[Cite as *State v. Porter,* 2009-Ohio-3112.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PICKAWAY COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	
	:	Case No. 08CA26
v.	:	
	:	**DECISION AND**
JOEY J. PORTER,	:	**JUDGMENT ENTRY**
	:	
Defendant-Appellant	:	File-stamped date: 5-26-09

APPEARANCES:

Mark J. Miller, Columbus, Ohio, for appellant.

Judy C. Wolford, Pickaway County Prosecutor and Jayme Hartley Fountain, Assistant Pickaway County Prosecutor, Circleville, Ohio, for appellee.

Kline, P.J.:

{¶1} Joey J. Porter appeals his three felony convictions and sentences from the Pickaway County Common Pleas Court. After Porter pled no contest, the trial court found him guilty of two counts of burglary and one count of attempted burglary. On appeal, Porter contends that the trial court erred when it denied his motion to suppress because the officer did not have reasonable suspicion to stop the van. Because the officer could articulate specific facts that would warrant a person of reasonable caution in the belief that the person stopped has committed or is committing a crime, we disagree. The trial court orally imposed a three-year term of post-release control in his presence at the sentencing hearing, but the trial court's sentencing entry stated it imposed a five-year term of post-release control. Based on this discrepancy, Porter further contends that the trial court must re-sentence him. Because the trial court

imposed the five-year term of post-release control outside his presence, we agree but only vacate the part of the sentence involving post-release control. Accordingly, we affirm, in part, reverse and vacate, in part, and remand this cause to the trial court for a partial re-sentencing. That is, the court must re-sentence Porter regarding the term of his post-release control.

I.

{¶2} On March 24, 2008 at about 10:15 a.m., a strange van pulled up to Chelsie Bixler's house. Chelsie went to the garage to see whether she knew who was in the van. One of the passengers in the van walked to the front door. He knocked a couple of times and rang the doorbell, but neither Chelsie nor her brother Kyler responded. The passenger walked back to the van and indicated to the driver that nobody answered the door. Chelsie called her father to see if he knew who these people were. The driver and the passenger walked from the van to the back door and tried to open it. This failed, and so the intruders tried to enter through the main garage door using force. Chelsie then ran inside and called 911. The intruders left the property with no explanation in the record as to why they fled.

{¶3} Deputy Tracy Andrews responded. Chelsie told him that the driver was wearing a red shirt and the passenger was all in black. She described the van as an older vehicle, light green in color, and said both of the occupants that she saw were men. Jared Woltz, a neighbor, told the deputy that he had seen a green minivan, and also saw one "guy" walk up to the front door, turn around, and walk back. Woltz further stated that the front of the van had a "funny nose."

{¶4} The Pickaway County Sheriff's office then saturated the area with patrol cars trying to find a vehicle fitting the given description. Within forty-five minutes of the 911 call, Deputy Andrews saw a green van about three and a half miles away from the Bixler residence. As the van passed him, Deputy Andrews noticed two occupants, including a female driver, and he also noted that the van had a "funny nose." Deputy Andrews followed the van and determined it was registered in the name of Angela Hirst.

{¶5} As the van approached a driveway and turned on its turn signal, Deputy Andrews initiated a stop and called for assistance. Deputy Andrews exited his car and saw three occupants, instead of two. Apparently, the driver placed her hands outside of the window while the passenger in the back placed his hands on top of his head before being asked to do so by the deputy. Later, the deputy identified Angela Hirst as the driver, David Hirst as the front seat passenger, and Porter as the back seat passenger. When David Hirst stopped showing Deputy Andrews his hands, the deputy removed him from the vehicle. He placed him in the patrol car of Sergeant Bachnicki who had just arrived.

{¶6} Sergeant Bachnicki walked to the minivan to remove Porter. When Sergeant Bachnicki opened the van's sliding side door, he could see several long guns and rifles. He yelled "gun" to the other officers who helped immediately remove the remaining suspects from the van and place them in handcuffs. An officer read all the suspects their *Miranda* rights.

{¶7} Detective Rex Emrick arrived. He obtained Angela Hirst's consent to search the van. He further obtained several incriminating statements from both Angela

Hirst and Porter. Angela Hirst indicated that they obtained the guns from a residence. Porter pointed out that residence to the detective.

{¶8} On April 4, 2008, a Pickaway County Grand Jury indicted Porter for five offenses: one count of attempted burglary in violation of R.C. 2911.12(A)(2), two counts of burglary in violation of R.C. 2911.12(A)(2), and two counts of theft in violation of 2913.02(A)(1). A subsequent indictment charged Porter with two additional counts of burglary in violation of 2911.12(A)(2).

