allen asked for permission to search, Perez testified that during the search Rox was "nice," "completely cooperative," and never objected to the search or asked that the police stop.

{¶ 43} We are mindful that, according to Allen's testimony, Rox consented to the search while she was in police custody. In *Schneckloth*, supra, the Supreme Court noted that its standard for consent may not be applicable to situations where an accused is in custody. Id. at footnotes 29, 36. A few years later, the Supreme Court addressed the issue in *United States v. Watson* (1976), 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598. In *Watson*, the defendant gave his consent to search his car while in custody. The Supreme Court held that "custody alone has never been enough in itself to demonstrate a coerced confession or consent to search." Id. at 424.

{¶ 44} The issue here is one of credibility. "Appellate courts give great deference to the factual findings of the trier of facts. At a suppression hearing, the trial court serves as the trier of fact, and must judge the credibility of witnesses and the weight of the evidence. The trial court is in the best position to resolve questions of fact and evaluate witness credibility. In reviewing a trial court's decision on a motion to suppress, an appellate court accepts the trial court's factual findings, relies on the trial court's ability to assess the credibility of witnesses, and independently determines whether the trial court applied the proper legal standard to the facts as found. An appellate court is bound to accept the trial court's factual findings as long as they are supported by competent, credible evidence." (Internal citations omitted.) *State v. Hurt*, Montgomery App. No. 21009, 2006-Ohio-990, ¶16.

The finding that Rox consented to the search of her apartment was so supported. Accordingly, the second assignment of error is overruled.

Judgment affirmed.

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. 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.

CHRISTINE T. McMONAGLE, JUDGE

SEAN C. GALLAGHER, A.J., and
JAMES J. SWEENEY, J., CONCUR