[Cite as *State v. Douglas*, 2008-Ohio-5568.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C. A. No. 24069
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
RASHIDD EUGENE DOUGLAS	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 06 09 3561(A)

DECISION AND JOURNAL ENTRY

Dated: October 29, 2008

WHITMORE, Judge.

{¶1} Defendant-Appellant, Rashidd Eugene Douglas, appeals from his conviction and sentence in the Summit County Court of Common Pleas. This Court affirms in part and reverses in part.

I

{¶2} On the night of September 28, 2006, Akron Police Detective Michael Zimcosky spotted two parked vehicles while patrolling in his unmarked car. Detective Zimcosky suspected that the vehicles' occupants were engaged in illegal activity based on several factors, including their response to his presence and their location. Consequently, Detective Zimcosky radioed dispatch and asked for the assistance of other officers in a marked cruiser. Officer Robert Richardson and his partner responded to the call.

{¶3} Before Officer Richardson and his partner could arrive, one of the parked vehicles left the scene and proceeded toward Russell Avenue. Officer Richardson and his partner caught

up with the vehicle, driven by Douglas, and stopped it as Douglas pulled onto Russell Avenue. Other officers also arrived to assist. When the officers approached Douglas' vehicle, one officer shined his flashlight in the back seat on the driver's side and spotted a plastic bag filled with marijuana in plain view. Subsequently, officers arrested Douglas and his passenger, Brandon Jones. In addition to the large bag of marijuana the officers found in Douglas' car, officers also found $5,705 in cash on Douglas' person.

{¶4} On October 10, 2006, the grand jury indicted Douglas on two counts: trafficking in marijuana, a felony of the fourth degree pursuant to R.C. 2925.03(A)(2), and possession of marijuana, a felony of the fifth degree pursuant to R.C. 2925.11(A). On October 25, 2006, Douglas filed a motion to suppress in which he argued that officers lacked reasonable suspicion to execute a traffic stop of his vehicle. The trial court subsequently denied the motion, and the matter proceeded to a jury trial on May 7, 2007. The jury found Douglas guilty on both counts.

{¶5} The trial court sentenced Douglas immediately after the jury returned its verdict. On the record, the court sentenced Douglas to two concurrent terms of eighteen months in prison, but suspended the terms on the condition that Douglas successfully complete two years of probation. In the court's written journal entry, however, the court changed Douglas' sentence to the extent that it decreased the term of his trafficking conviction to twelve months.

{¶6} On February 4, 2008, Douglas filed his notice of appeal. Douglas' appeal is now before this Court and raises two assignments of error for our review.

II

Assignment of Error Number One

"THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS ILLEGALLY SEIZED EVIDENCE."

{¶7} In his first assignment of error, Douglas argues that the trial court erred in denying his motion to suppress. Specifically, Douglas argues that officers did not have reasonable suspicion to conduct an investigatory stop. We disagree.

{¶8} In making its ruling on a motion to suppress, the trial court makes both legal and factual findings. *State v. Jones* (Mar. 13, 2002), 9th Dist. No. 20810, at *1. It follows that this Court's review of a denial of a motion to suppress involves both questions of law and fact. *State v. Long* (1998), 127 Ohio App.3d 328, 332. As such, this Court will accept the factual findings of the trial court if they are supported by some competent and credible evidence. *State v. Searls* (1997), 118 Ohio App.3d 739, 741. However, the application of the law to those facts will be reviewed de novo. Id.

{¶9} A traffic stop constitutes a seizure under the Fourth Amendment. *Whren v. United States* (1996), 517 U.S. 806, 809-10. An investigative traffic stop does not violate the Fourth Amendment where an officer has reasonable suspicion that the individual is engaged in criminal activity. *Maumee v. Weisner* (1999), 87 Ohio St.3d 295, 299. To justify an investigative stop, an officer must point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Id., quoting *Terry v. Ohio* (1968), 392 U.S. 1, 21. In evaluating the facts and inference supporting the stop, a court must consider the totality of the circumstances as "viewed through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training in evaluating the facts and inferences supporting the stop." *State v. Bobo* (1988), 37 Ohio St.3d 177, 179, quoting *United States v. Hall* (C.A.D.C.1976), 525 F.2d 857, 859. Accord *State v. Freeman* (1980), 64 Ohio St.2d 291, paragraph one of the syllabus.

