[Cite as *State v. Elliott,* 2010-Ohio-241.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92324

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOHNDRELL ELLIOTT

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART; REVERSED
AND VACATED IN PART; REMANDED
FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-510925

BEFORE: Celebrezze, J., Blackmon, P.J., and Stewart, J.

RELEASED: January 28, 2010

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), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendant-appellant Johndrell Elliot ("appellant") appeals the trial court's denial of his motion to suppress. After a thorough review of the record and pertinent case law, we affirm in part, reverse and vacate in part, and remand for resentencing.

{¶ 2} On April 23, 2008, Officer Jeffrey Yasenchack observed appellant driving a white Dodge Magnum with tinted windows. Officer Yasenchack, who was patrolling alone because his partner had called in sick, decided to run appellant's license plate number. While waiting on the results of this inquiry, appellant failed to make a complete stop at a stop sign and Officer Yasenchack pulled him over. As he approached appellant's vehicle, Officer Yasenchack observed appellant "bobbing down" as if he were reaching for something. Once he got closer to the vehicle, Officer Yasenchack also saw appellant making furtive gestures toward his waistband as if he were trying to conceal something.

{¶ 3} After appellant presented his driver's license, Officer Yasenchack ordered him out of the vehicle. Officer Yasenchack led appellant to the rear of the vehicle, instructed him to place his hands on the trunk, and attempted to complete a pat-down search for weapons. Officer Yasenchack testified that appellant was acting very nervous throughout this event; he was shaking

and his voice was trembling. Appellant became noncompliant and began questioning the officer, asking why he was ordered out of his car and why he was being searched.

{¶ 4} As a result of appellant's noncompliance and fearing for his personal safety, Officer Yasenchack placed appellant in handcuffs. He then conducted a pat-down search beginning at appellant's waistband because of the gestures appellant was making when sitting in his car. During this pat-down, Officer Yasenchack felt a "lump" on appellant's inner-thigh, and then two bags of crack cocaine fell out of appellant's pant leg and onto the sidewalk. Officer Yasenchack then shook appellant's pant leg and a third bag of crack cocaine fell out. Officer Yasenchack called for back up and appellant was placed under arrest.

{¶ 5} After appellant was arrested, but before he could be placed into a police car, he attempted to stomp on the bags of crack cocaine and mash them into the sidewalk. After ensuring that appellant was in custody and under the control of backup officers, Officer Yasenchack searched appellant's vehicle. This search revealed remnants of crack cocaine and a razor blade with cocaine residue on it found in the vehicle's ashtray, and $21,600 found in the trunk.

{¶ 6} Appellant was indicted in a four-count indictment for drug trafficking in violation of R.C. 2925.03(A)(2), a third degree felony; drug

possession in violation of R.C. 2925.11(A), a fourth degree felony; tampering with evidence in violation of R.C. 2921.12(A)(1), a third degree felony; and possession of criminal tools in violation of R.C. 2923.24(A), a fifth degree felony.

{¶ 7} Appellant filed a motion to suppress the evidence obtained during the traffic stop. The sole witness at the suppression hearing was Officer Yasenchack and, based on his testimony, the trial judge denied appellant's motion.

{¶ 8} Appellant then pled no contest to all charges and was sentenced to two years for drug trafficking, one year for drug possession, two years for tampering with evidence, and nine months for possession of criminal tools. These sentences were to run concurrent to one another for an aggregate sentence of two years.[1] This appeal followed, wherein appellant argues that the trial judge committed reversible error in denying his motion to suppress.

Law and Analysis

{¶ 9} When considering a trial court's grant or denial of a motion to suppress, this court's standard of review is divided into two parts. In *State v. Lloyd* (1998), 126 Ohio App.3d 95, 100-101, 709 N.E.2d 913, the court stated that "our standard of review with respect to motions to suppress is whether

[1] The trial judge allowed appellant to post a $10,000 appeal bond, and he has not yet begun to serve his sentence.

the trial court's findings are supported by competent, credible evidence. *State v. Winand* (1996), 116 Ohio App.3d 286, 288, 688 N.E.2d 9, 11, citing *Tallmadge v. McCoy* (1994), 96 Ohio App.3d 604, 608, 645 N.E.2d 802, 804-805. Naturally, this is the appropriate standard because ""[i]n a hearing on a motion to suppress evidence, the trial court assumes the role of trier of facts and is in the best position to resolve questions of fact and evaluate the credibility of witnesses."" *State v. Hopfer* (1996), 112 Ohio App.3d 521, 548, 679 N.E.2d 321, 339, quoting *State v. Venham* (1994), 96 Ohio App.3d 649, 653, 645 N.E.2d 831, 833. However, once we accept those facts as true, we must independently determine, as a matter of law and without deference to the trial court's conclusion, whether the trial court met the applicable legal standard."

{¶ 10} Officer Yasenchack was the only witness who testified at the suppression hearing. Based on his testimony, the trial judge made various findings of fact. These findings do not differ from the factual events as they were described above. Specifically, the trial judge found that, based on the gestures appellant was making toward his waistband when Officer Yasenchack approached the vehicle and appellant's nervous behavior throughout the event, Officer Yasenchack felt the need to ask appellant to step out of his vehicle and conduct a pat-down search.

{¶ 11} It is our opinion that these findings were based on competent, credible evidence. Officer Yasenchack was the only witness to testify at the suppression hearing. Appellant's trial counsel was not able to contradict the officer's testimony, nor did the officer contradict himself at any time throughout the suppression hearing. Appellant presented no evidence to refute Officer Yasenchack's testimony.

{¶ 12} Because we find that the trial judge based her ruling on competent, credible evidence, we must now determine whether denying appellant's motion to suppress met the applicable legal standard.

{¶ 13} A four-step process can be utilized to determine if the trial judge correctly denied appellant's motion to suppress. First, we must determine whether Officer Yasenchack was justified in stopping appellant's vehicle. We must then decide whether the officer could justifiably order appellant out of his vehicle. Our next query is whether Officer Yasenchack could legally conduct a pat-down search of appellant. Finally, we must decide whether the officer could lawfully conduct a warrantless search of appellant's vehicle once appellant was placed under arrest.

{¶ 14} When determining if Officer Yasenchack was justified in stopping appellant's vehicle, we turn to *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. Pursuant to *Terry*, a police officer can make a brief investigatory stop without a warrant and without probable cause so long as

the officer has a reasonable suspicion that the individual is or has been engaged in criminal activity. Id. See *State v. Hoskins*, Cuyahoga App. No. 80384, 2002-Ohio-3451, ¶11. To avoid running afoul of the *Terry* rule, the officer "'must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" *Hoskins*, supra, at ¶11, quoting *Terry*, supra.

{¶ 15} Officer Yasenchack had a reasonable suspicion that appellant was engaged in criminal activity. The officer originally began following appellant's vehicle because he thought the vehicle's windows were tinted beyond the legal limit. Then, while the officer was following appellant, appellant failed to make a complete stop at a stop sign. "The Ohio Supreme Court has determined stops based upon even minor traffic violations do not run afoul of the Fourth Amendment[.]" Id. at ¶13, citing *Dayton v. Erickson*, 76 Ohio St.3d 3, 1996-Ohio-431, 665 N.E.2d 1091, syllabus. Because Officer Yasenchack observed appellant run a stop sign in violation of a Cleveland city ordinance and the officer had a reasonable suspicion that appellant's windows were tinted beyond the legal limit, the officer was justified in stopping appellant's vehicle.

{¶ 16} We must next determine if Officer Yasenchack was justified in ordering appellant from his vehicle. *Hoskins*, supra, was factually similar to

the case at bar.[2] When addressing this particular issue, the court relied on *Pennsylvania v. Mimms* (1977), 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331. In *Mimms*, the Court held that an officer is permitted to order a driver from his car once the vehicle is stopped for a traffic violation, even if there is no reasonable suspicion of criminal activity. "As explained by the Ohio Supreme Court, such an order is a minimal additional intrusion that does not necessitate justification 'by any quantum of suspicion.'" *Hoskins*, supra, at ¶14, quoting *State v. Evans*, 67 Ohio St.3d 405, 407-408, 1993-Ohio-186, 618 N.E.2d 162. The Court in *Mimms* specifically held that the additional intrusion of ordering a driver out of his car is "de minimus" because the driver is being asked to expose little more than what is exposed during the original traffic stop. *Mimms*, supra, at 111.

