[Cite as *State v. Larios*, 2012-Ohio-4525.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

PREBLE COUNTY

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| STATE OF OHIO, | : | |
| Plaintiff-Appellee, | : | CASE NO. CA2009-07-019 |
| | : | <u>O P I N I O N</u><br>10/1/2012 |
| - vs - | : | |
| JUAN C. LARIOS, | : | |
| Defendant-Appellant. | : | |

CRIMINAL APPEAL FROM PREBLE COUNTY COURT OF COMMON PLEAS
Case No. 09-CR-10254

Martin P. Votel, Preble County Prosecuting Attorney, Kathryn M. Worthington, Courthouse, 101 East Main Street, Eaton, Ohio 45320, for plaintiff-appellee

Neal D. Schuett, 121 West High Street, Oxford, Ohio 45056, for defendant-appellant

**RINGLAND, J.**

**{¶ 1}** Defendant-appellant, Juan Larios, appeals his conviction and sentence from the Preble County Court of Common Pleas.

**{¶ 2}** On March 7, 2009, appellant was a passenger in a vehicle traveling on Interstate 70 in Preble County. Ohio State Highway Patrol Officer Darren Fussner pulled the vehicle over after detecting a speed of 74 m.p.h. Officer Fussner testified that it took nearly a minute from the time he activated his lights until the vehicle pulled off the road and stopped.

**{¶ 3}** Upon stopping, Officer Fussner noticed a lot of movement taking place between the driver, Mario Rodriguez, and appellant in the vehicle. He chose not to approach the vehicle, but rather signaled for Rodriguez to exit the vehicle and come back to him. Officer Fussner testified that Rodriguez exited the vehicle facing away from him, lifted up his shirt over his waist and straightened it out. The officer noted that Rodriguez suspiciously exited the vehicle without shoes on, wearing only socks on his feet. Rodriguez then walked back to Officer Fussner and shook his hand, at which time Officer Fussner noticed a black substance on Rodriguez's hand and the front of his shirt. Rodriguez informed the officer that he had rented the vehicle in California, and was driving to New York. With the permission of Rodriguez, Officer Fussner conducted a pat-down search of Rodriguez and noticed a hard, brick-like object on Rodriguez's waistband. After handcuffing him and removing the two objects that were shaped like shoe soles from Rodriguez's waistband, Officer Fussner asked if the substance was cocaine or heroin. Rodriguez replied that he wasn't sure, but he believed it was one of those.

**{¶ 4}** Officer Fussner testified that after removing the items from Rodriguez's waistband, he repeatedly looked back towards appellant and noticed that he was looking at him in the rearview mirror. Knowing that appellant was aware he had discovered whatever was in Rodriguez's waistband and placed him under arrest, Officer Fussner drew his weapon, approached the vehicle, yelled for appellant to put his hands up and removed him from the vehicle. Officer Fussner then ordered appellant to the ground and handcuffed him. He then searched appellant for weapons and asked that he remove his shoes. After pulling off the top of the bottom of the sole, Officer Fussner discovered another set of inserts like those he found in Rodriguez's waistband. Appellant was *Mirandized* and asked what was in the packages. Officer Fussner testified that appellant told him he wasn’t sure what was in the packages, but that he was being paid to transport them. Officer Fussner conducted a field

test on one of the packages and it tested positive for heroin.

**{¶ 5}** A suppression hearing was held on June 22, 2009, wherein appellant argued that he was illegally searched and seized by Officer Fussner during the traffic stop on March 7, 2009. The trial court denied appellant's motion to suppress.

**{¶ 6}** On June 30, 2009, appellant pled no contest to one count of possession of heroin, a felony of the first degree in violation of R.C. 2925.11(A) and (C)(6)(f), carrying a mandatory sentence of ten years in prison and a license suspension for a minimum of six months. Appellant further pled no contest to a one count of possession of criminal tools, a felony of the fifth degree in violation of R.C. 2923.24(A)(2), carrying a sentence of between six and twelve months. The trial court sentenced appellant to the mandatory sentence of ten years in prison on the first count, and twelve months in prison on the second count. The sentences were ordered to run concurrently. The court suspended appellant's driver's license for six months and waived fines as he was found indigent. However, appellant was ordered to pay all costs of prosecution, court appointed counsel costs, and any supervision fees permitted pursuant to R.C. 2929.18(A)(4).

**{¶ 7}** Appellant now appeals the decision and sentence of the trial court, raising two assignments of error for our review.

**{¶ 8}** Assignment of Error No. 1:

**{¶ 9}** THE TRAIL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE AND STATEMENTS OBTAINED AS THE RESULT OF HIS ILLEGAL [DETENTION] AND SEARCH.

**{¶ 10}** Within this assignment of error, appellant raises two issues for our review: (1) "the arresting officer did not have probable cause to arrest [appellant]"; and (2) "the search of [appellant's] shoes by the arresting officer was constitutionally invalid."

