[Cite as *State v. McMillon*, 2019-Ohio-2716.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

DION D. McMILLON,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 18 CO 0016

Criminal Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2016-CR-418

BEFORE:
Cheryl L. Waite, Gene Donofrio, Carol Ann Robb, Judges.

JUDGMENT:
Affirmed.

Atty. Robert Herron, Columbiana County Prosecutor, *Atty. Ryan P. Weikart*, and *Atty. Abbey Minamyer*, Assistant Prosecuting Attorneys, 105 South Market Street, Lisbon, Ohio 44432, for Plaintiff-Appellee

Atty. Brian A. Smith, Brian A. Smith Law Firm, LLC, 755 White Pond Drive, Suite 403, Akron, Ohio 44320, for Defendant-Appellant.

Dated: June 27, 2019

WAITE, P.J.

{¶1} Appellant Dion McMillon appeals the October 31, 2017, Columbiana County Court of Common Pleas decision to deny his motion to suppress. Appellant argues that the evidence used to convict him is the fruit of a search conducted pursuant to an unlawful arrest. Appellant also argues that his sentence is contrary to law. For the reasons provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} On June 21, 2016, Appellant was the passenger in a vehicle driven by his codefendant, Curtis Holland. Patrolman Chris Green of the East Liverpool Police Department observed Holland's car driving in the opposite direction and recognized both the car and Holland. Apparently, Appellant and Holland were known by law enforcement to be involved in drug activity and Patrolman Green previously had multiple confrontations with both men. Patrolman Green testified at the suppression hearing that he watched to see if Holland would commit a traffic infraction in order to justify a stop. He did observe Holland turn left without using a turn signal before driving away at a high rate of speed. Patrolman Green attempted to initiate a traffic stop. He followed the speeding vehicle until it reached a dead-end street where Holland attempted to turn the vehicle around in a yard. Patrolman Green "pinned in" the vehicle and requested backup.

{¶3} When Patrolman Green stepped out of his car, Holland exited his vehicle in an aggressive manner. Holland ignored several commands from Patrolman Green to get back into his car before he finally complied. According to Patrolman Green, both Holland and Appellant were acting "belligerently" and aggressive towards him. At one point, one of the men told Patrolman Green that they were going to dig him a grave. Patrolman

Green testified that the men refused to keep their hands visible, causing safety concerns, and failed to obey basic commands. The men were moving around while inside the vehicle and at least one of the men reached under a seat.

{¶4} When backup officers arrived, Appellant was ordered out of the car for a patdown, as officers feared for their safety. Despite this command, Appellant refused to exit the vehicle. At one point, Detective Greg Smith reached through a partially open window, unlocked the car, and began to open the door. Appellant and Holland pulled the door back, locked it, and then attempted to pull Det. Smith inside the vehicle. Eventually, the officers removed Appellant from the vehicle and conducted a patdown. No contraband was discovered during this patdown but a struggle ensued between Appellant and the officers. Patrolman Green attempted to arrest Appellant for obstruction of justice. Appellant resisted the handcuffs. Once Patrolman Green was able to handcuff Appellant, he again searched Appellant. No contraband was found or seized during this search.

{¶5} When the officers and Appellant arrived at the East Liverpool Police Department, Patrolman Green noticed Appellant dispose of a small fold of paper as he entered the building. The officers seized the paper fold. Testing revealed that it contained cocaine. On November 17, 2016, Appellant was indicted on one count of tampering with evidence, a felony of the third degree in violation of R.C. 2921.12(A)(1), and one count of possession of drugs, a felony of the fifth degree in violation of R.C. 2925.11(A).

{¶6} On August 24, 2017, Appellant filed a motion to suppress. On October 11, 2017, the trial court held a hearing on the matter. The trial court denied the motion in an October 31, 2017 judgment entry. On January 19, 2018, Appellant pleaded no contest to both charged offenses.