{¶ 17} Even if the Court in *Mimms* had required some sort of justification before an officer could order a driver out of his vehicle during a traffic stop, such justification was present here. Officer Yasenchack testified that he saw appellant bend down as if he were reaching for something and, as the officer got closer to the vehicle, he observed appellant shoving something into his waistband. Based on this testimony and the holdings in *Mimms* and

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[2] We recognize that in *Hoskins*, the individual ordered out of the vehicle was a passenger rather than the driver, but this is inconsequential to the analysis of this issue.

Hoskins, Officer Yasenchack was justified in ordering appellant out of his vehicle.

{¶ 18} We must now determine whether Officer Yasenchack was justified in conducting a pat-down search of appellant. "In analyzing the ensuing *Terry* frisk, the question we must ask is whether, based on the totality of the circumstances, the officers had a reasonable, objective basis for frisking defendant after ordering him out of the car." *Evans*, supra, at 409, citing *State v. Andrews* (1991), 57 Ohio St.3d 86, 565 N.E.2d 1271.

{¶ 19} Based on the totality of the circumstances, Officer Yasenchack was justified in frisking appellant. Officer Yasenchack had no backup when he originally stopped appellant's vehicle because his partner did not come to work that day. As the officer approached appellant's vehicle, he saw appellant bending down as if to reach for something and then observed appellant making furtive gestures as if he were shoving something into his waistband. According to Officer Yasenchack's testimony, appellant was also acting very nervous. Based on these circumstances, the officer had reason to fear for his personal safety and was justified in conducting a *Terry* frisk of appellant.

{¶ 20} Finally, we must determine whether Officer Yasenchack was justified in conducting a warrantless search of appellant's car once he was handcuffed and placed under arrest. It is our opinion that the search of

appellant's vehicle was a search incident to a lawful arrest, and thus, it met one of the exceptions to the search warrant requirement. In *Arizona v. Gant* (2009), ____ U.S. ____, 129 S.Ct. 1710, 173 L.Ed.2d 485, the Court held that an officer cannot lawfully search a defendant's car after he is arrested and placed in the back of the police car when the defendant was arrested for driving with a suspended license and the officer could not expect to find evidence of the crime committed in the vehicle. The Court specifically stated that, "[b]ecause police could not reasonably have believed either that Gant could have accessed his car at the time of the search or that evidence of the offense for which he was arrested might have been found therein, the search in this case was unreasonable." Id. at 1719.

{¶ 21} This case is distinguishable from *Gant*. In this case, appellant was arrested for drug offenses after three bags of crack cocaine fell out of his pant leg during the *Terry* search. Although appellant no longer had access to his vehicle, Officer Yasenchack reasonably believed that more evidence of appellant's drug activity could be discovered in his vehicle. When asked why he searched appellant's vehicle, Officer Yasenchack stated: "In this case, just in case there's more drugs in the vehicle." Based on this testimony and the holding in *Gant*, supra, the officer was justified in conducting a warrantless search of appellant's vehicle. Appellant's assignment of error is overruled.

Allied Offenses of Similar Import

{¶ 22} We must next determine whether drug trafficking in violation of R.C. 2925.03(A)(2) and drug possession in violation of R.C. 2925.11(A) are allied offenses of similar import. R.C. 2941.25(A) provides that, "[w]here the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant can be convicted of only one." It is well established that a two-step analysis is required to determine if two offenses are allied offenses of similar import. *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, ¶14. "'In the first step, the elements of the two crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step. In the second step, the defendant's *conduct* is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses.' (Emphasis sic.)" Id. at ¶14, quoting *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816.

{¶ 23} In *State v. Rance* (1999), 85 Ohio St.3d 632, 710 N.E.2d 699, the Ohio Supreme Court held that the test for allied offenses requires that the elements of the offenses be compared in the abstract. In *Cabrales*, supra, the

Court held that *Rance* had been misinterpreted. In an attempt to clarify *Rance*'s holding, the Court held that *Rance* did not require that the statutory elements of two offenses exactly align in order for the offenses to be allied offenses of similar import. *Cabrales*, supra, at ¶22. Specifically, the Court stated that, "[o]ther than identical offenses, we cannot envision any two offenses whose elements align *exactly*. We find this to be an overly narrow interpretation of *Rance*'s comparison test." (Emphasis in original.) Id. The Court went on to say, "we clarify that in determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), *Rance* requires courts to compare the elements of the offenses in the abstract, i.e., without considering the evidence in the case, but does not require an exact alignment of elements." Id. at ¶27.

{¶ 24} We note at the outset that appellant failed to make any allied offenses argument both below and in this appeal. As such, we must review any issue utilizing a plain error standard of review. To constitute plain error, the error must be obvious on the record, palpable, and fundamental, so that it should have been apparent to the trial court without objection. See *State v. Tichon* (1995), 102 Ohio App.3d 758, 767, 658 N.E.2d 16. Moreover, plain error does not exist unless the appellant establishes that the outcome of the trial clearly would have been different but for the trial court' allegedly improper actions. *State v. Waddell* (1996), 75 Ohio St.3d 163, 166, 661 N.E.2d 1043. Notice of plain error is to be taken with utmost caution, under exceptional

circumstances, and only to prevent a manifest miscarriage of justice. *State v. Phillips* (1995), 74 Ohio St.3d 72, 83, 656 N.E.2d 643.

{¶ 25} In this case, appellant was convicted of both drug trafficking pursuant to R.C. 2925.03(A)(2) and drug possession pursuant to R.C. 2925.11(A). The Ohio Supreme Court unequivocally held in *Cabrales,* supra, that these two offenses are allied offenses of similar import. The Court in *Cabrales* specifically held that "trafficking in a controlled substance under R.C. 2925.03(A)(2) and possession of that same controlled substance under R.C. 2925.11(A) are allied offenses of similar import because commission of the first offense necessarily results in commission of the second." Id. at ¶30.

{¶ 26} In order for appellant's conviction to contain allied offenses, his convictions for drug trafficking and drug possession must have been for the same controlled substance. Here, appellant was charged with possession of drugs and drug trafficking based on the three bags of crack cocaine that fell from his pants leg. As such, the offenses were allied offenses of similar import, and the trial court committed plain error in failing to merge them for sentencing. This case must therefore be remanded to the trial court for an allied offense merger under R.C. 2941.25. In view of this, defendant's sentence is vacated, and this cause is remanded for resentencing.

Conclusion

{¶ 27} Officer Yasenchack was justified in stopping appellant's vehicle because the officer personally observed him commit a traffic violation. After pulling appellant over, the officer observed him bending to reach for something and engaging in furtive behavior that the officer perceived to be shoving something into his waistband. Based on this suspicious activity, the officer was justified in ordering appellant from the vehicle and conducting a *Terry* frisk. It was during this frisk that two bags of crack cocaine fell from appellant's pant leg, and another bag fell once the officer shook appellant's pant leg. Based on this evidence, the officer was justified in arresting appellant, and the search of his vehicle met the search incident to a lawful arrest exception to the warrant requirement. Accordingly, the trial judge correctly denied appellant's motion to suppress. Appellant was, however, convicted and sentenced on allied offenses of similar import — drug trafficking in violation of R.C. 2925.03(A)(2) and drug possession in violation of R.C. 2925.11(A). The trial court's failure to merge these convictions constitutes plain error.

Judgment affirmed in part; reversed and vacated in part. Case remanded to the trial court for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

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

FRANK D. CELEBREZZE, JR., JUDGE

PATRICIA ANN BLACKMON, P.J., and
MELODY J. STEWART, J., CONCUR