{¶9} Porter filed a motion to suppress "all evidence derived from [the] illegal stop and search." At a hearing, the trial court ruled from the bench that the stop was justified and the subsequent evidence was therefore admissible. Upon Porter's motion, the trial court later filed a journal entry explaining its ruling.

{¶10} After the court denied his motion to suppress, Porter changed his plea and entered a plea of no contest to attempted burglary from the first indictment and the two additional counts of burglary from the subsequent indictment. In return, the state dismissed the remaining four charges from the first indictment. The trial court then sentenced Porter to six years for each burglary count and four years for the attempted burglary, with all sentences to be served concurrently. From the bench, the trial court noted Porter would have to undergo a mandatory three-year term of post-release control. However, the trial court's journal entry indicated Porter would have to undergo a five-year term of post-release control.

{¶11} Porter appeals his three convictions and sentences and asserts the following two assignments of error: I. "THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SUPPRESS BECAUSE THE STATE FAILED TO SHOW

THAT THERE WAS REASONABLE ARTICULABLE SUSPICION TO STOP THE VEHICLE IN WHICH THE APPELLANT WAS A PASSENGER." And, II. "THE APPELLANT'S SENTENCE IS VOID AND HE IS ENTITLED TO A NEW SENTENCING HEARING BECAUSE THE TRIAL COURT ERRED IN FAILING TO PROPERLY INFORM THE APPELLANT OF POST-RELEASE CONTROL."

II.

{¶12} Porter contends in his first assignment of error that the trial court erred by failing to grant his motion to suppress. He claims that the officer did not have a reasonable basis to stop the van.

{¶13} The state argues that the deputy had reasonable suspicion to stop the van for a brief investigatory detention because the officer had knowledge of facts that showed that the occupants of the van were engaged in criminal activity.

{¶14} Our review of a decision on a motion to suppress presents mixed questions of law and fact. *State v. Hatfield* (Mar. 11, 1999), Ross App. No. 98CA2426, citing *State v. McNamara* (1997), 124 Ohio App.3d 706, 710, citing *United States v. Martinez* (C.A.11, 1992), 949 F.2d 1117, 1119. At a suppression hearing, the trial court is in the best position to evaluate witness credibility. *State v. Dunlap* (1995), 73 Ohio St.3d 308, 314. Accordingly, we must uphold the trial court's findings of fact if the record supports them by competent, credible evidence. Id. We then conduct a de novo review of the trial court's application of the law to the facts. *State v. Anderson* (1995), 100 Ohio App.3d 688, 691.

{¶15} "Both passengers and the driver have standing regarding the legality of a stopping because when the vehicle is stopped, they are equally seized, and their freedom of movement is equally affected." *State v. Carter* (1994), 69 Ohio St.3d 57, 63.

{¶16} "[T]he state bears the burden of proving that a warrantless search or seizure meets Fourth Amendment standards of reasonableness." *Maumee v. Weisner* (1999), 87 Ohio St.3d 295, 297, citing 5 LaFave, Search and Seizure (3 Ed.1996), Section 11.2(b).

{¶17} Both the Ohio and the United States Constitutions require an officer to have reasonable suspicion of criminal activity before engaging in an investigatory stop. *Terry v. Ohio* (1968), 392 U.S. 1, 21; *State v. Andrews* (1991), 57 Ohio St.3d 86, 87, fn.1. "And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry* 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." *Andrews* at 88. "To justify a traffic stop based upon reasonable suspicion, the officer must be able to articulate specific facts that would warrant a person of reasonable caution in the belief that the person stopped has committed or is committing a crime." *Chillicothe v. Mitchell*, Washington App. No. 03CA2718, 2004-Ohio-430, at ¶10, citing *Dayton v. Erickson* (1996), 76 Ohio St.3d 3, 11-12.

{¶18} Here, Deputy Andrews was aware of the following facts at the time of the stop. Less than an hour ago, two men who were in an older light green van with a

"funny nose"[1] had attempted to rob a residence not four miles from where Deputy Andrews saw the van, which closely matched this description. The officer noticed that the van had temporary tags from outside the county. Porter points to the concession of the state's witnesses that the van was in fact dark green, instead of light green. This is a close case, but Deputy Andrews knew and articulated specific facts that caused him to reasonably suspect the van and its occupants may have engaged in criminal activity. Each of the facts relied upon may have easily had an innocent explanation individually, and no one fact above could have supported an investigatory stop. But all of them combined provide a sufficient basis to support the initial stop.

{¶19} Porter cites to several cases distinguishable from this case. Porter first relies on *Mitchell* supra. Porter contends that "[t]his Court held that the officer lacked a reasonable basis to stop the vehicle on the sole basis that the passenger resembled a suspect with an outstanding warrant." Porter's Brief at 8. However, in *Mitchell*, the arresting officer "explained that he 'honestly believed' that [the defendant] was [the suspect], but was unable to describe how [the defendant] resembled [the suspect], except to state that they both had short hair and that perhaps [the suspect], like [the defendant], had a goatee." *Mitchell* at ¶4. In other words, the only articulable fact the officer provided in support of his contention that the defendant in that case resembled the suspect was that they both had short hair. The trial court found the officer did not

[1] Porter appears to contend in his brief that Woltz may not have informed Deputy Andrews the van had a "funny nose." Porter's Brief at 11. However, the trial court found the testimony of Deputy Andrews credible, and we may not review that decision here. Porter also argues that Deputy Andrews never explains what the phrase "funny nose" means. However, Deputy Andrews stated the nose "was one of the funny looking ones that had the long nose on it." Transcript at 31. And in context, it is clear Deputy Andrews means the van he stopped had a front end that matched this description. See Transcript at 30.

sufficiently articulate the resemblance, and this Court deferred to the trial court's finding. Id. at ¶11.

{¶20} Porter further relies on *Sylvania v. Comeau*, Lucas App. No. L-01-1232, 2002-Ohio-529. In that case, the police received a tip from a driving school that it had just fired a mechanic, and that the mechanic might try to damage the school's vehicles in retaliation. An officer saw a parked vehicle in the parking lot of the strip mall where the driving school was located, and the officer then pulled the car over as the car left the parking lot. The officer did not know how long the car had been in the parking lot, the driver of the vehicle had not violated any traffic laws, and the officer did not have a description of the driving school mechanic or his vehicle. In *Comeau*, there was absolutely no description whatsoever. Here, unlike *Comeau,* it is uncontested that there was a description given to the police. The only question is whether that description is sufficient.

{¶21} Porter further cites *State v. Rhude* (1993), 91 Ohio App.3d 623. In that case, an officer stopped a vehicle that drove down a lane, back out onto the road, and then parked in a driveway. Id. at 625. The reports were of "prowlers and burglaries" in the area, but the officer "did not observe [the suspect] operating his vehicle in an impaired or erratic manner or violating any traffic laws." Id. The *Rhude* court held that these facts were not sufficient to show reasonable suspicion. Id. at 626.

{¶22} Here, witnesses provided the officers with a description of the car used by the burglars, and the witnesses actually saw the suspects commit the attempted burglary. The witnesses did not provide the make, model, and plate number of the van,

but this is not what the law requires. Rather, the law requires the police to have knowledge of specific articulable facts that give rise to a reasonable suspicion.

{¶23} Porter further cites *City of Bowling Green v. Tomor*, Wood App. No. WD-02-012, 2002-Ohio-6366. In that case, an officer stopped a white car on the basis of an anonymous tip that indicated "there was a suspicious white car traveling up and down [the road.]" Id. at ¶2. The officer stopped the car on the basis of this tip, and the fact the car was registered to a person who did not live in the area. Id. The reports were of thefts in the area, but the tip provided no details on the suspicious activity the car was allegedly engaging in. Id. at ¶¶2, 6.

{¶24} Porter also cites to *State v. Anderson*, Geauga App. No. 2003-G-2540, 2004-Ohio-3192, which involves an anonymous tip under facts nearly identical to the *Tomor* case, and is also easily distinguishable from the present case. Id. at ¶2. In effect, the officer in both of these cited cases knew little more than the anonymous tip that the suspect was engaging in unspecified "suspicious" activities. Here, the witnesses saw a green van pull up to their house, saw the occupants attempt to break in, and reported it to the police.

{¶25} Therefore, for the above stated reasons, we find that the officer had reasonable suspicion to stop the van because he articulated specific facts that would warrant a person of reasonable caution in the belief that the person stopped has committed or is committing a crime.

{¶26} Accordingly, we overrule Porter's first assignment of error.

III.

{¶27} Porter, in his second assignment of error, contends that his sentence is void, and the trial court must re-sentence him. He claims that the trial court orally sentenced him to a three-year term of post-release control in his presence at his sentencing hearing. However, he claims that the journal entry of his sentence erroneously sentences him to a five-year term of post-release control.

{¶28} The state correctly notes that the trial court did advise Porter of post-release control on the record, but when the trial court advised Porter of this the trial court only described the period of time as the mandatory three-year period of post-release control rather than the five-year period included in the entry. Transcript at 87.

{¶29} Porter cites to a line of cases, which stand for the following principle: "When a trial court fails to notify an offender about postrelease control at the sentencing hearing but incorporates that notice into its journal entry imposing sentence, it fails to comply with the mandatory provisions of R.C. 2929.19(B)(3)(c) and (d), and, therefore, the sentence must be vacated and the matter remanded to the trial court for resentencing." *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, paragraph two of the syllabus.

{¶30} Here, the transcript demonstrates that the trial court properly informed Porter of mandatory post-release control. In all the cases Porter cites, the trial court failed to inform the defendant about post-release control. *Jordan* at ¶3; *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, at ¶3 (court stated in the sentencing hearing that the defendant probably would not be on post-release control); *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, at ¶4.

{¶31} In response to these cases, the Ohio General Assembly amended the relevant statutes so that "the failure of a sentencing court to notify the offender * * * of this requirement or to include in the judgment of conviction entered on the journal a statement that the offender's sentence includes this requirement does not negate, limit or otherwise affect the mandatory period of supervision that is required for the offender under this division." *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, ¶29, citing R.C. 2967.28(B), (ellipsis in original). This amendment took effect on July 11, 2006, and Porter was sentenced on September 24, 2008.

{¶32} Here, the facts are different than the cases Porter cites. Porter was warned he was subject to a mandatory three-year period of post-release control after he served his sentence, but the later entry indicated his sentence included a five-year period of post-release control. That is, the entry subjects Porter to a higher sentence than the court announced during the sentencing hearing.

{¶33} The state argues this is merely a clerical error, and this error is amenable to a corrective entry under Crim.R. 36. According to the state, the trial court correctly stated that Porter was subject to a three-year period of post-release control after he serves his sentence at his change of plea hearing, in the change of plea entry, and at the sentencing hearing. However, "the Court mistakenly placed the mandatory five years post release control language [in the Sentencing Entry.]" State's Brief at 6. The language in the sentencing entry is as follows: "The Court has further notified the Defendant that he will be subject to a period of post release control of Five (5) years, to be imposed by the Parole Board after his release from imprisonment[.]"

{¶34} Crim.R. 36 authorizes a trial court to correct any "[c]lerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission[.]" "While courts possess authority to correct errors in judgment entries so that the record speaks the truth, nunc pro tunc entries are limited in proper use to reflecting what the court actually decided, not what the court might or should have decided or what the court intended to decide." *State v. Brown* (2000), 136 Ohio App.3d 816, 820, citing *State ex rel. Fogle v. Steiner* (1995), 74 Ohio St.3d 158, 163-164; *State v. Hawk* (1992), 81 Ohio App.3d 296, 300. A court of record speaks through its judgment entries. *State v. Littlefield*, Washington App. No. 02CA19, 2003-Ohio-863, at ¶11, citing *State v. King* (1994), 70 Ohio St.3d 158, 162; *In re Adoption of Gibson* (1986), 23 Ohio St.3d 170, 173, fn. 3; *Schenley v. Kauth* (1953), 160 Ohio St. 109, paragraph one of the syllabus. However, a criminal defendant has a right to be present at every stage of the criminal proceedings including imposition of sentence and any modification of a sentence. Crim.R. 43(A); *City of Columbus v. Rowland* (1981), 2 Ohio App.3d 144, 145.

{¶35} Here, the trial court never entered a nunc pro tunc entry. Thus, the only sentence is the sentence stated in the journal entry. The trial court sentenced Porter to a period of post-release control for five years, but the trial court failed to announce that modified decision from the bench in the presence of Porter at the sentencing hearing.[2] Under these circumstances, this Court must vacate the sentence and remand this case for re-sentencing. *State v. Jordan*, Franklin App. No. 05AP-1330, 2006-Ohio-5208, at ¶¶48-49; *State v. Culver*, 160 Ohio App.3d 172, 2005-Ohio-1359, at ¶70. See, also,

[2] This Court expresses no opinion on whether the trial court could have properly sentenced Porter to post-release control for five years if the entry had not violated Crim.R. 43(A).

State v. Ranieri (1992), 84 Ohio App.3d 432, 433-34 (trial court erred when it entered a subsequent sentence without the presence of defendant); Katz, et al., Baldwin's Ohio Practice Criminal Law (2008), Section 153:10, notes. However, we only vacate the part of Porter's sentence involving post-release control.

{¶36} Accordingly, we sustain Porter's second assignment of error. We affirm, in part, and reverse and vacate, in part, the part of the trial court's sentencing judgment that relates to post-release control. We remand this cause to the trial court with the instruction to only re-sentence Porter regarding his post-release control.

JUDGMENT AFFIRMED, IN PART, REVERSED AND VACATED, IN PART, AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED, IN PART, REVERSED AND VACATED, IN PART, and that the CAUSE IS REMANDED for further proceedings consistent with this opinion. Appellant and Appellee shall equally split the costs herein.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pickaway County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, J.: Concurs in Judgment and Opinion as to Assignment of Error II;
Concurs in Judgment Only as to Assignment of Error I.
McFarland, J.: Concurs in Judgment Only.

For the Court

BY: _____
Roger L. Kline, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.