{¶10} The trial court determined that officers had reasonable suspicion to conduct an investigatory stop of Douglas' vehicle based on the testimony presented at trial. The court found that Detective Zimcosky, an experienced officer, witnessed suspicious behavior on Douglas' part, and that behavior, when coupled with Douglas' location, warranted the stop of the vehicle.

{¶11} Detective Zimcosky testified that he had sixteen years of experience as an Akron Police Officer and specialized experience dealing with narcotics investigations. On the night of September 28, 2006, Detective Zimcosky spotted Douglas' vehicle parked alongside another vehicle in the west Akron area. Detective Zimcosky specified that the west Akron area is a high crime area where drug purchases and arrests often occur. Thus, his suspicions were raised as he proceeded towards the parked vehicles in his unmarked car.

{¶12} Detective Zimcosky testified that several individuals were standing around the two parked vehicles. As he approached, Detective Zimcosky noted that all of the individuals inside and around the two cars stopped talking and proceeded to "eyeball" him. He also believed that one of the parked vehicles had out of state license tags, which further aroused his suspicion as to the possibility that a drug transaction was occurring. Detective Zimcosky drove two blocks forward and parked his car so that he could continue to observe the two parked vehicles. He noted that the individuals crowded around the cars waited several minutes to resume their conversation. At this point, Detective Zimcosky radioed dispatch to request that a marked car stop Douglas' vehicle.

{¶13} Detective Zimcosky admitted that other extenuating circumstances could have accounted for the foregoing series of events, such as the group near Douglas' vehicle "eyeball[ing]" his unmarked car because it was the only car in the street at the time. Yet, Detective Zimcosky testified that in his experience the totality of all the circumstances that he

witnessed indicated that a drug transaction was occurring. Thus, the record contains competent, credible evidence in support of the trial court's factual findings.

{¶14} In a totality of the circumstances analysis, "[n]o single factor is dispositive[.]" *State v. White*, 9th Dist. No. 05CA0060, 2006-Ohio-2966, at ¶16. Rather, this Court looks to "specific and articulable facts *** which fall into four general categories: (1) location; (2) the officer's experience, training or knowledge; (3) the suspect's conduct or appearance; and (4) the surrounding circumstances." Id., citing *Bobo*, 37 Ohio St.3d at 178-79; *State v. Andrews* (1991), 57 Ohio St.3d 86, 87-88. Reasonable suspicion may arise when an experienced officer witnesses suspicious movements, "such as watching-out," in a high crime area. *White* at ¶19.

{¶15} Here, Detective Zimcosky, a veteran with sixteen years experience and specialized experience in narcotics detection, witnessed Douglas' vehicle remain in a parked position alongside another vehicle and several pedestrians. He testified that the vehicles were parked in a high crime and drug area, that he believed that one of the vehicles had out-of-state license tags, and that all of the foregoing events took place late in the evening. Finally, Detective Zimcosky testified that the group of individuals he observed all exhibited suspicious behavior, which included "eyeball[ing]" him as he drove by and stopping their conversation until after he had passed them and driven away. Based on the level of Detective Zimcosky's experience, the behavior he observed, the late hour, and the nature of the surrounding neighborhood, we agree with the trial court's determination that officers had reasonable suspicion to stop Douglas' vehicle. See *Bobo*, 37 Ohio St.3d at 179 (finding that officer with twenty years experience and specialized drug surveillance training had reasonable suspicion to stop vehicle when he observed vehicle legally parked in street, late at night, in a high drug activity area, and saw the defendant passenger look at him and then bend down "as if to hide something"); *State v. Freeman* (1980),

64 Ohio St.2d 291, 295 (finding that officer had reasonable suspicion to stop vehicle after he had observed the vehicle parked with engine off and the driver sitting inside for approximately twenty minutes in a high crime area at 3:00 a.m.); *State v. Jacobs* (May 31, 1995), 9th Dist. No. 16916, at *3 (finding reasonable suspicion where officer saw car stopped outside a known drug house and an individual standing at the driver's window, the individuals stopped and watched the police cruiser as it drove past, the officer testified that this was a common method of completing a drug transaction, and where the car sped away when officers returned to investigate further). As Douglas has not challenged the constitutionality of the officers' stop beyond their initial justification for the stop, we conclude that the trial court properly denied Douglas' motion to suppress. Douglas' first assignment of error is overruled.

