[Cite as *State v. Murray*, 2012-Ohio-4996.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio	Court of Appeals No. L-10-1059
Appellee	Trial Court No. CR0200902197
v.	
James Murray	**DECISION AND JUDGMENT**
Appellant	Decided: October 26, 2012

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and Kathryn J. T. Sandretto, Assistant Prosecuting Attorney, for appellee.

Brad F. Hubbell, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This appeal is from the January 28, 2010 judgment of the Lucas County Court of Common Pleas, which sentenced appellant, James Murray, following his conviction by a jury of violating R.C. 2925.11(A) and (C)(4)(b), possession of crack cocaine, a felony of the fourth degree. Upon consideration of the assignments of error,

we affirm the decision of the lower court. Appellant asserts the following assignments of error on appeal:

> First Assignment of Error: The trial court erred when it failed to suppress evidence derived from an illegal investigative stop by reasonable suspicion, in violation of the Fourth Amendment.
>
> Second Assignment of Error: The trial court erred when it imposed a post-release control sentence of 1258 days in re: CR200403611 at sentencing where the post-release control provision of the prior sentence in CR200403611 was void, and Mr. Murray had completed his term of incarceration.

{¶ 2} On June 17, 2009, appellant was indicted in a multi-count indictment alleging violations of R.C. 2925.11(A) and (C)(4)(b), possession of crack cocaine, and R.C. 2925.03(A)(2) and (C)(4)(c), trafficking in cocaine. On September 22, 2009, appellant moved to suppress evidence seized as a result of an illegal seizure of him on March 3, 2009. He contends that the police lacked a reasonable and articulable reason to stop the vehicle in which he was traveling as a passenger. He argues that the stop was a pretext to search for suspected narcotics.

{¶ 3} The following evidence was admitted at the motion to suppress hearing. Two police detectives from the Toledo vice narcotics unit testified about the apprehension of appellant. The detectives were observing the area near Belmont and Avondale Streets in Toledo, Ohio, on March 3, 2009, because of the high volume of drug

trafficking in the area and because of a confidential informant's tip that drugs were being sold from a particular home on Avondale. The detectives were familiar with the area and had conducted investigations there in the past because they knew it to be a high drug traffic area.

{¶ 4} The detectives were in an unmarked car and focusing their surveillance that day on one home for about 15-30 minutes. The detectives were beginning to leave the area as people were gathering at a church at the corner. As they left, they observed a vehicle parked on Belmont further away from the church than the others. A male passenger, appellant, exited the vehicle and walked past the church and down Avondale to the house they had been observing even though parking was available in front of the house. A female driver remained in the car. The detectives drove back to the house they had been watching and observed appellant enter that house and then exit approximately five minutes later. The detectives called for backup to stop the vehicle as soon as possible because they suspected a drug buy had occurred.

{¶ 5} As the vehicle left the area and made a u-turn, a police officer in a limited marked police cruiser pulled up behind the vehicle. Both detectives testified that they observed a traffic violation, but could not recall what it was or for what offense the driver was actually cited.

{¶ 6} When the vehicle stopped, appellant exited the vehicle and ran. Three officers pursued appellant. One officer observed appellant toss something just before he

was apprehended, which was later found to be a baggie of crack cocaine. The detectives questioned appellant and he admitted that he had dropped the baggie.

{¶ 7} The trial court denied appellant's motion to suppress the evidence obtained after the police stopped the vehicle finding that the stop was a reasonable investigatory stop. On appeal, appellant argues that the trial court's factual conclusions are unsupported by competent, credible evidence and there was no reasonable suspicion of criminal activity to support an investigatory stop of the vehicle.

{¶ 8} Because the trial court's ruling on a motion to suppress involves mixed questions of law and fact, the appellate court accepts the trial court's findings of fact if they are supported by competent and credible evidence. *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, ¶ 50. Having accepted the facts as true, the appellate court then independently reviews the legal question of whether the facts support the denial of the motion. *Ornelas v. United States*, 517 U.S. 690, 691, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996).

{¶ 9} We begin with appellant's challenges to certain factual findings made by the trial court. Appellant argues first the court erred in finding the detectives were "highly" suspicious appellant was involved in illegal drug trafficking when the detectives only testified they found his behavior "suspicious," "very suspicious," or raised a "red flag." We agree with appellant that the use of the adverb "highly" was an exaggeration of the actual testimony, but the court was summarizing, not quoting the testimony. However, whether the detectives were suspicious, very suspicious, or highly suspicious of

appellant's conduct does not alter the trial court's ability to find that there was a reasonable suspicion of criminal activity to warrant further investigation.