**{¶ 11}** A trial court's ruling on a motion to suppress presents an appellate court with a

mixed question of law and fact. *State v. Cochran*, 12th Dist. No. CA2006-10-023, 2007-Ohio-3353, ¶ 12. When considering a motion to suppress, the trial court assumes the role of trier of fact. *Id.* Because the trial court can personally observe the witnesses, the trial court is in the best position to evaluate their credibility and thus to resolve any disputed factual issues. *Id.* A reviewing court will accept the trial court's findings of fact so long as they are supported by competent, credible evidence. *Id.* However, a reviewing court "independently reviews the trial court's legal conclusions based on those facts and determines, without deference to the trial court's decision, whether as a matter of law, the facts satisfy the appropriate legal standard." *Id.*

**{¶ 12}** In order to arrest a person without a warrant an officer must have probable cause. *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 225 (1991). The test for establishing probable cause to arrest without a warrant is whether the facts and circumstances within an officer's knowledge were sufficient to warrant a prudent individual in believing that the defendant had committed or was committing an offense. *Id.* In making this determination, we examine the totality of the facts and circumstances. *State v. Homan*, 89 Ohio St.3d 421, 427, 2000-Ohio-212; *State v. Oglesby*, 12th Dist. No. CA2004-12-027, 2005-Ohio-6556, ¶ 17.

**{¶ 13}** In the present case, the totality of the facts and circumstances were sufficient for Officer Fussner to believe that appellant had committed or was committing an offense. He observed the vehicle taking an excessive amount of time to pull over. He saw significant movement between Rodriguez and appellant before Rodriguez exited the car. Officer Fussner witnessed Rodriguez adjusting his shirt over his waistband. As the trial court noted, appellant clearly saw Rodriguez hiding the drugs on his person upon exiting the vehicle. While conducting a pat-down for weapons following Rodriguez's suspicious activities, Officer Fussner located contraband on Rodriguez's waistband. He saw that appellant was watching

all of this happen in the rearview mirror. He further discovered that the two men were traveling across the country together. The facts and circumstances indicated that appellant was more than just a bystander who happened to be in the vehicle, but was likely a party to whatever activities Rodriguez was engaged in. Given the totality of the facts and circumstances within Officer Fussner's knowledge, a prudent person would believe that appellant was engaging with Rodriguez in the transport of contraband similar to that found in the sole-shaped objects in Rodriguez's waistband. Accordingly, Officer Fussner had probable cause to arrest appellant.

**{¶ 14}** A warrant is not required for a search incident to a valid arrest. *State v. Rice*, 69 Ohio St.2d 422, 428 (1982), citing *Michigan v. DeFillippo*, 443 U.S. 31, 35, 99 S.Ct. 2627, 2631 (1979). Therefore, having found that Officer Fussner had probable cause to arrest appellant, we find no error in the trial court's denial of appellant's motion to suppress evidence obtained from the resulting warrantless search of appellant's shoes.

**{¶ 15}** In light of the forgoing, having found that the officer had probable cause to arrest appellant and therefore conducted a search incident to a valid arrest, appellant's first assignment of error is overruled.

**{¶ 16}** Assignment of Error No. 2:

**{¶ 17}** THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT FAILED TO ADVISE THE DEFENDANT OF HIS RIGHT TO ALLOCUTION.

**{¶ 18}** Within this assignment of error, appellant argues that his "right to allocution was violated when the court failed to explicitly ask [appellant] if he wanted to make a statement or offer further information before sentencing."

**{¶ 19}** Crim.R. 32(A) provides that before imposing sentence in a criminal trial, the trial court shall afford counsel an opportunity to speak on behalf of the defendant and "address

the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment." *State v. Reynolds*, 80 Ohio St.3d 670, 684, 1998-Ohio-171.

**{¶ 20}** Although not considered a constitutional right, "the right of allocution is firmly rooted in the common-law tradition." *State v. Copeland*, 12th Dist. No. CA2007-02-039, 2007-Ohio-6168, ¶ 6, citing *Green v. United States*, 365 U.S. 301, 304, 81 S.Ct. 653 (1961); *State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, ¶ 100-103. This right is "both absolute and not subject to waiver due to a defendant's failure to object." *State v. Collier*, 2nd Dist. Nos. 2006 CA 102 and 2006 CA 104, 2007-Ohio-6349, ¶ 92.

**{¶ 21}** Crim.R. 32 does not merely give the defendant a right to allocution; it imposes an affirmative requirement on the trial court to ask if he or she wishes to exercise that right. *State v. Campbell*, 90 Ohio St.3d 320, 323-324, 2000-Ohio-183. However, while provisions of Crim.R. 32(A) are mandatory in both capital and noncapital cases, a trial court's failure to address the defendant at sentencing is not prejudicial in every case; when a trial court imposes a sentence without first asking the defendant whether he or she wishes to exercise the right of allocution created by Crim.R. 32(A), resentencing is not required where the error is invited error or harmless error. *Id.* at 323 and 325; *State v. Myers*, 97 Ohio St.3d 335, 2002-Ohio-6658, ¶ 135.

**{¶ 22}** In the present case, although the trial court erroneously failed to give appellant an opportunity for allocution, the error was harmless. As indicated above, the trial court sentenced appellant to the minimum mandatory prison term required, waived all fines and notified him that he would be subject to mandatory postrelease control. While he was ordered to pay costs, the state correctly notes that, "although costs in criminal cases are assessed at sentencing and are included in the sentencing entry, costs are not punishment, but are more akin to a civil judgment for money." *State v. Threatt*, 108 Ohio St.3d 277, 2006-

Ohio-905, ¶ 15; *Accord State v. Smith*, 12th Dist. No. CA2010-06-057, 2011-Ohio-1188, ¶ 13. Any allocution by appellant could have had no positive effect on the results of the proceeding. Therefore, the trial court's failure to provide appellant an opportunity for allocution was harmless.

**{¶ 23}** In light of the foregoing, having found that the trial court's failure to address appellant personally was harmless, appellant's second assignment of error is overruled.

**{¶ 24}** Judgment affirmed.

HENDRICKSON, P.J., and PIPER, J., concur.