{¶7} On April 23, 2018, the trial court sentenced Appellant to nine months of incarceration for possession of drugs and eighteen months of incarceration for tampering with evidence. The sentences were ordered to run concurrently. The court also imposed a six-month driver's license suspension. Appellant received thirty-eight days of jail-time credit. The court granted Appellant's motion to stay execution of his sentence pending this appeal.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS.

{¶8} Appellant contends that the evidence presented at the suppression hearing failed to establish that he obstructed justice. He argues that there is no evidence that he failed to comply with any specific order, only that it revealed he allegedly made vague threats towards the officer. Thus, he contends that the paper fold containing cocaine seized by police was the fruit of an illegal arrest and search and should have been suppressed.

{¶9} The state responds that as Appellant's actions clearly amounted to obstruction of justice, his patdown was necessary due to the safety concerns resulting from his behavior. More importantly, however, the state contends that the officers did not seize the cocaine as a result of a search. Instead, officers noticed the paper fold of cocaine when Appellant discarded it as he entered the police station. The state notes that Appellant did not challenge the legitimacy of his arrest within his motion to suppress.

{¶10} A motion to suppress presents mixed issues of law and fact. *State v. Lake*, 151 Ohio App.3d 378, 2003-Ohio-332, 784 N.E.2d 162, ¶ 12 (7th Dist.), citing *State v. Jedd*, 146 Ohio App.3d 167, 171, 765 N.E.2d 880 (4th Dist.2001.) If a trial court's findings of fact are supported by competent credible evidence, an appellate court must accept them. *Id*. The court must then determine whether the trial court's decision met the applicable legal standard. *Id*.

{¶11} There are two types of valid traffic stops: (1) where police have probable cause that a traffic violation has occurred or was occurring and (2) where police have reasonable articulable suspicion that criminal activity has occurred. *State v. Ward*, 7th Dist. Columbiana No. 10 CO 28, 2011-Ohio-3183, ¶ 35, citing *Dayton v. Erickson*, 76 Ohio St.3d 3, 11, 665 N.E.2d 1091 (1996); *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

{¶12} Patrolman Green initiated the stop of Holland's car after he observed Holland make a left-hand turn without using a turn signal. "An officer's observation that a vehicle failed to properly use a turn signal constitutes both reasonable suspicion and probable cause to justify a traffic stop." *Ward, supra,* at ¶ 37, citing *State v. McComb*, 2d Dist. Montgomery No. 21963, 2008-Ohio-425; *State v. Steen*, 9th Dist. Summit No. 21871, 2004-Ohio-2369. As such, Patrolman Green's traffic stop was valid.

{¶13} Patrolman Green admittedly waited to see if Holland would commit a traffic offense that would allow him to initiate a traffic stop because he knew Holland was involved with drugs. Regardless, "where a police officer stops a vehicle based on probable cause that a traffic violation has occurred or was occurring, the stop is not unreasonable under the Fourth Amendment to the United States Constitution even if the

officer had some ulterior motive for making the stop." *Ward*, *supra*, at ¶ 35, quoting *Dayton v. Erickson*, 76 Ohio St.3d 3, 11, 665 N.E.2d 1091 (1996). Pursuant to *Ward,* Holland's failure to use a turn signal gave Patrolman Green probable cause to stop the vehicle regardless of pretext.

{¶14} Appellant actually does not contest the traffic stop. Instead, he argues that the paper fold of cocaine would not have been discovered but for the "illegal" obstruction of justice arrest, which occurred after the traffic stop. The state is correct that Appellant did not specifically contest his arrest in his motion for suppression. It can be gleaned from this motion that he associated the discovery of the cocaine with a "search" of Appellant, and that he believed none of the warrant exceptions, including a search incident to a lawful arrest, existed at the time of the "search." The record shows that Appellant was subject to a patdown and then was searched at the scene of the traffic stop after officers arrested him for obstruction of justice. These searches revealed no contraband. The contraband was seized when Appellant attempted to dispose of the paper fold containing cocaine before entering the police station.