{¶ 10} Appellant next argues the court erred in finding that a traffic citation had been issued. The officer who stopped the vehicle never testified, the ticket was not admitted into evidence, and the detectives could not state with certainty why the driver would have been cited. Therefore, we agree with appellant that there was no competent, credible evidence to support the trial court's finding that the driver was cited for a traffic violation. However, as we discuss below, this finding is irrelevant to the outcome of this case.

{¶ 11} Appellant also argues the trial court found that appellant was in the home under surveillance for "less than five minutes" when the detective testified that he was in the home "five minutes." Again, we agree that the trial court's summation of the evidence is imprecise, but we fail to see how this alleged error is relevant to the ultimate issue the court decided, which is whether there was reasonable suspicion of criminal activity.

{¶ 12} Finally, appellant argues the trial court erroneously concluded that appellant "fled from the police as the car was coming to a stop." One detective testified he saw the car stop and then the door open, close, and open immediately again before appellant shot out of the vehicle and started running. The other detective testified he was not sure if the vehicle even came to a complete stop before appellant hopped out and ran. We find the trial court's factual finding was supported by competent, credible evidence.

{¶ 13} Next, appellant challenges the determination that the seizure of the vehicle did not violate his constitutional right to be free from unreasonable search and seizure.

{¶ 14} The Fourth Amendment to the United States Constitution protects individuals against unreasonable searches and seizures. *Florida v. Jimeno*, 500 U.S. 248, 250, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991). "Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances." *Ohio v. Robinette*, 519 U.S. 33, 39, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996). While there is a presumption that a warrantless search is unreasonable, there are a few judicially-recognized exceptions. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-455, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). The burden of establishing the exception is on the prosecution. *Id*.

{¶ 15} A warrantless seizure may be reasonable if it is based upon probable cause that the person has committed a crime. *Florida v. Royer*, 460 U.S. 491, 498, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). Where there is probable cause that a traffic violation has occurred, and the search or seizure was not extraordinary, the stop is reasonable under the Fourth Amendment even if the officer had some subjective intention to stop the vehicle to investigate for another crime. *Whren v. U.S.*, 517 U.S. 806, 810-813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996); *United States v. Ferguson*, 8 F.3d 385, 388 (6th Cir.1993); and *Dayton v. Erickson*, 76 Ohio St.3d 3, 665 N.E.2d 1091 (1996), syllabus.

{¶ 16} The prosecution asserted the seizure was permissible in this case because the officer had probable cause to make a warrantless seizure after observing the driver commit a traffic violation. The trial court found the officer who stopped the vehicle cited

the driver for a traffic violation, but we find there was insufficient evidence to support this finding. Even if we held otherwise, the mere fact that a citation was issued does not satisfy the burden of the prosecution to establish the exception to the warrant requirement. Without having established what violation occurred, the trial court was unable to make a finding that the stop was based upon probable cause.

{¶ 17} Instead, the trial court went further to determine whether the stop was reasonable under a different exception, i.e., whether this was an investigatory stop. An investigatory stop of a motor vehicle is permissible when there are specific objective, articulable facts to justify a reasonable suspicion that an individual has violated or is about to violate the law. *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). The significance of the facts must be viewed under the totality of the circumstances and with the ability of the officers to interpret the facts in light of their experience and training. *United States v. Cortez*, 449 U.S. 411, 418, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981) and *State v. Bobo*, 37 Ohio St.3d 177, 524 N.E.2d 489 (1988), paragraph one of the syllabus.

{¶ 18} The two drug trafficking detectives testified they were investigating a home for drug trafficking based upon information from a confidential informant. The home was located in an area where drug trafficking was a problem. The officers observed a car park on a street near a church where there was a lot of activity. The passenger exited the vehicle, walked past the church, and entered the home under surveillance. The driver did

not park in front of the home the passenger entered even though parking was available. The passenger exited the home five minutes later.

{¶ 19} The trial court also considered the fact that appellant fled as soon as the car had been stopped for the traffic violation. We find that this fact cannot be considered in this case because it occurred after the stop had been initiated. *State v. Freeman*, 64 Ohio St.2d 291, 294, 414 N.E.2d 1044 (1980).

{¶ 20} Based upon these facts, we find that the prosecution met its burden to establish that a reasonable officer observing this behavior under the circumstances of this case would undoubtedly have a reasonable suspicion of criminal activity to justify a seizure of appellant to investigate further. Appellant's first assignment of error is not well-taken.