Assignment of Error Number Two

> "THE TRIAL COURT COMMITTED PLAIN ERROR IN SENTENCING APPELLANT TO A SUSPENDED TERM OF IMPRISONMENT OF EIGHTEEN MONTHS FOR A FIFTH DEGREE FELONY OFFENSE."

{¶16} In his second assignment of error, Douglas argues that the trial court committed plain error by sentencing him to eighteen months in prison for a felony of the fifth degree. We agree.

{¶17} The record reflects that the trial court sentenced Douglas to two terms of eighteen months on the record after the jury returned its verdict. One eighteen-month term pertained to Douglas' trafficking conviction, a fourth degree felony, while the other pertained to his possession conviction, a fifth degree felony. R.C. 2929.14(A) allows a trial court to impose a maximum sentence of eighteen months for a fourth degree felony, but only a maximum sentence of twelve months for a fifth degree felony. R.C. 2929.14(A)(4)-(5). Accordingly, the trial court orally sentenced Douglas to six months more than the maximum permitted by R.C. 2929.14(A)

with regard to his possession conviction. Neither Douglas, nor the State, objected to the trial court's sentence. Instead, the trial court sua sponte reduced Douglas' sentence in its written sentencing entry so that he would receive one term of eighteen months and one term of twelve months. Yet, the trial court assigned the larger term of eighteen months to Douglas' possession charge, the lower felony with the maximum potential sentence length of twelve months. See R.C. 2929.14(A)(5). Douglas acknowledges his failure to object to his sentence when the trial court orally announced it, but argues that the trial court committed plain error by exceeding R.C. 2929.14's terms.

{¶18} Crim.R. 52(B) permits a reviewing court to take notice of "[p]lain errors or defects affecting substantial rights" even if a party forfeits an error by failing to object to the error at trial. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶15, quoting Crim.R. 52(B). To prevail on a plain error argument, an appellant must demonstrate an obvious error, which affected his substantial rights. *State v. Barnes* (2002), 94 Ohio St.3d 21, 27. "Courts are to notice plain error 'only to prevent a manifest miscarriage of justice.'" *Payne* at ¶16, quoting *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus.

{¶19} The State concedes that the trial court erred by sentencing Douglas to eighteen months on his fifth degree felony possession conviction. We agree that the trial court committed an obvious error when it sentenced Douglas to a term beyond R.C. 2929.14(A)'s maximum allowable term. Furthermore, we agree that the error affected Douglas' substantial rights. Although the court ordered Douglas' sentences to run concurrently, the court reduced his trafficking conviction sentence. Had the court imposed its oral sentence, ordering Douglas to serve equal eighteen-month consecutive terms, his improper possession sentence would not have overshadowed his permissible trafficking sentence. By amending Douglas' trafficking sentence

to a twelve-month term, however, the trial court rested the length of Douglas' term solely upon the improper eighteen-month term attached to his possession conviction. Consequently, the trial court's error affected the final outcome of Douglas' sentence. See *Barnes*, 94 Ohio St.3d at 27.

{¶20} As the trial court committed plain error in sentencing Douglas to a term of eighteen months on his fifth degree felony possession conviction, Douglas' second assignment of error is sustained.

III

{¶21} Douglas' first assignment of error is overruled. His second assignment of error is sustained, and his sentence is hereby vacated pursuant to that determination. The judgment of the Summit County Court of Common Pleas is affirmed in part, reversed in part, and the matter is remanded for re-sentencing.

Judgment affirmed in part,
reversed in part,
and cause remanded.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

BETH WHITMORE
FOR THE COURT

CARR, P. J.
CONCURS IN JUDGMENT, SAYING:

{¶22} I concur in judgment only in regard to Douglas' second assignment of error. I have previously stated that a defendant need not object to his sentence in order to preserve any errors with his sentence on appeal. See, e.g., *State v. Kienzle*, 9th Dist. No. 07CA009078, 2007-Ohio-4346, at ¶14 (Carr, P.J., concurring); *State v. Barnes*, 9th Dist. No. 06CA009034, 2007-Ohio-2460, at ¶10 (Carr, J., concurring, in part, and dissenting, in part). Furthermore, this Court has not been consistent in requiring a defendant either to have objected below or argued plain error before we have addressed the merits of his assignment of error challenging the validity of his sentence. See *State v. MacNellis*, 9th Dist. No. 07CA0103-M, 2008-Ohio-3207, at ¶22-24 (sustaining a defendant's challenge to a sentence beyond the maximum term in the absence of an objection below or an assertion of plain error). Accordingly, even though Douglas acknowledges his failure to object below and now asserts plain error, I do not believe that the Court must engage in a plain error analysis. Rather, I would sustain Douglas's second assignment of error solely for the reason that a trial court has no authority to sentence a defendant in excess of the statutory maximum. See *State v. Dudukovich*, 9th Dist. No. 05CA008729, 2006-Ohio-1309, at ¶19 (interpreting *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, as granting a trial court discretion to impose a sentence within the statutory range). I believe it is immaterial whether an improper sentence, i.e., one outside the statutory range, is

subsumed within another valid concurrent sentence. Accordingly, I concur in judgment only as to this assignment of error.

MOORE, J.
DISSENTS, SAYING:

{¶23} I respectfully dissent from the majority's finding that the facts in the instant case amounted to reasonable suspicion to justify the investigative traffic stop.

{¶24} As the majority aptly points out, if the officers had a reasonable suspicion that Douglas was engaged in criminal activity, the investigative stop was not in violation of the Fourth Amendment. *Maumee*, 87 Ohio St.3d at 299. To justify the stop, the officer needed to point to "specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Id., quoting *Terry*, 392 U.S. at 21. "A court reviewing the officer's actions must give due weight to his experience and training and view the evidence as it would be understood by those in law enforcement." *State v. Andrews*, 57 Ohio St.3d at 88. "[A]n officer's reliance on a mere 'hunch[,]' [however,] is insufficient to justify a stop[.]" *United States v. Arvizu* (2002), 534 U.S. 266, 274.

{¶25} Although the detective testified to some facts and stated that he was suspicious of the activity on the street, there was no testimony whatsoever with regard to any rational inferences that he made from his observations of those facts. He testified that around 10:50 p.m. on Thursday, September 28, 2006, in a high crime and drug area, he observed a group of individuals congregated around two cars. He testified that it was a warm fall night. The detective stated that it was fair to say that individuals in that neighborhood often socialized outside. He stated that as he drove by, the individuals stopped talking and watched him. Finally, he testified that he *believed* that one of the cars had out-of-state tags, although he could not be

sure. Based on his training, the detective testified that he believed a drug transaction was about to take place.

{¶26} Noticeably absent from his testimony was any explanation as to how he arrived at this conclusion based upon the facts in this case. He did not testify to any "'rational inferences from those facts'" that would have reasonably warranted the investigative search. *Maumee*, 87 Ohio St.3d at 299, quoting *Terry*, 392 U.S. at 21. Without an explanation as to how the detective got from point A to point B, I do not find that the testimony demonstrated reasonable suspicion. Instead, I would find that his repeated testimony that "I felt that something was not right, something was suspicious[,]" is more akin to a "hunch." *Arvizu*, 534 U.S. at 274, see, also, *State v. Wagner-Nitzsche*, 9th Dist. No. 23944, 2008-Ohio-3953, at ¶15.

{¶27} I recognize that police officers who are fighting drug crime must be given the tools to adequately combat the activity that often takes place under cover of darkness. The officers are permitted to rely upon their experience and training when deciding whether to conduct investigative searches. This governmental interest, however, must be balanced with an individual's right against unreasonable search and seizure as guaranteed by the Fourth Amendment. As the United States Supreme Court has stated, anything less than reasonable suspicion "would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction. *** And simple good faith on the part of the arresting officer is not enough. *** If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be secure in their persons, houses, papers and effects, only in the discretion of the police." (Citation omitted.) *Terry*, 392 U.S. at 22. It seems to me that at its core, this stop was precipitated by the fact that young men congregating around two cars "eyeballed" an undercover

officer as he drove by. This conduct simply cannot be the standard to support even an investigative stop. Neither our state nor federal constitution compels citizens to walk about with their eyes averted in order to avoid being detained for investigation. In fact, a subject's *lack* of eye contact is frequently suggested as a factor in evaluating reasonable suspicion. See, e.g., *United States v. Brigham* (C.A.5, 2004), 382 F.3d 500, 508; *United States v. Sanchez* (C.A.5, 2007), 225 Fed.Appx. 288. As I do not find that the officer's testimony amounted to reasonable suspicion, I respectfully dissent from the majority's decision.

APPEARANCES:

JEFFREY N. JAMES, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and THOMAS J. KROLL, Assistant Prosecuting Attorney, for Appellee.