{¶15} At oral argument, Appellant argued that the state must show that officers thought he was armed and dangerous before performing a patdown, as he believes that the "search" amounted to a *Terry* stop in accordance with *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). However, the root of Appellant's conviction is not the result of a *Terry* stop, thus *Terry* and its progeny are not implicated, here. Again, no contraband was detected in the patdown search of Appellant before or during arrest. The paper fold of cocaine was not discovered until after Appellant had been arrested for obstruction of justice and was transported to the police station, where he dropped the

contraband near the steps of the building. Appellant's argument appears to implicate two other issues: whether he was properly arrested for obstruction of justice and whether he abandoned the contraband at issue.

{¶16} Beginning with Appellant's arrest:

> In determining the lawfulness of an arrest, the elements of an underlying offense need not be proven, but there must exist a 'reasonable basis' for the arrest. That is, conduct which does not amount to an offense beyond a reasonable doubt may supply the officers with a reasonable basis for the arrest. The 'reasonable basis' test considers whether a reasonable police officer under similar circumstances would have concluded that the defendant committed a crime suitable for arrest. (Internal citations omitted.)

City of Cleveland v. Kristoff, 8th Dist. Cuyahoga No. 80086, 2002 WL 441584, *2 (Mar. 21, 2002), citing *Garfield Hts. v. Simpson,* 82 Ohio App.3d 286, 611 N.E.2d 892 (8th Dist.1992). See also *State v. Namey,* 11th Dist. Ashtabula No. 99-A-0003, 2000 WL 1487638 (Oct. 6, 2000); *State v. McAdams,* 1st Dist. Hamilton No. C-930715, 1995 WL 72330 (Feb. 22, 1995); *City of Elyria v. Meszes,* 9th Dist. Lorain No. 93CA005623, 1994 WL 64346 (Mar. 2, 1994).

{¶17} According to the state, Appellant was properly in custody after he was arrested for obstruction of justice. Obstruction of justice is defined within R.C. 2921.32:

> (A) No person, with purpose to hinder the discovery, apprehension, prosecution, conviction, or punishment of another for crime or to assist another to benefit from the commission of a crime, and no person, with

> purpose to hinder the discovery, apprehension, prosecution, adjudication as a delinquent child, or disposition of a child for an act that if committed by an adult would be a crime or to assist a child to benefit from the commission of an act that if committed by an adult would be a crime, shall do any of the following:
>
> (1) Harbor or conceal the other person or child;
>
> (2) Provide the other person or child with money, transportation, a weapon, a disguise, or other means of avoiding discovery or apprehension;
>
> (3) Warn the other person or child of impending discovery or apprehension;
>
> (4) Destroy or conceal physical evidence of the crime or act, or induce any person to withhold testimony or information or to elude legal process summoning the person to testify or supply evidence;
>
> (5) Communicate false information to any person;
>
> (6) Prevent or obstruct any person, by means of force, intimidation, or deception, from performing any act to aid in the discovery, apprehension, or prosecution of the other person or child.

{¶18} Although Appellant was not indicted on obstruction of justice, this record demonstrates that the officers had a reasonable basis for his arrest. Appellant's actions in resisting arrest and refusing to cooperate were designed to hinder the police from apprehending him and to avoid prosecution. It is equally clear that his threat to "dig"

Patrolman Green "a grave" was a form of intimidation. When resisting arrest, attempting to pull Det. Smith into the car involved force and was designed to prevent Appellant's arrest. Appellant also refused to exit the vehicle after being so ordered by law enforcement. Patrolman Green testified that both Appellant and Holland engaged in a struggle with officers during their patdown. As such, the officers had reasonable suspicion that Appellant committed the offense of obstruction of justice pursuant to R.C. 2921.32(A)(4), (6) and the ensuing arrest was proper.