{¶ 21} In his second assignment of error, appellant argues that the trial court erred as a matter of law by imposing a postrelease-control sanction in this case, based upon a violation of a postrelease-control condition in a prior criminal case, because the sentencing judgment in the prior case did not give proper notice of the mandatory postrelease-control sanction.

{¶ 22} Appellant was sentenced in 2005 to two years of imprisonment for his conviction of two counts of gross sexual imposition, felonies of the third degree. At that time, the court was required to inform appellant, at the sentencing hearing, he would be subject to postrelease-control supervision under R.C. 2967.28 for a five-year period after he left prison. R.C. 2929.19(B)(3)(c), effective, April 29, 2005, R.C. 2967.28(B)(1),

effective March 31, 2003. The court was also required to notify appellant that as a consequence of violating postrelease control, the parole board could impose a prison term as part of the sentence for the violation up to one-half of the prison term originally imposed by the court. R.C. 2929.19(B)(3)(b), effective April 29, 2005. Therefore, the court was required by statute to notify the offender he was subject to postrelease control, the length of the period of postrelease control, and the potential length of the prison sentence that the parole board could impose for violation of postrelease control. *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254, ¶ 32 (the trial court must notify appellant of the term of postrelease control and the potential term the parole board could impose for a violation of postrelease control); *State v. Jordon*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, paragraph one of the syllabus (the trial court must notify the offender about postrelease control if the offender is sentenced to a prison term). Both of these cases have been superseded by statute in part after the enactment of R.C. 2929.191, which provides a statutory procedure for correcting notification errors. *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958.

{¶ 23} The trial court was also required to include these notifications in its judgment of conviction and sentencing. R.C. 2929.14(F), effective April 29, 2005 and *State v. Jordan*, *supra*, paragraph one of the syllabus. The language used in the judgment must contain sufficient language that a reasonable person would understand that the court had authorized a postrelease-control sanction as part of the sentence. *Watkins v. Collins*, 111 Ohio St.3d 425, 2006-Ohio-5082, 857 N.E.2d 78, ¶ 51. If the trial court gives the

proper notice during the sentencing hearing, but fails to include proper notice in its sentencing judgment entry, the trial court can enter a nunc pro tunc judgment to correct the clerical error pursuant to Crim.R. 36 and need not provide a resentencing hearing pursuant to R.C. 2929.191. *State v. Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, 967 N.E.2d 718, ¶ 26. The correction of the judgment is permissible even after the offender has served his sentence and been released from prison. *State v. Gann*, 12th Dist. No. CA2010-07-153, 2011-Ohio-895, ¶ 24.

{¶ 24} Our court has released numerous cases holding a simple reference to the applicable statutes is sufficient to give the offender the required notice that the court authorized a postrelease-control sanction. *State v. Tribue*, 6th Dist. Nos. L-10-1250, L-10-1251, 2011-Ohio-4282, ¶ 11; *State v. Rossbach*, 6th Dist. No. L-09-1300, 2011-Ohio-281, ¶ 106-108; *State v. Maddox*, 6th Dist. L-09-1237, 2010-Ohio-1476, ¶ 15; *State v. Milazo*, 6th Dist. No. L-07-1264, 2008-Ohio-5137, ¶ 3, 27; and *State v. Blackwell*, 6th Dist. No. L-06-1296, 2008-Ohio-3268, ¶ 15. In *State v. Helms*, 6th Dist. No. L-10-1079, 2010-Ohio-6520, ¶ 12, however, we held *State v. Bloomer*, *supra*, requires that the judgment entry must specifically reference the term of postrelease control imposed. Upon reconsideration of the issue, we find that *State v. Helms*, *supra*, was erroneously decided.

{¶ 25} In the case before us, appellant failed to include in the record a transcript of the sentencing hearing. Therefore, we must presume the propriety of that hearing and find that appellant was properly notified of postrelease control at the sentencing hearing. *State*

v. Tribue, at ¶ 9. Therefore, we address only the issue of whether the trial court provided the notice required by law in the sentencing judgment. The judgment stated: "Defendant given notice of appellate rights under R.C. 2953.08 and post release control notice under R.C. 2929.19(B)(3) and R.C. 2967.28." Applying our precedent, we find this language was sufficient to give appellant notice of the postrelease-control sanction. Therefore, the trial court in the present case did not err when it imposed a sanction for appellant's violation of his postrelease-control condition imposed in the prior criminal action.

{¶ 26} Appellant's second assignment of error is not well-taken.

{¶ 27} Having found that the trial court did not commit error prejudicial to appellant, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE