

[Cite as *State v. Conley*, 2009-Ohio-3460.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91865

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DWAYNE CONLEY

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-502646

BEFORE: Rocco, P.J., Dyke, J., and Celebrezze, J.

RELEASED: July 16, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

KENNETH A. ROCCO, P.J.:

{¶ 1} Defendant-appellant, Dwayne Conley, appeals from a common pleas court order denying his motion to suppress evidence seized during a search of his person. We agree with appellant that the officer's seizure of a crack pipe from his pocket was not based on probable cause. The officer's observation that appellant repeatedly put his hand in his pocket may have created a reasonable suspicion of criminal activity sufficient to support further inquiry, but it did not demonstrate probable cause to believe that the pocket contained evidence of criminal activity. Therefore, we reverse and remand for further proceedings.

{¶ 2} Appellant was charged with possession of cocaine in one count of a two-count indictment filed October 29, 2007. The parties and the trial court refer to a written motion to suppress allegedly filed by appellant, but no such document appears in the record or on the trial court's docket. In any event, the court conducted a suppression hearing on June 30, 2008.

{¶ 3} At the suppression hearing, the state called Officer Joseph Cavanaugh of the Cleveland Police Department's community service unit as its sole witness. Officer Cavanaugh testified that he and his partner, Officer Flores, were patrolling on East 80th Street in Cleveland, Ohio, on June 15, 2007. They saw appellant and his co-defendant, Mary Gawlikowski, standing side-by-side on the sidewalk. They knew there was an outstanding warrant for Ms.

Gawlikowski, so they stopped. They instructed both appellant and Ms. Gawlikowski to show their hands and instructed Gawlikowski to come over to the police car.

{¶ 4} Officer Cavanaugh testified that as Ms. Gawlikowski was going toward the police car, appellant put his hand in his pocket. Cavanaugh instructed him to keep his hands visible. When Ms. Gawlikowski put her hands on the police car, she was clutching something in one hand. He instructed her to open her hand and found she had a rock of crack cocaine. Appellant then reached into his pocket again; Officer Cavanaugh told him to put his hands on the car. “[Appellant] stuffed something in his pocket. What, I wasn’t sure. He put his hands on the car. I reached in his right pocket and there was a glass crack pipe.”

{¶ 5} At the conclusion of the hearing, the court overruled the motion to suppress. The case then proceeded to a jury trial. The jury found appellant guilty of possession of cocaine. The court immediately sentenced him to one year of imprisonment.

{¶ 6} In his sole assignment of error, appellant complains that the common pleas court erred by denying his motion to suppress. He urges, first, that the police had no reasonable suspicion of criminal activity sufficient to detain him for further investigation, and second, that they lacked probable cause to search his pocket. Assuming that the police justifiably detained appellant

because he was with a person they intended to arrest, cf. *State v. Miller* (July 31, 1991), Summit App. No. 14973, his mere proximity to a person independently suspected of criminal activity did not justify a search of his person. *Sibron v. New York* (1968), 392 U.S. 40, 62-63. Appellant's persistent efforts to put his hand in his pocket may have created a reasonable suspicion that he had a weapon or contraband hidden there. This suspicion would have justified further inquiry and/or a pat-down for weapons, pursuant to *Terry v. Ohio* (1968), 392 U.S. 1. However, the suspicion that appellant was trying to hide something, without any indication of what he may have been trying to hide, did not provide probable cause sufficient to justify Officer Cavanaugh's immediate seizure of the contents of appellant's pocket. Cf. *State v. Rucker* (1990), 63 Ohio App.3d 762.

{¶ 7} Accordingly, we find the common pleas court erred by denying appellant's motion to suppress. Officer Cavanaugh did not have probable cause to seize the crack pipe from appellant's person. Therefore, we reverse the judgment and the trial court's order overruling appellant's motion to suppress and remand for further proceedings.

{¶ 8} This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court 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.

KENNETH A. ROCCO, PRESIDING JUDGE

ANN DYKE, J., CONCURS

FRANK D. CELEBREZZE, JR., J., CONCURS
IN JUDGMENT ONLY