{¶19} Appellant classifies Patrolman Green's recovery of the paper fold of cocaine as the result of a search. However, seizure of this contraband was not due to any search. Instead, officers observed Appellant discard the paper fold as he entered the police station. A defendant who has voluntarily abandoned property lacks standing to object to the search and seizure of that property. *State v. Freeman,* 64 Ohio St.2d 291, 296, 414 N.E. 1044 (1980), citing *Abel v. United States,* 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960). "The issue is not abandonment in the strict property-right sense, but whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search." *Freeman* at 297, citing *State v. Edwards,* 441 F.2d 749 (5th Cir.1971); *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

{¶20} The record is limited as to the facts surrounding seizure of the cocaine. The following information was provided during Patrolman Green's testimony:

Q. When you got back to the East Liverpool Police Department, did you find that he had had contraband on his person or hidden on his person somewhere?

A. I didn't initially find it on his person, found it as it fell to the floor as he attempted to get rid of it before walking completely into the police department on the top flight of the steps.

Q. Okay. So you observed him getting rid of --

A. Correct.

Q. -- a substance. And what was that? I mean, can you just describe what --

A. It was a white paper fold, commonly used to carry narcotics in.

(10/11/17 Suppression Hrg. Tr., p. 13.)

{¶21} Appellant does not dispute that he dropped the paper fold containing cocaine. The act of dropping the contraband was a voluntary relinquishment of property and was not the result of a search or of any other action by law enforcement. Again, the searches conducted around the time of arrest revealed no contraband. Based on this record, Appellant lacks standing to object to seizure of the cocaine pursuant to *Freeman.*

{¶22} Based on this record, no "search" is implicated in this matter. The officers had a reasonable basis for arresting Appellant on a charge of obstruction of justice.

Because of this arrest, Appellant was transported to the police station. Once there, he voluntarily abandoned the paper fold of cocaine.

{¶23} Accordingly, Appellant's first assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

THE RECORD DOES NOT SUPPORT THE TRIAL COURT'S SENTENCE OF APPELLANT.

{¶24} Appellant argues that his sentence is contrary to law. He asserts that he has only one prior felony on his record that occurred in New Jersey approximately six years ago. Aside from that, his record includes only minor misdemeanors.

{¶25} The state responds that, in addition to the convictions referenced by Appellant, he was charged with aggravated menacing while on bond in the instant case.

{¶26} An appellate court is permitted to review a felony sentence to determine if it is contrary to law. *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1. Pursuant to *Marcum*, "an appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law." *Id*.

{¶27} When determining a sentence, a trial court must consider the purposes and principles of sentencing in accordance with R.C. 2929.11, the seriousness and recidivism factors within R.C. 2929.12, and the proper statutory ranges set forth within R.C. 2929.14.

{¶28} The penalty for tampering with evidence is nine to thirty-six months of incarceration. The penalty for possession of drugs is six to twelve months. The trial court sentenced Appellant to eighteen months of incarceration for tampering with evidence and nine months for possession of drugs. Both sentences are in the middle of the appropriate sentencing range. In addition, the sentences were ordered to run concurrently.

{¶29} At the sentencing hearing, the trial court stated:

> I have considered the record. I've considered the information presented at this hearing. I have considered the principles and purposes of sentencing under Ohio Revised Code Section 2929.11. I have balanced the seriousness and recidivism factors of Ohio Revised Code Section R.C. 2929.12. I did consider the presentence investigation report prepared by the Adult Probation Department.

(4/20/18 Sentencing Hrg. Tr., p. 84.)

{¶30} Based on the record, the trial court considered the requisite sentencing statutes and each sentence is within the appropriate range. The court similarly indicated that it considered the relevant sentencing statutes within its judgment entry.

{¶31} The record reveals Appellant had previous convictions for "unlawful possession of a weapon, some misdemeanor offenses, some obstructing, resisting arrest." (4/20/18 Sentencing Hrg., p. 79.) The court was also informed that Appellant was arrested for aggravated menacing and possession of marijuana while he was on bond in the instant matter. Based on this record, Appellant's sentence is supported by clear and convincing evidence.

{¶32} Accordingly, Appellant's second assignment of error is without merit and is overruled.

Conclusion

{¶33} Appellant argues that the trial court erroneously denied his motion to suppress evidence that was the result of an improper search. Appellant also argues that his sentence is contrary to law. For the reasons provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.